

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

Ireland

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In Ireland, employees have a constitutional right and an implied contractual right to natural justice and fair procedures. If a workplace investigation is not conducted in accordance with these principles, an employee may allege that the investigation is fundamentally flawed. If such an allegation is made then an employee may seek recourse from the Workplace Relations Commission (WRC) or potentially the High Court. The WRC is the body in Ireland tasked with dealing with employment law-related claims, including unfair dismissal.

The constitutional rights that employees enjoy were specified in the Supreme Court case of *Re Haughey* in 1971. That case held that where proceedings may harm the reputation of a person, public bodies must afford certain basic protections of constitutional justice to a witness appearing before it. It further stated that article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures. These protections, known as “*Re Haughey rights*” are implied in each contract of employment.

A Code of Practice was introduced in 2000, namely S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (the Code). The Code set out the procedures for dealing with grievances or disciplinary matters, which must comply with the general principles of natural justice and fair procedures and include:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is allowed to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

Further Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work were published in 2021 and 2022, respectively. The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.

In addition to the above, the Data Protection Commission published Data Protection in the Workplace: Employer Guidance in April 2023.

All employers should have specific and up-to-date policies dealing with how workplace investigations will be carried out that are suitable for their organisation. These policies may vary, depending on the subject of the investigation and the size and type of employer. However, all should adhere to the principles identified above to ensure that a robust policy is in place and can be utilised.

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Sweden

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Workplace investigations in Sweden are governed by several rules and regulations. Listed below are the central legislation and regulations that govern a workplace investigation related to alleged employee misconduct.

- The Swedish Discrimination Act (2008:567).
- The Swedish Work Environment Act (1977:1160), which is complemented by the Swedish Work Environment Authority's other statutes.[\[1\]](#)
- The Swedish Whistleblowing Act (2021:890).

If a workplace investigation has been initiated after the receipt of a report filed through a reporting channel established under the Swedish Whistleblowing Act, that law applies provided that the report has been filed by a person who may report under the Act and provided that the subject of the report falls under the material scope of the Act. The Swedish Whistleblowing Act implements Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law and has been given a wide material scope in Sweden. The Swedish Whistleblowing Act may apply if the reported irregularity concerns breaches of certain EU laws or if the reported irregularity is of public interest.

In addition to the regulations mentioned above, certain data protection legislation may affect workplace investigations by restricting what personal data may be processed. Such data protection legislation includes the following:

- Regulation (EU) 2016/679 on the protection of natural persons concerning the processing of personal data and the free movement of such data (the GDPR);
- the Swedish Supplementary Data Protection Act (2018:218);
- the Swedish Supplementary Data Protection Regulation (2018:219);
- Regulation DIFS:2018:2 on the processing of personal data relating to criminal convictions or offences. This regulation governs the processing of personal data relating to criminal convictions or suspected criminal offences in internal workplace investigations that are not governed by the Swedish Whistleblowing Act.[\[2\]](#)

The above-mentioned legislation and regulations may overlap in many aspects and it is therefore important before starting an investigation, as well as during an investigation, to assess which rules and regulations apply to the situation at hand. Another aspect of this is that many issues that can arise during an investigation are not regulated by law or other legislation. If the investigation is a non-whistleblowing investigation there are limited rules on exactly how and by whom the investigation should be carried out.

A Swedish law firm that undertakes a workplace investigation also has to adhere to the Swedish Bar Association's Code of Conduct. The Code of Conduct includes additional considerations, mainly ethical, which will not be addressed in this submission. Furthermore, this submission will not focus on investigations following an employee's possible misappropriation of proprietary information or breach of the Swedish Trade Secrets Act (2018:558). Investigations into such irregularities are often conducted to gather evidence and these investigations include the same or similar investigative measures used in other investigations,

such as interviews with employees and IT-forensic searches, but also infringement investigations carried out by the authorities or other measures by the police.

[1] Mainly Systematic Work Environment Management (AFS 2001:1), Organisational and Social Work Environment (AFS 2015:4) and Violence and Menaces in the Working Environment (AFS 1993:2)

[2] Under Section 2 item 4 of DIFS 2018:2, personal data relating to criminal convictions or suspected criminal offences may only be processed if the personal data concerns serious misconduct, such as bribery, corruption, financial fraud or serious threats to the environment, health and safety, by an individual who is in a leading position or who is considered key personnel within the company. The processing of personal data received in a report or collected during an investigation governed by the Swedish Whistleblowing Act is instead governed by the Swedish Whistleblowing Act, which complements the GDPR and the supplementing Swedish act and regulation stated in item (ii) and (iii) above.

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02. How is a workplace investigation usually commenced?



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Investigations can start in multiple ways. They usually stem from an employee raising a grievance, a bullying complaint, or a possible protected disclosure. Investigations may also stem from the employer in a disciplinary context, or indeed can be commenced if an external complaint or issue is raised by a third party of the organisation.

The first thing the employer must consider is whether an investigation is necessary. It may be that the issue at hand can be resolved informally or is of such a nature that it cannot be investigated, either through a lack of detail or simply because the subject of the complaint is no longer an employee. Any such decision to investigate or not should be carefully documented.

The next step to determine is the nature of the investigation. It should be clear at the outset whether the investigation is simply a fact-gathering exercise or if the investigator will be tasked with making findings on the evidence. The distinction is significant as a fact-gathering investigation can proceed without prompting the full panoply of rights, but the basic principles of fairness should still be applied. A fact-gathering investigation should determine whether there is or is not, a case to answer. If a disciplinary hearing follows then the rights outlined in question 1 will apply at that stage. If it is a fact-finding investigation, the rights apply from the outset of the process. The employee who is required to respond to the issues (the respondent) should be fully aware of the extent of the investigation. The investigator appointed to do the investigation should be clear about what is expected of them.

If the employer believes an investigation is necessary, it should be acknowledged and started without delay. In particular, according to the Protected Disclosures legislation, a report should be acknowledged within seven days.

An employer should consider and identify the scope of the investigation and establish who will investigate the matter. Terms of reference under which the investigation will be carried out should be established by the employer and shared with the employee raising the issue (the complainant). An employer should not seek agreement on the terms, but invite commentary to ensure that the full scope of the investigation is captured within the terms of reference. Robust terms of reference that lay down the clear parameters of

the investigation will assist the investigator and all parties involved in the process.

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Sweden

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An investigation can be initiated in several ways. It is usually as a result of whistleblowing or a report on work environment deficiencies, or through other channels (eg, HR, the police, media coverage).

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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?



Ireland

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Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

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In general, an employee in the private sector may be temporarily suspended for a short period with pay and other benefits during a workplace investigation. The room for suspension without pay is, by contrast, very limited. An applicable collective bargaining agreement may impose additional restrictions on the right to temporarily suspend an employee. The suspension should be limited in time and only be in force during the investigation, but can be repeated for (multiple) additional short periods if necessary to conclude the investigation. An assessment needs to be made on a case-by-case basis as suspension in some cases may be considered unlawful. If not executed with sufficient consideration of the employee's interests, it may be considered a constructive dismissal or a breach of the employer's work environment obligations. If the employee is unionised, trade unions sometimes request that the employer initiates consultations as part of a decision to suspend an employee.

In the public sector, the right to suspension is limited. There are also special regulations regarding the suspension of certain employees, for example, employees who are employed as permanent judges.

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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?



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An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

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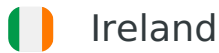
If the workplace investigation falls under the Swedish Whistleblowing Act, the investigation has to be conducted by independent and autonomous persons or entities designated under the Swedish Whistleblowing Act as competent to investigate reports.

If the workplace investigation is not governed by the Swedish Whistleblowing Act, there are no minimum

qualification requirements. When appointing an investigator, one should consider who would be most suitable in the given situation. For example, it may in some situations be more suitable to have an external investigator to ensure impartiality.

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05. Can the employee under investigation bring legal action to stop the investigation?



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Arguably yes, but it is the exception rather than the rule and it will depend upon the circumstances of the case. Generally, courts would be slow to intervene in ongoing workplace investigations. However, an employee may seek injunctive relief to prevent an investigation if they can show that the investigation is being conducted in breach of a policy or breach of fair procedures to such an extent that there is no reasonable prospect that the investigation's outcome(s) could be sustainable.

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No. It should, however, be noted that the employee under investigation may claim a right to rectification under article 16 of the GDPR and its right to object to processing under article 21 of the GDPR. This may give the employee under investigation an undesirable opportunity to withhold evidence and obstruct or impede the investigation. The risk of these rights being exercised is, however, considered to be low.

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?



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Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and

depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

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In general, yes, employees in Sweden have a far-reaching duty of loyalty toward their employers. This includes, among other things, a duty to truthfully answer an employer's questions and to inform the employer of events that may be of interest to the employer. An employee's obligation to assist is, however, more limited when assistance would entail self-incrimination.

A person acting as a witness under an investigation governed by the Swedish Whistleblowing Act will be protected by confidentiality. Personal data and details that could reveal the identity of a witness may not be disclosed without authorisation.

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07. What data protection or other regulations apply when gathering physical evidence?



Ireland

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Under the GDPR (General Data Protection Regulation), personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Data Protection Commission published Data Protection in the Workplace: Employer Guidance in April 2023, which is a useful guide.

Employers should exercise caution when gathering physical evidence that may involve the use of CCTV or other surveillance practices. The Irish Court of Appeal in the case of *Doolin v DPC* examined the use by an employer of CCTV footage for disciplinary purposes and found such use constituted unlawful further processing. The original reason for processing the CCTV footage was to establish who was responsible for terrorist-related graffiti that was carved into a table in the staff tearoom. It subsequently transpired Mr Doolin, who was in no way connected to the graffiti incident, had accessed the tearoom for unauthorised breaks and a workplace investigation followed. The original reason for viewing the CCTV related to security, but further use of the CCTV footage in the disciplinary investigation was not related to the original reason. This case confirms that employers must have clear policies in place in compliance with both GDPR and the Data Protection Act 2018 specifying the purpose for which CCTV or any other monitoring system is being used. Not only that, but these policies must be communicated to employees specifying the use of such

practices.

It is not only data about the investigation that must be processed fairly, but any retention of the data, which can only be further processed with good reason. It is a legitimate business reason to retain data to deal with any subsequent requests or appeals under various internal or statutory processes, provided employees have been advised of the relevant retention period.

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To the extent the gathering of physical evidence includes the processing of personal data, please see question 1.

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08. Can the employer search employees' possessions or files as part of an investigation?



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The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

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An employer can search an employee's personal possessions (eg, handbag, pockets and locker) if the employer has a legitimate interest in a search. This could, for example, include a reasonable suspicion of theft of employer property. Furthermore, an employer may search, but not continually monitor, an employee's computer and email provided that it is in accordance with GDPR requirements. For the processing to be lawful under the GDPR, the employer has to establish a purpose and a legal basis for the processing of personal data. Furthermore, data subjects must have received information on the legal basis for and purpose of the processing of personal data beforehand. If the data subjects have not received such information, the employer's right to process their data is limited. However, if the employer has reasonable grounds to believe that trade secrets or similar has been copied and stolen, no such requirements would typically apply.

Investigations into an employee's possessions may, under certain circumstances, also be carried out by the Swedish authorities.

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09. What additional considerations apply when the investigation involves whistleblowing?



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Most whistleblowing policies will include a section that provides for an initial assessment of the complaint as to whether it meets the definition of a protected disclosure. This assessment, which ought to be carried out by a designated person who has been appointed to deal with disclosures, is a useful tool as some matters which may be labelled as whistleblowing may fall under the grievance procedure.

Where there are grounds, an investigation will be commenced. Under the Protected Disclosures (Amendment) Act 2022, whistleblowers are protected from penalisation for having made a protected disclosure, under the Act.

Penalisation may include; suspension, lay-off or dismissal; demotion, loss of opportunity for promotion or withholding of promotion; transfer of duties, change of location or place of work; reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); coercion, intimidation, harassment or ostracism; or discrimination, disadvantage or unfair treatment.

If an employee (which includes trainees, volunteers, and job applicants) alleges that they have suffered penalisation as a result of making a protected disclosure, they may apply to the Circuit Court for interim relief within 21 days of the date of the last act of penalisation by the employer.

A claim for penalisation may also be brought before the WRC within six months of the alleged act of penalisation. If an employee alleges that they were dismissed for having made a protected disclosure, the potential award that the WRC can make increases from the usual unfair dismissal cap of two years' pay to up to five years' gross pay, based on actual loss.

Where a complaint of whistleblowing is made, employers should ensure that they appoint investigators with the appropriate knowledge and expertise to deal with such a matter and comply with the time limits set by legislation.

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If the Swedish Whistleblowing Act governs the investigation, additional considerations apply relating to who may investigate a reported irregularity (see question 4) and the duty of confidentiality and restrictions on access to and disclosure of personal data in investigations (see questions 6, 10 and 11), as well as the rights and protections of whistleblowers.

As regards the rights and protections of whistleblowers, the following can be noted. A person reporting in a reporting channel governed by the Swedish Whistleblowing Act is protected against retaliation and restrictive measures. Thus, companies are prohibited from preventing or trying to prevent a person from reporting, and retaliating against a person who reports. Furthermore, a reporting person will not be held liable for breach of confidentiality for collecting the reported information if the person had reasonable grounds to believe that it was necessary to submit the report to expose irregularities. Under the Swedish Whistleblowing Act, any person reporting irregularities in a reporting channel established under the Swedish Whistleblowing Act may also report irregularities to designated Swedish authorities.

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10. What confidentiality obligations apply during an investigation?

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This will depend on the nature of the investigation but, generally, investigations should be conducted on a confidential basis. All who participate in the investigation should be informed and reminded that confidentiality is a paramount consideration taken very seriously. However, it should be borne in mind that confidentiality cannot be guaranteed by an employer as the respondent in an investigation is entitled to know who has made complaints against them. Furthermore, the respondent is entitled to cross-examine the complainant and any witnesses, although in practice this right is rarely invoked strictly and is facilitated by the investigator, with questions from the respondent being put to the complainant and other witnesses.

On occasion, a breach of confidentiality may warrant disciplinary action, but this will depend on the circumstances. Exceptions to the requirement to keep matters confidential will of course apply where employees seek support and advice from others such as companions, trade union representatives or legal advisors. It may also not be possible to maintain confidentiality where regulators or the authorities are informed of the investigation.

Also, confidentiality may not be maintained if it is in the interests of the employer to communicate the complaint and any subsequent investigation, for example on a health and safety basis.

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If the Swedish Whistleblowing Act applies, the persons or entities handling the investigation have a duty of confidentiality and may not, without permission, disclose any information that could reveal the identity of the reporting person, any person subject to the report or any other person mentioned in the report or during the investigation of the report. Access to personal data is limited to designated competent entities or persons. Investigative material including personal data may not be shared with other persons or entities during the investigation. Once the investigation has reached actionable conclusions, investigative material may be shared with other persons or entities, such as HR or the police, provided that such sharing is necessary to take action on the outcome of the investigation. Investigative material may also be shared if it is necessary for the use of reports as evidence in legal proceedings or under the law or other regulations.

If the Swedish Whistleblowing Act does not apply, there are no particular confidentiality obligations for employers. Yet, an employer needs to consider what information is suitable to share during an investigation, how this is done and to whom it is shared. An employer must also respect employees' privacy in line with what is generally considered good practice in the labour market. This means that an employer should be careful as to what sensitive and personal information is shared during an investigation. Furthermore, the spreading of damaging information (even if true) about an employee to a wider group may be a criminal offence under the Swedish Criminal Code.

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11. What information must the employee under investigation be given about the allegations against them?

Ireland

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Under the fair procedures outlined above, details of the allegations or complaints against the employee should be put to them to enable them to fully respond to the allegations raised. The employee should also be provided with any relevant policies pertaining to the allegations against them, along with all documentary evidence of the allegations and the specific terms of reference that define the scope of the investigation. The employee should also be informed of their right to be represented, see question 15.

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Sweden

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According to article 14 of the GDPR, no information must be provided. The exemption in article 14.5(b) applies to the extent the obligation to provide such information is likely to render impossible or seriously impair the objectives of the processing of the personal data of the employee under investigation (ie, to diligently investigate the suspected irregularity).

If the Swedish Whistleblowing Act applies, information about where the personal data processed originates from may not be provided under article 14 of the GDPR, as the personal data must remain confidential subject to obligations under the Swedish Whistleblowing Act.

In addition to the above, an investigation should, to the extent possible and suitable, be characterised by

the principles in ECHR (particularly articles 6 and 8). The employee under investigation should, among other things, be presented with sufficient information to safeguard his or her interests and be allowed to respond to the allegations. The investigation must also be compliant with the work environment responsibilities that the employer has concerning the involved parties (see questions 17 and 20).

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



Ireland

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Failure by an employer to provide the identity of the complainant, witnesses or sources of information seriously impinges upon the employee's right to fair procedure and could result in a flawed investigation.

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If the Swedish Whistleblowing Act applies, their identity must be kept confidential under the duty of confidentiality. If the Swedish Whistleblowing Act does not apply, their identity can to a large extent be kept confidential.

It can also be noted that a workplace investigation carried out in the public sector will often (eventually) become an official document, which means that the document can be requested by the public. There are, however, provisions on secrecy that may restrict the right to gain access to official documents. These provisions are found in the Public Access to Information and Secrecy Act (2009:400).

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?



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There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and

discrimination". It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

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Sweden

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NDAs can be used for some investigations carried out in the private sector. However, under the Swedish Whistleblowing Act, a contract is void to the extent it retracts or restricts a person's rights under the Swedish Whistleblowing Act. An NDA that restricts the right to report irregularities to authorities or the media would, therefore, typically be void.

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14. When does privilege attach to investigation materials?



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It would be difficult to assert privilege over materials that relate to the investigation itself.

Privilege may arise before the instigation of an investigation where an employer may seek legal advice from their legal advisors over the initial complaint and appropriate next steps. Subject to the relevant tests being met, Legal Advice Privilege arises in respect of a confidential communication that takes place between a professionally qualified lawyer and a client. Who the client is will be of significant importance as they must be capable of giving instructions to their lawyer, on behalf of the employer. Caution should be exercised by employers if advice to "the client" is disseminated further within the business to other members of management. If such a scenario arises, then there is a risk that privilege may be waived and such material could be disclosable under a data subject access request. Litigation privilege arises with respect to confidential communications that take place between a lawyer or a client and a third party for the dominant purpose of preparing for litigation, whether existing or reasonably contemplated.

It is also prudent to consider whether an external investigator should have access to their own independent legal advisor, and the funding arrangements for such advice would have to be considered by the employer.

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Attorney-client privilege will apply to all communication and investigative material between a client and its law firm. Attorney-client privilege is, however, not without limitations. Regarding investigations into alleged employee misconduct, a law firm may have to report suspected money laundering to the authorities and under certain circumstances disclose information to the financial police.

Written material covered by attorney-client privilege generally may not be seized.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



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This depends on the nature of the investigation. If the complaint originates from an employee as a grievance, then the employee would have the right to representation during the investigation. Representation in this context is more akin to the right to be accompanied, as in the UK by either a colleague or trade union representative.

If the investigation is a fact-gathering investigation originating from the employer, then the employee would not have the right to be represented during the investigation. That right would apply only at any subsequent disciplinary hearing.

If the investigation is a fact-finding investigation as part of a disciplinary process originating from the employer, then the employee ought to be given the right to be represented at that investigation stage. Again the right is akin to the right to be accompanied. There was concern from employers that the right had been expanded to legal representation in disciplinary matters with the case of *McKelvey v Irish Rail*. However, the Supreme Court in that case clarified that the right to legal representation in disciplinary processes is only in exceptional circumstances.

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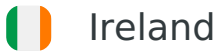
Sweden

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The employee has no right to bring legal representation. However, the outcome of an investigation may lead to employment-related consequences, so it may be appropriate (depending on the situation) to offer the employee the opportunity to bring a union representative (if the employee is unionised) or a legal representative.

Last updated on 15/09/2022

16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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This will depend on the agreement with the works council or trade union. The employee who is the respondent to the investigation may have views on their trade union being informed, aside from any agreement, which should be taken into account under GDPR provisions.

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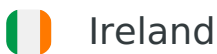
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No, but if the employee under investigation is unionised it is appropriate to inform the union about the investigation. If the employer chooses to take action against the employee during, or after, the investigation, the trade union generally needs to be consulted before any final decisions are made.

If the Swedish Whistleblowing Act applies, the employer is not authorised to inform a works council or trade union about the investigation, as it may be in violation of the duty of confidentiality (see question 10).

Last updated on 15/09/2022

17. What other support can employees involved in the investigation be given?



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If an employee assistance programme is in place, an employee irrespective of their role in the investigation should be directed to the programme and encouraged to avail of the services. Investigations can become protracted and employees should be kept informed as to progress and what is required of them regarding participation. Regular checks of the health and well-being of employees should also be made. Even if such a programme is not in place, occasionally and depending on the issues giving rise to the investigation, it may be appropriate for the employer to cover the cost of counselling to a certain extent.

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The employer is responsible for the work environment and must ensure that employees are not at risk of mental (or physical) illness due to an investigation. If an employee, in connection with an investigation, requires support or if risk of ill health is otherwise anticipated, the employer is obliged to assess the situation and provide said employee with sufficient support (eg, counselling or work adjustments).

Last updated on 15/09/2022

18. What if unrelated matters are revealed as a result of the investigation?



Ireland

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If an investigator finds other issues that are outside the scope of the terms of reference, these should not be ignored but equally should not be included as part of the investigation, as they are beyond the remit of the investigation that was established at the beginning. An investigator should identify the other matters that may require further action and report these to the employer separately so as not to conflate issues.

Last updated on 11/10/2023



Sweden

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According to the GDPR, personal data can only be processed for specified, explicit and legitimate purposes and may not be further processed in a manner that is incompatible with those purposes. This imposes restrictions on the use of material from previous investigations in new investigations when the material was collected for other purposes. It is, therefore, necessary to ensure whether the new matter relates to the investigation and falls within the purpose of the investigation. If the new matter is unrelated to the investigation and does not fall within the purpose of the investigation, the identified information may not be processed under the GDPR.

Except for what is stated above, no regulation limits how the employer can use information regarding unrelated matters. Unrelated matters may be a myriad of different things, and could in some instances just be discarded, while in other situations the information may invoke a responsibility to act for the employer (eg, if the unrelated matters concern work environment issues or other severe misconduct by an employee who is not the target of the investigation). Furthermore, the employer may always use any revealed information (unrelated or not) as evidence in a court of law, since the principle of free examination of evidence applies.

Last updated on 15/09/2022

19. What if the employee under investigation raises a grievance during the investigation?

Ireland

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If the subject of the grievance relates to the subject of the investigation, the employee should be reassured that all the matters that they wish to raise concerning the matter under investigation will be dealt with in full as part of the investigation.

If the employee raises a grievance that is unrelated to the matter under investigation, then that can be dealt with concurrently, albeit by a separate investigator.

The initial investigation does not automatically need to be halted upon receipt of a grievance. Frequently, grievances are submitted in the hope that they derail or delay the original investigation. Careful consideration should be given as to the nature of the grievance and the appropriate course of action adopted.

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Sweden

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There are no formal rules or processes for handling grievances in Sweden. Depending on the nature of the grievance, such a complaint may also have to be investigated (unless the grievance is deemed to be trivial). This could, for example, be the case if the grievance concerns new or other work environment issues that the employer is obliged to investigate.

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

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.

Last updated on 11/10/2023

Sweden

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The employer is responsible for the employee's work environment during the investigation. The employer must assess the situation and the impact on the employee's health and may, depending on the situation, have to postpone certain investigative measures, such as interviewing the employee in question. The investigation may even have to be completed without the employee participating.

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21. How do you handle a parallel criminal and/or regulatory investigation?

Ireland

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Workplace investigations can originate from criminal investigations or proceedings. It may be that an employer only becomes aware of a matter through the involvement of the police (An Garda Síochána) or regulatory bodies.

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue that any internal investigation should be put on hold, on the basis that it will harm any regulatory investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulatory investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

Employers will also have to consider their reporting obligations to An Garda Síochána. If the matter relates to fraud, misuse of public money, bribery, corruption or money laundering, for example, reporting obligations arise under section 19 of the Criminal Justice Act 2011. A failure to report information that an employer knows or believes might be of material assistance in preventing the commission of an offence, or assisting in the apprehension, prosecution or conviction of another person may be guilty of an offence.

Also, the Irish Central Bank's (Individual Accountability Framework) Act 2023 (the Act) was signed into law on 9 March 2023 but has not yet been enacted. The framework provides scope for a senior executive accountability regime, which will initially only apply to banks, insurers and certain MiFID firms. However, its application may be extended soon. The Act forces employers to engage in disciplinary action against those who may have breached specific "Conduct Standards".

Last updated on 11/10/2023

Sweden

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Handling a parallel investigation will have to be assessed on a case-by-case basis depending on the applicable rules. For instance, an investigation under the Swedish Discrimination Act is subject to certain timing requirements with which the employer must comply. In other cases, it may be more appropriate to

hold off the workplace investigation while awaiting the outcome of the parallel investigation.

The police or regulator can, depending on the matter at hand, request an employer to share evidence. The police or the regulator may also, under certain circumstances, retain evidence in a search.

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22. What must the employee under investigation be told about the outcome of an investigation?



Ireland

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The employee whose actions are the subject of the investigation must be advised of the outcome of the investigation. They are usually provided with a copy of the investigator's report.

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This depends on the outcome of the investigation and the applicable rules.

If the outcome of the investigation leads to termination, the employer will have to disclose some information regarding the reason for termination. If the employee questions the termination, the employer may have to disclose more information in a subsequent dispute. If the outcome of the investigation leads to less invasive measures, such as a warning, there are less extensive requirements to provide information.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and disclosure of personal data must be considered (see question 10). If the investigation is based on the rules in the Swedish Discrimination Act, there are also feedback requirements concerning the involved parties.

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23. Should the investigation report be shared in full, or just the findings?



Ireland

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The investigation report should be shared in full, unless there is some specific reason for not doing so. One example is where there is a possibility of a criminal investigation; in that instance, it may be appropriate not to share the full report. Occasionally, there may be several respondents involved in the complaint, and

each respondent may only be entitled to the report that relates to them.

Last updated on 11/10/2023

Sweden

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There is no obligation to share the investigation report, neither in full nor key findings, with the involved parties. An assessment needs to be made in each case of what is appropriate to share and with whom.

When sharing an investigation report, certain data protection considerations must be made. A purpose and legal basis for the sharing must be established and, in principle, documented.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and disclosure of personal data must be considered (see question 10).

Last updated on 15/09/2022

24. What next steps are available to the employer?

Ireland

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The investigator will usually set out recommendations within their report. It will then be up to the employer to act on those recommendations and to accept or reject the findings (if it were a fact-finding investigation). If, for example, a recommendation is made that the matter should proceed to a disciplinary hearing, the employer should then arrange such a hearing and nominate an impartial member of management to carry out the disciplinary hearing. In some instances, recommendations are made by investigators to provide training or update policies and such recommendations should be acted upon without delay. It may also be appropriate to notify a specific regulator of the outcome of the investigation.

Last updated on 11/10/2023

Sweden

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An investigation may result in employment law measures (eg, support, training, relocation, warning, termination or dismissal). An investigation may also be inconclusive and not result in any action.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can

the interview records be kept private, or are they at risk of disclosure?

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Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

Last updated on 11/10/2023

Sweden

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Findings may have to be handed over to the police or the regulator – there is no separate legal protection for material in employer investigations related to authorities. If the investigation has been carried out by a law firm, see question 14 on attorney-client privilege.

Last updated on 15/09/2022

26. How long should the outcome of the investigation remain on the employee's record?

Ireland

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Irrespective of the outcome of the investigation, the fact that an employee was subject to an investigation is not the key issue. The key concern is whether any further action was taken as a result of the investigation. If a disciplinary process ensued, then it is the outcome of that disciplinary record and any subsequent appeal that would or would not be noted on an employee's record. If a disciplinary sanction were imposed then the length of time the sanction remains on the employee's record would depend on what is specified in the disciplinary policy.

Last updated on 11/10/2023

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Under the GDPR personal data may not, according to the general principle on storage limitation, be retained for longer than is necessary for the purposes for which the personal data are processed. The GDPR does not stipulate a generally applicable storage limitation period. Such a regulation is, on the other hand, included in the Swedish Whistleblowing Act. If the Swedish Whistleblowing Act applies, the outcome of the investigation and all personal data should be retained for as long as necessary, but not for longer than two years after the investigation has been closed.

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27. What legal exposure could the employer face for errors during the investigation?



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A failure to follow fair procedures in the investigation can have significant consequences.

Although the exception rather than the rule, an employee could challenge the investigation through injunctive proceedings if there is a breach of fair procedures. Such action would be taken before the High Court. Injunction proceedings may be brought while the investigation is ongoing, or just before its conclusion to prevent publication of a report making specific findings against an employee. A successful injunction may curtail any subsequent attempt to investigate the matter as allegations of penalisation, prejudice and delay may arise.

Errors during the investigation can also give rise to a complaint of constructive dismissal, with allegations that flaws in the procedure have fundamentally breached the implied term of mutual trust and confidence.

A flawed investigation can also undermine any disciplinary process and sanction that is imposed as a result. This commonly occurs when an employee has been dismissed following a disciplinary process launched on foot of the investigation. While dismissal may be an appropriate sanction, the dismissal can still be found to be unfair if there is a failure to follow fair procedures. An employee may challenge their dismissal before the WRC and the employer should be alive to not only an unfair dismissal complaint, but allegations of discrimination and penalisation.

Overall, to carry out a successful workplace investigation, an employer should consider taking advice at the earliest opportunity to ensure that the investigation can withstand challenges.

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Errors resulting in terminations can be unlawful and, if they lead to employees terminating their employment as a result of the employer's missteps, could be seen as constructive dismissal. Constructive dismissal is generally equivalent to an unlawful dismissal. Unlawful terminations generally result in an obligation to pay financial and general damages to the affected employees.

Failure to fulfil the obligations under the Swedish Discrimination Act may lead to an obligation to pay financial and general damages.

If an employer does not fulfil its obligations according to work environment legislation, there is a risk that the Swedish Work Environment Authority will issue injunctions or prohibitions against the employer. If an employer omits to meet its work environment related obligations, and that in turn results in a work related accident, e.g. self-harm in connection with an internal investigation, it may also, in a worst case scenario, lead to criminal liability.

The Swedish Work Environment Authority is also responsible for monitoring compliance with the provisions of the Swedish Whistleblowing Act. The Swedish Work Environment Authority may, if necessary to ensure compliance with the Swedish Whistleblowing Act, order an operator to comply with the obligations and requirements of the Swedish Whistleblowing Act. Employers violating the Swedish Whistleblowing Act may also be liable to pay damages to the affected employees.

If personal data is processed in a way that violates the GDPR, the authorised supervisory authority may issue warnings or reprimands to the data controller, order the controller to comply with the GDPR, impose a ban on processing, or impose an administrative fine on the controller. Companies violating the GDPR may also be liable to pay damages to data subjects.

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