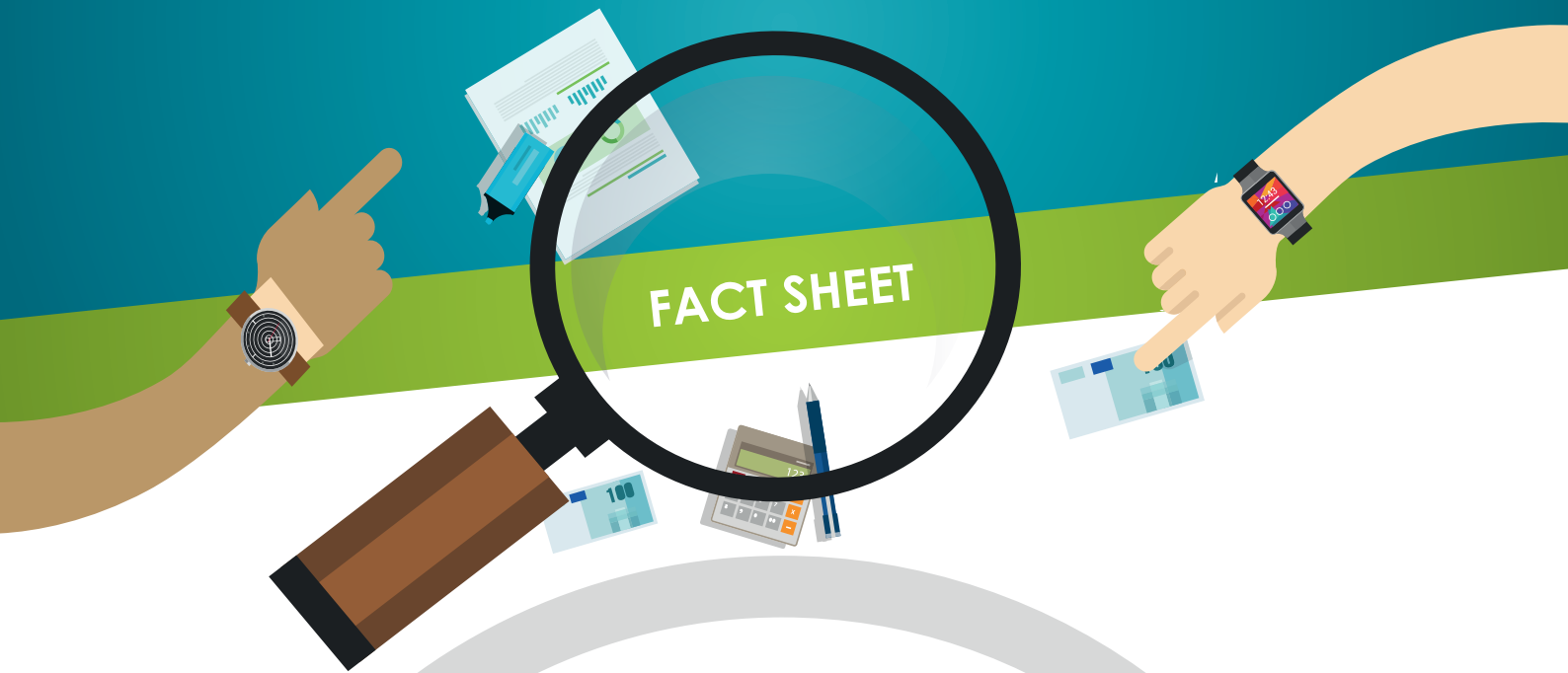


I AM BEING INVESTIGATED AT WORK —what are my rights?



It can be stressful and confusing to be told by your employer that you are being investigated for misconduct. This fact sheet answers some common questions about workplace investigations.

What should I do if my employer has asked me to attend a workplace investigation meeting?

You must follow your employer's 'lawful and reasonable directions'. Usually, it will be lawful and reasonable for your employer to ask you to attend a meeting.

It might not be lawful or reasonable if they ask you to attend a meeting:

- outside of work hours
- when you are sick, or
- if you can't go at a particular time because of your carer's responsibilities (for example, when you would normally leave work to pick up your children from school).



If your employer arranges the meeting when you can't go, you should suggest a time when you can attend.

You should ask your employer what the meeting is about and who will be there.

Can I choose not to go to the meeting?

If you don't go to the meeting, and you are dismissed, it will be difficult for you to later say that the process was unfair to you.

Can I take someone with me?

You can ask to bring a support person to the meeting. If your employer does not let you bring a support person and you are dismissed, their refusal to let you do so will be relevant to whether you were unfairly dismissed.

If you are allowed to take a support person, that person may not be allowed to speak at the meeting. However, they can be a witness to what happens at the meeting.

Can I record the meeting?

You can record a meeting (or any other conversation about your conduct) if everybody at the meeting (or taking part in the conversation) agrees.

It is against the law to secretly record a private conversation. There are serious penalties, like fines or even imprisonment, for doing this.

If the other people involved in the conversation don't give you permission you might not be able to use your recording if you go to a court or tribunal like the Fair Work Commission.

Can I be told not to come to work while the investigation is happening?

Yes. Your employer can tell you not to come to work (suspend you or stand you down) during the investigation.

Unless you are a casual worker, your employer should still pay you for the time you are not at work. Some awards or enterprise agreements allow employers to suspend their employees without paying them in some situations. You should check your award or enterprise agreement.

What does my employer need to do for the investigation to be fair?

Your employer should:

- give you clear information about the allegations of misconduct that have been made against you (like what they say you said or did, to whom, when and where)
- give you time to think about the allegations and a chance to respond
- follow any internal policy about conducting investigations
- choose someone independent to conduct the investigation. This does not mean someone outside your workplace has to do it, but if it is done by another employee, such as a manager, that person should not be involved in the situation and should not be biased
- take into account all the information you and others give them, and
- not take too long to make a decision

If your employer does not conduct a fair investigation and you are dismissed, your dismissal may be unfair. However, if you were dismissed for a good reason, your dismissal may be fair even if the investigation was unfair.

Can my employer get information from other people?

Yes. The investigator should look at all information that is relevant, even if it comes from other people. This could include:

- statements from other people involved in the incident that is being investigated
- incident reports
- CCTV footage
- photographs, and
- email or internet records.



You should ask the investigator to talk to people who support your story.

Can I be investigated by the police or other agencies as well as my employer?

Yes. If someone accuses you of a crime (for example theft, assault or fraud) the police can investigate you. If someone claims that you discriminated against them or abused an elderly person or a person with a disability, other agencies may also investigate.

Can my employer take action against me even if the police don't charge me with an offence?

Yes. Even if the police don't charge you with anything (or if they charge you, but the court finds you not guilty) your employer can still take action against you. This is because a crime must be proved 'beyond reasonable doubt' but workplace misconduct does not.



If you are accused of a crime you should get legal advice before you make a written or verbal statement to your employer. Your employer can pass on any statements you make during an investigation to the police and the statements can be used against you in court.

Can my employer look at my emails or monitor my internet use?

Yes, but they must first give you 14 days notice in writing that they are going to do this. They must tell you:

- what they are going to do (for example, monitor your internet use)
- how they intend to do it
- when it will start, and
- if it will be for a limited time or ongoing.

Your employer can give you this notice by asking you to accept their IT policies each time you log on to your computer.

If your employer has a policy about looking at your emails or monitoring your internet use, they must follow the policy, and they must make sure you know about it.

I'm being investigated and other workers who should be investigated are not

If you are being investigated, and another employee who is doing the same thing as you is not, the investigation might be unfair.

You may be able to make a discrimination or bullying complaint against your employer. If you lose your job, you may have an unfair dismissal claim against your employer.

What can I do if I was unfairly sacked after an investigation?

If your employer terminated your employment after an investigation you may be able to make:

- an unfair dismissal claim
- a general protections claim, or
- a discrimination complaint.

You should speak to a lawyer about the best action to take.



There are strict time limits for taking action. In some cases you only have 21 days to lodge your claim so it is important to act quickly.

I was given a warning letter after an investigation

If your employer gives you a warning letter after the investigation and you think the letter is wrong or unfair, you should respond to the letter in writing.

If you are asked to sign a warning letter, think about the following things before you decide whether to sign it:

- You will usually be taken to have received the warning, even if you don't sign the warning letter.
- The signed warning letter can be used as evidence that your employer gave you a warning.
- The warning letter may be used as evidence that you agree with the allegations in it. However you could make a note on the warning letter that you don't agree with the allegations but acknowledge that your employer has given you the warning.
- Depending on what the warning letter says, your employer may be giving you a 'reasonable and lawful' direction by asking you to sign the letter.

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing. However it may change. For more information contact LawAccess NSW on 1300 888 529.

© LEGAL AID NSW, AUGUST 2017