



International Employment Lawyer

# Guide to Workplace Investigations

Philippines



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# Philippines



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## Starting an investigation

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

There are essentially two phases in a workplace investigation: the fact-finding phase and the administrative proceeding.

The fact-finding phase of workplace investigations is usually governed by the internal policies of the employer, save for investigations relating to gender-based sexual harassment in the workplace. Republic Act No. 11313, otherwise known as the Safe Spaces Act, sets the parameters for these kinds of investigations.

Philippine case law recognises the right of an employer to conduct investigations for other acts of misconduct in the workplace in the exercise of its management prerogative. The Supreme Court has held that it is an employer's right to investigate acts of wrongdoing by employees, and employees involved in such investigations cannot simply claim that employers are out to get them.

After the fact-finding aspect of the investigation, if the employer decides it has sufficient grounds to proceed to full-blown administrative proceedings, it needs to comply with the due process requirements outlined under the Philippine Labor Code. These requirements are:

- a first notice, or notice to explain, informing the employee of the charges against him or her;
- an opportunity for the employee to be heard; and
- a final notice on the outcome of the administrative action.

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

Workplace investigations are normally commenced either through a complaint filed by other employees in the workplace or by HR or other representatives of management.

Under the Safe Spaces Act, employers are required to commence an investigation and decide on complaints regarding gender-based sexual harassment, within ten days of the complaint being brought to their attention. For other workplace misconduct, management is given wide discretion regarding the means and method by which the workplace investigation may be carried out.

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

A preventive suspension pending investigation is allowed under the law, provided that the continued employment of the subject of the investigation poses a serious and imminent threat to the life or property of the employer or other employees. Additionally, the period of preventive suspension pending investigation should not last longer than 30 days.

However, should the employer wish to extend this period, the employer must pay the employee's wages and other benefits. The employee is under no obligation to reimburse the amount paid to them during the extension if the employer should, later on, decide to dismiss the employee after the completion of the process.

In practice, the notice of preventive suspension is issued simultaneously with the first notice or the notice to explain after the employer has conducted its fact-finding investigation and has reason to believe that the employee must be held accountable for his or her actions.

Since placing an employee under preventive suspension requires the existence of a serious and imminent threat to the life or property of the employer or other employees, some employers opt to place the employee or employees involved on agreed paid leave. This will allow the employer to conduct an unhampered workplace investigation while the investigated employee is still able to receive his or her full salary during this period.

### 4. Who should conduct a workplace investigation – any qualifications/criteria?

Under the Safe Spaces Act, an employer should create an independent internal mechanism or a committee on decorum and investigation to investigate and address complaints of gender-based sexual harassment, which should:

- adequately represent the management, the employees from the supervisory rank, the rank-and-file employees, and the union, if any;
- designate a woman as its head and no less than half of its members should be women;
- be composed of members who are impartial and not connected or related to the alleged perpetrator;
- investigate and decide on the complaints within 10 days or less upon receipt thereof;
- observe due process;
- protect the complainant from retaliation; and
- guarantee confidentiality to the greatest extent possible.

For other types of offences, it is the prerogative of management as to who will conduct the investigation and how it will be conducted, provided the proceedings remain impartial.

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

There is generally no legal remedy for an employee to stop a workplace investigation as it is the prerogative of management to conduct it. Nevertheless, if the employee alleges violation of any specific law or contractual provision in the conduct of the investigation, the employee may be able to seek judicial relief for violation of the law or contract, and ask for interim relief.

## 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?

Neither the employer nor the employee subject of the investigation can compel co-workers to act as a witness. There

is no specific law for whistleblowers or employees who act as witnesses during an investigation. Nevertheless, the employer can have its own whistleblower policy.

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

The procedure for gathering physical evidence is governed primarily by company policy. Nevertheless, the Data Privacy Act of the Philippines protects all data subjects from unlawful processing of their personal information without consent.

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

Subject to the employees' reasonable expectation of privacy, gathering physical evidence within the premises of the workplace and through company-issued property has been upheld to be legally permissible in pursuit of the employer's right to conduct work-related investigations. The search, however, should be limited to the alleged acts complained of and must not be used as a fishing expedition to find incriminating information about the erring employee.

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

Since there is no specific law that governs whistleblowing, matters that involve whistleblowing will be governed by company policy.

### **Confidentiality and privilege**

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

Since the right to investigate ultimately belongs to the employer, it may impose strict confidentiality obligations upon the individuals involved, not only to ensure unhampered investigation proceedings but also and more importantly for the protection of the company and employees involved.

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

During the fact-finding stage of the investigation, the employees under investigation are not generally entitled to information concerning the conduct of the investigation. It is the prerogative of management to involve the employee under investigation during the fact-finding stage. When, however, the employer determines that an administrative disciplinary process must proceed, the employee's right to due process attaches. As such, due process includes the right to be informed of the grounds relied upon by the employer and the opportunity to be heard. The first notice or notice to explain should specifically inform the employee of the charge against him or her.

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

The identity of the complainant, witnesses and sources of information may be kept confidential under the employer's policies.

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

The practice of stipulating matters to ensure adherence to confidentiality is not uncommon. As such, NDAs are executed as a means of added protection for both the company and the employees involved.

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

The employer's internal policy can indicate that investigation materials must be kept confidential.

### **Rights to representation**

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

Since the fact-finding phase of the investigation is considered to be a preliminary step before the commencement of the administrative disciplinary process, an employee's right to representation does not attach.

However, when the administrative disciplinary process commences, the employee has the right to have legal representation during the investigation. While no law requires the employee to have counsel present during the investigation, the employee has the right, if he or she chooses, to be advised by counsel or have legal representation.

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

Except if provided expressly under a collective bargaining agreement, the union does not have the right to be involved in the investigation. Given that the investigation is between the employee and the company, it follows that the union does not have any right to participate in the investigation proceedings.

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

Since the conduct of an investigation is different from the administrative disciplinary process, management is given wide latitude for the exercise of the same.

After the employer determines that there are sufficient grounds to support the conduct of a formal administrative process, employees that are the subject of an administrative hearing should be allowed to present evidence to support his or her statements. Further, the employee may also provide affidavits of his or her co-employees consistent with his or her testimony.

### **Issues during the investigation**

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

If unrelated matters are revealed because of a workplace investigation, the employer may look into the new matter and then determine whether there are sufficient grounds to proceed with an administrative disciplinary process for the new matter.

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

If an employee under investigation raises a grievance during an ongoing investigation, the employer must ensure that the employee under investigation is treated reasonably and fairly. Thus, the employer must also give attention to the complaint made by the employee and determine if there are reasonable grounds for the concern of the employee. If the employer determines the validity of the grievance raised, the employer may conduct a separate investigation for it.

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

Since neither consent nor the presence of the employee is material to the conduct of the investigation, his or her absence would not, in practice, imperil the conduct of the investigation.

As previously discussed, because the employer exercises a wide latitude of discretion in conducting workplace investigations, the employer may choose to proceed with the investigation despite the absence of the employee being investigated. Since the proceeding is only in the investigation phase, the statutory right of the employee to be heard is not violated, even if the investigation takes place without his or her participation.

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

It is within the employer's discretion to pursue the investigation even if a parallel criminal or regulatory investigation is taking place. As such, different investigations may proceed independently of each other. However, if the workplace investigation would interfere with or hinder the criminal or regulatory investigation, the workplace investigation should defer to the investigation being conducted by the people in authority. Since the nature of a workplace investigation is highly confidential, the police or regulations cannot compel any evidence from the employer without a court order.

### **Outcome of investigation**

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

The employee under investigation should be informed of the results of the investigation and the basis of the conclusion. It should be included in the first notice or the notice to explain.

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

The employer is not compelled to share its investigation report with the employee. However, it would be ideal for the company to keep in its records a comprehensive report that details the findings of the investigation. This would be useful during the administrative disciplinary process when the employee requests to be informed of the substantive grounds for his or her eventual termination.

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

After the investigation has been concluded, the next steps of the employer will depend on the result of the investigation. If there are reasonable grounds to hold the employee for an

administrative hearing, the employer may issue a Notice To Explain containing the charges against him or her and allowing the employee to explain his or her side. Otherwise, the employer may terminate the investigation immediately.

## **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?**

The result of the workplace investigation must be kept private by the employer. These are confidential matters that should not be disclosed to people or entities who did not take part in the investigation. However, if the investigation findings show that a possibly unlawful or criminal activity has taken place, or is about to take place, the employer should share such findings with the authorities.

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

The outcome of the investigation should only remain on the employee's record for as long as is necessary, but shall not be less than three years as this is the record-keeping requirement under the Philippine Labor Code. If circumstances deem that such a report ceases to have any purpose whatsoever, it should be struck out of the employee's record.

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

An employer may be liable for illegal termination if a dismissal is made based on wrong information collected during the investigation. Thus, the data and information gathered during the investigation stage must be correct and accurate. Further, investigations should be conducted in a manner that is fair and reasonable to the employee under investigation. Otherwise, the employee may treat the investigation as harassment on the part of the employer, which may subject the employer to a potential lawsuit.

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Ms. Pomoy is the Deputy Head of Villaraza & Angangco's Labor & Employment Practice Group. Ms. Pomoy represents domestic and international clients in all aspects of employment and industrial relations, including general employment advisory and assistance, employee investigation, employment and industrial relations disputes, international transfers and global mobility matters, large-scale reductions in workforce and corporate restructures and the employment aspects associated with corporate transactions. Ms. Pomoy also has extensive experience litigating single and multi-plaintiff cases before the National Labor Relations Commission on a wide range of employment issues including illegal dismissal, contracting arrangements and other violations of Philippine labour law.

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