

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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## 01. What legislation, guidance and/or policies govern a workplace investigation?

### Belgium

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There is no specific legislation regarding a workplace investigation. In general, an employer has the right to investigate incidents at the workplace based on their authority over employees. However, the investigative powers of the employer are among others limited by the general right to privacy, which is also enshrined in Collective Bargaining Agreement No. 81 of 26 April 2002 to protect the privacy of employees concerning the control of electronic online data. If there are official complaints by employees due to sexual harassment, bullying or violence at work, well-being legislation provides a specific procedure. Also, upcoming whistleblower rules include some specifications for an investigation, but at the time of publication these are not yet final (we refer to is in more detail below). The information below is only valid for workplace investigations in the private sector. The public sector has a set of specific rules and principles, which are outside the scope of this chapter.

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### Switzerland

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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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### Vietnam

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There are no specific legislative requirements for workplace investigations in Vietnam. However, Labor Code No. 45/2019/QH14 dated 20 November 2019 (2019 Labor Code), which is currently the primary legislation governing employment relationships, requires employers that have more than ten employees to provide a mechanism and procedure for handling sexual harassment cases in the workplace. Other than that, an employer may incorporate policies and guidelines on how to deal with workplace investigations into its handbook.

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## 02. How is a workplace investigation usually commenced?



### Belgium

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First, the employer should appoint an investigator or investigative team that will be responsible for conducting the investigation. Next, the employer or the investigators might think about communicating with the involved employees. It depends on the situation if this is a good idea or not. In general, it can be recommended that the employer is transparent towards the involved employees and openly communicates about the (start of the) investigation process. This is definitively the case if it is already clear that the involved employees are under scrutiny because of their actions. In this case, the actual investigation can begin with a hearing of the involved employees. However, if there is a risk that employees will hide or destroy evidence or will collude to prevent the employer from finding the truth, the investigation can also start without any communication. In this case, it would be better to start collecting evidence before hearing from the employees involved.

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### Switzerland

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

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[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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## Vietnam

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The circumstances in which an employer commences a workplace investigation may vary, either through a whistleblower, through an internal system, email or phone call; complaints from suppliers, contractors, or customers; or accounts from observations and hearsay. Sometimes, it comes from anonymous complaints. However, it is common for an employer to verify whether the report or complaint is substantiated, partially substantiated, or unsubstantiated, which is sufficient to initiate and commence a workplace investigation.

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



## Belgium

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In principle, you cannot unilaterally suspend an employee during a workplace investigation, as there is a risk of constructive dismissal (ie, wrongful termination of the employment contract by the unilateral modification of one of its essential elements). Consequences could include the payment of an indemnity in lieu of notice based on seniority as foreseen by the Employment Contracts Act, plus possible damages (three to 17 weeks remuneration if an unreasonable dismissal, plus alternative or additional damages based on real prejudice suffered). The parties can nevertheless agree on a suspension of the employment contract. In this scenario, the remuneration will still have to be paid. Furthermore, a suspension could be a sanction that follows the outcome of the investigation, but even then it will only be possible for a limited time (and a suspension without pay is usually only allowed by the courts for a maximum of three days). However, if the complaint is about sexual harassment, bullying or violence at work, the prevention advisor (see question 4) can recommend that the employer take certain actions, which in grave circumstances could lead to employee suspension. The suspended employee should continue to receive his pay if this occurs.

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## Switzerland

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

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

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## Vietnam

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Article 128 of the 2019 Labor Code explicitly states that an employer has the right to temporarily suspend an employee who is being investigated for committing an alleged act of misconduct in breach of the labour rules, if the following conditions are met:

- the misconduct committed is complex in nature, and any further work carried out by the employee may jeopardise the ongoing investigation. The law does not clearly define “complex nature”; it may be open to various interpretations by the employer. In practice and from our experience, allegations of sexual harassment may be considered complex misconduct and, therefore, can be a ground for suspension;
- the employer has consulted with (and effectively obtained the approval of) the grassroots-level representative organisation of the employee. No formal process is stipulated under the law for such consultation with this organisation. From our experience, the consultation can be in the form of a meeting between the management of the employer and the executive committee of the organisation. However, the organisation should require the employee to acknowledge their consent in writing by signing the meeting minutes;
- the period of suspension cannot exceed 15 days or 90 days in “special circumstances”. The law does not define what falls under “special circumstances”. In our view, this will be subject to the interpretation and discretion of the employer after consulting with the grassroots-level representative organisation of the employee; and
- the employee must be paid 50% of his or her wage that would be due during the period of the temporary suspension in advance. When the temporary suspension ends, if no disciplinary measure is imposed on the employee, the employer must pay the full wage for the period of the suspension by paying the remaining 50%.

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



## Belgium

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In general, there are no legal minimum qualifications, the employer can delegate the investigation task to anyone. Of course, it is strongly recommended to appoint someone who is not involved in the case and who

can lead the investigation objectively with the necessary authority to take investigative measures.

However, in the specific case of an official complaint due to sexual harassment, violence or bullying at work, the investigation will be conducted by the prevention advisor for psychosocial aspects. Next, if the investigation is based on an internal whistleblowing report, there will have to be an independent reporting manager responsible for receiving the report, giving feedback to the whistleblower and ensuring a decent follow-up to the report. Logically, the reporting manager will lead the investigation in this case, but he can be assisted by other persons or a team who are bound by a duty of confidentiality.

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## Switzerland

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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<sup>[1]</sup>, if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

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

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## Vietnam

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There are no statutory minimum qualifications or criteria for someone to conduct a workplace investigation. The employer can simply delegate the investigation task to anyone. However, it is good practice for qualified persons with proper training in workplace investigations to conduct the investigation as these involve intricate issues. It is also important that investigators are fair, unbiased, and impartial. In addition, they should not be related to any parties involved in the investigation.

In complex cases or cases involving a senior or high-ranking employee, the employer should appoint a person with a higher authority or rank in the company to lead and oversee the conduct of the investigation. This also applies in instances where it is foreseeable that the investigation may lead to disciplinary action, summary dismissal of the employee, or a report to an authority.

There are instances when engaging with external parties or professional advisors may be necessary. This is especially the case if the conduct under investigation is serious or widespread, which may lead to regulatory consequences if the employer does not have the expertise to handle the investigation.

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

## Belgium

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This is only possible if the employee claims that his or her rights (eg, the right to privacy) are violated by the investigation (but this will merely limit the investigation methods) or if he or she finds that the investigation constitutes an abuse of rights. In any case, it will be very hard for an employee to completely halt the investigation.

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## Switzerland

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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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## Vietnam

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The employee can only bring legal action to stop the investigation if he or she claims that his or her rights have been clearly and blatantly violated during the investigation. However, the employee bears a heavy legal burden of proof to substantiate his or her claims. Based on our experience, most of the time, it is very difficult for the employee to prove this and successfully stop the investigation.

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

### Belgium

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Employees cannot be forced by their employer to act as a witness. If they decide to nonetheless testify as a witness, they do not, in principle, have particular rights. If the employee puts himself in a difficult or even dangerous position to act as a witness, it is up to the employer to offer the necessary protection or take measures to prevent any harm (eg, by keeping the identity of the witness confidential or by planning the

hearing at a place or time when the employees involved are not aware of it).

However, this is not the case for whistleblowing reports, where a witness might be seen as a “facilitator” who can receive protection against any retaliation by the employer.

Also, workers who were direct witnesses to official allegations of sexual harassment, violence or bullying at work are protected against retaliation by the employer. This also applies to witnesses in court.

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## Switzerland

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

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<sup>[1]</sup> 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.

<sup>[2]</sup> 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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## Vietnam

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There are no provisions in Vietnamese law that impose any statutory or legal obligation on an employee to act as a witness in an investigation. Hence, an employer does not have the power to compel its employees to act as witnesses in an investigation. However, a request for an employee to provide evidence or give details of an event that he or she knows of may reasonably be deemed to be a lawful and reasonable directive from an employer. Consequently, an employee's refusal to act as a witness may be tantamount to an act of insubordination, which may lead to disciplinary action by the employer. In any circumstances, if an employee refuses to attend an interview or is generally not cooperating with an investigation, the reasons for this will need to be considered carefully by the employer.

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



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Here, the investigation “collides” with the right to privacy of the persons involved.

First, the rules and principles of the GDPR will apply if personal data is involved. Therefore, the employer will have to find a data-processing ground, which could be his or her legitimate interest or the fact that the investigation could lead to legal proceedings, etc. The data processing should also be limited to what is proportionate and the data subjects should be informed. Due to this obligation, it is arguable that the GDPR policy already provides the necessary information for the employees not to jeopardise the investigation. In any case, data subjects should not be able to use their right to access data to ascertain the preliminary findings of the investigation (which are confidential) or any confidential identities involved (eg, in the whistleblower procedure, the identity of the report should be protected at all times).

Also, the employer should follow the procedure of Collective Bargaining Agreement No. 81 on searching the e-mails or computer files and internet searches of employees. This CBA limits the purposes for searches and lays down a double-phase procedure that needs to be followed if private data is involved. Next to this, the employer should also take into account the case law of the European Court of Human Rights, which only allows e-mail and computer searches based on the following:

- whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and the implementation of such measures;
- the extent of the monitoring and the degree of intrusion into the employee’s privacy (including a distinction between the monitoring of the flow or the content of the communications);
- whether the employer has provided legitimate reasons to justify monitoring of the communications and accessing of their actual content; and
- whether it would have been possible to establish a monitoring system based on less intrusive measures, the consequences of the monitoring for the employee who is subject to it, and whether the employee had been provided with adequate safeguards.

Next, if the employer wants to use camera images, the rules of Collective Bargaining Agreement No. 68 should have been followed when installing cameras. If not, the images might have been collected illegally.

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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.<sup>[1]</sup>

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

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[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 besonderem Fokus auf Finanzinstitute, p. 148.

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## Vietnam

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Decree No. 13/2023/ND-CP on personal data protection is the main data protection regulation in Vietnam. It regulates the processing of personal data, including the collection or gathering of data. If the physical evidence contains personal data of an individual, the gathering of physical evidence must comply with this decree.

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



## Belgium

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The employer is, in principle, not entitled to search the employee's private possessions, except with the explicit consent of the employee. Digital files on the computer or laptop of an employee can be searched under the rules of CBA No. 81 (see question 7) and other privacy rules.

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## Switzerland

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

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

<sup>[2]</sup> 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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## Vietnam

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As part of an investigation, an employer may search the objects or files that are part of the company's property (eg, company or employers' laptops or phones for business purposes and emails or messages stored on the company's servers) without prior notice and without the need of the consent of the employee. However, the employer has no right to search an employee's personal possessions without consent.

To further avoid arguments or conflicts as to the right of ownership of a particular object or property, employers may specify in their internal policies, labour contracts, and handover documents what is to be regarded as the company's assets and subject to a search in a workplace investigation.

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



## Belgium

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If the investigation is based on a whistleblower report that falls under the scope of the upcoming rules, the investigators are bound by a strict duty of confidentiality, especially regarding the identity of the report. The rules also provide some procedural deadlines for feeding back to the reporter. Within seven days of receiving the report through an internal reporting channel, the reporting manager needs to send a receipt to the whistleblower. From that moment, the reporting manager has three months to investigate the report and give feedback and an adequate follow-up to the report. Next, the rules offer strong protection against any retaliatory measures the reporter may experience. Regardless, these rules are mostly intended to offer the necessary protection for whistleblowers and to ensure that companies take necessary investigative steps following a report, but they do not include much information about the actual procedure of the investigation besides certain deadlines, nor do they deal with other employees involved (or under investigation).

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## Switzerland

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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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## Vietnam

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It is up to the employer to determine whether or not to open an investigation after a complaint from a whistleblower. It is very important that the identity of the whistleblower is protected and that the employer also should not reveal the identity of the witness or the source of information, as the sources and witnesses may fear retaliation and feel uncomfortable or hesitant in giving information or raising concerns again.

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# 10. What confidentiality obligations apply during an investigation?

## Belgium

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A workplace investigation is often a sensitive matter that requires necessary confidentiality to find out the truth discreetly and objectively. Nevertheless, there is often pressure from employees, trade unions or even the media and general public to be transparent and communicate about the case. From a legal perspective, it is not recommended to communicate openly about an ongoing investigation, as this can jeopardise the investigation or the possibility of taking disciplinary measures.

Whistleblower investigations will be bound by a strict duty of confidentiality regarding anything that could reveal the identity of the reporter.

In complaints due to sexual harassment, violence or bullying at work, the prevention adviser is bound by professional secrecy. Consequently, he or she may not disclose to third parties any information about individuals that have come to his or her knowledge in the performance of his or her duties. However, he or she still has the freedom to inform the people concerned to carry out his or her tasks in the procedure.

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## Switzerland

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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.<sup>[1]</sup>

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.<sup>[2]</sup>

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.<sup>[3]</sup>

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

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

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

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## Vietnam

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Workplace investigations should be conducted in a strictly confidential manner to preserve the integrity and professionalism of the investigation and to protect the identity of the employee under investigation. This means that all information gathered, received, and shared during the investigation (ie, the subject employee and any material witnesses) should only be disclosed on a need-to-know basis.

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



## Belgium

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In general, the employee should be informed that there is an ongoing investigation (unless this could jeopardise the investigation, in which case disclosure could be postponed until this is no longer the situation). Next, before imposing measures or sanctions, the employee should be allowed to be heard or to give his or her version of the facts. Of course, the employee can only do this if he or she is aware of the facts being investigated. It is not necessary to give the employee a full insight into the investigation, only the necessary facts that allow him or her to offer a defence are sufficient.

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## Switzerland

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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.<sup>[1]</sup> The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.<sup>[2]</sup>

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.<sup>[3]</sup>

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)).<sup>[4]</sup> 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).

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

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

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

<sup>[4]</sup> Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.



## Vietnam

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There is no legal requirement as to what particular information should be stated in the allegations; however, such information must be provided to the employee under investigation. The information provided by the employer to the employee must be sufficiently clear and specific so that the latter understands the case or alleged issues against him or her and can respond to it.

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



## Belgium

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If the complainant made use of an internal whistleblowing procedure, confidentiality regarding the identity of a reporter is mandatory. Also, in other cases and for other involved persons (witnesses), it is recommended to keep their identity confidential to prevent the risk of intimidation or other negative consequences.

In complaints due to sexual harassment, violence or bullying at work, if the prevention adviser heard or took written statements from persons that were considered useful for the evaluation, these persons may remain anonymous.

The employee must, nevertheless, receive sufficient information to be able to offer a defence concerning the facts of which he or she is accused.

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## Switzerland

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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' 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.[\[1\]](#)

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[\[1\]](#) Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

The identity of the complainant and witnesses must be kept confidential and cannot be disclosed to anyone, unless both the complainant and witnesses consent to its disclosure or if the employer is asked to disclose this information by the competent authorities under Vietnamese law.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

In principle this is possible. However, these NDAs do have their limits and cannot prevent involved persons from, for example, bringing a legal claim or filing a report if they are legally entitled to do so. Under whistleblower rules, a reporter can even publish his or her complaint under certain circumstances.

Last updated on 15/09/2022



## 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.

Last updated on 15/09/2022

## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Generally, NDAs can be used to keep the facts and substance of a workplace investigation confidential. There are no express prohibitions against such NDAs. However, there are cases set out under Decree No. 13/2023/ND-CP on personal data protection where personal data is allowed or required to be disclosed without the data subject's consent, in instances that are necessary to serve the public interest or to protect the life and health of the data subject.

Last updated on 25/09/2023

## 14. When does privilege attach to investigation materials?

### Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

If the investigation is conducted by a prevention advisor, the investigation and the prevention advisor are bound and protected by a professional duty of confidentiality.

Last updated on 15/09/2022

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

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

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

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Generally, privilege does not apply to internal workplace investigation materials as the investigation does not constitute a relationship between a lawyer and his or her client, and even less so a judicial investigation. However, if a lawyer is appointed to represent a specific party in an investigation, for example, as an investigator, the privilege may apply to materials exchanged between the lawyer and that client.

Last updated on 25/09/2023

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

### Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

An employee can be assisted by a member of a trade union. They are also free to consult a lawyer.

Last updated on 15/09/2022

### 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.

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[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.

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Yes, the employee under investigation has a right to be accompanied or have legal representation during the investigation. Before the start of investigation proceedings, the employee under investigation must be informed about his or her right to have someone present with him or have a legal representative during the investigation.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

At the request of the involved employee, an employee can be assisted by a member of the trade union delegation, for example, during his or her hearing.

The works council should be informed of an investigation if there is a considerable impact on the company; this will only be the case if the investigation concerns a very serious, important or widespread issue. This information should be communicated as soon as possible and before measures are taken as a result of the investigation. This is only a right to information, not consultation. Moreover, members of the works council may be asked to respect their duty of confidentiality. However, as the enforcement of this duty of confidentiality is difficult, the timing of the information should be chosen wisely so it does not jeopardise the investigation.

Last updated on 15/09/2022



## 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.

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

In Vietnam, the “trade union” is the only organisation solely dedicated to protecting employees’ legitimate rights and interests. Under the 2012 Labor Code, the term referring to trade unions was changed to “grassroots-level representative organisation of employees”. But the essence of this organisation remained and was later defined as “the executive committee of a grassroots trade union or the executive committee of the immediate upper-level trade union in a non-unionised company”. As such, it could be said that it was old wine in a new bottle.

As required under article 70.1 of Decree No. 145/2020/ND-CP, which serves as a guide to the Labor Code on working conditions and labour relations, when suspecting that an employee has committed a violation of labour discipline, the employer has to make a record of the violation at the time and notify the grassroots-level representative organisation of employees of which the employee is a member, or the legal representative of the employee if they are under 15 years of age. If the employer detects a violation after it has occurred, it will collect evidence to prove it. In this instance, the employer has no obligation to inform or involve the trade union or grassroots-level representative organisation of employees during the workplace investigation stage.

Also, an employee who is a member of the trade union or organisation has the right to seek assistance from this organisation and may authorise the trade union’s representative to represent and get involved in the workplace investigation.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

There are no other mandatory support measures. However, an employer is free to offer additional support, for example, by granting leave from work. If tensions at the workplace are high, it may be a good idea to ask the employee under investigation to take some leave. Some companies also provide certain legal, moral or even psychological support. If the complaint concerns sexual harassment, bullying or violence at work, the prevention adviser can also recommend that the employer take additional measures to support certain employees.

Furthermore, under the whistleblower rules, an external reporting authority can grant any support measure (eg, legal advice or financial, technical, psychological or media-related, social support).

For complaints due to sexual harassment, violence or bullying at work, and if the facts are serious, the prevention adviser should, during the examination of the request and before giving his or her opinion to the employer, propose protective measures to the employer. These measures are necessary to avoid serious

damage to the complainant's health or a significant deterioration in the situation (for example, causing opposing parties to commit criminal offences). The final decision on taking these measures rests with the employer. This means that the employer does not necessarily have to take the measures proposed by the prevention adviser. They may take other measures that provide an equivalent level of protection for the employee.

Last updated on 15/09/2022

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

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

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

Last updated on 15/09/2022

## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

It is quite stressful for an employee, whether as the victim, the subject of an investigation, or a witness, to be involved in a workplace investigation. Thus, transparency in the investigation process would alleviate the employees' stress and anxiety. This could be achieved by providing involved and concerned employees with the timeline for different stages of the investigation and regular updates. Further, the employer can make necessary work arrangements to minimise potential interaction with other involved employees so that it would not further aggravate the conflict or situation, (eg, days off or temporary suspension of work).

Last updated on 25/09/2023

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

## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

If the investigation is not protected by confidentiality towards the employer (e.g. the prevention advisor cannot disclose confidential information to the employer), it could result in further measures taken by the employer or lead to a new investigation.

Last updated on 15/09/2022



## 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.

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

If unrelated matters are revealed during the investigation, the employer should consider whether an investigation is needed. If necessary, the employer should decide whether it is appropriate to incorporate the new matters into the scope of the existing investigation by expanding the terms of reference. However, such action may not be appropriate if different individuals are involved or the inclusion of a new unrelated matter would unduly complicate or delay the progress of the existing investigation. If that is the case, the employer should investigate that matter separately.

Also, as detailed in article 19 of the 2015 Criminal Code of Vietnam, there is a legal duty on any person who is aware that a certain violation is being committed or has been committed to report it to the police unless otherwise provided for under law. Failure to comply with this requirement may lead to criminal liability for the offender.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

This will depend on where the employee raises a grievance and the content of the grievance. If it is against

the employer, the investigation can take this into account and continue from there. If the grievance is raised against the authorities, it will depend on the steps taken by the authorities.

Last updated on 15/09/2022



## 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).

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

The employer should require the employee to raise any grievance under the company's existing policy on grievance reporting, disciplinary, and investigation processes, so that it can determine if the grievance is relevant to the current investigation. The grievance can be investigated together with the ongoing investigation. It can also be dealt with separately and independently from the existing investigation.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

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

hearing anyway (eg, through digital means). If the employee unreasonably refuses (several) of these invitations, it could be argued that the employee is wilfully boycotting the investigation and therefore forfeits his or her opportunity to be heard.

Last updated on 15/09/2022



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

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

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<sup>[1]</sup> 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



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Workplace investigations do not require the presence or active cooperation of the employee under investigation. Thus, the investigation may start or continue in the employee's absence due to illness.

If the employee's presence is necessary for the conclusion of the investigation, the employer may invite the employee to provide information either by submitting his or her answers to a written questionnaire or attending a virtual meeting. However, the employee may not accede to the employer's requests and proposals, especially if the employee has an illness. As a result, the employer may not be able to conclude the investigation due to the absence of the involved employee.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

In legal proceedings, a criminal procedure takes precedence over civil procedures. However, disciplinary internal proceedings (like a workplace investigation) and an investigation by the authorities may run parallel to each other. If the public investigation leads to a court procedure that results in the acquittal of the employee under investigation, it could lead to legal problems if the employer has already imposed sanctions based on the same employee. Therefore, the employer could make the internal investigation dependent on the public investigation, and could take preventive measures while awaiting the outcome.

The public authorities normally have the legal competence to request information that can help them in their investigation. Therefore, they could rightfully ask the employer to share evidence or findings from the internal investigation.

Last updated on 15/09/2022



## 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).

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

There are no issues with an internal workplace investigation being conducted in parallel to any criminal or regulatory investigation. In such a case, the employer should handle the workplace investigation meticulously, pay attention to all the facts and evidence, inform the authorities of the ongoing internal workplace investigation, and ensure that it complies with all applicable legal requirements or directions made by the relevant authorities concurrently. Also, the employer should not take any steps that interfere with, hinder, or obstruct the parallel investigations.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

It is highly recommended to inform the employee under investigation of the outcome. If disciplinary measures are imposed upon him or her, the legal procedure must be followed and the sanction must be



imposed or communicated the day after the employer or his delegate has established the wrongdoing of the employee.

Last updated on 15/09/2022



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

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

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

Last updated on 15/09/2022



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

It is recommended that the employer informs the employee under investigation of the outcome and provides information on a need-to-know basis. Consequently, the employer has the discretion to proceed with any labour disciplinary procedure or actions against the employee based on the outcome of the investigation.

Last updated on 25/09/2023

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



## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

It is recommended to limit the communication to the findings and details of the report that are necessary

for the employee to fully understand the outcome. This is especially true if the investigation is bound by a duty of confidentiality (eg, under the whistleblowing rules), as the employee should not be allowed access to the full report.

Last updated on 15/09/2022

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

Last updated on 15/09/2022

## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

There is no obligation to share the investigation report or the findings unless the employer and employee agree to do so.

However, under Decree No. 13/2023/ND-CP on personal data protection, the contents of the investigation report or findings related to the employee are likely to constitute the personal data of the employee under investigation. In that case, the employee may have a right under the said Decree to obtain copies of such documents by making a statutory data access request after the workplace investigation is completed. Where the employer is required to provide such documents to the employee under Decree No. 13/2023/ND-CP but the requested documents also contain the personal data of any other third parties (such as the employee's co-workers who participated in the interview during the investigation), the employer should first redact or erase such data before providing the requested documents, unless the relevant third parties have consented to the disclosure of their personal data.

Last updated on 25/09/2023

## 24. What next steps are available to the employer?

## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

If the investigation leads to the establishment of grave errors by the employee, this can lead to sanctions. The employer must follow the procedure laid down in the internal work rules of the company and can only impose sanctions that are included in the internal work rules. In general, these are: a verbal warning; a written warning; a suspension (remunerated or not); a fine (capped to one-fifth of daily remuneration); and dismissal. If there are very serious errors leading to an immediate inability to continue the employment relationship with the employee, the employer can dismiss the employee with urgent cause without any notice period or indemnity in lieu of notice (following the specific procedure for these types of dismissals). In less serious cases, the employer could still dismiss the employee with a notice period or indemnity in lieu of notice. In principle, the employer has a right to dismiss the employee, even if this sanction is not included in the internal work rules.

As said previously, disciplinary sanctions (included in the internal work rules) must be communicated to the sanctioned employee the day after the employer or his delegate has established fault. The sanction must be registered in a sanction register, with the name of the employee, the date, the reason and the nature of the sanction. If there is a fine, the amount of the fine should be mentioned. The proceeds of the fines must be used for the benefit of employees. Where a works council exists, the use of the proceeds of the fines must be determined after consultation with it.

Last updated on 15/09/2022

## 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.<sup>[1]</sup>

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

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

Last updated on 15/09/2022

## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

After the completion of the investigation, the employer may:

- take the appropriate labour disciplinary action against the employee;

- proceed with legal action against the employee (eg, reporting the criminal violations of the employee to the proper authority or filing a civil lawsuit against the employee before the court); or
- adopting preventive or remedial measures on how to avoid these violations and to mitigate the damage to the company (eg, reviewing internal policies and conducting employee training).

Last updated on 25/09/2023

## 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?



### Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

If the investigated acts constitute a crime, the authorities or the police should be informed. In certain cases, not doing so could lead to the company being accused of concealing a crime or becoming jointly responsible for it. However, if the company is the only victim of the crime and it is minor, the company may choose not to inform the authorities. For example, there is an enormous difference between a bank employee stealing large amounts of money from clients and an employee who is stealing toilet paper from the company. As stated above, the interview records could be at risk of disclosure if the authorities or police seize them for their investigation.

Last updated on 15/09/2022



### Switzerland

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.<sup>[1]</sup> If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.<sup>[2]</sup>

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

<sup>[2]</sup> 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.

Last updated on 15/09/2022

## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Generally, the employer does not have to actively disclose the findings of a workplace investigation to any party.

Notwithstanding this, the employer should be aware of certain statutory disclosure requirements that may apply as a result of the matters revealed during the workplace investigation, if the said investigation reveals any knowledge or suspicion of an indictable offence that has been committed.

Interview records should be kept private unless disclosure is required by the authorities.

Last updated on 25/09/2023

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

## Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

According to the GDPR, personal data should only be stored for a proportionate amount of time. Usually, this means that it can be stored as long as it is relevant for the employment contract, and even afterwards, if there is a risk of legal proceedings (ie, regarding the dismissal of the employee).

Last updated on 15/09/2022

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

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



## Vietnam

Author: *Stephen Le, Trang Le*  
at Le & Tran Law Corporation

Vietnamese law does not provide for a period during which the outcome of the investigation should remain on the employee's records and files. However, this will depend on the employer's record-retention policies, which must comply with applicable data protection laws.

Last updated on 25/09/2023

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



## Belgium

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In general, abusive investigations could lead to a legal claim regarding the abuse of rights. During an investigation, an employer should be guided by principles of due diligence and not take disproportionate action. If the investigation causes unnecessary damage, involved employees could file for compensation (eg, before the labour court). Next, the employer is also responsible for following the mandatory procedure for official complaints regarding sexual harassment, bullying and violence at work and investigations of whistleblower reports. In the first case, an employer who does not follow the procedure or obstructs the procedure can be liable for penal or administrative fines (maximum 8,000 euro) or, if the employer has not taken necessary measures to mitigate the risks for the employee and the employee suffers damage to their health, they may be liable for a fine of a maximum of 48,000 euro and imprisonment for between six months and three years. In the second case (whistleblower procedure), if an employer did not follow or has obstructed the procedure, they can be fined up to 5% of the annual revenue of the preceding year.

If the complaints involve allegations of sexual harassment, violence or bullying at work, the employer might risk an investigation of the inspection on supervision and well-being at work. If the prevention advisor finds out, before giving his advice, that the employer did not take any suitable protective measures after they were recommended, the prevention advisor is obliged to call an inspection on supervision and well-being at work.

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## Switzerland

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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]

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[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.

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The employer may be exposed to legal action for its failure to conduct the investigation properly, such as a lawsuit for labour disputes or sanctions for its failure to protect personal data as required under personal data protection regulations. For instance, if there were errors during the investigation which led to erroneous results for the investigation and consequently, the employee was dismissed, the employee may file a claim for illegal dismissal against the employer.

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