

# Workplace Investigations

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## 02. How is a workplace investigation usually commenced?

### Hong Kong

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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.

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### Netherlands

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The workplace investigation can be exercised by an internal (ad hoc) investigation department of the company itself, for example under the direction of the internal audit department or compliance department. This is possible if there is sufficient manpower with the necessary independence, knowledge and experience. Case law, however, shows that courts tend to be more critical of internal investigations than external investigations. For more complex and sensitive investigations, a forensic accountant or lawyer is often involved. The advantage of involving a lawyer is that the investigation and its outcome are covered by privilege. This guarantees the confidentiality of the investigation, also regarding supervisors and investigating authorities. Yet, at the same time, there is increasing debate about the role of lawyers as investigators, given their inherent bias to work in the interests of their client (the employer).

The investigation starts with a plan of approach that must be signed by the contractor. This plan of approach outlines the legal framework of the investigation, such as the scope, the means to be used, how it will deal with data, the use of experts, how the interviews will be conducted, the way of reporting and confidentiality. Furthermore, there must be a protocol for how the investigator conducts the investigation and that applies to all parties involved.

Gathering information can be done in various ways. For example:

- An inventory can be made of the household effects of a company. In the event of theft, an inventory can be an appropriate means of establishing exactly what has been stolen.
- An investigation of the books: this is an investigation of all documents of the company. These are not private documents of employees, but documents of the company itself. For an investigator, an interview can be a good way to gather more information, for example by interviewing witnesses. In practice, there are almost always several interviews with the suspects, the employer and other people involved.
- Open source research, which often involves researching a person's social media, or public documents relevant to the research. In principle, "open sources" refers to all public documents in the world; nowadays, many public documents are digitised.
- A workplace search, which includes everything present in the workplace: diaries, computer files, e-mails, letters, and even the contents of a wastebasket.
- A digital data investigation: this is a frequently used tool in fraud investigations. Most communication and documents are digital nowadays. It is, therefore, very likely that evidence can be found in digital data. Each of these means of investigation must respect the principles of an internal investigation and comply with the GDPR principles .

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## Switzerland

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

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).<sup>[1]</sup> 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.<sup>[2]</sup>

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

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

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