

CEP Magazine – August 2024



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Data privacy protection in internal investigations in LATAM

By Melina Llodrá and Julieta D'Angelo

Internal investigations are key to ensuring an efficient compliance program. If an alleged infraction arises, the organization may need to launch an internal investigation, and protecting data privacy is one of the most challenging aspects to tackle.

Attorney confidentiality

Communications between lawyer and client are protected under the attorney–client privilege principle: the attorney's duty to protect client information confidentiality. The Argentinean national constitution recognizes such protection under the general criminal right of defense in the context of judicial proceedings and the right of not being obliged to self-incrimination, which is in line with several other Latin American (LATAM) countries such as Chile, Perú, Uruguay, and Brazil:

No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried. Nobody may be compelled to testify against himself, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated.^[1]

When analyzing the previously mentioned confidentiality duty, it is essential to distinguish between in-house and external lawyers. Given their proximity to their employer, in-house counsel may have their objectivity and independence questioned. In this regard, there are different ideological positions.^[2] It is generally considered that no difference should be made between external and in-house lawyers as long as the latter is registered in the corresponding professional association—and therefore subject to ethical and professional standards—as their independence is a key factor to practice law. It is commonly understood that attorney–client privilege should not be used to conceal irregularities. Therefore, there should be no confidentiality for documents or communications that were part of a violation of the law.

Preserving legal professional privilege in internal investigations allows lawyers and their clients to openly discuss underlying problems, conclusions, and alternative solutions. Without such privilege, companies might be highly exposed and unable to choose the best way to solve problems, especially since it is difficult to predict the outcome of an internal investigation when it begins.

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