

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

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

Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

The Employment Ordinance (EO), which is the primary legislation governing employment relationships in Hong Kong, does not provide for a statutory workplace investigation procedure.

The Labour Department of Hong Kong has, however, published a Guide to Good People Management Practices^[1] which recommends that employers lay down rules of conduct, grievance and disciplinary procedures. Such rules should be simple and clear, logical and fair, and in line with the provisions in the EO.

As part of risk management and internal controls, Hong Kong-listed companies are expected by The Stock Exchange of Hong Kong Limited (SEHK) to establish whistleblowing policies and systems for employees to raise concerns about possible improprieties with independent board members. Listed companies are also expected to establish policies for the promotion and support of anti-corruption laws and regulations. Such policies and systems may include workplace investigation procedures.^[2] If a listed company chooses to not establish such policies and systems, it is required to explain how it could achieve appropriate and effective risk management and internal controls.

[1] Hong Kong Labour Department, “Guide to Good People Management Practices” (June 2019)
<<https://www.labour.gov.hk/eng/public/wcp/practice.pdf>>.

[2] SEHK, Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited, Appendix 14, Provision D.2.6, D.2.7. SEHK, “Corporate Governance Guide for Boards and Directors” (December 2021)
<https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/guide_board_dir.pdf>.

Last updated on 15/09/2022

Workplace investigations in Sweden are governed by several rules and regulations. Listed below are the central legislation and regulations that govern a workplace investigation related to alleged employee misconduct.

- The Swedish Discrimination Act (2008:567).
- The Swedish Work Environment Act (1977:1160), which is complemented by the Swedish Work Environment Authority's other statutes.[\[1\]](#)
- The Swedish Whistleblowing Act (2021:890).

If a workplace investigation has been initiated after the receipt of a report filed through a reporting channel established under the Swedish Whistleblowing Act, that law applies provided that the report has been filed by a person who may report under the Act and provided that the subject of the report falls under the material scope of the Act. The Swedish Whistleblowing Act implements Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law and has been given a wide material scope in Sweden. The Swedish Whistleblowing Act may apply if the reported irregularity concerns breaches of certain EU laws or if the reported irregularity is of public interest.

In addition to the regulations mentioned above, certain data protection legislation may affect workplace investigations by restricting what personal data may be processed. Such data protection legislation includes the following:

- Regulation (EU) 2016/679 on the protection of natural persons concerning the processing of personal data and the free movement of such data (the GDPR);
- the Swedish Supplementary Data Protection Act (2018:218);
- the Swedish Supplementary Data Protection Regulation (2018:219);
- Regulation DIFS:2018:2 on the processing of personal data relating to criminal convictions or offences. This regulation governs the processing of personal data relating to criminal convictions or suspected criminal offences in internal workplace investigations that are not governed by the Swedish Whistleblowing Act.[\[2\]](#)

The above-mentioned legislation and regulations may overlap in many aspects and it is therefore important before starting an investigation, as well as during an investigation, to assess which rules and regulations apply to the situation at hand. Another aspect of this is that many issues that can arise during an investigation are not regulated by law or other legislation. If the investigation is a non-whistleblowing investigation there are limited rules on exactly how and by whom the investigation should be carried out.

A Swedish law firm that undertakes a workplace investigation also has to adhere to the Swedish Bar Association's Code of Conduct. The Code of Conduct includes additional considerations, mainly ethical, which will not be addressed in this submission. Furthermore, this submission will not focus on investigations following an employee's possible misappropriation of proprietary information or breach of the Swedish Trade Secrets Act (2018:558). Investigations into such irregularities are often conducted to gather evidence and these investigations include the same or similar investigative measures used in other investigations, such as interviews with employees and IT-forensic searches, but also infringement investigations carried out by the authorities or other measures by the police.

[\[1\]](#) Mainly Systematic Work Environment Management (AFS 2001:1), Organisational and Social Work Environment (AFS 2015:4) and Violence and Menaces in the Working Environment (AFS 1993:2)

[\[2\]](#) Under Section 2 item 4 of DIFS 2018:2, personal data relating to criminal convictions or suspected criminal offences may only be processed if the personal data concerns serious misconduct, such as bribery, corruption, financial fraud or serious threats to the environment, health and safety, by an individual who is in a leading position or who is considered key personnel within the company. The processing of personal data received in a report or collected during an investigation governed by the Swedish Whistleblowing Act is instead governed by the Swedish Whistleblowing Act, which complements the GDPR and the

supplementing Swedish act and regulation stated in item (ii) and (iii) above.

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

02. How is a workplace investigation usually commenced?

Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

The circumstances in which an employer commences a workplace investigation may vary. However, it is common that an employer will consider it necessary to commence a workplace investigation upon receipt of a complaint concerning a fellow employee. Sometimes, the complaint may be made anonymously. If the

employer considers there to be substance in the complaint, it may commence an investigation to find out the truth of the matter, resolve the complaint and, if necessary, improve its systems and controls to prevent the reoccurrence of any misconduct.

A workplace investigation may be warranted if the employer receives an enquiry from a regulator concerning its affairs or an employee's conduct. The investigation findings could enable the employer to respond to the regulator (which could be a mandatory obligation) and at the same time assess its risk exposure.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

An investigation can be initiated in several ways. It is usually as a result of whistleblowing or a report on work environment deficiencies, or through other channels (eg, HR, the police, media coverage).

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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 exist, 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]

^[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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

It may be appropriate to suspend an employee during a workplace investigation, for instance, where the investigation has revealed misconduct on his or her part (even on a preliminary basis), or his or her continued presence in the business would hinder the progress of the investigation. However, the employer will have to consider the relevant legislative provisions and the terms of the employment contract before making any decision on suspension.

Under section 11 of the EO, an employer may suspend an employee without pay pending a decision as to whether the employee should be summarily dismissed (up to 14 days) or pending the outcome of any criminal proceedings against the employee arising out of his or her employment (up to the conclusion of the criminal proceedings). If an employee is suspended as above, however, the employee may terminate his or her employment without notice or payment in lieu of notice.

It is more common for an employer to suspend an employee with pay during an investigation concerning his or her conduct rather than exercising its statutory right as mentioned above. This could avoid an unnecessary dispute with the employee concerned. Indeed, it is common for employers to include in employment contracts specific provisions to give themselves the right to suspend an employee with pay in certain circumstances. The provisions normally set out the circumstances in which the employer may exercise the right, the maximum period of suspension and other arrangements during the suspension period (eg, how the employee’s entitlements under the employment contract are to be dealt with).

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

In general, an employee in the private sector may be temporarily suspended for a short period with pay and other benefits during a workplace investigation. The room for suspension without pay is, by contrast, very limited. An applicable collective bargaining agreement may impose additional restrictions on the right to temporarily suspend an employee. The suspension should be limited in time and only be in force during the investigation, but can be repeated for (multiple) additional short periods if necessary to conclude the investigation. An assessment needs to be made on a case-by-case basis as suspension in some cases may be considered unlawful. If not executed with sufficient consideration of the employee's interests, it may be considered a constructive dismissal or a breach of the employer's work environment obligations. If the employee is unionised, trade unions sometimes request that the employer initiates consultations as part of a decision to suspend an employee.

In the public sector, the right to suspension is limited. There are also special regulations regarding the suspension of certain employees, for example, employees who are employed as permanent judges.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

04. Who should conduct a workplace investigation.

are there minimum qualifications or criteria that need to be met?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

There are no statutory or regulatory requirements regarding the choice of investigator in workplace investigations. However, it is good practice to have the investigation conducted by persons who have been trained to do so as investigations may involve intricate issues. It is also important that the investigators are perceived to be impartial and fair. For that reason, the investigators should be individuals who are not involved in the matter under investigation.

Complex cases or cases that involve a senior employee may require someone more senior within the company to lead and oversee the conduct of the investigation. This also applies where it is foreseeable that the investigation may lead to disciplinary action, summary dismissal of the employee or a report to an authority.

Engagement of external parties or professional advisors may be necessary if the conduct under investigation is serious or widespread and may lead to regulatory consequences, or if the employer does not have the requisite expertise to handle the investigation. Lawyers (whether in-house counsel or external lawyers) may be the best fit to conduct a workplace investigation to ensure that legal professional privilege attaches to documents and communications created during the investigation (please see question 14).

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

If the workplace investigation falls under the Swedish Whistleblowing Act, the investigation has to be conducted by independent and autonomous persons or entities designated under the Swedish Whistleblowing Act as competent to investigate reports.

If the workplace investigation is not governed by the Swedish Whistleblowing Act, there are no minimum qualification requirements. When appointing an investigator, one should consider who would be most suitable in the given situation. For example, it may in some situations be more suitable to have an external investigator to ensure impartiality.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*

at Slaughter and May

If the investigation is conducted in a manner that is contrary to an express term of the employment contract or the implied obligation of trust and confidence of the employer under common law (please see question 11), the employee may have a claim for breach of contract and possible remedies may include declaratory and injunctive relief against the investigation.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

No. It should, however, be noted that the employee under investigation may claim a right to rectification under article 16 of the GDPR and its right to object to processing under article 21 of the GDPR. This may give the employee under investigation an undesirable opportunity to withhold evidence and obstruct or impede the investigation. The risk of these rights being exercised is, however, considered to be low.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

06. Can co-workers be compelled to act as witnesses?

What legal protections do employees have when acting as witnesses in an investigation?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Under Hong Kong law, the employee has an implied duty to obey lawful instructions from his or her employer and to serve the employer with fidelity and good faith during the term of his or her employment. A lawful instruction from an employer may include a reasonable request for the employee to participate and provide information in the workplace investigation. If the employee refuses to comply with such instruction or is obstructive or provides untrue or misleading information, it could constitute a ground for summary dismissal under the EO and at common law.

That said, in general terms, an employer should not compel any employee to testify against a co-worker, particularly if such a co-worker is a senior colleague, as evidence provided under compulsion may not be helpful to the investigation.

Employees who act as witnesses must be treated as per their contractual and statutory rights, including the right against self-incrimination. If the investigation involves allegations of discrimination on the ground of sex, race or disability, the employer should ensure that the witnesses will not be victimised or treated less favourably than other employees.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

In general, yes, employees in Sweden have a far-reaching duty of loyalty toward their employers. This includes, among other things, a duty to truthfully answer an employer's questions and to inform the employer of events that may be of interest to the employer. An employee's obligation to assist is, however, more limited when assistance would entail self-incrimination.

A person acting as a witness under an investigation governed by the Swedish Whistleblowing Act will be protected by confidentiality. Personal data and details that could reveal the identity of a witness may not be disclosed without authorisation.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

^[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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If physical evidence contains data relating to an individual, from which the identity of the individual can be ascertained,^[1] the data would constitute personal data under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO). The PDPO sets out several data protection principles that the employer must comply with

while processing personal data, including:[2]

- personal data must be collected for a lawful purpose related to a function or activity of the employer and should not be excessive for this purpose. An internal investigation would be regarded as a lawful purpose;
- personal data must be accurate and not kept longer than is necessary;
- personal data must not be used for a purpose other than the internal investigation (or other purposes for which the data was collected) unless the employee consents to a new use or the new use falls within one of the exceptions provided in the PDPO;
- personal data must be safeguarded against unauthorised or accidental access, processing or loss; and
- the employee whose personal data has been collected has the right to request access to and correction of his or her personal data retained by the employer.

If an employer wants to gather evidence through employee monitoring, it should ensure that the act of monitoring complies with the data protection principles of the PDPO if the monitoring activity would amount to the collection of personal data. The Privacy Commissioner for Personal Data has issued guidelines to employers on the steps they can take in assessing whether employee monitoring is appropriate for their businesses.[3] As a general rule, employee monitoring should be conducted overtly. Further, those who may be affected should be notified in advance of the purposes the monitoring is intended to serve, the circumstances in which the system will be activated, what personal data (if any) will be collected and how the personal data will be used.

Covert surveillance of employees should not be adopted unless it is justified by relevant special circumstances. Employers should consider whether there is reason to believe that there is an unlawful activity taking place and the use of overt monitoring would likely prejudice the detection or collection of evidence.[4] Even if covert monitoring is justified, it should target only those areas in which an unlawful activity is likely to take place and be implemented for a limited duration of time.

[1] PDPO section 2.

[2] PDPO Schedule 1.

[3] PCPD, “Privacy Guidelines: Monitoring and Personal Data Privacy at Work” (April 2016) <https://www.pcpd.org.hk/english/data_privacy_law/code_of_practices/files/Monitoring_and_Personal_Data_Privacy_At_Work_revis_Eng.pdf>.

[4] Ibid at paragraph 2.3.3.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

To the extent the gathering of physical evidence includes the processing of personal data, please see question 1.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

^[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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

As part of an investigation, an employer may search objects or files that are the company's property (eg, electronic devices given by the employer for business purposes and emails or messages stored on the company's server) without prior notice and the employee's consent is not needed. The employer, however, has no right to search an employee's possessions (eg, a private smartphone) without the employee's

consent.

To avoid arguments as to who a particular object belongs to, employers may specify in internal policies what is to be regarded as a corporate asset and could be subject to a search in a workplace investigation.

Concerning an employee's possessions, even if he or she consents to a search, it is good practice for the employer to conduct the search in the presence of the employee or an independent third party who can act as a witness to the search. If the employer suspects that a criminal offence has been committed and that a search of the employee's possessions would reveal evidence, the employer should consider reporting its suspicion to the police, as they have wider legal powers to search.^[1]

^[1] Usually upon execution of a warrant.

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

An employer can search an employee's personal possessions (eg, handbag, pockets and locker) if the employer has a legitimate interest in a search. This could, for example, include a reasonable suspicion of theft of employer property. Furthermore, an employer may search, but not continually monitor, an employee's computer and email provided that it is in accordance with GDPR requirements. For the processing to be lawful under the GDPR, the employer has to establish a purpose and a legal basis for the processing of personal data. Furthermore, data subjects must have received information on the legal basis for and purpose of the processing of personal data beforehand. If the data subjects have not received such information, the employer's right to process their data is limited. However, if the employer has reasonable grounds to believe that trade secrets or similar has been copied and stolen, no such requirements would typically apply.

Investigations into an employee's possessions may, under certain circumstances, also be carried out by the Swedish authorities.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

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

Last updated on 15/09/2022

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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

Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Hong Kong does not have a comprehensive legislative framework relating to whistleblowing. Therefore, in general, employers are free to establish whistleblowing policies and procedures and confer such protections on whistleblowers as they see fit. That said, companies listed on the Main Board of the SEHK are expected to establish a whistleblowing policy and system for employees to voice concerns anonymously about possible improprieties in the companies' affairs. If a listed issuer deviates from this practice, it must explain the deviation.^[1]

When an investigation involves whistleblowing, the employer needs to comply with the relevant policy and system and provide the whistleblower with such protections as stated in the policy. The employer should not ignore a complaint simply because it was made anonymously, and should ascertain the substance of

the complaint to decide whether a full-blown investigation is warranted.

In addition, the employer should seek to establish a secure communication channel with the whistleblower to gather more information about the complaint or misconduct while maintaining the confidentiality of his or her identity. If the complaint is serious, the employer may consider referring the complaint to a law enforcement agency or regulator as they would be better placed in protecting the anonymity of the whistleblower while proceeding with the investigation. That said, employers generally have no obligation to report internal wrongdoing to any external body (please see question 25 for exceptions). The employer may assess whether it is appropriate to do so on a case-by-case basis.

[1] The Corporate Governance Code, Appendix 14 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited.

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

If the Swedish Whistleblowing Act governs the investigation, additional considerations apply relating to who may investigate a reported irregularity (see question 4) and the duty of confidentiality and restrictions on access to and disclosure of personal data in investigations (see questions 6, 10 and 11), as well as the rights and protections of whistleblowers.

As regards the rights and protections of whistleblowers, the following can be noted. A person reporting in a reporting channel governed by the Swedish Whistleblowing Act is protected against retaliation and restrictive measures. Thus, companies are prohibited from preventing or trying to prevent a person from reporting, and retaliating against a person who reports. Furthermore, a reporting person will not be held liable for breach of confidentiality for collecting the reported information if the person had reasonable grounds to believe that it was necessary to submit the report to expose irregularities. Under the Swedish Whistleblowing Act, any person reporting irregularities in a reporting channel established under the Swedish Whistleblowing Act may also report irregularities to designated Swedish authorities.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Workplace investigations should usually be conducted on a confidential basis to preserve the integrity of the investigation, avoid cross-contamination of evidence and maintain the confidentiality of the employee under investigation. This means that those involved in the investigation (ie, the subject employee and any material witnesses) should be made aware of the fact and substance of the investigation on a need-to-know basis.

While the extent of the confidentiality obligations are usually governed by the employer's internal policies and the employment contract, there are circumstances where the employer has a statutory duty to keep information unearthed in the investigation confidential. For instance, if it is found that certain property represents proceeds of an indictable offence^[1] or drug trafficking^[2], or is terrorist property^[3], the employer should report its knowledge or suspicion to the Joint Financial Intelligence Unit (JFIU) as soon as is reasonably practicable and avoid disclosure to any other person as such disclosure may constitute "tipping off". Another example is if a workplace investigation is commenced in response to a regulatory enquiry, the employer may be bound by a statutory secrecy obligation and may not be at liberty to disclose anything about the regulatory enquiry to anyone including those who are subject to the workplace investigation. For example, section 378 of the Securities and Futures Ordinance (SFO) imposes such a secrecy obligation on anyone who is under investigation or assists the Securities and Futures Commission (SFC) in an investigation.^[4]

^[1] OSCO section 25A(5). A person who contravenes the section is liable on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1 year.

^[2] DTROPO section 25A(1). A person who contravenes the section is liable on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1 year.

^[3] UNATMO section 12(1). A person who contravenes the section is liable on conviction to a fine and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1

year.

[4] A person who fails to maintain secrecy is liable upon conviction on indictment to a maximum fine of \$1 million and imprisonment for up to two years (or upon summary conviction, to a maximum fine of \$100,000 and imprisonment for up to six months).

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

If the Swedish Whistleblowing Act applies, the persons or entities handling the investigation have a duty of confidentiality and may not, without permission, disclose any information that could reveal the identity of the reporting person, any person subject to the report or any other person mentioned in the report or during the investigation of the report. Access to personal data is limited to designated competent entities or persons. Investigative material including personal data may not be shared with other persons or entities during the investigation. Once the investigation has reached actionable conclusions, investigative material may be shared with other persons or entities, such as HR or the police, provided that such sharing is necessary to take action on the outcome of the investigation. Investigative material may also be shared if it is necessary for the use of reports as evidence in legal proceedings or under the law or other regulations.

If the Swedish Whistleblowing Act does not apply, there are no particular confidentiality obligations for employers. Yet, an employer needs to consider what information is suitable to share during an investigation, how this is done and to whom it is shared. An employer must also respect employees' privacy in line with what is generally considered good practice in the labour market. This means that an employer should be careful as to what sensitive and personal information is shared during an investigation. Furthermore, the spreading of damaging information (even if true) about an employee to a wider group may be a criminal offence under the Swedish Criminal Code.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

An employer's internal policies or the employment contract may provide that an employee under investigation should be given certain information concerning the allegations raised against him or her. Such policies or terms should be followed and failure to do so may result in a claim for breach of contract or constructive dismissal by the employee. Even where there are no express provisions, the employer still owes an implied obligation of trust and confidence towards the employee at common law, which requires the employer not to, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.[1] In the context of an internal investigation, the implied duty would require the employer to conduct the investigation and reach its findings reasonably and rationally following the evidence available and in good faith. This would normally require that sufficient information about the allegations made against the employee be provided to him or her such that he or she has the opportunity to properly respond to the allegations before any disciplinary action is taken or any decision about his or her employment is made.

Last updated on 15/09/2022

Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

According to article 14 of the GDPR, no information must be provided. The exemption in article 14.5(b) applies to the extent the obligation to provide such information is likely to render impossible or seriously impair the objectives of the processing of the personal data of the employee under investigation (ie, to diligently investigate the suspected irregularity).

If the Swedish Whistleblowing Act applies, information about where the personal data processed originates from may not be provided under article 14 of the GDPR, as the personal data must remain confidential subject to obligations under the Swedish Whistleblowing Act.

In addition to the above, an investigation should, to the extent possible and suitable, be characterised by the principles in ECHR (particularly articles 6 and 8). The employee under investigation should, among other things, be presented with sufficient information to safeguard his or her interests and be allowed to respond to the allegations. The investigation must also be compliant with the work environment responsibilities that the employer has concerning the involved parties (see questions 17 and 20).

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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).

[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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Subject to any internal policies and terms of the employment contract, an employer would have discretion as to whether the identity of the complainant, witnesses or sources of information for the investigation should be kept confidential. In general, the employer should consider how the confidential treatment or its absence would affect the conduct and outcome of the investigation. The disclosure of the identity of the complainant in some cases may be necessary for the employee under investigation to respond in a meaningful way. On the other hand, both the complainant and witnesses may be more forthcoming in providing information if he or she is assured that his or her identity will not be made known to the person under investigation (especially if the latter is senior management personnel). A balance should be struck between the interests of the complainant or witnesses in maintaining confidentiality and the need for the employee under investigation to make a proper response to the allegations made. In any case, the

employer should follow its whistleblowing policy if there is one (as discussed in question 9), and take into account practical and statutory considerations relating to confidentiality (as discussed in question 10).

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

If the Swedish Whistleblowing Act applies, their identity must be kept confidential under the duty of confidentiality. If the Swedish Whistleblowing Act does not apply, their identity can to a large extent be kept confidential.

It can also be noted that a workplace investigation carried out in the public sector will often (eventually) become an official document, which means that the document can be requested by the public. There are, however, provisions on secrecy that may restrict the right to gain access to official documents. These provisions are found in the Public Access to Information and Secrecy Act (2009:400).

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.[\[1\]](#)

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

In general terms, NDAs can be used and indeed are commonly used to keep the fact and substance of a workplace investigation confidential. However, NDAs will not be effective in preventing the disclosure of information which is in the public interest or is important for safeguarding public welfare in matters of health and safety. Further, several laws in Hong Kong provide that disclosures as a result of compliance with a requirement made by the relevant authorities will not be treated as a breach of any restriction imposed by contract or otherwise by law.^[1]

^[1] The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 455), and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

NDAs can be used for some investigations carried out in the private sector. However, under the Swedish Whistleblowing Act, a contract is void to the extent it retracts or restricts a person's rights under the Swedish Whistleblowing Act. An NDA that restricts the right to report irregularities to authorities or the media would, therefore, typically be void.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Legal professional privilege may attach to investigation materials if they are generated for the sole or dominant purpose of giving or obtaining legal advice (legal advice privilege); or created with the sole or dominant purpose of either obtaining or giving advice about or obtaining evidence to be used in an actual or reasonably contemplated litigation (litigation privilege).^[1] Legal advice privilege applies to confidential communications between lawyers and their clients, whereas litigation privilege may extend to communications between lawyers, clients and third parties. The employer may withhold disclosure of any materials that are subject to either legal advice or litigation privilege.

In the context of a workplace investigation, internal interview records are protected by legal advice privilege if the dominant purpose of creating those records is to seek legal advice on potential disciplinary action against the employee. Such interview records are protected by litigation privilege if they are created to obtain evidence in an actual or reasonably contemplated litigation.

It should be noted that the point in time at which the sole or dominant purpose is judged is when the document is created. In other words, a document is not covered by litigation privilege if it was not created for litigation purposes but was subsequently used to obtain legal advice for litigation.^[2] On a practical point, if the employer would like to minimise disclosure of the investigation by claiming privilege over relevant materials, it may wish to limit the number of documents created and persons to which they are circulated to avoid potential waiver of privilege.

^[1] White Book 2023, 24/5/16, 24/5/18; Litigation privilege applies to adversarial proceedings, but not inquisitorial or administrative proceedings (White Book 2023, 24/5/28).

^[2] White Book 2023, 24/5/18.

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Attorney-client privilege will apply to all communication and investigative material between a client and its law firm. Attorney-client privilege is, however, not without limitations. Regarding investigations into alleged employee misconduct, a law firm may have to report suspected money laundering to the authorities and under certain circumstances disclose information to the financial police.

Written material covered by attorney-client privilege generally may not be seized.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Absent any right conferred by the employment contract or the relevant internal policy, employees do not have a right under Hong Kong law to be accompanied or have legal representation during an investigation meeting or interview. While the employee being investigated is entitled to seek his or her own legal advice during the investigation, employers have discretion on whether to allow the employee to be accompanied or represented by his or her legal adviser in an investigation meeting or interview. That said, to ensure fairness in the process and to avoid unnecessary allegations of undue influence, the employer may consider allowing the employee to have legal representatives present, especially if serious allegations are made against the employee and the outcome of the investigation could have a significant impact on the employee's future.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employee has no right to bring legal representation. However, the outcome of an investigation may lead to employment-related consequences, so it may be appropriate (depending on the situation) to offer the employee the opportunity to bring a union representative (if the employee is unionised) or a legal representative.

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

^[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.

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Unless the employment contract or the relevant internal policies specify otherwise, there is no automatic right under Hong Kong law for a works council or trade union to be informed or involved in a workplace investigation.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

No, but if the employee under investigation is unionised it is appropriate to inform the union about the investigation. If the employer chooses to take action against the employee during, or after, the investigation, the trade union generally needs to be consulted before any final decisions are made.

If the Swedish Whistleblowing Act applies, the employer is not authorised to inform a works council or trade union about the investigation, as it may be in violation of the duty of confidentiality (see question 10).

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

It could be stressful for employees to be involved in a workplace investigation, whether as the victim, the subject of an investigation or a witness. More transparency in the process would help reduce stress. This could be achieved by providing the relevant employees with the timeline for different stages of the investigation and regular updates.

The employer may also consider providing mental health support to the employees concerned, for example in the form of counselling services or medical consultations. Where appropriate, the employer may also consider making reasonable adjustments to the employee's workload and work schedule to facilitate his participation in the investigation.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employer is responsible for the work environment and must ensure that employees are not at risk of mental (or physical) illness due to an investigation. If an employee, in connection with an investigation, requires support or if risk of ill health is otherwise anticipated, the employer is obliged to assess the situation and provide said employee with sufficient support (eg, counselling or work adjustments).

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

^[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.



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If unrelated matters are revealed during the investigation, the employer should consider whether an investigation is needed. If yes, the employer should decide whether it is appropriate to incorporate the new matters into the scope of the existing investigation by expanding the terms of reference. However, it may not be appropriate to do so if different individuals are concerned or such inclusion would unduly complicate or delay the progress of the existing investigation. If that is the case, the employer should commence a separate investigation.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

According to the GDPR, personal data can only be processed for specified, explicit and legitimate purposes and may not be further processed in a manner that is incompatible with those purposes. This imposes restrictions on the use of material from previous investigations in new investigations when the material was collected for other purposes. It is, therefore, necessary to ensure whether the new matter relates to the investigation and falls within the purpose of the investigation. If the new matter is unrelated to the investigation and does not fall within the purpose of the investigation, the identified information may not be processed under the GDPR.

Except for what is stated above, no regulation limits how the employer can use information regarding unrelated matters. Unrelated matters may be a myriad of different things, and could in some instances just be discarded, while in other situations the information may invoke a responsibility to act for the employer (eg, if the unrelated matters concern work environment issues or other severe misconduct by an employee who is not the target of the investigation). Furthermore, the employer may always use any revealed information (unrelated or not) as evidence in a court of law, since the principle of free examination of

evidence applies.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

As discussed in question 11, an employer owes an implied obligation of trust and confidence towards its employees under common law. This means that an employer cannot disregard a genuine complaint made by an employee even if the employee is under internal investigation. The employer may have put in place an employee grievance handling policy, which should be followed when handling the employee's grievance.

If the grievance raised relates to how the workplace investigation is being conducted (for example, it is alleged that the investigator has a conflict of interest or is biased), the employer should consider suspending the investigation until this grievance is properly addressed to ensure fairness. However, if the grievance is nothing but an attempt to delay or hinder the investigation, the employer may be entitled to proceed with the investigation regardless. The employer should therefore carefully assess the nature and validity of any grievance raised in each case. The employer should also consider its rights under the employment contract if the employee is being uncooperative or obstructive.

Last updated on 15/09/2022

Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

There are no formal rules or processes for handling grievances in Sweden. Depending on the nature of the grievance, such a complaint may also have to be investigated (unless the grievance is deemed to be trivial). This could, for example, be the case if the grievance concerns new or other work environment issues that the employer is obliged to investigate.

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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).

Last updated on 15/09/2022

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?

Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If the employee under investigation goes off sick, the employer should ascertain the medical condition of the employee and when he or she is likely to return to fitness. If the employee is unlikely to return to work for a reasonable time, the employer should consider what adjustments can be made to the investigation process to continue with the investigation. If the employee's input is necessary for the conclusion of the investigation, the employer may invite the employee to provide information by way of a written questionnaire or to attend a virtual meeting. However, the employee may not necessarily agree to these proposals, especially if he or she is unwell. In such circumstances, the employer may not be able to conclude the investigation in the absence of the employee.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

The employer is responsible for the employee's work environment during the investigation. The employer must assess the situation and the impact on the employee's health and may, depending on the situation, have to postpone certain investigative measures, such as interviewing the employee in question. The investigation may even have to be completed without the employee participating.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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).

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Where there is a parallel criminal or regulatory investigation, the employer should handle the workplace investigation with extra care and ensure that it complies with all applicable legal requirements or lawful requests made by the relevant authorities concurrently. While there may be reasons why the employer wants to progress with its investigation as soon as possible, the employer should not take any steps that hinder or obstruct the parallel investigations. Therefore, it may be appropriate for the employer to stay its workplace investigation if its continuation may prejudice the parallel investigations.

The employer may also find itself duty-bound to stay the workplace investigation if it is subject to statutory secrecy obligations vis-à-vis the relevant law enforcement agency or regulatory body. As mentioned in question 10, several laws in Hong Kong impose secrecy obligations on any person who has acquired confidential information about certain law enforcement agencies or regulatory bodies and the investigations being conducted. The employer should assess whether they could continue with the workplace investigation without breaching secrecy obligations. The employer should take a prudent approach and may discuss with the relevant authority before proceeding further with its workplace investigation.

Depending on the nature of the matter, authorities in Hong Kong handling a criminal or regulatory investigation may be empowered to seize, or compel persons who are the subject of an investigation or assisting in such an investigation (which may include the employer) to produce, documents or evidence that are relevant to the matters being investigated. For example:

- the police or the Independent Commission Against Corruption may, under a search warrant (or in certain circumstances, without a warrant), inspect and take possession of articles or documents inside the premise of the employer they reasonably suspect to be of value to the investigation of the suspected offence; and
- the SFC or the Competition Commission may, under the SFO or Competition Ordinance (as applicable), require the employee under investigation or the employer to produce documents, attend interviews, and, specifically for the SFC, provide the investigator with all assistance he or she can give. Both authorities may also obtain a warrant from the Hong Kong courts to search the premise of the employer and obtain documents or information it reasonably believes to be relevant to its investigation.

Documents created and evidence gathered by the employer during its workplace investigation (such as witness statements or investigation reports) may be subject to production requests of, or may be seized by,

the authorities mentioned above (unless legal professional privilege is attached). The employer should ensure that it complies with all lawful requests from the authorities.

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Handling a parallel investigation will have to be assessed on a case-by-case basis depending on the applicable rules. For instance, an investigation under the Swedish Discrimination Act is subject to certain timing requirements with which the employer must comply. In other cases, it may be more appropriate to hold off the workplace investigation while awaiting the outcome of the parallel investigation.

The police or regulator can, depending on the matter at hand, request an employer to share evidence. The police or the regulator may also, under certain circumstances, retain evidence in a search.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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).

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

The employer is generally not obliged under Hong Kong law to inform the employee under investigation of the outcome of the investigation absent any express obligation under the employment contract, even where the investigation has led to a decision to terminate the employee. However, to avoid any unnecessary claim of unlawful dismissal or dismissal without a valid reason, the employer should inform the employee of the reason for his or her termination, even if the investigation results may not be shared in full with the employee.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

This depends on the outcome of the investigation and the applicable rules.

If the outcome of the investigation leads to termination, the employer will have to disclose some information regarding the reason for termination. If the employee questions the termination, the employer may have to disclose more information in a subsequent dispute. If the outcome of the investigation leads to less invasive measures, such as a warning, there are less extensive requirements to provide information.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and disclosure of personal data must be considered (see question 10). If the investigation is based on the rules in the Swedish Discrimination Act, there are also feedback requirements concerning the involved parties.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

[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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

The employer is generally not obliged to share the investigation report or the findings with the employee under Hong Kong law, absent any express obligations under the employment contract.

However, according to the PDPO, the content of the investigation report or meeting minutes related to the employee (including any findings and opinions expressed in such documents) are likely to constitute the personal data of the employee under investigation. In that case, the employee may have a right under the PDPO to obtain a copy of such documents by making a statutory data access request after the workplace investigation is completed. The employer's obligation to comply with such request is subject to certain exemptions under Part 8 of the PDPO, which include (among others) an exemption on the provision of personal data held for the prevention, preclusion or remedying of unlawful or seriously improper conduct, and the disclosure of which would be likely to prejudice the said purpose or directly or indirectly identify the person who is the source of the data.[1] Therefore, where there is a parallel criminal proceeding or investigation that has not been concluded, the employer may reject an employee's data access request on the basis that the requested disclosure may prejudice the prevention and remedy of the unlawful conduct. Further, any information protected by legal privilege is also exempt from disclosure under Part 8 of the PDPO.[2]

If the requested documents also contain the personal data of any other third parties (such as other co-workers of the employee who have also participated in the investigation), the employer should always redact or erase such data before providing the requested documents to the employee under investigation, unless the relevant third parties have consented to the disclosure of the data.

[1] PDPO sections 20 and 58(1)(d).

[2] PDPO sections 20 and 60.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

There is no obligation to share the investigation report, neither in full nor key findings, with the involved parties. An assessment needs to be made in each case of what is appropriate to share and with whom.

When sharing an investigation report, certain data protection considerations must be made. A purpose and legal basis for the sharing must be established and, in principle, documented.

If the Swedish Whistleblowing Act applies, the duty of confidentiality and the restrictions on access to and disclosure of personal data must be considered (see question 10).

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

[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).

Last updated on 15/09/2022



United States

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

Last updated on 15/09/2022

24. What next steps are available to the employer?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If the outcome of the investigation reveals that misconduct has been committed by the employee, the employer may consider whether it should allow the employee to defend him or herself against such findings. If the employment contract or relevant internal policies specify a right to be heard on the part of the employee through a disciplinary hearing before any actions can be taken against him or her, such procedures should be followed.

Assuming the employer maintains its findings that the employee has committed misconduct after the conclusion of the disciplinary hearing (if any), the employer may consider taking one of the following disciplinary actions against the employee depending on the nature and severity of the misconduct:

- Verbal or written warning – this is a common form of disciplinary action. The employer may consider including the nature of the misconduct and the potential consequences of repeating such misconduct (for example, termination of employment) in the warning to be given to the employee;
- Termination with notice – the EO allows employers and employees to terminate the employment with notice. It is not necessary to give reasons for the termination unless the employee concerned has been employed for at least 24 months, in which case the employer shall demonstrate a valid reason for the termination as defined under the EO;
- Suspension – the employer may suspend the employee without pay for up to 14 days in circumstances where the misconduct concerned justifies a summary dismissal, or where a decision on summary dismissal is pending. The employee may also be suspended where there is a criminal proceeding against him or her relevant to the investigation, until the conclusion of the criminal proceeding (as discussed in question 3);^[1] and
- Summary dismissal – the employer may terminate an employment contract without notice if the employee is found to have:
 - wilfully disobeyed a lawful and reasonable order;
 - failed to duly and faithfully discharge his duties;
 - committed fraud or acted dishonestly; or
 - been habitually neglectful in his duties.^[2]

^[1] EO section 11(1).

^[2] EO section 9. The employer is also entitled to summarily dismiss an employee on any other ground on which he would be entitled to terminate the contract without notice at common law.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

An investigation may result in employment law measures (eg, support, training, relocation, warning, termination or dismissal). An investigation may also be inconclusive and not result in any action.

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

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

Last updated on 15/09/2022

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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?

Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*

at Slaughter and May

As mentioned in questions 21, 22 and 23, under Hong Kong law, the employer is generally not obliged to actively disclose the findings of a workplace investigation to any party.

Having said that, the employer should be aware of certain statutory disclosure requirements that may become applicable as a result of the matters revealed during the workplace investigation. For example, if the investigation reveals or gives rise to any knowledge or suspicion that any property represents the proceeds of an indictable offence^[1], drug trafficking^[2], or terrorism^[3], the employer is required to report its knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to the JFIU as soon as is reasonably practicable (even where the investigation has not yet been concluded). Employers who are licensed corporations must also provide the SFC with information about whether departing licensed employees were the subject of an internal investigation in the six months prior to his/her departure. If the internal investigation commences after the departure of the licensed employee, the licensed corporation should notify the SFC as soon as practicable^[4].

In any event, as in question 14, if any documents related to the investigation are protected by legal professional privilege, they can generally be kept confidential and would not be subject to disclosure even if the employer is subject to a mandatory reporting or disclosure obligation.

^[1] OSCO section 25A(1).

^[2] DTROPO section 25A(1).

^[3] UNATMO section 12(1).

^[4] Frequently Asked Questions on “Disclosure of investigations commenced by licensed corporations in the notifications of cessation of accreditation” issued by the SFC on 21 May 2019

<<https://www.sfc.hk/en/faqs/intermediaries/licensing/Disclosure-of-investigations-commenced-by-licensed-corporations#627D0257CCA8410189F48C1A68443112>>.

Last updated on 27/11/2023



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Findings may have to be handed over to the police or the regulator – there is no separate legal protection for material in employer investigations related to authorities. If the investigation has been carried out by a law firm, see question 14 on attorney-client privilege.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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]

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

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

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

There is no legal requirement in Hong Kong on this. However, since the investigation records will likely contain personal data, employers should be mindful of the requirement under the PDPO that personal data should not be kept for longer than necessary.^[1]

According to the Code of Practice on Human Resources Management published by the Privacy Commissioner for Personal Data, generally, employment data about an employee can be kept for the entire duration of his or her employment, plus a recommended period of no more than seven years after the employee leaves employment unless there is a subsisting reason that justifies a longer retention period. A longer retention period may be justified where there is ongoing litigation or a parallel investigation. Even where it is deemed necessary to retain the outcome of the investigation concerning a departed employee, the employer should ensure that other personal data on the employee's record (that is unrelated to the purpose of retention) are erased after the expiry of the recommended retention period.

[1] DPP2 (in Sch. 1) and PDPO section 26.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Under the GDPR personal data may not, according to the general principle on storage limitation, be retained for longer than is necessary for the purposes for which the personal data are processed. The GDPR does not stipulate a generally applicable storage limitation period. Such a regulation is, on the other hand, included in the Swedish Whistleblowing Act. If the Swedish Whistleblowing Act applies, the outcome of the investigation and all personal data should be retained for as long as necessary, but not for longer than two years after the investigation has been closed.

Last updated on 15/09/2022



Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022



United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If the employer failed to comply with a requirement that is expressly stipulated in the employment contract or employee handbook (such as a procedural requirement to hold a disciplinary hearing or to provide certain information to the employee), the employer could be liable for breaching an express term in the employment contract.

Even where the employment contract does not contain express provisions for the conduct of an internal investigation, the employer is under an implied obligation of trust and confidence under common law (as discussed in question 11), which requires it to conduct the investigation and reach its findings reasonably and rationally in accordance with the evidence available and in good faith.^[1] If the employer reached a decision that no reasonable employer would have reached, the conduct of the investigation may be in breach of the employer's implied obligation of trust and confidence.

If the error in the investigation has led to a termination of employment (whether by way of summary dismissal or termination by notice), the employee may be able to bring a statutory claim for wrongful dismissal, unlawful dismissal or dismissal without a valid reason (as applicable).^[2] If such a claim is successful, in addition to ordering the employer to pay monetary compensation, the court or tribunal may also make a reinstatement order (an order that the employee shall be treated as if he had not been dismissed) or re-engagement order (an order that the employee shall be re-engaged in employment on terms comparable to his or her original terms of employment) for the affected employee.

The employer may also be liable for unlawful discrimination under Hong Kong law if the investigation has been conducted in a discriminatory manner or the outcome of the investigation reflects differential and less favourable treatment of the employee concerned based on grounds of sex, marital status, disability, family status or race.

^[1] Chok Kin Ming v Equal Opportunities Commission [2019] HKCFI 755

^[2] EO sections 9 and 32K.

Last updated on 15/09/2022



Sweden

Author: *Henric Diefke, Tobias Normann, Alexandra Baron*
at Mannheimer Swartling

Errors resulting in terminations can be unlawful and, if they lead to employees terminating their employment as a result of the employer's missteps, could be seen as constructive dismissal. Constructive dismissal is generally equivalent to an unlawful dismissal. Unlawful terminations generally result in an

obligation to pay financial and general damages to the affected employees.

Failure to fulfil the obligations under the Swedish Discrimination Act may lead to an obligation to pay financial and general damages.

If an employer does not fulfil its obligations according to work environment legislation, there is a risk that the Swedish Work Environment Authority will issue injunctions or prohibitions against the employer. If an employer omits to meet its work environment related obligations, and that in turn results in a work related accident, e.g. self-harm in connection with an internal investigation, it may also, in a worst case scenario, lead to criminal liability.

The Swedish Work Environment Authority is also responsible for monitoring compliance with the provisions of the Swedish Whistleblowing Act. The Swedish Work Environment Authority may, if necessary to ensure compliance with the Swedish Whistleblowing Act, order an operator to comply with the obligations and requirements of the Swedish Whistleblowing Act. Employers violating the Swedish Whistleblowing Act may also be liable to pay damages to the affected employees.

If personal data is processed in a way that violates the GDPR, the authorised supervisory authority may issue warnings or reprimands to the data controller, order the controller to comply with the GDPR, impose a ban on processing, or impose an administrative fine on the controller. Companies violating the GDPR may also be liable to pay damages to data subjects.

Last updated on 15/09/2022

Switzerland

Author: *Laura Widmer, Sandra Schaffner*
at Bär & Karrer

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.

Last updated on 15/09/2022

United States

Author: *Rachel G. Skaistis, Eric W. Hilfers, Jenny X. Zhang*
at Cravath, Swaine & Moore

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.

Last updated on 15/09/2022

Contributors



Hong Kong

Wynne Mok
Jason Cheng
Audrey Li
Slaughter and May



Sweden

Henric Diefke
Tobias Normann

Alexandra Baron
Mannheimer Swartling



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer



United States

Rachel G. Skaistis
Eric W. Hilfers
Jenny X. Zhang
Cravath, Swaine & Moore

www.internationalemploymentlawyer.com