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HR Internal Investigations 2026

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Switzerland: Law & Practice

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SWITZERLAND

Law and Practice

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1. Opening an HR Internal Investigation

1.1 Circumstances

Typically, an HR internal investigation is opened after receiving information that could indicate that there is a problem, in particular, unlawful activity (eg, discrimination, harassment, mobbing and/bullying (see **8.3 Other Forms of Discrimination and/or Harassment Including Bullying and/or Mobbing**), as well as violations of internal policies. These problems may involve employees with the same rank or supervisors/supervisees.

This could take the form of a complaint, a call to a whistle-blower hotline, an employee's exit interview, etc.

In practice, internal investigations are opened most frequently following a complaint. This may be made to a supervisor, HR, etc. Complaints also could be made to a dedicated hotline (if the employer has one).

When an employer has an internal policy related to investigations, the employer then would need to follow the internal policy, as this creates obligations going beyond the statutory ones.

An employer also might learn of the circumstances giving rise to an HR internal investigation at the end of the employment relationship: for instance, the employee might never have made a complaint, but then list an incident as a reason for leaving.

Less frequently, an HR internal investigation also could be opened based on observations made by the employer (eg, a manager or supervisor).

1.2 Bases

The carrying out of an HR internal investigation is not founded upon any specific legal provision.

Rather, it is based on case law regarding the steps that employers must take to fulfil their obligations with respect to ensuring that employees are appropriately protected when there is reason to suspect that this might not be the case.

In particular, these obligations are founded on the following.

- Article 328 of the Swiss Code of Obligations (private law) – the obligation to protect the personality rights of employees, which includes:
  - (a) health (physical and mental);
  - (b) dignity; and
  - (c) privacy and private life.
- Article 6 paragraph 1 of the Employment Act and Article 2 of the Ordinance 3 on the Employment Act (public law) – the obligation to protect the health (physical and mental) of employees.
- The Gender Equality Act – protection against gender-based discrimination.

Moreover, although it is not a legal requirement, in practice some employers have an internal policy related to internal investigations, containing a process for filing a complaint and carrying out the internal investigation. Whereas it can be good to have some general rules in place regarding internal investigations, care should be paid to not have internal policies that are too restrictive (eg, requiring that a full internal investigation be conducted any time a complaint, however minor, is made, or fixing an untenable timeframe in which to conduct the internal investigation).

1.3 Communication Channels

There are no specific requirements with respect to communication channels and there is no requirement that they be anonymous.

That said, there should be some way for employees to make complaints. As noted under **1.1 Circumstances**, in practice, this can be to a supervisor, HR etc, or to a dedicated hotline. Moreover, this procedure may be detailed in an internal policy. However, again, attention should be paid to not create excessively strict obligations when drafting such a policy.

Further, as part of the general obligation to protect employees, every effort should be made to respect the confidentiality of all parties involved and not share the complaint further than necessary.

However, generally, it is not advisable to guarantee anonymity, as the employer may not be able to keep

such a promise (eg, data subject request, court order, etc). If the employer wants to emphasise respect of anonymity, it is suggested that this only be guaranteed "to the extent possible".

Additionally, other general rules apply regarding communication channels that an employer must have in place, but these are general (ie, not with respect to HR internal investigations specifically); in particular, the Swiss Federal Supreme Court has stated that employers should appoint a person of trust (internal or external), with whom employees can discuss workplace issues in a fully confidential and anonymous manner.

1.4 Responsibility

There are no specific rules covering who should be responsible for carrying out a HR internal investigation; it may be conducted internally or by external counsel. This, too, is something that may be detailed in an internal policy – but again, attention should be paid to the wording of any such policy to avoid it being too restrictive.

In practice, when an HR internal investigation is conducted internally, often the HR or compliance department is responsible for carrying it out. In any case, in order to guarantee the objectivity of the investigation and the protection of the individuals involved, the individuals carrying it out should not be in the direct reporting line of the participants.

Further, outside counsel may be brought in to carry out the internal investigation. Typically, this is the case when the person under investigation is very senior (eg, an executive manager), when the topic is particularly sensitive and/or criminal in nature or when there is a high risk of reputational damage (especially for listed companies).

1.5 Obligation to Carry Out an HR Internal Investigation

In some instances, an HR internal investigation must be carried out as part of the employer's general duty to protect the employee. This is the case when the allegation involves potentially unlawful behaviour (eg, discrimination, harassment, bullying or mobbing). In such situations, conducting an internal investigation can be considered part of an employer's obligation to protect employees' personality rights (see **1.2 Bases**).

1.6 Prohibition on Carrying Out an HR Internal Investigation

In some instances, it might not be possible to carry out an HR internal investigation, or it might be necessary to wait to carry one out.

In particular, when the allegations are potentially criminal in nature, the competent criminal authorities (eg, the public prosecutor) may forbid the employer from carrying out an HR internal investigation until their own investigation has been concluded (see **8.4 Criminal Cases**).

1.7 Other Cases

First, an employer may need to conduct an HR internal investigation when not strictly legally required, due to its own internal policies.

Moreover, an employer may choose to conduct an HR internal investigation in other instances, even though neither legally necessary nor specifically dictated by its own internal policies, due to its general culture or values, or for reputational reasons.

2. Initial Steps

2.1 Communication to the Reporter and the Respondent

From an employment/labour law perspective, there are no specific rules with respect to communicating the opening of the HR internal investigation to the reporter or the respondent, in so far as the legal limit of protecting employee personality rights is respected (which also includes the rights of the respondent).

However, employers often have internal policies that go beyond the legal limits. In such instances, in principle, the internal policies should be followed.

Typically, the employer may inform both the reporter and the respondent. That said, when the HR internal investigation concerns criminal matters, the criminal authorities should be consulted to see whether an HR

internal investigation may be opened/whether the parties may be informed.

In some instances, the reporter and/or respondent also may be able to request certain information under data protection law (subject access request), although, again, the employer may be able to refuse to provide information by invoking an exception (eg, overriding interest of a third party).

In any case, if the reporter or respondent is interviewed, they will be informed, at the latest, at that moment.

2.2 Communication to Authorities

First, when the allegations are criminal in nature, it is advisable to contact the competent criminal authorities to see whether an HR internal investigation may be opened and, if so, with what limits.

Moreover, depending on the nature of the allegations and/or the status of the employer (eg, listed company, subject to financial regulatory authorities, etc), it may be necessary to notify other authorities about the opening of the investigation.

2.3 Confidentiality Agreements and NDAs

Parties may be asked to sign additional agreements, provided that they have adequate carve outs to report illegal activity and reply to requests from authorities and courts.

In practice, it is increasingly less common to ask parties to sign separate agreements, especially NDAs.

For parties bound by an employment agreement, Swiss statutory law provides additional protection: it stipulates that an employee must not exploit or reveal confidential information obtained while in the employer's service, even after the end of the employment relationship, to the extent required to safeguard the employer's legitimate interests.

2.4 Preliminary Investigation and Scope-Setting

In some instances, an employer may first conduct a preliminary investigation and then decide whether or not to conduct a full HR internal investigation. Provided that there is not an internal policy stipulating otherwise, this may be done, in so far as the employer can ensure that its obligations vis-à-vis its employees are respected.

3. Interviews and Fact-Finding

3.1 Interviewees

At a minimum, the reporter and respondent ordinarily are interviewed.

Typically, a few witnesses may also be interviewed. There is no specific number of witnesses to interview; witnesses should be interviewed to the extent that they may have evidence that can allow the allegation to be substantiated or not substantiated, but without unnecessarily dragging on the HR internal investigation.

3.2 Participation

Provided that the interviewee is an employee, participating in the interview may be considered part of the employee's general statutory duty to comply with instructions from the employer. That said, this request cannot infringe upon the employer's obligation to protect personality rights, etc. Moreover, the employer remains a private party, who cannot "compel" an individual to participate the way state authorities could.

3.3 Format

Provided there is no internal policy stating otherwise, interviews may be carried out remotely (eg, Teams, Zoom, etc). In practice, the interviewer is often given the option to request that the interview be carried out in person (within the limits of feasibility).

When interviews are conducted remotely, other procedural rules remain unchanged and it is still important to have at least two interviewers (see **3.4 Interviewers**).

3.4 Interviewers

The recommendation is to have at least two interviewers, so there is a witness.

Absent an internal policy, there are no specific rules with respect to who should conduct the interviews.

However, depending on the nature of the allegations, it may be advisable to have one interviewer who shares the protected characteristic (eg, someone who is the same gender as the reporter for allegations concerning gender-based discrimination and/or violence).

3.5 Neutral Party

In some situations, notably for matters that could be the subject of future proceedings, it may be advisable to have a neutral third party, who can vouch that future witnesses were not “influenced” in any manner.

3.6 Support Person and/or Lawyer

Interviewees may be accompanied to the interview by a support person, but there is no such inherent right. In some cases, especially those concerning sensitive allegations such as discrimination and violence, it could be seen as a protection of personality rights to allow the interviewee to be accompanied by a support person. Further, pragmatically speaking, in such cases, doing so may facilitate the interview process.

Interviewees may be accompanied to the interview by a lawyer, but again, there is no such inherent right. Moreover, in 2024, the Swiss Federal Supreme Court specifically ruled that respondents do not need to be given procedural guarantees equivalent to those given in criminal proceedings (Decision 4A_368/2023 of 19 January 2024).

Again, if there is an internal policy stating that interviewees may be accompanied by a lawyer, it is recommended that the policy be followed, although, as noted in the 2024 decision, the Swiss Federal Supreme Court ruled that the termination in question was not abusive despite the internal policy not having been entirely followed.

In practice, if an interviewee asks for a lawyer, the first step is to check the internal policy. If no such requirement exists in the internal policy, it should not be mandatory to allow the interviewee to be accompanied by a lawyer. In this case, it is suggested to decide whether or not to allow the individual to be accompanied by a lawyer based on the situation and the people involved, as allowing the interviewee to be accompanied by a lawyer could de-escalate or further escalate the situation.

3.7 Information

As noted in **3.6 Support Person and/or Lawyer**, in 2024, the Swiss Federal Supreme Court specifically ruled that respondents do not need to be given procedural guarantees equivalent to those given in criminal proceedings, meaning there is no specific list of information that must be given to interviewees.

That said, if there is an internal policy in place that states that specific information must be provided, generally, that policy should be followed.

Absent such a policy, it is suggested that before starting with the interview questions, the interviewee should be:

- thanked for being there and for their co-operation;
- reminded of the context in which the interview is being carried out (ie, an HR internal investigation);
- reminded of confidentiality obligations and of the non-retaliation policies;
- told that they are not required to answer any questions, but that this could be taken into consideration in the context of the outcome of the internal investigation;
- informed that minutes will be taken and that they will be asked to sign the minutes, as the case may be, after the interview;
- told a report will be drafted as part of the internal investigation; and
- asked to confirm that they are participating freely and voluntarily in the interview.

After the interview, it is suggested that the interviewee should be thanked again and reminded of their confidentiality obligations.

3.8 Stopping the Interview

If an interviewee requests to stop the interview, it should be stopped, as the employer cannot forcibly compel someone to participate. It should be clarified whether the interviewee is asking to take a break or stop for the day, or whether the interviewee is refusing to participate further.

In particular, with respect to cases pertaining to allegations of especially sensitive or traumatic situations, the individual may be asked if they would like to take

a break or come back another day with a support person.

Additionally, depending on the circumstances, the lack of participation may be taken into account in the outcome of the investigation. Moreover, in some instances, the employer could take disciplinary measures against a current employee (ie, for refusal to comply with an employer's directives). However, this will depend on the nature of the situation.

3.9 Minutes

Minutes of interviews should be taken. Generally, this may be done in the form of a summary which the interviewee may review and add any points they forgot in a separate section at the end.

Interviewees are not required to sign the minutes, and in some instances this might not be desired (eg, to increase the chance of them being considered notes, rather than part of the HR internal investigation that needs to be shared).

3.10 Recording

It is not prohibited to record interviews and, in principle, it may be possible to record interviews and transcribe them. That said, the need to record the interviews would have to be proportionate to the need to respect the interviewees' personal data and the interviewee should be informed of, and consent to, the recording. Therefore, in practice, it is suggested not to record interviews, especially as doing so is often more time-consuming and complicated.

3.11 Other Fact-Finding

Typically, interviewees are invited to provide any other documents or information they have that they think might be relevant. Very often, they will provide items likes emails and performance reviews.

The employer may access employees' emails; it generally is permissible to access employees' email, provided this is limited to business-related emails (ie, the employer refrains from reading emails marked "private" or stops doing so if an email seems private). That said, typically, it is accepted that employers also may access private emails, provided they have a legitimate interest for doing so (eg, suspicion of criminal activity).

If pertinent, the employer may also obtain logs (eg, when the employee entered and exited the premises).

4. Protection of the Parties During an HR Internal Investigation

4.1 Protection of the Reporter

The employer must protect the reporter. This is part of the general statutory duty to protect employees' personality rights. In this context, in particular, the employer might need to take measures to protect the reporter's physical safety and/or psychological well-being (see **1.2 Bases**).

Depending on the nature of the allegations, the employer might also have a duty to protect the reporter from gender-based discrimination and/or violence, under the Gender Equality Act.

Any measures taken must be proportional – the employer must balance its obligations towards all its employees. In this context, typical measures during the HR internal investigation might include making organisational changes (ie, team structure), having the respondent work remotely or suspending the respondent during the investigation. Any such measures must be proportional and not violate the employer's obligations vis-à-vis the respondent (see **4.2 Protection of the Respondent**).

In any case, when there may be serious risks to an employee's safety, the employer should, at least, make sure the reporter is not in the same physical space as the respondent. If the reporter felt the employer failed to protect them, notably, they could bring a lawsuit for violation of Article 328 of the Swiss Code of Obligations.

In certain cases, the reporter could bring a discrimination claim under the Gender Equality Act. The reporter could also file a claim with the public labour authorities for a violation under the Labour Act.

4.2 Protection of the Respondent

The employer must protect the respondent. Again, this is part of the general statutory duty to protect employees' personality rights (see **1.2 Bases**).

In this context, in particular, the employer might need to take measures to protect the respondent's reputation and psychological well-being. Typical measures during the HR internal investigation might include reminding investigation participants of their confidentiality obligations. The allegations should be kept confidential, the measures taken to protect the reporter and/or other employees (see **4.1 Protection of the Reporter** and **4.4 Protection of Other Employees**) should not be disproportionate and proper procedures should be followed when conducting the HR internal investigation.

Again, the employer needs to balance its obligations towards all its employees. If the respondent felt the employer failed to protect them, notably, they could also bring a lawsuit for violation of Article 328 of the Swiss Code of Obligations.

If the employment of the respondent is terminated following the internal investigation, it is also possible that they could use their treatment during the HR internal investigation to claim abusive termination under Article 336 of the Swiss Code of Obligations, which can result in the awarding of damages of up to an amount equivalent to six months' salary.

4.3 Measures Against the Respondent

In addition to the precautionary measures that may be taken during the internal investigation (see **4.2 Protection of the Respondent**), some employers may want to take disciplinary action prior to the conclusion of the internal investigation, especially termination and immediate termination for cause (Article 337 et seq of the Swiss Code of Obligations).

In the case of termination at this juncture, the respondent again could claim abusive termination under Article 336 of the Swiss Code of Obligations.

In the case of immediate termination for cause, the respondent could claim there was not cause. In this case the employee is entitled to damages in the amount they would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration, as well as additional damages of up to an amount equivalent to six months' salary. The courts examine whether there was good cause on a case-by-case basis, but, in general, there must be an irrevocable breakdown of trust between the parties (eg, serious breach of contract or criminal behaviour).

That said, it should be noted that the employer's decision may retroactively be validated (ie, if, after concluding, the internal investigation shows there was cause), but this approach has risks for the employer if the HR internal investigation does not find cause.

4.4 Protection of Other Employees

The employer must also protect other employees, again based on the general statutory duty to protect employees' personality rights (see **1.2 Bases**).

Depending on the nature of the allegation, the employer might also have a duty to protect other employees based on the Gender Equality Act (ie, in the event of allegations of gender-based discrimination and/or violence). This is part of the employer's balancing of its obligations towards all its employees and should be part of the equation when deciding whether to take measures against the respondent during the investigation.

Common measures that protect other employees also include having the respondent work remotely or suspending the respondent during the HR internal investigation.

In any case, when there may be serious risks to an employee's safety, the employer should, at least, make sure the employee is not in the same physical space as the respondent. If other employees felt the employer failed to protect them, notably, they could bring a lawsuit for violation of Article 328 of the Swiss Code of Obligations. In certain cases, they could also bring a discrimination claim under the Gender Equality Act or file a claim with the public labour authorities for a violation of the Labour Act.

5. Procedural Requirements and Proof

5.1 Requirements

There is no fixed list of procedural requirements to follow during an HR internal investigation.

According to the previously mentioned 2024 decision of the Swiss Federal Supreme Court, the employer is only required to carry out the clarifications needed, based on the circumstances of the case.

5.2 Internal Regulations

An employer may have an internal policy that goes beyond their statutory obligations (but not which exempts them from carrying out statutory obligations). When such a policy exists, in principle, it is this policy that must be followed, even with respect to elements going above and beyond any legal obligation. Therefore, careful drafting is important.

That said, as noted in **3.6 Support Person and/or Lawyer**, the Swiss Federal Supreme Court ruled the termination in question was not abusive, despite the internal policy not having been followed entirely. In this context, the consequences of not following an internal policy should be examined on a case-by-case basis by the courts to see whether sufficient clarity was obtained or not.

5.3 Burden and Degree of Proof

The allegation of the reporter should be substantiated. That said, the reporter is not required to supply all the evidence – the employer can, and should, gather evidence as part of the HR internal investigation (eg, interviews, requesting documents from other parties, etc).

As noted in **3.6 Support Person and/or Lawyer**, the Swiss Federal Supreme Court has said that criminal law standards do not apply and the employer must simply carry out the clarifications needed, based on the circumstances of the case. In this context, when the employer, based on the information at its disposal, has reasonable suspicion that the allegation can be upheld, it may take measures on this basis, including termination.

6. Conclusion and Outcome of an HR Internal Investigation

6.1 Deciding to End an HR Internal Investigation

There are no specific rules as to the moment at which an HR internal investigation is to be ended. As mentioned in **2.4 Preliminary Investigation and Scope-Setting**, in some instances it may even be possible to conclude after a preliminary investigation. In any case, in order to protect the personality rights of all parties, especially the respondent, the investigation will be concluded as soon as the employer has been able to carry out the clarifications needed.

6.2 Procedure for Ending an HR Internal Investigation

There are no specific procedures for how to wind down an HR internal investigation. However, an employer may have an internal policy providing for such a procedure.

6.3 Conclusion

There is no rule per se governing how the procedure should be concluded (eg, a report is drafted). However, in order to be able to demonstrate that the allegations were thoroughly investigated and that the necessary clarifications were carried out, a written form (ordinarily used in practice) is strongly recommended.

6.4 Reports

When a report is drafted, there are no specific rules regarding its form. In practice, such reports usually contain:

- background information about the allegation;
- information about the methodology;
- a summary of the fact finding, in particular the interviews; and
- a conclusion.

When prepared by outside counsel, they may contain information about the next steps that the employer lawfully may consider taking.

6.5 Information

Absent an internal policy, there is no specific right to information regarding the outcome of the HR internal investigation.

When there is an internal policy, employees may be able to rely upon this to request access to such information. However, it should be noted that in any case, employees should be treated equally: an internal policy requiring that certain information be provided to the reporter, but not the respondent, could be problematic from a Swiss employment law perspective.

In practice, the decision on whether to share an HR internal investigation report will often depend on the specifics of the case at hand – in particular, whether doing so is more likely to escalate or de-escalate the situation. Therefore, flexible internal policies are recommended in this respect.

Moreover, depending on the content of the report, certain parties may be able to request access, or partial access, on the basis of data protection laws (see **7.3 Access**).

Parties may be able to request that a judge order the report to be turned over in the context of future civil proceedings (eg, for abusive termination).

6.6 Communications to Authorities

Depending on the nature of the allegations and/or the status of the employer (eg, listed company, subject to financial regulatory authorities, etc), it may be necessary to notify other authorities, especially financial authorities (ie, Swiss Financial Market Supervisory Authority FINMA).

6.7 Other Communications

In general, the conclusion of the HR internal investigation is not communicated to other parties (eg, witnesses) or other employees who were not involved directly (eg, team members).

However, when an internal investigation turns up large-scale problems, it may be desirable to provide certain information to a wider audience (ie, an investigation was concluded and found systematic problems in team X; the company is putting in place the following measures…).

6.8 Disciplinary Measures

Depending on the allegation, the following disciplinary measures are often considered:

- informal warning;
- formal written warning;
- formal written warning, with commitments;
- termination; and
- termination with immediate effect.

Attention must be paid to the personality rights of all parties, as well as the company's culture and environment, when deciding on the appropriate measure to take.

Special care should be taken in cases where termination is considered; for less serious violations, it is also possible to provide a warning (or warning with formal commitments) and terminate the employee later on if the situation arises again in the future.

Extra special care must be taken with regard to termination with immediate effect since, as noted in **4.3 Measures Against the Respondent**, there must be cause, which is interpreted restrictively on a case-by-case basis. Further, immediate termination must be taken within a few days of having knowledge of the cause, otherwise there is not considered to be an irrevocable breakdown of trust. With respect to HR internal investigations, typically, the issuance of the report is when the employer is considered to have knowledge of the cause, not when the allegation is made.

If an employer is not sure whether there is cause, but also does not want the respondent in the workplace, another option is ordinary termination with garden leave.

6.9 Other Measures

In addition to disciplinary measures, an employer may choose to take organisational measures (eg, mediated discussions, team reassignments, etc). These may be independent of, or in conjunction with, disciplinary measures.

7. Data Protection

7.1 Collecting Personal Data

An employer may collect personal data for the purpose of an HR internal investigation, within the confines of the rules explained below.

Data Protection Law

From a data protection law standpoint, the employer is a data controller and employees are data subjects. Moreover, internal investigations almost always involve the processing of personal data.

Under the Swiss Federal Act on Data Protection (FADP), data processing must be lawful (Article 6 paragraph 1 FADP) and proportional. Attention must be paid not to unlawfully breach a data subject's rights without grounds for justification, that is:

- the consent of the data subject;
- an overriding interest; or
- a legal basis (Article 30 paragraph 1 and Article 31 paragraph 1 FADP).

However, consent must be given freely, so the nature of the relationship between an employer and an employee makes it difficult to rely on this basis. Therefore, absent a specific legal basis, an employer generally will need to rely on an overriding interest (protection of employees, fulfilment of the employment agreement, business needs, etc).

Employment Law

Employment law provides a further limit: under Article 328b CO, "the employer may handle data concerning the employee only to the extent that such data concern the employee's suitability for his job or are necessary for the performance of the employment contract".

That said, this typically is the case with respect to internal investigations, especially given the employer's general duty to protect employees.

Labour Law

Further, the Labour Act and its ordinances pose additional restrictions regarding surveillance and monitoring, which could affect the carrying out of an HR internal investigation.

Specifically, it is unlawful to use surveillance or monitoring systems for the purposes of monitoring the behaviour of employees at their workstations, although such systems may be used for other reasons (ie, health and safety). Further, according to the Swiss Federal Supreme Court, the employer must also ensure that the use is proportional and that the employees are informed of the surveillance and monitoring.

7.2 Specific Rules

First, under the FADP, the data controller must provide data subjects with information with respect to personal data being collected.

In this context, if the internal investigation involves collecting personal data beyond what was declared in the information already provided to the employee at the start of the employment relationship, additional information should be provided, especially with respect to the purpose of the processing and the recipients.

Moreover, in light of the considerations mentioned in **7.1 Collecting Personal Data**, the employer must ensure that all data collection and processing is lawful and proportional. In this context, special attention must be paid to the data collected (ie, it is limited to what is needed for the HR internal investigation) and how it is collected and processed (ie, in the least intrusive manner possible).

7.3 Access

There is no specific employment law provision that an employee can invoke in order to access an internal investigation report, although an employer could be ordered to turn it over in the context of legal proceedings.

From a personal data protection standpoint, as noted in **7.1 Collecting Personal Data**, internal investigation reports almost always contain personal data. Therefore, employees have the right to request that the employer inform them of the processing of their personal data, including with respect to internal investigation reports, and provide them access.

However, there are some limitations that may be invoked by the employer. In particular, an employer

may refuse, restrict or delay providing information when the request for access is obviously unjustified (eg, the information is being sought for non-data protection-related purposes, such as to prepare a civil claim).

An employer also may refuse, restrict or delay providing information to: (i) safeguard overriding third-party interests, or (ii) safeguard their own overriding interests, in so far as they do not intend to disclose the personal data to third parties.

Moreover, in some instances, it may be possible to rely on a formal legal provision to refuse, restrict or delay providing information (eg, attorney–client privilege). In this context, it should be noted that the Swiss Federal Supreme Court recently ruled that internal investigations conducted by law firms should be protected by attorney–client privilege (Decision 7B_158/2023 of 6 August 2024).

Further, when there is an internal policy in place, employees may be able to rely upon this to obtain information.

7.4 AI

In practice, AI is increasingly used in Switzerland during HR internal investigations, especially for document review. For instance, AI can be used to search and organise emails sent by an employee suspected of an infraction.

Unlike some jurisdictions, Switzerland does not have specific rules governing the use of AI. This means that any of use of AI, including in the context of an HR internal investigation, must be assessed to see whether it applies to general Swiss law provisions (eg, data protection law, employment law, labour law). Therefore, it is important to ensure that any use of AI, especially when conducting interviews, complies with the legal requirements mentioned elsewhere in this section, in particular **7.1 Collecting Personal Data**.

It is essential that the employer understand the AI system it is using, both in terms of what data is collected and whether that data is sent/stored, especially as many popular AI systems were developed in states not recognised by Switzerland as having adequate data protection under Annex 1 of the Data Protection Ordinance.

8. Special Cases

8.1 Whistle-Blowing

There is no general law on whistle-blowing or overall, specific whistle-blowing protections. The adoption of such a law has been the subject of heated debates in Switzerland but, so far, such a law has not been adopted.

If an employee were terminated as retaliation (ie, firing an employee for raising a concern), this typically would be deemed an abusive termination under the Swiss Code of Obligations.

With respect to external whistle-blowing, the Swiss Federal Supreme Court has set conditions under which this should be permissible, despite being in violation of an employee's general duty of loyalty towards the employer. In particular, external whistle-blowing must be an ultima ratio, meaning internal channels have not succeeded.

Further, in certain sectors, there could be specific rules around whistle-blowing (eg, financial sector). Moreover, federal government employees, and some cantonal employees, have specific duties and protections with respect to whistle-blowing.

In addition, if the employer has an internal policy covering whistle-blowing, this should be followed.

8.2 Sexual Harassment and/or Violence

The Gender Equality Act provides protection against discrimination, including discrimination through sexual harassment.

Sexual harassment is defined as "[a]ny harassing behaviour of a sexual nature or other behaviour related to the person's sex that adversely affects the dignity of women or men in the workplace is discriminatory. Such behaviour includes in particular threats, the promise of advantages, the use of coercion and the exertion of pressure in order to obtain favours of a sexual nature" (Article 4 of the Gender Equality Act).

Claims brought under the Gender Equality Act have a reduced burden of proof; discrimination is presumed if the person concerned can substantiate the claim by prima facie evidence (Article 7 of the Gender Equality Act).

The Gender Equality Act also provides additional protections against dismissal, including the possibility of requesting reinstatement (Articles 9 and 10 of the Gender Equality Act) and, in some instances, organisations may bring actions or appeals, if the probable outcome of proceedings will have an effect on a considerable number of jobs (Article 7 of the Gender Equality Act).

It should be noted that in 2019, the Swiss Federal Supreme Court, in a controversial ruling, concluded that discrimination based on sexual orientation is not covered by the Gender Equality Act (ATF 145 II 153). The Swiss Federal Supreme Court has not yet ruled as to whether gender identity is covered under the Gender Equality Act, but some lower instance courts have considered this to be the case.

8.3 Other Forms of Discrimination and/or Harassment Including Bullying and/or Mobbing

As noted above, the case law is not clear as to whether gender identity is protected under the Gender Equality Act.

With respect to other forms of discrimination and harassment, the main protection is the general protection of employee personality rights contained in Article 328 of the Swiss Code of Obligations, as well as requirements to protect employee health under the Labour Act and its ordinances.

As discrimination and/or harassment are considered unlawful treatment, the employer has an obligation to act when it suspects discrimination and/or harassment. In this context, action involves conducting an HR internal investigation to investigate the situation, taking measures during the investigation to protect employees pending an outcome and taking the necessary disciplinary measures following the outcome of the HR internal investigation.

Additionally, some public sector employers (eg, the federal government, cantons and municipalities) have additional protection against discrimination. For instance, the Federal Disability Discrimination Act provides protection to employees of the Swiss government against discrimination founded on disability. Further, employees of the Canton of Geneva have specific protection against discrimination founded on sex, sexual orientation, gender identity and gender expression under the *Loi sur l'égalité et la lutte contre les discriminations liées au sexe et au genre*, which provides a general definition of harassment, sexual harassment and sexual violence and also defines specific types of discrimination, including biphobia, homophobia, lesbophobia and transphobia.

Moreover, Switzerland is party to the European Convention on Human Rights (ECHR). The European Court of Human Rights has ruled that protection of private life (Article 8 ECHR) applies to the workplace, including with respect to private employers, and that this includes protection against discrimination (in conjunction with Article 14 ECHR) (see *Niemietz v Germany*, No 13710/88, ECtHR (16 December 1992) and *Sidabras and Džiautas v Lithuania*, Nos 55480/00 and 59330/00, ECtHR (27 October 2004)).

Article 328 of the Swiss Code of Obligations also provides protection against bullying and/or mobbing, as do the requirements to protect employee health under the Labour Act and its ordinances. These terms are not defined in statutory law.

However, the Swiss Federal Supreme Court has defined bullying and mobbing as a type of psychological harassment involving "[a] series of hostile comments and/or actions, frequently repeated over a fairly long period, by which one or more individuals seeking to isolate, marginalise or even exclude a person in the workplace" (translated, see Swiss Federal Supreme Court decisions 4A_215/2022 of 23 August 2022, 4A_310/2019 of 10 June 2020, and 4A_381/2014 of 3 February 2015).

As bullying and/or mobbing are also considered unlawful treatment, the employer has an obligation to act when it suspects bullying and/or mobbing. In this context, action involves conducting an HR inter-

nal investigation to investigate the situation, taking measures during the investigation to protect employees pending an outcome and taking the necessary disciplinary measures following the outcome of the HR internal investigation.

8.4 Criminal Cases

When the allegations are criminal in nature, co-ordination with the public prosecutor may be necessary. In particular, if a criminal complaint has been filed, co-ordination with the public prosecutor is advisable. The public prosecutor may require that the employer hold off on conducting an HR internal investigation, or even of informing the respondent of the allegations, until after it has finished its own investigation.

Further, in the event of certain criminal allegations, other authorities may need to be informed (eg, money laundering, securities' fraud) (see **2.2 Communication to Authorities** and **6.6 Communications to Authorities**).

Moreover, allegations of a criminal nature often involve behaviour that could create a high risk to an employee's health and/or safety, meaning immediate action may be needed.

8.5 Multi-Jurisdictional HR Internal Investigations

It is important first to determine the different jurisdictions implicated in the case at hand (ie, where the parties work, where the incident occurred, where the company is located, etc), and the law potentially applicable to each component (eg, the law governing the employment agreement with each party, criminal law applicable in the jurisdiction where the incident occurred, etc).

Employers should bear in mind that laws may vary from one jurisdiction to another. For instance, something that is legal in one jurisdiction may be illegal in another. Other protections might also exist – for instance, other jurisdictions may have more protection against specific types of discrimination, or a different definition of discrimination.

Further, the governing law of the employment agreement may affect the disciplinary measures that the employer may take; in particular, different jurisdictions often have different rules about the conditions for terminating an employee.

Moreover, multi-jurisdictional internal investigations typically involve cross-border transfer of personal data, so attention should be paid to ensuring the applicable data protection law is followed.

Against this background, after determining the potentially implicated jurisdictions, it is recommended that employers consult local counsel in these jurisdictions.

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