

# Workplace Investigations

## Contributing Editors

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## 02. How is a workplace investigation usually commenced?

### Portugal

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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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### 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).<sup>[1]</sup> 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.<sup>[2]</sup>

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<sup>[1]</sup> Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 21.

<sup>[2]</sup> Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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



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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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### Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.<sup>[1]</sup> 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).<sup>[2]</sup>

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<sup>[1]</sup> Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

<sup>[2]</sup> Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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