

Workplace Investigations

Contributing Editors

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

Portugal

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Pursuant to article 98 of the Portuguese Labour Code, the employer has a disciplinary power over its employees during the employment period. This is enforced through the initiation of disciplinary procedures – which can include a preliminary workplace investigation as provided for in article 352(1) of the Portuguese Labour Code – and ultimately the application of sanctions laid down by law or in an applicable collective bargaining agreement.

The Portuguese Labour Code governs disciplinary procedures, which can include a preliminary workplace investigation, in two different sections. On the one hand, articles 328 to 332 establish general rules regarding the imposition of disciplinary sanctions; statutory deadlines and statutes of limitations involved; decision criteria; penalties; and disciplinary records. On the other hand, articles 351 to 358 lay down the rules applicable to dismissals with cause, which are also widely understood to be applicable concerning conservatory sanctions (i.e. those that enable the continuity of the employment relationship).

Additionally, collective bargaining agreements may provide for different disciplinary penalties, as long as the rights and guarantees of employees are not impaired.

Workplace investigations must also abide by the general rules laid down in the Portuguese Constitution, Portuguese Civil Code and Data Protection Laws (including guidelines issued by the Data Protection Agency), as regards the personal rights of the employees.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the

employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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Vietnam

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

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02. How is a workplace investigation usually commenced?



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Having been informed of an alleged infraction committed by an employee, the employer must prepare a detailed written accusation and notify the employee.

Moreover, if the alleged infraction constitutes gross misconduct and the employer is considering dismissal, a formal statement of the employer's intention to dismiss the employee should accompany the accusation. If this is not expressly done, the employer will be unable to dismiss the employee and may only apply one of the conservatory sanctions. A copy of these documents must be sent to the works council, if any, and, should the employee be a union member, to the respective trade union.

Notwithstanding this, if before preparing the accusation the employer needs to further investigate the facts and circumstances, it may open a preliminary investigation aimed at collecting all the facts and circumstances and conclude if there are grounds to bring an accusation against the employee.

The preliminary investigation must start within 30 days of the employer becoming aware of the facts, be diligently carried out (but with no maximum period laid down by law) and concluded within 30 days of the last investigatory act. Furthermore, the preliminary investigation will suspend the relevant statutory deadlines and statutes of limitations (ie, 60 days from the date of acknowledgment, by the employer or a supervisor with disciplinary power, of the facts to enforce disciplinary action against the employee and one year from when the facts occurred, regardless of the employer's acknowledgment, unless the infraction also constitutes a criminal offence, in which case the longer statutes of limitation established in criminal law will apply).

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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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Vietnam

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

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

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After the employee is notified of the accusation, the employer may decide on a preventive suspension of the employee if the employee's presence on company premises is deemed problematic. In this case, the employee's salary will continue to be paid.

As per article 330(5) of the Portuguese Labour Code, a preventive suspension may also be determined

during the 30 days before the accusation is made, provided that the employer, in writing, justifies why is necessary (eg, for interfering with the inquiry) and why the accusation cannot be served at that moment.

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

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

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04. Who should conduct a workplace investigation,

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



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According to article 356(1) of the Portuguese Labour Code, the employer can appoint an instructor, who shall be responsible for the probationary proceedings. Usually, workplace investigations are conducted by external advisors (eg, lawyers), appointed by the employer.

However, regarding disciplinary powers, there is a legal limitation in article 98 of the Portuguese Labour Code. As such, only the employer (or the immediate superior of the concerned employee, if the employer has delegated its powers, as per article 329(4) of the Portuguese Labour Code) has disciplinary powers.

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

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

There are instances when engaging with external parties or professional advisors may be necessary. This is especially the case if the conduct under investigation is serious or widespread, which may lead to

regulatory consequences if the employer does not have the expertise to handle the investigation.

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



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The employee under investigation can only bring legal action after the investigation is finished and if the employer has applied a disciplinary sanction.

According to article 329(7) of the Portuguese Labour Code, the employee may submit a complaint to the immediate superior officer that applied the sanction or may resort to a dispute resolution procedure as provided for by the applicable collective bargaining agreements or the law (this is uncommon, however).

Furthermore, should a company dismiss an employee in breach of the legal requirements described above, the latter may take legal action against the company within 60 days of the date of termination of his or her employment agreement. The employee may also choose to file a preliminary injunction against the employer seeking immediate (albeit provisional) reinstatement.

Notwithstanding this, if the employee can prove that they suffered damages as a result of being subject to an abusive and illegal investigation, they may file a complaint with the Labour Authorities or bring a claim against the employer and demand the payment of compensation for the damages caused.

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

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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If the employer decides on an internal investigation to assess potential wrongful actions carried out within the company, employees must cooperate. However, employees are entitled to the privilege against self-incrimination established in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

An employee's refusal to cooperate with an internal investigation may be regarded as a breach of conduct by the employer and, ultimately, may lead to disciplinary sanctions.

Employees who act as witnesses in cases of harassment cannot be sanctioned unless they acted with wilful misconduct, and any sanction applied to an employee who acted as a witness in a harassment procedure will be presumed to be abusive.

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

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

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Whenever employers process personal data in the course of an investigation, they need to comply with Regulation (EU) 2016/679 (the GDPR) and Law 58/2019, which implements the GDPR in Portugal (jointly the Data Protection Regulations). If the gathering of physical evidence includes the collection and processing of sensitive data (eg, related to the employee's health or any other category outlined in article 9 of the GDPR), additional safety measures should be in place to safeguard the adequate and confidential nature of such information.

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

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



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The employer is allowed to search an employee's possessions or files, provided that they are work instruments or of a professional nature.

When performing these searches, employers should consider the specific provisions of the Data Protection Regulations as well as Resolution No. 1638/2013 of the Portuguese Data Protection Authority (CNPD), which contains rules on monitoring phone calls, e-mail and internet usage by employees. The CNPD understands that for the employer to access the employees' professional data (e-mails, documents and other information stored on electronic devices), the latter should be present during the monitoring, to identify any information of a personal nature that should not be accessed by the employer (the employer must comply with these directions and should not access that email). In addition, review of the data should respect specific protocols to avoid potential access to personal data (eg, review of subject, recipients, data flow and type of files attached).

Body searches or the seizure of personal belongings or documents belonging to the employee are not permitted within the scope of a disciplinary procedure.

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

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

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

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The treatment of whistleblowers and their reports is laid down in various specific laws in Portugal.

Law 93/2021

Under Law 93/2021, a whistleblower of work-related offences must not be retaliated against. Furthermore, imposing disciplinary penalties on the whistleblower within two years after their disclosure is presumed to be abusive. The whistleblower is entitled to judicial protection and may benefit from the witness protection

programme within criminal proceedings. Additionally, reports will be recorded for five years and, where applicable, personal data that is not relevant for the handling of a specific report will not be collected or, if accidentally collected, will be deleted immediately.

Corruption and Financial Crime Law (Law 19/2008)

Under Law 19/2008, a whistleblower must not be hampered. Furthermore, the imposition of disciplinary penalties on a whistleblower within one year following the communication of the infraction is presumed to be unfair.

Additionally, whistleblowers are entitled to:

- anonymity until the pressing of charges;
- be transferred following the pressing of charges; and
- benefit from the witness protection programme within criminal proceedings (remaining anonymous upon the verification of specific circumstances).

Money Laundering and Terrorism Financing Law (Law 83/2017)

Law 83/2017, which sets forth the legal framework to prevent, detect and effectively combat money laundering and terrorism financing, applies to financial entities and legal or natural persons acting in the exercise of their professional activities (eg, auditors and lawyers)(collectively, obliged entities).

According to article 20 of Law 83/2017, individuals who learn of any breach through their professional duties must report those breaches to the company's supervisory or management bodies. As a result, the obliged entities must refrain from threatening or taking hostile action against the whistleblower and, in particular, unfair treatment within the workplace. Specifically, the report cannot be used as grounds for disciplinary, civil or criminal action against the whistleblower (unless the communication is deliberately and clearly unjustified).

Legal Framework of Credit Institutions and Financial Companies (RGICSF)

Credit institutions must implement internal-reporting mechanisms that must guarantee the confidentiality of the information received and the protection of the personal data of the persons reporting the breaches and the persons charged. Under article 116-AA of RGICSF, persons who, while working in a credit institution, become aware of:

- any serious irregularities in the management, accounting procedures or internal control of the credit institution; or
- evidence of a breach of the duties set out in the RGICSF that may cause any financial imbalance, must communicate those circumstances to the company's supervisory body.

These communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower.

Moreover, article 116-AB of the RGICSF establishes that any person aware of compelling evidence of a breach of statutory duties may report it to the Bank of Portugal. Such communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower, unless the report is clearly unfounded.

The Bank of Portugal must ensure adequate protection of the person who has reported the breach and the person accused of breaching the applicable duties. It must also guarantee the confidentiality of the persons who have reported breaches at any given time.

Portuguese Securities Code (CVM)

Article 382 of the CVM states that financial intermediaries subject to the supervision of the Portuguese Securities Market Commission (CMVM), judicial authorities, police authorities, or respective employees must immediately inform the CMVM if they become aware of facts that qualify as crimes against the securities market or the market of other financial instruments, due to their performance, activity, or position.

Additionally, according to article 368-A of the CVM, any person aware of facts, evidence, or information regarding administrative offences under the CVM or its supplementary regulations may report them to the CMVM either anonymously or with the whistleblower's identity. The disclosure of the whistleblower's identity, as well as that of their employer, is optional. If the report identifies the whistleblower, their identity cannot be disclosed unless specifically authorised by the whistleblower, by an express provision of law or by the determination of a court.

Such communications may not be used as grounds for disciplinary, criminal, or civil liability action brought against the whistleblower, and they may not be used to demote the employee.

According to article 368-E of the CVM, the CMVM must cooperate with other authorities within the scope of administrative or judicial proceedings to protect employees against employer discrimination, retaliation or any other form of unfair treatment by the employer that may be linked to the communication to the CMVM. The whistleblower may be entitled to benefit from the witness-protection programme if an individual is charged in criminal or administrative proceedings because of their communication to the CMVM.

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

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10. What confidentiality obligations apply during an investigation?



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The Portuguese Labour Code does not specifically provide for any confidentiality obligations concerning

disciplinary procedures. On the contrary, it states that the employee should have access to any information included in the disciplinary procedure. Otherwise, the employee's defence rights could be jeopardised, which would make the disciplinary procedure (and possible disciplinary sanctions) null and void.

As for the witnesses, even though there is no specific provision on confidentiality, employees are generally bound by a duty of loyalty vis-a-vis the employer, which includes not disclosing information that should be kept reserved,

However, in the cases of whistleblowing, it is mandatory to ensure the confidentiality of the complainant, as per question 9.

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

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



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If, before taking disciplinary action, the employer decides to open a preliminary investigation phase, the employee does not have to be informed.

Only when the preliminary investigation leads to a formal accusation will the employee be entitled to know that enquiries were carried out and the source of the facts (eg, witnesses, documents).

However, if an employer does not need to open a formal preliminary investigation phase, it only has to serve the accusation notice to the employee.

As a rule, employees will only know that they are being investigated if they are suspended or when they are notified of the accusation.

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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



Vietnam

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

Last updated on 25/09/2023

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



Portugal

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An employee served a notice of accusation is entitled to assess all information that was gathered within the scope of the investigation and disciplinary procedure (notably the identity of the complainant, witnesses heard, other sources of information, etc), otherwise his right of defence may be jeopardised.

Where a preliminary investigation does not lead to an accusation against the employee, no disclosure has to be made by the employer.

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

Vietnam

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

Last updated on 25/09/2023

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

Portugal

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Please see question 12 above. NDAs are not admissible.

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

Vietnam

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

Last updated on 25/09/2023

14. When does privilege attach to investigation materials?

Portugal

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at Uría Menéndez - Proença de Carvalho

If any sources of information used within an investigation include privileged data, they may be redacted to safeguard third parties' rights. However, where disclosure of that data is necessary for the employee to understand why he or she is being accused, it may be necessary to reveal those elements. Otherwise, the employee may argue that their rights were affected and, for that reason, the disciplinary procedure – and any possible sanction – should be deemed null and void.

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



Vietnam

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

Last updated on 25/09/2023

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



Portugal

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Under the Portuguese Bar Association statutes, the assistance of a lawyer is allowed at all times and cannot be prevented by any jurisdiction or authority, public or private entity.

Nevertheless, the law does not provide any obligation to inform the employee that they are entitled to the assistance of a lawyer.

Last updated on 15/09/2022



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



Vietnam

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

Last updated on 25/09/2023

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



Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

Employee representative bodies are not entitled to be informed about or to participate in the preliminary investigation. The works council is only entitled to participate in disciplinary proceedings after a formal accusation has been made against the employee.

A copy of the accusation should be sent to the works council (if any) and if the employee is a trade union member, to the respective trade union. After the instruction phase of the procedure has ended (where the employer has to hear the witnesses identified by the employee in his written defence and file any other sources of information that have been requested), the employer should provide a copy of the disciplinary procedure to the works council (if any) and the respective trade union, if the employee is a member. These employees' representatives will then have five business days to issue their opinion on the matter.

Finally, a copy of the final decision must also be sent to these bodies.

There is no legal right for the interviewee to be assisted by a representative from the works council.

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



Vietnam

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

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

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

Last updated on 25/09/2023

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



Portugal

Author: *André Pestana Nascimento*
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Employees are usually assisted by lawyers when they are subject to an investigation or disciplinary procedure.

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]

^[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



Vietnam

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

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



Portugal

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If new facts arise as a result of the investigation and they are relevant, the employer may include them in the accusation. If, however, the new facts are revealed after the accusation has been served, the employer will have to prepare an addendum to the initial accusation and the employee will be able to use the same defence rights against that addendum.

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Switzerland

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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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Vietnam

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

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

Last updated on 25/09/2023

19. What if the employee under investigation raises a

grievance during the investigation?



Portugal

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Grievance procedures are not specifically provided for under Portuguese law. There is no formal procedure for an employee to raise a complaint against the employer. Nonetheless, a potential claim brought by the employee under investigation and subject to a disciplinary procedure should not have any impact.

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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).

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Vietnam

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

Last updated on 25/09/2023

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



Portugal

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The employer will be able to proceed with the investigation or disciplinary procedure regardless, although if it is necessary to hear the employee and they are unable to attend the interview, either the employer waits for their return or it could also send a written questionnaire for the employee to complete.

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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



Vietnam

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

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

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



Portugal

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These procedures are independent and autonomous, and the law does not provide any particular rules to ensure coordination. This raises particular concerns when an employee is subject to a criminal investigation in secret, as the employer will be unable to access any evidence from the criminal procedure to begin an internal investigation or disciplinary procedure against the employee.

On the other hand, considering the short statutes of limitation to enforce disciplinary action, it may prove impossible to wait for the outcome of the criminal or regulatory investigation to decide if a disciplinary procedure should also be enforced, because by the time the employer is fully aware of the facts, the statutes of limitation may have already expired.

However, both the judge in a criminal procedure and the regulator have the public authority to order the employer to share any findings within the scope of the investigation or disciplinary procedure.

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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



Vietnam

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

Last updated on 25/09/2023

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



Portugal

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If, further to the conclusion of the investigation, the employer concludes that there are no grounds to enforce disciplinary action against the employee, the employee does not even have to know that they were the subject of an investigation.

However, if the employer does decide to accuse the employee, the employee will be entitled to all the sources of information obtained during the preliminary investigation.

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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.

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

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



Portugal

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If the employee is accused by the employer, they will be entitled to consult the entire investigation report and not just the findings, as well as the witnesses' depositions, which should be in writing, and any other sources of information that were used by the employer

Even though the law is silent in this respect, courts have ruled that if this is not complied with, the employee's right of defence would be deemed to be disrespected.

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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 | hrtdaily.ch> (last visited on 27 June 2022).

Last updated on 15/09/2022



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

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

24. What next steps are available to the employer?



Portugal

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Once the preliminary investigation ends, the employer must decide whether or not, in its view, there are grounds to bring an accusation against the employee and enforce disciplinary action or if it should be dismissed due to a lack of evidence.

When the employer decides to enforce disciplinary action, the following sanctions may be applied:

- verbal warning;
- written warning;
- financial penalty;
- loss of holiday;
- suspension with loss of pay and length of service;
- dismissal with cause and without compensation.

The first five penalties are usually called conservatory sanctions, enabling the continuity of the employment relationship, as opposed to dismissal, which is deemed a measure of last resort.

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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



Vietnam

Author: *Stephen Le, Trang Le*

After the completion of the investigation, the employer may:

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

Last updated on 25/09/2023

25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?



Portugal

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at Uría Menéndez - Proença de Carvalho

The investigation findings must be disclosed to the employee when an accusation is brought against him or her and to the works council (if any) or trade union, if the employee is a member.

Regulators or police authorities may also notify the employer if any investigations were brought against a particular employee (as regards regulators, this could occur within the scope of fit and proper procedures), in which case the employer must cooperate and disclose any investigation findings.

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

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

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

Last updated on 25/09/2023

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



Portugal

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There are no specific rules in the Portuguese Labour Code on this matter.

However, article 332 of the PLC states that the employer should keep an updated record of disciplinary sanctions, so the competent authorities can easily verify compliance with applicable provisions. Accordingly, it is advisable to maintain a record of disciplinary sanctions during the entire employment relationship.

Also, please note that some collective bargaining agreements state that the disciplinary register must be deleted from the employee's record periodically.

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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.

Last updated on 15/09/2022



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

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



Portugal

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If the disciplinary procedure recommends an employee's dismissal

Should a company dismiss an employee that has breached legal requirements, the latter may take action against the company within 60 days of the date of termination of their employment agreement.

If this action results in a ruling of unfair dismissal, the employee will be entitled:

- to receive all the payments they should normally have earned (back pay, including salary, holidays, legal subsidies, etc), from the month preceding the commencement of the lawsuit and until the final ruling of the court, minus any amounts they may have received during the same period and they would otherwise not have received; and
- to be reinstated in their former position or at the employee's choice, to receive an indemnity that the court will calculate as between 15 and 45 days of base salary (and service bonuses) for each full year of service or fraction thereof, with a minimum limit of three months' compensation.

This graduation will depend on the amount of the base salary (the lower the base salary, the higher the indemnity) and the severity of the company's conduct. Additionally, the employee is entitled to claim an indemnity for further damages.

There are, however, two exceptions to the above: the first relates to high-ranking employees (ie employees carrying out management duties); the second refers to micro-companies (ie, a company that registered an average number of employees in the preceding calendar year below 10). In these two cases, the employer

may oppose the employee's option for reinstatement, arguing that it would be gravely harmful to the company's activity. From a practical perspective, opposition to reinstatement is not commonly decided by the courts.

Finally, should the court rule that the grounds for dismissal were valid, but the investigation was found to have been irregular, the dismissal will be deemed valid, but the employee will still be entitled to an indemnity of 7.5 to 22.5 days of base salary (plus service bonuses, if any) per year of service.

If the disciplinary procedure does not recommend dismissal, but the application of a conservatory sanction

In this event, the employee can challenge the application of the sanction through the filing of a lawsuit against the company. Although the law is not entirely clear, there are court rulings stating that the employee has one year to bring a lawsuit, but others consider that the statute of limitation to challenge a conservatory disciplinary sanction is also one year from the termination of the employment agreement when a pecuniary penalty or suspension was applied to the employee.

Moreover, according to article 331(3) of the Portuguese Labour Code, the employer who applies an unjustified conservatory penalty should compensate the worker under the terms set out in paragraphs 5 and 6 of said article. The imposition of an abusive penalty is also considered a very serious administrative offence as per article 331(7). Please note that the Portuguese Labour Code considers a penalty to be unjustified if its imposition is motivated by the following:

- the employee lawfully complaining about their labour conditions;
- the employee lawfully disobeying unlawful orders from a superior;
- the employee being a member of any employee representative structure or having been a candidate for such a position; and
- the employee exercising or invoking their rights and guarantees.

Furthermore, any penalty imposed within six months of any instance listed above (or within one year if the invoked rights are related to equality and non-discrimination) is presumed to be abusive.

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Switzerland

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).^[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual's interest in not using the evidence and in establishing the truth.^[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.^[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.^[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to

evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.^[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture^[6]).^[7]

^[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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Vietnam

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

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