

# Workplace Investigations

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## 20. What if the employee under investigation goes off sick during the investigation?

### Belgium

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If this occurs, there is a risk that any measure resulting from the investigation (eg, a dismissal) can be (wrongly) interpreted as discrimination based on the illness of the employee. However, if the employer can prove that the measure is not related to the illness but solely related to the investigation (which is also not related to the illness), there may be no discrimination. The sickness of the employee may prevent the continuation of the investigation because, for example, it becomes impossible to hear from the employee. In this instance, the investigation can be suspended, postponed or extended until the employee returns. If it is a long-term absence, this could lead to a disproportionate amount of time to complete the investigation. Therefore, the employer should take any necessary steps to invite the ill employee to a hearing anyway (eg, through digital means). If the employee unreasonably refuses (several) of these invitations, it could be argued that the employee is wilfully boycotting the investigation and therefore forfeits his or her opportunity to be heard.

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### Ireland

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If an employee goes off sick during the investigation, it is reasonable to adjourn the investigation until the employee is fit to return to work. Difficulties arise if it is a prolonged absence. The absence may necessitate a referral to an occupational health expert and it may be necessary to seek medical advice as to whether the employee can continue to participate in the investigation. It may be that reasonable accommodations should be considered to ensure that the employee can continue to participate. Such situations may impinge on the investigator's ability to conclude the investigation. In that instance, it would be prudent for the investigator to document all attempts to involve the employee in the investigation and to assess whether it can be concluded without the further involvement of the employee.

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## Switzerland

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The time spent on the internal investigation by the employee should be counted as working time<sup>[1]</sup>. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

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[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

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