

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
*Clare Fletcher at Slaughter and May*

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

### China

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

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.

Last updated on 29/11/2023

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

There is no codified law in India on conducting workplace investigations, so they largely depend on the internal policies of the employer. Certain requirements and best practice measures have evolved through judicial precedent, and these are codified through internal policies.

For claims involving sexual harassment, however, investigations can only be undertaken by the Internal Committee (IC), which an employer needs to constitute under the Prevention of Sexual Harassment of Women and Workplace (Prevention, Prohibition and Redressal) Act 2013 (SH Act).

The general principle laid down by the courts is that any action against an employee for misconduct should be taken after conducting a disciplinary inquiry as per the principles of natural justice (PNJ). Whether or not

a disciplinary inquiry can be done away with in any circumstances is a very fact-specific assessment and depends on various factors, including but not limited to the seniority and location of employment of the employee, and the nature and circumstances of the alleged misconduct.

The PNJ broadly require:

- that the accused employee should be issued with a written charge sheet or notice setting out the allegations against him or her along with a reasonable opportunity to respond;
- appointment of an independent inquiry officer to assess whether the allegations are proven or not; and
- that action must be taken based on the outcome of the inquiry, any punishment ordered should be proportionate to the gravity of the misconduct, and also take into account the service history (eg, prior warnings) of the individual.

The charge sheet or notice issued to the employee has to set out the evidence used by the employer to support the allegations in sufficient detail. Therefore, gathering necessary information and evidence is usually a critical precursor for any disciplinary process that an employer may eventually initiate against an employee.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

In Ireland, employees have a constitutional right and an implied contractual right to natural justice and fair procedures. If a workplace investigation is not conducted in accordance with these principles, an employee may allege that the investigation is fundamentally flawed. If such an allegation is made then an employee may seek recourse from the Workplace Relations Commission (WRC) or potentially the High Court. The WRC is the body in Ireland tasked with dealing with employment law-related claims, including unfair dismissal.

The constitutional rights that employees enjoy were specified in the Supreme Court case of *Re Haughey* in 1971. That case held that where proceedings may harm the reputation of a person, public bodies must afford certain basic protections of constitutional justice to a witness appearing before it. It further stated that article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures. These protections, known as “*Re Haughey rights*” are implied in each contract of employment.

A Code of Practice was introduced in 2000, namely S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (the Code). The Code set out the procedures for dealing with grievances or disciplinary matters, which must comply with the general principles of natural justice and fair procedures and include:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is allowed to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

Further Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work were published in 2021 and 2022, respectively. The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.

In addition to the above, the Data Protection Commission published Data Protection in the Workplace:

All employers should have specific and up-to-date policies dealing with how workplace investigations will be carried out that are suitable for their organisation. These policies may vary, depending on the subject of the investigation and the size and type of employer. However, all should adhere to the principles identified above to ensure that a robust policy is in place and can be utilised.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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.

Last updated on 15/09/2022

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

### China

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

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.

Last updated on 29/11/2023

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

As a precursor to the actual disciplinary process, investigations are usually initiated when the employer becomes aware of an allegation or complaint of misconduct, or observes any acts or omissions by an

employee constituting workplace misconduct. The employer (or investigating committee – which could also be an outside agency like an auditor or law firm appointed by the employer) would generally commence the investigation by speaking with the complainant (or whistleblower) to gather as many details as possible (relevant facts, evidence, list of witnesses, etc) concerning the allegations, so that the next steps and approach can be determined upfront.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Investigations can start in multiple ways. They usually stem from an employee raising a grievance, a bullying complaint, or a possible protected disclosure. Investigations may also stem from the employer in a disciplinary context, or indeed can be commenced if an external complaint or issue is raised by a third party of the organisation.

The first thing the employer must consider is whether an investigation is necessary. It may be that the issue at hand can be resolved informally or is of such a nature that it cannot be investigated, either through a lack of detail or simply because the subject of the complaint is no longer an employee. Any such decision to investigate or not should be carefully documented.

The next step to determine is the nature of the investigation. It should be clear at the outset whether the investigation is simply a fact-gathering exercise or if the investigator will be tasked with making findings on the evidence. The distinction is significant as a fact-gathering investigation can proceed without prompting the full panoply of rights, but the basic principles of fairness should still be applied. A fact-gathering investigation should determine whether there is or is not, a case to answer. If a disciplinary hearing follows then the rights outlined in question 1 will apply at that stage. If it is a fact-finding investigation, the rights apply from the outset of the process. The employee who is required to respond to the issues (the respondent) should be fully aware of the extent of the investigation. The investigator appointed to do the investigation should be clear about what is expected of them.

If the employer believes an investigation is necessary, it should be acknowledged and started without delay. In particular, according to the Protected Disclosures legislation, a report should be acknowledged within seven days.

An employer should consider and identify the scope of the investigation and establish who will investigate the matter. Terms of reference under which the investigation will be carried out should be established by the employer and shared with the employee raising the issue (the complainant). An employer should not seek agreement on the terms, but invite commentary to ensure that the full scope of the investigation is captured within the terms of reference. Robust terms of reference that lay down the clear parameters of the investigation will assist the investigator and all parties involved in the process.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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)?



#### China

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

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.

Last updated on 29/11/2023



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Yes, an employee can be suspended or placed on administrative leave during an investigation if the circumstances warrant it. It is recommended to include the right to suspend in employee-facing policies. The employee should be informed about the suspension in writing, by issuing a suspension letter. In practice, a suspension is used when the charges against the employee are serious or if the employee's presence at the workplace is likely to prejudice the investigation in any manner (eg, where there are concerns that evidence may be tampered with or witnesses pressurised). The requirement to suspend the employee should be assessed on a case-by-case basis and should not be exercised in every instance. If an employee is suspended, the investigation and inquiry should be completed as quickly as possible.

Further, concerning payment during the period of suspension, the law varies depending on the state and the category of employee. Generally, Indian law requires that individuals who are "workmen" be paid a subsistence allowance during the period of suspension, usually at the rate of 50% of their regular wages during the first 90 days of the suspension, and at varying rates thereafter. The exact rates at which subsistence allowance is paid will vary from state to state. In our experience, many companies choose to suspend employees with full salary even if there is an applicable subsistence allowance statute. This helps take some pressure off of the timeline within which the investigation and subsequent disciplinary inquiry can be completed.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

Last updated on 11/10/2023

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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.

Last updated on 15/09/2022

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

### China

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

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.

Last updated on 29/11/2023

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Complaints pertaining to sexual harassment can only be investigated by the IC constituted under the SH Act.

For other kinds of misconduct, employers usually constitute a fact-finding investigation team with members who are independent and unbiased. The fact-finding team can be appointed internally, or the employer could also engage an external agency, depending upon the gravity and sensitivity of the matter, the nature

of the issues being investigated or a desire to try and maintain legal privilege regarding the findings of the investigation.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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

Last updated on 15/09/2022

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

## China

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



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.

Last updated on 29/11/2023



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

An employee has very limited ability to bring legal action to stop the investigation, as no disciplinary measure is taken against an individual during the investigation stage. The risk of claims or disputes generally arises after the employer has taken disciplinary measures against the individual.

An employee could, however, bring claims in some circumstances – for example, if the individual has been suspended without pay, or if the individual's assets have been seized as part of the investigation without following due process. Therefore, it is critical that robust internal guidelines are framed that lay out the framework to follow in investigations to mitigate the risk of legal claims or disputes.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Arguably yes, but it is the exception rather than the rule and it will depend upon the circumstances of the case. Generally, courts would be slow to intervene in ongoing workplace investigations. However, an employee may seek injunctive relief to prevent an investigation if they can show that the investigation is being conducted in breach of a policy or breach of fair procedures to such an extent that there is no reasonable prospect that the investigation's outcome(s) could be sustainable.

Last updated on 11/10/2023



## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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.

Last updated on 15/09/2022

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



### China

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

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. "

Last updated on 29/11/2023



### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at *Trilegal*

Yes, in matters pertaining to sexual harassment, the SH Act expressly stipulates that the IC holds the powers of a civil court to summon any person to be examined as a witness. In misconduct cases, the investigating authority can ask employees to appear and testify before it as witnesses and internal policies should have provisions for this. As a result, employees are duty-bound to fairly and honestly participate in any investigative or disciplinary proceedings relating to the workplace, including offering truthful evidence and testimony on matters they may have observed or experienced as an employee of the organisation. While employees don't have any express statutory protections when acting as witnesses, any such policy should be balanced and include necessary safeguards, such as assuring employees that any retaliation against them will not be tolerated and that the details of their participation will only be shared on a need-

to-know basis.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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.

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



### China

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

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.

Last updated on 29/11/2023



### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

In India, the collection, disclosure, transfer and storage of personal data is regulated by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPD Rules). Accordingly, if during an investigation any sensitive personal information (such as information relating to passwords; financial information such as a bank account, credit or debit card or other payment instrument details; a physical, physiological or mental health condition; sexual orientation; medical history; and biometric information) is collected, then the requirements under the SPD Rules will need to be complied with. This would include obtaining an individual's "informed consent" before collecting any sensitive personal data if such information is intended to be collected or stored in an electronic format.

Last updated on 15/09/2022



### Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Under the GDPR (General Data Protection Regulation), personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Data Protection Commission published Data

Protection in the Workplace: Employer Guidance in April 2023, which is a useful guide.

Employers should exercise caution when gathering physical evidence that may involve the use of CCTV or other surveillance practices. The Irish Court of Appeal in the case of *Doolin v DPC* examined the use by an employer of CCTV footage for disciplinary purposes and found such use constituted unlawful further processing. The original reason for processing the CCTV footage was to establish who was responsible for terrorist-related graffiti that was carved into a table in the staff tearoom. It subsequently transpired Mr Doolin, who was in no way connected to the graffiti incident, had accessed the tearoom for unauthorised breaks and a workplace investigation followed. The original reason for viewing the CCTV related to security, but further use of the CCTV footage in the disciplinary investigation was not related to the original reason. This case confirms that employers must have clear policies in place in compliance with both GDPR and the Data Protection Act 2018 specifying the purpose for which CCTV or any other monitoring system is being used. Not only that, but these policies must be communicated to employees specifying the use of such practices.

It is not only data about the investigation that must be processed fairly, but any retention of the data, which can only be further processed with good reason. It is a legitimate business reason to retain data to deal with any subsequent requests or appeals under various internal or statutory processes, provided employees have been advised of the relevant retention period.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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.

Last updated on 15/09/2022

## 08. Can the employer search employees' possessions

# or files as part of an investigation?



## China

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

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.

Last updated on 29/11/2023



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Yes, an employer can search its employees' official possessions and files as part of an investigation. It may be difficult, however, to seize personal assets or possessions of an employee (such as the individual's mobile phone or personal laptop).

Employers should expressly create policies that address key issues associated with employee surveillance, forensic searches and investigations, such as:

- whether or not the official assets and infrastructure of the company can be used for personal purposes by employees;
- the organisation's right to monitor, surveil or search any authorised or unauthorised use of its corporate assets; and
- that the employee should not have any expectation of privacy when using the companies' resources, etc.

Any forensic review of digital data must be carried out with due regard to Indian rules of evidence to avoid situations where such evidence becomes unreliable in a future legal claim or dispute.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be

a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

Last updated on 11/10/2023

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

<sup>[2]</sup> 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?

### China

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

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.

Last updated on 29/11/2023

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*

at Trilegal

Indian labour legislation does not stipulate any additional considerations or requirements concerning whistleblower complaints in private organisations and these are only available if there are complaints against public servants. Further, under the Companies Act, 2013, certain companies are required to establish a “vigil mechanism” for directors and employees to report genuine concerns regarding the affairs of the company. The vigil mechanism should provide adequate safeguards against the victimisation of persons using it.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Most whistleblowing policies will include a section that provides for an initial assessment of the complaint as to whether it meets the definition of a protected disclosure. This assessment, which ought to be carried out by a designated person who has been appointed to deal with disclosures, is a useful tool as some matters which may be labelled as whistleblowing may fall under the grievance procedure.

Where there are grounds, an investigation will be commenced. Under the Protected Disclosures (Amendment) Act 2022, whistleblowers are protected from penalisation for having made a protected disclosure, under the Act.

Penalisation may include; suspension, lay-off or dismissal; demotion, loss of opportunity for promotion or withholding of promotion; transfer of duties, change of location or place of work; reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); coercion, intimidation, harassment or ostracism; or discrimination, disadvantage or unfair treatment.

If an employee (which includes trainees, volunteers, and job applicants) alleges that they have suffered penalisation as a result of making a protected disclosure, they may apply to the Circuit Court for interim relief within 21 days of the date of the last act of penalisation by the employer.

A claim for penalisation may also be brought before the WRC within six months of the alleged act of penalisation. If an employee alleges that they were dismissed for having made a protected disclosure, the potential award that the WRC can make increases from the usual unfair dismissal cap of two years' pay to up to five years' gross pay, based on actual loss.

Where a complaint of whistleblowing is made, employers should ensure that they appoint investigators with the appropriate knowledge and expertise to deal with such a matter and comply with the time limits set by legislation.

Last updated on 11/10/2023

## 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.



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



### China

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

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.

Last updated on 29/11/2023



### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Indian labour statutes do not contain any specific confidentiality obligations concerning investigations. However, in practice, the records of investigative or disciplinary proceedings should be kept confidential and shared only on a need-to-know basis to ensure that the parties do not suffer prejudice. The internal policies should also include provisions on confidentiality.

The SH Act, however, provides that certain information must not be published or made known to the public, press and media such as:

- the contents of the SH complaint;
- the identity and addresses of the complainant, accused and witnesses;
- any information on the conciliation and inquiry process;
- the recommendations of the IC; and
- action to be taken by the employer.

The SH Act permits the dissemination of information regarding remedies extended to any victim without disclosing the name, address or identity of the victim or witnesses. The SH Act also outlines punishments for violating confidentiality obligations.

Last updated on 15/09/2022



### Ireland

Author: *Bláthnaid Evans, Mary Gavin*

at Ogier

This will depend on the nature of the investigation but, generally, investigations should be conducted on a confidential basis. All who participate in the investigation should be informed and reminded that confidentiality is a paramount consideration taken very seriously. However, it should be borne in mind that confidentiality cannot be guaranteed by an employer as the respondent in an investigation is entitled to know who has made complaints against them. Furthermore, the respondent is entitled to cross-examine the complainant and any witnesses, although in practice this right is rarely invoked strictly and is facilitated by the investigator, with questions from the respondent being put to the complainant and other witnesses.

On occasion, a breach of confidentiality may warrant disciplinary action, but this will depend on the circumstances. Exceptions to the requirement to keep matters confidential will of course apply where employees seek support and advice from others such as companions, trade union representatives or legal advisors. It may also not be possible to maintain confidentiality where regulators or the authorities are informed of the investigation.

Also, confidentiality may not be maintained if it is in the interests of the employer to communicate the complaint and any subsequent investigation, for example on a health and safety basis.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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?



## China

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

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.

Last updated on 29/11/2023



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

As mentioned earlier, workplace investigations are normally a precursor to the actual disciplinary process against an employee. If the individual is being suspended during the investigation, the employer is only expected to inform the individual that they are being suspended on account of an ongoing investigation along with the broad nature of allegations or concerns, and does not need to disclose specific details about the allegations until the appropriate time. Further details may be provided at the investigation stage itself when the employee may be interviewed, or at the subsequent disciplinary inquiry.

Where a disciplinary process is necessary and initiated (after the investigation), the employee will have to be given a charge sheet or notice setting out the allegations against the individual in detail and be provided with an opportunity to submit an explanation.

In sexual harassment investigations, the SH Act mandatorily requires the IC to submit a copy of the complaint to the accused. Further, the accused should be informed of the requirement to file his or her reply to the complaint along with a list of supporting documents, evidence, names and addresses of witnesses, etc, and the timelines for submitting his response in defence.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Under the fair procedures outlined above, details of the allegations or complaints against the employee should be put to them to enable them to fully respond to the allegations raised. The employee should also be provided with any relevant policies pertaining to the allegations against them, along with all documentary evidence of the allegations and the specific terms of reference that define the scope of the investigation. The employee should also be informed of their right to be represented, see question 15.

## 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.

## 12. Can the identity of the complainant, witnesses or

# sources of information for the investigation be kept confidential?



## China

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

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.

Last updated on 29/11/2023



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

The response and approach to this would be very fact-specific.

Under the SH Act, an individual cannot file an anonymous complaint and, therefore, the name of the complainant cannot be kept confidential. The same would go for details of witnesses, if any.

For other types of misconduct, the name of the complainant could potentially be kept confidential, depending on the nature of the allegations. For example, if an individual observes another colleague or employee committing inappropriate conduct (such as fraud or bribery) and reports this, the name of the complainant may not necessarily have to be disclosed to the accused employee, especially where the company is independently able to gather evidence substantiating the allegations. The names of witnesses generally cannot be kept confidential, since doing so may prove prejudicial to the accused employee. Further, as part of the disciplinary inquiry process, the accused has the right to cross-examine witnesses.

Notwithstanding the above, the approach to this issue should be assessed on a case-by-case basis by looking at the underlying sensitivities and risks involved. Courts have, in limited circumstances, permitted non-disclosure of the names of witnesses or complainants.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Failure by an employer to provide the identity of the complainant, witnesses or sources of information seriously impinges upon the employee's right to fair procedure and could result in a flawed investigation.

Last updated on 11/10/2023

## 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?**

### 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

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Yes. While it is common for employees to be bound by general confidentiality obligations at the beginning

of employment, it is advisable to reiterate such confidentiality obligations through NDAs during an investigation.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to “restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination”. It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

Last updated on 11/10/2023



## 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.

Last updated on 15/09/2022

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



## China

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

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Professional advice given by an "advocate" to a client is protected as "privileged communication" and is not admissible as evidence in a court of law. Such privilege may not attach to advice or communications involving in-house lawyers as they are not licensed advocates (since they are expected to surrender their bar licences when they take on in-house roles). This is a grey area as there are conflicting judicial precedents on this. Hence, communications, documents or information gathered during an investigation conducted entirely internally may not be legally privileged and may be discoverable in a dispute. That said, companies generally mark sensitive communications with in-house attorneys as privileged and confidential in an attempt to protect the same.

For the above reasons, investigations conducted by external advocates have better chances of retaining legal privilege. However, the following will not be treated as privileged information:

- any correspondence about the commission of a crime or fraud by the client; and
- the observations of an attorney that would suggest that a crime or fraud will be committed by the client.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

It would be difficult to assert privilege over materials that relate to the investigation itself.

Privilege may arise before the instigation of an investigation where an employer may seek legal advice from their legal advisors over the initial complaint and appropriate next steps. Subject to the relevant tests being met, Legal Advice Privilege arises in respect of a confidential communication that takes place between a professionally qualified lawyer and a client. Who the client is will be of significant importance as they must be capable of giving instructions to their lawyer, on behalf of the employer. Caution should be exercised by employers if advice to "the client" is disseminated further within the business to other members of management. If such a scenario arises, then there is a risk that privilege may be waived and such material could be disclosable under a data subject access request. Litigation privilege arises with respect to confidential communications that take place between a lawyer or a client and a third party for the dominant purpose of preparing for litigation, whether existing or reasonably contemplated.

It is also prudent to consider whether an external investigator should have access to their own independent legal advisor, and the funding arrangements for such advice would have to be considered by the employer.

Last updated on 11/10/2023



## Switzerland



Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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

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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<sup>[1]</sup> 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?**

### China

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

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

## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

In SH cases, parties are not allowed to bring in a legal practitioner to represent them in the IC's proceedings.

In investigations related to other forms of misconduct, there isn't a statutory right to be accompanied by another employee, colleague or lawyer during a fact-finding investigation. In a disciplinary inquiry, if the employee seeks permission to be represented by another person, such as an advocate, co-worker or a union leader, the inquiry officer must decide whether to allow the request based on the specific facts and circumstances as well as any company policies on the subject. If the management has appointed a lawyer to present the company's case in disciplinary proceedings or if the matter is complex and involves legal aspects, courts have held that the employee would also have a right to legal representation.

Further, in general misconduct matters, "workman" employees would generally have the right to be represented by a co-worker in inquiry proceedings, if the establishment is covered under the Industrial Employment (Standing Orders) Act, 1946 (SO Act). The applicability of this statute depends on the nature of the establishment and its headcount.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

This depends on the nature of the investigation. If the complaint originates from an employee as a grievance, then the employee would have the right to representation during the investigation. Representation in this context is more akin to the right to be accompanied, as in the UK by either a colleague or trade union representative.

If the investigation is a fact-gathering investigation originating from the employer, then the employee would not have the right to be represented during the investigation. That right would apply only at any subsequent disciplinary hearing.

If the investigation is a fact-finding investigation as part of a disciplinary process originating from the employer, then the employee ought to be given the right to be represented at that investigation stage. Again the right is akin to the right to be accompanied. There was concern from employers that the right had been expanded to legal representation in disciplinary matters with the case of *McKelvey v Irish Rail*. However, the Supreme Court in that case clarified that the right to legal representation in disciplinary processes is only in exceptional circumstances.

Last updated on 11/10/2023

## 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.[\[1\]](#)

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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[1] Claudia Götz Staehelin, Unternehmensinterne Untersuchungen, 2019, p. 37.

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

[3] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 392; Niklaus Ruckstuhl, BSK-StPO, Art. 158 StPO N 36.

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*  
at Jingtian & Gongcheng

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

No.

There is no specific requirement to constitute a works council for most industries or inform the trade union about an investigation or disciplinary inquiry.

It is common, however, for individuals to share details of the matter with trade union representatives and seek their support. Further, if an employee has the right to be represented or supported by a colleague (for example, if the establishment is covered by the SO Act), the individual may request trade union representatives to support them during inquiry proceedings.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

This will depend on the agreement with the works council or trade union. The employee who is the respondent to the investigation may have views on their trade union being informed, aside from any agreement, which should be taken into account under GDPR provisions.

Last updated on 11/10/2023

## 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?

## China

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

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Every workplace investigation is unique and varies based on the facts and circumstances of each case. As a result, the nature or type of support to be given to an employee would also vary from case to case. The bare minimum should be an assurance that there will be no retaliation against them for participating in the investigation. Other measures may include:

- changing the reporting relationship if the accused is the reporting manager or boss of the complainant;
- conducting investigations and interviews virtually or through videoconferencing in cases where parties or witnesses may not be able to physically appear before the investigating authorities; and
- allowing witnesses to be cross-examined virtually or through a written questionnaire where there is a fear of intimidation or retaliation from the parties.

The employer should be mindful that any interim measures or support it extends does not prejudice any particular party.

Under the SH Act, employers are legally required to assist the complainant if he or she chooses to file a complaint about workplace sexual harassment with the police under the Indian Penal Code or any other law that is in force. Further, the complainant can also seek interim protective measures from the IC, such as a request for transfer for the accused or the complainant or to grant leave to the complainant for three months.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

If an employee assistance programme is in place, an employee irrespective of their role in the investigation should be directed to the programme and encouraged to avail of the services. Investigations can become protracted and employees should be kept informed as to progress and what is required of them regarding participation. Regular checks of the health and well-being of employees should also be made. Even if such a programme is not in place, occasionally and depending on the issues giving rise to the investigation, it may be appropriate for the employer to cover the cost of counselling to a certain extent.

Last updated on 11/10/2023

## 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?

### China

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

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

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Where unrelated matters are revealed during, or because of, the investigation, the course to be adopted may depend on several factors. Normally, if additional instances of misconduct are revealed against the same accused employee, even if they are unrelated to the original investigation, it would be advisable to independently investigate those issues too, to ensure that there are comprehensive grounds for any future disciplinary inquiry or action. If unrelated matters are revealed against other stakeholders involved in the investigation – for example, a forensic review reveals that the complainant or some witnesses have themselves potentially engaged in some other form of policy breach – whether or not those issues are investigated (as well as the timing of such investigation) would need to be decided on a case-by-case basis. Issues to consider include whether these matters affect the credibility of their statements, point at some form of other conspiracy, or create the risk of retaliation claims at a later date.

In SH matters, however, if the complaint involves instances of sexual harassment as well as other forms of general harassment or misconduct, to the extent such other issues aren't linked to the instances of sexual harassment (eg, creation of a hostile work environment for the complainant), these other concerns should preferably not be investigated by the IC and instead should be referred to the employer to address, as per its general grievance-redressal mechanisms.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

If an investigator finds other issues that are outside the scope of the terms of reference, these should not be ignored but equally should not be included as part of the investigation, as they are beyond the remit of the investigation that was established at the beginning. An investigator should identify the other matters that may require further action and report these to the employer separately so as not to conflate issues.

Last updated on 11/10/2023

## 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?**

## China

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

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Indian labour statutes do not prescribe any particular process to be followed if the accused raises any grievances during the investigation and such situations would need to be dealt with on a case-by-case basis. For example, if the grievances relate to the fairness of the investigation or inquiry process, the lack of impartiality of the investigators or the inquiry officer, those may need to be addressed upfront before proceeding further. Where grievances may be unrelated to the investigation or inquiry at hand (and potentially also a method to distract the employer from the core issues or delay or confuse the main investigative proceedings), it may be advisable to communicate to the employee that such grievances will have to be dealt with separately and other safeguards adopted to avoid calling the main investigation or inquiry proceedings into question (eg identifying an independent team to review the grievances).

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

If the subject of the grievance relates to the subject of the investigation, the employee should be reassured that all the matters that they wish to raise concerning the matter under investigation will be dealt with in full as part of the investigation.

If the employee raises a grievance that is unrelated to the matter under investigation, then that can be dealt with concurrently, albeit by a separate investigator.

The initial investigation does not automatically need to be halted upon receipt of a grievance. Frequently, grievances are submitted in the hope that they derail or delay the original investigation. Careful consideration should be given as to the nature of the grievance and the appropriate course of action adopted.

Last updated on 11/10/2023

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## 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?

### China

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

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

### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

The approach to be adopted would be fact-specific but the investigation itself can normally continue, even in the absence of the accused employee. Where it is critical to speak with the employee as part of the investigative process, delays on account of the employee's sickness may need to be accommodated. At the same time, the employer would normally be justified in seeking necessary evidence of the authenticity of the employee's illness and anticipated duration of absence. An accused individual's participation would be more crucial in a disciplinary inquiry to formally respond to the written charges or present their side before the inquiry officer, and absences due to genuine health concerns may need to be reasonably

accommodated. Significantly long periods of absence for health reasons may itself be valid grounds to terminate employment under Indian law, subject to the terms and conditions of employment.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

If an employee goes off sick during the investigation, it is reasonable to adjourn the investigation until the employee is fit to return to work. Difficulties arise if it is a prolonged absence. The absence may necessitate a referral to an occupational health expert and it may be necessary to seek medical advice as to whether the employee can continue to participate in the investigation. It may be that reasonable accommodations should be considered to ensure that the employee can continue to participate. Such situations may impinge on the investigator's ability to conclude the investigation. In that instance, it would be prudent for the investigator to document all attempts to involve the employee in the investigation and to assess whether it can be concluded without the further involvement of the employee.

Last updated on 11/10/2023



## 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?



## China

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

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Often the tests or standards applied by external agencies (such as the police or regulators) in their investigations vary significantly in comparison to those that apply for internal investigations that are focused on potential disciplinary action against an accused employee. For example, the standard of proof required for taking an internal disciplinary measure is one of a preponderance of probability and does not require the employer to establish guilt beyond a reasonable doubt, which is the standard applied in criminal proceedings. Depending on the circumstances, conducting or continuing an internal investigation can also place the organisation in a better position to collaborate with external agencies such as the police or a regulator in their investigations, and be better prepared to share information that such agencies may request. It may also help demonstrate that the organisation does not tolerate potential violations of law or its policies and that it proactively investigates and addresses such issues. This may also help in protecting innocent members of management from liability from external agencies. To that extent, a parallel criminal or regulatory investigation may not normally be a reason for the organisation to suspend its internal investigation.

In the context of sexual harassment claims, the complainant has the right to file a police complaint against the alleged harasser (and the organisation must support her in doing so). However, a parallel police investigation would not take away the organisation's responsibility to address the grievances through its IC, which would be expected to complete its proceedings within 90 days.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Workplace investigations can originate from criminal investigations or proceedings. It may be that an employer only becomes aware of a matter through the involvement of the police (An Garda Síochána) or regulatory bodies.

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue that any internal investigation should be put on hold, on the basis that it will harm any regulatory

investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulation investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

Employers will also have to consider their reporting obligations to An Garda Síochána. If the matter relates to fraud, misuse of public money, bribery, corruption or money laundering, for example, reporting obligations arise under section 19 of the Criminal Justice Act 2011. A failure to report information that an employer knows or believes might be of material assistance in preventing the commission of an offence, or assisting in the apprehension, prosecution or conviction of another person may be guilty of an offence.

Also, the Irish Central Bank's (Individual Accountability Framework) Act 2023 (the Act) was signed into law on 9 March 2023 but has not yet been enacted. The framework provides scope for a senior executive accountability regime, which will initially only apply to banks, insurers and certain MiFID firms. However, its application may be extended soon. The Act forces employers to engage in disciplinary action against those who may have breached specific "Conduct Standards".

Last updated on 11/10/2023

## 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?

### 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

## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Concerning SH cases, the IC must supply a copy of the preliminary findings to the complainant and accused (where both are employees of the organisation) to allow them to make their representations before final findings and recommendations are shared. The IC's final report with recommendations for disciplinary action, if any, must also be shared with both parties.

For other forms of misconduct, it is not mandatory to share the details of the fact-finding investigation itself. However, if disciplinary action is contemplated and a disciplinary inquiry is necessary against the employee under investigation, the relevant details of the evidence gathered against the individual will need to be shared with him or her as part of the charge sheet. On the other hand, where no disciplinary inquiry is being conducted after an investigation (eg, if there is no merit in the allegations), the employer may choose to not share the investigative findings and only inform the individual that no further action is being taken.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

The employee whose actions are the subject of the investigation must be advised of the outcome of the investigation. They are usually provided with a copy of the investigator's report.

Last updated on 11/10/2023

## 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?



### China

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

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



### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Please see question 22.

Last updated on 15/09/2022



### Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

The investigation report should be shared in full, unless there is some specific reason for not doing so. One example is where there is a possibility of a criminal investigation; in that instance, it may be appropriate not to share the full report. Occasionally, there may be several respondents involved in the complaint, and each respondent may only be entitled to the report that relates to them.

Last updated on 11/10/2023

## 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?

## China

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

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

## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

In misconduct cases, the next steps for an employer would depend on the outcome of the investigation. If

the investigation reveals that the employee has violated the terms of employment and the employer wishes to take disciplinary action (which may include dismissal, depending on the gravity of the misconduct), it would normally be necessary to conduct a disciplinary inquiry as per the principles of natural justice before any actual punishment is meted out. Such a disciplinary inquiry would normally require the issuance of a charge sheet, the appointment of an independent inquiry officer (who should not have been involved in the investigation or otherwise in a position of bias vis-a-vis the parties involved), and conducting disciplinary hearings, etc.

With SH complaints, once the investigation is concluded by the IC, the employer will be provided with a copy of the final report by the IC along with recommendations (ie, the disciplinary measures to be taken against the accused) for the employer to implement. The employer would then be required to act upon the recommendations shared by the IC within 60 days.

Last updated on 15/09/2022

## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

The investigator will usually set out recommendations within their report. It will then be up to the employer to act on those recommendations and to accept or reject the findings (if it were a fact-finding investigation). If, for example, a recommendation is made that the matter should proceed to a disciplinary hearing, the employer should then arrange such a hearing and nominate an impartial member of management to carry out the disciplinary hearing. In some instances, recommendations are made by investigators to provide training or update policies and such recommendations should be acted upon without delay. It may also be appropriate to notify a specific regulator of the outcome of the investigation.

Last updated on 11/10/2023

## 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?



## 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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

Please see question 22.

For SH complaints, the report would normally contain a complete record of interviews conducted, evidence provided and other associated artefacts.

While investigation reports for other forms of misconduct may be kept private (subject to observations in the prior response relating to disciplinary inquiries), whether or not the investigative report should be disclosed to external agencies such as the police or other regulators would be a subjective decision. Disclosure may be necessary where a demand is made by the external agency as per powers it enjoys under the law (to seek production of necessary documents or personnel Rules of legal privilege may also be important to assess if any information can be withheld based on client-attorney privilege).

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*

at Ogier

Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

Last updated on 11/10/2023

## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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 Romero/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 Romero/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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*  
at Jingtian & Gongcheng

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



## India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

There is no statutory guidance on this. It is common for employers to retain details of disciplinary proceedings on an employee's record for the entire duration of their employment.

It is also advisable to retain the details of any investigations or disciplinary proceedings for at least three years after an individual has been dismissed on account of such proceedings, as this is the general limitation period for raising claims of unfair dismissal. In labour matters, courts in India often allow delays in filing suit after the limitation period, meaning organisations sometimes make a practical call to retain details of investigations and disciplinary proceedings for longer.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

Irrespective of the outcome of the investigation, the fact that an employee was subject to an investigation is not the key issue. The key concern is whether any further action was taken as a result of the investigation. If a disciplinary process ensued, then it is the outcome of that disciplinary record and any subsequent appeal that would or would not be noted on an employee's record. If a disciplinary sanction were imposed then the length of time the sanction remains on the employee's record would depend on what is specified in the disciplinary policy.

Last updated on 11/10/2023



## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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

Last updated on 15/09/2022

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



### China

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

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



### India

Author: *Atul Gupta, Kanishka Maggon, Kopal Kumar*  
at Trilegal

The risk an employer may face would be quite subjective. For example, if an individual is suspended without pay, the individual may attempt to argue that the entire investigation should be set aside, as non-payment of salary affects an individual's ability to properly represent themselves. Material errors in disciplinary proceedings or not adhering to the rules of natural justice may result in disciplinary action being set aside, and potentially also orders for reinstatement of the employee with back pay (if the individual is protected by local labour laws) if the dismissal is found to be unfair or disproportionate to the gravity of the misconduct.

In addition to the above risks, in SH matters, if the IC constitution is incorrect or there are allegations of bias against a committee member, the whole investigation may be set aside and the organisation ordered to conduct a fresh inquiry through a properly constituted committee.

Last updated on 15/09/2022



## Ireland

Author: *Bláthnaid Evans, Mary Gavin*  
at Ogier

A failure to follow fair procedures in the investigation can have significant consequences.

Although the exception rather than the rule, an employee could challenge the investigation through injunctive proceedings if there is a breach of fair procedures. Such action would be taken before the High Court. Injunction proceedings may be brought while the investigation is ongoing, or just before its conclusion to prevent publication of a report making specific findings against an employee. A successful injunction may curtail any subsequent attempt to investigate the matter as allegations of penalisation, prejudice and delay may arise.

Errors during the investigation can also give rise to a complaint of constructive dismissal, with allegations that flaws in the procedure have fundamentally breached the implied term of mutual trust and confidence.

A flawed investigation can also undermine any disciplinary process and sanction that is imposed as a result. This commonly occurs when an employee has been dismissed following a disciplinary process launched on foot of the investigation. While dismissal may be an appropriate sanction, the dismissal can still be found to be unfair if there is a failure to follow fair procedures. An employee may challenge their dismissal before the WRC and the employer should be alive to not only an unfair dismissal complaint, but allegations of discrimination and penalisation.

Overall, to carry out a successful workplace investigation, an employer should consider taking advice at the earliest opportunity to ensure that the investigation can withstand challenges.

Last updated on 11/10/2023



## Switzerland

Author: *Laura Widmer, Sandra Schaffner*  
at Bär & Karrer

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).[1]

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.

Last updated on 15/09/2022

## Contributors



### China

Leo Yu

Yvonne Gao

Tracy Liu

Larry Lian

*Jingtian & Gongcheng*




### India

Atul Gupta

Kanishka Maggon

Kopal Kumar  
*Trilegal*

 Ireland

Bláthnaid Evans  
Mary Gavin  
*Ogier*

 Switzerland

Laura Widmer  
Sandra Schaffner  
*Bär & Karrer*

[www.internationalemploymentlawyer.com](http://www.internationalemploymentlawyer.com)