

Workplace Investigations

Contributing Editors

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

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

No specific rules directly govern a workplace investigation in the event of employee misconduct. However, several rules, both legal and administrative, affect the conduct of such an investigation. In addition, codes of conduct, internal regulations or guidelines may also exist within companies.

A new law (No. 2022-401) came into effect on 1 September 2022 and constitutes one of the cornerstones for future regulation of workplace investigations. This law transposes into French law the European directive relating to whistleblower protection. It does not, however, constitute a revolution, as a previous French law dated 9 December 2016 (the so-called Sapin 2 Law) already provided the whistleblower with a specific status and protection. These laws are fundamental when considering an internal investigation as the rules protecting the whistleblower and requiring the establishment of an internal whistleblowing channel (eg, a dedicated email or hotline) affect the degree of flexibility available to companies in conducting the investigation.

A new decree has been adopted (No. 2022-1284), dated 3 October 2022, for application of these new provisions. This decree sets out several obligations relating to the internal whistleblowing reporting process. The reporting channel will necessarily contribute to shape the internal investigation triggered by situations which have been reported by that channel. Companies subject to this decree may define the reporting procedure using the supporting tool of their choice (company collective agreement, internal memorandum, etc.), as long as the employee representative bodies are duly consulted on the matter. The decree also specifies that an acknowledgement of receipt of the alert must be provided to the author of the alert in writing within seven days from the company receiving the alert. The author of the alert must also be informed in writing, within a reasonable period not exceeding three months from acknowledgement of receipt of the alert, of the measures envisaged or taken to assess the accuracy of the allegations and, where appropriate, to remedy the situation which had been reported, as well as the reasons for these measures and, finally, the closure of the case.

More generally, not only do all the “pure” labour law rules relating to the protection of the human rights of employees need to be complied with (right to privacy, data protection under the GDPR, etc), but also the disciplinary rules and regulations that protect employees from unfounded sanctions imposed by their employer. For example, an employer can only sanction an employee's misconduct if the disciplinary procedure begins within two months of when the misconduct was committed or when the employer

becomes aware of it. In this respect, an internal investigation can be necessary for the employer to obtain full knowledge of the facts alleged to have been committed by the employee. It is nonetheless recommended that the internal investigation be completed within these two months to avoid the risk of the disciplinary action being time-barred.

Administrative rules produced by the French anti-corruption agency should also be taken into consideration (good practice, guidelines and recommendations relating to senior management's commitment to implement anti-corruption measures, corruption risk mapping, corruption risk management measures and procedures), as well as the guidelines produced by the French Ministry of Employment relating to the prevention of sexual harassment and gender-based violence or the recommendations of the Human Rights Defender, which is a French special institution aimed at protecting fundamental rights.

When the investigation in question concerns moral or sexual harassment or violence in the workplace, the national interprofessional agreement of 26 March 2010 should be referred to. This text stipulates that in the event of an investigation procedure, it should be based on, but not limited to, the following guiding principles:

- it is in everyone's interest to act with the discretion necessary to protect everyone's dignity and privacy;
- no information, unless it is anonymized, should be divulged to parties not involved in the case in question;
- complaints must be investigated and dealt with without delay;
- all parties involved must be listened to impartially and treated fairly;
- complaints must be supported by detailed information;
- deliberate false accusations must not be tolerated, and may result in disciplinary action;
- external assistance may be useful, notably from occupational health services.

Many are calling for the adoption of legislative rules governing such investigations, and their coordination with general whistleblower protection measures.

Finally, a company must take its own rules and regulations into account. Every company with at least 50 employees has the legal obligation to draw up internal rules and regulations, which notably set out the disciplinary sanctions applicable to employees, as well as a reminder of certain employees' rights.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

There are essentially two phases in a workplace investigation: the fact-finding phase and the administrative proceeding.

The fact-finding phase of workplace investigations is usually governed by the internal policies of the employer, save for investigations relating to gender-based sexual harassment in the workplace. Republic Act No. 11313, otherwise known as the Safe Spaces Act, sets the parameters for these kinds of investigations.

Philippine case law recognises the right of an employer to conduct investigations for other acts of misconduct in the workplace in the exercise of its management prerogative. The Supreme Court has held that it is an employer's right to investigate acts of wrongdoing by employees, and employees involved in such investigations cannot simply claim that employers are out to get them.

After the fact-finding aspect of the investigation, if the employer decides it has sufficient grounds to proceed to full-blown administrative proceedings, it needs to comply with the due process requirements outlined under the Philippine Labor Code. These requirements are:

- a first notice, or notice to explain, informing the employee of the charges against him or her;

- an opportunity for the employee to be heard; and
- a final notice on the outcome of the administrative action.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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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02. How is a workplace investigation usually commenced?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

When a report of wrongdoing is brought to the employer's attention, whether through a whistleblower or another channel, and an internal investigation is expected, it may be either mandatory or optional, depending on the facts of the alleged wrongdoing.

The investigation will be mandatory when the alleged wrongdoing relates to an ethical issue according to anti-corruption regulations, the employer's duty of due diligence regarding, for example, human rights or environmental matters, or where the works council has issued an alert relating to a "serious and imminent danger" (or to "fundamental human rights"), but also whenever it relates to the employer's obligation to ensure employee safety (eg, moral or sexual harassment).

If the investigation is not mandatory, it is up to the employer to decide whether or not to carry out the investigation. Several key questions can help the employer determine whether or not it is appropriate to carry out an investigation, such as:

- What are the benefits of doing nothing? The company will have to draw up a list of the pros and cons of an investigation, bearing in mind that in some cases a poorly conducted investigation could make the situation worse;
- What is the priority (eg, obtaining or securing evidence, or correcting the irregularity)?
- What rules or codes of ethics must the company comply with?
- Should external legal counsel only advise the company or should they play a major role in the investigation process by becoming an investigator?

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Workplace investigations are normally commenced either through a complaint filed by other employees in the workplace or by HR or other representatives of management.

Under the Safe Spaces Act, employers are required to commence an investigation and decide on complaints regarding gender-based sexual harassment, within ten days of the complaint being brought to their attention. For other workplace misconduct, management is given wide discretion regarding the means and method by which the workplace investigation may be carried out.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

An employee may be suspended or relocated during a workplace investigation by:

- suspending the employee as a precautionary measure (eg, pending a confirmation of dismissal);
- temporarily assigning the employee to another site; or
- exempting the employee from having to work while continuing to pay them their salary.

The employee can be suspended as a precautionary measure, pending confirmation of dismissal, but this implies that disciplinary proceedings have already begun and that the investigation is therefore at a relatively advanced stage and that there is sufficient evidence to suggest the need for disciplinary action. It should be made clear to the employee that the suspension is a provisional measure (in the absence of specifying this, the suspension could be interpreted as a disciplinary layoff constituting a sanction and, in some jurisdictions, as depriving the employer of the possibility of dismissing the employee for the same facts).

Temporary reassignment can also be considered. However, this contractual change must not apply for long and the measure taken must be temporary. The employer must act promptly – the measure is only valid for as long as the investigation continues. Failing this, and because of the absence of concurrent disciplinary proceedings, there is considerable risk that the temporary reassignment may be reclassified by a judge as an illegal modification of the employment contract or as a disciplinary sanction preventing the employee from subsequently being dismissed.

Finally, paid exemption from work is also possible and consists of temporarily suspending, by mutual agreement, the obligation of the employer to provide work for the employee and the employee's obligation to work, without affecting their remuneration. Such a measure must generally be taken with the consent of the employee, because it implies a suspension (and therefore a modification) of the employment contract. This measure may be useful in temporarily removing an employee with whom the employer maintains a good relationship. This may be an employee who is or feels they are a victim of harassment, especially when the employee is not on sick leave.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

A preventive suspension pending investigation is allowed under the law, provided that the continued employment of the subject of the investigation poses a serious and imminent threat to the life or property of the employer or other employees. Additionally, the period of preventive suspension pending investigation should not last longer than 30 days. However, should the employer wish to extend this period, the employer must pay the employee's wages and other benefits. The employee is under no obligation to reimburse the amount paid to them during the extension if the employer should, later on, decide to dismiss the employee after the completion of the process.

In practice, the notice of preventive suspension is issued simultaneously with the first notice or the notice to explain after the employer has conducted its fact-finding investigation and has reason to believe that the employee must be held accountable for his or her actions.

Since placing an employee under preventive suspension requires the existence of a serious and imminent threat to the life or property of the employer or other employees, some employers opt to place the employee or employees involved on agreed paid leave. This will allow the employer to conduct an unhampered workplace investigation while the investigated employee is still able to receive his or her full salary during this period. The exact period of paid leave may be agreed upon by the employer and the employee, but ideally it should not last for more than thirty days.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

In determining who is to conduct a workplace investigation, the main objective is to ensure that the team is independent or at least that it is perceived as being independent. The key people in the investigation team can be identified in a pre-established procedure. It is good practice to give decision-makers the possibility to set up, on a case-by-case basis, the team most appropriate to the situation.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Under the Safe Spaces Act, an employer should create an independent internal mechanism or a committee on decorum and investigation to investigate and address complaints of gender-based sexual harassment, which should:

- adequately represent the management, the employees from the supervisory rank, the rank-and-file employees, and the union, if any;
- designate a woman as its head and no less than half of its members should be women;
- be composed of members who are impartial and not connected or related to the alleged perpetrator;
- investigate and decide on the complaints within 10 days or less upon receipt thereof;
- observe due process;
- protect the complainant from retaliation; and
- guarantee confidentiality to the greatest extent possible.

For other types of offences, it is the prerogative of management as to who will conduct the investigation and how it will be conducted, provided the proceedings remain impartial.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

An internal investigation is not a police enquiry or a judicial instruction; there is no legal provision enabling an employee to stop the investigation. At the same time, there is no legal provision enabling the employer to force an employee to be interviewed. Interviewing an employee within the context of an internal investigation is also not a disciplinary matter. Therefore, the employee has no right to be assisted by another employee or an employee representative. The employee could, however, lawfully request the presence of their lawyer, especially if the company's lawyer is part of the investigation team.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

There is generally no legal remedy for an employee to stop a workplace investigation as it is the prerogative of management to conduct it. Nevertheless, if the employee alleges violation of any specific law or contractual provision in the conduct of the investigation, the employee may be able to seek judicial relief for violation of the law or contract, and ask for interim relief.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Co-workers can spontaneously act as witnesses and provide statements to superiors before, during or after the interviews. Co-workers can also be interviewed as witnesses at the investigator's request, although they are not under any obligation to answer the questions and they cannot be compelled to do so. The investigators have an absolute obligation of discretion during the investigation and cannot reveal any details of the information gathered.

Certain employees may benefit from whistleblower status, which implies that they may be exempt from potential criminal and civil liability relating to their report or testimony and they are protected from any retaliatory measures from the employer. "Facilitators" who helped the whistleblower and the individuals connected with the whistleblower and risk retaliatory measures by testifying as a witness may also benefit from this status, as of 1 September 2022.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Neither the employer nor the employee subject of the investigation can compel co-workers to act as a witness. There is no specific law for whistleblowers or employees who act as witnesses during an investigation. Nevertheless, the employer can have its own whistleblower policy.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

GDPR principles fully apply to data gathering, as well as case law protecting the right to respect one's private life and the secret of correspondence.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The procedure for gathering physical evidence is governed primarily by company policy. Nevertheless, the Data Privacy Act of the Philippines protects all data subjects from unlawful processing of their personal information without consent.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

In internal investigations, the fundamental rights and freedoms of employees are at stake, including the right to privacy, respect for the privacy of home life and correspondence, freedom of expression, and the obligation of loyalty in searching for evidence.

In principle, work emails and files can be reviewed, even without the employee's consent, prior knowledge or warning. This includes: work email accounts; files stored on a work computer or a USB key connected to a work computer; and SMS messages and files stored on a work mobile phone and documents stored in the workplace unless they are labelled as “personal”. On the other hand, it is not permissible for an employer (or an investigator) to review “personal” emails and files, such as documents or emails identified as “personal” by the employee, or personal email accounts (Gmail, Yahoo, etc), even if accessed from a work computer.

There are certain exceptions to the above principle. An employer is allowed to check “personal” emails or data in any of the following cases:

- if the employee is present during the review;
- if the employee is absent, but was duly notified and invited to be present;
- if there is a particularly serious “specific risk or event”;
- if the review is authorised by a judge (this means having to prove a legitimate reason justifying not informing the employee).

When documents or emails are not marked as “personal” but contain information of a personal nature, the employer may open and review the data but may not use such documents or emails to justify applying disciplinary measures to the employee or use such documents or emails as evidence in court if they indeed relate to the employee’s private life.

Special attention must be given to employee representatives who must be entirely free to carry out their duties.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Subject to the employees' reasonable expectation of privacy, gathering physical evidence within the premises of the workplace and through company-issued property has been upheld to be legally permissible in pursuit of the employer's right to conduct work-related investigations. The search, however, should be limited to the alleged acts complained of and must not be used as a fishing expedition to find incriminating information about the erring employee.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Evidence obtained in the context of an investigation must specify who provided it and the date it was provided. No retaliatory measures may be taken against the whistleblower for the act of whistleblowing.

In certain cases, the whistleblower report must be forwarded to the judicial authorities (eg, when there is an obligation to assist persons in imminent danger, for serious offences or a disclosure that a vulnerable person is in danger (ie, minors under 15 or a person who is unable to protect themselves)).

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Since there is no specific law that governs whistleblowing, matters that involve whistleblowing will be governed by company policy.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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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10. What confidentiality obligations apply during an investigation?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Interviewers, investigators, interviewees or any others involved in the investigation are often bound by a reinforced confidentiality obligation, particularly when the internal investigation is triggered by a whistleblower alert. In addition, every person that comes to know of the investigation, facts or people involved is bound by an obligation of discretion. Furthermore, investigators should specifically be trained for interviews and be reminded of their obligations relating to the investigation.

The investigators will need to determine the order of the tasks to be carried out in the investigation, as this will have a significant impact on confidentiality management. Should they start with the hearings or a review of documents? The answer may depend on the subject matter of the investigation. It is advisable to first review the documentation before organising interviews, particularly to avoid the destruction of certain documents by employees acting in bad faith or by those wishing to erase the traces of alleged wrongdoing. Sometimes, however, it is possible to start with the interviews, especially in the case of harassment, as there may be no documents to review. If the decision is taken to conduct the documentation review after the interviews, it could be useful to ask the employees involved to sign a document stating that they must preserve and retain documents, meaning that if they delete or destroy documents, they would be acting

against the company and in breach of the law.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Since the right to investigate ultimately belongs to the employer, it may impose strict confidentiality obligations upon the individuals involved, not only to ensure unhampered investigation proceedings but also and more importantly for the protection of the company and employees involved.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

According to the French data protection authority, the employee under investigation must be informed of the name of the person in charge of the investigation, the alleged facts that have led to the whistleblowing alert and their rights to access and rectify data collected about them. This information must be given as soon as the data collection starts, before the interviews, as per GDPR principles.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

During the fact-finding stage of the investigation, the employees under investigation are not generally entitled to information concerning the conduct of the investigation. It is the prerogative of management to involve the employee under investigation during the fact-finding stage. When, however, the employer determines that an administrative disciplinary process must proceed, the employee's right to due process attaches. As such, due process includes the right to be informed of the grounds relied upon by the employer and the opportunity to be heard. The first notice or notice to explain should specifically inform the employee of the charge against him or her.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The identity of the complainant must be kept confidential and cannot be disclosed. There are two exceptions: if the complainant consents to the disclosure; or if the employer is asked for this information by the judicial authorities.

Last updated on 15/09/2022



Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The identity of the complainant, witnesses and sources of information may be kept confidential under the employer's policies.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Most of the time, the legal protection afforded by the legally prescribed confidentiality obligation that applies to whistleblowing is sufficient. This is all the more so given every person involved is bound by an obligation of discretion. However, there is no legal obstacle to the creation of an NDA between the employer and the people involved.

NDAs setting out a strict and reinforced obligation of confidentiality and discretion during the investigation should be signed by any external parties involved (eg, translation agency, IT expert) or when the internal investigation is outside the scope of whistleblowing regulations.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The practice of stipulating matters to ensure adherence to confidentiality is not uncommon. As such, NDAs

are executed as a means of added protection for both the company and the employees involved.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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 materials?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Privilege does not generally apply to internal investigation materials as the investigation does not constitute a relationship between a lawyer and their client, and even less so a judicial investigation. However, if a lawyer is appointed as an investigator, privilege may apply to materials exchanged between the lawyer and that client.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The employer's internal policy can indicate that investigation materials must be kept confidential.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The employee under investigation has the right to be assisted by a lawyer during the interviews and, if the employee chooses to be so, the lawyer must also always be present. The employee may not, however, be accompanied by anyone other than a legal representative (ie, another employee cannot attend the interview).

Last updated on 27/11/2023



Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Since the fact-finding phase of the investigation is considered to be a preliminary step before the commencement of the administrative disciplinary process, an employee's right to representation does not attach.

However, when the administrative disciplinary process commences, the employee has the right to have legal representation during the investigation. While no law requires the employee to have counsel present during the investigation, the employee has the right, if he or she chooses, to be advised by counsel or have legal representation.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Neither the works council nor the trade unions have any right to be informed or involved in the investigation. It is the employer who is responsible for carrying out the investigation. However, when the investigation is triggered due to a works council issuing an alert relating in particular to a “serious and imminent danger”, one member of the works council must be involved in the investigation process.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Except if provided expressly under a collective bargaining agreement, the union does not have the right to be involved in the investigation. Given that the investigation is between the employee and the company, it follows that the union does not have any right to participate in the investigation proceedings.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Apart from being informed of any facts and data concerning them being collected during the investigation, employees involved in the investigation do not have any specific rights. Some companies choose to use external firms specializing in psychosocial risk management, not only to conduct internal investigations, but also to provide additional psychological support for their employees, as part of the employer's safety obligation.

Last updated on 27/11/2023

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Since the conduct of an investigation is different from the administrative disciplinary process, management is given wide latitude for the exercise of the same.

After the employer determines that there are sufficient grounds to support the conduct of a formal administrative process, employees that are the subject of an administrative hearing should be allowed to present evidence to support his or her statements. Further, the employee may also provide affidavits of his or her co-employees consistent with his or her testimony.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Unrelated matters revealed during the investigation do not necessarily mean that another investigation will be opened. Nevertheless, if reprehensible acts unrelated to the current investigation are revealed, the employer will need to take action and sanction the perpetrator (after checking the facts). Sometimes the only way to check the facts is to carry out another investigation on a separate matter. However, the investigation team may also consider if there is enough connection between the matters to widen the scope of the current internal investigation.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

If unrelated matters are revealed because of a workplace investigation, the employer may look into the new matter and then determine whether there are sufficient grounds to proceed with an administrative disciplinary process for the new matter.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The grievance may also have to be investigated (eg, moral/sexual harassment reported by an employee under investigation).

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

If an employee under investigation raises a grievance during an ongoing investigation, the employer must ensure that the employee under investigation is treated reasonably and fairly. Thus, the employer must also give attention to the complaint made by the employee and determine if there are reasonable grounds for the concern of the employee. If the employer determines the validity of the grievance raised, the employer may conduct a separate investigation for it.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The investigation will likely be able to continue with the other employees and, as soon as the employee under investigation returns from sick leave, they will be able to be interviewed.

However, as disciplinary sanctions are time-barred after two months from the moment the misconduct was committed or from when the employer becomes aware of it, if the sick leave lasts for the whole of that period, the investigation must be conducted anyway. In this instance, the investigator can ask the employee to attend the interview despite being on sick leave or arrange for the interview to take place using other means (eg, conference call). As a last resort, a questionnaire can be sent to the employee, but the pros and cons must be assessed as this is a way of information gathering that carries a certain amount of risk, could be less reliable and is of less probative value.

Last updated on 15/09/2022



Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

Since neither consent nor the presence of the employee is material to the conduct of the investigation, his or her absence would not, in practice, imperil the conduct of the investigation.

As previously discussed, because the employer exercises a wide latitude of discretion in conducting workplace investigations, the employer may choose to proceed with the investigation despite the absence of the employee being investigated. Since the proceeding is only in the investigation phase, the statutory right of the employee to be heard is not violated, even if the investigation takes place without his or her participation.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

A criminal investigation always takes precedence over other investigations. However, this does not mean that the internal investigation has to stop. It can and should continue, and the report drawn up upon completion of the investigation could be used by the authorities in the criminal investigation. In some cases, especially when privilege does not apply, police or regulatory authorities may request that the employer share such evidence. However, even when privilege does apply, there is no certainty that the evidence would not have to be communicated to certain authorities.

Some administrative authorities often challenge the application of legal privilege or try to reduce its scope. For example, the French financial markets authority (AMF) regularly puts forward its view of legal privilege, according to which an email where a lawyer is only copied (and is not one of the main recipients) in from one of their clients is not confidential and can therefore be disclosed in proceedings. However, if the AMF investigators impose disclosure of privileged documents, this should result in the annulment of the investigation procedure. By way of exception, legal privilege cannot be invoked against certain other authorities, such as the URSSAF (authority in charge of collecting social security contributions) or the DGCCRF (directorate-general for competition, consumer protection and anti-fraud investigations). Where legal privilege is enforceable, the judge must first determine whether the documents constitute correspondence relating to defence rights and, second, must cancel the seizure of documents that they find to be covered by legal privilege due to the principle of professional secrecy of relations between a lawyer and their client and the rights of defence.

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Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

It is within the employer's discretion to pursue the investigation even if a parallel criminal or regulatory investigation is taking place. As such, different investigations may proceed independently of each other.

However, if the workplace investigation would interfere with or hinder the criminal or regulatory investigation, the workplace investigation should defer to the investigation being conducted by the people in authority. Since the nature of a workplace investigation is highly confidential, the police or regulations cannot compel any evidence from the employer without a court order.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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 told about the outcome of an investigation?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The employee under investigation, like the other employees interviewed and the whistleblower, must be informed that the investigation has been completed. However, there is no obligation to provide them with the report and, for reasons of confidentiality, it is very often best not to do so.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The employee under investigation should be informed of the results of the investigation and the basis of the conclusion. It should be included in the first notice or the notice to explain.

Last updated on 26/01/2023

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022

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



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

There is no obligation to share the investigation report. The findings, or a summary of them without revealing any confidential information, may be disclosed, but it is the employer's responsibility to keep the identity of every person interviewed confidential.

Last updated on 15/09/2022



Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The employer is not compelled to share its investigation report with the employee. However, it would be ideal for the company to keep in its records a comprehensive report that details the findings of the investigation. This would be useful during the administrative disciplinary process when the employee requests to be informed of the substantive grounds for his or her eventual termination.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

Last updated on 15/09/2022

24. What next steps are available to the employer?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The employer can decide to sanction the person who was under investigation or to close the case. The employer may also need to protect any victims, witnesses and whistleblowers. If, during the investigation, it is discovered that a supplier or other commercial partner is implicated, the relevant contract may be terminated. The employer can take legal action, file a complaint (if the company is a direct victim of a criminal offence) or report the offence to the public prosecutor's office. The employer must archive the file or ensure its lawful preservation after a certain period.

Last updated on 15/09/2022



Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

After the investigation has been concluded, the next steps of the employer will depend on the result of the investigation. If there are reasonable grounds to hold the employee for an administrative hearing, the employer may issue a Notice To Explain containing the charges against him or her and allowing the employee to explain his or her side. Otherwise, the employer may terminate the investigation immediately.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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?



France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

The findings must be submitted to the employer or management, but there is no obligation to disclose them to anybody else. The only exception is if a judicial investigation has been opened. In this case, the entire report must be provided to the authorities if the judge requests this. Normally the investigators only take written notes and there is no audio or video recording, unless the employee consents. Whether or not to make a voluntary disclosure of wrongdoing is a tactical decision for companies. Disclosure may mitigate fines and penalties or even help the employer avoid liability entirely. However, the downsides of disclosure include increased costs, the possibility of a follow-on government investigation and exposure to penalties. Thus, most companies assess their options on a case-by-case basis to determine what steps would be in the best interests of the company.

Last updated on 15/09/2022




Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The result of the workplace investigation must be kept private by the employer. These are confidential matters that should not be disclosed to people or entities who did not take part in the investigation. However, if the investigation findings show that a possibly unlawful or criminal activity has taken place, or is about to take place, the employer should share such findings with the authorities.

Last updated on 26/01/2023



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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 Romero/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romero/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?

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

If the outcome of the internal investigation has led to the sanctioning of an employee, this sanction may no longer be invoked to support a new sanction after three years. Moreover, under the GDPR principles, the duration of retention must be proportional to the use of the data. Therefore, the data must be retained only for a period that is "strictly necessary and proportionate". If the employer wants to keep information about the investigation in the longer term, it is possible to archive the employee's record even though the employer will no longer be able to use it against the employee after three years.

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

The outcome of the investigation should only remain on the employee's record for as long as is necessary, but shall not be less than three years as this is the record-keeping requirement under the Philippine Labor Code. If circumstances deem that such a report ceases to have any purpose whatsoever, it should be struck out of the employee's record.

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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

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

France

Author: *Pascale Lagesse, Valentino Armillei*
at Bredin Prat

Within the context of an investigation following a whistleblower alert, any violation of the confidentiality obligation is punishable by two years' imprisonment and a €30,000 fine.

If the employer fails to comply with its obligation to protect its employees' safety, the employer will be liable for damages resulting from any failings during the investigation (eg, if sexual harassment is reported and no action is taken by the employer)

Last updated on 15/09/2022

Philippines

Author: *Rashel Ann C. Pomoy*
at Villaraza & Angangco

An employer may be liable for illegal termination if a dismissal is made based on wrong information collected during the investigation. Thus, the data and information gathered during the investigation stage must be correct and accurate. Further, investigations should be conducted in a manner that is fair and

reasonable to the employee under investigation. Otherwise, the employee may treat the investigation as harassment on the part of the employer, which may subject the employer to a potential lawsuit.

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Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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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Contributors

France

Pascale Lagesse
Valentino Armillei
Bredin Prat

Philippines

Rashel Ann C. Pomoy
Villaraza & Angangco

Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

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