International Employment Lawyer

Workplace Investigations

Contributing Editors

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

China

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Currently there are no unified laws, administrative regulations or policies in the field of labor laws in People's Republic of China (referred to as “PRC”) regarding investigations on workplaces of ordinary employers. The laws and regulations of employers in certain specific industries (such as banking, securities, insurance, medical institutions, etc.) and the laws and regulations governing certain personnel (such as officers of state-owned enterprises and members of the Communist Party of China) contain provisions relating to investigations on employees' conduct, but such provisions are only applicable to the aforementioned specific industries or personnel.

Employers generally will specify their investigation rights and rules and procedures of internal investigations in their internal rules and regulations (such as the employee handbook) or the employment contracts entered into with their employees. However, it should be noted that workplace investigations are still subject to laws and regulations in relation to personal information, privacy and data protection.

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Finland

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Mainly, the Occupational Safety and Health Act (738/2002). In addition, the following also have relevance in connection to a workplace investigation: the Employment Contracts Act (55/2001), the Criminal Code (39/1889), the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006), the Act on Equality between Women and Men (609/1986) and the Non-discrimination Act (1325/2014). In addition, the employer's own policies must be taken into consideration while conducting a workplace investigation.

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Portugal

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Pursuant to article 98 of the Portuguese Labour Code, the employer has a disciplinary power over its employees during the employment period. This is enforced through the initiation of disciplinary procedures – which can include a preliminary workplace investigation as provided for in article 352(1) of the Portuguese Labour Code – and ultimately the application of sanctions laid down by law or in an applicable collective bargaining agreement.

The Portuguese Labour Code governs disciplinary procedures, which can include a preliminary workplace investigation, in two different sections. On the one hand, articles 328 to 332 establish general rules regarding the imposition of disciplinary sanctions; statutory deadlines and statutes of limitations involved; decision criteria; penalties; and disciplinary records. On the other hand, articles 351 to 358 lay down the rules applicable to dismissals with cause, which are also widely understood to be applicable concerning conservatory sanctions (i.e. those that enable the continuity of the employment relationship).

Additionally, collective bargaining agreements may provide for different disciplinary penalties, as long as the rights and guarantees of employees are not impaired.

Workplace investigations must also abide by the general rules laid down in the Portuguese Constitution, Portuguese Civil Code and Data Protection Laws (including guidelines issued by the Data Protection Agency), as regards the personal rights of the employees.

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02. How is a workplace investigation usually commenced?

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The employer will generally obtain clues of employees' misconduct, actively or passively, through such means as internal audit, employee whistleblowing, whistleblowing from suppliers or partners, regular or irregular compliance management assessment of the employer and management concerns, and carry out investigation based on such clues. Meanwhile, the employer will further investigate whether the employees involved have committed other acts of misconduct.

The investigation is usually carried out from outside to inside and from the macro level to the specific level. That is to first interview the provider of the clues and other insiders for verification and obtaining further information. Then to conduct internal and external system and written documents review based on the investigation clues. Preliminary evidence will be formed after the basic verification of facts. Finally, the employer will interview the employees involved and listen to their explanations, and finally determine the subsequent handling method.

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When the employer becomes aware of possible misconduct, the employer must commence an investigation immediately, in practice within about two weeks. The information may come to the employer's knowledge via, for example, the employer's own observations, from the complainant or their colleagues or an employee representative.

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Having been informed of an alleged infraction committed by an employee, the employer must prepare a detailed written accusation and notify the employee.

Moreover, if the alleged infraction constitutes gross misconduct and the employer is considering dismissal, a formal statement of the employer’s intention to dismiss the employee should accompany the accusation. If this is not expressly done, the employer will be unable to dismiss the employee and may only apply one of the conservatory sanctions. A copy of these documents must be sent to the works council, if any, and, should the employee be a union member, to the respective trade union.

Notwithstanding this, if before preparing the accusation the employer needs to further investigate the facts and circumstances, it may open a preliminary investigation aimed at collecting all the facts and circumstances and conclude if there are grounds to bring an accusation against the employee.

The preliminary investigation must start within 30 days of the employer becoming aware of the facts, be diligently carried out (but with no maximum period laid down by law) and concluded within 30 days of the last investigatory act. Furthermore, the preliminary investigation will suspend the relevant statutory deadlines and statutes of limitations (ie, 60 days from the date of acknowledgment, by the employer or a supervisor with disciplinary power, of the facts to enforce disciplinary action against the employee and one year from when the facts occurred, regardless of the employer’s acknowledgment, unless the infraction also constitutes a criminal offence, in which case the longer statutes of limitation established in criminal law will apply).

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

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When an employer is found to have engaged in misconduct of an employee, whether it has the right to suspend the employee from his/her duties and subject him/her to investigation, there are no explicit provisions in the existing labor law. Generally speaking, suspension of investigation arranged internally by an employer is within the scope of autonomous management of the employer. However, such suspension of investigation is subject to certain restrictions, and the basic rights and interests of the employee must be

guaranteed. For example, the employer should continue to pay social insurance fund for the employee.

Suspension investigation shall generally be specified in advance in the labor contract or rules and regulations, and the duration of suspension investigation should be within the necessary and reasonable period. Indefinite suspension or the suspension of obviously long time will not be supported by arbitral tribunals and courts.

Generally annual leave may be taken preferentially by the employees during suspension period. The annual leave period shall be deemed as normal attendance, and the salary shall remain unchanged. Under the circumstance that the annual leave has been used up, in judicial practice, there are few cases supporting the claim that the employer can fully deduct the employee's salary during the suspension period. It is generally believed that the employer shall at least guarantee the basic living needs of the employee during the suspension period (i.e. the salary shall not be lower than the local minimum salary standard) or pay the employee as per the original salary standard. However, in judicial practice, some arbitrators and judges hold the view that an employer may use its discretion to reduce employees' salary if all of the following conditions are met:

- it is stipulated in its rules and regulations or a contract that it is entitled to suspend employees from their duties and reduce salaries if their fraudulent behaviour harms the employer's interests;
- the rules and regulations are stipulated in its rules and regulations, and are publicly announced and accepted by the employees; and
- there is evidence showing the corresponding fraudulent behaviour of the employees.

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There is no legislation on temporary suspension in the event of a workplace investigation or similar. In some situations, the employer may relieve the employee from their working obligation with pay for a short period.

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After the employee is notified of the accusation, the employer may decide on a preventive suspension of the employee if the employee’s presence on company premises is deemed problematic. In this case, the employee’s salary will continue to be paid.

As per article 330(5) of the Portuguese Labour Code, a preventive suspension may also be determined during the 30 days before the accusation is made, provided that the employer, in writing, justifies why is necessary (eg, for interfering with the inquiry) and why the accusation cannot be served at that moment.

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

to be met?

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In some laws and regulations for specific industries, enterprises or personnel, there are certain requirements for the qualifications of investigators. For example, according to the Interim Measures for Investigating and Dealing with Disciplinary Violations of Professional Personnel by Medical Institutions, the personnel conducting an investigation and evidence collection shall not be less than two. If the investigator is a close relative of the investigated person, or a tip-off person or a key witness of the issue to be investigated, the investigator shall withdraw from the investigation.

However, at present, there are no unified and detailed national rules and regulations on the qualification of the investigators and organizations. In practice, the selection of the personnel and organizations responsible for internal investigation is usually based on the relevant provisions in the internal rules and regulations of the employer. The personnel conducting internal investigation are usually internal functional departments of the employer and are independent to some extent, including the personnel department, legal department, compliance department or risk control department. For significant or complex issues or senior management investigations, in order to ensure professionalism, accuracy and compliance, external law firms, consultants and accounting firms are also frequently hired to conduct investigations.

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

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According to article 356(1) of the Portuguese Labour Code, the employer can appoint an instructor, who shall be responsible for the probationary proceedings. Usually, workplace investigations are conducted by external advisors (eg, lawyers), appointed by the employer.

However, regarding disciplinary powers, there is a legal limitation in article 98 of the Portuguese Labour Code. As such, only the employer (or the immediate superior of the concerned employee, if the employer has delegated its powers, as per article 329(4) of the Portuguese Labour Code) has disciplinary powers.

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

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There is no provision in the law which provides the employee the right to suspend or interrupt an investigation by initiating a lawsuit. However, the employee who is suspended for investigation may request to terminate the employment contract unilaterally and demand the employer to pay economic compensation on the ground that the employer has not paid enough remuneration, and may initiate labor arbitration and litigation accordingly, but such arbitration and litigation will not have the effect of suspending or interrupting the investigation.

In addition, if the employee's privacy or personal information is improperly disposed of during the investigation, the relevant evidence obtained during the suspension investigation may be deemed as illegal evidence by arbitral tribunals and courts, and the employer may also be exposed to relevant legal liabilities for the infringement of privacy, etc.

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The employee does not have a legal right to stop the investigation. The employer must fulfil its obligation to investigate the alleged misconduct.

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The employee under investigation can only bring legal action after the investigation is finished and if the employer has applied a disciplinary sanction.

According to article 329(7) of the Portuguese Labour Code, the employee may submit a complaint to the immediate superior officer that applied the sanction or may resort to a dispute resolution procedure as provided for by the applicable collective bargaining agreements or the law (this is uncommon, however).

Furthermore, should a company dismiss an employee in breach of the legal requirements described above, the latter may take legal action against the company within 60 days of the date of termination of his or her employment agreement. The employee may also choose to file a preliminary injunction against the employer seeking immediate (albeit provisional) reinstatement.

Notwithstanding this, if the employee can prove that they suffered damages as a result of being subject to an abusive and illegal investigation, they may file a complaint with the Labour Authorities or bring a claim against the employer and demand the payment of compensation for the damages caused.

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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?

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Article 75 of the Civil Procedure Law of the PRC (Amended in 2021) provides, "All entities and individuals that are aware of the circumstances of a case shall have the obligation to testify in court. The persons-in-charge of relevant entities shall support the witnesses to testify in court. "Article 193 of the Criminal Procedure Law of the PRC (Amended in 2018) provides, "Where, after the notification of a people's court, a witness refuses to testify in court without justified reasons, the people's court may compel the witness to appear in court, unless the witness is the spouse, a parent or a child of the defendant."

According to relevant provisions of the Civil Procedure Law of the PRC, only a court has the power to compel a witness to appear in court. Neither the employer nor any other individual may compel any colleague to act as a witness and testify in court. However, the employer may set forth in the employment contract or its internal rules and regulations that the employee shall cooperate with its internal investigation.

As for the legal system for witness protection, PRC's criminal procedure laws stipulate a relatively detailed legal system for witness protection, such as establishing a crime of retaliating against a witness; making public a witness's personal information such as name, address, employer and contact information for the purpose of protecting the personal safety of the witness; using assumed names in the indictments; and so on. However, there are relatively few legal provisions regarding the legal protection of witness in civil procedure, and provisions only regulate the expenses that may be incurred by the witness for testifying in court. For instance, Article 77 of the Civil Procedure Law of the PRC (Amended in 2021) provides, "The necessary expenses incurred by a witness in fulfilling his obligation to testify in court, including transportation, accommodation and meals, as well as the loss of salaries, shall be borne by the losing party. If a party applies for a witness to testify, the costs and expenses shall be advanced by the party; if the people's court notifies a witness to testify without the application by a party, the costs and expenses shall be advanced by the people's court. "

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There is no legislation on a witness's role in investigations. However, the legislation on occupational safety requires that employees must report any irregularities they observe. Depending on the situation, participating in the investigation may also be part of the person's work duties, role or position, in which case the employer may require the employee to contribute to clarifying the situation. However, there is no formal obligation to act as a witness, and there is no legislation regarding the protection of witnesses. If a witness wishes, they may have, for example, an employee representative as a support person during the hearing.

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If the employer decides on an internal investigation to assess potential wrongful actions carried out within the company, employees must cooperate. However, employees are entitled to the privilege against self-incrimination established in the Portuguese Criminal Code, according to which individuals are not obliged to self-report.

An employee's refusal to cooperate with an internal investigation may be regarded as a breach of conduct by the employer and, ultimately, may lead to disciplinary sanctions.

Employees who act as witnesses in cases of harassment cannot be sanctioned unless they acted with wilful misconduct, and any sanction applied to an employee who acted as a witness in a harassment procedure will be presumed to be abusive.

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

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The Civil Code of the PRC, the Personal Information Protection Law of the PRC and other laws provide for the protection of employees' personal information and privacy. Employers are often involved in checking the information and materials stored in the computers, hard disks and other electronic office equipment provided to employees in internal investigation and are likely to access the employees' personal information including personal privacy information, such as the communication records stored in instant communication software such as WeChat, QQ or other instant communication software or to and from private email boxes. According to the Personal Information Protection Law of the PRC, employers are required to perform the obligation of informing and obtain the individuals' consent prior to the processing of personal information, i.e. the principle of informing + consent. Moreover, the Civil Code of the PRC stipulates that no organization or individual may process any person's private information, except as otherwise provided by law or with the explicit consent of the right holder.

Therefore, the legitimacy of obtaining data evidence can be enhanced and guaranteed only if it is explicitly stated in the relevant rules and regulations that the employer shall have the right to the work equipment provided to the employees or obtains the employees' personal consent.

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Generally, the basic principles set out by the GDPR and the Finnish Data Protection Act apply to data processing in connection with investigations, including evidence gathering: there must be a legal basis for

processing, personal data may only be processed and stored when and for as long as necessary considering the purposes of processing, etc.

Additionally, if physical evidence concerns the electronic communications (such as emails and online chats) of an employee, gathering evidence is subject to certain restrictions based on Finnish ePrivacy and employee privacy laws. As a general rule, an employee's electronic communications accounts, including those provided by the employer for work purposes, may not be accessed and electronic communications may not be searched or reviewed by the employer. In practice, the employer may access such electronic correspondence only in limited situations stipulated in the Act on Protection of Privacy in Working Life (759/2004), or by obtaining case-specific consent from the employee, which is typically not possible in internal investigations, particularly concerning the employee suspected of wrongdoing.

However, monitoring data flow strictly between the employee and the employer's information systems (eg, the employee saving data to USB sticks, using printers) is allowed under Finnish legislation, provided that employee emails, chats, etc, are not accessed and monitored. If documentation is unrelated to electronic communications, it also may be reviewed by the employer. Laptops, paper archives and other similar company documentation considered "physical evidence" may be investigated while gathering evidence on the condition that any private documentation, communications, pictures or other content of an employee are not accessed.

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Whenever employers process personal data in the course of an investigation, they need to comply with Regulation (EU) 2016/679 (the GDPR) and Law 58/2019, which implements the GDPR in Portugal (jointly the Data Protection Regulations). If the gathering of physical evidence includes the collection and processing of sensitive data (eg, related to the employee's health or any other category outlined in article 9 of the GDPR), additional safety measures should be in place to safeguard the adequate and confidential nature of such information.

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

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Article 13 of the Constitution of the PRC provides that the lawful private property of the citizens shall not be violated. Therefore, during the process of investigation, without the employees' consent, the employer has no right to search the employees' personal possessions or files. If it is necessary to search the employees' personal possessions or files, the employer may require the employees to sign a Letter of Informed Consent before searching; or the employer may call the police and the search will be conducted under the escort of the public security authorities or directly by the public security authorities.

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

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The employer is allowed to search an employee’s possessions or files, provided that they are work instruments or of a professional nature.

When performing these searches, employers should consider the specific provisions of the Data Protection Regulations as well as Resolution No. 1638/2013 of the Portuguese Data Protection Authority (CNPD), which contains rules on monitoring phone calls, e-mail and internet usage by employees. The CNPD understands that for the employer to access the employees’ professional data (e-mails, documents and other information stored on electronic devices), the latter should be present during the monitoring, to identify any information of a personal nature that should not be accessed by the employer (the employer must comply with these directions and should not access that email). In addition, review of the data should respect specific protocols to avoid potential access to personal data (eg, review of subject, recipients, data flow and type of files attached).

Body searches or the seizure of personal belongings or documents belonging to the employee are not permitted within the scope of a disciplinary procedure.

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

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In practice, the following factors to be considered will be: (1) verification of the informant's identity; (2) whether the informant has any conflict of interest with the reported employee or whether it will affect the objectivity of their reporting; (3) how to persuade the informant to provide more information or evidence, or to cooperate in court as a witness; (4) how to increase the admissibility of evidence when the informant refuses to cooperate in court as a witness or fails to provide original evidence; (5) how to improve the evidence chain and protect the informant from being attacked or retaliated by the informant, etc.

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In respect of data protection, the processing of personal data in whistleblowing systems is considered by the Finnish Data Protection Ombudsman (DPO) as requiring a data protection impact assessment (DPIA).

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The treatment of whistleblowers and their reports is laid down in various specific laws in Portugal.

Law 93/2021

Under Law 93/2021, a whistleblower of work-related offences must not be retaliated against. Furthermore, imposing disciplinary penalties on the whistleblower within two years after their disclosure is presumed to be abusive. The whistleblower is entitled to judicial protection and may benefit from the witness protection programme within criminal proceedings. Additionally, reports will be recorded for five years and, where applicable, personal data that is not relevant for the handling of a specific report will not be collected or, if accidentally collected, will be deleted immediately.

Corruption and Financial Crime Law (Law 19/2008)

Under Law 19/2008, a whistleblower must not be hampered. Furthermore, the imposition of disciplinary penalties on a whistleblower within one year following the communication of the infraction is presumed to be unfair.

Additionally, whistleblowers are entitled to:

- anonymity until the pressing of charges;
- be transferred following the pressing of charges; and
- benefit from the witness protection programme within criminal proceedings (remaining anonymous upon the verification of specific circumstances).

Money Laundering and Terrorism Financing Law (Law 83/2017)

Law 83/2017, which sets forth the legal framework to prevent, detect and effectively combat money laundering and terrorism financing, applies to financial entities and legal or natural persons acting in the exercise of their professional activities (eg, auditors and lawyers)(collectively, obliged entities).

According to article 20 of Law 83/2017, individuals who learn of any breach through their professional duties must report those breaches to the company's supervisory or management bodies. As a result, the obliged entities must refrain from threatening or taking hostile action against the whistleblower and, in particular, unfair treatment within the workplace. Specifically, the report cannot be used as grounds for disciplinary, civil or criminal action against the whistleblower (unless the communication is deliberately and clearly unjustified).

Legal Framework of Credit Institutions and Financial Companies (RGICSF)

Credit institutions must implement internal-reporting mechanisms that must guarantee the confidentiality of the information received and the protection of the personal data of the persons reporting the breaches and the persons charged. Under article 116-AA of RGICSF, persons who, while working in a credit institution, become aware of:

- any serious irregularities in the management, accounting procedures or internal control of the credit

institution; or
- evidence of a breach of the duties set out in the RGICSF that may cause any financial imbalance, must communicate those circumstances to the company's supervisory body.

These communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower.

Moreover, article 116-AB of the RGICSF establishes that any person aware of compelling evidence of a breach of statutory duties may report it to the Bank of Portugal. Such communications cannot, per se, be used as grounds for disciplinary, criminal or civil liability actions brought by the credit institution against the whistleblower, unless the report is clearly unfounded.

The Bank of Portugal must ensure adequate protection of the person who has reported the breach and the person accused of breaching the applicable duties. It must also guarantee the confidentiality of the persons who have reported breaches at any given time.

Portuguese Securities Code (CVM)

Article 382 of the CVM states that financial intermediaries subject to the supervision of the Portuguese Securities Market Commission (CMVM), judicial authorities, police authorities, or respective employees must immediately inform the CMVM if they become aware of facts that qualify as crimes against the securities market or the market of other financial instruments, due to their performance, activity, or position.

Additionally, according to article 368-A of the CVM, any person aware of facts, evidence, or information regarding administrative offences under the CVM or its supplementary regulations may report them to the CMVM either anonymously or with the whistleblower's identity. The disclosure of the whistleblower's identity, as well as that of their employer, is optional. If the report identifies the whistleblower, their identity cannot be disclosed unless specifically authorised by the whistleblower, by an express provision of law or by the determination of a court.

Such communications may not be used as grounds for disciplinary, criminal, or civil liability action brought against the whistleblower, and they may not be used to demote the employee.

According to article 368-E of the CVM, the CMVM must cooperate with other authorities within the scope of administrative or judicial proceedings to protect employees against employer discrimination, retaliation or any other form of unfair treatment by the employer that may be linked to the communication to the CMVM. The whistleblower may be entitled to benefit from the witness-protection programme if an individual is charged in criminal or administrative proceedings because of their communication to the CMVM.

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10. What confidentiality obligations apply during an investigation?

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Although there are no specific laws or regulations regulating the extent of confidentiality obligation employers or the investigators shall comply with, in practice, the confidentiality obligation of both parties usually originates from the confidentiality agreement between the employee and the employer, as well as general provisions on protection of personal information and right of privacy, etc.

In this regard, it is advisable to require the relevant personnel responsible for handling the suspension for investigation to sign a confidentiality agreement or a letter of commitment, and require them to pay

attention to the protection of the personal information and privacy of the complainant and other relevant personnel, for the purpose of avoiding extra losses caused by the occurrence of disputes relating to right of reputation, right of privacy and personal information leakage during the investigation.

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Concerning a workplace investigation, there is no specific legislation in force at the moment regarding confidentiality obligations. All normal legal confidentiality obligations (eg, obligations outlined in the Trade Secrets Act (595/2018)), and if using an external investigator, the confidentiality obligations outlined in the agreement between the employer and the external investigator, apply. Attorneys-at-law always have strict confidentiality obligations as per the Advocates Act (496/1958).

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The Portuguese Labour Code does not specifically provide for any confidentiality obligations concerning disciplinary procedures. On the contrary, it states that the employee should have access to any information included in the disciplinary procedure. Otherwise, the employee's defence rights could be jeopardised, which would make the disciplinary procedure (and possible disciplinary sanctions) null and void.

As for the witnesses, even though there is no specific provision on confidentiality, employees are generally bound by a duty of loyalty vis-a-vis the employer, which includes not disclosing information that should be kept reserved,

However, in the cases of whistleblowing, it is mandatory to ensure the confidentiality of the complainant, as per question 9.

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

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Although there are no explicit provisions of law or policy requiring employers to provide specific information of allegations to investigated employees, in practice, at the early stage of investigation, in order to avoid alerting the investigated employee and reduce the possibility that the investigated employee may destroy the relevant evidence, the employer usually will not disclose the information of allegations to

the investigated employee at the beginning of investigation. At the later stage of an investigation, when the employer has already obtained main evidence, the employer usually will properly disclose to the investigated employee the allegations that are clearly known by the employer and have sufficient evidence, and listen to the counterparty's opinions or argument, for the purpose of obtaining more information or getting the employee's confession.

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The process must be transparent and impartial, and therefore all the information that may influence the conclusions made during the investigation should be shared with the employee.

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If, before taking disciplinary action, the employer decides to open a preliminary investigation phase, the employee does not have to be informed.

Only when the preliminary investigation leads to a formal accusation will the employee be entitled to know that enquiries were carried out and the source of the facts (eg, witnesses, documents).

However, if an employer does not need to open a formal preliminary investigation phase, it only has to serve the accusation notice to the employee.

As a rule, employees will only know that they are being investigated if they are suspended or when they are notified of the accusation.

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

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At the level of criminal procedure in PRC, only the Criminal Procedure Law of PRC provides that pseudonyms may be used in the indictment as a substitute for the disclosure of a witness's personal information, such as name, address, employer and contact information, to protect the personal safety of the witness. However, there are no relevant provisions on whether the identity of the complainant, the witness in civil litigation and the provider of information shall be kept confidential during an investigation.

During the course of an investigation, in order to protect the privacy of relevant personnel and avoid the risk of infringement, the employer usually keeps the identity of the complainant or the provider of investigation information confidential. However, at the civil litigation stage, the witness is unavoidably required to testify in court, and must truthfully identify himself/herself to the court.

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Finland

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See question 11, there is no protection of anonymity as the process must be transparent to the parties involved.

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An employee served a notice of accusation is entitled to assess all information that was gathered within the scope of the investigation and disciplinary procedure (notably the identity of the complainant, witnesses heard, other sources of information, etc), otherwise his right of defence may be jeopardised.

Where a preliminary investigation does not lead to an accusation against the employee, no disclosure has to be made by the employer.

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
at Jingtian & Gongcheng

Yes. In practice, before conducting a compliance investigation, we recommend that the employer and the investigator enter into a confidentiality agreement to require the investigator to keep confidential the facts and the substance of the investigation. This will not only better protect the personal information of the complainant, the witness and the investigated employee, but also help the investigation to proceed smoothly.

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

Yes, however, the need for an NDA is assessed always on a case-by-case basis.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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Please see question 12 above. NDAs are not admissible.

Last updated on 15/09/2022

14. When does privilege attach to investigation materials?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The employer has the property right over all its properties. When discovering employee's misconduct, the employer is entitled to conduct an investigation within a certain scope according to the relevant laws and regulations, as well as the management system of the employer. Generally speaking, the employer is not required to obtain consent of the employee when conducting an investigation of the space and objects owned by it. The employer has no right to directly conduct an investigation of the employee's private space, objects, bank accounts and stock trading accounts. The public security organ or other public authorities should be involved in the investigation. In principle, if the employee's private space or objects are mixed with the employer's private space or objects, the employer should obtain consent of the employee for an investigation. Meanwhile, the employer's investigation should be controlled within the reasonable and necessary limit, and the employer is not allowed to illegally use or disclose the investigation results, otherwise it may constitute infringement. In addition, we also recommend that the employer stipulate explicitly in the employment contract and the internal management system that the employer has the right to detain and inspect the articles or equipment distributed by the employer, so as to reduce the compliance risk of internal investigation.

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

The privilege of investigation materials concerns a rather limited amount of cases. In practice, materials may be considered privileged in connection with the litigation process under the Procedural Code (4/1734). For example, communications between a client and an attorney may attract protection against forcible public disclosure.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

If any sources of information used within an investigation include privileged data, they may be redacted to safeguard third parties' rights. However, where disclosure of that data is necessary for the employee to understand why he or she is being accused, it may be necessary to reveal those elements. Otherwise, the employee may argue that their rights were affected and, for that reason, the disciplinary procedure – and any possible sanction – should be deemed null and void.

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?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The relevant laws and regulations in the PRC have not made explicit provision regarding rights to representation. In practice, some arbitral tribunals and courts hold the view that it is reasonable for the employee to refuse to cooperate with the investigation if he/she is not accompanied or has no legal representatives. Therefore, the employer usually cannot impose disciplinary punishment by warning or even termination of employment contract on the basis of such refusal. Therefore, we tend to believe that, where the employee under investigation requests to be accompanied or have legal representation, the employer should fully consider and communicate with the employee about the request, and prudently impose disciplinary punishment on the employee for failing to cooperate with the investigation.

Of course, considering that satisfying such request will increase the difficulties and obstacles for the employer to carry out the investigation to a certain extent, we still suggest that the employer include in its rules and regulations such provisions as "the employee being investigated shall actively and unconditionally cooperate with the employer's investigation", etc., in order to provide institutional support for the follow-up requirement or even disciplinary punishment by the employer on employee and to encourage the employee to cooperate in the investigation.

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

The employee under investigation has a right to have a support person present (eg, a lawyer or an employee representative) during the hearings and a right to assistance in preparing written statements.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

Under the Portuguese Bar Association statutes, the assistance of a lawyer is allowed at all times and cannot be prevented by any jurisdiction or authority, public or private entity.

Nevertheless, the law does not provide any obligation to inform the employee that they are entitled to the assistance of a lawyer.

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?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The relevant laws and regulations in the PRC have not expressly provided the employer's obligation to inform the trade union of the internal investigation or the right of the trade union to participate in the employer's internal investigation. In practice, given the confidential nature of internal investigation, the employer usually does not voluntarily inform the trade union of such information. However, in accordance with Article 25 of the Measures for the Supervision of Labor Law by Trade Unions of the PRC, the trade union shall have the right to conduct an investigation if the employer has violated the labor laws and regulations or infringed the legitimate rights and interests of the employee. Therefore, it is still possible that the employer, in the course of the internal investigation, may be investigated by the trade union if it has violated the labor laws and regulations or infringed the legitimate rights and interests of the employee (e.g. being suspected of infringing personal information or privacy).

In addition, if the employer determines that the employee has committed a serious disciplinary offence based on the result of the internal investigation and thus decides to terminate the employment contract unilaterally, it shall notify the trade union of the reasons for termination in advance. If the employer has violated the laws, administrative regulations or the provisions of the employment contract, the trade union is entitled to request the employer to make corrections.

Last updated on 29/11/2023

Finland

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at Roschier

A works council or a trade union does not have a role in the investigation.

Last updated on 15/09/2022

Portugal

Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

Employee representative bodies are not entitled to be informed about or to participate in the preliminary investigation. The works council is only entitled to participate in disciplinary proceedings after a formal accusation has been made against the employee.

A copy of the accusation should be sent to the works council (if any) and if the employee is a trade union member, to the respective trade union. After the instruction phase of the procedure has ended (where the employer has to hear the witnesses identified by the employee in his written defence and file any other sources of information that have been requested), the employer should provide a copy of the disciplinary procedure to the works council (if any) and the respective trade union, if the employee is a member. These employees' representatives will then have five business days to issue their opinion on the matter.

Finally, a copy of the final decision must also be sent to these bodies.

There is no legal right for the interviewee to be assisted by a representative from the works council.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The relevant laws and regulations in the PRC have not made explicit requirements regarding the supports received by the employee involved in the investigation. In practice, the employer will usually prepare an internal time schedule before carrying out the investigation. Although the detailed time schedule will not be disclosed to the employee, the employer will usually inform the employee of each investigation in advance. In order to improve the transparency of the investigation, we recommend that employer should make positive and proper responses to employee who enquires about the progress of the investigation, so as to avoid employee's suspicion.

In addition, the Personal Information Protection Law of the PRC stipulates the rights of individuals in the process of personal information processing. In the scenario of internal investigation of an employer, the investigated party may, in accordance with such provisions, ask the employer for the right to review and even copy the personal information collected. Where the employee finds that the personal information collected by internal investigation is inaccurate or incomplete, he/she is entitled to request for correction or supplementation.

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

They can request assistance, for example, from an occupational health and safety representative, a shop steward or the occupational healthcare provider.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

Employees are usually assisted by lawyers when they are subject to an investigation or disciplinary procedure.

Last updated on 15/09/2022

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

China

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If any matter unrelated to this investigation is revealed during the investigation and the matter is suspected of violating regulations, the employer may comprehensively consider whether it is necessary to investigate the new matter. If the employer assesses that a combined investigation will seriously affect and hinder the progress of the investigation or complicate the investigation, the employer can handle the unrelated matters through separate investigations.

In addition, Article 6 of the Personal Information Protection Law of the PRC requires that the processing of personal information shall be for a specific and reasonable purpose and shall be directly related to the purpose of the processing and shall adopt the method with minimum impact on individuals' rights and interests. If the result of the investigation reveals unrelated personal information, it means that the collection and storage of such personal information are unrelated to the purpose of the processing. According to paragraph 1 of Article 47 of the Personal Information Protection Law of the PRC, the employer as the personal information processor shall take the initiative to delete personal information. If the employer fails to delete such information, the employee is entitled to request for deletion.

Last updated on 29/11/2023

Finland

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at Roschier

If they are related to the work or workplace, the employer will handle the emerging matters separately. In internal investigations, the employer is allowed to use any material legally available.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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If new facts arise as a result of the investigation and they are relevant, the employer may include them in the accusation. If, however, the new facts are revealed after the accusation has been served, the employer will have to prepare an addendum to the initial accusation and the employee will be able to use the same defence rights against that addendum.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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There is no specific provision on this in relevant laws and regulations in the PRC. In practice, the employer will usually stipulate the relevant grievance procedure and process in its internal rules and regulations, and provide the employee with the relevant grievance rights in accordance with the grievance regulations. Alternatively, even if there is no provision on grievance procedure and process in their internal rules and regulations, from the perspective of fairness and rationality, we recommend that the employer should review and evaluate the grievance raised by the employee. If it is confirmed that irregularities exist in the investigation, which may directly affect the conclusions of the investigation (e.g. a past conflict between the employee and the investigator or the employee was unfairly treated in the investigation), the employer shall suspend the investigation and resume the investigation after timely resolution of such complaint. If the grievance does not affect the normal conduct of the investigation, the employer can still proceed with the investigation.

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

If the nature of the grievance relates to the employer's obligations to handle such matters in general, the grievance will be investigated either separately or as a part of the ongoing investigation.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
at Uría Menéndez - Proença de Carvalho

Grievance procedures are not specifically provided for under Portuguese law. There is no formal procedure for an employee to raise a complaint against the employer. Nonetheless, a potential claim brought by the employee under investigation and subject to a disciplinary procedure should not have any impact.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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During the investigation, the employer should fully respect the basic labor rights of the employee. According to the relevant provisions of Labor Contract Law of the PRC, if an employee is sick during the investigation, the employer should permit him/her to take sick leave provided that he/she provides the medical certificate issued by the medical institution and performs the medical leave application procedure as required by the employer. Therefore, the employer usually needs to request the employee to cooperate with the investigation after the sick leave, and cannot force the investigation by means of coercion or violence.

However, for the contents that can be investigated by the employer alone, such as the information publicized by the employee on social media and the employee's relevant information publicized on official website, since the investigation of such information is not affected by the employee's physical condition, the employer may adjust the investigation plan and conduct such part of the investigation first.

Last updated on 29/11/2023

Finland

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As a general rule, sick leave does not prevent an investigation from progressing. Depending on the nature of the sickness, the employee can attend hearings and take part in the procedure. If the sickness prevents the employee from participating, the employer can put the process on hold temporarily.

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Portugal

Author: *André Pestana Nascimento*
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The employer will be able to proceed with the investigation or disciplinary procedure regardless, although if it is necessary to hear the employee and they are unable to attend the interview, either the employer waits for their return or it could also send a written questionnaire for the employee to complete.

Last updated on 15/09/2022

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

regulatory investigation?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The PRC law is silent on how to deal with the conflict between internal investigation and criminal or regulatory investigation. In general, the employer should cooperate with the criminal or regulatory investigation being conducted by the investigating authority to avoid hindering official business.

According to the Civil Procedure Law of the PRC, the Administrative Procedure Law of the PRC, and the Criminal Procedure Law of the PRC, the investigating authorities (including the public security authority, the people's procuratorate, the people's court, and the supervision authority) have the power to investigate and verify evidence from the witness or the individuals or entities that have access to the evidentiary materials. Therefore, the investigating authorities have the power to compel the employer to share or provide evidentiary materials relating to the case, and the employer shall cooperate and provide such materials. If the employer refuses to cooperate, it may face administrative liability (such as warning, fine and detention of the directly responsible person), judicial liability (fine shall be imposed on the main person in charge or the directly responsible person, and detention may be granted to those who refuse to cooperate) and even criminal liability (those who conceal criminal evidence may be guilty of perjury).

Last updated on 29/11/2023

Finland

Author: *Anu Waaralinna, Mari Mohsen*
at Roschier

Regardless of a possible criminal investigation, the employer must run its internal workplace investigation without unnecessary delay. A workplace investigation and a criminal investigation are two separate processes and can be ongoing simultaneously, so the criminal process does not require the workplace investigation to be stayed. Thus, parallel investigations are to be considered as two separate matters. The police may only obtain evidence or material from the company or employer if strict requirements for equipment searches are met after a request for investigation has been submitted to the police.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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These procedures are independent and autonomous, and the law does not provide any particular rules to ensure coordination. This raises particular concerns when an employee is subject to a criminal investigation in secret, as the employer will be unable to access any evidence from the criminal procedure to begin an internal investigation or disciplinary procedure against the employee.

On the other hand, considering the short statutes of limitation to enforce disciplinary action, it may prove impossible to wait for the outcome of the criminal or regulatory investigation to decide if a disciplinary procedure should also be enforced, because by the time the employer is fully aware of the facts, the statutes of limitation may have already expired.

However, both the judge in a criminal procedure and the regulator have the public authority to order the

employer to share any findings within the scope of the investigation or disciplinary procedure.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
at Jingtian & Gongcheng

There is no explicit stipulation in the laws and regulations in the PRC on this issue. In practice, given the confidentiality of any investigation into a violation, the employer usually will not disclose the investigation result or submit the investigation report to the investigated employee, unless it is explicitly provided in its rules and regulations that the employer is obliged to inform the employee of the investigation result. However, according to the Employment Contract Law of the PRC and the opinions of the mainstream arbitration tribunals and courts, if an employer decides to take disciplinary action against an employee (in particular, termination of employment contract) according to the investigation result, it is generally required to inform the employee of the investigation result. In other words, the employer generally needs to inform the employee of the specific facts based on which the disciplinary action is taken. Failure to do so may result in the generalization of serious violation of the employer's rules and regulations and lead the arbitration tribunals and courts to regard the termination as illegal.

Last updated on 29/11/2023

Finland

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The employer's conclusions from the investigation.

Last updated on 15/09/2022

Portugal

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If, further to the conclusion of the investigation, the employer concludes that there are no grounds to enforce disciplinary action against the employee, the employee does not even have to know that they were the subject of an investigation.

However, if the employer does decide to accuse the employee, the employee will be entitled to all the sources of information obtained during the preliminary investigation.

Last updated on 15/09/2022

23. Should the investigation report be shared in full,

or just the findings?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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For the employee: As mentioned in our response to question 22, the relevant laws and regulations in the PRC do not impose any obligation on an employer to share investigation report (including the findings) with its employee, unless otherwise expressly provided in its internal rules and regulations that the employer may share with its employee any investigation report or findings that do not involve trade secrets or another person's privacy or personal information. Therefore, the employer has the discretion to decide whether and to what extent to share the investigation report based on its business management needs.

For the police/regulatory authorities: In general, an employer shall provide a complete report according to the law as required by the authority handling the case. It is recommended that the employer should conduct a detailed review of the investigation authority and the information contained in the evidence collection documents issued by the authority, and communicate with the authority to specify the scope of assistance and evidentiary materials to be provided. Although the employer cannot refuse to provide relevant evidentiary materials to the investigation authority on the grounds that such evidentiary materials involve trade secret or personal privacy, it still needs to carefully assess the relevance of the evidentiary materials to the facts of the case and timely communicate with the authority to confirm and narrow the scope of providing evidence as much as possible. If necessary, the employer can consult professional lawyers to provide professional opinions. In addition, we suggest that the employer may also try to require the investigation officer to sign a confidentiality letter, and file the investigation materials involving trade secret or personal privacy, the reasons thereof, etc., for the purpose of reducing legal risks faced by the employer.

Last updated on 29/11/2023

Finland

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The employee under investigation may only be informed of the conclusions.

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Portugal

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If the employee is accused by the employer, they will be entitled to consult the entire investigation report and not just the findings, as well as the witnesses' depositions, which should be in writing, and any other sources of information that were used by the employer

Even though the law is silent in this respect, courts have ruled that if this is not complied with, the employee’s right of defence would be deemed to be disrespected.

Last updated on 15/09/2022

24. What next steps are available to the employer?

China

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The employer may take disciplinary actions against the employee based on the investigation result and pursue their civil, administrative and even criminal liabilities. To be specific: 1) the employer may criticize and educate the employee, or take disciplinary actions such as warning, demotion and removal according to the internal rules and regulations of the employer. If the misconduct of the employee constitutes one of the circumstances stipulated in Article 39 of the Employment Contract Law of the PRC, the employer is entitled to take the most severe disciplinary action, namely termination of employment contract; 2) if the employee has caused economic loss to the employer, the employer may lawfully initiate a civil litigation recourse procedure; 3) if the employee violates the Law on Administrative Penalties for Public Security Administration of the PRC, the employer may deliver the case to the administrative department for corresponding administrative penalties; 4) if the employee is suspected of a crime, the employer should deliver the case to the public security authority and pursue his/her corresponding criminal liabilities according to the law.

Last updated on 29/11/2023

Finland

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at Roschier

The employer decides whether misconduct has taken place or not. Depending on the case, the employer may recommend a workplace conciliation in which the parties try to find a solution that can be accepted by both sides. The employer may choose to give an oral reprimand or a written warning. If the legal conditions are met, the employer may also terminate the employment agreement.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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Once the preliminary investigation ends, the employer must decide whether or not, in its view, there are grounds to bring an accusation against the employee and enforce disciplinary action or if it should be dismissed due to a lack of evidence.

When the employer decides to enforce disciplinary action, the following sanctions may be applied:

- verbal warning;
- written warning;
- financial penalty;
- loss of holiday;
- suspension with loss of pay and length of service;
- dismissal with cause and without compensation.

The first five penalties are usually called conservatory sanctions, enabling the continuity of the employment

relationship, as opposed to dismissal, which is deemed a measure of last resort.

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?

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
at Jingtian & Gongcheng

If the relevant investigation authorities or regulatory authorities require the employer to provide the investigation findings and the interview records of its employee's illegal activities, the employer is usually obliged to cooperate with the authorities and make disclosures according to the requirements of the law. Meanwhile, according to Article 110 of the Criminal Procedure Law of the PRC, any entity or individual who has found out facts of a crime or a criminal suspect has both the right and the duty to report the case or provide information to the public security authority, the people's procuratorate or the people's court. Therefore, if the investigation findings show that the employee is suspected of a crime, the employer should disclose the information to the relevant investigation authorities including the public security authority. For some special industries, for example, the investigation findings against the banking industry usually also need to be reported to the higher-level banking supervisory authorities. Although the relevant investigation staff and supervisory staff are usually required to comply with the confidentiality obligations according to the laws or regulations, the risk of leakage of the reported information due to the expansion of the scope of persons who are aware of the investigation findings cannot be completely excluded.

In addition, an employer may decide whether to disclose the results of an investigation (mainly including the violation of disciplines and the disciplinary punishment) to other employees at its own discretion, but has to disclose the relevant information among employees to the extent that it is "minimum and necessary", so as to avoid infringing on the employee's personal information or privacy or even right of reputation.

Last updated on 29/11/2023

Finland

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at Roschier

In general, investigation materials, including findings, that includes personal data should only be processed by the personnel of the organisation who are responsible for internal investigations. However, it may in some situations be required by applicable legislation that findings are disclosed to competent authorities for the performance of their duties, such as conducting investigations in connection with malpractice and violations of the law.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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The investigation findings must be disclosed to the employee when an accusation is brought against him or her and to the works council (if any) or trade union, if the employee is a member.

Regulators or police authorities may also notify the employer if any investigations were brought against a particular employee (as regards regulators, this could occur within the scope of fit and proper procedures), in which case the employer must cooperate and disclose any investigation findings.

Last updated on 15/09/2022

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

China

Author: *Leo Yu, Yvonne Gao, Tracy Liu, Larry Lian*
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The relevant laws and regulations in the PRC have not clarified the retention period of the investigation findings. According to Article 19 of the Personal Information Protection Law of the PRC, unless otherwise required by laws or administrative regulations, the retention period of personal information shall be the shortest period necessary to achieve the purpose of handling the information. Since the employee's personal information is very likely to be involved in the investigation findings, such report should be retained for the shortest period necessary to achieve the purpose of handling the information. In general, once the investigation is completed, the purpose of the internal investigation has been achieved or it is no longer necessary to achieve the purpose, and the employer may, in accordance with Article 22 of the Administrative Regulations of the PRC on Network Data Security (Draft for Comments), delete or anonymize the personal information within fifteen (15) working days. If it is technically difficult to delete the personal information, or it is difficult to do so within fifteen (15) working days due to business complexity or other reasons, the employer shall not conduct any processing other than storing the personal information and adopting necessary security measures, and shall give reasonable explanations to the employee.

Last updated on 29/11/2023

Finland

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at Roschier

Please see question 7. The outcome of the investigation involving personal data may be retained only for as long as is necessary considering the purposes of the processing. In general, the retention of investigation-related data may be necessary while the investigation is still ongoing and even then the requirements of data minimization and accuracy should be considered. The data concerning the outcome of an investigation should be registered to the employee's record merely to the extent necessary in light of the employment relationship or potential disciplinary measures. In this respect, the applicable retention time depends on labour law-related rights and limitations, considering eg, the applicable periods for filing a suit.

Last updated on 15/09/2022

Portugal

Author: *André Pestana Nascimento*
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There are no specific rules in the Portuguese Labour Code on this matter.

However, article 332 of the PLC states that the employer should keep an updated record of disciplinary sanctions, so the competent authorities can easily verify compliance with applicable provisions. Accordingly, it is advisable to maintain a record of disciplinary sanctions during the entire employment relationship.

Also, please note that some collective bargaining agreements state that the disciplinary register must be deleted from the employee's record periodically.

Last updated on 15/09/2022

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

China

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It is inevitable that the investigation involves the employee's personal information, and once the investigation is mishandled, the employer may face the following legal risks:

Civil liability: Both the Civil Code of the PRC and the Personal Information Protection Law of the PRC, clearly provide the civil liability for infringement of privacy and illegal processing of personal information. Therefore, the investigated employee or relevant organizations such as the people's procuratorate have the right to claim or file a public interest lawsuit on the employer's improper collection of evidence, requiring the employer to bear the liability for infringement. In addition, the evidence obtained by an employer through infringing the employee's privacy and personal information rights and interests, in violation of the law, cannot be used as the valid evidence for the employer's unilateral termination of the employment contract or requiring the employee to compensate for losses.

Administrative liability: Article 66 of the Personal Information Protection Law of the PRC provides that, where personal information is processed in violation of regulations, administrative penalties imposed by the department performing duties of personal information protection may be up to revoking the business license, and the person directly in charge and other directly liable persons may be fined up to one million yuan and prohibited from practicing within a time limit. Meanwhile, Article 67 of the Personal Information Protection Law of the PRC provides that relevant illegal acts shall be recorded in the employer's credit files and disclosed to the public.

Criminal liability: if an employer illegally sells or provides to others the personal information obtained during the internal investigation, and the circumstance is serious enough, the judicial authority has the right to hold the employer, the managers directly in charge and other directly liable persons criminally liable in accordance with the crime of "infringement of citizens' personal information" under Article 253A of the Criminal Law of the PRC.

It should be noted that a compliance investigation may also involve the employer's communication and investigation reporting with overseas authorities, or overseas institutions' direct access to information from the employer's domestic systems. If the employer conducts cross-border transmission of such personal information, it shall also meet one of the conditions set out in Article 38 of the Personal Information Protection Law of the PRC (i.e. passing the security assessment organized by the national cyberspace

administration authority, obtaining certification from a professional institution concerning the protection of personal information or entering into a standard contract with an overseas recipient). Violations of the above provisions may result in civil, administrative and even criminal liability.

Last updated on 29/11/2023

Finland

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There are no regulations regarding the actual investigation process. Therefore, the employer cannot be accused of procedural errors as such. However, once the matter has been adequately investigated, the employer must decide whether or not misconduct has taken place. If the employer considers that misconduct has taken place, the employer must take adequate measures for remedying the situation. Failure to adequately conduct the investigation could result in criminal sanctions being imposed on the employer as an organisation or the employer's representative, or damages.

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Portugal

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If the disciplinary procedure recommends an employee's dismissal

Should a company dismiss an employee that has breached legal requirements, the latter may take action against the company within 60 days of the date of termination of their employment agreement.

If this action results in a ruling of unfair dismissal, the employee will be entitled:

- to receive all the payments they should normally have earned (back pay, including salary, holidays, legal subsidies, etc), from the month preceding the commencement of the lawsuit and until the final ruling of the court, minus any amounts they may have received during the same period and they would otherwise not have received; and
- to be reinstated in their former position or at the employee's choice, to receive an indemnity that the court will calculate as between 15 and 45 days of base salary (and service bonuses) for each full year of service or fraction thereof, with a minimum limit of three months' compensation.

This graduation will depend on the amount of the base salary (the lower the base salary, the higher the indemnity) and the severity of the company's conduct. Additionally, the employee is entitled to claim an indemnity for further damages.

There are, however, two exceptions to the above: the first relates to high-ranking employees (ie employees carrying out management duties); the second refers to micro-companies (ie, a company that registered an average number of employees in the preceding calendar year below 10). In these two cases, the employer may oppose the employee's option for reinstatement, arguing that it would be gravely harmful to the company's activity. From a practical perspective, opposition to reinstatement is not commonly decided by the courts.

Finally, should the court rule that the grounds for dismissal were valid, but the investigation was found to have been irregular, the dismissal will be deemed valid, but the employee will still be entitled to an indemnity of 7.5 to 22.5 days of base salary (plus service bonuses, if any) per year of service.

If the disciplinary procedure does not recommend dismissal, but the application of a

conservatory sanction

In this event, the employee can challenge the application of the sanction through the filing of a lawsuit against the company. Although the law is not entirely clear, there are court rulings stating that the employee has one year to bring a lawsuit, but others consider that the statute of limitation to challenge a conservatory disciplinary sanction is also one year from the termination of the employment agreement when a pecuniary penalty or suspension was applied to the employee.

Moreover, according to article 331(3) of the Portuguese Labour Code, the employer who applies an unjustified conservatory penalty should compensate the worker under the terms set out in paragraphs 5 and 6 of said article. The imposition of an abusive penalty is also considered a very serious administrative offence as per article 331(7). Please note that the Portuguese Labour Code considers a penalty to be unjustified if its imposition is motivated by the following:

- the employee lawfully complaining about their labour conditions;
- the employee lawfully disobeying unlawful orders from a superior;
- the employee being a member of any employee representative structure or having been a candidate for such a position; and
- the employee exercising or invoking their rights and guarantees.

Furthermore, any penalty imposed within six months of any instance listed above (or within one year if the invoked rights are related to equality and non-discrimination) is presumed to be abusive.

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