

Workplace Investigations

Contributing Editors

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

Poland

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There is no legislation on this area in Poland. However, employers implement internal policies that provide for workplace investigation rules to fulfil certain legal obligations, including those arising directly from labour law.

Based on the currently binding provisions of labour law, an employer must counteract unwanted behaviour in the workplace (eg, bullying, discrimination and unequal treatment). To fulfil this obligation, employers implement internal policies that provide a framework for reporting misconduct and conducting internal investigations. They may freely design the rules of such investigations, within the constraints of their policy. Therefore, it is recommended they create the policy based on the following:

- it should be possible to effectively report the misconduct;
- there should be more than one way to report misconduct;
- anonymous reporting should be allowed;
- an investigation committee should be appointed and be objective;
- rules on excluding persons with a conflict of interest from conducting the investigation should be provided; and
- the report from the investigation should be prepared and signed by all persons participating in the process.

However, work on a bill on whistleblower protections is in progress (the Draft Law). The Draft Law will not determine the rules of workplace investigations but it will force employers to implement a whistleblowing procedure and follow-up on recommendations in the case of a report, including initiating an internal investigation where appropriate. Whether an internal investigation is initiated depends on the assessment of a reported irregularity by the employer.

In addition, employers (especially those that are part of an international group) often already implement internal policies on whistleblowing management and internal investigations. Employers often base their policies on guidelines issued by relevant (usually international) organisations.

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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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02. How is a workplace investigation usually commenced?

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There are no legal requirements in this respect – it depends on the internal policies or practices at a given working establishment. Based on our experience – an internal investigation usually commences with a preliminary assessment of a reported irregularity. If the preliminary assessment leads to a conclusion that a reported situation may be an irregularity, an investigation is launched by appointing a commission or team that conducts the investigation or selecting an investigator. Then, a plan of investigation is established. Depending on the circumstances, the investigation plan may involve a collection of documents or files, their analysis, and interviews with a victim, witnesses or a subject (although the procedure depends on the type of case, internal rules and practice). At the end of the process, the report is prepared by the commission or team with facts established during the process, recommendations, and other suggestions as to the investigated issue.

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



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Polish law does not provide for the suspension of an employee. Instead, an employer may agree with an employee that he or she will be released from the obligation to perform work during a relevant period of investigation (with the right to remuneration). The employer may not do this unilaterally, unless the employee is in a notice period. As an alternative, which is more common in practice, the employer may force the employee to use outstanding holiday leave (subject to limitations provided by law) or the parties may mutually agree on the use of holiday leave or unpaid leave (if the employee has already used his or her holiday entitlement in full).

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



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There are no legal requirements in this regard but it is good practice if the team of investigators or individuals who deal with the case consists of:

- a person who has specific knowledge in a given field (concerning the violation);
- a member of the HR team; and
- a lawyer (it is recommended to engage an independent, external lawyer who can maintain the objectivity of the investigation, especially in complex matters or where a conflict of interest arises or may arise).

It is crucial that the investigators are independent (and they must be allowed to act independently).

Also, certain personal features are useful (eg, the ability to objectively assess a situation, empathy, and managing skills).

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



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This is unlikely. Theoretically, an employee can file a claim against an employer concerning the infringement of personal rights in the course of an investigation and a motion to secure his or her claims, which would consist of an employer being forced to suspend the proceedings, but in practice we have not encountered such a situation.

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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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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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In general, an employee may not be forced to act as a witness, but based on the provisions of the Polish Labour Code, an employee must act for the benefit of a working establishment or employer and perform work in line with the instructions of an employer. A lack of cooperation from an employee (eg, refusing to attend a hearing, hiding facts or even false testimony) may constitute a basis for the loss of an employer's trust in the employee and, as a consequence, may constitute a valid reason for termination (in some specific situations, even without notice).

There is no formal protection for employees who act as witnesses. However, participation in an investigation cannot result in negative consequences (eg, no retaliation is allowed). Also, during an investigation, employees who are bound by professional secrecy are not required to provide information that would imply a breach of such secrecy.

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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](https://www.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](https://www.hrtoday.ch), last visited on 17 June 2022.

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



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If personal data is involved – the rules and principles of the GDPR will apply. If the physical evidence includes e-mail correspondence, files, or an employee's equipment and possessions, the Labour Code will apply (ie, as a general rule, to monitor it, a monitoring policy must be implemented at that working establishment). Such a policy must strictly determine the aim of the surveillance and an employer must only apply surveillance in situations that reflect this aim. Also, when it comes to monitoring correspondence, it must not infringe on the secrecy of the correspondence, which in practice means that the employer should not check employees' private correspondence when checking their business mailboxes.

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



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It depends on whether the employer implemented rules of personal control at the workplace. If yes, such rules are applicable. If not, in our opinion if there is suspicion of a serious violation, it is possible to carry out an ad hoc inspection but its scope should be limited only to necessary activities and should not concern an employee's private files or correspondence, so as not to infringe on personal rights. If there is an ad hoc inspection, an employee should be informed in advance, and it should take place in the presence of the employee or employee's representative, observing the rules of fairness and equity.

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

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In principle, an internal investigation should be conducted in the same way, regardless of whether it is initiated following a whistleblowing report, an audit, or a monitoring result. This includes anything related to confidentiality, fairness, data privacy protection, etc.

If an internal investigation is initiated following a whistleblower report, the main characteristic that is imposed by the EU Directive on the protection of persons who report breaches of EU Law (Whistleblowers Directive) and that will also be available under the Draft Law is for the organisation (employer) to communicate (if practicable) the report to the whistleblower. Furthermore, the whistleblower should receive feedback as to whether follow-up actions were undertaken following the report and, if yes – what actions were taken – and if not – why the follow-up actions were not taken.

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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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10. What confidentiality obligations apply during an investigation?

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The law does not cover this issue, apart from whistleblower regulations, as it should be regulated by the employer in their internal rules. The employer should ensure all participants of the investigation keep information related to it secret, as long as is necessary for the investigation (or even longer, if required by law concerning personal data or other specially protected information). Reputation, personal data and the personal rights of other people cannot be breached during the proceedings and this should be protected.

Moreover, according to the Draft Law – a whistleblower's personal data should be kept confidential. It can only be disclosed if law enforcement authorities require it. Also, confidentiality should be guaranteed for the subject and other interested persons.

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

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There is no specific mandatory information that should be given to an employee who is the subject of an internal investigation. However, it is common practice that he or she must know what the allegations against them are, on what grounds these allegations are formulated and be given a right to discuss these allegations and the evidence or grounds for these allegations.

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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.

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



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Yes.

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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.

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



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Yes, but it may not stop the disclosure of information at the request of relevant law enforcement authorities.

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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.

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14. When does privilege attach to investigation materials?



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In general, findings made and documents established during an internal investigation, including the report thereof, are not covered by privilege per se. It can be claimed that they are covered by the employer's commercial secrecy, but this secrecy is not very well protected from requests of law enforcement authorities. Hence, if prosecuting authorities find a report of an internal investigation or other documents established during an investigation relevant for criminal proceedings, they can ask for them. If they are not produced voluntarily, a search can be performed.

Legal privilege will, on the other hand, cover an internal investigation if it is entrusted to an independent lawyer. Specifically, client-attorney privilege will cover all documents that are established during the investigation by a lawyer.

Under Polish law there is no distinction between legal advice privilege and litigation privilege. Hence, legal privilege will cover the documentation of the internal investigation led by a lawyer regardless of whether the lawyer's involvement is for the purpose of obtaining legal advice or because of ongoing or contemplated litigation.

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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.

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



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This is not regulated by law and it depends on internal procedures or practice at a given working establishment. As a rule, the participation of third parties or proxies is neither a recognised practice nor recommended (according to the principle that the fewer people participate in the investigation, the easier it is to determine the circumstances of the case, the so-called need-to-know rule). However, in certain situations it should be permissible for a proxy (eg, a lawyer) to participate in a meeting with a subject.

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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.

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



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There is no such obligation, unless it is provided for in an internal procedure or, for example, in the applicable collective bargaining agreement. It is neither a recognised practice nor recommended that such persons participate in the investigation.

However, in the event of violations that justify the termination of an employment contract with the employee, the employer should consult with that employee's union about their intention to immediately terminate any employment contract concluded with that person or to terminate, with notice, the employment contract agreed with him or her for an indefinite term, or apply for consent to terminate the employment contract with an employee who is protected by a union.

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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.

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



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They may be supported by, for example, allowing an alternative work environment (eg, remote work to avoid direct contact with people involved in the case). Depending on circumstances of the case, this solution will be offered to the subject or the victim. However, it is important that such actions do not infringe the rights of other people (eg, the subject itself).

Employees may also be sent on leave (by a unilateral decision of the employer – if possible under currently binding law provisions) or the parties to an employment contract may mutually agree to use such leave. Moreover, if the employer thinks it is necessary, they may assign the employee to another job for a period not exceeding three months (only if it does not result in a reduction in the employee's remuneration and corresponds to the employee's qualifications).

Also, depending on the employer's decision – psychological or even legal assistance can be provided by the employer to a whistleblower or a victim.

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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.

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



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It depends on the circumstances of the revealed issue and the employer's compliance culture. Normally, if a new issue is revealed during the investigation, it should be analysed and investigated if appropriate.

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

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It depends on the internal policies in force in the organisation. Most often, it constitutes the basis for separate proceedings.

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

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This may prolong the investigation, as the employee may be unable to participate for a time (if the employee is not able to work, in many cases he or she will not be able to participate in proceedings that requires some level of engagement and psychophysical ability). Also, an employee is protected against termination of an employment contract with notice during sick leave. During such a period, the employer may only terminate his or her employment contract without notice (with immediate effect).

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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.

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

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They can be run in parallel. It is up to the company whether it informs the authority about the ongoing internal investigation.

Based on our experience in criminal matters, a report from an internal investigation may not necessarily be treated as evidence per se, but as a source of information about the evidence.

According to procedural rules stemming from, for example, the Criminal Procedure Code, the authorities can demand to see evidence and documents in the employer's possession that they consider relevant to the conducted proceedings and their subject matter.

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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).

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

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He or she must be given feedback about follow-up actions that were undertaken, or reasons why the follow-up actions were not undertaken.

In any case – the feedback must be adapted to the circumstances of each case so as not to reveal too many details or infringe the other interested parties' rights.

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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.

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



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It does not need to be shared with the employees at all. It may be shared only to the extent such a disclosure will not violate any law, including personal data protection law or personal rights.

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

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24. What next steps are available to the employer?



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It depends on the outcome of the investigation: imposing penalties; reporting to a regulator; notifying a suspected offence or civil claim; termination of an employment contract with or without notice; and

changes to the work organisation. Following the investigation, the employer must make some legal, business or HR corrective actions.

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Switzerland

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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.

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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?

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It depends on the matter. In general, there is no obligation to disclose the report. In some instances, there is an obligation to notify a suspected offence (for example, a terrorist attack or a political assassination). This, however, does not mean there is an obligation to file a report from the internal investigation, but to provide the law enforcement authority with the facts and evidence at the notifier's disposal. In other instances of criminal offences, for example corruption, there is no obligation to notify law enforcement authorities. Therefore, it is up to the organisation to decide whether it will file a notification for a suspected offence.

At the same time, presenting a report from an internal investigation can constitute an element of defence for an organisation if a regulatory authority initiates proceedings regarding a failure by the organisation to comply with regulatory obligations.

Records of interviews do not need to be produced for the case file provided the law enforcement authority does not ask for them.

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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 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.

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

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Neither Polish law nor the Draft Law specifically provide for a mandatory period during which the outcome of the investigation should be kept on the employee's record.

At the same time, the Draft Law indicates that the register of whistleblowing reports, which should also contain information about follow-up actions undertaken as a result of the report, should be kept for 15 months starting from the end of the calendar year in which the follow-up actions have been completed, or the proceedings initiated by those actions have been terminated.

Also, while determining how long the outcome of an internal investigation should be kept, additional legal considerations can be taken into account, especially data privacy.

The GDPR does not specify precise storage time for personal data. The employer must assess what will be an appropriate time for storage of the data, taking into consideration the necessity of keeping personal data concerning the purpose of the processing in question. Employees' personal data should be kept for the period necessary for the performance of the employment relationship and may be kept for a period appropriate for the statute of limitations for claims and criminal deeds. A longer retention period may result from applicable laws. Following the Regulation of the Minister of Family, Labour and Social Policy on employee documentation, the employer may keep a copy of the notice of punishment and other documents related to the employee's incurring of disciplinary responsibility in the employee record.

There are different retention periods for the data contained in employee files:

- 10 years if the employee was hired on or after 1 January 2019;
- if the employment relationship began between 1 January 1999 and 1 January 2019, the retention period is 50 years, but may be reduced to 10 years if the employer provides the Polish Social Insurance Institution with certain mandatory information; and
- for 50 years if the employee was hired before 1 January 1999. It does not matter whether the person is still working or not.

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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.

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

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If any untrue allegations were made by an employer against an employee without checking them beforehand, there is a risk that such an employee would claim damages eg, for infringement of personal rights or even filing a private indictment for defamation or outrage.

Certainly, an employer must be aware that one must never behave in a way that, for example, in the employee's opinion, could constitute a form of blackmailing or deprivation of liberty. A problem may also arise when accessing the employee's correspondence, especially when access is made to documents or private correspondence. The Draft Law provides for several criminal offences related to, for example, preventing reporting, using retaliatory measures against a whistleblower or disclosing personal data of a whistleblower).

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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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