

Workplace Investigations

Contributing Editors

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02. How is a workplace investigation usually commenced?

Hong Kong

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The circumstances in which an employer commences a workplace investigation may vary. However, it is common that an employer will consider it necessary to commence a workplace investigation upon receipt of a complaint concerning a fellow employee. Sometimes, the complaint may be made anonymously. If the employer considers there to be substance in the complaint, it may commence an investigation to find out the truth of the matter, resolve the complaint and, if necessary, improve its systems and controls to prevent the reoccurrence of any misconduct.

A workplace investigation may be warranted if the employer receives an enquiry from a regulator concerning its affairs or an employee's conduct. The investigation findings could enable the employer to respond to the regulator (which could be a mandatory obligation) and at the same time assess its risk exposure.

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



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As discussed in question 11, an employer owes an implied obligation of trust and confidence towards its employees under common law. This means that an employer cannot disregard a genuine complaint made by an employee even if the employee is under internal investigation. The employer may have put in place an employee grievance handling policy, which should be followed when handling the employee's grievance.

If the grievance raised relates to how the workplace investigation is being conducted (for example, it is alleged that the investigator has a conflict of interest or is biased), the employer should consider suspending the investigation until this grievance is properly addressed to ensure fairness. However, if the grievance is nothing but an attempt to delay or hinder the investigation, the employer may be entitled to proceed with the investigation regardless. The employer should therefore carefully assess the nature and validity of any grievance raised in each case. The employer should also consider its rights under the employment contract if the employee is being uncooperative or obstructive.

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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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