

Workplace Investigations

Contributing Editors

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

Finland

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Mainly, the Occupational Safety and Health Act (738/2002). In addition, the following also have relevance in connection to a workplace investigation: the Employment Contracts Act (55/2001), the Criminal Code (39/1889), the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006), the Act on Equality between Women and Men (609/1986) and the Non-discrimination Act (1325/2014). In addition, the employer's own policies must be taken into consideration while conducting a workplace investigation.

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Japan

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There is no specific legislation, guidance or policies covering investigations in the workplace. Issues such as the Personal Data Protection Law, invasion of privacy, and infringement of freedoms may arise regarding the related parties, subjects, methods, and results of investigations. In addition, court decisions have stated that "when there has been a violation of corporate order, an investigation of the facts may be conducted to clarify the nature of the violation, issue business instructions or orders necessary to restore the disturbed order or take disciplinary action against the violator as a sanction". The investigation or order must be reasonable and necessary for the smooth operation of the enterprise, and the method and manner of the investigation or order must not be excessive or restrain an employee's personality or freedom. In such a case, the investigation may be considered to be illegal and may constitute a tort.

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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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Thailand

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The Labour Protection Act B.E. 2541 (1998) (LPA) is the key legislation governing the relationship between employer and employee in Thailand. The LPA set out a minimum standard for the protection of employees' rights, as well as a mechanism for suspension from work for an investigation.

The LPA requires any employer having ten or more employees to prepare work rules in the Thai language and the work rules require an employer to prescribe a procedure for the submission of grievances that would normally include the process for investigations in the workplace. Therefore, the work rules are the main guidance and policy that govern a workplace investigation. In some cases, an employer may have a whistleblowing policy allowing whistle-blowers to submit complaints of illegal or improper activities to the employer. The whistleblowing policy will also prescribe the procedures for investigating in workplace reflecting the complaints submitted by whistle-blowers.

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02. How is a workplace investigation usually commenced?

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When the employer becomes aware of possible misconduct, the employer must commence an investigation immediately, in practice within about two weeks. The information may come to the employer's knowledge via, for example, the employer's own observations, from the complainant or their colleagues or an employee representative.

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Japan

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The trigger for an investigation in the workplace may be:

- when an employee makes a report (eg, a report of harassment, a report of misconduct by another employee, etc);
- when an investigation is conducted by the Labour Standards Inspection Office or another regulatory agency;
- when a criminal or illegal act is discovered in the workplace; or
- when an internal audit conducted by the company reveals a problem.

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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).^[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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Thailand

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Usually, a complainant submitting a grievance to the company would be a trigger for proceeding with a workplace investigation. The LPA does not specify when a workplace investigation should commence but it is subject to the employer's work rules and regulations, including the whistleblowing policy, as the investigation usually commences after an employee or a whistle-blower has filed a complaint to the employer. In some cases, there might be a whistleblower and the start of the workplace investigation would be subject to the whistleblowing policy and the employer's discretion. Also, if a questionable transaction or activity is detected, fiscal audits may be the source that triggers a voluntary 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)?

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There is no legislation on temporary suspension in the event of a workplace investigation or similar. In some situations, the employer may relieve the employee from their working obligation with pay for a short period.

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Japan

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Court precedent states that a valid requirement for a stay-at-home order is it “would not be considered to put employees at a legal disadvantage (deprive them of their rights and imposes obligations on them), except in exceptional cases where employees are legally entitled to request work, unless there are special circumstances such as discrimination in salary increases and the like.” (Tokyo High Court decision 25 January 2012, All Japan Mariners' Union). Therefore, it is considered possible to order the employee to stay at home during the investigation period if necessary. Some companies stipulate in their work rules that they may order employees to take special leave or stay at home when an incident occurs that could be the subject of disciplinary action.

In principle, the payment of salary in full during the stay-at-home period is required. However, work rules may stipulate that an employee will not be paid during the investigation period, and in cases where the employee is clearly responsible and it is inappropriate to allow the employee to work (eg, where it is almost certain that the employee has embezzled money on the job), the employee may be ordered to stay at home without pay. In addition, if the work rules stipulate that an absence allowance under the Labour Standards Law (60% or more of wages) must be paid for the stay-at-home period, such an allowance may be paid under the said rules.

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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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Thailand

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While an employee is being investigated by the employer, the LPA permits the employer to suspend that employee from work for the duration of the investigation, provided that the suspension can only be made when permitted by the work rules or an agreement related to the conditions of employment. Also, a suspension order must be made in writing and specify the offence and period of the suspension, which may not exceed seven days. Note that the employer must give a written suspension order in advance to the employee before the work suspension.

As aforementioned, the LPA only permits the employer to suspend the employee under investigation from work only for seven days. During the interim period of the suspension, the employer must pay the employee at the rate indicated in the work rules or the agreement reached between the employer and the employee, which must not be less than half of the employee's wages for a working day before his or her suspension. If the employer determines that the employee subject to investigation is not guilty following the outcome, the employer must compensate the employee for outstanding wages from the date of suspension with 15% interest per annum.

In some complicated cases, a workplace investigation does not conclude within seven days, and, in which case the employer should consult with a legal advisor.

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

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

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Japan

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There are no specific qualifications or requirements for an investigator. In many cases, the investigation is handled by a department or employee as deemed appropriate by the company. In some cases, an outside attorney may be asked to handle the investigation. Also, when it is a serious matter for the company, a third-party committee may be formed and commissioned to conduct an investigation.

However, under the revision of the Whistleblower Protection Act, which came into effect in June 2022,

entities employing 300 or more employees must designate a person (whistleblower response service employee) in charge of accepting internal whistleblowing reports, investigating internal whistleblowing reports, or taking corrective measures as a whistleblower response service provider. Entities with less than 300 employees must also make an effort to do the same.

The person designated as a whistleblower response service provider must not divulge the name, employee ID number, or other information that would enable whistleblower identification without a justifiable reason. Criminal penalties (fines of up to 300,000 yen) have been established for violations of this confidentiality obligation.

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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^[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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The employer should conduct a workplace investigation on its own; however, an outside firm experienced in interviewing witnesses and assessing the credibility of evidence may also be appointed to assist with the workplace investigation.

There is no minimum qualification or criteria provided under Thai laws. It is worth noting that anyone who has been accused of misconduct or potentially has a conflict of interest should be excluded from any role in the investigation. This is to avoid a challenge from the subject employee that the investigation was not conducted fairly.

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

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The employee does not have a legal right to stop the investigation. The employer must fulfil its obligation to investigate the alleged misconduct.

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Japan

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There are very few cases in which an employee subject to an investigation can file a legal proceeding to have the investigation stopped. Theoretically, an employee may be able to file a lawsuit or a provisional disposition to stop the investigation if he or she has a legal right to request that the company stop the investigation, but usually a lawsuit or a petition for a provisional disposition alone will not stop an investigation from proceeding. Although a provisional injunction would conclude in a relatively short period, such a provisional injunction would be unlikely to be issued if the investigation is conducted properly.

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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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Thailand

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There is no mechanism in place to take legal action to halt an investigation. The investigation is an internal process of the employer.

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

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There is no legislation on a witness's role in investigations. However, the legislation on occupational safety requires that employees must report any irregularities they observe. Depending on the situation, participating in the investigation may also be part of the person's work duties, role or position, in which case the employer may require the employee to contribute to clarifying the situation. However, there is no formal obligation to act as a witness, and there is no legislation regarding the protection of witnesses. If a witness wishes, they may have, for example, an employee representative as a support person during the hearing.

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Japan

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Interviewing co-workers is often conducted in internal investigations. Company employees are generally required to cooperate with company investigations, especially those who are in a position to instruct and supervise employees, or those who are responsible for maintaining corporate order, since cooperation with an investigation is itself the fulfilment of their duty to the company. Other employees are not compelled to cooperate with such an investigation unless it is deemed necessary and reasonable. No specific legal protection is provided for testifying in an investigation.

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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.^[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, 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, last visited on 17 June 2022.

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Normally, the work rules prescribe requirements for cooperation with investigations. An employer may instruct co-workers to give statements as witnesses as this would be a fair and legitimate order of the employer, because investigations are conducted to maintain a good working environment.

Witness protection measures in a workplace can vary as no minimum standard has been set and they are generally subject to work rules and regulations. However, some legislation, which may not relate to a workplace investigation conducted by an employer, also protects the witnesses who are helping authorities investigate violations under the relevant acts. For example, the Labor Relation Act B.E. 2518 (1975) prohibits an employer from terminating an employee or conducting any action that may result in the employee being unable to work because of filing a complaint or being a witness for the authorities, or providing information on issues related to labour protection laws to the authorities.

The employer may have a policy of non-retaliation for the protection of witnesses who have given statements and evidence for a workplace investigation.

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

Finland

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Generally, the basic principles set out by the GDPR and the Finnish Data Protection Act apply to data processing in connection with investigations, including evidence gathering: there must be a legal basis for processing, personal data may only be processed and stored when and for as long as necessary considering the purposes of processing, etc.

Additionally, if physical evidence concerns the electronic communications (such as emails and online chats) of an employee, gathering evidence is subject to certain restrictions based on Finnish ePrivacy and employee privacy laws. As a general rule, an employee's electronic communications accounts, including those provided by the employer for work purposes, may not be accessed and electronic communications may not be searched or reviewed by the employer. In practice, the employer may access such electronic correspondence only in limited situations stipulated in the Act on Protection of Privacy in Working Life (759/2004), or by obtaining case-specific consent from the employee, which is typically not possible in internal investigations, particularly concerning the employee suspected of wrongdoing.

However, monitoring data flow strictly between the employee and the employer's information systems (eg, the employee saving data to USB sticks, using printers) is allowed under Finnish legislation, provided that employee emails, chats, etc, are not accessed and monitored. If documentation is unrelated to electronic communications, it also may be reviewed by the employer. Laptops, paper archives and other similar company documentation considered "physical evidence" may be investigated while gathering evidence on the condition that any private documentation, communications, pictures or other content of an employee are not accessed.

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Japan

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When collecting physical evidence that contains personal information, the Personal Information Protection Law and its related guidelines apply. In addition, when collecting physical evidence that contains privacy information or an employee's photograph, care must be taken to ensure that the right to privacy and the image rights are not violated.

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Switzerland

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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.[\[1\]](#)

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 besonderem Fokus auf Finanzinstitute, p. 148.

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Thailand

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The basic premise is that all evidence is admissible unless it violates the law of admissibility and production of evidence, which may vary depending on the jurisdiction. In a criminal court, for example, evidence gathered in violation of the fruit of the poisonous tree doctrine would be typically inadmissible, yet in a civil court, this doctrine would not be an exclusionary rule.

The Personal Data Protection Act, BE 2562 (2019) (PDPA), which is the main data protection law in

Thailand, applies when collecting, using, and disclosing pieces of evidence containing the personal data of employees. If the investigation requires sensitive information of the employee under investigation, for example, race, ethnic origin, political opinion, religious or philosophical beliefs, sexual behavior, criminal records, health data, disability, genetic data and biometric data, consent from the employee should be obtained.

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

Finland

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

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Japan

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Since inspections of personal belongings may potentially undermine employees' fundamental human rights, they would not become lawful simply because they are conducted under employment regulations.

Inspections of personal belongings must be conducted uniformly among employees in the workplace based on reasonable grounds, in a generally reasonable manner and to a generally reasonable degree, and based on the work rules, etc.

When inspections of personal belongings are conducted under employment regulations, etc, employees must agree to the inspection except in special circumstances, such as the method or degree of the inspection being unreasonable.

On the other hand, an investigation of information stored on a company network system may constitute an infringement of the right to privacy. If there is a provision in the employment regulations regarding the use of the internet and monitoring, it is possible to investigate under such a provision. A Japanese court case on the illegality of reading e-mails in the absence of a monitoring provision stated that private use of e-mails also carries a certain right to privacy, but also stated that "considering the fact that the system is maintained and managed by the company, the protection of the employee's privacy can only be expected within a reasonable range according to the specific circumstances of the system," and that the act of reading e-mails was not illegal because the extent of private use of e-mails was beyond the limit, which was outside the reasonable range of socially accepted ideas. The court also ruled that the monitoring of the employee's abusive private use of e-mail, which was discovered in the course of an investigation of slanderous e-mails within the company, was not illegal because even if the monitoring was conducted without notice, there was suspicion of a violation of the duty of devotion to duty and corporate order. The court also stated that the investigation was necessary and that the scope of the investigation did not exceed its limit.

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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.^[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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Electronic information created during employment would generally be owned by the employer and would be the employer's assets. If an employee is given a computer or laptop to use for work, the employer has the right to log into that device and take any data that is stored therein, provided that the data does not contain sensitive information of that employee and PDPA requirements are met.

To avoid any potential issues regarding physical data such as documents on the employee's desk, it is advisable to search those areas with the subject employee to show good faith. In practice, the employee normally agrees to search those areas with the employer, or allows the employer to search alone.

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

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In respect of data protection, the processing of personal data in whistleblowing systems is considered by the Finnish Data Protection Ombudsman (DPO) as requiring a data protection impact assessment (DPIA).

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Japan

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See question 4 regarding amendments to the Whistleblower Protection Act.

The person designated as a whistleblower response service employee must not divulge the name, employee ID number, or other information that would allow a whistleblower to be identified without a justifiable reason, and there is a criminal penalty of up to 300,000 yen for violating this duty of confidentiality.

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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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It is down to the employer's discretion and subject to the whistleblowing policy (if any) to commence the investigation resulting from a complaint from a whistleblower. Whistleblowers and those who cooperate with an investigation should be protected. Normally the employer would not try to identify the whistleblowers. Also, it is best not to reveal the identity of the witness or the source of information; otherwise, they may feel uncomfortable giving information or raising their concerns next time. Any allegations of retaliation that surface during the investigation should be treated as a new report of possible misconduct that could be subject to additional investigation.

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10. What confidentiality obligations apply during an investigation?

Finland

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Concerning a workplace investigation, there is no specific legislation in force at the moment regarding

confidentiality obligations. All normal legal confidentiality obligations (eg, obligations outlined in the Trade Secrets Act (595/2018)), and if using an external investigator, the confidentiality obligations outlined in the agreement between the employer and the external investigator, apply. Attorneys-at-law always have strict confidentiality obligations as per the Advocates Act (496/1958).

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See question 9 for the confidentiality obligations of a whistleblower response service employee.

Other than the above, there is no specific legal obligation to maintain confidentiality for persons in charge of investigations, etc. However, if the information falls under the category of confidential information obtained by employees in the course of their work, compliance is required as an obligation attached to a labour contract, and many employment regulations stipulate a duty to keep information obtained in the course of work confidential.

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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.^[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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Unless the investigation is handled by a qualified professional (eg, attorney or auditor) where certain privileges apply, confidentiality obligations are generally subject to the contractual arrangement between the parties involved in the investigation. The employers need to inform any persons, including the investigators, to respect confidentiality obligations because a leak of the information gathered from the investigations could cause damage to relevant parties.

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

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The process must be transparent and impartial, and therefore all the information that may influence the conclusions made during the investigation should be shared with the employee.

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There are no specific legal stipulations or requirements regarding information, etc, that must be provided to employees who are the subject of an investigation.

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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.[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.

Last updated on 15/09/2022

Thailand

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The subject employee(s) should be informed of the details of the allegations, such as the details of wrongdoing or violations, made against them. This creates a fair opportunity for them to clarify themselves and defend against such allegations properly. Also, if there is any evidence that needs clarification from the employee, it should be shown to the employee.

Last updated on 15/09/2022

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

Finland

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See question 11, there is no protection of anonymity as the process must be transparent to the parties involved.

Last updated on 15/09/2022

Japan

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For whistleblowing investigations, whistleblower protection is required (see question 9).

Witnesses and other sources of information are not protected by the Whistleblower Protection Act.

In addition, as a response to a report of harassment, the Ministry of Health, Labour and Welfare guidelines require that necessary measures be taken to protect the privacy of the reporter, the offender, and others, and that these measures be announced to the company.

Last updated on 15/09/2022

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]

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

Last updated on 15/09/2022

Thailand

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It is generally possible to keep the identity of the complainant, witnesses, or information sources confidential. There is no mandatory rule to disclose the identity of a complainant, witnesses, or sources of information. If the complainant, witnesses, or sources of information for the investigation know that their identities would not be disclosed, they will be more confident in cooperating with and supporting the investigations.

Last updated on 15/09/2022

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

Finland

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Yes, however, the need for an NDA is assessed always on a case-by-case basis.

Last updated on 15/09/2022

Japan

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It is possible to use NDAs in investigations.

Last updated on 15/09/2022

Switzerland

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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

Thailand

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Non-disclosure agreements can be made between an employer and employees who are involved in an investigation. This may include investigators and witnesses, apart from the employee under investigation. This minimises the risk of information being leaked, which can affect all parties related to the workplace investigation. However, an NDA is not absolute means to prevent the disclosure of confidential information, as the court has the authority to compel disclosure.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?

Finland

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The privilege of investigation materials concerns a rather limited amount of cases. In practice, materials may be considered privileged in connection with the litigation process under the Procedural Code (4/1734). For example, communications between a client and an attorney may attract protection against forcible public disclosure.

Last updated on 15/09/2022

Japan

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There are no specific laws or rules for the provision of confidentiality privileges other than that provided by the Fair Trade Commission Rules, which allow companies that are the subject of investigations into cartels, bid rigging, etc, to treat communications with their lawyers as confidential. However, when a motion for an order to produce documents is filed in a court proceeding, if the requested documents are "documents exclusively for the use of the possessor of the documents", the obligation to produce the documents is not recognised. If the investigation materials fall under this category, it is possible to exclude them from the scope of the court order to produce documents.

Last updated on 15/09/2022

Switzerland

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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.

Last updated on 15/09/2022



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Client-attorney privilege between qualified attorneys and the client (ie, an employer) begins once information is made available to the attorney, regardless of the form it takes.

Last updated on 15/09/2022

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



Finland

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The employee under investigation has a right to have a support person present (eg, a lawyer or an employee representative) during the hearings and a right to assistance in preparing written statements.

Last updated on 15/09/2022



Japan

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There is no legal right to have a legal representative present or appointed during the investigation.

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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.^[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.

Last updated on 15/09/2022

Thailand

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Unless the work regulations provide otherwise, an employee has the right to request legal representation during an investigation. If legal representation is requested, it is an opportunity for the employer to confirm and verify that an investigation is being conducted fairly, as the employee under investigation can bring his or her lawyer to attend the investigation.

Last updated on 15/09/2022

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

Finland

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A works council or a trade union does not have a role in the investigation.

Last updated on 15/09/2022

Japan

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A labour union has no legal right to be involved in the investigation. However, if there is a provision in the collective bargaining agreement between the company and the labour union that allows the labour union to be involved in an investigation conducted by the company or to receive disclosure of the results of an investigation, then such a provision should be followed.

Last updated on 15/09/2022

Switzerland

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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

Thailand

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Thai labor laws do not require a workplace investigation to involve participation from trade unions or labour unions. However, it is possible for labour unions established under the Labor Relation Act BE. 2518 (1975) to submit a demand for a collective bargaining agreement (CBA) with employers to get a seat at the table. There was a case where a management union made a CBA with the employer wherein the president of the management union would be involved in any investigation of any manager, who is a union member, under investigation. In that case, the employer must comply with the CBA by informing the president and allowing the president to participate in the investigations.

Last updated on 15/09/2022

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

Finland

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They can request assistance, for example, from an occupational health and safety representative, a shop steward or the occupational healthcare provider.

Last updated on 15/09/2022

Japan

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There is no legally established assistance programme.

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Switzerland

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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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Thailand

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The employees may then file a complaint with the labour inspection officer of the Labour Protection and Welfare Department to investigate the situation if they view that the conduct of the employer in the investigation violates the LPA. For example, if the employer issues a written order for suspending an

employee for more than seven days. The labour inspection officer may issue an order requesting compliance, where failure to comply with such an order would result in a criminal penalty.

Last updated on 15/09/2022

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

Finland

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If they are related to the work or workplace, the employer will handle the emerging matters separately. In internal investigations, the employer is allowed to use any material legally available.

Last updated on 15/09/2022

Japan

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Even if a matter arises that is not subject to the investigation, it can be used as an opportunity to conduct another investigation.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

Thailand

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Subject to the grievance protocol in place, any matter that emerges during the investigation should be handled separately as a fresh report of potential misconduct that needs further investigation.

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

Finland

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If the nature of the grievance relates to the employer's obligations to handle such matters in general, the grievance will be investigated either separately or as a part of the ongoing investigation.

Last updated on 15/09/2022

Japan

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Whether or not an investigation should be suspended when an employee under investigation files a complaint depends on the specific circumstances. There is no legal requirement to suspend the investigation.

Last updated on 15/09/2022

Switzerland

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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).

Last updated on 15/09/2022

Thailand

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The investigator should guide the employee who has raised the grievance to properly raise their concerns through the grievance protocols or whistleblowing policy (if any). It is acceptable to preliminarily hear their concerns, but the investigation should be initiated separately and subject to the employer's discretion.

Last updated on 15/09/2022

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

Finland

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As a general rule, sick leave does not prevent an investigation from progressing. Depending on the nature of the sickness, the employee can attend hearings and take part in the procedure. If the sickness prevents the employee from participating, the employer can put the process on hold temporarily.

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Japan

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The company will seek a physician's diagnosis and opinion and determine whether to proceed with the investigation. If an employee's mental health suffers because of the investigation, the company may be charged with a violation of its duty of care.

Last updated on 15/09/2022

Switzerland

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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

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If the absence is anticipated to be brief, the employer may wait until the employee's return before concluding the investigation. If the employee's absence is expected to be prolonged, the investigator may alter the time of meetings or request that the employee submits a witness statement. The key point would be that all necessary measures should be taken to give the employee a chance to participate.

Last updated on 15/09/2022

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

Finland

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Regardless of a possible criminal investigation, the employer must run its internal workplace investigation without unnecessary delay. A workplace investigation and a criminal investigation are two separate processes and can be ongoing simultaneously, so the criminal process does not require the workplace investigation to be stayed. Thus, parallel investigations are to be considered as two separate matters. The police may only obtain evidence or material from the company or employer if strict requirements for equipment searches are met after a request for investigation has been submitted to the police.

Last updated on 15/09/2022

Japan

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It is possible to proceed with an investigation of a company even if there are concurrent criminal proceedings. It is up to the company to decide whether or not to proceed. The company may submit collected evidence collected to the police. The police will rarely disclose or provide the company with evidence they have collected. Usually, upon request by the police or regulator, the workplace investigation would be stayed. The police or regulator has to take legally required steps if compelling the employer to share evidence.

Last updated on 15/09/2022

Switzerland

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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



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Employers are not required to wait until the police or regulatory investigations are finished before conducting their disciplinary investigations, but it is necessary to ensure that such internal proceedings do not compromise the integrity of an investigation or result in misrepresentation or a miscarriage of justice. The level of proof for internal disciplinary action is less than the level of proof for criminal proceedings.

Last updated on 15/09/2022

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



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The employer's conclusions from the investigation.

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Japan

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Although there is no legal obligation to report the results of the investigation to the employee, when taking disciplinary action it is generally necessary, from a due process point of view, to explain the facts of the disciplinary action and the results of the investigation, and to allow the employee to explain him or herself. Particularly in the case of serious disciplinary actions such as dismissal, failure to provide an adequate opportunity for an explanation is a possible ground for denying the validity of the disciplinary action.

Last updated on 15/09/2022



Switzerland

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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.

Last updated on 15/09/2022



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There is no mandatory information on the outcome of an investigation that must be disclosed to an employee. However, disclosure of the outcome should, at a minimum, include whether an employee did or did not commit a violation. In addition, an employee who has committed a violation should be informed of any disciplinary action, and the grounds for such a decision (such as a violation of the company's work rules). This enables the employee under investigation to appeal the outcome if it is applicable under the work rules or whistleblowing policy.

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



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The employee under investigation may only be informed of the conclusions.

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Japan

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There is no legal obligation to share reports of findings. Therefore, the company may share only the summary or the entire report at its discretion.

Last updated on 15/09/2022

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

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It depends on with whom the investigation report should be shared. If there is a court case or criminal case to be further investigated by police, the investigation report should be shared in full as this would be used as documentary evidence to make a case stronger. On the contrary, if the investigation report is requested by the employee under investigation, employers are entitled to use their discretion as to what information to share.

Last updated on 15/09/2022

24. What next steps are available to the employer?

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The employer decides whether misconduct has taken place or not. Depending on the case, the employer may recommend a workplace conciliation in which the parties try to find a solution that can be accepted by both sides. The employer may choose to give an oral reprimand or a written warning. If the legal conditions are met, the employer may also terminate the employment agreement.

Last updated on 15/09/2022

Japan

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In an investigation into an employee's misconduct, based on the results of the investigation, disciplinary action will be considered if there are grounds for disciplinary action, and dismissal will also be considered. Personnel actions (eg, dismissal, reassignment) may also be taken.

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Switzerland

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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.

Last updated on 15/09/2022

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Upon completion of the investigation, the employer can decide to take proper disciplinary action against the employee if it is found that the employee committed an offence or violated the work rules. An employer may also file a report with the police if the findings of the investigation amount to a criminal offence.

Last updated on 15/09/2022

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?

Finland

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In general, investigation materials, including findings, that includes personal data should only be processed by the personnel of the organisation who are responsible for internal investigations. However, it may in some situations be required by applicable legislation that findings are disclosed to competent authorities for the performance of their duties, such as conducting investigations in connection with malpractice and violations of the law.

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Japan

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If it is information related to a crime, and if it is necessary to report it to the supervisory authority, it is necessary and possible to report it even if the content relates to personal information. There is no obligation to report to the police even if one is aware of a criminal fact. However, it is possible to use the results of an investigation to file a complaint or charge with the police. It is also possible to use the results of the investigation to realise the company's rights (eg, to claim damages based on tortious behaviour).

Last updated on 15/09/2022

Switzerland

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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

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The investigation findings should be disclosed to a limited group of persons who are involved in the investigation, and for which the findings are useful. For example, an HR manager who needs to record the findings in the employee's record, the police if the employer decides to proceed further with a criminal claim, the court if requested by that court, or if there is a court case related to the violations of the employee.

Interview records should be kept confidential and private. There is a risk of disclosure because the information in the records may be beneficial to one but damaging to others. If the interview records are leaked to others who are not involved in the investigation, it may affect the work environment in the workplace and the protection of witnesses.

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

Finland

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Please see question 7. The outcome of the investigation involving personal data may be retained only for as long as is necessary considering the purposes of the processing. In general, the retention of investigation-related data may be necessary while the investigation is still ongoing and even then the requirements of data minimization and accuracy should be considered. The data concerning the outcome of an investigation should be registered to the employee's record merely to the extent necessary in light of the employment relationship or potential disciplinary measures. In this respect, the applicable retention time depends on labour law-related rights and limitations, considering eg, the applicable periods for filing a suit.

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Japan

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Records related to responses to whistleblowing must be kept for an appropriate period, but there is no legal stipulation on the retention period. Each entity is required to set an appropriate period after considering the need for evaluation and inspection, and the handling of individual cases. There is no legally stipulated retention period for other investigation results.

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Switzerland

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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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Thailand

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There is no period required by law for keeping the outcome of the investigation on the employee's record. However, if termination of employment is the outcome of the investigation, an employer should keep details of the investigation for at least 10 years, in line with the prescribed period for an employee to file an unfair dismissal claim against an employer. An employer may use the details of an investigation to defend such a claim. For other disciplinary action, the retention of investigation details on the employee's record is at the employer's discretion.

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

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There are no regulations regarding the actual investigation process. Therefore, the employer cannot be accused of procedural errors as such. However, once the matter has been adequately investigated, the employer must decide whether or not misconduct has taken place. If the employer considers that misconduct has taken place, the employer must take adequate measures for remedying the situation. Failure to adequately conduct the investigation could result in criminal sanctions being imposed

on the employer as an organisation or the employer's representative, or damages.

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Japan

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If the company deviates from appropriate social rules in its investigative methods and means, it will be liable for tortious behaviour. If disciplinary action or dismissal is taken based on erroneous investigation results, the validity of such action or dismissal will be denied, the employee will be able to claim for back wages, and, in some cases, claim for compensation.

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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]

[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 Thai Supreme Court has ruled that the termination of an employee was unfair due to an investigation being conducted contrary to requirements in the company's work rules. As such, employers may be liable for damages to employees if there are errors made during investigations, or where investigations are not conducted properly.

The Supreme Court has also ruled that in cases of unfair termination, the underlying cause of the termination should be the determining factor, rather than other issues, including investigative procedures.

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