

Workplace Investigations

Contributing Editors

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

China

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

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

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Hong Kong

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The Employment Ordinance (EO), which is the primary legislation governing employment relationships in Hong Kong, does not provide for a statutory workplace investigation procedure.

The Labour Department of Hong Kong has, however, published a Guide to Good People Management Practices^[1] which recommends that employers lay down rules of conduct, grievance and disciplinary procedures. Such rules should be simple and clear, logical and fair, and in line with the provisions in the EO.

As part of risk management and internal controls, Hong Kong-listed companies are expected by The Stock Exchange of Hong Kong Limited (SEHK) to establish whistleblowing policies and systems for employees to raise concerns about possible improprieties with independent board members. Listed companies are also

expected to establish policies for the promotion and support of anti-corruption laws and regulations. Such policies and systems may include workplace investigation procedures.^[2] If a listed company chooses to not establish such policies and systems, it is required to explain how it could achieve appropriate and effective risk management and internal controls.

[1] Hong Kong Labour Department, “Guide to Good People Management Practices” (June 2019) <<https://www.labour.gov.hk/eng/public/wcp/practice.pdf>>.

[2] SEHK, Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited, Appendix 14, Provision D.2.6, D.2.7. SEHK, “Corporate Governance Guide for Boards and Directors” (December 2021) <https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/guide_board_dir.pdf>.

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India

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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.

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Switzerland

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

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02. How is a workplace investigation usually commenced?



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

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

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Hong Kong

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The circumstances in which an employer commences a workplace investigation may vary. However, it is common that an employer will consider it necessary to commence a workplace investigation upon receipt of a complaint concerning a fellow employee. Sometimes, the complaint may be made anonymously. If the employer considers there to be substance in the complaint, it may commence an investigation to find out the truth of the matter, resolve the complaint and, if necessary, improve its systems and controls to prevent the reoccurrence of any misconduct.

A workplace investigation may be warranted if the employer receives an enquiry from a regulator concerning its affairs or an employee's conduct. The investigation findings could enable the employer to respond to the regulator (which could be a mandatory obligation) and at the same time assess its risk exposure.

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India

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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.

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Switzerland

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Internal investigations are usually initiated after reports about possible violations of the employer's code of conduct, applicable laws or regulations have been submitted by employees to their superiors, the human resources department or designated internal reporting systems such as hotlines (including whistleblowing hotlines).

For an internal investigation to be initiated, there must be a reasonable suspicion (grounds).^[1] 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.^[2]

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

^[2] Klaus Moosmayer, *Compliance, Praxisleitfaden für Unternehmen*, 2. A. München 2015, N 314.

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

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When an employer is found to have engaged in misconduct of an employee, whether it has the right to suspend the employee from his/her duties and subject him/her to investigation, there are no explicit provisions in the existing labor law. Generally speaking, suspension of investigation arranged internally by

an employer is within the scope of autonomous management of the employer. However, such suspension of investigation is subject to certain restrictions, and the basic rights and interests of the employee must be guaranteed. For example, the employer should continue to pay social insurance fund for the employee.

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

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

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

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Hong Kong

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It may be appropriate to suspend an employee during a workplace investigation, for instance, where the investigation has revealed misconduct on his or her part (even on a preliminary basis), or his or her continued presence in the business would hinder the progress of the investigation. However, the employer will have to consider the relevant legislative provisions and the terms of the employment contract before making any decision on suspension.

Under section 11 of the EO, an employer may suspend an employee without pay pending a decision as to whether the employee should be summarily dismissed (up to 14 days) or pending the outcome of any criminal proceedings against the employee arising out of his or her employment (up to the conclusion of the criminal proceedings). If an employee is suspended as above, however, the employee may terminate his or her employment without notice or payment in lieu of notice.

It is more common for an employer to suspend an employee with pay during an investigation concerning his or her conduct rather than exercising its statutory right as mentioned above. This could avoid an unnecessary dispute with the employee concerned. Indeed, it is common for employers to include in employment contracts specific provisions to give themselves the right to suspend an employee with pay in certain circumstances. The provisions normally set out the circumstances in which the employer may exercise the right, the maximum period of suspension and other arrangements during the suspension period (eg, how the employee's entitlements under the employment contract are to be dealt with).

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India

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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.

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Switzerland

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

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

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



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

investigated, the investigator shall withdraw from the investigation.

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

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Hong Kong

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There are no statutory or regulatory requirements regarding the choice of investigator in workplace investigations. However, it is good practice to have the investigation conducted by persons who have been trained to do so as investigations may involve intricate issues. It is also important that the investigators are perceived to be impartial and fair. For that reason, the investigators should be individuals who are not involved in the matter under investigation.

Complex cases or cases that involve a senior employee may require someone more senior within the company to lead and oversee the conduct of the investigation. This also applies where it is foreseeable that the investigation may lead to disciplinary action, summary dismissal of the employee or a report to an authority.

Engagement of external parties or professional advisors may be necessary if the conduct under investigation is serious or widespread and may lead to regulatory consequences, or if the employer does not have the requisite expertise to handle the investigation. Lawyers (whether in-house counsel or external lawyers) may be the best fit to conduct a workplace investigation to ensure that legal professional privilege attaches to documents and communications created during the investigation (please see question 14).

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India

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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.

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Switzerland

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

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

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



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

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

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Hong Kong

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If the investigation is conducted in a manner that is contrary to an express term of the employment contract or the implied obligation of trust and confidence of the employer under common law (please see question 11), the employee may have a claim for breach of contract and possible remedies may include declaratory and injunctive relief against the investigation.

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India

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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.

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Switzerland

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

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



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

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

As for the legal system for witness protection, PRC's criminal procedure laws stipulate a relatively detailed legal system for witness protection, such as establishing a crime of retaliating against a witness; making public a witness's personal information such as name, address, employer and contact information for the purpose of protecting the personal safety of the witness; using assumed names in the indictments; and so on. However, there are relatively few legal provisions regarding the legal protection of witness in civil

procedure, and provisions only regulate the expenses that may be incurred by the witness for testifying in court. For instance, Article 77 of the Civil Procedure Law of the PRC (Amended in 2021) provides, "The necessary expenses incurred by a witness in fulfilling his obligation to testify in court, including transportation, accommodation and meals, as well as the loss of salaries, shall be borne by the losing party. If a party applies for a witness to testify, the costs and expenses shall be advanced by the party; if the people's court notifies a witness to testify without the application by a party, the costs and expenses shall be advanced by the people's court. "

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Hong Kong

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Under Hong Kong law, the employee has an implied duty to obey lawful instructions from his or her employer and to serve the employer with fidelity and good faith during the term of his or her employment. A lawful instruction from an employer may include a reasonable request for the employee to participate and provide information in the workplace investigation. If the employee refuses to comply with such instruction or is obstructive or provides untrue or misleading information, it could constitute a ground for summary dismissal under the EO and at common law.

That said, in general terms, an employer should not compel any employee to testify against a co-worker, particularly if such a co-worker is a senior colleague, as evidence provided under compulsion may not be helpful to the investigation.

Employees who act as witnesses must be treated as per their contractual and statutory rights, including the right against self-incrimination. If the investigation involves allegations of discrimination on the ground of sex, race or disability, the employer should ensure that the witnesses will not be victimised or treated less favourably than other employees.

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India

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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.

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Switzerland

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.^[1] 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).^[2]

^[1] 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.

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

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



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

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

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Hong Kong

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If physical evidence contains data relating to an individual, from which the identity of the individual can be ascertained,^[1] the data would constitute personal data under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO). The PDPO sets out several data protection principles that the employer must comply with while processing personal data, including:^[2]

- personal data must be collected for a lawful purpose related to a function or activity of the employer and should not be excessive for this purpose. An internal investigation would be regarded as a lawful purpose;
- personal data must be accurate and not kept longer than is necessary;
- personal data must not be used for a purpose other than the internal investigation (or other purposes for which the data was collected) unless the employee consents to a new use or the new use falls within one of the exceptions provided in the PDPO;
- personal data must be safeguarded against unauthorised or accidental access, processing or loss; and
- the employee whose personal data has been collected has the right to request access to and correction of his or her personal data retained by the employer.

If an employer wants to gather evidence through employee monitoring, it should ensure that the act of monitoring complies with the data protection principles of the PDPO if the monitoring activity would amount to the collection of personal data. The Privacy Commissioner for Personal Data has issued guidelines to employers on the steps they can take in assessing whether employee monitoring is appropriate for their businesses.^[3] As a general rule, employee monitoring should be conducted overtly. Further, those who may be affected should be notified in advance of the purposes the monitoring is intended to serve, the circumstances in which the system will be activated, what personal data (if any) will be collected and how the personal data will be used.

Covert surveillance of employees should not be adopted unless it is justified by relevant special circumstances. Employers should consider whether there is reason to believe that there is an unlawful activity taking place and the use of overt monitoring would likely prejudice the detection or collection of evidence.^[4] Even if covert monitoring is justified, it should target only those areas in which an unlawful activity is likely to take place and be implemented for a limited duration of time.

^[1] PDPO section 2.

^[2] PDPO Schedule 1.

^[3] PCPD, “Privacy Guidelines: Monitoring and Personal Data Privacy at Work” (April 2016) <https://www.pcpd.org.hk/english/data_privacy_law/code_of_practices/files/Monitoring_and_Personal_Data_Privacy_At_Work_revis_Eng.pdf>.

^[4] Ibid at paragraph 2.3.3.

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India

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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.

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Switzerland

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

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.^[2] 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.

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

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

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

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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.



Hong Kong

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As part of an investigation, an employer may search objects or files that are the company's property (eg, electronic devices given by the employer for business purposes and emails or messages stored on the company's server) without prior notice and the employee's consent is not needed. The employer, however, has no right to search an employee's possessions (eg, a private smartphone) without the employee's consent.

To avoid arguments as to who a particular object belongs to, employers may specify in internal policies what is to be regarded as a corporate asset and could be subject to a search in a workplace investigation.

Concerning an employee's possessions, even if he or she consents to a search, it is good practice for the employer to conduct the search in the presence of the employee or an independent third party who can act as a witness to the search. If the employer suspects that a criminal offence has been committed and that a search of the employee's possessions would reveal evidence, the employer should consider reporting its suspicion to the police, as they have wider legal powers to search.^[1]

^[1] Usually upon execution of a warrant.



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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.



Switzerland

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

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

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

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

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



China

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

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Hong Kong

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Hong Kong does not have a comprehensive legislative framework relating to whistleblowing. Therefore, in general, employers are free to establish whistleblowing policies and procedures and confer such protections on whistleblowers as they see fit. That said, companies listed on the Main Board of the SEHK are expected to establish a whistleblowing policy and system for employees to voice concerns anonymously about possible improprieties in the companies' affairs. If a listed issuer deviates from this practice, it must explain the deviation.^[1]

When an investigation involves whistleblowing, the employer needs to comply with the relevant policy and system and provide the whistleblower with such protections as stated in the policy. The employer should not ignore a complaint simply because it was made anonymously, and should ascertain the substance of the complaint to decide whether a full-blown investigation is warranted.

In addition, the employer should seek to establish a secure communication channel with the whistleblower to gather more information about the complaint or misconduct while maintaining the confidentiality of his or her identity. If the complaint is serious, the employer may consider referring the complaint to a law enforcement agency or regulator as they would be better placed in protecting the anonymity of the whistleblower while proceeding with the investigation. That said, employers generally have no obligation to report internal wrongdoing to any external body (please see question 25 for exceptions). The employer may assess whether it is appropriate to do so on a case-by-case basis.

[1] The Corporate Governance Code, Appendix 14 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited.

Last updated on 27/11/2023



India

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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.

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Switzerland

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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.

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10. What confidentiality obligations apply during an investigation?



China

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Although there are no specific laws or regulations regulating the extent of confidentiality obligation employers or the investigators shall comply with, in practice, the confidentiality obligation of both parties usually originates from the confidentiality agreement between the employee and the employer, as well as

general provisions on protection of personal information and right of privacy, etc.

In this regard, it is advisable to require the relevant personnel responsible for handling the suspension for investigation to sign a confidentiality agreement or a letter of commitment, and require them to pay attention to the protection of the personal information and privacy of the complainant and other relevant personnel, for the purpose of avoiding extra losses caused by the occurrence of disputes relating to right of reputation, right of privacy and personal information leakage during the investigation.

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Hong Kong

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Workplace investigations should usually be conducted on a confidential basis to preserve the integrity of the investigation, avoid cross-contamination of evidence and maintain the confidentiality of the employee under investigation. This means that those involved in the investigation (ie, the subject employee and any material witnesses) should be made aware of the fact and substance of the investigation on a need-to-know basis.

While the extent of the confidentiality obligations are usually governed by the employer's internal policies and the employment contract, there are circumstances where the employer has a statutory duty to keep information unearthed in the investigation confidential. For instance, if it is found that certain property represents proceeds of an indictable offence^[1] or drug trafficking^[2], or is terrorist property^[3], the employer should report its knowledge or suspicion to the Joint Financial Intelligence Unit (JFIU) as soon as is reasonably practicable and avoid disclosure to any other person as such disclosure may constitute "tipping off". Another example is if a workplace investigation is commenced in response to a regulatory enquiry, the employer may be bound by a statutory secrecy obligation and may not be at liberty to disclose anything about the regulatory enquiry to anyone including those who are subject to the workplace investigation. For example, section 378 of the Securities and Futures Ordinance (SFO) imposes such a secrecy obligation on anyone who is under investigation or assists the Securities and Futures Commission (SFC) in an investigation.^[4]

^[1] OSCO section 25A(5). A person who contravenes the section is liable on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1 year.

^[2] DTROPO section 25A(1). A person who contravenes the section is liable on conviction on indictment to a fine of \$500,000 and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1 year.

^[3] UNATMO section 12(1). A person who contravenes the section is liable on conviction to a fine and to imprisonment for 3 years, or upon summary conviction to a fine of \$100,000 and to imprisonment for 1 year.

^[4] A person who fails to maintain secrecy is liable upon conviction on indictment to a maximum fine of \$1 million and imprisonment for up to two years (or upon summary conviction, to a maximum fine of \$100,000 and imprisonment for up to six months).

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India

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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.

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Switzerland

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

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

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

[\[1\]](#) 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.

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



China

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Although there are no explicit provisions of law or policy requiring employers to provide specific information of allegations to investigated employees, in practice, at the early stage of investigation, in order to avoid alerting the investigated employee and reduce the possibility that the investigated employee may destroy the relevant evidence, the employer usually will not disclose the information of allegations to the investigated employee at the beginning of investigation. At the later stage of an investigation, when the employer has already obtained main evidence, the employer usually will properly disclose to the investigated employee the allegations that are clearly known by the employer and have sufficient evidence, and listen to the counterparty's opinions or argument, for the purpose of obtaining more information or getting the employee's confession.

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Hong Kong

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An employer's internal policies or the employment contract may provide that an employee under investigation should be given certain information concerning the allegations raised against him or her. Such policies or terms should be followed and failure to do so may result in a claim for breach of contract or constructive dismissal by the employee. Even where there are no express provisions, the employer still owes an implied obligation of trust and confidence towards the employee at common law, which requires the employer not to, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.^[1] In the context of an internal investigation, the implied duty would require the employer to conduct the investigation and reach its findings reasonably and rationally following the evidence available and in good faith. This would normally require that sufficient information about the allegations made against the employee be provided to him or her such that he or she has the opportunity to properly respond to the allegations before any disciplinary action is taken or any decision about his or her employment is made.

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

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India

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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.

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Switzerland

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

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.^[3]

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)).^[4] 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).

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

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

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

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

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



China

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

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

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Hong Kong

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at Slaughter and May

Subject to any internal policies and terms of the employment contract, an employer would have discretion as to whether the identity of the complainant, witnesses or sources of information for the investigation should be kept confidential. In general, the employer should consider how the confidential treatment or its absence would affect the conduct and outcome of the investigation. The disclosure of the identity of the complainant in some cases may be necessary for the employee under investigation to respond in a meaningful way. On the other hand, both the complainant and witnesses may be more forthcoming in providing information if he or she is assured that his or her identity will not be made known to the person under investigation (especially if the latter is senior management personnel). A balance should be struck between the interests of the complainant or witnesses in maintaining confidentiality and the need for the employee under investigation to make a proper response to the allegations made. In any case, the employer should follow its whistleblowing policy if there is one (as discussed in question 9), and take into account practical and statutory considerations relating to confidentiality (as discussed in question 10).

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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.

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Switzerland

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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's 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.^[1]

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

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

confidential?



China

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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.

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Hong Kong

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In general terms, NDAs can be used and indeed are commonly used to keep the fact and substance of a workplace investigation confidential. However, NDAs will not be effective in preventing the disclosure of information which is in the public interest or is important for safeguarding public welfare in matters of health and safety. Further, several laws in Hong Kong provide that disclosures as a result of compliance with a requirement made by the relevant authorities will not be treated as a breach of any restriction imposed by contract or otherwise by law.[\[1\]](#)

[\[1\]](#) The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the Organized and Serious Crimes Ordinance (Cap. 455), and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)

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India

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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.

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Switzerland

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In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure

agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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14. When does privilege attach to investigation materials?



China

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

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Hong Kong

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Legal professional privilege may attach to investigation materials if they are generated for the sole or dominant purpose of giving or obtaining legal advice (legal advice privilege); or created with the sole or dominant purpose of either obtaining or giving advice about or obtaining evidence to be used in an actual or reasonably contemplated litigation (litigation privilege).^[1] Legal advice privilege applies to confidential communications between lawyers and their clients, whereas litigation privilege may extend to communications between lawyers, clients and third parties. The employer may withhold disclosure of any materials that are subject to either legal advice or litigation privilege.

In the context of a workplace investigation, internal interview records are protected by legal advice privilege if the dominant purpose of creating those records is to seek legal advice on potential disciplinary action against the employee. Such interview records are protected by litigation privilege if they are created to obtain evidence in an actual or reasonably contemplated litigation.

It should be noted that the point in time at which the sole or dominant purpose is judged is when the document is created. In other words, a document is not covered by litigation privilege if it was not created for litigation purposes but was subsequently used to obtain legal advice for litigation.^[2] On a practical point, if the employer would like to minimise disclosure of the investigation by claiming privilege over relevant materials, it may wish to limit the number of documents created and persons to which they are

circulated to avoid potential waiver of privilege.

[1] White Book 2023, 24/5/16, 24/5/18; Litigation privilege applies to adversarial proceedings, but not inquisitorial or administrative proceedings (White Book 2023, 24/5/28).

[2] White Book 2023, 24/5/18.

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India

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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.

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Switzerland

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

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

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

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



China

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

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

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Hong Kong

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Absent any right conferred by the employment contract or the relevant internal policy, employees do not have a right under Hong Kong law to be accompanied or have legal representation during an investigation meeting or interview. While the employee being investigated is entitled to seek his or her own legal advice during the investigation, employers have discretion on whether to allow the employee to be accompanied or represented by his or her legal adviser in an investigation meeting or interview. That said, to ensure fairness in the process and to avoid unnecessary allegations of undue influence, the employer may consider allowing the employee to have legal representatives present, especially if serious allegations are made against the employee and the outcome of the investigation could have a significant impact on the employee's future.

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India

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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.

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Switzerland

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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.^[2] 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.^[3]

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

^[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.

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



China

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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



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Unless the employment contract or the relevant internal policies specify otherwise, there is no automatic right under Hong Kong law for a works council or trade union to be informed or involved in a workplace investigation.

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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.



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.

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



China

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

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

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Hong Kong

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at Slaughter and May

It could be stressful for employees to be involved in a workplace investigation, whether as the victim, the subject of an investigation or a witness. More transparency in the process would help reduce stress. This could be achieved by providing the relevant employees with the timeline for different stages of the investigation and regular updates.

The employer may also consider providing mental health support to the employees concerned, for example in the form of counselling services or medical consultations. Where appropriate, the employer may also

consider making reasonable adjustments to the employee's workload and work schedule to facilitate his participation in the investigation.

Last updated on 15/09/2022



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.

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Switzerland

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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.^[1] 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.^[2]

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

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

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



China

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

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

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Hong Kong

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If unrelated matters are revealed during the investigation, the employer should consider whether an investigation is needed. If yes, the employer should decide whether it is appropriate to incorporate the new matters into the scope of the existing investigation by expanding the terms of reference. However, it may not be appropriate to do so if different individuals are concerned or such inclusion would unduly complicate or delay the progress of the existing investigation. If that is the case, the employer should commence a separate investigation.

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India

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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.

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Switzerland

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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.

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



China

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

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Hong Kong

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at Slaughter and May

As discussed in question 11, an employer owes an implied obligation of trust and confidence towards its employees under common law. This means that an employer cannot disregard a genuine complaint made by an employee even if the employee is under internal investigation. The employer may have put in place an employee grievance handling policy, which should be followed when handling the employee's grievance.

If the grievance raised relates to how the workplace investigation is being conducted (for example, it is alleged that the investigator has a conflict of interest or is biased), the employer should consider suspending the investigation until this grievance is properly addressed to ensure fairness. However, if the grievance is nothing but an attempt to delay or hinder the investigation, the employer may be entitled to proceed with the investigation regardless. The employer should therefore carefully assess the nature and validity of any grievance raised in each case. The employer should also consider its rights under the employment contract if the employee is being uncooperative or obstructive.

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India

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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).

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Switzerland

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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).

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



China

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

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

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Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

If the employee under investigation goes off sick, the employer should ascertain the medical condition of the employee and when he or she is likely to return to fitness. If the employee is unlikely to return to work for a reasonable time, the employer should consider what adjustments can be made to the investigation process to continue with the investigation. If the employee's input is necessary for the conclusion of the investigation, the employer may invite the employee to provide information by way of a written questionnaire or to attend a virtual meeting. However, the employee may not necessarily agree to these proposals, especially if he or she is unwell. In such circumstances, the employer may not be able to conclude the investigation in the absence of the employee.

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India

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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.



Switzerland

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The time spent on the internal investigation by the employee should be counted as working time^[1]. 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).

^[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

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The PRC law is silent on how to deal with the conflict between internal investigation and criminal or regulatory investigation. In general, the employer should cooperate with the criminal or regulatory investigation being conducted by the investigating authority to avoid hindering official business.

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

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Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
at Slaughter and May

Where there is a parallel criminal or regulatory investigation, the employer should handle the workplace investigation with extra care and ensure that it complies with all applicable legal requirements or lawful requests made by the relevant authorities concurrently. While there may be reasons why the employer wants to progress with its investigation as soon as possible, the employer should not take any steps that hinder or obstruct the parallel investigations. Therefore, it may be appropriate for the employer to stay its workplace investigation if its continuation may prejudice the parallel investigations.

The employer may also find itself duty-bound to stay the workplace investigation if it is subject to statutory secrecy obligations vis-à-vis the relevant law enforcement agency or regulatory body. As mentioned in question 10, several laws in Hong Kong impose secrecy obligations on any person who has acquired confidential information about certain law enforcement agencies or regulatory bodies and the investigations being conducted. The employer should assess whether they could continue with the workplace investigation without breaching secrecy obligations. The employer should take a prudent approach and may discuss with the relevant authority before proceeding further with its workplace investigation.

Depending on the nature of the matter, authorities in Hong Kong handling a criminal or regulatory investigation may be empowered to seize, or compel persons who are the subject of an investigation or assisting in such an investigation (which may include the employer) to produce, documents or evidence that are relevant to the matters being investigated. For example:

- the police or the Independent Commission Against Corruption may, under a search warrant (or in certain circumstances, without a warrant), inspect and take possession of articles or documents inside the premise of the employer they reasonably suspect to be of value to the investigation of the suspected offence; and
- the SFC or the Competition Commission may, under the SFO or Competition Ordinance (as applicable), require the employee under investigation or the employer to produce documents, attend interviews, and, specifically for the SFC, provide the investigator with all assistance he or she can give. Both authorities may also obtain a warrant from the Hong Kong courts to search the premise of the employer and obtain documents or information it reasonably believes to be relevant to its investigation.

Documents created and evidence gathered by the employer during its workplace investigation (such as witness statements or investigation reports) may be subject to production requests of, or may be seized by, the authorities mentioned above (unless legal professional privilege is attached). The employer should ensure that it complies with all lawful requests from the authorities.

Last updated on 27/11/2023



India

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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.

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Switzerland

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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).

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



China

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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.

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Hong Kong

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The employer is generally not obliged under Hong Kong law to inform the employee under investigation of the outcome of the investigation absent any express obligation under the employment contract, even where the investigation has led to a decision to terminate the employee. However, to avoid any unnecessary claim of unlawful dismissal or dismissal without a valid reason, the employer should inform the employee of the reason for his or her termination, even if the investigation results may not be shared in full with the employee.

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India

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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.

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Switzerland

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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.^[1] 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.^[2]

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

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

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



China

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

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

Last updated on 29/11/2023



Hong Kong

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The employer is generally not obliged to share the investigation report or the findings with the employee under Hong Kong law, absent any express obligations under the employment contract.

However, according to the PDPO, the content of the investigation report or meeting minutes related to the employee (including any findings and opinions expressed in such documents) are likely to constitute the personal data of the employee under investigation. In that case, the employee may have a right under the PDPO to obtain a copy of such documents by making a statutory data access request after the workplace investigation is completed. The employer's obligation to comply with such request is subject to certain exemptions under Part 8 of the PDPO, which include (among others) an exemption on the provision of personal data held for the prevention, preclusion or remedying of unlawful or seriously improper conduct, and the disclosure of which would be likely to prejudice the said purpose or directly or indirectly identify the person who is the source of the data.^[1] Therefore, where there is a parallel criminal proceeding or investigation that has not been concluded, the employer may reject an employee's data access request on the basis that the requested disclosure may prejudice the prevention and remedy of the unlawful conduct. Further, any information protected by legal privilege is also exempt from disclosure under Part 8 of the PDPO.^[2]

If the requested documents also contain the personal data of any other third parties (such as other co-

workers of the employee who have also participated in the investigation), the employer should always redact or erase such data before providing the requested documents to the employee under investigation, unless the relevant third parties have consented to the disclosure of the data.

[1] PDPO sections 20 and 58(1)(d).

[2] PDPO sections 20 and 60.

Last updated on 15/09/2022



India

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Please see question 22.

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Switzerland

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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).[1] 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.[2]

[1] 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 | hrtdaily.ch> (last visited on 27 June 2022).

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24. What next steps are available to the employer?



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

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Hong Kong

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If the outcome of the investigation reveals that misconduct has been committed by the employee, the employer may consider whether it should allow the employee to defend him or herself against such findings. If the employment contract or relevant internal policies specify a right to be heard on the part of the employee through a disciplinary hearing before any actions can be taken against him or her, such procedures should be followed.

Assuming the employer maintains its findings that the employee has committed misconduct after the conclusion of the disciplinary hearing (if any), the employer may consider taking one of the following disciplinary actions against the employee depending on the nature and severity of the misconduct:

- Verbal or written warning – this is a common form of disciplinary action. The employer may consider including the nature of the misconduct and the potential consequences of repeating such misconduct (for example, termination of employment) in the warning to be given to the employee;
- Termination with notice – the EO allows employers and employees to terminate the employment with notice. It is not necessary to give reasons for the termination unless the employee concerned has been employed for at least 24 months, in which case the employer shall demonstrate a valid reason for the termination as defined under the EO;
- Suspension – the employer may suspend the employee without pay for up to 14 days in circumstances where the misconduct concerned justifies a summary dismissal, or where a decision on summary dismissal is pending. The employee may also be suspended where there is a criminal proceeding against him or her relevant to the investigation, until the conclusion of the criminal proceeding (as discussed in question 3);[\[1\]](#) and
- Summary dismissal – the employer may terminate an employment contract without notice if the employee is found to have:
 - wilfully disobeyed a lawful and reasonable order;
 - failed to duly and faithfully discharge his duties;
 - committed fraud or acted dishonestly; or
 - been habitually neglectful in his duties.[\[2\]](#)

[\[1\]](#) EO section 11(1).

[\[2\]](#) EO section 9. The employer is also entitled to summarily dismiss an employee on any other ground on which he would be entitled to terminate the contract without notice at common law.

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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.

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Switzerland

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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.^[1]

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

^[1] David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 180 et seq.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

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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.

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Hong Kong

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As mentioned in questions 21, 22 and 23, under Hong Kong law, the employer is generally not obliged to actively disclose the findings of a workplace investigation to any party.

Having said that, the employer should be aware of certain statutory disclosure requirements that may become applicable as a result of the matters revealed during the workplace investigation. For example, if the investigation reveals or gives rise to any knowledge or suspicion that any property represents the proceeds of an indictable offence^[1], drug trafficking^[2], or terrorism^[3], the employer is required to report its knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to the JFIU as soon as is reasonably practicable (even where the investigation has not yet been concluded). Employers who are licensed corporations must also provide the SFC with information about whether departing licensed employees were the subject of an internal investigation in the six months prior to his/her departure. If the internal investigation commences after the departure of the licensed employee, the licensed corporation should notify the SFC as soon as practicable^[4].

In any event, as in question 14, if any documents related to the investigation are protected by legal professional privilege, they can generally be kept confidential and would not be subject to disclosure even if the employer is subject to a mandatory reporting or disclosure obligation.

[1] OSCO section 25A(1).

[2] DTROPO section 25A(1).

[3] UNATMO section 12(1).

[4] Frequently Asked Questions on "Disclosure of investigations commenced by licensed corporations in the notifications of cessation of accreditation" issued by the SFC on 21 May 2019

<<https://www.sfc.hk/en/faqs/intermediaries/licensing/Disclosure-of-investigations-commenced-by-licensed-corporations#627D0257CCA8410189F48C1A68443112>>.



India

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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.

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

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

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

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

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

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



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

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Hong Kong

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There is no legal requirement in Hong Kong on this. However, since the investigation records will likely contain personal data, employers should be mindful of the requirement under the PDPO that personal data should not be kept for longer than necessary.^[1]

According to the Code of Practice on Human Resources Management published by the Privacy Commissioner for Personal Data, generally, employment data about an employee can be kept for the entire duration of his or her employment, plus a recommended period of no more than seven years after the employee leaves employment unless there is a subsisting reason that justifies a longer retention period. A longer retention period may be justified where there is ongoing litigation or a parallel investigation. Even where it is deemed necessary to retain the outcome of the investigation concerning a departed employee, the employer should ensure that other personal data on the employee's record (that is unrelated to the purpose of retention) are erased after the expiry of the recommended retention period.

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

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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.

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

From a data protection point of view, only data that is in the interest of the employee (eg, to issue a reference letter) may be retained during the employment relationship. In principle, stored data must be deleted after the termination of the employment relationship. Longer retention may be justified if rights are still to be safeguarded or obligations are to be fulfilled in the future (eg, data needed regarding foreseeable legal proceedings, data required to issue a reference letter or data in relation to a non-competition clause).^[1]

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

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

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

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

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

Protection Law of the PRC provides that relevant illegal acts shall be recorded in the employer's credit files and disclosed to the public.

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

It should be noted that a compliance investigation may also involve the employer's communication and investigation reporting with overseas authorities, or overseas institutions' direct access to information from the employer's domestic systems. If the employer conducts cross-border transmission of such personal information, it shall also meet one of the conditions set out in Article 38 of the Personal Information Protection Law of the PRC (i.e. passing the security assessment organized by the national cyberspace administration authority, obtaining certification from a professional institution concerning the protection of personal information or entering into a standard contract with an overseas recipient). Violations of the above provisions may result in civil, administrative and even criminal liability.

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If the employer failed to comply with a requirement that is expressly stipulated in the employment contract or employee handbook (such as a procedural requirement to hold a disciplinary hearing or to provide certain information to the employee), the employer could be liable for breaching an express term in the employment contract.

Even where the employment contract does not contain express provisions for the conduct of an internal investigation, the employer is under an implied obligation of trust and confidence under common law (as discussed in question 11), which requires it to conduct the investigation and reach its findings reasonably and rationally in accordance with the evidence available and in good faith.^[1] If the employer reached a decision that no reasonable employer would have reached, the conduct of the investigation may be in breach of the employer's implied obligation of trust and confidence.

If the error in the investigation has led to a termination of employment (whether by way of summary dismissal or termination by notice), the employee may be able to bring a statutory claim for wrongful dismissal, unlawful dismissal or dismissal without a valid reason (as applicable).^[2] If such a claim is successful, in addition to ordering the employer to pay monetary compensation, the court or tribunal may also make a reinstatement order (an order that the employee shall be treated as if he had not been dismissed) or re-engagement order (an order that the employee shall be re-engaged in employment on terms comparable to his or her original terms of employment) for the affected employee.

The employer may also be liable for unlawful discrimination under Hong Kong law if the investigation has been conducted in a discriminatory manner or the outcome of the investigation reflects differential and less favourable treatment of the employee concerned based on grounds of sex, marital status, disability, family status or race.

^[1] Chok Kin Ming v Equal Opportunities Commission [2019] HKCFI 755

^[2] EO sections 9 and 32K.

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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.

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

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

[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

[3] Pascal Grolimund in: Adrian Staehelin/Daniel Staehelin/Pascal Grolimund (editors), Zivilprozessrecht,

Zurich/Basel/Geneva 2019, 3rd Edition, §18 N 24a.

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

[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

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

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

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