

# Workplace Investigations

## Contributing Editors

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

## 14. When does privilege attach to investigation materials?

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

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

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<sup>[1]</sup> 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

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

### Switzerland

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

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

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<sup>[1]</sup> 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

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



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

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.<sup>[2]</sup> 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.<sup>[3]</sup> 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.<sup>[4]</sup>

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.<sup>[5]</sup> 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<sup>[6]</sup>).<sup>[7]</sup>

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[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.

Last updated on 15/09/2022

## Contributors



### Switzerland

Laura Widmer

Sandra Schaffner

*Bär & Karrer*

[www.internationalemploymentlawyer.com](http://www.internationalemploymentlawyer.com)