

Workplace Investigations

Contributing Editors

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

Switzerland

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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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These should typically be disregarded by the investigator. From a data protection perspective, the ICO's position is that other information collected during an investigation should be disregarded and, where feasible, deleted unless it reveals information that no reasonable employer could be expected to ignore. In those circumstances, the employer should arrange for an independent third party to determine whether a separate investigation into unrelated matters is needed.

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

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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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This is a relatively common tactic. The employer will need to decide whether to suspend the investigation to deal with the grievance, or conclude the investigation first, depending on the circumstances. It would usually be difficult to deal with both the grievance and the investigation concurrently, unless the facts overlap significantly.

If the employee becomes uncooperative and refuses to take part in the investigation, they should be told that the investigator may need to make a decision in the absence of their account based on all the other evidence available. The employer may decide to treat it as failure to comply with a reasonable management instruction and take disciplinary action on that basis.

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