

# Workplace Investigations

## Contributing Editors

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

### 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.

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

## 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.

Last updated on 15/09/2022



### Switzerland

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

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

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[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, *Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR*, 7. A. 2012, Art. 328b N 8 OR.

Last updated on 15/09/2022

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