

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

While there are no specific laws that regulate a workplace investigation, there are several laws that companies should consider when conducting a workplace investigation concerning alleged employee misconduct.

One key example is the Whistleblower Protection Act (WPA). The WPA provides legal protection to a whistleblower if their allegations are raised in good faith and are in the public interest as specified under the WPA. If the WPA applies, certain obligations apply to the company, including but not limited to the following:

- the obligation to protect the confidentiality of the whistleblower's identity;
- protecting the whistleblower if the whistleblower suffers or is likely to suffer serious harm to life or health as a result of whistleblowing and the whistleblower requests protection; and
- refraining from taking retaliatory action on the whistleblower.

Therefore, if an employee raises allegations of another employee's misconduct, the company should review whether the allegations fall under the WPA.

There are also special laws that impose obligations on the company if there are certain types of allegations (eg, sexual harassment, workplace harassment).

In addition, when collecting and reviewing employees' electronic data, such as emails or files stored in work laptops or company servers, which may contain personal information, the company should comply with data privacy laws discussed in more detail in questions 7 and 8.

Companies may also have internal policies (eg, whistleblower protection policies, Code of Conduct) that may apply to workplace investigations, aside from the requirements under Korean law.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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02. How is a workplace investigation usually commenced?



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There are many different ways a workplace investigation concerning employee misconduct could commence. Below are some key examples from our experience:

- an employee reports allegations concerning another employee's misconduct through an ethics hotline or other means (eg, email, phone call);
- an outsider such as a former employee or a vendor reports allegations concerning employee misconduct to a company officer;

- an internal audit reveals potential employee misconduct;
- media reports raise allegations of employee misconduct; and
- an external investigation begins (eg, by criminal authorities or administrative agencies) concerning alleged employee misconduct.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).^[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exist, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 21.

^[2] Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

The company may place an employee who is subject to a workplace investigation under administrative leave if this seems necessary or appropriate to ensure the integrity of the workplace investigation. While administrative leave can take different forms, one way is to issue a "standby order" to the relevant employee, instructing him or her not to come into work and prohibiting contact with other employees or customers while the workplace investigation is ongoing.

Administrative leave is not a disciplinary action, but rather an exercise of the company's authority to take personnel management measures. This authority is generally subject to a "reasonableness" test, with the Korean courts balancing the employer's business necessity in placing the employee on administrative leave with the inconvenience caused to the employee. In conducting the balancing test, the Korean courts have considered whether the employee receives pay during the leave and the duration of the leave, among other things. In general, if the duration of the leave is not excessive and is with full pay and benefits, the employer's management prerogative is likely to be recognised.

The company doesn't need to obtain the employee's consent but, in practice, a company should consider getting the employee's acknowledgement that they have received the administrative leave notice.

In addition to Korean labour law, other factors such as the company's rules of employment or a collective bargaining agreement (if any) may affect the company's ability to place the employee on administrative leave, by providing for prescribed procedures for placing an employee on administrative leave or requiring the company to obtain the union's consent if a union leader or executive is involved.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

It is possible to suspend an employee during a workplace investigation.^[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 181.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

While there are no laws that set minimum qualifications for who should conduct a workplace investigation, companies often engage external legal counsel to ensure the investigation is conducted in an unbiased and professional manner. If the company itself undertakes the workplace investigation, the company should take precautions such as ensuring that the person conducting the investigation is not biased and not involved in the alleged wrongdoing. If the person conducting the investigation cannot converse in the native language of the employee under investigation, the company may consider arranging for an interpreter when conducting interviews, to minimise the risk of misunderstanding.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level^[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 18.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

An employee under investigation cannot bring legal action (eg, an injunction) to stop a workplace investigation. However, there have been instances where an employee under investigation raised legal challenges concerning the investigation (eg, breach of privacy). Please see question 19. While the company would not be legally compelled to stop the investigation when legal challenges are raised, they may face penalties under the relevant laws if it is determined they have committed a violation.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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06. Can co-workers be compelled to act as witnesses?

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

While there are no laws to compel co-workers to act as witnesses, the company may have internal policies (eg, rules of employment, code of conduct) that require employees to cooperate with company actions such as a workplace investigation. That said, it would be difficult to enforce such policies even if the employee refuses to cooperate (eg, taking disciplinary action against an employee who refuses to act as a witness).

There may be instances when the company is required to provide certain legal protection to employees acting as witnesses in an investigation. For example, if a whistleblower falling under the WPA is required to act as a witness, they would be entitled to legal protections as discussed in question 1. The company may also have internal policies that provide protection to employees acting as witnesses in an investigation.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the

employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.^[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

^[2] Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

It may be difficult for a company to search and collect physical items that personally belong to the employee.

While the company may search and gather electronic data, such as emails or files stored in work laptops or company servers, there are requirements and restrictions under the Criminal Code, the Personal Information Protection Act (PIPA), and the Act on Promotion of Information and Communications Network Utilisation and Information Protection, etc (Network Act), among other laws.

Article 316(2) of the Criminal Code states that accessing the contents of another person's documents, pictures, special media records, etc, that are sealed or designated as secret using technical means may constitute the crime of accessing electronic records.

Under the PIPA, consent must be obtained from the information owner to collect or use personal information, or to provide such information to a third party. Consent must be separately obtained for sensitive information or unique identification information. There are strict requirements as to the format and contents of the consent forms under the PIPA.

The Network Act prohibits accessing an information and communications network without rightful authority or any intrusion that goes beyond the permitted authority for access. Although this may not be an issue if a company directly manages the email accounts at issue, if an employee's email account is protected by a password or through other means, accessing emails from that account without obtaining the employee's consent could constitute unlawful intrusion under the Network Act as well as under the Criminal Code as discussed above.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.^[1]

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.^[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

^[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

^[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

As discussed in question 7, it may be difficult for a company to search an employee's personal possessions. The company may search and gather electronic data stored in work laptops or company servers, subject to legal requirements and restrictions (eg, obtaining consent).

The PIPA provides specific guidance on the requirements for obtaining consent. Under the PIPA, to collect or use an individual's personal information, the information holder must be informed of and consent to:

- the purpose of the collection or use;
- the personal information that will be collected;
- the period of retention and use; and
- his or her right to refuse to provide consent and any disadvantages that may result from such refusal.

There are separate requirements for obtaining consent to provide an individual's personal information to a third party. Also, consent must be obtained separately for the collection, use or provision of sensitive or unique identification information.

Under limited circumstances, personal information may be collected, used, or provided to third parties without obtaining the consent of the information holder. For instance, a company may collect and use

personal information without obtaining consent where obtaining the information is necessary to achieve the company's "legitimate interests", which clearly exceed the information holder's right to his or her personal information, and the collection and use are carried out within reasonable bounds. The term "legitimate interests" in this context is generally understood as a concept similar to "justifiable act" under the Criminal Code. The Korean Supreme Court has held that under exceptional circumstances such as the following, the company's collection and review of employee data may constitute a "justifiable act" under the Criminal Code:

1. the company had specific and reasonable suspicion that the employee had committed a crime and the company had an urgent need to verify the facts;
2. the scope of the company's review was limited to the suspected crime through the use of keywords, etc;
3. the employee had signed an agreement stating that he or she would not use work computers in an unauthorised manner and that all work products would belong to the company; and
4. the company's review uncovered materials that could be used to verify whether the employee committed the alleged crime.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.^[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.^[2]

^[1] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

^[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

Aside from the legal obligations imposed on the company when dealing with a whistleblower who is subject to the WPA as discussed in question 1, there are also practical considerations the company should keep in mind when dealing with a whistleblower, regardless of whether the whistleblower falls under the WPA.

For example, there have been instances where an employee who raised allegations filed a complaint with Korean authorities (such as the Anti-Corruption and Civil Rights Commission (ACRC) or the Labour Office) that the company took retaliatory action against the whistleblower. The company should carefully review the legal risks before taking action, such as personnel action or civil or criminal action, against an employee who raises allegations if that employee was also involved in the wrongdoing.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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10. What confidentiality obligations apply during an investigation?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

It is general practice in Korea for a company to require interviewees to maintain confidentiality concerning a workplace investigation and instruct them that they are not permitted to discuss the matter under investigation with other employees, etc. If an employee violates this instruction, it may be possible for the company to take disciplinary action against them under the company's rules.

Further, the company or its employees who have engaged in an investigation for sexual harassment or workplace harassment in the workplace are obliged to maintain the confidentiality of the investigation. Failure to comply with such requirements may lead to an administrative fine from the Ministry of Employment and Labour for the company or its registered representative.

There may be some exceptions to the confidentiality obligation, such as when an employee is required by government authorities to provide relevant information in a parallel investigation.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the

employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.^[1]

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.^[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.^[3]

[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[2] Claudia Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

[3] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 133.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

Last updated on 11/10/2023



South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There is no requirement to notify an employee under investigation concerning the allegations against him or her when requesting cooperation with a workplace investigation (eg, requesting the employee's consent to review electronic data, or requesting an interview).

However, the company may strategically consider explaining the general purpose of the investigation before requesting consent to review electronic data or when requesting an interview. This may help increase the likelihood of cooperation and also reduce the risk of the employee raising objections to the company's findings from the investigation by saying he or she was not properly informed of the purpose of the investigation, or that the investigation was conducted in a coercive manner.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.^[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.^[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.^[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).^[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

^[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

^[2] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

^[3] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

^[4] Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

As discussed in question 1, if the whistleblower falls under the WPA, the whistleblower's identity should be kept confidential. Even if the WPA does not apply, the company may wish to keep the identity of the whistleblower and other key witnesses confidential to the greatest extent possible.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused's interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.[\[1\]](#)

Last updated on 15/09/2022

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

Some companies require an employee subject to investigation to sign an NDA or other similar documents (eg, a pledge of confidentiality) agreeing not to disclose information relating to the investigation to outside parties.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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14. When does privilege attach to investigation materials?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

No law recognises the common law concept of "attorney-client privilege" in Korea. However, communication with an attorney is protected to some extent under certain laws, such as the Constitution, the Attorney Act, the Criminal Procedure Act, and the Civil Procedure Act. This protection is based on the attorney's confidentiality obligation, which prohibits an attorney from divulging confidential matters acquired in the course of representing clients, unless otherwise prescribed by law. This confidentiality obligation generally allows an attorney to refuse to testify or comply with document production orders for information or materials the attorney obtained in the course of his or her duties that relate to the confidential information of clients.

In addition, there could be instances where materials from an investigation conducted in Korea may become subject to discovery outside of Korea. It is, therefore, important to ensure investigation materials are privileged under the relevant non-Korean laws in the jurisdictions where attorney-client privilege is recognised (eg, the US).

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As outlined above, all employees generally have the right to know whether and what personal data is being

or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).^[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

^[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

While the company cannot prevent an employee from engaging his or her legal counsel, there is no legal obligation for a company to allow an employee to bring his or her legal counsel to an interview, for example. If the employee expresses his or her intention not to participate in the interview session without his or her legal counsel, the company may consider explaining to the employee that such refusal to participate in the interview may constitute a breach of reasonable work-related orders and may be subject to disciplinary action. However, the company should consider the possibility of the employee claiming that he or she was not given a proper opportunity to explain the allegations during the investigation because they were prevented from obtaining legal assistance.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.^[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.^[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.^[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of the employee involved to cooperate.

^[1] Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

^[2] Simona Wantz/Sara Licci, *Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen*, in: *Jusletter* 18 February 2019, N 59.

^[3] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

While a labour union does not have a legal right under Korean law to be informed or involved in the investigation, unless otherwise required under the relevant collective bargaining agreement, there have been instances where the labour union raised complaints that the company did not properly investigate an employee, who is a member of the labour union, particularly if the company took disciplinary action against that employee based on the findings of the investigation. The company should consider such a practical risk when conducting a workplace investigation.

If the investigation was conducted based on a claim filed by an employee to the Grievance Handling Committee (which is a sub-committee of a works council), the members of that committee have a right to be informed of the results of the investigation.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There could be some instances where an employee involved in an investigation may be entitled to support from the company. To give an example, there have been some cases where a whistleblower claimed they suffered workplace harassment or their employer took retaliatory action (eg, wrongful transfer) and they sought damages or other relief.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.^[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.^[2]

^[1] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 390.

^[2] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern, 2021, p. 133.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

Sometimes, the company discovers other potential misconduct in addition to the specific allegations that trigger a workplace investigation. No law limits the scope of the company's investigation to the allegations that were initially raised.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

It is not uncommon for an employee under investigation to raise grievances during or after the investigation. Below are some examples of claims an employee may raise:

- that the company reviewed the employee's electronic data without obtaining the requisite consent;
- that witnesses or the company committed defamation in violation of the Criminal Code;
- that the employee was coerced to comply with the investigation in violation of the Criminal Code;
- that the employee was disciplined without just cause; or
- that the employee was harassed by other employees for providing information during the investigation.

The actions the company should take would vary depending on the grievance raised.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

The company should review whether the employee under investigation is requesting sick leave under appropriate procedures and for a legitimate reason and may consider ways to persuade the employee to cooperate with the investigation. If the employee applies for sick leave following company policy, the company would need to grant such sick leave and suspend the investigation during the sick leave.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The time spent on the internal investigation by the employee should be counted as working time^[1]. 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).

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

Last updated on 15/09/2022

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



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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 regulation 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 Siochana. 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".

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There is no obligation to stay the workplace investigation while the parallel criminal or regulatory investigation is being conducted. In practice, companies often proceed with, or even accelerate, the workplace investigation to find out the facts and defend themselves against the parallel criminal or regulatory investigation being conducted. The company should be careful not to engage in activities that may raise suspicions as to whether the company is impeding the government investigation or concealing or destroying evidence.

While the investigation report would typically not be privileged, the company may consider explaining to the authorities that the investigation findings are not conclusive, should the police or regulator request the internal investigation report.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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22. What must the employee under investigation be

told about the outcome of an investigation?

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There is no legal obligation for a company to disclose the outcome of an investigation to the employee who was subject to it. Having said that, if the company wishes to take disciplinary action against the employee based on the outcome of an investigation, it is required to disclose sufficient detail on the employee's wrongdoing that is subject to disciplinary action. This information should be provided to the employee before the disciplinary action committee (DAC) hearing to provide the employee with sufficient time to present and defend his or her position during the DAC hearing.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.^[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.^[2]

[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, *Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht*, SJZ 114/2018, p. 394.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

As discussed in question 22, when taking disciplinary action against an employee based on the outcome of an investigation, the company would need to disclose sufficient detail on the employee's wrongdoing. However, this does not mean that the full investigation report would need to be shared with the employee to be disciplined. Key details of the investigation findings that apply to the relevant employee due to be disciplined should be shared, and not other findings concerning other persons.

There is also no requirement under Korean law for a company to disclose the investigation report or investigation findings to the whistleblower. If the company discloses the personal identity of the target employees, such disclosure could constitute a violation of the PIPA, libel or defamation under the Criminal Code. If the whistleblower strongly requests that the company share the investigation report or the findings, the company may consider providing a summary of the key findings concerning the allegations that the whistleblower raised, without disclosing personal information.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).^[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von

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24. What next steps are available to the employer?



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

After completing an investigation, the company may consider the following measures, among others:

1. taking disciplinary action against the relevant employees;
2. taking legal action (eg, criminal action, civil action) against the relevant employees; and
3. taking appropriate remedial measures (eg, strengthening existing policies and establishing new policies, and conducting training).

The company may also consider making a voluntary report to the relevant authorities as discussed in question 25.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.^[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate

termination of employment.

[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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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?



Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There is generally no obligation to report violations to the Korean authorities, subject to limited exceptions (eg, financial institutions are required to report certain types of wrongdoing to the financial regulator; if there was a leak of an industrial technology developed through a national research and development project or a national core technology, this leak should be reported to the Ministry of Trade, Industry and Energy and the National Intelligence Service). However, even in the absence of a self-reporting obligation, the company may consider strategically deciding to make a voluntary report. For example, there have been instances where the police or prosecutors' investigations were conducted in a more limited manner where the company filed a voluntary report and cooperated with the investigation. Also, for certain types of violations (eg, cartel activities), self-reporting to the relevant authority may entitle the company to leniency provided under the law.

In certain instances, the company may also consider reporting violations to the relevant foreign authorities, in addition to, or instead of, the Korean authorities. For example, if the company found potential violations of US law such as sanctions law or the Foreign Corrupt Practice Act, the company may want to self-report these violations to the relevant authorities such as the Office of Foreign Assets Control, or the US Department of Justice.

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Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

^[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

There is no legal requirement on how long the records of the investigation (eg disciplinary action) should be maintained by the company. Many companies maintain a record of disciplinary action throughout the employment period.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).^[1]

^[1] Wolfgang Portmann/Isabelle Wildhaber, *Schweizerisches Arbeitsrecht*, 4. Edition, Zurich/St. Gallen 2020, N 473.

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

Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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.



South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
at Kim & Chang

As mentioned in question 19, employees may potentially raise claims, such as that the company violated data privacy laws in reviewing employee data, committed defamation, coerced the employee to comply with the investigation, and that witnesses or the company committed defamation in violation of the Criminal Code or disciplined the employee without just cause.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), *Zivilprozessrecht*, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

Last updated on 15/09/2022

Contributors



Ireland

Bláthnaid Evans

Mary Gavin

Ogier



South Korea

Hyunjae Park

Paul Cho

Jihay Ellie Kwack

Kyson Keebong Paek

Kim & Chang



Switzerland

Laura Widmer

Sandra Schaffner

Bär & Karrer