

Labour & Employment

Global Snapshot on Workplace Investigations




















Whether it's an employee "blowing the whistle", allegations of bullying, harassment or discrimination, potentially fraudulent conduct by a supplier or claims of regulatory or health and safety breaches, we have continued to see a significant number of companies seeking advice on how to handle workplace investigations.

Workplace investigations can be complicated, time-consuming and a significant distraction for any business. Furthermore, the manner in which a business handles an investigation can attract as much scrutiny from internal and external stakeholders (if not more), as the alleged wrongdoing that led to the investigation in the first place. It is therefore critical that companies are aware of when a workplace investigation should be triggered, what a "good" investigation looks like and their duties and obligations in relation to such investigations.

In this updated version of our global guide, we set out the key questions that employers are likely to have in relation to workplace investigations and lawyers from our global Labour & Employment team provide outline answers to these questions for their particular jurisdiction.

Please note that this guide is a high-level overview only and should not be regarded as a substitute for legal advice. It sets out the position as of 7 October 2024. We recommend that you always check the latest position with your local labour and employment lawyers.

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In what circumstances might it be necessary to conduct a workplace investigation?

A workplace investigation might be necessary in any situation where the employer needs to establish the facts. Typical examples include:

- Where an employee lodges a grievance containing allegations of bullying, harassment, discrimination, etc
- Where the employer needs to determine whether disciplinary action is warranted, e.g. if there are performance or disciplinary issues
- Where an employee raises a whistleblowing complaint, e.g. allegations of a legal, regulatory or health and safety breach

What is the role of an investigator?

This is usually to establish what has happened, to collate evidence and to report the findings so that a decision can be made about next steps.

Typically, an investigation deals only with establishing the facts and not with determining what should be done about them, or what they mean as a matter of law. However, some investigators are also asked to provide non-binding recommendations to the employer. It is rare that they are instructed also to make any final and binding decisions.



Five Key Issues to Consider When Conducting a Workplace Investigation

1. **Scope and objectives** – It is important that the employer obtains a clear understanding of the specific factual issues it needs to determine and appoints the right investigator. A misstep, even at this early stage, could derail or undermine the whole process. In some circumstances, it may be appropriate to appoint an external investigator to maintain the integrity of the investigation. Clear terms of reference are essential.
2. **Evidence** – What evidence needs to be collected? Which individuals need to be interviewed? When identifying witnesses, it is important an investigator does not just speak to those individuals who will support or deny a particular version of events. It is important to look at both sides.
3. **Reporting the investigator's findings** – Are the allegations proven, disproved or are the findings inconclusive? The investigator's report should set out the findings based on the facts. Consider what action should be taken in response to the findings. The action (or perceived lack of action) taken in response to the findings from an investigation is important and will face scrutiny from the company's stakeholders, from employees and customers to regulators and shareholders.
4. **Confidentiality** – The details of an investigation should be kept confidential wherever possible. Companies should however be aware that any evidence collated as part of the investigation may need to be disclosed at a later stage, whether as part of court proceedings, in response to a data subject access request, to a regulator, etc. Consideration should be given to data privacy issues, as well as whether the investigation can be conducted under legal professional privilege.
5. **Consequences** – The stakes have never been higher when it comes to workplace investigations – not only doing the right thing but being seen to do the right thing. A failure to carry out a reasonable investigation can make any subsequent decisions or actions unfair, leaving the company vulnerable to legal action and/or negative publicity.



Australia

1. Who should carry out a workplace investigation?

Workplace investigations may be conducted internally or externally. In some instances, it may be preferable to appoint an external investigator where there are insufficient internal resources or experienced personnel to conduct the investigation, the matter is complex, the allegations are against a senior employee, there is the potential for an allegation of bias or it is considered essential for the investigation report to be subject to legal privilege. To avoid any allegations of conflict or bias in any later employment proceedings, it is generally recommended that external investigations be conducted by a third-party, not by an employer's external legal counsel, who will commonly be instructed to provide legal advice to the employer's decision-maker on the investigation findings, but there can be some exceptions to this.

2. What is the required standard of proof in a workplace investigation?

The standard of proof required is the balance of probabilities. This requires the investigator to determine whether it is "more probable than not" (i.e. more than 50% probability), that the alleged event(s)/conduct occurred. This may require the investigator to compare competing versions of events from various parties and witnesses to determine which version is more probable.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings, but it is good practice to offer this, particularly to the complainant.

If an employee requests to have a support person present during any investigatory meetings, an employer should not unreasonably refuse this request. It is generally considered that the role of the support person is to provide the employee with emotional support. They can also ask clarifying questions or request a break in the meeting, but they are not to act as the employee's advocate or speak on the employee's behalf (unless the employee is unable to do so, for example, due to a disability). If the employee has language difficulties, it may be necessary for an interpreter to assist the employee in meetings. It is appropriate for the employee and their support person to be informed or reminded of the role of the support person.

4. Are documents created during a workplace investigation protected by legal privilege?

Only documents created by an employer, the employer's lawyer or a third-party for the dominant purpose of legal advice, or in preparation of anticipated litigation are protected by legal privilege.

To enable the investigation report to be protected by legal privilege, it is recommended that the investigator be directly engaged by the employer's external lawyers for the purpose of allowing the lawyers to provide the employer with legal advice.

If an employer wants to maintain legal privilege over certain investigation documents (such as an investigation report which contains findings), it is recommended that all communications relevant to the investigation are labelled "Confidential and subject to legal professional privilege". However, employers should note that a document will not be privileged simply because it is marked as such, and that not all communications between a lawyer and a client are covered by legal professional privilege. Disclosures about the substance of a report can also waive privilege. This is a complex area and advice should be sought.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Investigations should always be conducted as confidentially and discreetly as possible. However, generally, no complainant, respondent or witness should be guaranteed confidentiality or anonymity as this may not be reasonably practicable.

The Privacy Act 1988 (Cth) (the "Act") governs the way in which certain organisations (those with an annual turnover of AUD\$3 million or more) handle personal information. Personal information is often collected, used and disclosed as part of the investigation process. It may be information already held by the employer and then used in the investigation or it may be new information collected throughout the course of the investigation.

Employee Record Exemption – As a starting point, employee records are not covered by the Act and employers are not required to handle employee records in the same way as other records of personal information are handled, as long as the record is being used in the course of the employee's employment. An employee record means a record of personal information relating to the employment of the employee, including information about discipline, performance and conduct. The investigation may however involve parties who are not employees and in respect of those individuals the Act will still apply.

Best practice is to ensure that any documents prepared during the investigation are stored confidentially in an appropriately secure human resources information system (or similar).

6. How long should a workplace investigation take?

The duration of a workplace investigation will depend on the seriousness of the matter, complexity, urgency and availability of the parties and any key witnesses.

The investigation should be conducted as soon as practicable and be conducted efficiently, discreetly and thoroughly. Significant delay in an investigation process could constitute a lack of procedural fairness to the accused employee, complainant and/or other witnesses. Such delay could also be considered by a court or tribunal to amount to condonation of the conduct being investigated. Typically, investigations can last one to four weeks, however more complex investigations (e.g. allegations of employee fraud) may take longer.

7. Is a complainant entitled to see the investigator's report?

Generally, no. It is recommended that a complainant only be advised of the investigation findings and outcomes as they relate to them. Providing a copy of the investigator's report or a substantial (or even a small) part of the report may result in any legal privilege being waived (if legal privilege is claimed) and/or increase the risk of potential claims by the complainant.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of ensuring that any action taken in respect of a complainant or accused employee is done in a procedurally fair way. An inadequate or unfair investigation can give rise to claims under the common law and statute including:

- Unfair dismissal under applicable state or federal employment legislation (if there is no valid reason for dismissal or the investigation process is flawed)
- Discrimination under state or federal anti-discrimination legislation or federal employment legislation (if the way in which the investigation is conducted is in itself discriminatory)
- General protections claim under federal employment legislation (noting that there have been cases in which the investigation itself was found to have constituted adverse action) if "adverse action" was taken because an employee exercised or purported to exercise a "workplace right"
- Victimisation under state or federal anti-discrimination legislation or federal employment legislation
- Breach of contract (if an employer's policy requires an investigation be undertaken a certain way and the policy forms part of the employee's employment contract)

9. What records should an employer keep?

An employer should keep records of all documents relating to the workplace investigation, including the investigative report and details of meetings and interviews undertaken. These documents should be placed on the relevant parties' personnel files (subject to there being any documents over which legal privilege is being claimed, which should be stored confidentially).

As certain types of employment-related claims can be brought up to six years after the conduct complained of; it is recommended that records relating to investigations are held for six years following the termination of an employee's employment.

10. Other points to consider

Not all workplace incidents and allegations require formal investigation. It is important to determine at the outset whether the circumstances warrant an investigation, whether the employer's policies place a legal obligation on the employer to investigate and whether any specific process is required to be followed. Certain complaints can, for instance, attract the whistleblower protections under the Corporations Act 2001 (Cth), which will dictate particular investigation protocols. Advice should therefore be sought when a complainant asserts to be a "whistleblower" to ensure compliance with the Corporations Act 2001 (Cth), if necessary.

Contact



Nicola Martin
Partner, Sydney
T +61 2 8248 7836
E nicola.martin@squirepb.com



Belgium

1. Who should carry out a workplace investigation?

Workplace investigations may be conducted internally or externally. Although less common, it may in some instances be preferable to appoint an external investigator where there are insufficient internal resources or experienced personnel to conduct the investigation, the matter is complex, or the allegations are against a senior employee. To avoid any allegations of conflict or bias in any later employment proceedings, it is generally recommended that external investigations be conducted by a third-party, not by an employer's external legal counsel, who will commonly be instructed to provide legal advice to the employer's decision-maker on the investigation findings.

2. What is the required standard of proof in a workplace investigation?

There is no statutory standard of proof for internal investigations. In relation to investigations of serious wrongdoing at the workplace and the potential legal implications for employees under investigation and considering the very high standards that employment tribunals apply for proof of employees' wrongdoing, we advise that employers apply the criminal law test "beyond all reasonable doubt".

3. Are employees entitled to be accompanied at any investigatory meetings?

There is no general rule in this regard, and very few industry-level provisions award such a specific right (e.g. the banking sector), but it is generally considered that an employee may request to be accompanied by a member of the union delegation during investigatory meetings.

4. Are documents created during a workplace investigation protected by legal privilege?

Documents and emails created during a workplace investigation are covered by legal privilege if they contain or reflect legal advice provided by external legal counsel.

Communications and documents prepared by internal legal counsel (if they do not have the protected status of "company lawyer" ("*bedrijfsjurist*" / "*juriste d'entreprise*")) are not protected by legal privilege.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR. Specific elements to consider are the obligation of data minimisation, the data subject right to information and the fact that the investigation may point towards criminal activities, which are considered a special category of data under the GDPR.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the time required to obtain the necessary information, the number of witnesses that need to be spoken to, etc.

Case law on termination for cause requires that an investigation should be completed as quickly as practicable, but it also needs to be sufficiently thorough to be fair and reasonable.

7. Is a complainant entitled to see the investigator's report?

Generally, no. It is recommended that a complainant only be advised of the investigation findings.

Under whistleblowing legislation, the whistleblower is allowed to receive a certain amount of feedback. Furthermore, if the complainant files a data subject access request, they will also be entitled to receive a (redacted) copy of the report.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Rejection of the termination for cause arising from the investigation – If certain elements of the investigation are rejected, there may no longer be sufficient proof of the alleged wrongdoing
- Unfair dismissal claims – In disciplinary cases, if an investigation is flawed, this can render any subsequent dismissal unfair
- Discrimination claims – If the way in which the investigation is conducted is in itself discriminatory
- Criminal claims – For example where the investigatory measures are an infringement of criminal laws (e.g. the Telecommunications Act)

9. What records should an employer keep?

Pursuant to the GDPR, the employer can only retain data which is strictly necessary for the purpose of the investigation, and these records can be kept only for a limited duration, i.e. until the investigation is completed and/or the judicial procedure that eventually follows the investigation is completed (if any).

10. Other points to consider

Belgian law has specific rules on investigations regarding so-called psychosocial risks (including harassment in the workplace) in which case the investigation is to be conducted by the (external) prevention adviser.

Following implementation of the Whistleblowing Directive by the Belgian legislator, whistleblowers are entitled to receive acknowledgement of receipt of their report and feedback on the investigation within strict deadlines. Furthermore, whistleblowers and witnesses in the investigation will enjoy protection against dismissal and other retaliatory measures taken in relation to the whistleblower's report.

Contact



Marga Caproni

Partner, Brussels

T +322 627 7620

E marga.caproni@squirepb.com



Brazil

1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator or a team of investigators, i.e. a manager, member or members of the HR team, or members of the compliance team, depending on the structure of the company and the severity/complexity of the investigation.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer lacks the internal capacity to deal with a complaint, where the investigation involves sensitive matters, etc.

Whether internal or external, the investigator should be as independent as practicable and hold the seniority required to collect and evaluate the evidence effectively.

Those directly or indirectly involved in the investigation or who could potentially be affected by its outcome should not be responsible for conducting the investigation.

2. What is the required standard of proof in a workplace investigation?

There is no standard for workplace investigations, but it must adhere to legal boundaries and the employer's related policies.

The evidence required to substantiate any alleged misconduct by an employee will vary based on the seriousness of the alleged misconduct. However, all investigations should prioritise swiftness, confidentiality, and the well-being and reputation of everyone involved in the investigation, including the accuser, the accused, and any witnesses.

As the assessment of the Labour Courts when judging an employee's claim of unfair termination for cause will be more demanding (as the terminated employee's severance would be significantly impacted), the investigation must gather robust evidence on the misconduct to support a potential termination for cause, where applicable.

3. Are employees entitled to be accompanied at any investigatory meetings?

It is not mandatory by law. In most circumstances, as it is an internal proceeding and not a legal lawsuit, employees are not accompanied at most investigatory meetings. However, the employee has the right to be accompanied by their own lawyer if they deem necessary. Also, depending on the scope of the investigation, it is possible to evaluate the convenience/need of the employee to be accompanied at the investigatory meetings.

4. Are documents created during a workplace investigation protected by legal privilege?

As a rule, documents produced by in-house counsel or external attorneys and communications between client and attorney for the purpose of legal advice in the context of the internal investigation are protected by legal privilege (e.g. email exchanges with attorneys, investigation reports and plans, interview minutes with the attorneys' impressions, etc.).

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes. Employers must comply with their obligations under Brazil's applicable privacy and data protection laws, especially Law 13,709/2018 (Brazilian General Data Protection Law), observing its mandatory and recommended practices, including, without limitation: (i) use only the data strictly necessary for the investigation; (ii) ensure a valid legal basis for processing personal data involved (e.g., legitimate interest or fraud prevention); (iii) implement transparency measures regarding the data processing while maintaining necessary confidentiality (e.g. reference in privacy policies); (iv) retain personal data as long as needed to fulfil legal or regulatory obligations or to support the employer's rights in potential litigation; (v) establish security protocols to protect personal data from unauthorised access; (vi) provide a channel for employees to exercise their rights as data subjects; and (vii) include the data processing related to the investigation in the employer's Record of Processing Activities (RoPA).

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation, but the investigation must be initiated as soon as the company is aware of any potential misconduct, whether through a formal or informal complaint. The length of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, and other factors. Once initiated, the investigation must be completed as quickly as possible so that the company can promptly apply any disciplinary measures resulting from the investigation.

7. Is a complainant entitled to see the investigator's report?

No, there is no statutory requirement that the complainant see the investigation report, and it is generally not best practice to show them. The report, as well as the entire internal investigation, must be treated with confidentiality, especially as it may contain restricted and personal information, conclusions, and recommendations, which may also include disciplinary measures.

8. What claims may an employer face if it does not handle a workplace investigation properly?

A workplace investigation is usually conducted for employee disciplinary purposes. If an employer does not handle the investigation properly, the highest risk an employer may face is a wrongful employment termination claim. In disciplinary cases, where an employee is terminated for cause, if an investigation is flawed, an employee may assert that the termination is a wrongful/unfair/discriminatory termination and require reinstatement and/or indemnification for moral damages.

Inappropriate or inefficient conduct of an investigation in the workplace may also discourage employees from reporting situations that may be subject to investigation, which will ultimately harm the work environment.

9. What records should an employer keep?

Employers should keep all notes, supporting documents, interviews and any reports related to an investigation as well as any supplemental disciplinary records or documentation. This is important in the event that the conclusion or process of an investigation ever becomes the subject of a legal action.

Additionally, it is always important to retain records in the event the investigator is an internal employee who ends up leaving the company and should the company require access to this information.

Records related to an investigation should be kept in a secure place with confidentiality.

10. Other points to consider

Companies should maintain up-to-date policies and reporting channels available to the employees, ensuring that the employees are aware of the existence of such policies and channels. In particular, policies and/or handbooks should outline company procedures for complaints, including the company's and management's duties to report specific violations, no retaliation against complainant, etc.

Contact



Jose Martin

Of Counsel, Regional Lead for Latin America

T +1 305 577 2816

E jose.martin@squirepb.com



China

1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager, member of the HR team, etc.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior or where the employer does not have the internal capacity to deal with a complaint, etc.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused).

2. What is the required standard of proof in a workplace investigation?

The standard for workplace investigations is “the preponderance of the evidence” – whether it is more likely than not that the act did occur.

3. Are employees entitled to be accompanied at any investigatory meetings?

No, it is not mandatory by law. In most circumstances, for confidentiality concerns, employees are not accompanied at most investigatory meetings.

Employers should check their own policies and procedures.

4. Are documents created during a workplace investigation protected by legal privilege?

No.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the Personal Information Protection Law.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

7. Is a complainant entitled to see the investigator's report?

No, there is no statutory requirement that the complainant see the investigation report, and it is generally not best practice to show them. The report may contain findings that contain personal and/or information confidential to the company or other employees, including disciplinary or termination details.

The company should check in with the complainants during the investigation, to let them know that the investigation is ongoing and when it has concluded. In reporting that the investigation has concluded, the company may advise regarding whether claims have been substantiated and provide a high-level summary as appropriate.

8. What claims may an employer face if it does not handle a workplace investigation properly?

A workplace investigation is usually conducted for employee discipline purposes. If an employer does not handle the investigation properly, the highest risk an employer may face is a wrongful employment termination claim. In disciplinary cases where an employee is terminated for cause, if an investigation is flawed, an employee may assert that the termination is a wrongful termination and require double severance or reinstatement.



9. What records should an employer keep?

Employers should keep all notes, supporting documents, interviews and any reports related to an investigation, as well as any supplemental disciplinary records or documentation. This is important in the event that the conclusion or process of an investigation ever becomes the subject of a legal action.

Additionally, it is always important to retain records in the event the investigator is an internal employee who ends up leaving the company and should the company require access to this information.

Records relating to an investigation should be kept in a secure place with confidentiality.

10. Other points to consider

Companies should maintain up-to-date policies. In particular, policies and/or handbooks should outline company procedures for complaints, including the company's and management's duties to report specific violations, no retaliation against complainant, etc.

Contact



Julia Yeo

Partner, Regional Lead for Asia

T +65 6922 8671

E julia.yeo@squirepb.com



Czech Republic

1. Who should carry out a workplace investigation?

There is no legal obligation to appoint an external investigator, but for employment-related workplace investigations that potentially carry serious consequences, an external investigator is usually chosen.

It is also appropriate to appoint an external investigator where technical expertise is required, if any of the parties are particularly senior, in cases of suspected serious misconduct where there is a risk of triggering an obligation to report to the criminal authorities or in any other cases where the employer seeks to apply legal privilege (described in greater detail below), etc.

Any internal or external investigator should be independent so far as practicable. If the investigation is initiated based on a whistleblower's tip, an appointed designated person should handle the investigation.

2. What is the required standard of proof in a workplace investigation?

There is no statutory standard of proof for internal investigations. In relation to investigations of serious wrongdoing at the workplace and the potential legal (civil, administrative or even criminal) implications for employees under investigation, we would conservatively tend to apply the criminal law test "beyond all reasonable doubt".

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings, but it is good practice to offer this, particularly to the complainant. Employers should check their own policies and procedures.

4. Are documents created during a workplace investigation protected by legal privilege?

Documents and emails created during a workplace investigation are covered by legal privilege if they contain or reflect legal advice provided by external legal counsel.

Communications and documents prepared by internal legal counsel (if they are not an attorney-at-law) are not protected by legal privilege.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR when processing personal data of their employees or third persons. Also, note that consent from an employee to their employer is not often seen as a sufficient legal basis for processing employee personal data so another legal basis is required (in most cases the employer's legitimate interests should apply).

6. How long should a workplace investigation take?

The only field with an investigation timescale is currently investigation of whistleblowing complaints. The new Act on the Protection of Whistleblowers requires the investigator to conclude the investigation within 30 days of receiving a complaint (this deadline can be extended twice, each time for an additional 30 days).

Otherwise, there are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses that need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

Employers should ensure they comply with any suggested or required timescales set out in their own policies and procedures, or at least notify the relevant parties with reasons in writing if that timetable seems likely to slip.

7. Is a complainant entitled to see the investigator's report?

Under the bespoke whistleblowing laws, the complainant must be informed about the results of the investigation within the aforementioned deadlines. Otherwise, the answer will generally be no.

It is possible with the employer's consent. It should be remembered that disclosing the investigator's report might affect the employer's position in possible future criminal proceedings. In that context, it would be advisable to keep the report confidential and not disclose it to any employee, including the complainant.

Protection of personal data and privacy of third-parties (e.g. other employees) must be taken into account prior to disclosing any documents to the complainant.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Unfair dismissal claims – In disciplinary cases, if an investigation is flawed, this can render any subsequent dismissal unfair
- Breach of contract claims – A failure to follow any contractual arrangements or procedures could result in a possible breach of contract claim
- Discrimination claims – If the way in which the investigation is conducted is in itself discriminatory
- Whistleblowing claims – Failure to comply with the obligations under the Act on the Protection of Whistleblowers may result in sanctions from state authorities
- Fines from labour inspection authorities and other state authorities
- Criminal claims.

A lack of internal investigations and internal reports summarising the findings may lead the police to a conclusion that the employer's internal compliance processes are not functional or that they are "just on paper". This would likely have adverse consequences for the employer's legal position in any criminal investigations or proceedings.

9. What records should an employer keep?

Employers should always keep records of any workplace investigations in case their approach is subsequently challenged. They should be aware of their data protection obligations in terms of what they retain, how long for, etc. Companies are obliged to keep records of any whistleblowing cases for a period of five years. Furthermore, it is advisable to share an investigator's reports with legal and compliance departments of the company in order for them to review the investigator's findings and, if necessary, adjust internal corporate processes accordingly.

10. Other points to consider

When dealing with disciplinary or grievance investigations, investigators should familiarise themselves with labour and employment legislation, including anti-discrimination laws, the Act on the Protection of Whistleblowers, personal data protection laws and all applicable employer's internal regulations. They should also be familiar with the company's own internal policies and procedures.

Contact



Sabina Krajičková

Of Counsel, Prague

T +420 221 662 262

E sabina.krajickova@squirepb.com



France

1. Who should carry out a workplace investigation?

In most circumstances, the person in charge of any investigation is an employee of the company. Their identity depends on the subject matter of the investigation:

- In most cases, in practice, it is the HR department or the (Chief) legal officer who is appointed internally.
- Staff representatives can ask to conduct an internal investigation and in a limited number of cases this cannot be refused: harassment in the workplace (when a claim is brought to the staff representatives' knowledge) and occupational accidents. The fact that staff representatives carry out an investigation does not prevent the employer from conducting its own investigation.
- For whistleblowing allegations, the allegations must be brought to the attention of a specific person designated by the employer. The Whistleblowing Directive requires the designation of an impartial person or department competent for following up on the reports. Whistleblowing allegations must be investigated under strict confidentiality rules (especially regarding the identity of the whistleblower) and data shared on a need-to-know basis.

According to the CNIL (French data protection authority), "the persons responsible for the collection and processing of professional allegations are limited in number, specially trained and are bound by a reinforced contractual confidentiality obligation".

An external investigator can also be appointed in specific contexts, e.g. to avoid any allegations of conflict of interest, where specific technical expertise is required or when the staff representatives have requested this.

2. What is the required standard of proof in a workplace investigation?

There is no legal provision defining the "required standard of proof" in workplace investigations.

Practically speaking, the required standard of proof is more probable than not that the alleged event/misconduct took place.

The investigator must make their own assessment of the situation by analysing any competing evidence provided by the parties.

3. Are employees entitled to be accompanied at any investigatory meetings?

It depends on the context.

Generally speaking, no. There is no systematic right for employees to be accompanied at an investigatory meeting. Equally, there is no obligation on employees to cooperate with the investigator, especially if the latter is the usual legal counsel of the employer. Interviews are carried out on a voluntary basis. Consequently, the interview can be interrupted at any time.

By way of exception, yes, in the following circumstances: Employees are entitled to be accompanied by a lawyer during investigatory meetings if the investigation is conducted by the usual legal counsel of the employer, and if the legal counsel believes that an employee who is about to be interviewed will be charged for an alleged event or misconduct. In these circumstances, the employee under investigation must be informed that they have the right to be accompanied by a lawyer.

4. Are documents created during a workplace investigation protected by legal privilege?

That depends on the context:

- Documents, correspondence and any other exchanges between a person involved in the investigation and their legal counsel are protected by legal privilege
- Other documents are confidential, but this confidentiality is not equivalent to "legal privilege", as they can be disclosed to third parties who have the authority (such as labour inspection, etc.)

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, the CNIL published in December 2019 a reference document relating to the processing of personal data intended for the implementation of a whistleblowing system. Many of the solutions proposed can be applied to the internal investigation.

The CNIL's reference document was updated on 24 July 2023, following France's transposition of the Whistleblowing Directive, which took place in March 2022 followed by decrees in October 2022 for full implementation.

Please also see the answer to question 9.

6. How long should a workplace investigation take?

As a general rule, the timeframe for the investigation is set out in the investigator's employment contract or engagement letter.

For example, pursuant to Article 1.2 of the Annex XXIV, Vademecum of the Legal Counsel in charge of workplace investigations, it is a fixed-term agreement that specifies all elements of the assignment.

The timeframe should consider:

- The urgency of the matter and degree of flexibility timewise.
- The effectiveness and reliability of the means employed.
- The volume of the scope of work.
- The nature of the assignment.
- The nature of the alleged event/misconduct.
- The limit to the privacy of the persons involved in the investigation. For example, the time available to interview or collect information from the relevant employees in their place of work.

In disciplinary matters, the employer has two months from knowledge of the facts to start a disciplinary procedure. Moreover, the employer has only one month after the day fixed for the pre-dismissal meeting to decide whether and how to sanction an employee and notify it to them. Practically speaking, this means that the investigation may have to be very quick in some specific disciplinary matters.

7. Is a complainant entitled to see the investigator's report?

The investigator's report is normally only disclosed, for confidentiality and professional secrecy reasons, to the employer and the appointing parties.

However, if the investigator is a legal counsel that has been acting as an expert or compliance officer, they are obliged to give a copy of the complainant's statement to the appointing parties.

Under whistleblowing legislation, the whistleblower is allowed to receive a certain level of feedback.

8. What claims may an employer face if it does not handle a workplace investigation properly?

Employers are most likely to face claims of:

- Breach of their legal obligation of workers' health and safety
- Unfair dismissal or dismissal considered as null and void
- Damages for discrimination/harassment
- Invasion of privacy

In addition, this may provide additional grounds for a whistleblower to make an external or public report.

9. What records should an employer keep?

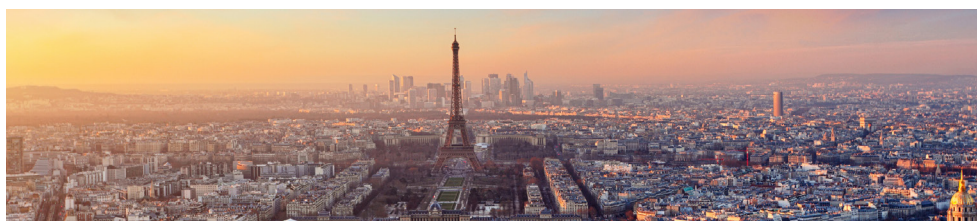
Pursuant to the GDPR, the employer can only retain data which is strictly necessary for the purpose of the investigation, and these records can be kept only for a limited duration, i.e. until the investigation is completed and/or the judicial procedure that eventually follows the investigation is completed (if any). Following the procedure, the records can be kept in archive until the end of the statute of limitation of the relevant claim.

Where a whistleblowing report is not followed by any sanction or adverse finding, the data has to be destroyed or archived after anonymization, within two months of the end of the investigation, or immediately if it is decided not to carry out an investigation.

10. Other points to consider

French labour law sets up a specific framework for disciplinary procedures, which must be taken into account when conducting workplace investigations. For example, the employer must comply with legal deadlines while conducting the investigation in the context of a disciplinary procedure.

Care should be taken when asking questions as part of the investigation. For example, questions asked to interviewed employees should not focus on accusing the person against whom issues have been alleged. They should include open questions to enable those being interviewed to be free to express themselves.



Contact



Pauline Pierce

Partner, Paris

T +33 1 53 83 73 91

E pauline.pierce@squirepb.com

Germany

1. Who should carry out a workplace investigation?

In most cases, in practice, it is the HR department or the (Chief) legal officer who is appointed internally. Depending on the specific allegation, it may also be advisable that management is involved in carrying out such an investigation.

Under the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*) employers are obliged to install a “complaints department” (*Beschwerdestelle*) in the firm. This complaints department handles complaints from employees when they feel discriminated against in connection with their employment relationship by their employer, superior, another employee or third-party on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

Under the Whistleblower Protection Act (*Hinweisgeberschutzgesetz – WPA*), employers are obliged to set up a complaints department which is compliant with the requirements of the Act. The WPA complaints department must investigate a range of reports, including all violations of German criminal law, as well as breaches of occupational health and safety regulations or violations of the German Minimum Wage Act. Other areas of German and EU law are also covered, for example money laundering.

2. What is the required standard of proof in a workplace investigation?

There is no legal provision defining the “required standard of proof” in workplace investigations. However, when the investigation results in employment sanctions, such as a dismissal for cause and such a matter becomes contentious before a Labour Court, the employer bears the full burden of proof that the high requirements for a dismissal are met.

3. Are employees entitled to be accompanied at any investigatory meetings?

Currently, there is no such statutory obligation. However, depending on the specific circumstances, it is highly recommended or even required that employees are offered the opportunity to bring a lawyer or a works council member to attend an investigatory meeting. Further, the employer should inform employees in detail of the accusation and provide full information regarding the investigation process prior to an investigatory meeting. The reason for this is that such an investigatory meeting could be considered a formal hearing which is required when implementing a dismissal based on “severe suspicion”.

It is possible to dismiss an employee based on “severe suspicion”, i.e. without definite proof of an incident (*Verdachtskündigung*), simply because the suspicion itself constitutes a “compelling reason”. This, however, requires that a formal hearing takes place taking into account the requirements spelt out above. Therefore, if in doubt about whether the investigatory meeting will result in employment sanctions, we would recommend complying with the requirements for a formal hearing.

4. Are documents created during a workplace investigation protected by legal privilege?

The concept of legal privilege is not completely transferable to Germany. However, according to Sec. 43a of the Federal Code for Lawyers, a lawyer is bound to maintain confidentiality. This means that in practice all documents, correspondence and any other exchanges between a person involved in the investigation and their legal counsel are protected by legal privilege.

Note that court proceedings are generally public in Germany, even if the subject of the court proceeding involves a confidential aspect of an internal investigation. Therefore, while it is possible to redact certain documents in court proceedings, in court the parties can be required to disclose such information.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, absolutely. Despite the undeniable tension between effective internal investigations and an employee’s privacy, case law since the entry into force of the GDPR and the German Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*) has clarified that compliance with data protection should not mean protection for offenders. However, if email screening, forensic PC evaluations or other data analyses are carried out, personal data within the meaning of the GDPR is collected, recorded, processed and stored.

If employee data is collected in the investigation process, the employer should have the employee expressly consent to the collection. Without corresponding consent, the collection of data in an employee interview is only permissible under the conditions set out in Sec. 26 of the BDSG, which lists criminal offences or suspicion of criminal offences. Sec. 26 of the BDSG is to be interpreted broadly and the collection of data only requires an initial suspicion.

However, this must go beyond vague indications or uncertain conjecture by third parties.

If a report is covered by the WPA, the identity of the whistleblower must be kept confidential, as well as any individuals who are the subject of the report or mentioned in it.

6. How long should a workplace investigation take?

There is no statutory time limit for conducting a workplace investigation. In the case of a dismissal for “cause” the notice of termination must be received by the employee within two weeks of the employer becoming aware of the misconduct, for example by finishing the investigation. This is a statutory requirement that cannot be “extended” discretionarily. If, due to the complexity of the alleged misconduct, an investigation period of more than two weeks is required, the above two-week period can be extended. The law does not specify by how much time the investigation can be extended. If an extension is required, the employer must do its best to speed up the process. If the employer takes too long to complete the investigation, then a “cause” dismissal may no longer be possible, although an ordinary dismissal might be justified depending on the outcome of the investigation. To mitigate this risk, all steps of the process should be mapped and tracked.

If a report falls within the WPA, the reporting office must follow a mandatory timeline: The internal reporting office is required to confirm receipt of the whistleblower’s report within seven days of receipt. Additionally, they must provide the whistleblower with feedback within three months of confirming receipt of the report.

7. Is a complainant entitled to see the investigator’s report?

Generally, this is not the case. However, if a complaint is lodged via the complaints department under the AGG, the result of the investigation must be communicated to the complainant. The complaints department may disclose to the employee the findings collected during the review. This may also be done informally.

For WPA reports, a response must be provided to the whistleblower within three months, including a description of any follow-up measures taken.

8. What claims may an employer face if it does not handle a workplace investigation properly?

Even though the decision to launch an internal investigation is often clearly warranted, great care needs to be taken when designing the investigation. Internal investigations are subject to a multitude of rules, which need to be strictly observed. A company must ensure that it does not encroach upon the rights of the persons concerned, particularly data protection and labour law rights. Non-compliance during investigations can pose a compliance risk in itself (i.e. it endangers the admissibility of evidence in civil and labour law matters and puts the investigators at risk for violation of penal and administrative offence rules).

The WPA includes fines of up to €50,000 for obstructing or attempting to obstruct a report or subsequent communication, taking or attempting to take any reprisals or intentional or reckless violation of the confidentiality requirements. There are also fines of up to €20,000 for a failure to establish or operate an internal reporting office if required by the WPA.

9. What records should an employer keep?

As long as an offence is still legally actionable (in particular not time-barred), recordings may in principle be stored and viewed in the event of reasonable suspicion. Art. 17 of the GDPR provides for the immediate deletion of personal data after the purpose of collection and use has been achieved, but also allows storage for the purpose of exercising legal claims; the courts will have to decide how it should apply this on a case-by-case basis in the event of a dispute.

Documentation relating to WPA reports must be deleted after three years. However, documentation can be kept for longer if required to comply with other regulations.

10. Other points to consider

Employers should keep in mind that information gathered can only be used legally if the procedure is carried out in compliance with employment law and, above all, data protection law. It should also be noted that regardless of whether the employer outsources internal investigations to external bodies or carries them out itself, it remains responsible for compliance with the relevant GDPR obligations, and responsible for the investigations.

Contact



Tanja Weber
Partner, Berlin
T +49 30 72616 8106
E tanja.weber@squirepb.com



Hong Kong

1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager, member of the HR team, etc.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer does not have the internal capacity to deal with a complaint, where the employer wants to try and gain legal privilege (discussed in greater detail below), etc.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused).

If an employer appoints an external investigator, it should be clear about the scope of their role and ensure they comply with its policies and procedures (if any) and remember that at the end of the day a tribunal or court may be interested in the employer's decision. It should also remember that any instructions the employer provides to an external investigator as to facts, process, outcome, etc. could be disclosable in any subsequent litigation (subject to the discussion below).

Whoever is chosen to be the investigator should act fairly and objectively.

2. What is the required standard of proof in a workplace investigation?

The standard of proof required would depend on the purpose of the workplace investigation. In some voluntary self-initiated workplace investigations, the employer could have some flexibility to determine the standard it wishes to adopt.

Generally, a workplace investigation is not a criminal investigation. The test usually adopted is whether the alleged action took place "on the balance of probabilities" (more than 50% likely). An employer does not have to satisfy the criminal law test, i.e. be satisfied beyond reasonable doubt.

The key to any workplace investigation is reasonableness – there is no requirement to be perfect or to explore every single factual possibility or interview every single possible witness, or to go back to events so long ago that they cannot factually or legally be relevant to the issue under investigation. An employer should make the same level of enquiry into both parties' position, i.e. not just look for evidence to support or rebut one side only.

What counts as "reasonable" depends on a range of matters including the gravity of the matter, the potential consequences for employer and employee, any stakeholder or PR pressure, its complexity, the availability of documentary and/or witness evidence, the age of the allegations and the extent to which a resolution of them is now practicable, etc.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have any general statutory right to be accompanied at investigatory meetings.

Employers should check their own policies and procedures to see if there is any contrary position contractually.

For completeness, employers should make reasonable accommodations for employees if, for example, they have a disability and require special assistance in the investigatory meetings, unless this would cause the employer unjustifiable hardship.

4. Are documents created during a workplace investigation protected by legal privilege?

Typically, no, but there may be limited circumstances in which such documents are protected by legal privilege (especially when lawyers are involved under certain circumstances).

There are two main types of legal privilege: legal advice privilege (which protects confidential communications between a lawyer and a client for the purpose of seeking and receiving legal advice) and litigation privilege (which applies where litigation has started or is contemplated, but not where it is merely a possibility).

A document will not become privileged simply because it is marked as such, e.g., where it is actually about facts found rather than the applicable law. Equally, not all communications between a lawyer and a client are privileged. There are strict criteria that have to be met in order for a document to be covered by legal professional privilege.

Sometimes an employer may involve lawyers (either internal or external) to try to ensure that certain documents created during investigations are protected by legal privilege, but this may limit the employer's ability to rely on them in Court or Tribunal to support later action if privilege is to be maintained.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the Hong Kong Personal Data (Privacy) Ordinance.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

7. Is a complainant entitled to see the investigator's report?

The starting point will generally be to say no.

Such a report will, however, normally be disclosable (subject to any arguments about privilege) as part of any tribunal or court proceeding (and potentially in response to a data access request).

8. What claims may an employer face if it does not handle a workplace investigation properly?

Even if a workplace investigation is not done properly, it would not necessarily justify any claim from the employee. However, in some cases, it may lead to the following claims, including:

- Breach of contract claims – A failure to follow any contractual policies or procedures could result in a possible breach of contract or constructive dismissal claim
- Constructive dismissal claims – In serious cases, a failure to investigate properly could constitute a breach of the implied term of trust and confidence, giving rise to a constructive dismissal claim
- Discrimination claims – If the way in which the investigation is conducted is in itself discriminatory.

9. What records should an employer keep?

In practice, some employers would adopt an approach not to keep any records as they are concerned that such records could be disclosable in subsequent court or tribunal proceedings.

But other than certain exceptional circumstances, we would generally suggest employers keep proper records of any workplace investigations in case their approach or conclusion is subsequently challenged. They should be aware of their data protection obligations in terms of what they retain, how long for, etc.

10. Other points to consider

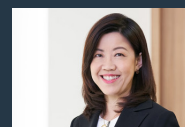
There is no mandatory statutory requirement for employers to carry out workplace investigations under Hong Kong law. Having said that, carrying out workplace investigations properly may reduce the employer's risks in subsequent claims by employees.

In practice, given that employees in Hong Kong do not generally have the right to be given any reason at the time of dismissal, and the claims that the employee may bring against the employer are relatively limited, it is less common for full-blown workplace investigations to be carried out except for the more serious or tricky cases (e.g. cases that potentially involve discrimination or harassment claims, etc).

When dealing with disciplinary or grievance investigations, investigators should be familiar with the company's own policies and procedures (if any).

Ultimately an investigation is merely a means to an end, i.e. to establish facts on which to base future decisions and if possible, the resolution of the underlying issue. An employer is entitled to focus on those parts of any complaint or disclosure which are recent, relevant and where appropriate, resolvable.

Contact



Julia Yeo

Partner, Regional Lead for Asia

T +65 6922 8671

E julia.yeo@squirepb.com



1. Who should carry out a workplace investigation?

Employee-related workplace investigations should be carried out by an inquiry officer who can be an employee of the company, e.g. a manager, member of the HR team or any other senior official of the establishment, etc. Such a person should be impartial and free from any bias or prejudice. Employers may also appoint an inquiry committee or disciplinary committee comprising of more than one inquiry officer. Depending on the facts and circumstances of the case (such as in forensic investigations or investigations which require technical expertise), the establishment may also appoint an outsider/ external investigator.

As regards investigations into complaints of sexual harassment raised by female employees, these must be investigated by a “Local Committee” (in circumstances where the establishment has less than 10 employees) or an “Internal Committee” (in circumstances where the establishment has 10 or more employees) constituted as per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (POSH Act). While the Local Committee is established by the appropriate government in respect of each district, the Internal Committee must be established by the employer of every establishment engaging 10 or more employees, and shall comprise of the following members:

- Presiding Officer (who will be a woman employed at a senior level in the organisation – Where a senior-level employee is not available, the Presiding Officer can be nominated from other offices or administrative units of the organisation)
- A minimum of two members from among the employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge
- One member from among the non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment

At least half of the total members so nominated to the Internal Committee must be women.

2. What is the required standard of proof in a workplace investigation?

A workplace investigation is not a criminal investigation. Therefore, the standard of proof (including in investigations into complaints of sexual harassment) would be ‘preponderance of probability’ i.e., whether the alleged action took place on the balance of probabilities.

3. Are employees entitled to be accompanied at any investigatory meetings?

An employee cannot demand representation, whether through a counsel or an outsider, in internal workplace investigations (including an investigation by the Internal Committee pertaining to sexual harassment) as a matter of right. If the employee wishes another employee of his/her choice to witness the inquiry in the conduct of his/her defence, it may be allowed by the inquiry officer, on a case-by-case basis.

4. Are documents created during a workplace investigation protected by legal privilege?

The POSH Act prescribes for the confidentiality of documents and information (including identity and addresses of the complainant, witnesses and respondent, inquiry proceedings, recommendations, etc.) pertaining to an investigation by an Internal Committee/Local Committee under the POSH Act. Violation of the same may result in a penalty as per the service rules of the establishment or in the absence of such rules, with a fine of INR 5,000.

Save as mentioned above, there is no statutory legal privilege in relation to documents or information relating to internal workplace investigations. Notwithstanding, it is advisable for employers to ensure confidentiality of any internal investigations to maintain the integrity of the investigation and the findings.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

As per the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules 2011, an entity is required to comply with prescribed security practices and procedures while handling ‘sensitive personal data or information’ (“SPDI”) of an individual. SPDI includes information such as bank account or credit card details, health condition, medical records and history and biometric information, etc.

While handling SPDI of individuals during a workplace investigation, the individual’s consent should be obtained in writing through letter or any mode of electronic communication. In obtaining consent, the individual should be informed of the following:

- The fact that the information being collected is SPDI
- The purpose of the collection and processing of such data
- The intended recipients of such data/the persons who would be privy to such information.

SPDI should be maintained in a secure manner as per the prescribed safety procedures.

6. How long should a workplace investigation take?

There is no statutory guidance in relation to the timeline for the conclusion of a workplace investigation. While the aim should be to conclude the investigation at the earliest point, much would depend on the complexity of the investigation, nature of the investigation, availability of witnesses/evidence, number of persons involved, etc.

As regards a complaint of sexual harassment, the POSH Act specifies that the Internal Committee/Local Committee should complete the inquiry within a period of 90 days.

7. Is a complainant entitled to see the investigator's report?

Unless there are any specific reasons to not disclose the contents of the investigation report, a copy of the investigator's report should be provided to the complainant.

A report of the Internal Committee pertaining to sexual harassment is required to be shared with the concerned parties as well.

8. What claims may an employer face if it does not handle a workplace investigation properly?

In addition to the veracity of the investigation being undermined, depending on the nature of the investigation, a failure to handle a workplace investigation properly may also result in additional issues such as discrimination claims, unfair dismissal claims, negligence claims, etc. This may also entail a reputational risk of not being a "fair and just" employer.

9. What records should an employer keep?

There is no statutory guidance on internal investigation records that an employer is required to maintain. However, employers should always keep records of any workplace investigations (in accordance with applicable data privacy laws) in case of an appeal or challenge against the outcome of the investigation.

10. Other points to consider

Internal workplace investigations cannot be conducted arbitrarily or with any *mala fide* intention by the employer. The concerned parties should be put on a fair trial by the investigating authority. Therefore, to prevent a miscarriage of justice, the procedures followed in the investigation must be in accordance with the principles of natural justice, as well as the procedures prescribed under the service rules of the establishment (if any). To conduct an investigation in conformity with the principles of natural justice, the following conditions should be met:

- The respondent employee has been informed of the charges levelled against them
- The parties are provided with copies of reports/statements submitted by other employees/witnesses (if any)
- The investigation and all other associated proceedings are to be conducted in the language understood by the parties
- The witnesses are examined ordinarily in the presence of the parties, and they are given a fair opportunity to cross-examine the witnesses
- The parties are given adequate notice and a fair opportunity to examine the witnesses
- The investigating authority records the findings with appropriate reasons for the same in the investigation report
- A copy of the investigation report and findings is to be provided to the parties involved

Employers may also formulate a guide/policy which provides for the manner in which workplace investigations have to be conducted.

Contact



Julia Yeo

Partner, Regional Lead for Asia

T +65 6922 8671

E julia.yeo@squirepb.com

Italy

1. Who should carry out a workplace investigation?

In principle, a workplace investigation may be conducted by internal or external investigators to the extent the employer has a specific and substantial suspicion that an employee is guilty of misconduct.

Specific rules on workplace investigations arise from various sources, including, among other things: (i) Law no. 300/1970 (Workers Statute); (ii) Legislative Decree no. 231/2001; (iii) Legislative Decree no. 24/2023 (Italian Whistleblowing Act); (iv) specific provisions governing certain industry sectors; (v) employment and health and safety regulations; (vi) internal company policies; and (vii) national collective bargaining agreements.

Investigations on employee performance may be carried out exclusively by internal investigators, as only the employer has the right to carry out such investigations.

Save for investigations on employee performance, external investigators may be appointed and, in some circumstances, an external investigator may be preferable, for example, where there are insufficient internal resources or experienced personnel to conduct investigations and/or in order to keep a greater distance between the investigator and the workplace environment and/or to reduce the risk of allegations of conflicts of interest.

If an external investigator is appointed, a clear written agreement is required setting forth, among other things, the circumstances justifying the investigation, the name of the external investigator and a reasonable time limit within which the investigation must be concluded.

2. What is the required standard of proof in a workplace investigation?

There is no legal provision defining the “required standard of proof” for workplace investigations. Therefore, the standard of proof required depends on the purposes of the investigation.

If an investigation leads to disciplinary proceedings, the employer will have to prove the employee’s misconduct.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings.

However, if investigations lead to disciplinary proceedings, the employee has a statutory right to be heard at the disciplinary hearing, and at that time he/she has the right to be accompanied by a trade union representative.

4. Are documents created during a workplace investigation protected by legal privilege?

In principle, if documents and/or correspondence are exchanged between the company and its legal counsel, they may be protected by legal professional secrecy rules.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR and the Italian Privacy Code. In cases of non-compliance, the evidence collected may be challenged.

In addition, due to the Workers Statute:

- Employers cannot carry out workplace investigations on employees’ political opinions, religious beliefs, union membership or on any matters which do not strictly relate to the employees’ professional skills.
- Employers must make employees aware of the methods of control carried out on them.
- Audiovisual systems and other tools that allow for remote control of the employees can be installed and used only for the following purposes: i) organisation and production purposes; ii) health and safety; and iii) protection of the company’s assets and only subject to the execution of collective agreements or, in the absence of agreements, subject to the authorisation of the National Labour Inspectorate (*Ispettorato Nazionale del Lavoro*) or the headquarters of the National Labour Inspectorate (*Ispettorato Nazionale del Lavoro*). The information collected through these tools should only be used if the employees have previously been notified of the possibility of such monitoring/control.

Furthermore, under the Italian Whistleblowing Act, the internal reporting channels should guarantee the confidentiality of the whistleblower’s identity, of the persons involved and of any persons mentioned in the report, as well as the content of the report and related documentation.

6. How long should a workplace investigation take?

There are no fixed timeframes for conducting workplace investigations.

Timing will depend on different facts such as the seriousness, complexity and urgency of the matter, the number of witnesses to be interviewed, etc.

In any case, workplace investigations should be conducted – to the extent there are specific and substantial suspicions that an employee is guilty of misconduct – efficiently, discreetly and for as long as necessary.

If the workplace investigation is conducted under the Italian Whistleblowing Act, the person in charge of handling the report is required to: (i) acknowledge receipt of the report to the whistleblower within seven days of receipt; (ii) keep in dialogue with the whistleblower and if asked to provide additional information on the report if and when necessary; (iii) diligently follow up the report; and (iv) give the whistleblower feedback on the status of the report within three months from the date of acknowledgement of receipt or, in the absence of such notice, within three months from expiry of the seven day period of the report being made.

7. Is a complainant entitled to see the investigator's report?

In principle no.

8. What claims may an employer face if it does not handle a workplace investigation properly?

Inadequate or unfair workplace investigations could give rise to claims under Italian law including but not limited to:

- Unfair dismissal
- Invasion of privacy
- Anti-union behaviour

Furthermore, economic penalties may apply in the case of non-compliance with the obligations set out in the Italian Whistleblowing Act. The Italian Anticorruption Authority (ANAC) may sanction an employer with a fine of up to €50,000 for failure to establish reporting channels, define procedures to receive and provide feedback and follow up on reports in accordance with the Italian Whistleblowing Act.

9. What records should an employer keep?

Pursuant to the GDPR and the Italian Privacy Code, employers may only keep data which is strictly necessary for the purpose of the investigation and only for a limited term, such as until the investigation is completed and/or judicial proceedings (if any) which follow a workplace investigation are completed.

Under the Italian Whistleblowing Act, documentation connected to the reports should be stored for the time that is strictly necessary for processing the reports and, in any case, for no longer than five years after the notification of the final outcome of the reporting procedure was made.

10. Other points to consider

When dealing with disciplinary investigations, investigators should take into account the specific framework provided under Italian labour law in relation to disciplinary procedures as well as specific criminal offences relating to methods of acquiring evidence.

In addition, the use of any evidence obtained during an investigation in breach of GDPR rules may be challenged.

Under the Italian Whistleblowing Act, before implementing the internal reporting channels, the company should inform the works council and then provide clear information about the channels, the procedures and the relevant conditions for making internal or external reports, making the said information easily visible to employees in workplaces (and on the company's website, if any), as well as accessible to persons who, while not attending workplaces, have a legal relationship with the company (e.g. volunteers, interns).

Contact



Elsa Mora

Counsel, Milan

T +39 02 7274 2001

E elsa.mora@squirepb.com

Mexico

1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager, member of the HR team, local counsel, etc.

In some circumstances, it may be appropriate to appoint an external investigator, e.g., where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer does not have the internal capacity to deal with a complaint, etc.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused).

2. What is the required standard of proof in a workplace investigation?

There is no standard for workplace investigations, but the employer should follow a consistent approach. Claims of unjust termination by employees resulting from an investigation's finding of wrongdoing are judged by labour courts under "the preponderance of the evidence" standard.

3. Are employees entitled to be accompanied at any investigatory meetings?

No, it is not mandatory by law, but it cannot be prohibited by the employer. In most circumstances, for confidentiality concerns, employees are not accompanied at interview meetings.

Employers should check their own policies and procedures.

4. Are documents created during a workplace investigation protected by legal privilege?

No.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the Mexican Data Privacy Law and company privacy policy.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable. Please note that sexual harassment claims may require special considerations.

7. Is a complainant entitled to see the investigator's report?

No, there is no statutory requirement that the complainant see the investigation report, and it is generally not best practice to show them. The report may contain findings that contain personal and/or information confidential to the company or other employees, including disciplinary or termination details.

The company should check in with the complainants during the investigation to let them know that the investigation is ongoing and when it has concluded. In reporting that the investigation has concluded, the company may advise whether claims have been substantiated and provide a high-level summary as appropriate.

8. What claims may an employer face if it does not handle a workplace investigation properly?

A workplace investigation is usually conducted for employee disciplinary purposes. If an employer does not handle the investigation properly, the employer may fail to prevail under a claim of wrongful employment termination. In disciplinary cases, where an employee is terminated for cause, if an investigation is flawed, an employee is likely to assert that the termination is a wrongful termination and require double severance or reinstatement.

9. What records should an employer keep?

Employers should keep all notes, supporting documents, interviews and any reports related to an investigation as well as any supplemental disciplinary records or documentation. This is important if the conclusion or process of an investigation ever becomes subject of a legal action. These documents should be kept for a period of five years after the employee is terminated or has left the employment.

Additionally, it is always important to retain records in the event the investigator is an internal employee who ends up leaving the company and should the company require access to this information.

Records related to an investigation should be kept in a secure place with confidentiality.

10. Other points to consider

Companies are obliged to investigate all acts of discrimination, harassment and violence; hence, they should maintain up-to-date policies. In particular, protocols, policies and/or handbooks should outline company procedures for complaints, including the company's and management's duties to report specific violations, no retaliation against complainant, etc.

Contact



Jose Martin

Of Counsel, Regional Lead for Latin America

T +1 305 577 2816

E jose.martin@squirepb.com



Poland

1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager, member of the HR or compliance team, etc.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior or where the employer does not have the internal capacity to deal with a complaint.

If the workplace investigation is covered by the whistleblowing regime, restrictions on external investigators apply.

Any internal or external investigator should be impartial and act fairly, objectively and diligently.

If an employer appoints an external investigator, it should be clear about the scope of their role and ensure they comply with its policies and procedures.

2. What is the required standard of proof in a workplace investigation?

Polish law does not set any particular standard of proof in a workplace investigation.

The standard of proof may depend on the type of the allegation, scope of the investigation and proposed follow up actions.

If the employer decides to proceed with disciplinary action or dismissal, if challenged, it will need to be able to defend its decision before the employment court (e.g. prove that the employee committed a disciplinary offence).

3. Are employees entitled to be accompanied at any investigatory meetings?

There are no statutory rules governing the right to be accompanied and in practice it is rare for internal policies to allow this.

4. Are documents created during a workplace investigation protected by legal privilege?

Documents created internally by the entity are not subject to legal privilege. In principle, documents and/or correspondence exchanged between the company and its legal counsel may be protected by legal professional secrecy rules.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR, the Labour Code and other legal regulations concerning the privacy of employees.

Investigations under the Polish Whistleblowing Act (if workplace investigations fall within its scope) must protect the identity of the whistleblower.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

There are specific timelines to comply with if the investigation is undertaken under the Polish Whistleblowing Act (seven days to confirm receipt, and three months from that date to share feedback with the reporting person).

Equally, there are timescales in the Polish Labour Code within which to take disciplinary action or summary dismissal decisions, and these may in practice influence the timing of workplace investigations.

7. Is a complainant entitled to see the investigator's report?

No, it is not a requirement that the complainant see the investigation report, and it is generally not disclosed in practice. The report may contain findings that contain personal and/or information confidential to the company or other employees, including disciplinary or termination details.

As a matter of good practice (outside of the whistleblowing regime), the company should check in with an employee during the investigation, to let them know that the investigation is ongoing and when it has concluded. When reporting to the employee that the investigation has concluded, the company may advise whether the claims have been substantiated and provide a high-level summary, as and if appropriate.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Objection against any disciplinary penalty brought before an employment court
- Unfair dismissal claim – If as a result of an improper investigation the employee was dismissed
- Constructive dismissal claims – If the employee decided to terminate their contract in this manner because of a breach of the employer's duties
- Discrimination claims – Depending on the decisions taken based on any investigation findings
- Breach of personal interests – e.g. Breach of dignity, good name, confidentiality of correspondence
- Breach of data privacy laws – If information obtained during the investigation was disclosed to unauthorised persons
- Breach of whistleblowing protections – If the workplace investigation was undertaken under the whistleblowing regime

9. What records should an employer keep?

There is no statutory guidance on internal investigation records that an employer is required to maintain. Employers should keep records of any workplace investigations in case their approach is subsequently challenged. When doing so, employers should abide by the GDPR principles of lawfulness, fairness, transparency, accuracy, minimisation, purpose and storage limitation as well as integrity and confidentiality.

Separate recording requirements apply under the whistleblowing regime, where the employer is also obliged to maintain a record of reports in the scope prescribed by law.

10. Other points to consider

The Polish Whistleblowing Act entered into force on 25 September 2024. Polish employers may decide whether breaches of employment laws, internal policies or codes of conduct should be dealt with under the whistleblowing regime or whether they should form part of the separate rules on workplace investigations.

Contact



Malgorzata Grzelak

Partner, Warsaw

T +48 22 395 55 28

E malgorzata.grzelak@squirepb.com



Saudi Arabia

1. Who should carry out a workplace investigation?

There is no legal requirement to appoint an external investigator. Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager or member of the HR team.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused) and consideration needs to be given to potential conflicts of interest or biases when appointing the investigator. The investigator should also be an excellent communicator.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer does not have the in-house expertise or resources to deal with a complaint or where the potential internal investigators must maintain an ongoing relationship with the complainant and the alleged perpetrator, etc.

If an employer appoints an external investigator, it should be clear about the scope of their role and ensure they comply with the employer's policies and procedures.

What is most important is that whoever is chosen to be the investigator acts fairly and objectively.

2. What is the required standard of proof in a workplace investigation?

The standard of proof required is not set out in the Labour Law and it is unclear whether the employer must prove the allegation(s) beyond reasonable doubt or on a balance of probabilities. In practice, the courts will look to strong evidence and the employer's mere reasonable belief in the allegation(s) made against the employee is likely to be insufficient.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings. Employers should check their own policies and procedures prior to commencing the investigation to check whether they provide any such right.

4. Are documents created during a workplace investigation protected by legal privilege?

No, there is no concept of legal privilege in the KSA.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the Royal Decree M/19 of 9/2/1443H, Cabinet Resolution No. 98 of 7/2/1443H (as may be amended and/or supplemented by regulatory guidelines issued by the Saudi Authority for Data and Artificial Intelligence in the Kingdom of Saudi Arabia) ("PDPL") when processing personal data of their employees or third persons.

While handling the personal data of individuals during a workplace investigation and accounting for the requirements of the PDPL, employers should consider the obligation of data minimisation and the data subject's right to access personal data. For example, employers should ensure that they comply with their obligations when handling such information (e.g. taking care to protect the information, ensuring the accuracy of the information and not retaining the information once it is no longer required for legal or business purposes).

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses that need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable, and the employee must be informed of any allegations in writing at the outset.

Employers should ensure they comply with any suggested or required timescales set out in their own policies and procedures, or at least notify the relevant parties with reasons in writing if that timetable seems likely to slip.

An employer cannot dismiss an employee until it has investigated the disciplinary allegation(s), concluded its investigations and established the employee's guilt.

Employers also need to be mindful of the timeframes for disciplinary action in Article 69 of the KSA Labour Law which provides that no employee can be charged with a disciplinary offence more than 30 days after the offence has been discovered, and no penalty should be imposed more than 30 days after the investigation is completed and proof of the employee's guilt has been established.

7. Is a complainant entitled to see the investigator's report?

No, the report should not be provided to the complainant or any of the participants in the investigation. However, if any proceedings arise out of the investigation, the employer may need to subsequently disclose the report in those proceedings in support of its case.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Invalid termination claims – In disciplinary cases, if an investigation is flawed or incomplete, this can render any subsequent dismissal invalid/unlawful. If an employee is dismissed for an “invalid” reason they will be entitled to receive either:
 - An amount of compensation agreed in the employment contract (to the extent such compensation must be a minimum of two months' wages)
 - If no compensation is agreed in the employment contract, their wages for the remaining period of their employment contract (subject to a minimum of two months' wages) if they are employed on a fixed term contract; or
 - 15 days' wages for each year of service (subject to a minimum of two months' wages) if they are a KSA national and employed on an unlimited term contract.
 - Any invalid termination compensation would be payable in addition to the employee's minimum statutory and contractual entitlements.
- Constructive dismissal claims – A failure to follow any contractual policies or procedures could result in a possible constructive dismissal claim (e.g. due to the employer having committed a serious breach of contract). The employer must strike a balance between the need to obtain sufficient information for the investigation and an employee's right to be treated fairly and reasonably.
- Defamation claims – Defamation in the KSA is a criminal offence. Statements or comments made or published with the use of an information technology device which causes harm to the person the comment, or statement is about could lead to criminal charges for defamation. All communications need to be carefully managed and confidentiality needs to be maintained as far as possible to reduce the risk of a defamation claim; and/or criminal complaints against the employer or other employees – if the allegations involve potential criminal behaviour and the complainant is dissatisfied with the employer's handling of their complaint, they may be more likely to pursue a criminal claim.

9. What records should an employer keep?

Employers should always keep records of any workplace investigations in case their approach is subsequently challenged. Keeping an accurate record of the investigation and any witness interviews conducted is particularly important in the KSA where litigation is document based. The KSA Labour Law requires that minutes are recorded of any disciplinary meeting and kept in the employee's personnel file.

Employers need to be aware of their data protection obligations in terms of what they retain, how long for, etc.

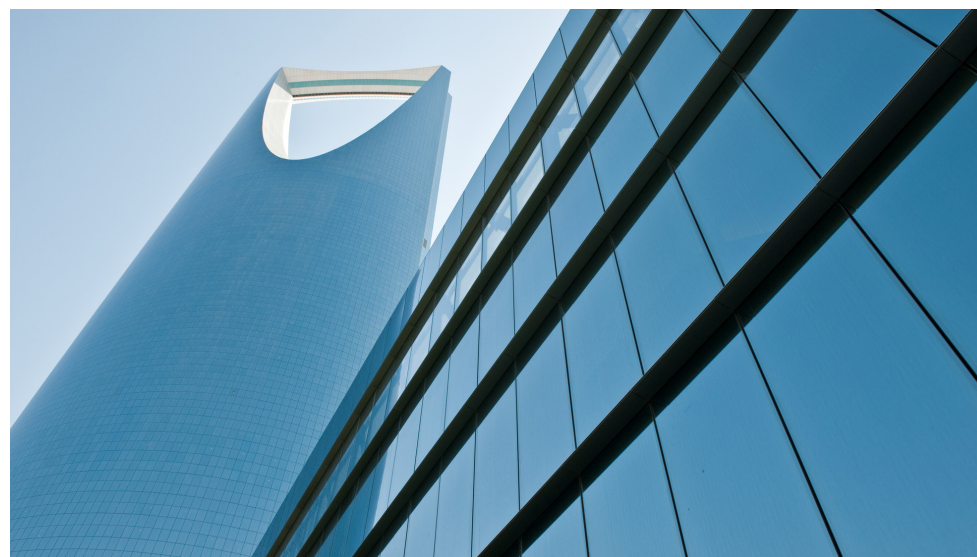
10. Other points to consider

When dealing with disciplinary or grievance investigations, investigators should familiarise themselves with the company's own policies and procedures.

Contact



Sarah Lawrence
Partner, Regional Lead for Middle East
T +971 4 447 8718
E sarah.lawrence@squirepb.com



Singapore

1. Who should carry out a workplace investigation?

Workplace investigations may be conducted by internal or external investigators.

An internally appointed investigator is usually a manager or member of the HR team or in-house legal counsel.

An externally appointed investigator is generally an external legal counsel. External appointments typically happen where there are insufficient internal resources or experienced personnel to conduct the investigation, the matter is complex, the allegations are against a senior employee, there is the potential for an allegation of bias or it is considered essential for the investigation report to be subject to legal privilege.

2. What is the required standard of proof in a workplace investigation?

The standard of proof required is the balance of probabilities. This requires the investigator to determine whether it is “more likely than not” (i.e. more than 50% probability) that the alleged event(s) or conduct occurred. This may require the investigator to compare competing versions of events from various parties and witnesses to determine which version is more credible.

3. Are employees entitled to be accompanied at any investigatory meetings?

This depends on the company’s policies and processes – whether they allow employees to have a support person. There is no statutory entitlement for employees to be accompanied.

Even if the company’s policy does not provide for this, an employer should not unreasonably refuse a request from an employee for support during an investigatory meeting. It is generally considered that the role of the support person is to provide the employee with emotional support, not to act as the employee’s advocate or speak on the employee’s behalf (unless the employee is unable to do so, for example, due to a disability). If the employee has language difficulties, it may be necessary for an interpreter to assist the employee in meetings.

It is advisable that a support person should be limited to a trusted colleague, not spouse or family member or the employee’s lawyer.

The employee may be entitled to a trade union representative under a collective agreement or if the company is unionised.

4. Are documents created during a workplace investigation protected by legal privilege?

Only documents created by an employer, the employer’s lawyer or a third-party for the dominant purpose of legal advice or in preparation for anticipated litigation are protected by legal privilege.

To enable the investigation report to be protected by legal privilege, it is recommended that external lawyers be appointed as the external investigator for the purpose of allowing the lawyers to provide the employer with legal advice.

If an employer wants to maintain legal privilege over certain investigation documents (such as an investigation report which contains findings), it is recommended that all communications relevant to the investigation are labelled “Confidential and subject to legal professional privilege”. However, employers should note that a document will not be privileged simply because it is marked as such, and that not all communications between a lawyer and a client are covered by legal professional privilege. This is a complex area and specific advice should be sought.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Data about any individual who can be identified from that data or from that data and any other information to which employers have or is likely to have access is “personal data” under the Personal Data Protection Act 2012.

As it is likely that information gleaned from workplace investigations constitutes personal data under the Act, employers should ensure that they comply with their obligations under the Act when handling such information (e.g. taking care to protect the information, ensuring the accuracy of the information and not retaining the information once it is no longer required for legal or business purposes).

6. How long should a workplace investigation take?

The duration of a workplace investigation will depend on the seriousness of the matter, complexity, urgency and availability of the parties and any key witnesses.

The investigation should be conducted as soon as practicable and be conducted efficiently, discreetly and thoroughly. Significant delay in an investigation process could constitute a lack of procedural fairness to the accused employee, complainant and/or other witnesses or result in the loss, or destruction of evidence or an impediment to the recollection of events. Such delay could also be considered by a court or tribunal to amount to condonation of the conduct being investigated.

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses that need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

Employers should ensure they comply with any suggested or required timescales set out in their own policies and procedures, or at least notify the relevant parties with reasons in writing if that timetable seems likely to slip.

7. Is a complainant entitled to see the investigator's report?

Generally, no. It is recommended that a complainant only be advised of the investigation findings. Providing a copy of the investigator's report or a substantial (or even a small) part of the report may result in any legal privilege being waived (if legal privilege is claimed) and/or increase the risk of potential claims by the complainant.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process. An inadequate or unfair investigation can give rise to complaints or claims under the common law and statute including:

- Complaints to the Ministry of Manpower (if there is an Employment Act violation)
- Complaints to the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) (if there is a discrimination or harassment issue)
- Unfair dismissal under the Employment Act (if there is no just cause for dismissal or the investigation process is flawed)
- Constructive dismissal (if the way in which the investigation is conducted is flawed or demonstrated bias or partiality)
- Breach of contract (if an employer's policy requires an investigation be undertaken a certain way, the policy forms part of the employee's employment contract and the employee fails to comply with the policy)

9. What records should an employer keep?

An employer should keep records of all documents relating to the workplace investigation, including the investigative report and details of meetings and interviews undertaken. These documents should be placed on the relevant parties' personal files. A complaint register is also helpful in allowing the employer to determine if there is any larger workplace issue to be resolved, e.g. a toxic workplace culture, discriminatory behaviour practised by a division, etc.

10. Other points to consider

Not all workplace incidents and allegations require formal investigation. Sometimes it may be resolved via informal counselling or a consultative process managed by a supervisor or the HR personnel. It is important to determine at the outset whether the circumstances warrant an investigation, whether the employer's policies place a legal obligation on the employer to conduct an investigation and any specific process required to be followed.

Certain company policies provide for an appeal process. This may be helpful to encourage resolution of the matter internally without the employee needing to challenge an investigator's outcome in court or before a tribunal.

Contact



Julia Yeo

Partner, Regional Lead for Asia

T +65 6922 8671

E julia.yeo@squirepb.com



Slovak Republic

1. Who should carry out a workplace investigation?

The person or entity conducting the workplace investigation depends on the nature of the investigation. Generally, the employer or an external adviser (e.g. a law firm) engaged by the employer may conduct the investigation.

A special regime applies to investigations carried out following receipt of a report on “anti-social behaviour” which qualifies as a criminal or administrative offence (ASB) under the Slovak Whistleblowing Act. Employers with 50+ employees and employers providing financial services, transport security services and environmental services (regardless of the number of employees) are obliged to designate a natural person or organisational unit responsible for receiving, processing and investigating whistleblowing reports. It can be either an employee or a third-party performing such duties on a contractual basis. This so-called responsible person performs its duties independently and is bound only by the instructions of the statutory body of the employer, or statutory body of the parent company. If the responsible person performs other duties in addition to the duties pursuant to the Slovak Whistleblowing Act, the employer is obliged to ensure that no conflict of interest arises, and that the responsible person is not punished for discharging its duties. Furthermore, the Slovak Whistleblowing Act enshrines that the employer must provide the responsible person with necessary cooperation, including access to personal data and documents and ensure that professional qualifications of the responsible person are up to date.

2. What is the required standard of proof in a workplace investigation?

Slovak legislation does not envisage any specific standard of proof for workplace investigations. In cases of wrongdoing at the workplace, we recommend applying the criminal law “beyond all reasonable doubt” test.

3. Are employees entitled to be accompanied at any investigatory meetings?

Slovak law does not provide for any right that would enable an employee to be accompanied at investigatory meetings. It is up to an employer whether it allows for the accompaniment of the employee on an ad hoc basis or in its internal regulations and policies. Such a decision should not result in discrimination.

4. Are documents created during a workplace investigation protected by legal privilege?

It depends on who prepares the documents. If an internal organisational unit or specifically designated employee conducting the investigation prepares the documents, such documents are not subject to legal privilege. On the contrary, if external legal counsel (law firm, attorney-at-law) prepares the documents and they reflect or otherwise contain the counsel’s legal advice, such documents enjoy legal privilege.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR, the Slovak Data Protection Act and other legal regulations concerning the privacy of employees. For instance, the Slovak Labour Code imposes certain limits on the monitoring of employees as a means of collecting evidence in a workplace investigation. In the case of investigations under the Slovak Whistleblowing Act, employers must keep the whistleblower’s identity confidential and specify this obligation in more detail in the internal whistleblowing policy.

6. How long should a workplace investigation take?

If the workplace investigation is conducted under the Slovak Whistleblowing Act, an employer is required to confirm receipt of the whistleblower’s report within seven days of receipt.

The employer is required to verify the whistleblower’s report, to notify the whistleblower about the result of the investigation and to notify whether any actions were taken within 90 days of confirmation of receipt of the report.

7. Is a complainant entitled to see the investigator’s report?

If an employer conducts an investigation under the Slovak Whistleblowing Act, the employer must inform the whistleblower about:

- The outcome of the investigation within 10 days of completion of the investigation (if the internal investigation leads to deferring the submitted report to the respective criminal or administrative authority, the responsible person shall request information on the outcome from them and is obliged to provide such information to the whistleblower within 10 days from receipt)
- The measures taken based on the investigation

In the case of other workplace investigations, it is not a requirement that the complainant see the investigation report.

8. What claims may an employer face if it does not handle a workplace investigation properly?

The answer depends on the nature of the employer's breach of its obligations pertaining to the workplace investigation. These may vary from data protection to privacy or discrimination. It also depends on whether an employee brings a lawsuit before a court, or a public authority imposes a fine for non-compliance with the employer's statutory obligations. The latter being usually higher in amount and more difficult to challenge.

As an example, we would point out that under the Slovak Whistleblowers Act public authorities may sanction an employer for non-compliance with its obligations under the Act with a fine of up to €50,000.

9. What records should an employer keep?

With investigations under the Slovak Whistleblowing Act, the employer is obliged to keep records of the reports for a minimum period of three years from receipt to the following extent:

- The date of delivery of the report
- Name, surname and residence of the whistleblower
- The subject of the report
- The outcome of the investigation of the report
- The date of completion of the investigation of the report

In other workplace investigations, it is highly recommended to comply with the applicable data protection legislation and minimize the extent and duration of personal data processing.

10. Other points to consider

Under the Slovak Whistleblowing Act, all employers with 50+ employees and employers providing financial services, transport security services and environmental services (regardless of the number of their employees) are required to implement an internal reporting system for whistleblowers, comprehensively inform employees about such a system and ensure that at least one of the means for reporting the ASB is accessible at all times.

Contact



Tatiana Prokopová

Partner, Bratislava

T +421 5930 3433

E tatiana.prokopova@squirepb.com



Spain

1. Who should carry out a workplace investigation?

Investigations are usually carried out internally. It is common practice to set up a commission to carry out the investigation. The commission will usually be made up of a member of the human resources team or the legal department, and a workers' representative. The commission may also include a specialised technician, external to the organisation and appointed by an external body, in order to ensure the balance and impartiality of the parties within the process.

If a commission is not set up, the human resources team or legal department will oversee carrying out the investigation. If there are no such departments, it is possible to appoint any employee responsible for conducting the investigation as long as they were not involved in the facts under investigation.

If the persons in charge of the workplace investigation are relatives, in blood or affinity, have an intimate friendship or manifest enmity with any person affected by the investigation or have any direct or indirect interest in the specific process, they must abstain from acting in the workplace investigation.

In addition, companies with 50 or more employees are obliged to establish internal whistleblowing channels. As well as the areas covered by the Whistleblowing Directive, whistleblowers are also allowed to report on issues that may constitute a "serious" or "very serious" criminal or administrative offence and include possible infringements of health and safety matters at work.

2. What is the required standard of proof in a workplace investigation?

There is no legal provision defining the "required standard of proof" in workplace investigations.

In the course of workplace investigations, all the enquiries deemed necessary to clarify the facts (interviews with the persons concerned, interviews with witnesses, collection of evidence, etc.) should be carried out. Therefore, the more information that can be gathered on the facts that are the object of the investigation, the sharper the clarification of the facts will be.

It is important to note that an employer should make the same level of enquiry into both parties' position, i.e. not just look for evidence to support or rebut one side only.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings. However it is normally permitted for both the complainant and the person being investigated to be accompanied to the investigation meetings/interviews, either by an employee representative or by a person from the work environment with whom they have confidence. In any case, the accompanying person must maintain confidentiality regarding the information to which they have access.

4. Are documents created during a workplace investigation protected by legal privilege?

Typically, no, but where lawyers are involved in the investigation there may be limited circumstances in which such documents are protected by legal privilege.

In addition, all persons involved in the workplace investigation shall have the obligation to act with strict confidentiality and secrecy with respect to all information to which they have access to protect the privacy and dignity of the persons concerned.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the GDPR and the Spanish Data Protection Act 3/2018.



6. How long should a workplace investigation take?

There are no specific deadlines to follow, unless established in the applicable collective bargaining agreement. The procedure should be agile, efficient and the privacy, confidentiality and dignity of the affected persons should be protected in all cases. The investigation and resolution of the conduct denounced must be carried out in the shortest possible time, with rigour and speed, avoiding unnecessary delays.

In any case, it is necessary to take into consideration the statute of limitations in relation to the investigated offence or misconduct, in order to be able to impose a sanction in case the workplace investigation ends up finding that the investigated person has committed such an offence or misconduct. Minor offences expire after ten days, serious offences after twenty days, and very serious offences after sixty days from the date on which the company became aware of their commission and, in any case, six months after they were committed.

As a general guideline, the reference manual for implementation of the harassment protocol published by the Ministry of Equality establishes the following deadlines:

- Investigation commission meeting: three working days from receipt of the complaint
- Preliminary phase to try to solve the conflict by mutual agreement between the parties: seven working days
- Investigation – 10 working days, extendable for another three working days
- Resolution – Three working days from the end of the investigation
- Follow-up – 30 calendar days from the resolution.

For whistleblowing allegations, once the information has been received, the person who conducts the investigation must send an acknowledgement of receipt of the communication to the informant within seven calendar days of receipt. It must also determine the maximum period for responding to the report, and this period must not exceed three months.

7. Is a complainant entitled to see the investigator's report?

Both the complainant and the person being investigated usually can access the content of the other party's statement, of the witnesses' interviews and of the documentation on the file.

However, the documents, correspondence and any other exchanges between a person involved in the investigation and their legal counsel are protected by legal privilege.

8. What claims may an employer face if it does not handle a workplace investigation properly?

Depending on the provisions of the applicable collective bargaining agreement, the lack of workplace investigation can give rise to the following claims:

- Unfair dismissal – If an investigation is flawed, this can render any subsequent dismissal unfair
- Discrimination – If the way in which the investigation is conducted is in itself discriminatory

9. What records should an employer keep?

Employers should always keep records of any workplace investigations in case their approach is subsequently challenged. However, they should be aware of their data protection obligations in terms of what they retain, how long for, etc.

10. Other points to consider

When dealing with disciplinary or grievance investigations it is necessary to bear in mind that, on many occasions, the collective bargaining agreement itself regulates how workplace investigations must be carried out. Therefore, it is very important to be familiar with the protocol established in the applicable collective bargaining agreement in order to comply with all the requirements.

Contact



Ignacio Regojo
Partner, Madrid
T +34 91 426 4804
E Ignacio.regojo@squirepb.com

United Arab Emirates

1. Who should carry out a workplace investigation?

There is no legal requirement to appoint an external investigator. Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager or member of the HR team.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused), and consideration needs to be given to potential conflicts of interest or biases when appointing the investigator. The investigator should also be an excellent communicator.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer does not have the in-house expertise or resources to deal with a complaint, or where the potential internal investigators must maintain an ongoing relationship with the complainant and the alleged perpetrator, etc.

If an employer appoints an external investigator, it should be clear about the scope of their role and ensure they comply with the employer's policies and procedures.

What is most important is that whoever is chosen to be the investigator acts fairly and objectively.

2. What is the required standard of proof in a workplace investigation?

A workplace investigation is not a criminal investigation. The test is whether the alleged action took place "on the balance of probabilities" (51% likely that something did or did not occur). For each specific allegation, a finding should be made as to whether the allegation is proven, disproven or that the finding is inconclusive if there is insufficient evidence to make a finding.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings. Employers should check their own policies and procedures prior to commencing the investigation to check whether they provide any such right.

4. Are documents created during a workplace investigation protected by legal privilege?

No, there is no concept of legal privilege in the UAE.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the following data protection laws when processing personal data of their employees or third persons:

- The Federal Decree Law No. 44 & 45/2021 (for entities registered onshore)
- The DIFC Data Protection Law No. 5 of 2020 (for entities registered in the DIFC)
- The ADGM Data Protection Regulations 2021 (for entities registered in the ADGM)

Specific elements to consider are the obligation of data minimisation and the data subject's right to access personal data. For example, employers should ensure that they comply with their obligations when handling such information (e.g. taking care to protect the information, ensuring the accuracy of the information and not retaining the information once it is no longer required for legal or business purposes). Also, consent from an employee to their employer may not be seen as a sufficient legal basis in a workplace investigation context for processing an employee's personal data and so another legal basis may be required.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses that need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable and the employee must be informed of any allegations in writing at the outset.

Employers should ensure they comply with any suggested or required timescales set out in their own policies and procedures, or at least notify the relevant parties with reasons in writing if that timetable seems likely to slip. Onshore employers also need to be mindful of the timeframes for disciplinary action in Article 24(4) of the Executive Regulations supplementing the UAE Labour Law, which provides that no employee can be charged with a disciplinary offence more than 30 days after the offence has been discovered and no penalty should be imposed more than 60 days after the investigation is completed. However, in practice, we do not see these timeframes enforced.

7. Is a complainant entitled to see the investigator's report?

No, the report should not be provided to the complainant or any of the participants in the investigation. However, if any proceedings arise out of the investigation, the employer may need to subsequently disclose the report in those proceedings in support of its case.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Unlawful termination claims – In disciplinary cases, if an investigation is flawed, this can render any subsequent dismissal arbitrary.
- Breach of contract claims – A failure to follow any contractual policies or procedures could result in a possible breach of contract claim.
- Constructive dismissal claims – The UAE Labour Law provides the employee the right to terminate the employment immediately without notice where the employer has breached his/her contractual or legal obligations towards the employee. For this to work, the term that the employer is seeking to change must be a significant one. This means that the employee must leave his/her employment, but is treated as having been dismissed by his/her employer. Following this, the employee can claim compensation for unlawful termination, as well as payment of his/her other legal and contractual rights/entitlements.
- Discrimination claims.
- Defamation claims – Defamation in the UAE is a criminal offence. Statements or comments made, either orally or published, which cause harm to the person the comment or statement is about could lead to criminal charges for defamation. All communications need to be carefully managed and confidentiality needs to be maintained as far as possible to reduce the risk of a defamation claim.
- Criminal complaints against the employer or other employees – If the allegations involve potential criminal behaviour and the complainant is dissatisfied with the employer's handling of their complaint, they may be more likely to pursue a criminal claim.

9. What records should an employer keep?

Employers should always keep records of any workplace investigations in case their approach is subsequently challenged. Keeping an accurate record of the investigation and any witness interviews conducted is particularly important in the UAE where litigation is document based.

Employers need to be aware of their data protection obligations in terms of what they retain, how long for, etc.

10. Other points to consider

When dealing with disciplinary or grievance investigations, investigators should familiarise themselves with the company's own policies and procedures.

Contact



Sarah Lawrence
Partner, Regional Lead for Middle East
T +971 4 447 8718
E sarah.lawrence@squirepb.com



1. Who should carry out a workplace investigation?

Most employment-related workplace investigations are carried out by an internally appointed investigator, e.g. a manager, member of the HR team, etc.

In some circumstances, it may be appropriate to appoint an external investigator, e.g. where the employer is keen to demonstrate impartiality, where technical expertise is required, if any of the parties are particularly senior, where the employer does not have the internal capacity to deal with a complaint, where the employer wants to try and gain legal privilege (discussed in greater detail below), etc.

Any internal or external investigator should be independent so far as practicable (this will depend on the size of the employer and the seniority of those accusing and accused).

If an employer appoints an external investigator, it should be clear about the scope of their role and ensure they comply with its policies and procedures, as well as remember that at the end of the day a tribunal or court will be interested in the employer's decision. It should also remember that any instructions the employer provides to an external investigator as to facts, process, outcome, etc. will generally be disclosable in any subsequent litigation.

What is most important is that whoever is chosen to be the investigator acts fairly and objectively.

2. What is the required standard of proof in a workplace investigation?

A workplace investigation is not a criminal investigation. The test is whether the alleged action took place "on the balance of probabilities" (51% likely). An employer does not have to satisfy the criminal law test, i.e. be satisfied beyond reasonable doubt (99%).

The key to any workplace investigation is reasonableness – there is no requirement to be perfect or to explore every single factual possibility or interview every single possible witness, or to go back to events so long ago that they cannot factually or legally be relevant to the issue under investigation. An employer should make the same level of enquiry in to both parties' position, i.e. not just look for evidence to support or rebut one side only.

What counts as "reasonable" depends on a range of matters including the gravity of the matter, the potential consequences for employer and employee, any stakeholder or PR pressure, its complexity, the availability of documentary and/or witness evidence, the age of the allegations and the extent to which a resolution of them is now practicable, etc.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees do not have a statutory right to be accompanied at investigatory meetings, but it is good practice to offer this, particularly to the complainant.

Employers should check their own policies and procedures.

4. Are documents created during a workplace investigation protected by legal privilege?

Typically, no, but where lawyers are involved in the investigation there may be limited circumstances in which such documents are protected by legal privilege.

There are two main types of legal privilege: legal advice privilege (which protects confidential communications between a lawyer, and a client for the purpose of seeking and receiving legal advice) and litigation privilege (which applies where litigation has started or is contemplated, but not where it is merely a possibility).

A document will not become privileged simply because it is marked as such, e.g., where it is actually about facts found rather than the applicable law. Equally, not all communications between a lawyer and a client are privileged. There are strict criteria that must be met in order for a document to be covered by legal professional privilege.

Sometimes an employer may involve lawyers (either internal or external) to ensure that certain documents created during investigations are protected by legal privilege, but this will very much limit the employer's ability to rely on them in court or tribunal to support later action.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

Yes, employers must comply with their obligations under the UK GDPR and the Data Protection Act 2018.

6. How long should a workplace investigation take?

There are no fixed timescales for conducting a workplace investigation. The amount of time it takes will depend on the nature of the allegations, the number of witnesses who need to be spoken to, etc.

While an investigation should be completed as quickly as practicable, it also needs to be sufficiently thorough to be fair and reasonable.

7. Is a complainant entitled to see the investigator's report?

The starting point will generally be to say no. With grievances, for example, the employee is strictly only entitled to receive a response to their grievance – they are not necessarily entitled to see the basis on which such a decision was made. Such a report will, however, normally be disclosable as part of any Employment Tribunal proceedings (and potentially in response to a data subject access request) so sometimes there may be little to gain from withholding it. Hopefully, it should simply help justify the decision you have reached, and early disclosure of a thorough and reasoned investigation report may be a powerful deterrent to further action by the employee.

8. What claims may an employer face if it does not handle a workplace investigation properly?

An investigation is a key part of a fair process – an inadequate or unfair investigation can give rise to additional claims, including:

- Unfair dismissal – In disciplinary cases, if an investigation is flawed, this can render any subsequent dismissal unfair.
- Breach of contract – A failure to follow any contractual policies or procedures could result in a possible breach of contract or constructive dismissal claim.
- Constructive dismissal – The employer must strike a balance between the need to obtain sufficient information for the investigation and an employee's right to be treated fairly and reasonably. A failure to do this could constitute a breach of the implied term of trust and confidence, giving rise to a constructive dismissal claim; and/or.
- Discrimination – If the way in which the investigation is conducted is in itself discriminatory.
- Whistleblowing – If the way the investigation is carried out is deliberately prejudicial to the person making the disclosure being looked into, for example through its overt scepticism or lack of discretion.

9. What records should an employer keep?

Employers should always keep records of any workplace investigations in case their approach is subsequently challenged. They should be aware of their data protection obligations in terms of what they retain, how long for, etc.

10. Other points to consider

When dealing with disciplinary or grievance investigations, investigators should familiarise themselves with the Acas Code of Practice on Disciplinary and Grievance Procedures and the accompanying guidance. They should also be familiar with the company's own policies and procedures. Acas has also produced a guide to conducting workplace investigations, which provides practical advice for investigators.

Ultimately an investigation is merely a means to an end, i.e. to establish facts on which to base future decisions and if possible, the resolution of the underlying issue. An employer is entitled to focus on those parts of any complaint or disclosure which are recent, relevant and where appropriate, resolvable.

Contact



Alison Treliving

Partner, Global Co-Chair, Labour & Employment

T +44 161 830 5327

E alison.treliving@squirepb.com



1. Who should carry out a workplace investigation?

The investigator should hold a position of impartiality within the company and must not be involved in the act or complaint being investigated. Typically, this would be a member of an employer's human resources department. There is no requirement to hire an external party to conduct an investigation, but it is permitted and sometimes beneficial. Employers should keep in mind that any investigator would be conflicted out of defending the employer in litigation if a case arises following the investigation.

The "pros" of hiring an external investigator:

- Stronger likelihood of impartiality
- Investigator is more of a specialist
- Greater ability to maintain confidentiality
- Ability to provide helpful resources during an investigation, such as private offices for interviews
- Some employees may feel more comfortable speaking to an investigator who does not work at the company and that they are less familiar with (this could go either way, as some employees may be more intimidated and less forthcoming if, for example, speaking with legal counsel)

2. What is the required standard of proof in a workplace investigation?

The standard for workplace investigations is "the preponderance of the evidence" – whether it is more likely than not that the act did occur.

3. Are employees entitled to be accompanied at any investigatory meetings?

Employees who are a member of a union may bring a union representative to an interview if the proceedings may result in disciplinary action. Non-union employees are not entitled to be accompanied at an investigatory meeting. If the investigation is conducted by an attorney, employees are entitled to be represented by attorneys. In these situations, the employee's attorney should be communicating directly with the employer's legal counsel.

4. Are documents created during a workplace investigation protected by legal privilege?

Documents that show correspondence between legal counsel for the purpose of obtaining and sharing legal advice are protected by attorney-client privilege. For example, an email of a human resources representative asking the general counsel whether they can terminate an employee. However, the investigation report, notes or conclusion are not unless conducted by an attorney. If an attorney conducts the investigation, the report and notes may be protected by attorney-client privilege but would then not be able to be used as a defence in legal proceedings.

5. Are there data protection/privacy issues for employers to consider when conducting workplace investigations?

As with any employee data, appropriate security measures should be implemented to protect personal data from unauthorised and inappropriate use. Employers should ensure they comply with their policies prior to reviewing any employee email, text messages or instant messaging and ensure that employees have been given notice that the employer's systems are subject to search by the employer.

6. How long should a workplace investigation take?

Investigations should take as long as is reasonably necessary to be thorough, fair and prompt, but should also aim to provide a prompt resolution or action, particularly in cases where there is risk to security and safety. The general recommendation is that an investigation should take between one to four weeks, depending on witnesses involved and the complexity.

Additionally, once a company becomes aware or has reason to believe a violation of company policy or law has occurred, they should immediately begin an investigation.

7. Is a complainant entitled to see the investigator's report?

No, it is not a requirement that the complainant see the investigation report, and it is generally not best practice to show them. The report may contain findings that contain personal and/or information confidential to the company or other employees, including disciplinary or termination details.

The company should check in with an employee during the investigation, to let them know that the investigation is ongoing and when it has concluded. In reporting that the investigation has concluded, the company may advise regarding whether claims have been substantiated and provide a high-level summary as appropriate.

8. What claims may an employer face if it does not handle a workplace investigation properly?

Depending on state law, separate claims for failure to prevent harassment and a loss of potential defences in discrimination, harassment or retaliation claims. There may also be claims related to negligent retention by putting existing employees at risk.

9. What records should an employer keep?

Employers should keep all notes, interview notes, documents reviewed, and any reports related to an investigation, as well as any supplemental disciplinary records or documentation. This is important in the event that the conclusion or process of an investigation ever becomes the subject of a legal action.

Additionally, it is always important to retain records in the event the investigator is an internal employee who ends up leaving the company and should the company require access to this information.

Records related to an investigation should be kept in a secure place separate from an employee's personnel file.

10. Other points to consider

Companies should maintain up-to-date policies. In particular, policies and/or handbooks should outline company procedure for complaints, including the company's and management's duties to report specific violations.

Companies should provide training for conducting workplace investigations to internal personnel responsible for handling investigations (for example, interviewing techniques, drafting reports and assessing credibility).

There should be multiple avenues provided in policies for employees to direct their complaints. If possible, employers should consider creating an anonymous complaint hotline for employees.

Contact



Meghan Hill

Partner, Global Co-Chair Labour & Employment
T +1 614 365 2720
E meghan.hill@squirepb.com



