

# Workplace Investigations

## Contributing Editors

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

### Australia

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Before commencing a workplace investigation, an employer must review the terms of any applicable employment contract, policy, procedure or industrial instrument. These documents will likely contain clauses that will dictate the investigation process.

There is also a significant body of common law that dictates how an investigation should be conducted and the procedural fairness that should be afforded to those involved. To ensure a workplace investigation is procedurally fair, employers must consider several factors, including:

- putting all allegations to the respondent in a manner which does not suggest a pre-determination of the outcome;
- conducting the investigation in a timely manner;
- providing the respondent with the opportunity to respond to the allegations;
- conducting a fair investigation process;
- making an unbiased (and not pre-determined) decision; and
- permitting the respondent and complainant to involve a support person or union representative.

Employers should also consider the additional steps they can take to conduct a best-practice investigation, including:

- being thorough and taking the time to plan the investigation;
- communicating clearly and fairly;
- considering whether the allegations are indicative of a wider workplace behaviour problem;
- maintaining confidentiality; and
- preventing victimisation.

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### Hong Kong

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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<sup>[1]</sup> 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.<sup>[2]</sup> 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.

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[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](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/guide_board_dir.pdf)>.

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## South Korea

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

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

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

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

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

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

Companies may also have internal policies (eg, whistleblower protection policies, Code of Conduct) that

may apply to workplace investigations, aside from the requirements under Korean law.

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## Switzerland

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

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



## Australia

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A workplace investigation will generally be triggered by an employee making a complaint; however, issues may also be brought to the attention of an employer through an anonymous tip, by suppliers or contractors, from customers or because of observations and hearsay.

Complaints can be made directly to Human Resources (HR), anonymously, by email to a line manager or a third party. While complaints do not need to be written and can be informal, brief or verbal, complaints of this nature can make the process harder and more information may be required.

The receipt of a complaint does not necessarily mean that an employer needs to undertake an investigation immediately. A grievance policy ordinarily contains a multi-step approach to dealing with complaints, starting with internal resolution options such as informal discussions, conciliation and mediation. However, an investigation should be commenced where:

- the complaint alleges serious misconduct or unlawful conduct;
- the employer is required to conduct a workplace investigation as per an employment contract, policy, procedure or industrial instrument; or
- the complaint is complex and requires clarity on what has occurred to establish the facts.

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## 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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## South Korea

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

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

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

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

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)?



#### Australia

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It is an important consideration as to whether any of the employees involved in the investigation should be suspended, stood down or asked to undertake alternative duties for the period of the investigation. This decision will need to be made taking into consideration the nature of the complaint, any further damage to workplace relationships that could be caused by employees continuing to interact with each other, and potential work, health and safety issues.

It should not be automatic that the respondent is suspended as the employer will need to consider whether this is necessary in the circumstances. However, a period of suspension should be considered where:

- the allegations involve serious misconduct;
- there is a risk that the conduct will continue throughout the investigation;
- the respondent's presence could exacerbate the situation; or
- the respondent's presence could be disruptive to the investigation.

As an alternative to suspension, other options include working from home, performing amended duties or moving to a different workspace.

If an employee is suspended then they should ordinarily receive their full pay for this period. There are some exceptions to this, for example, if the employee is a casual employee or if a policy, employment contract or other industrial instrument allows the employee to be suspended without pay.

Generally, there is no minimum or maximum period a suspension should last, as this will depend on the length of the investigation.

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#### Hong Kong

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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).

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## South Korea

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

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

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

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

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## Switzerland

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

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

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## 04. Who should conduct a workplace investigation,

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



## Australia

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Once the decision to undertake a workplace investigation has been made, it is important to decide who is the most appropriate person to conduct the investigation. For the investigation process to run smoothly a single lead investigator should be selected, although they may work with a larger team. The lead investigator and investigation team can be internally or externally appointed.

In deciding whether to appoint an external investigator an employer should consider:

- the nature of the allegations;
- the seniority of the respondent;
- whether a fair investigation can be conducted internally without any actual or perceived bias;
- whether there is a dedicated HR department with someone who has the required capability, skills and experience to conduct the investigation; and
- whether the employer wants the investigation to be covered by legal professional privilege.

If the employer decides to investigate the matter internally without appointing a third party, then the investigator does not need to have any specific qualifications. However, it is prudent to confirm that the investigator has the time and skills to conduct the investigation and that they can be objective.

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## Hong Kong

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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).

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## South Korea

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

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## Switzerland

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

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

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



## Australia

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The respondent has several rights including the right to have the complaint investigated in a fair, impartial and adequate manner, to hear the allegations in full and to not be victimised. However, there is no avenue for a respondent to bring legal action to stop a procedurally fair investigation.

In 2014, Australia introduced an anti-bullying jurisdiction which gave the Fair Work Commission (FWC) the powers to issue a Stop Bullying Order. There have been circumstances where it has been successfully argued that an investigation itself amounted to bullying and accordingly the respondent applied to the FWC for a Stop Bullying Order to suspend the investigation.

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## Hong Kong



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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.

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## South Korea

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

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## Switzerland

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

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



## Australia

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Co-workers can be interviewed as part of an investigation where they are witnesses to a complaint. If the employee refuses to attend the interview or is generally not cooperating with the investigation, the reasons for this will need to be considered carefully by the employer. Employers should consider whether there can be any amendments made to the interview process to accommodate the employee. However, an employer can make a reasonable and lawful direction to an employee to attend an interview. If an employee fails to comply with a lawful and reasonable direction, then it may constitute grounds for disciplinary action.

Witnesses who are employees are entitled to the legal protections that ordinarily attach to their employment, including not being bullied, discriminated against, or harassed and having their health and safety protected. Employers should also ensure that witnesses are not victimised as a result of participating in the investigation and that confidentiality is maintained.

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## Hong Kong

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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.

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## South Korea

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

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

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## Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any

summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.<sup>[1]</sup> 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).<sup>[2]</sup>

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<sup>[1]</sup> Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

<sup>[2]</sup> Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on [hrtoday.ch](https://www.hrtoday.ch), last visited on 17 June 2022.

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



### Australia

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As part of an investigation, the investigator may want to collect evidence such as camera footage from CCTV, swipe card records, computer records, telephone records or recordings and GPS tracking. There are state-based workplace surveillance laws that operate in each jurisdiction in Australia. The laws recognise that employers are justified in monitoring workplaces for proper purposes, but this is balanced against employees' reasonable expectations of privacy.

The Privacy Act 1988 (Cth) (Privacy Act) also regulates how certain organisations handle personal information, sensitive personal information and employee records. The Privacy Act contains 13 privacy principles that regulate the collection and management of information. Employers should familiarise themselves with the privacy principles before conducting any investigation to ensure they are not in breach when gathering evidence.

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### Hong Kong

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If physical evidence contains data relating to an individual, from which the identity of the individual can be ascertained,<sup>[1]</sup> 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:<sup>[2]</sup>

- 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.<sup>[3]</sup> 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.<sup>[4]</sup> 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.

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[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](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.

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## South Korea

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

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

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

Under the PIPA, consent must be obtained from the information owner to collect or use personal

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

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

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## Switzerland

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

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.<sup>[2]</sup> The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

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

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

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

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

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The starting position is that there is no general right for an employer to search an employee's possessions.

However, an employer may be able to undertake a search in circumstances where:

- the employee consents to the search;
- there is a “right to search” contained in a contract, policy, procedure or industrial instrument; or
- the request to search constitutes a lawful and reasonable direction.

If an employee agrees to a search of their possessions, this consent should be confirmed in writing. If the employee does not consent then the employer can issue a direction to the employee. If the direction is lawful and reasonable, and the employee does not comply, then disciplinary action may be considered.

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## Hong Kong

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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.<sup>[1]</sup>

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<sup>[1]</sup> Usually upon execution of a warrant.

Last updated on 27/11/2023



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

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

unique identification information.

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

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

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.<sup>[1]</sup> 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.<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. 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.

Last updated on 15/09/2022

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



## Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

A complaint will be a whistleblowing complaint where a complainant has reasonable grounds to suspect that the information they are disclosing about the organisation concerns misconduct or an improper state of affairs or circumstances. The information can be about the organisation or an officer or employee of the organisation engaging in conduct that:

- breaches the Corporations Act 2001 (Cth);
- breaches other financial sector laws;
- breaches any other law punishable by 12 months' imprisonment; or
- represents a danger to the public or the financial system.

Since 2020, all public companies, large proprietary companies and trustees of registrable superannuation entities in Australia are required to have a whistleblower policy. Employers conducting an investigation will need to follow the processes outlined in their policy.

One of the key differences when conducting an investigation that involves whistleblowing is identity protection and the ability of the whistleblower to disclose anonymously and remain anonymous.

Last updated on 15/09/2022



## 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.<sup>[1]</sup>

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.

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<sup>[1]</sup> 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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



mind when dealing with a whistleblower, regardless of whether the whistleblower falls under the WPA.

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

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

## 10. What confidentiality obligations apply during an investigation?

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Confidentiality protects the interests of the persons involved in the investigation as well as the integrity of the investigation. Before providing information as part of the investigation, employers should direct the complainant, respondent or witnesses to sign confidentiality agreements. This agreement should direct the person to refrain from discussing the investigation or matters that are the subject of the investigation with any person other than the investigator.

It is also best practice for participants in the investigation to be directed not to victimise (threaten or subject to any detriment) any persons who are witnesses to or are otherwise involved in the investigation.

After an investigation, employers should write to the complainant, respondent and any witnesses reminding them of their ongoing confidentiality obligations.

Last updated on 15/09/2022

### 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<sup>[1]</sup> or drug trafficking<sup>[2]</sup>, or is terrorist property<sup>[3]</sup>, 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.<sup>[4]</sup>

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<sup>[1]</sup> 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.

<sup>[2]</sup> 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.

<sup>[3]</sup> 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.

<sup>[4]</sup> 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



## South Korea


Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

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## Switzerland

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

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

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

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[\[1\]](#) 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

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

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

To ensure procedural fairness, the allegations must be put to the respondent in writing in advance of the investigation interview. The allegations must be specific, but the respondent does not need to be provided with a copy of the original complaint. The respondent should also be informed that if the allegations are substantiated they may result in disciplinary action up to and including the termination of the employee's employment.

Last updated on 15/09/2022

### 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.<sup>[1]</sup> 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.

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<sup>[1]</sup> *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20.

Last updated on 15/09/2022



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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## Switzerland

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.<sup>[1]</sup> The employer, on the other hand, is not obliged to provide the employee with existing evidence, documents, etc, before the start of the questioning.<sup>[2]</sup>

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.<sup>[3]</sup>

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)).<sup>[4]</sup> Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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

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

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

<sup>[4]</sup> Claudia Götz Staehelin, *Unternehmensinterne Untersuchungen*, 2019, p. 37.

Last updated on 15/09/2022

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



### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Employers will generally take steps to treat complaints sensitively and confidentially. However, because of the obligations employers have, confidentiality cannot be guaranteed as part of the investigation and the complainant, respondent and witnesses should be made aware of this.

Understandably, the complainant or witnesses may wish to remain anonymous. However, because the details of the allegations need to be put to the respondent so that they can provide an informed response or explanation, the source of the information will often need to be disclosed.

Employers can take steps to “ringfence” the investigation by asking employees to sign a confidentiality agreement. This will protect the interests of the participants of the investigation and uphold the integrity of the investigation.



## 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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.<sup>[1]</sup>

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

Last updated on 15/09/2022

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



### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Non-disclosure agreements, also known as confidentiality agreements, can be used to maintain the confidentiality of the investigation. In this agreement, the employee will be directed to maintain confidentiality concerning the investigation and matters that are the subject of the investigation, and not speak to anyone outside the investigation team about the investigation without authorisation.

Confidentiality agreements are legal documents. Employees should be informed that a breach of the confidentiality agreement could result in disciplinary action being taken against them, up to and including termination of their employment.

Last updated on 15/09/2022



### 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]

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[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



### South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*

at Kim & Chang

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

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.

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## 14. When does privilege attach to investigation materials?

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Investigation materials are not privileged and an employer may be required to disclose them in subsequent legal proceedings. If an employer is concerned about privilege attaching to an investigation, they should engage a legal practitioner to facilitate the investigation.

Employers who are concerned about privilege attaching to investigation materials should also consider the method of a lawyer's engagement. The lawyer should be expressly engaged to investigate, report and to assist the employer by providing legal advice. Additional benefits can be achieved if the legal practitioner engages an external investigator to investigate the complaint and prepare the investigation report. Privilege will attach to the investigation materials because they are prepared for the lawyer to allow the lawyer to provide legal advice to the employer.

It is important that employers do not expressly or inadvertently waive privilege. For example, by disclosing the investigation report or substantial contents of the investigation report. It is a balance between providing information to the respondent and complainant about the outcome of the investigation and disclosing too much information.

Last updated on 15/09/2022

### 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.

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[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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

Last updated on 15/09/2022



## Switzerland

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

328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

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

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

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?



### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

The respondent should be given the opportunity to have a support person present during the investigation meeting and any subsequent conversations that concern the termination of their employment. Failure to allow the respondent to have a support person may result in any subsequent termination of employment being found to be an unfair dismissal. This is because under the Fair Work Act 2009 (Cth), when the FWC is considering whether a dismissal is an unfair dismissal, they must consider any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

Employers should request that the respondent inform them 48 hours before any meeting of the identity of their support person. This will allow the employer to confirm the support person's suitability. A support person can be a legal representative or trade union representative, but the role of a support person is limited to assisting the employee and they are not there to act as an advocate or representative.

Last updated on 15/09/2022



### 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.

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## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

Last updated on 15/09/2022



## 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.<sup>[1]</sup>

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.<sup>[2]</sup> 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.<sup>[3]</sup>

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

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<sup>[1]</sup> Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

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

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

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?



### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

A trade union does not have any right to be informed of, or involved in, an investigation by an employer. However, an employee may request that their support person is a trade union member or trade union representative. This is appropriate and should be permitted.

Employers should review the terms of an employment contract, policy or industrial instrument as this may contain terms regarding trade union involvement. In particular, heavily-unionised workplaces may contain enterprise agreements which contain relevant clauses.

Last updated on 25/09/2023



### 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



### South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

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

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Employers should be conscious that the investigation may have an impact on the complainant, respondent and witnesses. Employers will need to consider how to support their employees. The level of support provided will often depend on the size of the organisation and programmes already in place.

Many employers have an Employee Assistance Programme and employees should be reminded about this programme if further support or assistance is required. An employer's HR team may also be able to assist if an employee has concerns about the progress of an investigation.

Last updated on 15/09/2022

### 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

### South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*

at Kim & Chang

There could be some instances where an employee involved in an investigation may be entitled to support from the company. To give an example, there have been some cases where a whistleblower claimed they suffered workplace harassment or their employer took retaliatory action (eg, wrongful transfer) and they sought damages or other relief.

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.<sup>[1]</sup> 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.<sup>[2]</sup>

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

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

Last updated on 15/09/2022

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

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

During the investigation, unrelated matters can come to light, usually made by the complainant or a witness during the interview process. Unrelated matters may take the form of further complaints against the respondent (but on grounds that are outside the scope of the current investigation), or entirely different complaints.

An employer should first assess the nature of the new allegations. Entirely unrelated matters should be dealt with separately. However, if the matter relates to the respondent it may be appropriate to obtain consent from the respondent and complainant for the scope of the investigation to be widened. It is important to remember that all allegations must be put to the respondent and they must be given an opportunity to respond.

Last updated on 15/09/2022



## 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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



## Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

If a respondent raises a grievance during the investigation this should be dealt with under any employment contract, grievance policy or industrial instrument. This may involve investigating and responding accordingly. The content of the grievance should be carefully considered, but in many circumstances it is appropriate for the initial investigation to continue. Multiple investigations can be run simultaneously.



## 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

Last updated on 15/09/2022



## Switzerland

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

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



### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

It is not uncommon for respondents to an investigation to take personal or carer's leave (sick leave) claiming that they are suffering from stress or anxiety. If this occurs, employers need to act appropriately, but this does not necessarily involve stopping the investigation process.

Employers should:

- assess the medical evidence to ascertain the respondent's condition and determine how long they are likely to be unwell;
- avoid exacerbating the condition;
- determine whether the employee is unfit to attend the investigation meeting;
- take into consideration the evidence of other witnesses;
- consider delaying the investigation for a short period; and
- consider conducting the interviews in other ways, for example, in writing.

While all efforts should be made to accommodate an employee who has taken personal or carer's leave during an investigation, if the respondent does not participate in the investigation, the investigation report may be prepared based on the available evidence.

Last updated on 15/09/2022



### 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



### South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

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

Last updated on 15/09/2022

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

### Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

There are circumstances of misconduct in the workplace that can also constitute criminal conduct and be subject to a criminal or regulatory investigation. This can include physical or sexual assault, theft, fraud, illegal drug use or stalking.

An employer can proceed with an investigation to determine whether the respondent engaged in misconduct on the balance of probabilities. The employer can terminate an employee's employment before the outcome of any criminal investigation. However, the employer must keep in mind that procedural fairness must be afforded to the employee, particularly in circumstances where an employee is awaiting the outcome of a court proceeding.

Alternatively, an employer may decide to suspend the employee pending the outcome of the criminal investigation. If a criminal act has been committed, then the employer may decide to terminate the employee's employment.

Co-operation with the police and regulatory authorities is sensible and evidence can be compelled by the police or regulators by, for example, a subpoena, search warrant or an order for production.

Last updated on 23/09/2023



## 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

There is no obligation to stay the workplace investigation while the parallel criminal or regulatory

investigation is being conducted. In practice, companies often proceed with, or even accelerate, the workplace investigation to find out the facts and defend themselves against the parallel criminal or regulatory investigation being conducted. The company should be careful not to engage in activities that may raise suspicions as to whether the company is impeding the government investigation or concealing or destroying evidence.

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

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

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



## Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Managing the outcome of the investigation is an important part of the process. The respondent must be informed of the outcome of the investigation as soon as possible after the investigation is completed and the decision-maker has decided how to proceed.

The investigator must decide whether the claims have been substantiated on the balance of probabilities and the decision-maker must decide what disciplinary action, if any, will be taken. Any disciplinary action should be proportionate to the seriousness of the misconduct. Disciplinary action could include a warning, counselling, monitoring of behaviour or termination of employment.

Ideally, the outcome of the investigation should be communicated to the respondent and complainant in writing, setting out the allegations that have been substantiated, unsubstantiated or whether there is insufficient evidence to make a finding.

Last updated on 15/09/2022



## 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



## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*

at Kim & Chang

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

Last updated on 15/09/2022



## Switzerland

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.<sup>[1]</sup> 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.<sup>[2]</sup>

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

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

Last updated on 15/09/2022

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

## Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

The investigator should prepare a written report setting out whether the allegations are substantiated, unsubstantiated or cannot be determined due to insufficient evidence. This report should be used for internal purposes only. Accordingly, the report should not be shared with the complainant, respondent or witnesses unless required by law, the employer's policies or another industrial instrument. It is particularly important not to share the investigation report should the employer wish to maintain privilege in respect of the report.

Last updated on 15/09/2022

## 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.<sup>[1]</sup> 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.<sup>[2]</sup>

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.

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<sup>[1]</sup> PDPO sections 20 and 58(1)(d).

<sup>[2]</sup> PDPO sections 20 and 60.

Last updated on 15/09/2022

## South Korea

Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

As discussed in question 22, when taking disciplinary action against an employee based on the outcome of

an investigation, the company would need to disclose sufficient detail on the employee's wrongdoing. However, this does not mean that the full investigation report would need to be shared with the employee to be disciplined. Key details of the investigation findings that apply to the relevant employee due to be disciplined should be shared, and not other findings concerning other persons.

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

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).<sup>[1]</sup> 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.<sup>[2]</sup>

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<sup>[1]</sup> 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

## 24. What next steps are available to the employer?



## Australia

Author: *Joydeep Hor, Kirryn West James, Chris Oliver*  
at People + Culture Strategies

Employers must take steps to deal with the findings of the investigation and implement any recommendations promptly. This may involve commencing disciplinary action.

The complainant and respondent need to be informed of the outcome of the investigation. All witnesses who participated in the investigation should also be thanked for their contribution and advised that the investigation has been completed. All participants in an investigation should be reminded of their ongoing obligations concerning confidentiality and victimisation.

If an employer decides that it may be appropriate to terminate a respondent's employment, the employee

must be provided with the opportunity to respond and to “show cause” as to why their employment should not be terminated.

The investigation report along with any other materials produced during the investigation should be kept in a separate confidential file.

Employers should also consider whether action should be taken at an organisational level to prevent future misconduct. In particular, employers are required to take a proactive approach to addressing systemic workplace cultural issues in relation to sex discrimination, sexual harassment and victimisation.

Last updated on 25/09/2023



## 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.[\[2\]](#)

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[\[1\]](#) 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



## South Korea



Author: *Hyunjae Park, Paul Cho, Jihay Ellie Kwack, Kyson Keebong Paek*  
at Kim & Chang

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

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

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

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.<sup>[1]</sup>

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

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<sup>[1]</sup> 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

## **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?**

### Australia

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The outcome of the investigation must be disclosed to the complainant and respondent. If there is a concurrent police or regulatory investigation, they may request a copy of the investigation report. Employers should generally cooperate with regulatory authorities, but should be careful about disclosing the investigation report as this may be privileged and privacy obligations must be considered. Employers should consider only disclosing the investigation findings and interview records if compelled to do so by

regulators or police.

Interview reports, the investigation report and communications about the investigation should be kept in a separate file. The file should be marked confidential and access to the file should be restricted.

If proceedings are commenced, the investigation materials may be subject to disclosure unless legal professional privilege can be asserted, see above.

Last updated on 15/09/2022



## Hong Kong

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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<sup>[1]</sup>, drug trafficking<sup>[2]</sup>, or terrorism<sup>[3]</sup>, 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<sup>[4]</sup>.

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.

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<sup>[1]</sup> OSCO section 25A(1).

<sup>[2]</sup> DTROPO section 25A(1).

<sup>[3]</sup> UNATMO section 12(1).

<sup>[4]</sup> 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



## South Korea

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There is generally no obligation to report violations to the Korean authorities, subject to limited exceptions (eg, financial institutions are required to report certain types of wrongdoing to the financial regulator; if there was a leak of an industrial technology developed through a national research and development project or a national core technology, this leak should be reported to the Ministry of Trade, Industry and

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

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

Last updated on 15/09/2022

## Switzerland

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

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

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

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

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

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

### Australia

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There are legal requirements related to the time you must keep certain employee records in Australia, such as pay slips and time sheets. However, there are no laws concerning disciplinary records.

Employers can rely on previous misconduct to justify an employee's termination of employment where it can be shown it is part of a course of conduct. Accordingly, if complaints have been substantiated, and

disciplinary action has been taken, these records should be maintained. However, if a significant period has elapsed since the misconduct, an employer should carefully consider whether it is appropriate to rely on this past behaviour to justify future disciplinary action for similar conduct.

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## Hong Kong

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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.

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

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## South Korea

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

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## Switzerland

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

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be

deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).[1]

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

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



### Australia

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It is important for employers to conduct procedurally fair investigations that result in a fair outcome. Failure to do so may expose the employer to various claims by an employee. The most common type of claim following an investigation is an unfair dismissal claim. If a respondent's employment is terminated because of an investigation, they may be eligible to bring an unfair dismissal claim in the FWC alleging their dismissal was harsh, unjust or unreasonable.

An employee may also bring a bullying, discrimination or general protections claim. These claims may be made even where the investigation does not result in the employee's dismissal.

If an employer has departed from the procedures set out in their policies, or they have not followed the terms of an employee's employment contract or another applicable industrial instrument then an employee may bring a claim for breach of contract.

Australia has also recently introduced the "Respect@Work" legislation which places a positive obligation on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Accordingly, an employer who is not perceived to have taken a proactive and fair approach to these workplace issues faces significant legal exposure.

Failure to conduct an investigation properly (or a failure to conduct an investigation in circumstances where it is needed) can also cause significant reputational and financial risk.

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### Hong Kong

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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.<sup>[1]</sup> 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).<sup>[2]</sup> 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.

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<sup>[1]</sup> Chok Kin Ming v Equal Opportunities Commission [2019] HKCFI 755

<sup>[2]</sup> EO sections 9 and 32K.

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## South Korea

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

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## Switzerland

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

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

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]

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[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

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

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

[5] Decision of the Swiss Federal Court 6B\_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B\_22/2012 dated 11 May 2012 consid. 2.4.4.

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

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

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