

Bird & Bird

# Conducting international workplace investigations



*Spring 2022*

# The modern workplace is *increasingly complex*

Employers now manage their people in the context of hybrid and remote working arrangements, increasing government regulation, 24/7 attention from social media and new cultural movements. The pandemic has accelerated these trends and they create opportunities for businesses, but also potential legal, financial and reputational risks.

In this environment, robust procedures are needed for handling workplace investigations when difficult issues arise. The approach taken will need to reflect certain key elements whilst being sensitive to local practices and specific circumstances.

This guide provides an overview of the main considerations when conducting an investigation across Europe and the Asia-Pacific region. It provides general guidance only and is not legal advice: the law and practice on investigations varies between countries and we would always recommend that you obtain legal advice from your usual Bird & Bird contact for specific cases.



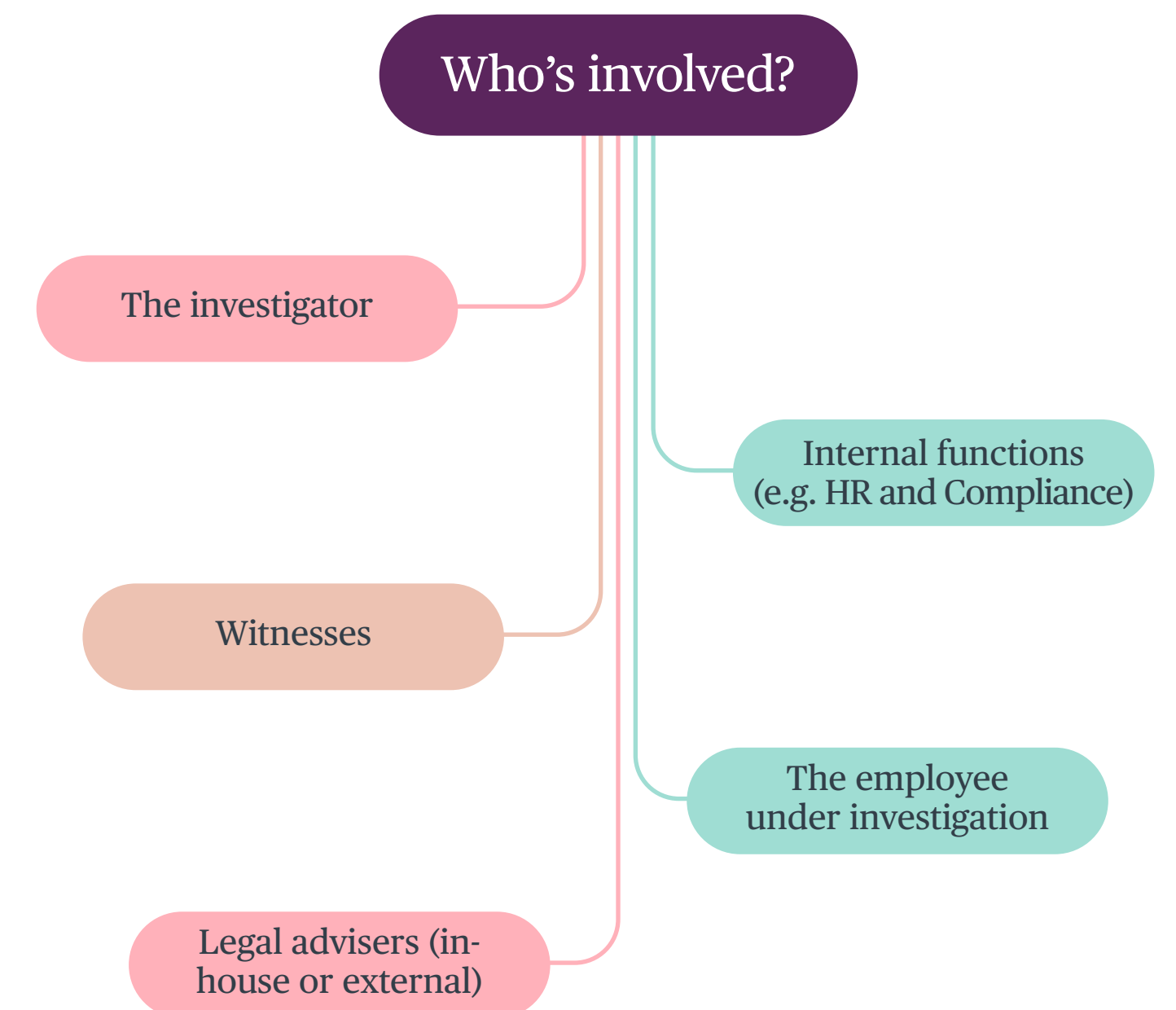
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# Getting started

An investigation may be necessary for a range of reasons. You may have received an internal complaint from a member of staff or an external complaint from a customer or a member of the public. The complaint could be anonymous and it might have been submitted via a whistleblowing helpline. An investigation may also be necessary following an audit of a company's systems and processes.

## Before getting the investigation underway:

- Review any relevant internal **policies or agreements** as these may contain requirements beyond the legal minimum, including in company or sector collective bargaining agreements.
- Consider how the company has handled similar issues in the past, to ensure a consistent approach.
- Consider and document the key questions, facts and allegations that you will be investigating, and consider whether there could be legal ramifications for the company if the allegations are found to be factually correct.
- Take steps to ensure that any potentially relevant documents (whether physical or electronic) are preserved and not deleted or destroyed (while considering any applicable data protection rules). It may be appropriate to send a 'legal hold' notice to certain individuals.
- Consider if anyone needs to be notified within the organisation and if employee/works council representatives need to be involved, whilst keeping in mind confidentiality and **data protection** issues.



## The investigator

Depending on the country and circumstances, the investigator is usually someone from HR, management or the Compliance or Legal teams. It may be appropriate for a second person to attend investigation interviews as a note-taker, in case of any dispute regarding the content of the meeting. Sometimes an **external investigator** is appointed, especially if the matter is particularly sensitive, gives rise to potential internal conflicts of interest, or if there is limited internal resource and capacity to handle it.

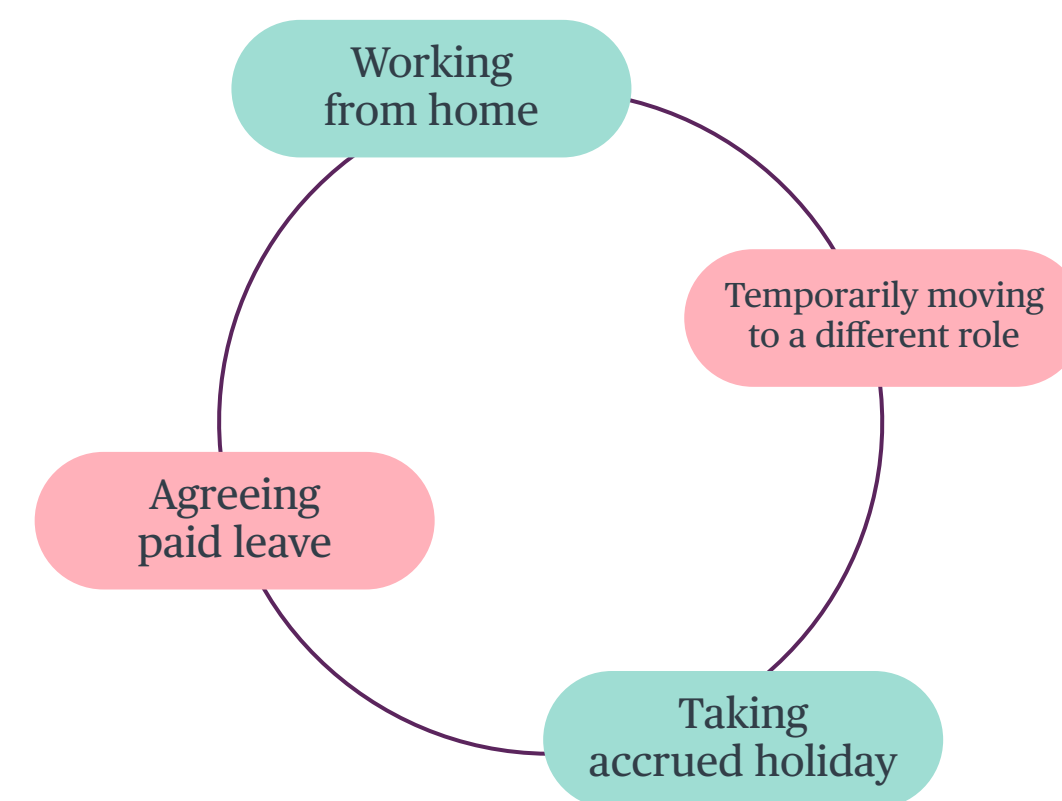
## Privilege

Privilege is a complex area, which may apply where internal or external lawyers are involved. **See further guidance on privilege here.**

## Suspension

Suspension is a complex area, which should be considered carefully. **See further guidance on suspension here.**

Depending on the circumstances, you may consider the following alternatives to suspension. Some of these might need the employee's agreement:



It may also be appropriate to allow the employee who raised the complaint to take paid leave (or modify their activities or working hours) if there are concerns regarding their wellbeing. At the same time, employers should be careful about any such discussions being intrusive or being perceived as retaliation.

## Notifications to third parties

Notifications to the police or to a regulator may be necessary depending on the facts (for example if there is any criminal conduct involved) and whether the employer is subject to external regulatory controls (e.g. competition or financial services authorities). Such a notification may be appropriate at various stages, including at the start or end of an investigation, or subsequent disciplinary process. Any notification should be considered carefully and specialist advice should be obtained, especially in light of the possible wider impact on relevant employees and the company.

## The EU Whistleblowing Directive

National laws on whistleblowing are changing in the EU, as a result of the EU Whistleblowing Directive. **See further guidance on the Directive here.**

# Investigation process

In most countries there are no time limits for investigations, and in general the investigator should not commit to employees that they will complete their investigation within a particular timescale. It is generally recommended not to insert a time limit in a company policy, unless this is required by law.

Regional variations may apply. For example, in Hungary, investigations covered by its whistleblowing legislation must normally be concluded within 30 days from the receipt of the complaint.

Investigations should always be conducted without unreasonable delay. Any delay could increase legal risk, through important information being lost or forgotten, participants losing confidence in the process, or impacting the legitimacy or fairness of any subsequent disciplinary sanction.

In general, the individual who raised the complaint should be kept up to date on the progress (but not the current findings) of the investigation, to reassure them that the company is taking a **proactive** approach.

**The two main sources of evidence are:**

- 1. Witness evidence** — the individual who made the complaint might have provided a written complaint or statement. The investigator should follow up with a meeting. They should also arrange meetings with other witnesses and with the employee under investigation.
- 2. Other evidence** — this could include CCTV recordings, internal company records and “e-discovery” of emails and messages (for example on the employee’s work phone and laptop). It may be appropriate to consider forensic imaging of devices, to ensure data is not deleted or transferred. You should consider any applicable requirements, such as notification to employees and employee consent.

## Data protection


When reviewing evidence and sharing information, it is critical to consider data protection rules.

**See further guidance on data protection here.**

## Interviews

It is normally appropriate to interview the individual who raised the complaint first, in order to fully understand the allegations, before interviewing the employee under investigation or any other witnesses.

“Investigation documents should be stored and shared securely, and you should consider applying password protection.”



Points to note when meeting with the individual who raised the complaint and other witnesses:

- **Be clear about what will happen with notes from their interview**, for example that they may be shared with the employee under investigation if a disciplinary hearing takes place. Even if they are not shared, meeting notes may be disclosable as part of any future litigation.
- **Reassure witnesses that the information they provide will be treated sensitively** and stored carefully, and that the company has a policy against retaliation.
- **In exceptional circumstances, it may be appropriate to anonymise the witness' meeting notes.** However, the employee under investigation will have the right to fully understand the case against them, and an anonymised statement may make this more challenging.
- **If appropriate, be clear that the internal investigation and investigators are not public authorities.** The employer is not replacing the courts or any other law enforcement authorities (who may initiate their own investigations) and is not entitled to make enforceable judgments.

Document management and forensic review

Investigation documents should be stored and shared securely, and you should consider applying password protection. For more complex investigations, consider whether secure document management platforms could assist in organising the documents.

[See further guidance on conducting a forensic review here.](#)

# Meeting with the employee under investigation

## Duties of the employer:

- Treat the employee fairly and consistently.
- Follow a fair and reasonable process.
- Comply with relevant policies and any collective agreements.

## Duties of the employee:

Co-operate with any investigation and obey reasonable instructions from the employer, including:

- Providing any documents or evidence.
- Answering questions and attending any investigatory meetings.

In some countries, refusal to co-operate may itself be grounds for disciplinary action.

Once the investigator has information regarding the allegations, they should explain them to the employee under investigation, to understand whether they admit or deny them. In some countries employees have the right to be accompanied at the investigation meeting, and in other countries the position should be considered based on the circumstances.

For example, it may be appropriate to allow the employee to be accompanied if there is a possibility of criminal liability in connection with the findings of the investigation.

Similarly, whether to give advance notice of the meeting, or details of the complaint in advance of the meeting, should be considered on a case-by-case basis and depending on local laws.

It might be necessary to hold follow-up meetings if you receive further detail regarding the allegations.

## Conducting the investigation meeting:

- **Make clear the purpose** of the meeting at the start.
- **Remain neutral and objective.** Focus on understanding the facts.
- **Confirm that the meeting is for the purposes of an investigation** and is not a disciplinary meeting.
- **Understand any mitigating factors** or explanations for the suspected misconduct.
- **Explain that the meeting is confidential.**
- **Take a detailed note** of the meeting.
- **Ask whatever questions are reasonably necessary** to establish the facts of the situation. The employee's comments may require you to react quickly and ask new questions that you had not previously considered.
- **Consider whether to ask open or closed questions.** It is often best to start with open questions and then ask closed questions.



# Next steps

At the end of the investigation, depending on the case, the employer may provide the employee under investigation with a report summarising the findings from the investigation, and possibly copies of any witness statements/interview notes and other evidence obtained or reviewed as part of the investigation.

However, the precise information that is provided will depend on the country in question and specific circumstances of the case.

Local advice should be taken. For example, in Italy, it is recommended not to provide the employee under investigation with a report summarising the investigation findings. Also, depending on the case, the company may wish to keep the investigation findings confidential (and rely on legal privilege where available).

The company should carefully consider what information it is appropriate to give to the **individual who raised the complaint**, including whether it is appropriate for them to see the full investigation report, witness statements/interview notes and other evidence, and what further action is needed (if any).

In some cases, it may be there is nothing further to be done, or **informal action** may be sufficient, such as a mediation meeting between two employees or an informal verbal warning.

In other cases, if the employer is proceeding to a **disciplinary hearing**, this should be conducted without unreasonable delay and in accordance with the company's disciplinary procedure and local legal requirements. For example, in France, any disciplinary action must be taken within two months of the employer finding out about the facts.

**In disciplinary circumstances, at a minimum, the company should typically:**

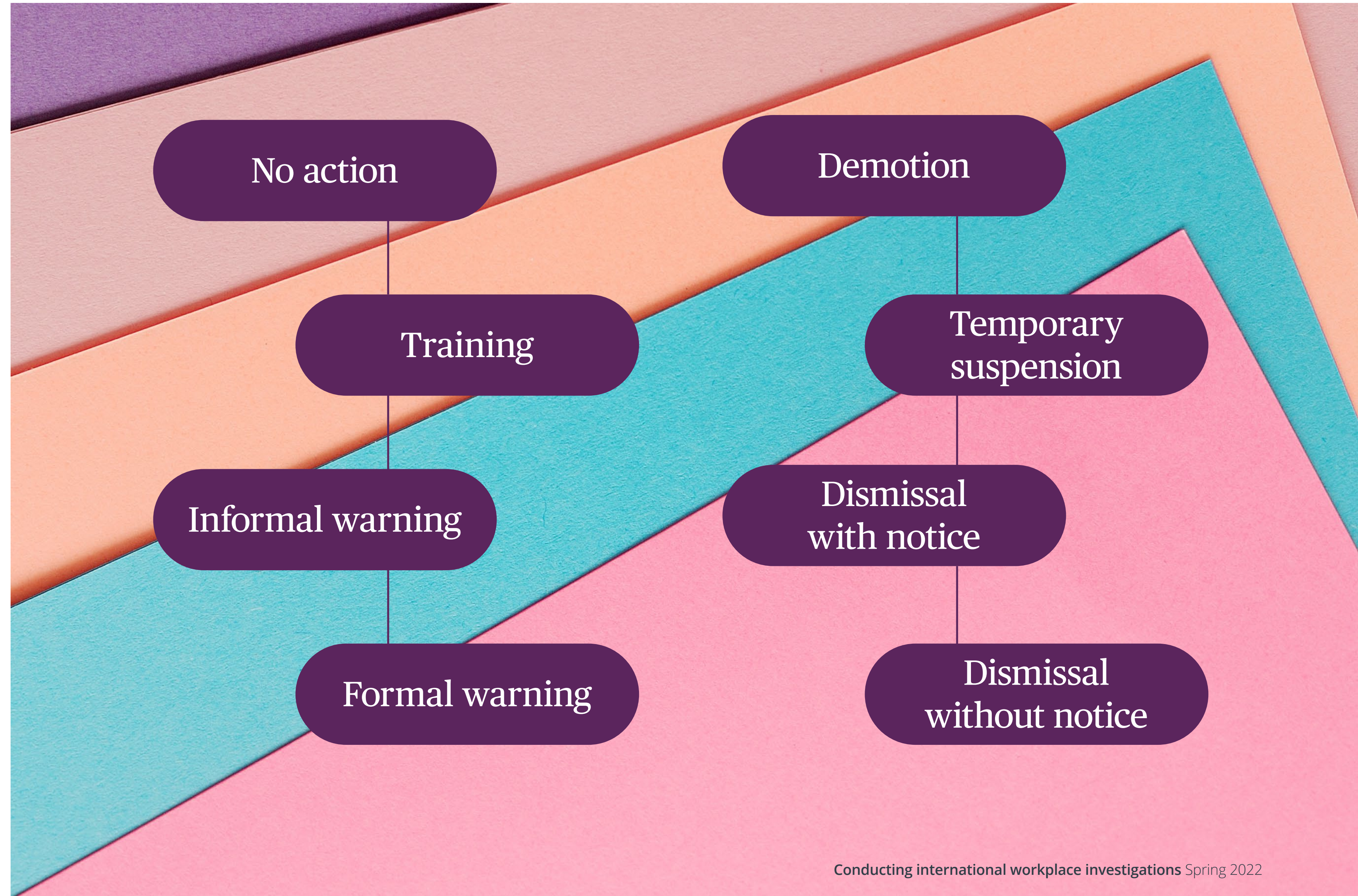
- Inform the employee of the allegations in writing (and provide relevant supporting evidence).
- Invite the employee to a disciplinary hearing with reasonable prior notice.
- Give the employee a written decision after the hearing.

**Depending on the country and the circumstances:**

- It might be standard for the disciplinary process to be chaired by someone who was not involved in the investigation.
- The employee might have a right to be accompanied to the disciplinary hearing.
- The employee might have a right to respond to the disciplinary allegations in writing, or to appeal the decision.

Regional variations apply. For example, in China, it is not typical or required to inform an employee of the allegations or hold a disciplinary hearing before issuing a written decision.

The appropriate disciplinary sanction will depend on factors including the severity of the actions, the employee's response to the allegations (including any mitigating factors), their length of service, seniority and any history of good conduct. Possible subsequent actions following a disciplinary process may include the following, although local legal advice should be obtained based on the specific case, and some of these actions may not be permissible in some countries:



# Further focus points



## Suspension

Suspension of staff members may be appropriate, for example to stop the alleged misconduct or if there is a risk to any employee's health and safety or to the company's property or business interests. If the company is regulated, suspension may be necessary to prevent the employee from continuing in a regulated role.

**Many countries have specific rules around suspension and local law advice should always be obtained. For example:**

- In **Italy**, suspension is only permitted under certain collective agreements.
- In **Poland**, suspension is not possible.
- In **Singapore**, the maximum period of suspension is one week (for longer periods, an employer must apply to the Ministry of Manpower).
- In **Sweden**, the employer may be required to consult about suspension (or alternatives to suspension) with the relevant trade union, and for companies bound by Collective Bargaining Agreements there may be limits on the duration of a suspension.

**The following general points are also worth noting:**

- In some countries, a contractual right to suspend may be required, in which case individual employment contracts or relevant policy documents should be checked. In some cases, it may be appropriate to obtain the employee's consent to be suspended.
- In most countries there are no fixed limits on the duration of suspension, but it is not usually seen as a 'neutral act' and any decision to suspend should be regularly reviewed to ensure that it does not last longer than is reasonably necessary.
- You should inform the employee about the reason for suspension, the expected length of time, and whether the employee will remain on full pay (which will normally be the case).
- The reasons for continuing suspension should be recorded in writing.
- It is generally best to say very little (if anything) to other employees about suspension or the investigation process.

“Suspension is not usually seen as a ‘neutral act’ and any decision to suspend should be regularly reviewed to ensure that it does not last longer than is reasonably necessary.”





## Privilege

Investigations are normally conducted on an 'open' basis. This means that, if there is subsequent litigation relating to the issue (for example if the investigation results in an employee being dismissed), the fact of the investigation and the content of any investigation documents or discussions can be relied on by the parties, and they may also be visible to the general public.

However, in some countries, it is possible for investigations to be conducted by internal or external lawyers on a 'legally privileged' basis.

This might be preferable if there are possible legal or regulatory consequences of the investigation, including possible disclosure to a regulator or claims by third parties against the company.

### Conducting the investigation on a privileged basis may assist in:

- Assessing possible liability for the company.
- Retaining control over potentially damaging evidence.
- Exempting documents from disclosure under a Data Subject Access Request.

Where you wish to treat an investigation as privileged, it may be appropriate to label documents as "confidential and legally privileged".

Conducting the investigation on a privileged basis could have drawbacks. If the report is negative and not disclosed, but the company still relies on the fact of the investigation in any subsequent litigation (for example to prove that the matter was not ignored), some courts may not give much credit for a company having obtained a privileged report, or may infer that something negative is being hidden.

Also, privilege may not apply to parts of the investigation that do not include the provision of legal advice, for example records of the interviews with current and former employees.

## The EU Whistleblowing Directive

Many countries have rules around how to handle concerns raised by 'whistleblowers'.

In the EU, the EU Whistleblowing Directive (Directive 2019/1937 on the protection of persons who report breaches of Union law) was required to be implemented by all EU Member States by 17 December 2021 though a number of jurisdictions have missed this deadline.

The Directive requires Member States to implement legislation requiring all companies with 50 or more workers to put in place appropriate reporting channels to enable those workers to report breaches of EU law, which ensure the confidentiality of the whistleblower.

Employers must ensure that those making whistleblowing reports are legally protected against retaliation for having done so.

The Directive also requires Member States to implement external reporting channels. The protections for whistleblowers must cover reports made in relation to breaches of the areas of EU law specified in the Directive (including public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; protection of the environment; protection of privacy and personal data, and security of network and information systems).

However, if they wish, Member States can include protections for those who blow the whistle in other areas and several countries have widened the scope of their implementing legislation to include breaches of domestic law or other matters not covered by the Directive.

Companies operating in the EU should review their whistleblowing systems and policies, and check how and when the Directive is being implemented in each Member State.

Bird & Bird have produced an Implementation Tracker for the EU Whistleblowing Directive. [Please see the Tracker here.](#)



“Employers must ensure that those making whistleblowing reports are legally protected against retaliation for having done so.”



## Data protection

- Data protection rules could apply to various activities connected to the investigation, for example (a) monitoring an employee's emails and (b) sharing the names of the individual who raised the complaint and of other witnesses with the employee under investigation.
- Data protection is a complex area. While the EU's General Data Protection Regulation (GDPR) creates some consistency within the EU (and in the UK, since the GDPR was implemented into UK law post-Brexit), local specialist data protection advice should be obtained.
- It is usually necessary to consider whether the relevant personal data includes 'sensitive' or 'special category' personal data, such as data about an employee's health, which is subject to more strict conditions and will require an additional legal basis.
- Outside the EU, countries generally have their own legislation.

- Depending on the circumstances and country, you may need to check what the privacy policy or privacy notice states, conduct a data protection impact assessment, or consult with works councils.
- You should consider your obligations around whether and when to retain or delete/destroy documents that you produce or collect as part of the investigation (including documents that were ultimately not relevant).
- Under the GDPR, employees involved in the investigation could make data subject access requests or requests for deletion. These can be challenging to address and may need to be handled within short time frames.


Bird & Bird's HR Data Essentials microsite has a range of information to help employers navigate data protection issues around the globe. **To access the Microsite, [click here](#).**

## Forensic review

In some cases it may be appropriate to conduct a forensic review of documents and other data. This often necessitates engaging forensic specialists. Forensic experts use specialised hardware and software for handling of data, to ensure that data integrity is preserved and that materials can be accepted by courts in the event of legal proceedings.

A forensic review typically starts with preparing a “data map” of potentially relevant data sources to be reviewed (e.g. emails, corporate systems). The data collected from these sources usually includes a large number of irrelevant documents not relevant to the investigation. Therefore it may be appropriate to use an e-discovery platform. Such platforms allow the application of data ranges, de-duplication, keyword searches or more advanced analytics, in order to select the most relevant documents, and keep the review proportionate and manageable.

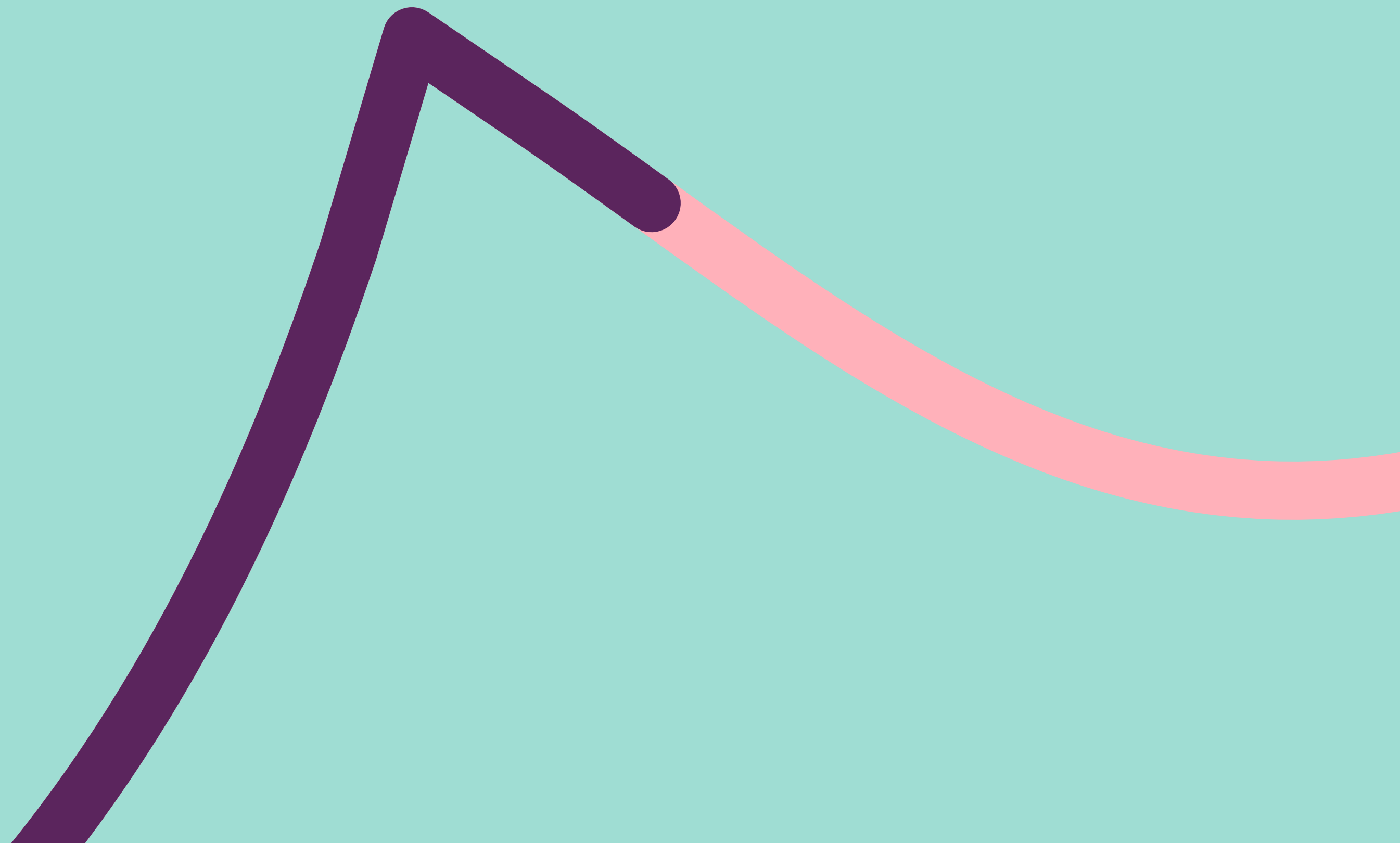
Bird & Bird has a dedicated Forensic Services team. [Please see here for further information.](#)

A black computer keyboard and a yellow computer mouse are shown on a light green background. The keyboard is on the left, and the mouse is on the right. The mouse is a bright yellow color with a black scroll wheel and buttons. The keyboard is black with white text on the keys. The background is a solid light green color.

“A forensic review typically starts with preparing a “data map” of potentially relevant data sources to be reviewed.”



Watch *Seow Hui Goh* and *Rob Briggs* talk about international workplace investigations, including practical tips for conducting interviews.



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