

Workplace Investigations

Contributing Editors

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

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

India

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Yes, an employee can be suspended or placed on administrative leave during an investigation if the circumstances warrant it. It is recommended to include the right to suspend in employee-facing policies. The employee should be informed about the suspension in writing, by issuing a suspension letter. In practice, a suspension is used when the charges against the employee are serious or if the employee's presence at the workplace is likely to prejudice the investigation in any manner (eg, where there are concerns that evidence may be tampered with or witnesses pressurised). The requirement to suspend the employee should be assessed on a case-by-case basis and should not be exercised in every instance. If an employee is suspended, the investigation and inquiry should be completed as quickly as possible.

Further, concerning payment during the period of suspension, the law varies depending on the state and the category of employee. Generally, Indian law requires that individuals who are "workmen" be paid a subsistence allowance during the period of suspension, usually at the rate of 50% of their regular wages during the first 90 days of the suspension, and at varying rates thereafter. The exact rates at which subsistence allowance is paid will vary from state to state. In our experience, many companies choose to suspend employees with full salary even if there is an applicable subsistence allowance statute. This helps take some pressure off of the timeline within which the investigation and subsequent disciplinary inquiry can be completed.

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Switzerland

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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.

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



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Often the tests or standards applied by external agencies (such as the police or regulators) in their investigations vary significantly in comparison to those that apply for internal investigations that are focused on potential disciplinary action against an accused employee. For example, the standard of proof required for taking an internal disciplinary measure is one of a preponderance of probability and does not require the employer to establish guilt beyond a reasonable doubt, which is the standard applied in criminal proceedings. Depending on the circumstances, conducting or continuing an internal investigation can also place the organisation in a better position to collaborate with external agencies such as the police or a regulator in their investigations, and be better prepared to share information that such agencies may request. It may also help demonstrate that the organisation does not tolerate potential violations of law or its policies and that it proactively investigates and addresses such issues. This may also help in protecting innocent members of management from liability from external agencies. To that extent, a parallel criminal or regulatory investigation may not normally be a reason for the organisation to suspend its internal investigation.

In the context of sexual harassment claims, the complainant has the right to file a police complaint against the alleged harasser (and the organisation must support her in doing so). However, a parallel police investigation would not take away the organisation's responsibility to address the grievances through its IC, which would be expected to complete its proceedings within 90 days.

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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).

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