International Employment Lawyer

Workplace Investigations

Contributing Editors

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

China

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Currently there are no unified laws, administrative regulations or policies in the field of labor laws in People's Republic of China (referred to as “PRC”) regarding investigations on workplaces of ordinary employers. The laws and regulations of employers in certain specific industries (such as banking, securities, insurance, medical institutions, etc.) and the laws and regulations governing certain personnel (such as officers of state-owned enterprises and members of the Communist Party of China) contain provisions relating to investigations on employees' conduct, but such provisions are only applicable to the aforementioned specific industries or personnel.

Employers generally will specify their investigation rights and rules and procedures of internal investigations in their internal rules and regulations (such as the employee handbook) or the employment contracts entered into with their employees. However, it should be noted that workplace investigations are still subject to laws and regulations in relation to personal information, privacy and data protection.

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South Korea

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While there are no specific laws that regulate a workplace investigation, there are several laws that companies should consider when conducting a workplace investigation concerning alleged employee misconduct.

One key example is the Whistleblower Protection Act (WPA). The WPA provides legal protection to a whistleblower if their allegations are raised in good faith and are in the public interest as specified under the WPA. If the WPA applies, certain obligations apply to the company, including but not limited to the following:

- the obligation to protect the confidentiality of the whistleblower’s identity;

- protecting the whistleblower if the whistleblower suffers or is likely to suffer serious harm to life or health as a result of whistleblowing and the whistleblower requests protection; and
- refraining from taking retaliatory action on the whistleblower.

Therefore, if an employee raises allegations of another employee's misconduct, the company should review whether the allegations fall under the WPA.

There are also special laws that impose obligations on the company if there are certain types of allegations (eg, sexual harassment, workplace harassment).

In addition, when collecting and reviewing employees' electronic data, such as emails or files stored in work laptops or company servers, which may contain personal information, the company should comply with data privacy laws discussed in more detail in questions 7 and 8.

Companies may also have internal policies (eg, whistleblower protection policies, Code of Conduct) that may apply to workplace investigations, aside from the requirements under Korean law.

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Switzerland

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There is no specific legal regulation for internal investigations in Switzerland. The legal framework is derived from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights. Depending on the context of the investigation, additional legal provisions may apply; for instance, additional provisions of the Swiss Federal Act on Data Protection or the Swiss Criminal Code.

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United States

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In the United States, any combination of legislation at the federal, state and local level, as well as judicial opinions and regulatory guidance interpreting those statutes, may impose obligations on relevant employers to undertake a timely internal investigation in response to complaints of workplace misconduct and to promptly implement remedial measures, where appropriate.

An employer's written policies often also set forth the company's expectations for how its employees, partners, vendors, consultants or other third parties will conduct themselves in carrying out the business of the company, and these policies may include protocols setting forth the parameters for an investigation in the event of potential non-compliance. Such investigatory roadmaps are often described in, for example, employee handbooks or a company's policy against discrimination and harassment.

Due to the patchwork nature of employment and related laws, it is not possible to cover every investigation scenario or related legislation in this guide. Employers should instead consult with experienced employment attorneys in their state to ensure compliance with the applicable legal and regulatory regimes.

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02. How is a workplace investigation usually commenced?

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The employer will generally obtain clues of employees' misconduct, actively or passively, through such means as internal audit, employee whistleblowing, whistleblowing from suppliers or partners, regular or irregular compliance management assessment of the employer and management concerns, and carry out investigation based on such clues. Meanwhile, the employer will further investigate whether the employees involved have committed other acts of misconduct.

The investigation is usually carried out from outside to inside and from the macro level to the specific level. That is to first interview the provider of the clues and other insiders for verification and obtaining further information. Then to conduct internal and external system and written documents review based on the investigation clues. Preliminary evidence will be formed after the basic verification of facts. Finally, the employer will interview the employees involved and listen to their explanations, and finally determine the subsequent handling method.

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South Korea

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There are many different ways a workplace investigation concerning employee misconduct could commence. Below are some key examples from our experience:

- an employee reports allegations concerning another employee’s misconduct through an ethics hotline or other means (eg, email, phone call);
- an outsider such as a former employee or a vendor reports allegations concerning employee misconduct to a company officer;
- an internal audit reveals potential employee misconduct;
- media reports raise allegations of employee misconduct; and
- an external investigation begins (eg, by criminal authorities or administrative agencies) concerning alleged employee misconduct.

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).[1] If no such

grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exists, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.[2]

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[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 21.

[2] Klaus Moosmayer, Compliance, Praxisleitfaden für Unternehmen, 2. A. München 2015, N 314.

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A workplace investigation is often, although not always, prompted by a complaint of workplace misconduct, usually made directly by the employee who was harmed by the conduct, a third party who witnessed the conduct, or a manager or supervisor who was made aware of the issue and has reporting obligations as a result of his or her role in the organisation.

It is best practice – and often a legal requirement depending on the applicable state law – for companies to clearly outline a complaint process in their policies and to provide employees who experience, have knowledge of, or witness incidents they believe to violate the company's policies with one or more options for making a report. Although the specific complaint procedure may vary depending on the size of the organisation, the nature of the business and the type of complaint at issue, many companies provide for (or require) making a report through one of the following channels:

- a company-managed hotline or online equivalent;
- human resources;
- an affected employee's supervisor or manager; or
- a member of the legal or compliance department.

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

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When an employer is found to have engaged in misconduct of an employee, whether it has the right to suspend the employee from his/her duties and subject him/her to investigation, there are no explicit provisions in the existing labor law. Generally speaking, suspension of investigation arranged internally by an employer is within the scope of autonomous management of the employer. However, such suspension of investigation is subject to certain restrictions, and the basic rights and interests of the employee must be

guaranteed. For example, the employer should continue to pay social insurance fund for the employee.

Suspension investigation shall generally be specified in advance in the labor contract or rules and regulations, and the duration of suspension investigation should be within the necessary and reasonable period. Indefinite suspension or the suspension of obviously long time will not be supported by arbitral tribunals and courts.

Generally annual leave may be taken preferentially by the employees during suspension period. The annual leave period shall be deemed as normal attendance, and the salary shall remain unchanged. Under the circumstance that the annual leave has been used up, in judicial practice, there are few cases supporting the claim that the employer can fully deduct the employee's salary during the suspension period. It is generally believed that the employer shall at least guarantee the basic living needs of the employee during the suspension period (i.e. the salary shall not be lower than the local minimum salary standard) or pay the employee as per the original salary standard. However, in judicial practice, some arbitrators and judges hold the view that an employer may use its discretion to reduce employees' salary if all of the following conditions are met:

- it is stipulated in its rules and regulations or a contract that it is entitled to suspend employees from their duties and reduce salaries if their fraudulent behaviour harms the employer's interests;
- the rules and regulations are stipulated in its rules and regulations, and are publicly announced and accepted by the employees; and
- there is evidence showing the corresponding fraudulent behaviour of the employees.

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The company may place an employee who is subject to a workplace investigation under administrative leave if this seems necessary or appropriate to ensure the integrity of the workplace investigation. While administrative leave can take different forms, one way is to issue a “standby order” to the relevant employee, instructing him or her not to come into work and prohibiting contact with other employees or customers while the workplace investigation is ongoing.

Administrative leave is not a disciplinary action, but rather an exercise of the company’s authority to take personnel management measures. This authority is generally subject to a “reasonableness” test, with the Korean courts balancing the employer’s business necessity in placing the employee on administrative leave with the inconvenience caused to the employee. In conducting the balancing test, the Korean courts have considered whether the employee receives pay during the leave and the duration of the leave, among other things. In general, if the duration of the leave is not excessive and is with full pay and benefits, the employer’s management prerogative is likely to be recognised.

The company doesn't need to obtain the employee’s consent but, in practice, a company should consider getting the employee’s acknowledgement that they have received the administrative leave notice.

In addition to Korean labour law, other factors such as the company’s rules of employment or a collective bargaining agreement (if any) may affect the company’s ability to place the employee on administrative leave, by providing for prescribed procedures for placing an employee on administrative leave or requiring the company to obtain the union’s consent if a union leader or executive is involved.

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Switzerland

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It is possible to suspend an employee during a workplace investigation.[1] While there are no limits on duration, the employee will remain entitled to full pay during this time.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 181.

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United States

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Yes. An employer may suspend the subject of an internal investigation with full pay pending the outcome of an investigation. However, this measure should be used sparingly, for example in cases where an employee has been accused of gross misconduct or where it is the only means of separating the alleged victim of harassment from the accused to prevent continued harassment. As an alternative means of separating the victim from the accused, an employer can consider interim measures such as a schedule change, transfer or leave of absence for the alleged victim with his or her consent (employers should take care not to take any action that could be perceived as retaliatory against the complainant – even if well-intentioned – including involuntarily transferring him or her or forcing a leave of absence).

Where an employer does determine that suspending the subject of an investigation is warranted while the company carries out its investigation, it should provide him or her with a written statement briefly outlining the reason for the suspension and the estimated date the employee will be advised of the investigation outcome and his or her final employment status.

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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

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In some laws and regulations for specific industries, enterprises or personnel, there are certain requirements for the qualifications of investigators. For example, according to the Interim Measures for Investigating and Dealing with Disciplinary Violations of Professional Personnel by Medical Institutions, the personnel conducting an investigation and evidence collection shall not be less than two. If the investigator is a close relative of the investigated person, or a tip-off person or a key witness of the issue to be investigated, the investigator shall withdraw from the investigation.

However, at present, there are no unified and detailed national rules and regulations on the qualification of the investigators and organizations. In practice, the selection of the personnel and organizations responsible for internal investigation is usually based on the relevant provisions in the internal rules and

regulations of the employer. The personnel conducting internal investigation are usually internal functional departments of the employer and are independent to some extent, including the personnel department, legal department, compliance department or risk control department. For significant or complex issues or senior management investigations, in order to ensure professionalism, accuracy and compliance, external law firms, consultants and accounting firms are also frequently hired to conduct investigations.

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South Korea

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While there are no laws that set minimum qualifications for who should conduct a workplace investigation, companies often engage external legal counsel to ensure the investigation is conducted in an unbiased and professional manner. If the company itself undertakes the workplace investigation, the company should take precautions such as ensuring that the person conducting the investigation is not biased and not involved in the alleged wrongdoing. If the person conducting the investigation cannot converse in the native language of the employee under investigation, the company may consider arranging for an interpreter when conducting interviews, to minimise the risk of misunderstanding.

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The examinations can be carried out internally by designated internal employees, by external specialists, or by a combination thereof. The addition of external advisors is particularly recommended if the allegations are against an employee of a high hierarchical level[1], if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 18.

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While every internal investigation should be carried out promptly, thoroughly and in a well-documented manner, employers should appoint one individual or team of individuals to oversee all complaints regardless of how they are received. Doing so helps to ensure that all allegations are documented, reviewed and assigned for investigation as consistently as practicable.

Once a complaint is received and recorded, the company should undertake an initial triage process to determine:

- the risk of the alleged misconduct from a reputational, operational and legal perspective;
- who is best suited to conduct an investigation based on the nature of the alleged misconduct and the perceived risk level (potential candidates may include members of human resources, legal or compliance departments, or outside counsel); and
- a plan for investigating the factual allegations raised in the complaint.

The appropriate investigator should be able to investigate objectively without bias (ie, the investigator cannot have a stake in the outcome, a personal relationship with the involved parties and the outcome of the investigation should not directly affect the investigator's position within the organisation); has skills that include prior investigative knowledge and a working knowledge of employment laws; has strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair; is detail-oriented; has the right temperament to conduct interviews; can be trusted to maintain confidentiality; is respected within the organisation; and can act as a credible witness.

At this triage stage, an employer may also wish to use the information collected from the complaint to proactively identify potential patterns or systemic issues at an individual, divisional or corporate level and react accordingly. For example, if a company receives a complaint against a supervisor for harassing conduct and that same individual has already been the subject of previous complaints, the company should consider whether it may be appropriate to engage outside counsel to carry out a new investigation to bring objectivity and lend credibility to the review – even if the prior complaints were not ultimately substantiated following thorough internal investigations. Similarly, the engagement of outside counsel is often appropriate where a complaint involves alleged misconduct on the part of a company's senior management or board members.

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

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There is no provision in the law which provides the employee the right to suspend or interrupt an investigation by initiating a lawsuit. However, the employee who is suspended for investigation may request to terminate the employment contract unilaterally and demand the employer to pay economic compensation on the ground that the employer has not paid enough remuneration, and may initiate labor arbitration and litigation accordingly, but such arbitration and litigation will not have the effect of suspending or interrupting the investigation.

In addition, if the employee's privacy or personal information is improperly disposed of during the investigation, the relevant evidence obtained during the suspension investigation may be deemed as illegal evidence by arbitral tribunals and courts, and the employer may also be exposed to relevant legal liabilities for the infringement of privacy, etc.

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An employee under investigation cannot bring legal action (eg, an injunction) to stop a workplace investigation. However, there have been instances where an employee under investigation raised legal challenges concerning the investigation (eg, breach of privacy). Please see question 19. While the company would not be legally compelled to stop the investigation when legal challenges are raised, they may face penalties under the relevant laws if it is determined they have committed a violation.

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Switzerland

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The accused could theoretically request a court to stop the investigation, for instance, by arguing that there is no reason for the investigation and that the investigation infringes the employee's personality rights. However, if the employer can prove that there were grounds for reasonable suspicion and is conducting the investigation properly, it is unlikely that such a request would be successful.

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In general, private sector employees have considerably fewer rights vis-à-vis a company-led internal investigation than their public sector counterparts. This is because many US states are “at will” employment states, which means that, absent an employment contract that provides otherwise, an employee can be terminated for any reason not prohibited by statute or public policy. Depending on the specific circumstances, however, an employee who is the subject of an internal investigation could bring or threaten legal action according to contract or tort principles to stop an investigation. An employee may also challenge an investigation because it was conducted in violation of certain federal, state or foreign laws, for example, the use of polygraph tests in violation of the Employee Polygraph Protection Act or foreign data privacy laws.

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

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Article 75 of the Civil Procedure Law of the PRC (Amended in 2021) provides, "All entities and individuals that are aware of the circumstances of a case shall have the obligation to testify in court. The persons-in-charge of relevant entities shall support the witnesses to testify in court. "Article 193 of the Criminal Procedure Law of the PRC (Amended in 2018) provides, "Where, after the notification of a people's court, a

witness refuses to testify in court without justified reasons, the people's court may compel the witness to appear in court, unless the witness is the spouse, a parent or a child of the defendant."

According to relevant provisions of the Civil Procedure Law of the PRC, only a court has the power to compel a witness to appear in court. Neither the employer nor any other individual may compel any colleague to act as a witness and testify in court. However, the employer may set forth in the employment contract or its internal rules and regulations that the employee shall cooperate with its internal investigation.

As for the legal system for witness protection, PRC's criminal procedure laws stipulate a relatively detailed legal system for witness protection, such as establishing a crime of retaliating against a witness; making public a witness's personal information such as name, address, employer and contact information for the purpose of protecting the personal safety of the witness; using assumed names in the indictments; and so on. However, there are relatively few legal provisions regarding the legal protection of witness in civil procedure, and provisions only regulate the expenses that may be incurred by the witness for testifying in court. For instance, Article 77 of the Civil Procedure Law of the PRC (Amended in 2021) provides, "The necessary expenses incurred by a witness in fulfilling his obligation to testify in court, including transportation, accommodation and meals, as well as the loss of salaries, shall be borne by the losing party. If a party applies for a witness to testify, the costs and expenses shall be advanced by the party; if the people's court notifies a witness to testify without the application by a party, the costs and expenses shall be advanced by the people's court. "

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While there are no laws to compel co-workers to act as witnesses, the company may have internal policies (eg, rules of employment, code of conduct) that require employees to cooperate with company actions such as a workplace investigation. That said, it would be difficult to enforce such policies even if the employee refuses to cooperate (eg, taking disciplinary action against an employee who refuses to act as a witness).

There may be instances when the company is required to provide certain legal protection to employees acting as witnesses in an investigation. For example, if a whistleblower falling under the WPA is required to act as a witness, they would be entitled to legal protections as discussed in question 1. The company may also have internal policies that provide protection to employees acting as witnesses in an investigation.

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.[1] However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end

up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).[2]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, published on hrtoday.ch, last visited on 17 June 2022.

[2] Same opinion: Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, published on hrtoday.ch, last visited on 17 June 2022.

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Yes. The investigator is empowered to decide which witnesses should be interviewed as a part of the fact-gathering process. In addition to interviewing the complainant, the investigation should include individual interviews with other involved parties, including the subject of the complaint, as well as individuals who may have observed the alleged conduct or may have other relevant knowledge, including supervisors or other employees. Many companies' code of conduct, employee handbook or similar policy set forth the requirement for current employees to cooperate fully in any investigation by the company or its external advisors and also provide that failure to do so could result in disciplinary action, up to and including termination.

In the absence of contractual protections, employees may have no legal right to refuse to submit to an interview, even if their answers tend to incriminate them. That being said, when acting as a witness in an internal investigation, a current employee is usually afforded similar legal protections as the subject of an investigation, including the right to oppose unreasonable intrusions into his or her privacy and unreasonable workplace searches. For example, certain state laws prohibit an employer from questioning an employee regarding issues that serve no business purpose.

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

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The Civil Code of the PRC, the Personal Information Protection Law of the PRC and other laws provide for the protection of employees' personal information and privacy. Employers are often involved in checking the information and materials stored in the computers, hard disks and other electronic office equipment provided to employees in internal investigation and are likely to access the employees' personal information including personal privacy information, such as the communication records stored in instant communication software such as WeChat, QQ or other instant communication software or to and from private email boxes. According to the Personal Information Protection Law of the PRC, employers are required to perform the obligation of informing and obtain the individuals' consent prior to the processing of

personal information, i.e. the principle of informing + consent. Moreover, the Civil Code of the PRC stipulates that no organization or individual may process any person's private information, except as otherwise provided by law or with the explicit consent of the right holder.

Therefore, the legitimacy of obtaining data evidence can be enhanced and guaranteed only if it is explicitly stated in the relevant rules and regulations that the employer shall have the right to the work equipment provided to the employees or obtains the employees' personal consent.

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It may be difficult for a company to search and collect physical items that personally belong to the employee.

While the company may search and gather electronic data, such as emails or files stored in work laptops or company servers, there are requirements and restrictions under the Criminal Code, the Personal Information Protection Act (PIPA), and the Act on Promotion of Information and Communications Network Utilisation and Information Protection, etc (Network Act), among other laws.

Article 316(2) of the Criminal Code states that accessing the contents of another person’s documents, pictures, special media records, etc, that are sealed or designated as secret using technical means may constitute the crime of accessing electronic records.

Under the PIPA, consent must be obtained from the information owner to collect or use personal information, or to provide such information to a third party. Consent must be separately obtained for sensitive information or unique identification information. There are strict requirements as to the format and contents of the consent forms under the PIPA.

The Network Act prohibits accessing an information and communications network without rightful authority or any intrusion that goes beyond the permitted authority for access. Although this may not be an issue if a company directly manages the email accounts at issue, if an employee’s email account is protected by a password or through other means, accessing emails from that account without obtaining the employee’s consent could constitute unlawful intrusion under the Network Act as well as under the Criminal Code as discussed above.

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The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.[1]

It can be derived from the duty to disclose and hand over benefits received and work produced (article 321b, Swiss Code of Obligations) as they belong to the employer.[2] The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her

may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

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[1] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

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Documents and instruments that set out a company's policies (eg, employee handbooks, code of conduct or other written guidelines) often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy, and confidentiality. As discussed below, state and federal constitutional, statutory and common law – and in some cases foreign data privacy regimes – may provide additional protections to protect employees from an unwarranted or unreasonable invasion of privacy during an internal investigation.

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08. Can the employer search employees' possessions or files as part of an investigation?

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Article 13 of the Constitution of the PRC provides that the lawful private property of the citizens shall not be violated. Therefore, during the process of investigation, without the employees' consent, the employer has no right to search the employees' personal possessions or files. If it is necessary to search the employees' personal possessions or files, the employer may require the employees to sign a Letter of Informed Consent before searching; or the employer may call the police and the search will be conducted under the escort of the public security authorities or directly by the public security authorities.

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As discussed in question 7, it may be difficult for a company to search an employee's personal possessions. The company may search and gather electronic data stored in work laptops or company servers, subject to legal requirements and restrictions (eg, obtaining consent).

The PIPA provides specific guidance on the requirements for obtaining consent. Under the PIPA, to collect or use an individual's personal information, the information holder must be informed of and consent to:

- the purpose of the collection or use;
- the personal information that will be collected;
- the period of retention and use; and
- his or her right to refuse to provide consent and any disadvantages that may result from such refusal.

There are separate requirements for obtaining consent to provide an individual's personal information to a third party. Also, consent must be obtained separately for the collection, use or provision of sensitive or unique identification information.

Under limited circumstances, personal information may be collected, used, or provided to third parties without obtaining the consent of the information holder. For instance, a company may collect and use personal information without obtaining consent where obtaining the information is necessary to achieve the company's "legitimate interests", which clearly exceed the information holder's right to his or her personal information, and the collection and use are carried out within reasonable bounds. The term "legitimate interests" in this context is generally understood as a concept similar to "justifiable act" under the Criminal Code. The Korean Supreme Court has held that under exceptional circumstances such as the following, the company's collection and review of employee data may constitute a "justifiable act" under the Criminal Code:

1. the company had specific and reasonable suspicion that the employee had committed a crime and the company had an urgent need to verify the facts;
2. the scope of the company's review was limited to the suspected crime through the use of keywords, etc;
3. the employee had signed an agreement stating that he or she would not use work computers in an unauthorised manner and that all work products would belong to the company; and
4. the company's review uncovered materials that could be used to verify whether the employee committed the alleged crime.

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Switzerland

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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.[1] The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.[2]

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[1] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168.

[2] Claudia Fritsche, Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen, Zürich/St. Gallen 2013, p. 168 et seq.

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United States

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As there is no unified data protection regime, privacy protections stem from a patchwork of federal and state privacy laws which impose limits on the extent to which an employer can collect information from its employees in connection with an internal investigation. Whether specific conduct violates an employee's rights is a very fact-specific inquiry requiring the application of relevant state laws and a regulatory regime.

In most circumstances, an employer is free to conduct searches of its workplace and computer systems in the course of investigating potential wrongdoing. Such searches are generally not protected by personal privacy laws because workspaces, computer systems and company-issued electronic devices are often considered company property. Many companies explicitly address this in written corporate policies and employment agreements. Employees who use their own electronic devices for work should be aware that work-related data stored on those devices is generally considered to belong to the employer (as a matter of best practice, employers should generally prohibit or at least advise employees against using personal devices for work and to maintain separate work devices, where possible).

These broad investigatory powers notwithstanding, the ability of an employer to conduct searches in furtherance of an internal investigation is not unlimited. For example, if an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data. Certain states also prohibit an employer from requiring an employee to disclose passwords or other credentials to his or her personal email and social networking accounts, but permit an employer to require employees to share the content of personal online accounts as necessary during an interview while investigating employee misconduct.

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09. What additional considerations apply when the investigation involves whistleblowing?

China

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In practice, the following factors to be considered will be: (1) verification of the informant's identity; (2) whether the informant has any conflict of interest with the reported employee or whether it will affect the objectivity of their reporting; (3) how to persuade the informant to provide more information or evidence, or to cooperate in court as a witness; (4) how to increase the admissibility of evidence when the informant refuses to cooperate in court as a witness or fails to provide original evidence; (5) how to improve the evidence chain and protect the informant from being attacked or retaliated by the informant, etc.

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South Korea

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Aside from the legal obligations imposed on the company when dealing with a whistleblower who is subject to the WPA as discussed in question 1, there are also practical considerations the company should keep in mind when dealing with a whistleblower, regardless of whether the whistleblower falls under the WPA.

For example, there have been instances where an employee who raised allegations filed a complaint with Korean authorities (such as the Anti-Corruption and Civil Rights Commission (ACRC) or the Labour Office) that the company took retaliatory action against the whistleblower. The company should carefully review the legal risks before taking action, such as personnel action or civil or criminal action, against an employee who raises allegations if that employee was also involved in the wrongdoing.

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Switzerland

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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United States

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Several federal, state, and local employment laws prohibit retaliation against employees who come forward with complaints or participate in corporate investigations. Employees who possess information regarding corporate misconduct may also be considered whistleblowers protected from retaliation under federal and state whistleblower laws, including but not limited to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Consumer Financial Protection Act of 2010.

An employee generally does not need to show that he or she was terminated or demoted to bring a retaliation claim; other actions on the part of the employer may qualify if they could be seen to discourage employees from raising complaints. To protect against a potential retaliation claim, employers should make clear at the outset of an investigation that retaliation will not be tolerated and require the complaining employee (and potentially his or her manager) to bring any instances of retaliation to the investigator’s attention immediately.

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10. What confidentiality obligations apply during an investigation?

China

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Although there are no specific laws or regulations regulating the extent of confidentiality obligation employers or the investigators shall comply with, in practice, the confidentiality obligation of both parties usually originates from the confidentiality agreement between the employee and the employer, as well as general provisions on protection of personal information and right of privacy, etc.

In this regard, it is advisable to require the relevant personnel responsible for handling the suspension for investigation to sign a confidentiality agreement or a letter of commitment, and require them to pay attention to the protection of the personal information and privacy of the complainant and other relevant personnel, for the purpose of avoiding extra losses caused by the occurrence of disputes relating to right of reputation, right of privacy and personal information leakage during the investigation.

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South Korea

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It is general practice in Korea for a company to require interviewees to maintain confidentiality concerning a workplace investigation and instruct them that they are not permitted to discuss the matter under investigation with other employees, etc. If an employee violates this instruction, it may be possible for the company to take disciplinary action against them under the company's rules.

Further, the company or its employees who have engaged in an investigation for sexual harassment or workplace harassment in the workplace are obliged to maintain the confidentiality of the investigation. Failure to comply with such requirements may lead to an administrative fine from the Ministry of Employment and Labour for the company or its registered representative.

There may be some exceptions to the confidentiality obligation, such as when an employee is required by government authorities to provide relevant information in a parallel investigation.

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Switzerland

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Besides the employee's duty of performance (article 319, Swiss Code of Obligations), the employment relationship is defined by the employer's duty of care (article 328, Swiss Code of Obligations) and the employee's duty of loyalty (article 321a, Swiss Code of Obligations). Ancillary duties can be derived from the two duties, which are of importance for the confidentiality of an internal investigation.[1]

In principle, the employer must respect and protect the personality (including confidentiality and privacy) and integrity of the employee (article 328 paragraph 1, Swiss Code of Obligations) and take appropriate measures to protect the employee. Because of the danger of pre-judgment or damage to reputation as well as other adverse consequences, the employer must conduct an internal investigation discreetly and objectively. The limits of the duty of care are found in the legitimate self-interest of the employer.[2]

In return for the employer's duty of care, employees must comply with their duty of loyalty and safeguard the employer's legitimate interests. In connection with an internal investigation, employees must therefore keep the conduct of an investigation confidential. Additionally, employees must keep confidential and not disclose to any third party any facts that they have acquired in the course of the employment relationship, and which are neither obvious nor publicly accessible.[3]

[1] Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

[2]Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 202.

[3] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 133.

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United States

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Information arising from the initial complaint, interviews and records should be kept as confidential as practically possible while still permitting a thorough investigation. Although an employer must maintain confidentiality to the best of its ability, it is often not possible to keep confidential the identity of the complainant or all information gathered through the investigation process. An employer should therefore not promise absolute confidentiality to any party involved in an internal investigation, including the complainant. The investigator should instead explain at the outset to the complaining party and all individuals involved that information gathered will be maintained in confidence to the extent possible, but that some information may be revealed to the accused or potential witnesses on a need-to-know basis to conduct a thorough and effective investigation.

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

China

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Although there are no explicit provisions of law or policy requiring employers to provide specific information of allegations to investigated employees, in practice, at the early stage of investigation, in order to avoid alerting the investigated employee and reduce the possibility that the investigated employee may destroy the relevant evidence, the employer usually will not disclose the information of allegations to the investigated employee at the beginning of investigation. At the later stage of an investigation, when the employer has already obtained main evidence, the employer usually will properly disclose to the investigated employee the allegations that are clearly known by the employer and have sufficient evidence, and listen to the counterparty's opinions or argument, for the purpose of obtaining more information or getting the employee's confession.

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South Korea

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There is no requirement to notify an employee under investigation concerning the allegations against him or her when requesting cooperation with a workplace investigation (eg, requesting the employee's consent to review electronic data, or requesting an interview).

However, the company may strategically consider explaining the general purpose of the investigation before requesting consent to review electronic data or when requesting an interview. This may help increase the likelihood of cooperation and also reduce the risk of the employee raising objections to the company's findings from the investigation by saying he or she was not properly informed of the purpose of the investigation, or that the investigation was conducted in a coercive manner.

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Switzerland

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As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.[1] The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.[2]

Covert investigations in which employees are involved in informal or even private conversations to induce them to provide statements are not compatible with the data-processing principles of good faith and the requirement of recognisability, according to article 4 of the Swiss Federal Act on Data Protection.[3]

Also, rights to information arise from the Swiss Federal Act on Data Protection. In principle, the right to information (article 8, Swiss Federal Act on Data Protection) is linked to a corresponding request for information by the concerned person and the existence of data collection within the meaning of article 3 (lit. g), Swiss Federal Act on Data Protection. Insofar as the documents from the internal investigation recognisably relate to a specific person, there is in principle a right to information concerning these documents. Subject to certain conditions, the right to information may be denied, restricted or postponed by law (article 9 paragraph 1, Swiss Federal Act on Data Protection). For example, such documents and reports may also affect the confidentiality and protection interests of third parties, such as other employees. Based on the employer's duty of care (article 328, Swiss Code of Obligations), the employer is required to protect them by taking appropriate measures (eg, by making appropriate redactions before handing out copies of the respective documents (article 9 paragraph 1 (lit. b), Swiss Federal Act on Data Protection)).[4] Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[4] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

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United States

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The investigator must disclose to the employee under investigation the purpose of the investigation and, where the investigator is in-house or outside counsel, he or she should disclose that the company is the client.

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

China

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At the level of criminal procedure in PRC, only the Criminal Procedure Law of PRC provides that pseudonyms may be used in the indictment as a substitute for the disclosure of a witness's personal information, such as name, address, employer and contact information, to protect the personal safety of the witness. However, there are no relevant provisions on whether the identity of the complainant, the witness in civil litigation and the provider of information shall be kept confidential during an investigation.

During the course of an investigation, in order to protect the privacy of relevant personnel and avoid the risk of infringement, the employer usually keeps the identity of the complainant or the provider of investigation information confidential. However, at the civil litigation stage, the witness is unavoidably required to testify in court, and must truthfully identify himself/herself to the court.

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South Korea

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As discussed in question 1, if the whistleblower falls under the WPA, the whistleblower’s identity should be kept confidential. Even if the WPA does not apply, the company may wish to keep the identity of the whistleblower and other key witnesses confidential to the greatest extent possible.

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Switzerland

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.[1]

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[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

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United States

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In general, except as provided above, depending on the seriousness of the complaint and investigation, the only persons who should be aware of it are the relevant individual in human resources or legal, and where different, the persons assigned to investigate. Although it may not be feasible to maintain absolute confidentiality in conducting an investigation depending on the nature of the allegations, investigators should exercise discretion at all times and, where possible, avoid identifying complainants, the subject of the investigation or witnesses by name where it is not necessary, and where doing so could be detrimental to the fact-finding process.

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

China

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Yes. In practice, before conducting a compliance investigation, we recommend that the employer and the investigator enter into a confidentiality agreement to require the investigator to keep confidential the facts and the substance of the investigation. This will not only better protect the personal information of the complainant, the witness and the investigated employee, but also help the investigation to proceed smoothly.

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South Korea

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Some companies require an employee subject to investigation to sign an NDA or other similar documents (eg, a pledge of confidentiality) agreeing not to disclose information relating to the investigation to outside parties.

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Switzerland

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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United States

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This is a fact-specific inquiry that depends on the specific circumstances and laws of the relevant state. In general, NDAs are frowned upon but can be used to an extent to keep certain facts and the substance of an investigation confidential. NDAs can never prevent employees from assisting in official agency investigations, however. NDAs also cannot lawfully prohibit employees from officially reporting illegal conduct by their employer.

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14. When does privilege attach to investigation materials?

China

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The employer has the property right over all its properties. When discovering employee's misconduct, the employer is entitled to conduct an investigation within a certain scope according to the relevant laws and regulations, as well as the management system of the employer. Generally speaking, the employer is not required to obtain consent of the employee when conducting an investigation of the space and objects owned by it. The employer has no right to directly conduct an investigation of the employee's private space, objects, bank accounts and stock trading accounts. The public security organ or other public authorities should be involved in the investigation. In principle, if the employee's private space or objects are mixed with the employer's private space or objects, the employer should obtain consent of the employee for an investigation. Meanwhile, the employer's investigation should be controlled within the reasonable and necessary limit, and the employer is not allowed to illegally use or disclose the investigation results, otherwise it may constitute infringement. In addition, we also recommend that the employer stipulate explicitly in the employment contract and the internal management system that the employer has the right to detain and inspect the articles or equipment distributed by the employer, so as to reduce the compliance risk of internal investigation.

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South Korea

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No law recognises the common law concept of “attorney-client privilege” in Korea. However, communication with an attorney is protected to some extent under certain laws, such as the Constitution, the Attorney Act, the Criminal Procedure Act, and the Civil Procedure Act. This protection is based on the attorney’s confidentiality obligation, which prohibits an attorney from divulging confidential matters acquired in the course of representing clients, unless otherwise prescribed by law. This confidentiality obligation generally allows an attorney to refuse to testify or comply with document production orders for information or materials the attorney obtained in the course of his or her duties that relate to the confidential information of clients.

In addition, there could be instances where materials from an investigation conducted in Korea may become subject to discovery outside of Korea. It is, therefore, important to ensure investigation materials are privileged under the relevant non-Korean laws in the jurisdictions where attorney-client privilege is recognised (eg, the US).

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Switzerland

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third

parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

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[1] Claudia M. Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

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United States

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For legal privilege to apply, a primary purpose of the investigation should be to provide legal advice to the company, including concerning non-lawyers working at the counsel's direction, and legal privilege likely will not apply to internal investigations performed as part of the ordinary course of business or where the investigation is required by a state or federal regulatory regime (eg, post-incident investigations of operations governed by OSHA's Process Safety Management Standards). It is, therefore, important to contemporaneously document the scope and purpose of the investigation and not risk waiving privilege by sharing privileged materials with unnecessary third parties.

Whereas attorney-client privilege includes only communications between an attorney and the client, work-product privilege is broader and includes materials prepared or collected by persons other than the attorney with an eye towards impending litigation. Examples of potential work products produced by attorneys in the context of an investigation include investigative work plans, interview outlines, memoranda summarising witness interviews and investigative reports.

As a practical matter, employees should be aware that communications with other employees or colleagues regarding the investigation are not privileged regardless of whether the colleague is also involved in the investigation or represented by the same counsel. Even if an employee believes he or she is sharing attorney communications with other employees who need to know the attorney's advice and who also have attorney-client privilege with the same counsel because he or she is involved or implicated in the investigation and also represented by company counsel, it is always prudent to refrain from sharing privileged information. If an attorney's communication is shared beyond those who need to know, attorney-client privilege may be destroyed.

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

China

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The relevant laws and regulations in the PRC have not made explicit provision regarding rights to representation. In practice, some arbitral tribunals and courts hold the view that it is reasonable for the employee to refuse to cooperate with the investigation if he/she is not accompanied or has no legal representatives. Therefore, the employer usually cannot impose disciplinary punishment by warning or even termination of employment contract on the basis of such refusal. Therefore, we tend to believe that, where the employee under investigation requests to be accompanied or have legal representation, the employer should fully consider and communicate with the employee about the request, and prudently impose disciplinary punishment on the employee for failing to cooperate with the investigation.

Of course, considering that satisfying such request will increase the difficulties and obstacles for the employer to carry out the investigation to a certain extent, we still suggest that the employer include in its rules and regulations such provisions as "the employee being investigated shall actively and unconditionally cooperate with the employer's investigation", etc., in order to provide institutional support for the follow-up requirement or even disciplinary punishment by the employer on employee and to encourage the employee to cooperate in the investigation.

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South Korea

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While the company cannot prevent an employee from engaging his or her legal counsel, there is no legal obligation for a company to allow an employee to bring his or her legal counsel to an interview, for example. If the employee expresses his or her intention not to participate in the interview session without his or her legal counsel, the company may consider explaining to the employee that such refusal to participate in the interview may constitute a breach of reasonable work-related orders and may be subject to disciplinary action. However, the company should consider the possibility of the employee claiming that he or she was not given a proper opportunity to explain the allegations during the investigation because they were prevented from obtaining legal assistance.

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Switzerland

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In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.[1]

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.[2] Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.[3]

In general, it is advisable to allow the involvement of a legal representative to increase the willingness of

the employee involved to cooperate.

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[1] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

[2] Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 59.

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

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United States

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Employees generally have no automatic right to counsel in connection with an internal investigation, unless contractually provided for under the terms of an employment agreement. Nonetheless, employees may choose to retain counsel, particularly if they face liability.

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

China

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The relevant laws and regulations in the PRC have not expressly provided the employer’s obligation to inform the trade union of the internal investigation or the right of the trade union to participate in the employer's internal investigation. In practice, given the confidential nature of internal investigation, the employer usually does not voluntarily inform the trade union of such information. However, in accordance with Article 25 of the Measures for the Supervision of Labor Law by Trade Unions of the PRC, the trade union shall have the right to conduct an investigation if the employer has violated the labor laws and regulations or infringed the legitimate rights and interests of the employee. Therefore, it is still possible that the employer, in the course of the internal investigation, may be investigated by the trade union if it has violated the labor laws and regulations or infringed the legitimate rights and interests of the employee (e.g. being suspected of infringing personal information or privacy).

In addition, if the employer determines that the employee has committed a serious disciplinary offence based on the result of the internal investigation and thus decides to terminate the employment contract unilaterally, it shall notify the trade union of the reasons for termination in advance. If the employer has violated the laws, administrative regulations or the provisions of the employment contract, the trade union is entitled to request the employer to make corrections.

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South Korea

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While a labour union does not have a legal right under Korean law to be informed or involved in the investigation, unless otherwise required under the relevant collective bargaining agreement, there have been instances where the labour union raised complaints that the company did not properly investigate an employee, who is a member of the labour union, particularly if the company took disciplinary action against that employee based on the findings of the investigation. The company should consider such a practical risk when conducting a workplace investigation.

If the investigation was conducted based on a claim filed by an employee to the Grievance Handling Committee (which is a sub-committee of a works council), the members of that committee have a right to be informed of the results of the investigation.

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Switzerland

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In general, works councils and trade unions are not very common in Switzerland and there are no statutory rules that would provide a works council or trade union a right to be informed or involved in an ongoing internal investigation. However, respective obligations might be foreseen in an applicable collective bargaining agreement, internal regulations or similar.

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United States

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Employers generally have no obligation to inform employees of their right to union representation or to ask if they would like a union representative present during the interview. Union employees may insist, however, that a union representative attend any investigatory interview that could lead to the employee's punishment, although the union representative may not interfere with the interview.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The relevant laws and regulations in the PRC have not made explicit requirements regarding the supports received by the employee involved in the investigation. In practice, the employer will usually prepare an internal time schedule before carrying out the investigation. Although the detailed time schedule will not be disclosed to the employee, the employer will usually inform the employee of each investigation in advance. In order to improve the transparency of the investigation, we recommend that employer should make positive and proper responses to employee who enquires about the progress of the investigation, so as to avoid employee's suspicion.

In addition, the Personal Information Protection Law of the PRC stipulates the rights of individuals in the process of personal information processing. In the scenario of internal investigation of an employer, the investigated party may, in accordance with such provisions, ask the employer for the right to review and even copy the personal information collected. Where the employee finds that the personal information collected by internal investigation is inaccurate or incomplete, he/she is entitled to request for correction or supplementation.

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South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*
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There could be some instances where an employee involved in an investigation may be entitled to support from the company. To give an example, there have been some cases where a whistleblower claimed they suffered workplace harassment or their employer took retaliatory action (eg, wrongful transfer) and they sought damages or other relief.

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Switzerland

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The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.[1] These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.[2]

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[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

[2] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern, 2021, p. 133.

Last updated on 15/09/2022

United States

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The employer's counsel should provide an *Upjohn* warning at the start of any interview, and delivery of the warning should be documented by a note-taker. An *Upjohn* warning is the notice an attorney (in-house or outside counsel) provides a company employee to inform the employee that the attorney represents only the company and not the employee individually.

Last updated on 15/09/2022

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

China

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If any matter unrelated to this investigation is revealed during the investigation and the matter is suspected of violating regulations, the employer may comprehensively consider whether it is necessary to investigate the new matter. If the employer assesses that a combined investigation will seriously affect and hinder the progress of the investigation or complicate the investigation, the employer can handle the unrelated matters through separate investigations.

In addition, Article 6 of the Personal Information Protection Law of the PRC requires that the processing of personal information shall be for a specific and reasonable purpose and shall be directly related to the purpose of the processing and shall adopt the method with minimum impact on individuals' rights and interests. If the result of the investigation reveals unrelated personal information, it means that the collection and storage of such personal information are unrelated to the purpose of the processing. According to paragraph 1 of Article 47 of the Personal Information Protection Law of the PRC, the employer as the personal information processor shall take the initiative to delete personal information. If the employer fails to delete such information, the employee is entitled to request for deletion.

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South Korea

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Sometimes, the company discovers other potential misconduct in addition to the specific allegations that trigger a workplace investigation. No law limits the scope of the company's investigation to the allegations that were initially raised.

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Switzerland

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There are no regulations in this regard in the Swiss employment law framework. However, in criminal proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

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United States

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Where new issues or claims arise during an ongoing workplace investigation, the investigator should discuss with in-house counsel whether the new issues or claims should be separately investigated and if so, by whom, or if instead those new issues or claims are sufficiently related to the current review that they can be investigated in parallel and incorporated into the ongoing fact-gathering process.

Last updated on 15/09/2022

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

China

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There is no specific provision on this in relevant laws and regulations in the PRC. In practice, the employer will usually stipulate the relevant grievance procedure and process in its internal rules and regulations, and provide the employee with the relevant grievance rights in accordance with the grievance regulations. Alternatively, even if there is no provision on grievance procedure and process in their internal rules and regulations, from the perspective of fairness and rationality, we recommend that the employer should review and evaluate the grievance raised by the employee. If it is confirmed that irregularities exist in the investigation, which may directly affect the conclusions of the investigation (e.g. a past conflict between the employee and the investigator or the employee was unfairly treated in the investigation), the employer shall suspend the investigation and resume the investigation after timely resolution of such complaint. If the grievance does not affect the normal conduct of the investigation, the employer can still proceed with the investigation.

Last updated on 29/11/2023

South Korea

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It is not uncommon for an employee under investigation to raise grievances during or after the investigation. Below are some examples of claims an employee may raise:

- that the company reviewed the employee's electronic data without obtaining the requisite consent;
- that witnesses or the company committed defamation in violation of the Criminal Code;
- that the employee was coerced to comply with the investigation in violation of the Criminal Code;
- that the employee was disciplined without just cause; or
- that the employee was harassed by other employees for providing information during the investigation.

The actions the company should take would vary depending on the grievance raised.

Last updated on 15/09/2022

Switzerland

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In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

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United States

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Where an employee who is the subject of a workplace investigation raises his or her grievance during the investigation, the investigator should follow the same steps outlined above to triage new issues or claims. The investigator should also discuss with in-house counsel whether any particular steps should be taken to avoid the perception that any disciplinary measures taken against the employee (in the event the original claims are substantiated) were retaliatory.

Last updated on 15/09/2022

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

China

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at Jingtian & Gongcheng

During the investigation, the employer should fully respect the basic labor rights of the employee.

According to the relevant provisions of Labor Contract Law of the PRC, if an employee is sick during the investigation, the employer should permit him/her to take sick leave provided that he/she provides the medical certificate issued by the medical institution and performs the medical leave application procedure as required by the employer. Therefore, the employer usually needs to request the employee to cooperate with the investigation after the sick leave, and cannot force the investigation by means of coercion or violence.

However, for the contents that can be investigated by the employer alone, such as the information publicized by the employee on social media and the employee's relevant information publicized on official website, since the investigation of such information is not affected by the employee's physical condition, the employer may adjust the investigation plan and conduct such part of the investigation first.

Last updated on 29/11/2023

South Korea

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The company should review whether the employee under investigation is requesting sick leave under appropriate procedures and for a legitimate reason and may consider ways to persuade the employee to cooperate with the investigation. If the employee applies for sick leave following company policy, the company would need to grant such sick leave and suspend the investigation during the sick leave.

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Switzerland

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The time spent on the internal investigation by the employee should be counted as working time[1]. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

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[1] Ullin Streiff/Adrian von Kaenel/Roger Rudolph, Arbeitsvertrag, Praxiskommentar zu Art. 319–362 OR, 7. A. 2012, Art. 328b N 8 OR.

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United States

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If an employee who is the subject of a workplace investigation becomes sick during the investigation, the

investigator should complete as much of the process as possible in the employee's absence, for example by conducting interviews with the complainant and other witnesses and collecting and reviewing relevant documentation. Where the employee's absence is expected to be short-term, the employer can postpone completing the investigation until the employee returns to work and can be interviewed. Where a lengthy absence is expected, the investigator should take steps to ensure that the employee nevertheless has a fair chance to participate in the process, for example by providing the employee with flexibility in scheduling his or her interview or by offering other accommodations such as conducting the interview by video conference instead of requiring an in-person interview, or alternatively meeting in a neutral place instead of the office. It is important to maintain records of the steps taken to accommodate the employee to show that the process was reasonable and fair.

Last updated on 15/09/2022

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

China

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The PRC law is silent on how to deal with the conflict between internal investigation and criminal or regulatory investigation. In general, the employer should cooperate with the criminal or regulatory investigation being conducted by the investigating authority to avoid hindering official business.

According to the Civil Procedure Law of the PRC, the Administrative Procedure Law of the PRC, and the Criminal Procedure Law of the PRC, the investigating authorities (including the public security authority, the people's procuratorate, the people's court, and the supervision authority) have the power to investigate and verify evidence from the witness or the individuals or entities that have access to the evidentiary materials. Therefore, the investigating authorities have the power to compel the employer to share or provide evidentiary materials relating to the case, and the employer shall cooperate and provide such materials. If the employer refuses to cooperate, it may face administrative liability (such as warning, fine and detention of the directly responsible person), judicial liability (fine shall be imposed on the main person in charge or the directly responsible person, and detention may be granted to those who refuse to cooperate) and even criminal liability (those who conceal criminal evidence may be guilty of perjury).

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South Korea

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There is no obligation to stay the workplace investigation while the parallel criminal or regulatory investigation is being conducted. In practice, companies often proceed with, or even accelerate, the workplace investigation to find out the facts and defend themselves against the parallel criminal or regulatory investigation being conducted. The company should be careful not to engage in activities that may raise suspicions as to whether the company is impeding the government investigation or concealing or destroying evidence.

While the investigation report would typically not be privileged, the company may consider explaining to the authorities that the investigation findings are not conclusive, should the police or regulator request the internal investigation report.

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Switzerland

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The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

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United States

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Employers have obligations to conduct a thorough and unbiased internal investigation and take prompt remedial action to prevent further workplace violations. As such, absent a criminal or regulatory investigation where the investigators ask the employer to pause an internal investigation, employers should be prepared to continue their internal investigation in parallel with the criminal or regulatory investigation while cooperating with police or regulatory investigators.

The police and the regulator can often compel the employer to share certain information gathered from its internal investigation. In some cases, the employer should analyse whether the non-disclosure of information evidencing criminal conduct within the company itself constitutes an independent crime or whether an applicable statute or regulation imposes an independent duty to disclose. Alternatively, the employer should consider whether, even absent an affirmative duty to disclose, disclosure of information gathered during an internal investigation may still benefit the employer.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
at Jingtian & Gongcheng

There is no explicit stipulation in the laws and regulations in the PRC on this issue. In practice, given the confidentiality of any investigation into a violation, the employer usually will not disclose the investigation result or submit the investigation report to the investigated employee, unless it is explicitly provided in its rules and regulations that the employer is obliged to inform the employee of the investigation result. However, according to the Employment Contract Law of the PRC and the opinions of the mainstream arbitration tribunals and courts, if an employer decides to take disciplinary action against an employee (in particular, termination of employment contract) according to the investigation result, it is generally

required to inform the employee of the investigation result. In other words, the employer generally needs to inform the employee of the specific facts based on which the disciplinary action is taken. Failure to do so may result in the generalization of serious violation of the employer's rules and regulations and lead the arbitration tribunals and courts to regard the termination as illegal.

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South Korea

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There is no legal obligation for a company to disclose the outcome of an investigation to the employee who was subject to it. Having said that, if the company wishes to take disciplinary action against the employee based on the outcome of an investigation, it is required to disclose sufficient detail on the employee's wrongdoing that is subject to disciplinary action. This information should be provided to the employee before the disciplinary action committee (DAC) hearing to provide the employee with sufficient time to present and defend his or her position during the DAC hearing.

Last updated on 15/09/2022

Switzerland

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.[2]

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[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

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United States

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In general, it is often helpful to provide the complainant and subject of the complaint with a short written communication or verbal communication at the end of an investigation to advise that the investigation has concluded. Where the allegations are unsubstantiated, the communication should convey that no evidence

of misconduct or unlawful conduct was found. Where the allegations are substantiated, the results and proposed communication should be reviewed with the legal function, together with potential disciplinary and remedial action, before it is communicated to the complainant and the subject of the complaint.

Where the misconduct alleged poses a high risk to the company from a reputational, operational or legal perspective, and especially where an investigation is conducted by outside counsel, outside counsel should determine, in consultation with the relevant individuals at the company, for example the general counsel, how and with whom to share investigation results and if and how to communicate the outcome to the complainant and the subject of the complaint. This is the case regardless of whether the allegations are found to be substantiated or unsubstantiated.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
at Jingtian & Gongcheng

For the employee: As mentioned in our response to question 22, the relevant laws and regulations in the PRC do not impose any obligation on an employer to share investigation report (including the findings) with its employee, unless otherwise expressly provided in its internal rules and regulations that the employer may share with its employee any investigation report or findings that do not involve trade secrets or another person's privacy or personal information. Therefore, the employer has the discretion to decide whether and to what extent to share the investigation report based on its business management needs.

For the police/regulatory authorities: In general, an employer shall provide a complete report according to the law as required by the authority handling the case. It is recommended that the employer should conduct a detailed review of the investigation authority and the information contained in the evidence collection documents issued by the authority, and communicate with the authority to specify the scope of assistance and evidentiary materials to be provided. Although the employer cannot refuse to provide relevant evidentiary materials to the investigation authority on the grounds that such evidentiary materials involve trade secret or personal privacy, it still needs to carefully assess the relevance of the evidentiary materials to the facts of the case and timely communicate with the authority to confirm and narrow the scope of providing evidence as much as possible. If necessary, the employer can consult professional lawyers to provide professional opinions. In addition, we suggest that the employer may also try to require the investigation officer to sign a confidentiality letter, and file the investigation materials involving trade secret or personal privacy, the reasons thereof, etc., for the purpose of reducing legal risks faced by the employer.

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South Korea

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As discussed in question 22, when taking disciplinary action against an employee based on the outcome of an investigation, the company would need to disclose sufficient detail on the employee’s wrongdoing. However, this does not mean that the full investigation report would need to be shared with the employee to be disciplined. Key details of the investigation findings that apply to the relevant employee due to be

disciplined should be shared, and not other findings concerning other persons.

There is also no requirement under Korean law for a company to disclose the investigation report or investigation findings to the whistleblower. If the company discloses the personal identity of the target employees, such disclosure could constitute a violation of the PIPA , libel or defamation under the Criminal Code. If the whistleblower strongly requests that the company share the investigation report or the findings, the company may consider providing a summary of the key findings concerning the allegations that the whistleblower raised, without disclosing personal information.

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Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

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[1] Nicolas Facincani/Reto Sutter, Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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United States

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Only the findings should be shared with the complainant and the subject of the complaint.

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24. What next steps are available to the employer?

China

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The employer may take disciplinary actions against the employee based on the investigation result and pursue their civil, administrative and even criminal liabilities. To be specific: 1) the employer may criticize and educate the employee, or take disciplinary actions such as warning, demotion and removal according to the internal rules and regulations of the employer. If the misconduct of the employee constitutes one of the circumstances stipulated in Article 39 of the Employment Contract Law of the PRC, the employer is entitled to take the most severe disciplinary action, namely termination of employment contract; 2) if the employee has caused economic loss to the employer, the employer may lawfully initiate a civil litigation recourse procedure; 3) if the employee violates the Law on Administrative Penalties for Public Security Administration of the PRC, the employer may deliver the case to the administrative department for corresponding administrative penalties; 4) if the employee is suspected of a crime, the employer should deliver the case to the public security authority and pursue his/her corresponding criminal liabilities according to the law.

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South Korea

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After completing an investigation, the company may consider the following measures, among others:

1. taking disciplinary action against the relevant employees;
2. taking legal action (eg, criminal action, civil action) against the relevant employees; and
3. taking appropriate remedial measures (eg, strengthening existing policies and establishing new policies, and conducting training).

The company may also consider making a voluntary report to the relevant authorities as discussed in question 25.

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Switzerland

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If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.[1]

If individual disciplinary actions are necessary, these may range from warnings to ordinary or immediate termination of employment.

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[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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United States

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Where the misconduct alleged is substantiated in whole or in part by an internal investigation, the human resources function, potentially in consultation with in-house or outside counsel, should agree on disciplinary or remedial action to be implemented.

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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?

China

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If the relevant investigation authorities or regulatory authorities require the employer to provide the investigation findings and the interview records of its employee's illegal activities, the employer is usually obliged to cooperate with the authorities and make disclosures according to the requirements of the law. Meanwhile, according to Article 110 of the Criminal Procedure Law of the PRC, any entity or individual who has found out facts of a crime or a criminal suspect has both the right and the duty to report the case or provide information to the public security authority, the people's procuratorate or the people's court. Therefore, if the investigation findings show that the employee is suspected of a crime, the employer should disclose the information to the relevant investigation authorities including the public security authority. For some special industries, for example, the investigation findings against the banking industry usually also need to be reported to the higher-level banking supervisory authorities. Although the relevant investigation staff and supervisory staff are usually required to comply with the confidentiality obligations according to the laws or regulations, the risk of leakage of the reported information due to the expansion of the scope of persons who are aware of the investigation findings cannot be completely excluded.

In addition, an employer may decide whether to disclose the results of an investigation (mainly including the violation of disciplines and the disciplinary punishment) to other employees at its own discretion, but has to disclose the relevant information among employees to the extent that it is "minimum and necessary", so as to avoid infringing on the employee's personal information or privacy or even right of reputation.

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South Korea

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There is generally no obligation to report violations to the Korean authorities, subject to limited exceptions (eg, financial institutions are required to report certain types of wrongdoing to the financial regulator; if there was a leak of an industrial technology developed through a national research and development project or a national core technology, this leak should be reported to the Ministry of Trade, Industry and Energy and the National Intelligence Service). However, even in the absence of a self-reporting obligation,

the company may consider strategically deciding to make a voluntary report. For example, there have been instances where the police or prosecutors' investigations were conducted in a more limited manner where the company filed a voluntary report and cooperated with the investigation. Also, for certain types of violations (eg, cartel activities), self-reporting to the relevant authority may entitle the company to leniency provided under the law.

In certain instances, the company may also consider reporting violations to the relevant foreign authorities, in addition to, or instead of, the Korean authorities. For example, if the company found potential violations of US law such as sanctions law or the Foreign Corrupt Practice Act, the company may want to self-report these violations to the relevant authorities such as the Office of Foreign Assets Control, or the US Department of Justice.

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Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.[2]

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[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 123.

[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), Interne und regulatorische Untersuchungen, Zürich/Basel/Genf 2016, p. 102 et seq.

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Once fact-finding is complete, the investigator should discuss his or her notes with in-house or outside counsel and prepare a summary of the process, high-level findings, and a proposed resolution at the counsel's direction. This report should not include subjective commentary and should also avoid including excessive detail, and generally be treated confidentially during and after the investigation. If the report is requested by regulators or the police, the company should discuss with in-house counsel, and preferably also with outside counsel, how to respond to the request and whether any steps need to be taken to protect any applicable legal privilege.

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

China

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at Jingtian & Gongcheng

The relevant laws and regulations in the PRC have not clarified the retention period of the investigation findings. According to Article 19 of the Personal Information Protection Law of the PRC, unless otherwise required by laws or administrative regulations, the retention period of personal information shall be the shortest period necessary to achieve the purpose of handling the information. Since the employee's personal information is very likely to be involved in the investigation findings, such report should be retained for the shortest period necessary to achieve the purpose of handling the information. In general, once the investigation is completed, the purpose of the internal investigation has been achieved or it is no longer necessary to achieve the purpose, and the employer may, in accordance with Article 22 of the Administrative Regulations of the PRC on Network Data Security (Draft for Comments), delete or anonymize the personal information within fifteen (15) working days. If it is technically difficult to delete the personal information, or it is difficult to do so within fifteen (15) working days due to business complexity or other reasons, the employer shall not conduct any processing other than storing the personal information and adopting necessary security measures, and shall give reasonable explanations to the employee.

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South Korea

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There is no legal requirement on how long the records of the investigation (eg disciplinary action) should be maintained by the company. Many companies maintain a record of disciplinary action throughout the employment period.

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Switzerland

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From an employment law point of view, there is no statute of limitations on the employee's violations. Based on the specific circumstances (eg, damage incurred, type of violation, basis of trust or the position of the employee), a decision must be made as to the extent to which the outcome should remain on the record.

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).[1]

[1] Wolfgang Portmann/Isabelle Wildhaber, Schweizerisches Arbeitsrecht, 4. Edition, Zurich/St. Gallen 2020, N 473.

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United States

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There is no requirement for the results of a workplace investigation to remain on an employee's record for any specific period. It is often helpful, however, for information relating to the outcome of such an investigation (regardless of whether the allegations are substantiated) to be accessible to the human resources or legal functions such that during the initial complaint intake process described above, any prior complaints and investigations relating to the same individual or group of individuals can be taken into account to identify any recurring issues or systemic violations.

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

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It is inevitable that the investigation involves the employee's personal information, and once the investigation is mishandled, the employer may face the following legal risks:

Civil liability: Both the Civil Code of the PRC and the Personal Information Protection Law of the PRC, clearly provide the civil liability for infringement of privacy and illegal processing of personal information. Therefore, the investigated employee or relevant organizations such as the people's procuratorate have the right to claim or file a public interest lawsuit on the employer's improper collection of evidence, requiring the employer to bear the liability for infringement. In addition, the evidence obtained by an employer through infringing the employee's privacy and personal information rights and interests, in violation of the law, cannot be used as the valid evidence for the employer's unilateral termination of the employment contract or requiring the employee to compensate for losses.

Administrative liability: Article 66 of the Personal Information Protection Law of the PRC provides that, where personal information is processed in violation of regulations, administrative penalties imposed by the department performing duties of personal information protection may be up to revoking the business license, and the person directly in charge and other directly liable persons may be fined up to one million yuan and prohibited from practicing within a time limit. Meanwhile, Article 67 of the Personal Information Protection Law of the PRC provides that relevant illegal acts shall be recorded in the employer's credit files and disclosed to the public.

Criminal liability: if an employer illegally sells or provides to others the personal information obtained during the internal investigation, and the circumstance is serious enough, the judicial authority has the right to hold the employer, the managers directly in charge and other directly liable persons criminally liable in accordance with the crime of "infringement of citizens' personal information" under Article 253A of

the Criminal Law of the PRC.

It should be noted that a compliance investigation may also involve the employer's communication and investigation reporting with overseas authorities, or overseas institutions' direct access to information from the employer's domestic systems. If the employer conducts cross-border transmission of such personal information, it shall also meet one of the conditions set out in Article 38 of the Personal Information Protection Law of the PRC (i.e. passing the security assessment organized by the national cyberspace administration authority, obtaining certification from a professional institution concerning the protection of personal information or entering into a standard contract with an overseas recipient). Violations of the above provisions may result in civil, administrative and even criminal liability.

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As mentioned in question 19, employees may potentially raise claims, such as that the company violated data privacy laws in reviewing employee data, committed defamation, coerced the employee to comply with the investigation, and that witnesses or the company committed defamation in violation of the Criminal Code or disciplined the employee without just cause.

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Switzerland

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As there are no specific regulations for internal investigations, the usual legal framework within which the employer must act towards the employee derives from general rules such as the employer's duty of care, the employee's duty of loyalty and the employee's data protection rights.

But, for example, unwarranted surveillance could conceivably result in criminal liability (article 179 et seq, Swiss Criminal Code) for violations of the employee's privacy. Furthermore, errors made by the employer could have an impact on any later criminal proceedings (eg, in the form of prohibitions on the use of evidence).[1]

Evidence obtained unlawfully may only be used in civil proceedings if there is an overriding interest in establishing the truth (article 152 paragraph 2, Swiss Civil Procedure Code). Consequently, in each case, a balance must be struck between the individual’s interest in not using the evidence and in establishing the truth.[2] The question of the admissibility of evidence based on an unlawful invasion of privacy is a sensitive one – admissibility in this case is likely to be accepted only with restraint.[3] Since the parties in civil proceedings do not have any means of coercion at their disposal, it is not necessary, in contrast to criminal proceedings, to examine whether the evidence could also have been obtained by legal means.[4]

Unlawful action by the employer may also have consequences on future criminal proceedings: The prohibitions on exploitation (article 140 et seq, Swiss Criminal Procedure Code) apply a priori only to evidence obtained directly from public authorities. Evidence obtained unlawfully by private persons (ie, the employer) may also be used if it could have been lawfully obtained by the authority and if the interest in establishing the truth outweighs the interest of the individual in not using the evidence.[5] Art. 140 paragraph 1 Swiss Criminal Procure Code remains reserved: Evidence obtained in violation of Art. 140 paragraph 1 Swiss Criminal Procure Code is subject to an absolute ban on the use of evidence (e.g. evidence obtained under the use of torture[6]).[7]

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[4] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht, Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

[6] Jérôme Benedict/Jean Treccani, CR-CPP Art. 140 N. 5 and Art. 141 N. 3.

[7] Yvan Jeanneret/André Kuhn, Précis de procédure pénale, 2nd Edition, Berne 2018, N 9011.

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The subject of the investigation, the complainant, or a government agency investigating the same alleged misconduct could subject the employer to legal exposure. It is, therefore, helpful for a company to prepare a contemporaneous report of the investigation that summarises: the incident or issues investigated, including dates; the parties involved; key factual and credibility findings; employer policies or guidelines and their applicability to the investigation; specific conclusions; the party (or parties) responsible for making the final determination; issues that could not be resolved through the internal investigation; and employer actions taken.

The employer should also maintain a clear record of the steps taken to investigate the alleged misconduct and any findings, as well as all evidence gathered during the investigation, including documents collected and reviewed, any work done to identify systemic issues or patterns of behaviour, and notes from all interviews, which should be limited to the facts gathered, dated and should indicate the duration and location of the interview.

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