International Employment Lawyer

Workplace Investigations

Contributing Editors

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

India

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There is no codified law in India on conducting workplace investigations, so they largely depend on the internal policies of the employer. Certain requirements and best practice measures have evolved through judicial precedent, and these are codified through internal policies.

For claims involving sexual harassment, however, investigations can only be undertaken by the Internal Committee (IC), which an employer needs to constitute under the Prevention of Sexual Harassment of Women and Workplace (Prevention, Prohibition and Redressal) Act 2013 (SH Act).

The general principle laid down by the courts is that any action against an employee for misconduct should be taken after conducting a disciplinary inquiry as per the principles of natural justice (PNJ). Whether or not a disciplinary inquiry can be done away with in any circumstances is a very fact-specific assessment and depends on various factors, including but not limited to the seniority and location of employment of the employee, and the nature and circumstances of the alleged misconduct.

The PNJ broadly require:

- that the accused employee should be issued with a written charge sheet or notice setting out the allegations against him or her along with a reasonable opportunity to respond;
- appointment of an independent inquiry officer to assess whether the allegations are proven or not; and
- that action must be taken based on the outcome of the inquiry, any punishment ordered should be proportionate to the gravity of the misconduct, and also take into account the service history (eg, prior warnings) of the individual.

The charge sheet or notice issued to the employee has to set out the evidence used by the employer to support the allegations in sufficient detail. Therefore, gathering necessary information and evidence is usually a critical precursor for any disciplinary process that an employer may eventually initiate against an employee.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

02. How is a workplace investigation usually commenced?

India

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As a precursor to the actual disciplinary process, investigations are usually initiated when the employer becomes aware of an allegation or complaint of misconduct, or observes any acts or omissions by an employee constituting workplace misconduct. The employer (or investigating committee – which could also be an outside agency like an auditor or law firm appointed by the employer) would generally commence the investigation by speaking with the complainant (or whistleblower) to gather as many details as possible (relevant facts, evidence, list of witnesses, etc) concerning the allegations, so that the next steps and approach can be determined upfront.

Last updated on 15/09/2022

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 exists, 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]

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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.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

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

Last updated on 15/09/2022

04. Who should conduct a workplace investigation,

are there minimum qualifications or criteria that need to be met?

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Complaints pertaining to sexual harassment can only be investigated by the IC constituted under the SH Act.

For other kinds of misconduct, employers usually constitute a fact-finding investigation team with members who are independent and unbiased. The fact-finding team can be appointed internally, or the employer could also engage an external agency, depending upon the gravity and sensitivity of the matter, the nature of the issues being investigated or a desire to try and maintain legal privilege regarding the findings of the investigation.

Last updated on 15/09/2022

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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.

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

Last updated on 15/09/2022

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

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An employee has very limited ability to bring legal action to stop the investigation, as no disciplinary measure is taken against an individual during the investigation stage. The risk of claims or disputes generally arises after the employer has taken disciplinary measures against the individual.

An employee could, however, bring claims in some circumstances – for example, if the individual has been suspended without pay, or if the individual's assets have been seized as part of the investigation without

following due process. Therefore, it is critical that robust internal guidelines are framed that lay out the framework to follow in investigations to mitigate the risk of legal claims or disputes.

Last updated on 15/09/2022

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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.

Last updated on 15/09/2022

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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Yes, in matters pertaining to sexual harassment, the SH Act expressly stipulates that the IC holds the powers of a civil court to summon any person to be examined as a witness. In misconduct cases, the investigating authority can ask employees to appear and testify before it as witnesses and internal policies should have provisions for this. As a result, employees are duty-bound to fairly and honestly participate in any investigative or disciplinary proceedings relating to the workplace, including offering truthful evidence and testimony on matters they may have observed or experienced as an employee of the organisation. While employees don't have any express statutory protections when acting as witnesses, any such policy should be balanced and include necessary safeguards, such as assuring employees that any retaliation against them will not be tolerated and that the details of their participation will only be shared on a need-to-know basis.

Last updated on 15/09/2022

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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]

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[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.

Last updated on 15/09/2022

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

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In India, the collection, disclosure, transfer and storage of personal data is regulated by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPD Rules). Accordingly, if during an investigation any sensitive personal information (such as information relating to passwords; financial information such as a bank account, credit or debit card or other payment instrument details; a physical, physiological or mental health condition; sexual orientation; medical history; and biometric information) is collected, then the requirements under the SPD Rules will need to be complied with. This would include obtaining an individual's "informed consent" before collecting any sensitive personal data if such information is intended to be collected or stored in an electronic format.

Last updated on 15/09/2022

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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.

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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.

Last updated on 15/09/2022

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

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Yes, an employer can search its employees' official possessions and files as part of an investigation. It may be difficult, however, to seize personal assets or possessions of an employee (such as the individual's mobile phone or personal laptop).

Employers should expressly create policies that address key issues associated with employee surveillance, forensic searches and investigations, such as:

- whether or not the official assets and infrastructure of the company can be used for personal purposes by employees;
- the organisation's right to monitor, surveil or search any authorised or unauthorised use of its corporate assets; and
- that the employee should not have any expectation of privacy when using the companies' resources, etc.

Any forensic review of digital data must be carried out with due regard to Indian rules of evidence to avoid situations where such evidence becomes unreliable in a future legal claim or dispute.

Last updated on 15/09/2022

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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.

Last updated on 15/09/2022

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

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Indian labour legislation does not stipulate any additional considerations or requirements concerning whistleblower complaints in private organisations and these are only available if there are complaints against public servants. Further, under the Companies Act, 2013, certain companies are required to establish a “vigil mechanism” for directors and employees to report genuine concerns regarding the affairs of the company. The vigil mechanism should provide adequate safeguards against the victimisation of persons using it.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?

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Indian labour statutes do not contain any specific confidentiality obligations concerning investigations.

However, in practice, the records of investigative or disciplinary proceedings should be kept confidential and shared only on a need-to-know basis to ensure that the parties do not suffer prejudice. The internal policies should also include provisions on confidentiality.

The SH Act, however, provides that certain information must not be published or made known to the public, press and media such as:

- the contents of the SH complaint;
- the identity and addresses of the complainant, accused and witnesses;
- any information on the conciliation and inquiry process;
- the recommendations of the IC; and
- action to be taken by the employer.

The SH Act permits the dissemination of information regarding remedies extended to any victim without disclosing the name, address or identity of the victim or witnesses. The SH Act also outlines punishments for violating confidentiality obligations.

Last updated on 15/09/2022

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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]

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[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.

Last updated on 15/09/2022

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

them?

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As mentioned earlier, workplace investigations are normally a precursor to the actual disciplinary process against an employee. If the individual is being suspended during the investigation, the employer is only expected to inform the individual that they are being suspended on account of an ongoing investigation along with the broad nature of allegations or concerns, and does not need to disclose specific details about the allegations until the appropriate time. Further details may be provided at the investigation stage itself when the employee may be interviewed, or at the subsequent disciplinary inquiry.

Where a disciplinary process is necessary and initiated (after the investigation), the employee will have to be given a charge sheet or notice setting out the allegations against the individual in detail and be provided with an opportunity to submit an explanation.

In sexual harassment investigations, the SH Act mandatorily requires the IC to submit a copy of the complaint to the accused. Further, the accused should be informed of the requirement to file his or her reply to the complaint along with a list of supporting documents, evidence, names and addresses of witnesses, etc, and the timelines for submitting his response in defence.

Last updated on 15/09/2022

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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).

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[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

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

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The response and approach to this would be very fact-specific.

Under the SH Act, an individual cannot file an anonymous complaint and, therefore, the name of the complainant cannot be kept confidential. The same would go for details of witnesses, if any.

For other types of misconduct, the name of the complainant could potentially be kept confidential, depending on the nature of the allegations. For example, if an individual observes another colleague or employee committing inappropriate conduct (such as fraud or bribery) and reports this, the name of the complainant may not necessarily have to be disclosed to the accused employee, especially where the company is independently able to gather evidence substantiating the allegations. The names of witnesses generally cannot be kept confidential, since doing so may prove prejudicial to the accused employee. Further, as part of the disciplinary inquiry process, the accused has the right to cross-examine witnesses.

Notwithstanding the above, the approach to this issue should be assessed on a case-by-case basis by looking at the underlying sensitivities and risks involved. Courts have, in limited circumstances, permitted non-disclosure of the names of witnesses or complainants.

Last updated on 15/09/2022

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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

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

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Yes. While it is common for employees to be bound by general confidentiality obligations at the beginning of employment, it is advisable to reiterate such confidentiality obligations through NDAs during an investigation.

Last updated on 15/09/2022

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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

14. When does privilege attach to investigation

14. When does privilege attach to investigation materials?

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Professional advice given by an "advocate" to a client is protected as “privileged communication” and is not admissible as evidence in a court of law. Such privilege may not attach to advice or communications involving in-house lawyers as they are not licensed advocates (since they are expected to surrender their bar licences when they take on in-house roles). This is a grey area as there are conflicting judicial precedents on this. Hence, communications, documents or information gathered during an investigation conducted entirely internally may not be legally privileged and may be discoverable in a dispute. That said, companies generally mark sensitive communications with in-house attorneys as privileged and confidential in an attempt to protect the same.

For the above reasons, investigations conducted by external advocates have better chances of retaining legal privilege. However, the following will not be treated as privileged information:

- any correspondence about the commission of a crime or fraud by the client; and
- the observations of an attorney that would suggest that a crime or fraud will be committed by the client.

Last updated on 15/09/2022

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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.

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[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

15. Does the employee under investigation have a

right to be accompanied or have legal representation during the investigation?

India

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In SH cases, parties are not allowed to bring in a legal practitioner to represent them in the IC's proceedings.

In investigations related to other forms of misconduct, there isn't a statutory right to be accompanied by another employee, colleague or lawyer during a fact-finding investigation. In a disciplinary inquiry, if the employee seeks permission to be represented by another person, such as an advocate, co-worker or a union leader, the inquiry officer must decide whether to allow the request based on the specific facts and circumstances as well as any company policies on the subject. If the management has appointed a lawyer to present the company's case in disciplinary proceedings or if the matter is complex and involves legal aspects, courts have held that the employee would also have a right to legal representation.

Further, in general misconduct matters, “workman” employees would generally have the right to be represented by a co-worker in inquiry proceedings, if the establishment is covered under the Industrial Employment (Standing Orders) Act, 1946 (SO Act). The applicability of this statute depends on the nature of the establishment and its headcount.

Last updated on 15/09/2022

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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.

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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

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

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No.

There is no specific requirement to constitute a works council for most industries or inform the trade union about an investigation or disciplinary inquiry.

It is common, however, for individuals to share details of the matter with trade union representatives and seek their support. Further, if an employee has the right to be represented or supported by a colleague (for example, if the establishment is covered by the SO Act), the individual may request trade union representatives to support them during inquiry proceedings.

Last updated on 15/09/2022

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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

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

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Every workplace investigation is unique and varies based on the facts and circumstances of each case. As a result, the nature or type of support to be given to an employee would also vary from case to case. The

bare minimum should be an assurance that there will be no retaliation against them for participating in the investigation. Other measures may include:

- changing the reporting relationship if the accused is the reporting manager or boss of the complainant;
- conducting investigations and interviews virtually or through videoconferencing in cases where parties or witnesses may not be able to physically appear before the investigating authorities; and
- allowing witnesses to be cross-examined virtually or through a written questionnaire where there is a fear of intimidation or retaliation from the parties.

The employer should be mindful that any interim measures or support it extends does not prejudice any particular party.

Under the SH Act, employers are legally required to assist the complainant if he or she chooses to file a complaint about workplace sexual harassment with the police under the Indian Penal Code or any other law that is in force. Further, the complainant can also seek interim protective measures from the IC, such as a request for transfer for the accused or the complainant or to grant leave to the complainant for three months.

Last updated on 15/09/2022

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]

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[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.

Last updated on 15/09/2022

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

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Where unrelated matters are revealed during, or because of, the investigation, the course to be adopted may depend on several factors. Normally, if additional instances of misconduct are revealed against the same accused employee, even if they are unrelated to the original investigation, it would be advisable to independently investigate those issues too, to ensure that there are comprehensive grounds for any future disciplinary inquiry or action. If unrelated matters are revealed against other stakeholders involved in the investigation – for example, a forensic review reveals that the complainant or some witnesses have themselves potentially engaged in some other form of policy breach – whether or not those issues are investigated (as well as the timing of such investigation) would need to be decided on a case-by-case basis. Issues to consider include whether these matters affect the credibility of their statements, point at some form of other conspiracy, or create the risk of retaliation claims at a later date.

In SH matters, however, if the complaint involves instances of sexual harassment as well as other forms of general harassment or misconduct, to the extent such other issues aren't linked to the instances of sexual harassment (eg, creation of a hostile work environment for the complainant), these other concerns should preferably not be investigated by the IC and instead should be referred to the employer to address, as per its general grievance-redressal mechanisms.

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

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

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Indian labour statutes do not prescribe any particular process to be followed if the accused raises any grievances during the investigation and such situations would need to be dealt with on a case-by-case basis. For example, if the grievances relate to the fairness of the investigation or inquiry process, the lack of impartiality of the investigators or the inquiry officer, those may need to be addressed upfront before proceeding further. Where grievances may be unrelated to the investigation or inquiry at hand (and potentially also a method to distract the employer from the core issues or delay or confuse the main investigative proceedings), it may be advisable to communicate to the employee that such grievances will have to be dealt with separately and other safeguards adopted to avoid calling the main investigation or inquiry proceedings into question (eg identifying an independent team to review the grievances).

Last updated on 15/09/2022

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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

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

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The approach to be adopted would be fact-specific but the investigation itself can normally continue, even in the absence of the accused employee. Where it is critical to speak with the employee as part of the investigative process, delays on account of the employee's sickness may need to be accommodated. At the same time, the employer would normally be justified in seeking necessary evidence of the authenticity of the employee's illness and anticipated duration of absence. An accused individual's participation would be more crucial in a disciplinary inquiry to formally respond to the written charges or present their side before the inquiry officer, and absences due to genuine health concerns may need to be reasonably accommodated. Significantly long periods of absence for health reasons may itself be valid grounds to terminate employment under Indian law, subject to the terms and conditions of employment.

Last updated on 15/09/2022

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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

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.

Last updated on 15/09/2022

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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

22. What must the employee under investigation be

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

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Concerning SH cases, the IC must supply a copy of the preliminary findings to the complainant and accused (where both are employees of the organisation) to allow them to make their representations before final findings and recommendations are shared. The IC's final report with recommendations for disciplinary action, if any, must also be shared with both parties.

For other forms of misconduct, it is not mandatory to share the details of the fact-finding investigation itself. However, if disciplinary action is contemplated and a disciplinary inquiry is necessary against the employee under investigation, the relevant details of the evidence gathered against the individual will need to be shared with him or her as part of the charge sheet. On the other hand, where no disciplinary inquiry is being conducted after an investigation (eg, if there is no merit in the allegations), the employer may choose to not share the investigative findings and only inform the individual that no further action is being taken.

Last updated on 15/09/2022

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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]

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[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

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

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Please see question 22.

Last updated on 15/09/2022

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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]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

Last updated on 15/09/2022

24. What next steps are available to the employer?

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In misconduct cases, the next steps for an employer would depend on the outcome of the investigation. If the investigation reveals that the employee has violated the terms of employment and the employer wishes to take disciplinary action (which may include dismissal, depending on the gravity of the misconduct), it would normally be necessary to conduct a disciplinary inquiry as per the principles of natural justice before any actual punishment is meted out. Such a disciplinary inquiry would normally require the issuance of a charge sheet, the appointment of an independent inquiry officer (who should not have been involved in the investigation or otherwise in a position of bias vis-a-vis the parties involved), and conducting disciplinary hearings, etc.

With SH complaints, once the investigation is concluded by the IC, the employer will be provided with a copy of the final report by the IC along with recommendations (ie, the disciplinary measures to be taken against the accused) for the employer to implement. The employer would then be required to act upon the recommendations shared by the IC within 60 days.

Last updated on 15/09/2022

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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.

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[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

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?

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Please see question 22.

For SH complaints, the report would normally contain a complete record of interviews conducted, evidence provided and other associated artefacts.

While investigation reports for other forms of misconduct may be kept private (subject to observations in the prior response relating to disciplinary inquiries), whether or not the investigative report should be disclosed to external agencies such as the police or other regulators would be a subjective decision. Disclosure may be necessary where a demand is made by the external agency as per powers it enjoys under the law (to seek production of necessary documents or personnel Rules of legal privilege may also be important to assess if any information can be withheld based on client-attorney privilege.

Last updated on 15/09/2022

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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]

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[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 (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

Last updated on 15/09/2022

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

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There is no statutory guidance on this. It is common for employers to retain details of disciplinary proceedings on an employee's record for the entire duration of their employment.

It is also advisable to retain the details of any investigations or disciplinary proceedings for at least three years after an individual has been dismissed on account of such proceedings, as this is the general limitation period for raising claims of unfair dismissal. In labour matters, courts in India often allow delays in filing suit after the limitation period, meaning organisations sometimes make a practical call to retain details of investigations and disciplinary proceedings for longer.

Last updated on 15/09/2022

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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]

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

Last updated on 15/09/2022

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

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The risk an employer may face would be quite subjective. For example, if an individual is suspended without pay, the individual may attempt to argue that the entire investigation should be set aside, as non-payment of salary affects an individual's ability to properly represent themselves. Material errors in disciplinary proceedings or not adhering to the rules of natural justice may result in disciplinary action being set aside, and potentially also orders for reinstatement of the employee with back pay (if the individual is protected by local labour laws) if the dismissal is found to be unfair or disproportionate to the gravity of the misconduct.

In addition to the above risks, in SH matters, if the IC constitution is incorrect or there are allegations of bias against a committee member, the whole investigation may be set aside and the organisation ordered to conduct a fresh inquiry through a properly constituted committee.

Last updated on 15/09/2022

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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.

Last updated on 15/09/2022

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