

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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08. Can the employer search employees' possessions or files as part of an investigation?

Austria

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In general, it is advisable to back up data, documents, emails and other records promptly to prevent their deletion. Admissibility depends on whether the data originates from personal or professional records and whether they are legally relevant. If internal investigations are carried out based on a specific suspicion of a criminal offence, it is the processing of legally relevant data. In general, the processing of professional emails or documents is permissible. If there is no professional connection, access to private files and documents is only permitted in exceptional cases.

If, for example, using a business email account for private purposes is not allowed, the employer can usually assume that the data processed is only "general" data within the meaning of article 6 GDPR and that such data processing is justified by a balancing of interests. However, if private use is allowed, the data may still be part of a special category within the meaning of article 9 GDPR. In such cases, the justification for its use must be based on one of the grounds explicitly mentioned in article 9(2) GDPR.

The employer must protect the employee's rights under section 16 of the ABGB and must consider the proportionality of the interference. Only the least restrictive means – the method that least interferes with the employee's rights – may be used to obtain the necessary information. The employer's interest in obtaining the information must outweigh the employee's interest in protecting his or her rights. The implementation or initiation of controls by the employer does not automatically constitute an interference with personal rights, as being subject to the employer's rights of control is part of the position as an employee.

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Germany

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Files and documents that are purely business-related – whether in physical or digital form – may, in

principle, be inspected by the employer without restriction. The employee has no right to refuse inspection.

When searching business laptops, computers, phones and e-mail accounts, a distinction must be made as to whether private use is permitted (or at least tolerated) or not: if the employee is allowed to use the items exclusively for business purposes, the employer may monitor and control them. If private use is permitted, the employee's right to privacy must be observed for private files, as must the protection of the secrecy of correspondence. Accordingly, the employer must avoid accessing private documents, files and e-mails. However, a review of private documents, files and e-mails may be permissible in the event of particularly serious violations if the employer's interest in the review outweighs the employee's interest in safeguarding his right to privacy. Generally, employers should allow private use of electronic devices only if employees have previously consented to the terms of use (including searches in certain cases).

A search of the employee's workplace by the employer is, in principle, permissible. However, a search of personal items (eg, bags, clothes, personal mobile phone) is generally only permissible with the employee's consent. Similarly to the review of digital personal data, a search of personal items may be permitted, however, in the event of particularly serious violations if the employer's interest in the search outweighs the employee's right to privacy.

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Switzerland

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

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

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

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

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