

Workplace Investigations

Contributing Editors

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

China

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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.

Last updated on 29/11/2023

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.

Last updated on 15/09/2022

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



China

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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.

Last updated on 29/11/2023



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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.

Last updated on 15/09/2022



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