

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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### **15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?**

#### Ireland

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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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#### Switzerland

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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.<sup>[1]</sup>

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.<sup>[2]</sup> 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.<sup>[3]</sup>

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

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<sup>[1]</sup> Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

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

<sup>[3]</sup> 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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## 23. Should the investigation report be shared in full, or just the findings?



### Ireland

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

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### Switzerland

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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).<sup>[1]</sup> 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.<sup>[2]</sup>

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[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 Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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