

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May

Clare Fletcher at Slaughter and May

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



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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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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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