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International Employment Lawyer

# Guide to Workplace Investigations

**Turkey**



**Contributor:**

**Paksoy**

# Turkey

Elvan Aziz, Gülce Saydam Pehlivan,  
Emre Kotil, and Osman Pepeoğlu  
Paksoy

## Starting an investigation

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

There is no specific legislation governing workplace investigations in Turkish law. However, there are general principles stemming from Labour Law No. 4857 as well as good practice principles. Data protection laws also occasionally intertwine with these. The internal codes and policies of the company should also be followed throughout the process.

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

The need to initiate an internal investigation may arise from the receipt of information from various sources. Reporting is one of the most common sources and can be in different forms. In Turkey, while conventional methods such as reporting to a direct supervisor, human resources or executives is quite common, whistleblowers also use reporting mechanisms such as web-based forms, telephone hotlines or e-mail, if such mechanisms exist. It is critical to obtain as much information as possible from the complainants at this initial contact, to make a sound decision on whether or not to commence an investigation. There is no requirement to decide to start an investigation and it can be commenced through a corporate resolution (eg, ethics committee resolution or board resolution) of a decision-making body or a decision of the body or person who has such authority under the company policies. The investigation team who will conduct the process may also be approved by the company's decision-making body. It is also advisable to have a preliminary inquiry for the complaints, before commencing a fully-fledged investigation.

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

An employee can be suspended during a workplace investigation provided his or her prior written consent is obtained to this effect during or immediately before the investigation. Obtaining a generic written consent from the employee regarding suspension, which is not tied to a specific event, will not be valid. If there is a suspension of employment due to the workplace investigation, the obligations of the parties arising from the employment relationship continue, except for the employer's obligation to pay a salary (and provide benefits, if any) and the employees' duty to perform work.

There is no provision or established court decision setting forth the rules regarding the length of the suspension period; however, as a general rule, this period should be as brief as possible, so as not to cause any impression that the employment relationship has been terminated by the

employer. Suspension of an employee on full pay during a workplace investigation, which is also known as garden leave, is a commonly used alternative to a conventional suspension method described above. During the garden leave period, an employee can be banned from entering the workplace and performing any of his or her duties either partially or entirely while continuing to be paid his or her regular salary, along with fringe benefits. Garden leave is not a concept regulated under Turkish employment legislation, but rather developed in practice, mostly by the Turkish subsidiaries of multinational companies. An ideal approach for the implementation of garden leave would be to obtain the written consent of the employees either at the commencement of employment or during the investigation.

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

There is no compulsory requirement or qualification arising from the law as to the selection of the investigation team. The number and the profile of the investigation team need to be decided according to the characteristics of the case, whereas the head of the investigation team needs to be a competent and experienced investigator. A conflict of interest review is required to be conducted for the whole investigation team to protect the interests of the company. As conflicts of interest can also arise during an investigation process, relying on the support of an outside legal team should be considered, particularly for internal investigations that are likely to expand.

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

There is no specific remedy provided under Turkish law to stop the investigation. One may consider requesting an injunction from a court for this purpose, but it is less likely that such a request would be successful. This is because investigations are often conducted for fact-finding purposes and to obtain an injunction the claimant will need to prove that this fact-finding exercise will pose a great risk and cause irreparable harm to the employee.

## 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?

Co-workers cannot be compelled to act as witnesses in a workplace investigation. Employees also have rights arising from the law that must be respected by the employers and investigators, such as the right to privacy or to remain silent, freedom of expression and communication. These rights must be protected during every step of the workplace investigation process.

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

The conditions applicable to gathering physical evidence mainly stem from the precedents of the Turkish Constitutional Court about employment disputes and the rules set forth under Turkish Law No. 6698 on the Protection of Personal Data (DPL). It is generally accepted that employers can gather physical evidence for certain legitimate purposes, such as disciplinary investigations, the prevention of bribery and corruption, fraud or theft, money laundering, and employee performance

monitoring and compliance. In doing so, employers must, however, comply with the fundamental principles of the Turkish Constitutional Court as briefly described below:

- The grounds for the gathering of evidence must be legitimate. The definition of the legitimate interests of the employer may change depending on the characteristics of the business, workplace and employee job description, as well as the specific circumstances of the case. Therefore, it is advisable to carry out a balancing test between the legitimate interest the employer is seeking to protect and the employee's interest in the protection of their privacy.
- The collection activities must be proportionate, in the sense that the measure implemented by the employer must be appropriate and reasonably necessary to achieve the legitimate purpose, without infringing upon the fundamental rights and freedoms of the employees. For instance, e-mail monitoring to collect evidence may not be proportionate if it is determined that e-mails that are not related to the incident subject to investigation are also accessed. To achieve this, certain keywords or algorithms can be used while monitoring e-mails during a disciplinary investigation.
- The collection process must be necessary to achieve the purpose. In other words, the collection of physical evidence must only be carried out to the extent there are no other measures allowing the employer to achieve its purpose, such as witness testimony, workplace records, or examining the results of projects. If the purpose can be achieved through less invasive means, the collection of physical evidence may not comply with the principles established by the decisions of the Constitutional Court.

Separately, depending on the type of physical evidence collected, the collection process may lead to the processing of the concerned employees' personal data. Under the DPL, personal data collected in Turkey can only be processed if the explicit consent of the data subject is obtained; or the data is processed based on one of the exceptions to consent provided by the law. To the extent the data processing can be deemed to be based on the pursuit of a legitimate interest of the employer, it should also meet the following conditions:

- it should be the most convenient and efficient method to identify any employee wrongdoing to protect the legitimate interests of the company; and
- the data processing should not harm the fundamental rights and freedoms of the employees.

The employer should in any case comply with the obligation to inform employees before the processing of their data, through a privacy notice containing mandatory information required by the DPL.

In addition, as a general principle, the evidence-gathering process should always be conducted based on the assumption that the internal investigation can lead to litigation. Any evidence that will be used in litigation needs to have been gathered in compliance with the law. In both criminal and civil litigation, the courts will review each piece of evidence to confirm whether it was gathered through lawful and disregard any evidence that fails to comply with due process.

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

There is no explicit answer to this question. However, it is important to make a distinction between employees'

possessions and files that are strictly personal and employees' possessions and files that are found on devices or files provided for company use. For the first category, the employer does not have the right to search employees' possessions and files. For the latter category though, justifications need to be established, by observing the requirements explained in question 7. Furthermore, the employers must also ensure that employees are fully and explicitly informed in advance of the monitoring operations, either through a provision included in the employment agreement, or in a separate notice or employee policy, the receipt of which should be duly acknowledged by the employee.

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

Although there is no specific legislation in Turkish law on whistleblowing, necessary mechanisms need to be implemented to ensure that whistleblowers and the whistleblowing process are kept confidential. In addition, whistleblowers must be encouraged and supported to be open about raising their concerns in good faith. A whistleblowing activity, when it amounts to raising a concern in good faith, must not be mistreated by the employer. Employers should also put in place protection mechanisms against the mistreatment of whistleblowers or retaliation towards them by other employees.

### **Confidentiality and privilege**

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

As a general practice, workplace investigations need to be kept confidential for the integrity of the process. In some cases, employees can specifically request their identity or involvement be kept confidential. In such cases, additional measures need to be taken to protect confidentiality. In any case, obligations and rights arising from the DPL and Labour Law must be respected and complied with by the employer and the investigation team.

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

Informing the employee under investigation on the subject, purpose and possible consequences of the investigation need to be evaluated by the investigation team before the interview. As a general principle, the interviewer is expected to share the information he obtained on the case with the employee, and ask for confirmation or clarification on these matters. The employee under investigation may be subject to an interview to gain information or as a confrontation if there is concrete evidence. If the evidence in hand is not based on concrete and material grounds, it would be more appropriate not to lead the interview to a confession, but inform the employee of the possible allegations. However, if the available evidence is based on concrete and material grounds, the interviewer may confront the interviewee by sharing the information that was gathered during the investigation in an attempt to obtain a confession.

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

It is possible to keep such information confidential. If this is the case, the investigation team should conduct the interview outside the workplace of the company. This is actually good practice applicable to all internal investigations, unless there is a particular reason that requires the meetings to be held at the company.

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

It is crucial to keep the events and facts of a workplace investigation confidential for the integrity of the process. It may be necessary to consider appropriate confidentiality measures to protect the complainant, mitigate risks, and preserve evidence. Damage to the confidentiality of the case can prevent the investigation team from bringing the case to a correct and complete conclusion. Although the labour legislation imposes a general confidentiality obligation on employees, NDAs can still be used as supplementary documents that may emphasise the confidentiality obligations of employees in workplace investigations and provide additional contractual protections such as penalties if there is a breach.

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

Attorney-client privilege is attached at the time the attorney is hired as a legal representative. Attorney-client privilege, which is regulated under the Law of Criminal Procedure No. 5271 and the Attorney's Act No. 1136, covers not only the investigation process, but also the legal advice and counselling received before and after the investigation. The importance of this privilege is especially present in cases where judicial or administrative authorities are involved in the process. Documents and correspondence benefiting from attorney-client privilege can be protected and fall outside the scope of preventive measures such as search and seizures due to the right of defence.

## **Rights to representation**

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

Yes, the employee under investigation has a right to be accompanied by his or her legal representative during the investigation. It is also essential that the employee under investigation is informed about his or her right to have a legal representative.

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

An authorized trade union, if any, may have the right to be informed or involved in the investigation, depending on the terms of the collective bargaining agreement in place. Even in the absence of such a provision in the collective bargaining agreement, it would still be recommended to inform the trade union of the investigation as a courtesy. We do not have works councils under Turkish employment law.

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

The employees involved in the investigation should be granted their personal needs (such as refreshments or access to the bathroom), as well as translation services or transportation, if needed. A breach of these rights or needs during the process may constitute a violation of the law and adversely affect the validity of the results to be obtained from the investigation.

## **Issues during the investigation**

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

If an unrelated matter is revealed during the investigation, an independent assessment needs to be made as to whether this new matter requires to be included in the same internal investigation, or a separate/new one should be commenced.

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

If, during the investigation, the employee under investigation raises a grievance, the investigator will be expected to temporarily stop the investigation to assess the situation. The investigation team will evaluate whether the employee is raising a grievance as a defence mechanism or in good faith and with sincere concerns. If the subject of the grievance is related to the pending investigation, the investigation may be extended to cover this new item. Otherwise, a new investigation can be initiated by the investigation team.

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

The employee's participation in the investigation is vital for a fair assessment and to ensure that the employee has been allowed to defend himself or herself against the allegations. As such, every reasonable effort must be made by the employer to adjust the investigation process so that the employee can take part in the investigation. For example, if the employee goes off sick and thus cannot attend the investigation interviews or disciplinary hearings, the investigation should be carried out as much as possible without resorting to the employee in question, by initially exhausting the other available options (such as conducting interviews or disciplinary hearings with other available witnesses). However, if the employee's absence takes longer than is reasonably expected or the matter at hand must be dealt with urgently, the employer may consider concluding the investigation and determining the next steps based on the information at hand. In such a case, it is recommended to explain in the investigation report the reasons why the employee could not take part in the investigation process (ie, why an interview or disciplinary hearing, etc, could not have been arranged with the employee) along with supporting documentation evidencing the employer's efforts to involve the employee in the investigation process and the employee's excuse for not participating interviews or disciplinary hearings.

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

If the issues being examined during an investigation are also subject to parallel criminal or regulatory investigation, the

workplace investigation will probably be stayed. This is primarily because parallel criminal or regulatory investigations would necessitate a more comprehensive examination and public bodies overseeing such investigations have a broader legal prerogative to gather evidence. It is, therefore, advisable to stay the internal investigation to not interfere with the criminal or regulatory authorities. If a prosecutor or a court requires the employer to give evidence or share certain documents, the police can compel the employer to share evidence. Regulatory bodies may also ask the employer to share evidence and the powers conferred on such regulatory bodies will be a determining factor in whether they can compel the employer.

## Outcome of investigation

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

In general, the employee under investigation should be adequately informed about the allegations and findings to be able to defend him or herself. If no legal action will be taken against the employee under investigation as a result of the investigation, the employee may be notified regarding the findings and the outcome of the investigation. If the employee will be subject to a legal or administrative action (ie, warning, reprimand, or termination of employment), the formal requirements stemming from the Labour Law will need to be followed.

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

There is no legal requirement for the disclosure of the investigation report in full. If the investigation report needs to be submitted to the court, public institutions or other third parties, measures may need to be taken to protect confidentiality or to comply with the confidentiality requests of the persons participating in the investigation.

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

The employer may take various legal remedies against the employee whose infringement is discovered as a result of the internal investigation. Depending on the outcome of the investigation, the employer:

- may provide the employee with a written warning requesting him or her not to repeat the same conduct;
- terminate the employment relationship based on either just cause, without paying any compensation immediately, or valid reason by observing statutory notice periods or making payment in lieu of notice and paying severance compensation if applicable; or
- not take any action if the investigation concludes that no fault is attributable to the employee.

### 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?

Investigation reports may be disclosed in potential lawsuits or judicial proceedings. Therefore, the investigation report must demonstrate that a detailed and objective investigation has been carried out. Courts may also request that the interview records be disclosed to them, failing which, the courts may

resort to an adverse inference in civil proceedings. Criminal courts can also ask the interview records to be disclosed if this would be necessary for reaching the truth. Failure to disclose may entail criminal responsibility under certain conditions.

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

There is no provision in the legislation setting forth a specific duration for keeping the outcome of the investigation findings in personnel files. However, based on general principles, the outcome of the investigation can remain on the employee's personnel files as long as the employer has a lawful interest in such processing without unnecessarily harming the privacy rights of the employee.

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

The nature of legal exposure is very much dependent on the legal action the employer has taken after the investigation. The employer may be subject to a wrongful termination lawsuit to be filed by the employee, which may result in the payment of compensation to the employee of between eight and 12 months' salary, if the court concludes that the termination is wrongful. This may also include monetary and moral damages claims. If no termination has taken place, the employee may terminate his or her employment with just cause if the employer has erred in its neutral fact-finding mission and this affects the employee. The employee may also file a criminal complaint to the extent that the investigation findings incriminate the employee in error.

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# Authors:



## **Elvan Aziz, Paksoy**

Elvan Aziz is the partner co-heading the M&A practice, and heading the corporate, labour and employment departments of Paksoy. Ms. Aziz has been acknowledged and highly regarded by various international law firm rating agencies and since 2018 has been determined as one of the “Women Leaders” from Turkey by IFLR 1000, who is considered as the “best transactional specialists in her market and practice area”.

With respect to labour and employment matters, together with her team, Ms Aziz provides advice on Turkish employment laws including implementation of management incentive schemes, strategy building on HR aspects of restructuring or closure of business, preparation of employment agreements and internal bylaws, dealings with the trade union as well as collective and individual termination, separation, settlement and release of employees including C-level executives and other top management.

On M&A and Turkish corporate and commercial law, Ms. Aziz she has been actively advising clients in various industries for high profile and strategic transactions which includes cross border acquisitions and international joint ventures. She has been acting for foreign and Turkish strategic investors and PEs in their acquisitions in Turkey, as well as advising selling shareholders in transactions of all sizes and sectors.

Ms Aziz is a member of the Istanbul Bar and International Bar Association.



## **Gülce Saydam Pehlivan, Paksoy**

Gülce Saydam Pehlivan is the counsel having primary focus on all aspects of labour and employment law including individual and collective labour law matters. Ms Saydam Pehlivan represents broad spectrum of clients in various industries and sectors including online gaming, banking, energy, real estate investment, retail, chemical industries and media. She has significant experience on implementation of employment restructurings such as downsizings, collective redundancies, closure of business, negotiating and drafting of employment agreements of C- level executives and other top management as well as termination, separation, settlement and release documents, and employment law aspects of the cross border and local business/workplace transfers and acquisitions. She also has significant knowledge and experience in the fields of social security and immigration laws.

Ms Saydam Pehlivan also specializes in corporate and commercial law where she regularly advises multinational and domestic clients on corporate and commercial matters for their day-to-day activities. She further represents local and multinational clients on mergers and acquisitions transactions across a wide range of sectors.

Before joining Paksoy in 2013 following her LL. M degree at Queen Mary University of London, she worked as an associate at the labour and employment department of a top- tier law firm based in Istanbul.

# Authors:



## **Emre Kotil, Paksoy**

Emre Kotil specialises in compliance and investigations, commercial litigation, and dispute resolution. He advises clients on compliance programs and internal investigations with respect to anti-bribery, anti-corruption, anti-money laundering, regulatory compliance, workplace misconduct and other violations of the law, and supports them with devising codes of conduct, internal policies and employee training programs. He is certified as an Ethics and Compliance Manager by TEİD (Turkish Ethics and Reputation Society). He also has extensive litigation experience acting for foreign and domestic clients on their commercial, administrative and civil conflicts as well as conservatory relief measures.

Prior to joining Paksoy, Mr Kotil gained experience in a wide range of sectors such as maritime, aviation and insurance. He is actively involved in the enforcement of foreign court decisions and arbitral awards. He advised ship owners, P&I Clubs and cargo interests in a variety of disputes including but not limited to vessel collisions, cargo claims and successfully realized numerous vessel arrests. He also represented aviation companies in disputes arising from air crashes, lease agreements, baggage and cargo claims.

Mr Kotil has experience appearing before civil courts, commercial courts and courts of appeal, and also represents his clients before public authorities such as the Directorate General of Civil Aviation, Port Authorities and Customs Offices.



## **Osman Pepeoğlu, Paksoy**

Osman Pepeoğlu specialises in compliance and investigations, as well as litigation and dispute resolution. He gets heavily involved in compliance projects and various types of internal, regulatory and judicial investigations, in which he forms part of the core team, and in domestic and international arbitration matters.