

Workplace Investigations

Contributing Editors

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

Thailand

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The Labour Protection Act B.E. 2541 (1998) (LPA) is the key legislation governing the relationship between employer and employee in Thailand. The LPA set out a minimum standard for the protection of employees' rights, as well as a mechanism for suspension from work for an investigation.

The LPA requires any employer having ten or more employees to prepare work rules in the Thai language and the work rules require an employer to prescribe a procedure for the submission of grievances that would normally include the process for investigations in the workplace. Therefore, the work rules are the main guidance and policy that govern a workplace investigation. In some cases, an employer may have a whistleblowing policy allowing whistle-blowers to submit complaints of illegal or improper activities to the employer. The whistleblowing policy will also prescribe the procedures for investigating in workplace reflecting the complaints submitted by whistle-blowers.

Last updated on 15/09/2022

02. How is a workplace investigation usually commenced?

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Usually, a complainant submitting a grievance to the company would be a trigger for proceeding with a workplace investigation. The LPA does not specify when a workplace investigation should commence but it is subject to the employer's work rules and regulations, including the whistleblowing policy, as the investigation usually commences after an employee or a whistle-blower has filed a complaint to the employer. In some cases, there might be a whistleblower and the start of the workplace investigation would

be subject to the whistleblowing policy and the employer's discretion. Also, if a questionable transaction or activity is detected, fiscal audits may be the source that triggers a voluntary workplace investigation.

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)?

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While an employee is being investigated by the employer, the LPA permits the employer to suspend that employee from work for the duration of the investigation, provided that the suspension can only be made when permitted by the work rules or an agreement related to the conditions of employment. Also, a suspension order must be made in writing and specify the offence and period of the suspension, which may not exceed seven days. Note that the employer must give a written suspension order in advance to the employee before the work suspension.

As aforementioned, the LPA only permits the employer to suspend the employee under investigation from work only for seven days. During the interim period of the suspension, the employer must pay the employee at the rate indicated in the work rules or the agreement reached between the employer and the employee, which must not be less than half of the employee's wages for a working day before his or her suspension. If the employer determines that the employee subject to investigation is not guilty following the outcome, the employer must compensate the employee for outstanding wages from the date of suspension with 15% interest per annum.

In some complicated cases, a workplace investigation does not conclude within seven days, and, in which case the employer should consult with a legal advisor.

Last updated on 15/09/2022

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

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The employer should conduct a workplace investigation on its own; however, an outside firm experienced in interviewing witnesses and assessing the credibility of evidence may also be appointed to assist with the workplace investigation.

There is no minimum qualification or criteria provided under Thai laws. It is worth noting that anyone who has been accused of misconduct or potentially has a conflict of interest should be excluded from any role in the investigation. This is to avoid a challenge from the subject employee that the investigation was not

conducted fairly.

Last updated on 15/09/2022

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



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There is no mechanism in place to take legal action to halt an investigation. The investigation is an internal process of the employer.

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?



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Normally, the work rules prescribe requirements for cooperation with investigations. An employer may instruct co-workers to give statements as witnesses as this would be a fair and legitimate order of the employer, because investigations are conducted to maintain a good working environment.

Witness protection measures in a workplace can vary as no minimum standard has been set and they are generally subject to work rules and regulations. However, some legislation, which may not relate to a workplace investigation conducted by an employer, also protects the witnesses who are helping authorities investigate violations under the relevant acts. For example, the Labor Relation Act B.E. 2518 (1975) prohibits an employer from terminating an employee or conducting any action that may result in the employee being unable to work because of filing a complaint or being a witness for the authorities, or providing information on issues related to labour protection laws to the authorities.

The employer may have a policy of non-retaliation for the protection of witnesses who have given statements and evidence for a workplace investigation.

Last updated on 15/09/2022

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



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The basic premise is that all evidence is admissible unless it violates the law of admissibility and production of evidence, which may vary depending on the jurisdiction. In a criminal court, for example, evidence gathered in violation of the fruit of the poisonous tree doctrine would be typically inadmissible, yet in a civil court, this doctrine would not be an exclusionary rule.

The Personal Data Protection Act, BE 2562 (2019) (PDPA), which is the main data protection law in Thailand, applies when collecting, using, and disclosing pieces of evidence containing the personal data of employees. If the investigation requires sensitive information of the employee under investigation, for example, race, ethnic origin, political opinion, religious or philosophical beliefs, sexual behavior, criminal records, health data, disability, genetic data and biometric data, consent from the employee should be obtained.

Last updated on 15/09/2022

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

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Electronic information created during employment would generally be owned by the employer and would be the employer's assets. If an employee is given a computer or laptop to use for work, the employer has the right to log into that device and take any data that is stored therein, provided that the data does not contain sensitive information of that employee and PDPA requirements are met.

To avoid any potential issues regarding physical data such as documents on the employee's desk, it is advisable to search those areas with the subject employee to show good faith. In practice, the employee normally agrees to search those areas with the employer, or allows the employer to search alone.

Last updated on 15/09/2022

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

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It is down to the employer's discretion and subject to the whistleblowing policy (if any) to commence the investigation resulting from a complaint from a whistleblower. Whistleblowers and those who cooperate with an investigation should be protected. Normally the employer would not try to identify the whistleblowers. Also, it is best not to reveal the identity of the witness or the source of information; otherwise, they may feel uncomfortable giving information or raising their concerns next time. Any

allegations of retaliation that surface during the investigation should be treated as a new report of possible misconduct that could be subject to additional investigation.

Last updated on 15/09/2022

10. What confidentiality obligations apply during an investigation?



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Unless the investigation is handled by a qualified professional (eg, attorney or auditor) where certain privileges apply, confidentiality obligations are generally subject to the contractual arrangement between the parties involved in the investigation. The employers need to inform any persons, including the investigators, to respect confidentiality obligations because a leak of the information gathered from the investigations could cause damage to relevant parties.

Last updated on 15/09/2022

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



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The subject employee(s) should be informed of the details of the allegations, such as the details of wrongdoing or violations, made against them. This creates a fair opportunity for them to clarify themselves and defend against such allegations properly. Also, if there is any evidence that needs clarification from the employee, it should be shown to the employee.

Last updated on 15/09/2022

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



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It is generally possible to keep the identity of the complainant, witnesses, or information sources confidential. There is no mandatory rule to disclose the identity of a complainant, witnesses, or sources of information. If the complainant, witnesses, or sources of information for the investigation know that their identities would not be disclosed, they will be more confident in cooperating with and supporting the investigations.

Last updated on 15/09/2022

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



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Non-disclosure agreements can be made between an employer and employees who are involved in an investigation. This may include investigators and witnesses, apart from the employee under investigation. This minimises the risk of information being leaked, which can affect all parties related to the workplace investigation. However, an NDA is not absolute means to prevent the disclosure of confidential information, as the court has the authority to compel disclosure.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?



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Client-attorney privilege between qualified attorneys and the client (ie, an employer) begins once information is made available to the attorney, regardless of the form it takes.

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?



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Unless the work regulations provide otherwise, an employee has the right to request legal representation during an investigation. If legal representation is requested, it is an opportunity for the employer to confirm and verify that an investigation is being conducted fairly, as the employee under investigation can bring his or her lawyer to attend the investigation.

Last updated on 15/09/2022

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



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Thai labor laws do not require a workplace investigation to involve participation from trade unions or labour unions. However, it is possible for labour unions established under the Labor Relation Act BE. 2518 (1975) to submit a demand for a collective bargaining agreement (CBA) with employers to get a seat at the table. There was a case where a management union made a CBA with the employer wherein the president of the management union would be involved in any investigation of any manager, who is a union member, under investigation. In that case, the employer must comply with the CBA by informing the president and allowing the president to participate in the investigations.

Last updated on 15/09/2022

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



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The employees may then file a complaint with the labour inspection officer of the Labour Protection and Welfare Department to investigate the situation if they view that the conduct of the employer in the investigation violates the LPA. For example, if the employer issues a written order for suspending an employee for more than seven days. The labour inspection officer may issue an order requesting compliance, where failure to comply with such an order would result in a criminal penalty.

Last updated on 15/09/2022

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

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Subject to the grievance protocol in place, any matter that emerges during the investigation should be handled separately as a fresh report of potential misconduct that needs further investigation.

Last updated on 15/09/2022

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

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The investigator should guide the employee who has raised the grievance to properly raise their concerns through the grievance protocols or whistleblowing policy (if any). It is acceptable to preliminarily hear their concerns, but the investigation should be initiated separately and subject to the employer's discretion.

Last updated on 15/09/2022

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

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If the absence is anticipated to be brief, the employer may wait until the employee's return before concluding the investigation. If the employee's absence is expected to be prolonged, the investigator may alter the time of meetings or request that the employee submits a witness statement. The key point would be that all necessary measures should be taken to give the employee a chance to participate.

Last updated on 15/09/2022

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

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Employers are not required to wait until the police or regulatory investigations are finished before conducting their disciplinary investigations, but it is necessary to ensure that such internal proceedings do not compromise the integrity of an investigation or result in misrepresentation or a miscarriage of justice. The level of proof for internal disciplinary action is less than the level of proof for criminal proceedings.

Last updated on 15/09/2022

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



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There is no mandatory information on the outcome of an investigation that must be disclosed to an employee. However, disclosure of the outcome should, at a minimum, include whether an employee did or did not commit a violation. In addition, an employee who has committed a violation should be informed of any disciplinary action, and the grounds for such a decision (such as a violation of the company's work rules). This enables the employee under investigation to appeal the outcome if it is applicable under the work rules or whistleblowing policy.

Last updated on 15/09/2022

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



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It depends on with whom the investigation report should be shared. If there is a court case or criminal case to be further investigated by police, the investigation report should be shared in full as this would be used as documentary evidence to make a case stronger. On the contrary, if the investigation report is requested by the employee under investigation, employers are entitled to use their discretion as to what information to share.

Last updated on 15/09/2022

24. What next steps are available to the employer?



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Upon completion of the investigation, the employer can decide to take proper disciplinary action against the employee if it is found that the employee committed an offence or violated the work rules. An employer may also file a report with the police if the findings of the investigation amount to a criminal offence.

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?



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The investigation findings should be disclosed to a limited group of persons who are involved in the investigation, and for which the findings are useful. For example, an HR manager who needs to record the findings in the employee's record, the police if the employer decides to proceed further with a criminal claim, the court if requested by that court, or if there is a court case related to the violations of the employee.

Interview records should be kept confidential and private. There is a risk of disclosure because the information in the records may be beneficial to one but damaging to others. If the interview records are leaked to others who are not involved in the investigation, it may affect the work environment in the workplace and the protection of witnesses.

Last updated on 15/09/2022

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



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There is no period required by law for keeping the outcome of the investigation on the employee's record. However, if termination of employment is the outcome of the investigation, an employer should keep details of the investigation for at least 10 years, in line with the prescribed period for an employee to file an unfair dismissal claim against an employer. An employer may use the details of an investigation to defend such a claim. For other disciplinary action, the retention of investigation details on the employee's record is at the employer's discretion.

Last updated on 15/09/2022

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

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The Thai Supreme Court has ruled that the termination of an employee was unfair due to an investigation being conducted contrary to requirements in the company's work rules. As such, employers may be liable for damages to employees if there are errors made during investigations, or where investigations are not conducted properly.

The Supreme Court has also ruled that in cases of unfair termination, the underlying cause of the termination should be the determining factor, rather than other issues, including investigative procedures.

Last updated on 15/09/2022

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