



International Employment Lawyer

# GUIDE TO WORKPLACE INVESTIGATIONS

NORWAY

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## Starting an investigation

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

Workplace investigations initiated by whistleblowing are governed by the Norwegian Working Environment Act. Other internal investigations are not regulated by law. The employer can structure these investigations as they see fit, provided they act in good faith and with fairness. Internal investigations that do not involve whistleblowing are typically structured in the same way as those involving whistleblowing.

Workplace investigations related to alleged employee misconduct will normally involve processing of personal data, which are governed by the Norwegian Personal Data Act, which also implements the General Data Protection Regulation (GDPR). Workplace investigations in the public sector are also subject to select provisions of the Norwegian Freedom of Information Act. Internal policies often supplement the legal framework.

The European Whistleblowing Directive (EU 2019/1937) is not yet implemented into Norwegian law. Legal references:

- Norwegian Working Environment Act (2005-06-17-62)
- Norwegian Personal Data Act (2018-06-15-38)
- Norwegian Freedom of Information Act (2006-05-19-16)

### 2. How is a workplace investigation usually commenced?

Matters related to the physical or psychosocial work environment fall under the Norwegian whistleblowing mechanism. This also applies to issues involving breaches of other workplace rules, such as the prohibition against sexual harassment and discrimination, as well as generally recognized ethical norms. Consequently, most workplace investigations in Norway are initiated following a whistleblowing report received by the employer. Investigations can also be started by the employer if issues are uncovered through the company's systematic internal controls or other means.

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

If there is reason to believe that an employee may have committed acts justifying dismissal without notice, and the needs of the employer require it, the employer can suspend the employee while the matter is being investigated. The employer must continuously assess if the conditions for suspension are still met. If they are not, the suspension should be lifted immediately. Any suspension longer than three months must be justified by the specific nature of the case.

The employee will keep their salary from the time of suspension until it is lifted.

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

Either the employer or the board of directors is responsible for the investigations. The board of

directors are normally responsible where the matter under investigations relates to top management.

Investigations can be conducted by internal resources within the employer's organization, supported by external experts such as legal counsel, occupational health services, or other specialists. If the investigation concerns top management, it is typically carried out by external resources.

#### **5. Can the employee under investigation bring legal action to stop the investigation?**

The employee under investigation cannot bring legal action to stop the investigation.

### **Evidence gathering**

#### **6. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?**

As a starting point, all employees have a duty of loyalty towards the employer and must contribute to a fully satisfactory working environment. Employees also have a specific duty to notify the employer or the safety representative if they become aware of harassment or discrimination in the workplace. Together, these duties mean that employees are obligated to contribute what they know during investigations. However, a balance must be struck to avoid damaging the working environment of the employee acting as a witness. If the employee can provide strong reasons for not wanting to act as a witness, this should generally be respected, unless it would significantly impede the employer's investigation.

Witnesses do not have any specific protections, other than the general right to a fully satisfactory working environment. The employer should however be mindful of the protection against self-incrimination.

#### **7. What data protection or other regulations apply when gathering physical evidence?**

The Norwegian Personal Data Act and the GDPR apply to the collection of physical evidence when it involves the processing of personal data.

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

As the main rule, the employer cannot search the employee's person, physical possessions or data stored on private devices or accounts. The employer can call the police to perform such searches.

The employer may access the email account and other areas of personal storage on company systems, such as Outlook, Teams and OneDrive. This requires a lawful basis and is subject to procedural rules. As a general rule, the employee should be notified about the access in advance and given the opportunity to state any objections and to be present when the access is carried out.

There are exceptions to these general rules. Notification can be omitted if certain conditions are met. For example, if it is required to maintain confidentiality for the purposes of prevention, investigation, detection, and prosecution of criminal offenses.

#### **9. What additional considerations apply when the investigation involves whistleblowing?**

The employer should be aware of the rules regarding the right to access to information and personal data, when they apply and the exceptions to these rules. This should be clear from the start of the

investigation and communicated to the involved individuals to manage expectations, as well as raising understanding on the scope and limitations of confidentiality obligations.

## **Confidentiality and privilege**

### **10. What confidentiality obligations apply during an investigation?**

The Norwegian Working Environment Act does not contain specific regulations on confidentiality. However, a duty of confidentiality is implied as part of the duty of loyalty between the employer and the employee.

This duty of confidentiality does not prevent the employer from sharing allegations directed at the individual under investigation, allowing them to exercise their right to respond. However, it may impose limitations on the extent or manner in which the information is shared. For example, in certain cases, the employer cannot disclose the identity of the person making the allegations. The GDPR includes an obligation to process personal data confidentially, but it does not impose a statutory duty of confidentiality.

Lawyers advising the employer in the investigations are subject to statutory confidentiality obligations. The same applies to other specific professions, such as medical personnel and auditors.

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

The employee under investigation shall be provided with sufficient information to understand the allegations against them and to exercise their right to respond. It is sometimes necessary to present copies or extracts of documents relevant to the allegations. The employer must consider whether personal data in these documents needs to be redacted to protect the privacy rights of others.

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

Yes.

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

In the private sector, non-disclosure agreements can be used to maintain confidentiality, but this is not common practice. The employee under investigation, the whistleblower, or witnesses cannot be compelled to sign an NDA. Instead, the individuals involved should be reminded to keep the information confidential out of respect for everyone involved and by referring to the confidentiality obligations in their employment contracts.

The NDA cannot legally restrict the employees right to report externally to a public supervisory authority or another public authority.

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

Assuming this question refers to legal privilege of lawyers: Legal privilege applies to all information lawyers get access to, prepare, or communicate on behalf of clients in connection with assignments or potential assignments in legal practice, and which is not generally known or publicly available.

## Rights to representation

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

The employee may choose to be assisted by an advisor of their choice during the investigation. This is often a union representative or a lawyer. Be advised that the Norwegian Bar Association *recommends* that the employer cover the legal costs of the employee under investigation in larger or complex investigations, so that the employee is able to protect their interests and present their view.

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

As the starting point, the Working Environment Committee and union does not have a right to be involved in the investigations. The Working Environment Committee must be informed about the investigation and the result, if the investigation relates to the working environment.

It can be wise to inform relevant trade unions so that they are prepared to assist their members. Employee representatives such as union representatives and safety representatives may be relevant as witnesses, particularly if the matter under investigation pertains to the work environment.

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

The whistleblower shall be protected against retaliation. Retaliation refers to any adverse action, practice, or omission that results from or is a reaction to an employee reporting a concern. The employer must generally ensure that the whistleblower has a fully satisfactory work environment. The right to a fully satisfactory working environment also applies to other involved employees, such as the reported person(s) and witnesses.

If necessary, the employer shall implement measures to prevent retaliation and ensure a fully satisfactory working environment.

One approach to achieve this is to clearly communicate the timeline of the investigation, the prohibition against retaliation, manage expectations, and implement preventive measures during the investigation. These measures may include clear rules on how the involved parties should act towards each other, changes in work tasks, or adjustments to the organisation.

## Issues during the investigations

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

Unrelated matters should not be included in the investigation but can give grounds for separate investigations. New, related matters can be included in the ongoing investigation.

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

The Norwegian labour law system does not have a formal grievance procedure. Employees affected by investigations can raise their objections during the investigations, and the employer must consider these. Employees whose legal positions are impacted by investigations can challenge this through legal channels. This will not be relevant until after the investigations are concluded and follows specific procedural rules in Norway.

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

Investigations can continue even if the employee under investigation goes on sick leave. Sick leave may present certain practical challenges, such as finding a suitable time for interviews with employees who are on sick leave. However, they are generally obligated to contribute despite being on sick leave, unless they are too ill for it to be possible.

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

This situation should be discussed with the police or regulatory body to ensure that the employer's internal investigation does not negatively affect the criminal or regulatory investigation.

The employer often decides to stay its internal investigation while the criminal or regulatory investigation takes place unless it is important for internal reasons to continue.

Police and regulatory bodies can compel the employer to share evidence. Sometimes a court order is necessary. Documents subject to attorney-client privilege cannot be compelled to be presented.

## **Outcome of investigation**

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

The employee shall be told about the outcome.

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

This matter is not governed by law. Best practice suggests sharing the report in full with the employee under investigation and the whistleblower (if any). Presenting it to witnesses and union representatives is often necessary. The report shall be presented to the Working Environment Committee if it relates to the working environment.

Personal data or confidential information could be redacted, but a better approach is to write the report in a manner that can be presented to all affected individuals in its entirety.

## **24. What next steps are available to the employer?**

The employer must assess and decide how to follow up on the findings in the report. There may be a need for measures aimed at the working environment, changes in routines, organisational changes, or sanctions in individual employment relationships. These sanctions can include changes to a position in tasks or responsibilities, warnings and termination with or without notice.

## **25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?**

This matter is not governed by civil law. As a starting point, the investigated person must be informed about the findings to the extent it relates to this individual.

Findings of criminal matters can be shared with the police.

Interview records can be kept private. However, the interview records can be compelled to be presented to the courts if they are relevant in a potential court case, provided they are not subject to attorney-client privilege.

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

This is up to the employer to decide, however personal data cannot be retained for longer than is necessary for the purposes for which the personal data are processed. A rule of thumb would be to retain the final report from the investigation for the duration of the company's existence, while deleting the underlying documents after, for example, three years.

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

Disciplinary sanctions in individual employment relationships can be based on the results of the investigation. Errors during the investigation could render the disciplinary sanction void and make the employer liable for any financial loss the employee has suffered as a result of the sanction. The employer can also be responsible for non-financial losses for pain and suffering.

employers exercise diligence and due process in internal investigations. Investigations must be conducted transparently and lawfully.