

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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## 01. What legislation, guidance and/or policies govern a workplace investigation?

### Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*  
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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<sup>[1]</sup> 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.<sup>[2]</sup> 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.

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[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](https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Corporate-Governance-Practices/guide_board_dir.pdf)>.

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- The Constitution of the Federal Republic of Nigeria, 1999 (as amended)
- The Criminal Code Act
- Penal Code Law
- Money Laundering (Prohibition) Act 2011 (as amended)
- Freedom of Information Act 2011
- Terrorism (Prevention) Act 2013
- Independent Corrupt Practices and other related offences Act 2000
- Code of Conduct Bureau and Tribunal Act
- Companies and Allied Matters Act 2020
- Nigerian Code of Corporate Governance 2018
- Economic Financial Crime Commission (Establishment) Act 2004
- Investment Securities Act 2007
- Central Bank of Nigeria Act 2007
- Banks and Other Financial Institutions Act 2020
- Whistleblowing Programme under the Ministry of Finance

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## Singapore

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A workplace investigation is usually governed by the employer's internal grievance policy or contractual guidelines found in the employment contract or employee handbook. In the absence of the same, the default governing regime is as set out by the Ministry of Manpower (MOM) and the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) in its guidelines and advisories, which include:

- the Tripartite Advisory on Managing Workplace Harassment;
- the TAFEP Grievance Handling Handbook; and
- the Tripartite Guidelines on Fair Employment Practices.

In addition, section 14(1) of the Employment Act 1968 provides that an employer is required to conduct "due inquiry" before dismissing an employee covered under the Employment Act 1968 without notice for misconduct. The Singapore Courts take the view that "due inquiry" suggests some sort of process in which the employee concerned is informed about the allegations and the evidence against him or her so that he or she has an opportunity to defend him or herself with or without evidence during the investigation process.

Further, there are numerous cases where the Singapore High Court has alluded to or implicitly accepted the application of the implied term of mutual trust and confidence in employment contracts that would oblige the employer to act reasonably and fairly during the investigation, even though it is worth noting that the Singapore Court of Appeal has stated that the status of the implied term of mutual trust and confidence has not been settled in Singapore and that the Appellate Division of the Singapore High Court has stated that "[i]t remains an open question for the Court of Appeal to resolve in a more appropriate case, ideally with facts capable of bearing out a claim based directly on the existence of the implied term" (see [81]-[82] of *Dong Wei v Shell Eastern Trading (Pte) Ltd* and another [2022] SGHC(A) 8).

Hence, any references to the application of the implied term of mutual trust and confidence in Singapore in this article must be read in light of the above.

The current position is expected to change in the second half of 2024, with the passing of Singapore's first workplace fairness law, the Workplace Fairness Legislation. On 4 August 2023, the Singapore government announced that it has accepted the final set of recommendations by the Tripartite Committee on

Workplace Fairness in respect of the upcoming Workplace Fairness Legislation. The Tripartite Committee on Workplace Fairness recommended, among other things, that employers are required to put grievance-handling processes in place. It is therefore expected that the Workplace Fairness Legislation may contain requirements on how and when a workplace investigation should be conducted.

This article sets out the current position, before the Workplace Fairness Legislation was enacted, and will be updated when appropriate.

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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?

### 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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### Nigeria

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A workplace investigation is conducted to verify alleged misconduct within a workplace.[\[1\]](#) Once a

complaint is made regarding wrongdoing, misconduct or unethical behaviour by an employee or group of employees within a workplace, an investigation is required to confirm the complaint and if it is confirmed, the body in charge of supervising the employees (usually the HR specialist, disciplinary committee or line managers) determine and implement necessary corrective or disciplinary actions.

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[1] [Conducting Internal Investigations In Organisation - Health & Safety - Nigeria \(mondaq.com\)](#)

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## Singapore

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A workplace investigation usually commences with the receipt of feedback, a complaint or a grievance, by named or anonymous persons, in respect of a work-related matter or event, or the conduct of an employee.

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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).<sup>[1]</sup> If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exist, the case must be closed. If grounds for reasonable suspicion exist, the appropriate investigative steps can be initiated by a formal investigation request from the company management.<sup>[2]</sup>

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[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)?



## Hona Kona

 **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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## Nigeria

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Yes, an employee can be suspended during an investigation to allow the employer to investigate the allegations against the employee unhindered and without undue interference by that employee. A suspension under the law merely prevents the employee from discharging the ordinary functions of his or her role without any deprivation of his rights during the period of the suspension. Thus, unless there is an express provision in the contract of employment or employee's handbook stating that the employee can be suspended with or without half pay, the employee would be entitled to a full salary.

Further, the duration for which the employee may be suspended should be as contained in the employee's contract, employee's handbook, or letter of suspension.

In the recent case of *GLOBE MOTORS HOLDINGS NIGERIA LIMITED v. AKINYEMI ADEGOKE OYEWOLE (2022)*, the court held, *"Since suspension is not a termination of the employment contract nor a dismissal of the employee, the implication is that the employee is still in continuous employment of the employer until he is recalled or formally terminated or dismissed. Pending his recall or dismissal, a suspended employee is entitled to his wages or salary during the period of suspension, unless the terms of the contract of employment or the letter of suspension itself is specific that the suspended employer will not be paid salaries during the period of suspension"*.

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## Singapore

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Yes. Section 14(1) read with 14(8) of the Employment Act 1968 provides that an employee can be suspended during a workplace investigation

However, pursuant to section 14(8) of the Employment Act 1968, the employer:

- may suspend the employee from work for:
  - a period not exceeding one week; or
  - such longer period as the Commissioner for Labour may determine on an application by the employer; but
- must pay the employee at least half the employee's salary during the period the employee is suspended from work.

Section 14(9) of the Employment Act 1968 further states that if the inquiry does not disclose any misconduct on the employee's part, the employer must immediately restore to the employee the full amount of the withheld salary.

In addition to the above legislative requirements, the company is required to also comply with its policies relating to such suspensions.

In terms of the threshold to be crossed before a suspension can take place, the Singapore Courts have highlighted that suspending an employee quickly as part of a "knee-jerk" reaction to an unclear or unspecific allegation with dubious credibility is arguably a breach of the implied term of mutual trust and confidence that exists in all employment relationships ([56] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123). The employer would need to have proper and reasonable cause to suspend an employee for disciplinary purposes ([56(d)] of *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577; [2013] SGHC 32), for example, where multiple credible sources claimed that they had been sexually harassed by an employee, and the employer had strong grounds to believe that if the employee was not suspended, the safety and wellbeing of the other employees in the organisation would be threatened.

In contrast, an employer is not entitled to suspend an employee during a workplace investigation where the employer has only received one complaint that has not been properly described or substantiated with sufficient details from an unverified or unreliable source against an employee who has a good track record with the organisation. This is especially so if the complaint is so unclear that further inquiries should be made before the allegation can be properly ascertained and characterised (see also [51] of *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123).

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## Switzerland

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

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

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## 04. Who should conduct a workplace investigation,

# are there minimum qualifications or criteria that need to be met?



## 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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## Nigeria

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Typically, the legal department, the chief compliance officer, the HR manager, the audit committee or any other committee as may be set up by the company may conduct a workplace investigation. However, in other instances, the company may engage the services of independent external personnel to assist with conducting an internal investigation.

The minimum qualification or criteria of the person conducting the investigation should be as contained in the relevant company policies. Criteria may include independence, objectivity and impartiality.

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## Singapore

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While there are no prescribed minimum qualifications or criteria that need to be met for any person conducting a workplace investigation, the person handling employee grievances should be someone who:

- has been authorised and empowered to do so by the employer;
- is not in a position of actual or potential conflict; and
- is independent and impartial.

The grievance handler should be familiar with the organisation's investigative procedure, have attended the relevant training to ensure full compliance with the same; and have a good understanding of the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices.

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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<sup>[1]</sup>, if the allegations concerned are quite substantive and, in any case, where an increased degree of independence is sought.

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<sup>[1]</sup> 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?



## 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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## Nigeria

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Generally, issues surrounding workplace investigations are usually embedded in either the employee's contract or handbook, which is binding on the employee. Thus, an employee cannot validly bring an action to stop the investigation unless his rights as guaranteed by the Constitution, the Employee's handbook, and other laws such as a right to a fair hearing are violated during the investigation.

Consequently, the employee may apply to the National Industrial Court for an order of interim relief against his or her employer restraining further prejudicial investigation.





## Singapore

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The employee under investigation is entitled to apply to the Court to stop the investigation. However, the employee bears the legal burden of showing that the employer has, for instance:

1. failed to comply with the organisation's grievance policy;
2. committed a serious breach of natural justice; and/or
3. breached the implied term of mutual trust and confidence when investigating the matter, and that such a breach will, unless remedied, cause such prejudice to the employee that it would be more just for the investigation to be stopped than to be allowed to continue.

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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?**



## Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*  
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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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## Nigeria

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The employee's contract, employee handbook or company policies typically mandate an employee to cooperate and participate in good faith in any lawful internal investigation undertaken by the company, and also protects an employee acting as a witness in an internal investigation. Some of the legal protections available to an employee acting as a witness during workplace investigations are freedom from intimidation, threats or the loss of employment.

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## Singapore

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Singapore law does not impose any statutory or legal obligation on an employee to act as a witness in the investigation. Accordingly, an employer does not have the power to compel its employees to act as witnesses in an investigation.

Notwithstanding this, an employer may require an employee to assist in investigations pursuant to specific contractual obligations in the employee's terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). Further, a request for an employee to provide evidence of an event that he or she knows of may reasonably be deemed to be a lawful and reasonable directive from an employer.

Consequently, an employee's refusal to act as a witness may amount to an act of insubordination that may attract disciplinary action by the employer.

Employers requiring employees to act as witnesses in an investigation must ensure that they comply with the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices and the TAFEP Grievance Handling Handbook.

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## Switzerland

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Due to the employee's duty of loyalty towards the employer and the employer's right to give instructions to its employees, employees generally must take part in an ongoing investigation and comply with any summons for questioning if the employer demands this (article 321d, Swiss Code of Obligations). If the employees refuse to participate, they generally are in breach of their statutory duties, which may lead to measures such as a termination of employment.

The question of whether employees may refuse to testify if they would have to incriminate themselves is disputed in legal doctrine.<sup>[1]</sup> However, according to legal doctrine, a right to refuse to testify exists if criminal conduct regarding the questioned employee or a relative (article 168 et seq, Swiss Criminal Procedure Code) is involved, and it cannot be ruled out that the investigation documentation may later end up with the prosecuting authorities (ie, where employees have a right to refuse to testify in criminal proceedings, they cannot be forced to incriminate themselves by answering questions in an internal investigation).<sup>[2]</sup>

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<sup>[1]</sup> Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

<sup>[2]</sup> Same opinion: Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, published on hrtoday.ch, last visited on 17 June 2022.

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



### Hong Kong

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at Slaughter and May

If physical evidence contains data relating to an individual, from which the identity of the individual can be ascertained,<sup>[1]</sup> 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:<sup>[2]</sup>

- 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.<sup>[3]</sup> 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.<sup>[4]</sup> 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.

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[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](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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## Nigeria

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When gathering evidence, the person being investigated is protected by the Constitution, the Freedom of Information Act and the Nigerian Data Protection Regulation (NDPR), among others.

The Constitution, particularly section 37, guarantees the right of a person to privacy.

The NDPR is the main data protection regulation in Nigeria. It regulates the processing and transfer of personal data.

Further, the Freedom of Information Act, 2011 prohibits the disclosure of information gathered during an investigation to the public.

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## Singapore

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The employer may collect the personal data of an individual without the individual’s consent or from a source other than the individual, where it is necessary for any investigation according to section 17(1) read with paragraph 4 of Part 3 of the Third Schedule of the Personal Data Protection Act 2012 (PDPA). Under section 2(1) of the PDPA, “investigation” means an investigation relating to:

- a breach of an agreement;
- a contravention of any written law, or any rule of professional conduct or other requirement imposed by any regulatory authority in the exercise of its powers under any written law; or
- a circumstance or conduct that may result in a remedy or relief being available under any law.

Under the Banking Act 1970, a bank and its officers cannot disclose customer information to third parties, subject to certain exceptions. An employer carrying out a workplace investigation does not fall within any of the exceptions.

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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.<sup>[1]</sup>

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.<sup>[2]</sup> The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

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

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

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

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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.<sup>[1]</sup>

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[\[1\]](#) Usually upon execution of a warrant.

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## Nigeria

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Yes, an employer can search the possessions or files of an employee as part of an investigation where the employee's contract or handbook authorises such a search and there is a reasonable suspicion of wrongdoing.

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## Singapore

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The employer is not allowed to search employees' personal possessions or files as part of an investigation without the employee's consent. However, such consent may be explicitly provided for in the terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). The employer may, however, search the employees' company email accounts and files if these are stored on the company's internal systems or devices.

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## 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.[\[2\]](#)

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[\[1\]](#) 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.

Last updated on 15/09/2022

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



### Hong Kong

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

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.<sup>[1]</sup>

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.

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<sup>[1]</sup> 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



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Consideration must be given to the confidentiality or anonymity of the whistleblower, when an investigation involves whistleblowing.

Last updated on 15/09/2022



### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Under the Prevention of Corruption Act 1960 and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (CDSCA), in any civil or criminal proceeding, no witness is obliged to disclose the name or address of any informer, or disclose any information that might lead to his or her discovery concerning offences such as corruption, drug trafficking, and money laundering, save where:

- in any proceeding for the offence, the Court, after a full inquiry into the case, is of the opinion that the informer wilfully made, in his complaint, a material statement that he knew or believed to be false or did not believe to be true; or
- in any other proceeding, the court is of the opinion that justice cannot be fully done between the parties without the discovery of the informer.

In line with the above, employers should therefore keep the informer's identity confidential upon receiving a complaint relating to corruption, drug trafficking, money laundering, and other serious offences prescribed in the second schedule of the CDSCA.

Last updated on 15/09/2022



## Switzerland

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

If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

Last updated on 15/09/2022

# 10. What confidentiality obligations apply during an investigation?



## Hong Kong

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

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<sup>[1]</sup> or drug trafficking<sup>[2]</sup>, or is terrorist property<sup>[3]</sup>, 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.<sup>[4]</sup>



[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).

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Workplace investigations should be kept strictly confidential to protect the parties involved in the investigation from victimisation. Some of the confidential obligations that apply during investigations are the identities of the parties involved in the process (whether as a complainant, respondent or witnesses), the confidentiality of reports, recordings and other documents generated or discovered during the investigation, as well as attorney-client privilege between the employee and his or her attorney, provided that such privilege is within the bounds of the law.

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

The existence and scope of any confidentiality obligations would generally depend on the specific terms of the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations.

In the context of investigations into workplace harassment issues, the Tripartite Advisory on Managing Workplace Harassment issued by the MOM provides that the identities of the alleged harasser, affected persons and the informant should be protected unless the employer assesses that disclosure is necessary for safety reasons.

This may change with the enactment of the Workplace Fairness Legislation referred to in question 1. The Tripartite Committee on Workplace Fairness recommended, among other things, that employers should protect the confidentiality of the identity of persons who report workplace discrimination and harassment, where possible. As such, it is expected that the upcoming Workplace Fairness Legislation may impose certain confidentiality obligations on an employer during an investigation.

Last updated on 15/09/2022

## Switzerland

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

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

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.<sup>[2]</sup>

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.<sup>[3]</sup>

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<sup>[1]</sup> Wolfgang Portmann/Roger Rudolph, BSK OR, Art. 328 N 1 et seq.

<sup>[2]</sup> Claudia Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 202.

<sup>[3]</sup> David Rosenthal et al., *Praxishandbuch für interne Untersuchungen und eDiscovery*, Release 1.01, Zürich/Bern 2021, p. 133.

Last updated on 15/09/2022

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

### **Hong Kong**

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

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

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

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

An employee must be given the full details of the allegations against him or her to enable the employee to make adequate representations against the complaints made against him or her.

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

There is no specific list of information about the allegations against the employee under investigation that must be provided to the employee under investigation. However, the information provided to the employee must be sufficiently clear and specific so that the employee understands the case being made against him or her and can respond to it. The employee should also be made aware of the evidence against him or her and be given a reasonable opportunity to respond.

Last updated on 15/09/2022

## Switzerland

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

As a result of the employer's duty of care (article 328, Swiss Code of Obligations), employees under investigation have certain procedural rights. These include, in principle, the right of the accused to be heard. In this context, the accused has the right to be informed at the beginning of the questioning about the subject of the investigation and at least the main allegations and they must be allowed to share their view and provide exculpatory evidence.[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)).<sup>[4]</sup> Furthermore, the employer may refuse, restrict or defer the provision of information where the company's interests override the employee's, and not disclose personal data to third parties (article 9 paragraph 4, Swiss Federal Act on Data Protection). The right to information is also not subject to the statute of limitations, and individuals may waive their right to information in advance (article 8 paragraph 6, Swiss Federal Act on Data Protection). If there are corresponding requests, the employer must generally grant access, or provide a substantiated decision on the restriction of the right of access, within 30 days (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 paragraph 4, Ordinance to the Federal Act on Data Protection).

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[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.

Last updated on 15/09/2022

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



### Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*  
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).

Last updated on 15/09/2022



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Typically, the identities of the complainant, witnesses and sources of information for the investigation are kept confidential.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Such information can be kept confidential, subject to questions 10 and 11. However, disclosure may nevertheless be compelled in court or arbitration proceedings as well as by disclosure requests or directions by the police or statutory authorities, including the MOM.

Last updated on 15/09/2022



## Switzerland

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

As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused'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.[\[1\]](#)

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

Last updated on 15/09/2022

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



## Hong Kong

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

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.[\[1\]](#)

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[\[1\]](#) 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)

Last updated on 15/09/2022



## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

NDAs are usually part of an employee's contract and, as such, create a contractual obligation between the parties privy to it. However, where the subject matter of an investigation borders on matters of a criminal nature, it might be impossible for parties to the NDA to continually uphold the obligation under the NDA because the parties have an obligation to the state to disclose facts of a criminal nature.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Yes, NDAs can be used to keep the fact and substance of an investigation confidential. There are no express prohibitions against such NDAs under Singapore law. However, information or evidence covered by the NDA may still be discoverable in court or arbitration proceedings; and may also be subject to disclosure requests or directions by the police or statutory authorities, including the MOM.

Last updated on 15/09/2022



## Switzerland

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

In addition to the above-mentioned statutory confidentiality obligations, separate non-disclosure agreements can be signed. In an internal investigation, the employee should be expressly instructed to maintain confidentiality.

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



### Hong Kong

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

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).<sup>[1]</sup> 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.<sup>[2]</sup> 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.

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

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

Last updated on 27/11/2023



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Privilege attaches to investigation materials when a legal practitioner facilitates the internal investigation. Documents prepared during a workplace investigation will not automatically attract legal professional privilege, unless the investigation is facilitated by a legal practitioner.

Last updated on 15/09/2022



### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Litigation privilege may attach to investigation materials if there was a reasonable prospect of litigation at the time of the creation of the materials, and the materials were created for the dominant purpose of a pending or contemplated litigation.

Legal advice privilege may attach to investigation materials if the materials were created to seek or obtain legal advice; or if the materials contain legal advice that is so embedded or has become such an integral part of the materials that the legal advice cannot be redacted from them. If the legal advice is separable from the materials, then only the parts of the materials containing legal advice will be protected by privilege.

Last updated on 15/09/2022



## Switzerland

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

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

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

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

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<sup>[1]</sup> Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

Last updated on 15/09/2022

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



## Hong Kong

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

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.

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

The Constitution guarantees the right of every person to legal representation during investigations and interrogations by law enforcement agencies. However, our labour legislation is silent on whether an employee has a right to be accompanied or have legal representation during an investigation. Whether an employee has a right to legal representation will depend on the policy of the employer as well as the nature of the interrogation.

In practice, an employee is usually not accompanied or represented legally during an investigation. However, unless it is stipulated in the employee's policy, nothing prohibits the employee from being accompanied or represented legally during an investigation.

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## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

This is dependent on the employee's employment contract and the employer's internal grievance policies and investigative processes. There is no free-standing legal entitlement for an employee to have legal representation. Employers may, at their discretion, consider allowing an employee to bring a colleague or to have legal representation if such a request is reasonable, such as to provide emotional support to the employee who may view the disciplinary hearing as an unnerving and stressful experience or so that the employee may be advised and informed of his or her legal rights in respect of the investigation commenced against him or her.

Last updated on 15/09/2022

## Switzerland

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

In the case of an employee involved in an internal investigation, a distinction must be made as to whether the employee is acting purely as an informant or whether there are conflicting interests between the company and the employee involved. If the employee is acting purely as an informant, the employee has, in principle, no right to be accompanied by their own legal representative.<sup>[1]</sup>

However, if there are conflicting interests between the company and the employee involved, when the employee is accused of any misconduct, the employee must be able to be accompanied by their own legal representative. For example, if the employee's conduct might potentially constitute a criminal offence, the involvement of a legal representative must be permitted.<sup>[2]</sup> Failure to allow an accused person to be accompanied by a legal representative during an internal investigation, even though the facts in question are relevant to criminal law, raises the question of the admissibility of statements made in a subsequent criminal proceeding. The principles of the Swiss Criminal Procedure Code cannot be undermined by alternatively collecting evidence in civil proceedings and thus circumventing the stricter rules applicable in criminal proceedings.<sup>[3]</sup>

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

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

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

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

Last updated on 15/09/2022

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



### 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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### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

The law is silent on whether a member of a trade union has the right to be informed or involved in the investigation. Typically, this is dependent on the employee's contract, handbook or other policies of the employer.

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## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

An employee who is a member of a works council or trade union has the right to seek assistance from the works council or trade union representative (whichever is applicable) and have the works council or trade union involved in resolving the grievances.

For unionised companies, the grievance procedure and the role of the union representative are usually set out in the collective agreement entered into between the company and the works council or trade union. In some organisations, the employee handbook or grievance policy will also state when the trade union representative will be involved in the investigation process.

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## 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?

## Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*  
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

## Nigeria

Author: *Adekunle Obebe*

at Bloomfield LP

An employee being investigated has a right to be heard before a decision being made by the employer. Further, the body responsible for investigating the employee must be independent, so as not to be considered biased.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Employers may provide support, such as:

1. offering counselling for its employees to encourage open discussions and communication on any issues that they may be facing or clarify any questions they may have in respect of the investigation process;
2. reminding its employees of its zero-retaliation policy; and, if need be
3. making the necessary work arrangement to minimise potential interaction that would further aggravate the conflict or situation between the employees involved.

Employers may also inform employees of the external resources available to them if they require any assistance in respect of the investigation provided by external parties such as TAFEP, the Singapore National Employers Federation, National Trade Union Congress, and Legal Aid Bureau.

Last updated on 15/09/2022



## Switzerland

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

The employer does not generally need to provide specific support for employees that are subject to an internal investigation. The employer may, however, allow concerned employees to be accompanied by a trusted third party such as family members or friends.<sup>[1]</sup> These third parties will need to sign separate non-disclosure agreements before being involved in the internal investigation.

In addition, a company may appoint a so-called lawyer of confidence who has been approved by the employer and is thus subject to professional secrecy. This lawyer will not be involved in the internal investigation but may look after the concerned employees and give them confidential advice as well as inform them about their rights and obligations arising from the employment relationship.<sup>[2]</sup>

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

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

Last updated on 15/09/2022

## 18. What if unrelated matters are revealed as a result

## of the investigation?



### Hong Kong

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

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.

Last updated on 15/09/2022



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Where unrelated matters are revealed as a result of the investigation, the body investigating the employee is expected to inform the employee of the new matters and give him adequate time to respond.

However, there are exceptional cases where a crime is revealed during an investigation. In such instances, the employer is required to report its findings to the police for investigation and possible prosecution.

Last updated on 15/09/2022



### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

If unrelated matters that require further investigation are revealed as a result of the investigation, the employer should take the necessary steps to investigate these matters, where relevant, under the employer's grievance reporting, investigation and disciplinary processes. This should be done separately and independently from the existing investigation. Please note that section 424 of the Criminal Procedure Code imposes a legal duty on any person who is aware that another has committed certain specified offences to "immediately" report the matter to the police, "in the absence of reasonable excuse" not to do so. Failure to comply with this requirement is punishable with imprisonment for up to six months, and/or a fine.

Last updated on 15/09/2022



### Switzerland

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

There are no regulations in this regard in the Swiss employment law framework. However, in criminal

proceedings, the rules regarding accidental findings apply (eg, article 243, Swiss Criminal Procedure Code for searches and examinations or article 278, Swiss Criminal Procedure Code for surveillance of post and telecommunications). In principle, accidental findings are usable, with the caveat of general prohibitions on the use of evidence.

Last updated on 15/09/2022

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



### Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*  
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.

Last updated on 15/09/2022



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

It is not unusual for an employee under investigation to raise a grievance during the investigation. This grievance may be on the same subject matter as the complaint being investigated or may disclose new facts outside the scope of the matter being investigated.

Where the issue discloses new facts, the employer is required to investigate those facts without suspending the investigation. However, where the grievance relates to the same subject matter as the complaint being investigated, the employer may either suspend the investigation to allow the investigation to recognise the grievance and the complaint against the employer or proceed with the investigation while noting that the matter disclosed is being or will be investigated.

Last updated on 15/09/2022



### Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

The employer should require the employee to raise the grievance under the company's existing grievance reporting, disciplinary and investigation processes so that the grievance, to the extent that it is relevant to the current investigation, can be investigated together. Otherwise, the grievance can be dealt with separately and independently of the existing investigation.

Last updated on 15/09/2022



## Switzerland

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

In the context of private internal investigations, grievances initially raised by the employee do not usually have an impact on the investigation.

However, if the employer terminates the employment contract due to a justified legal complaint raised by an employee, a court might consider the termination to be abusive and award the employee compensation in an amount to be determined by the court but not exceeding six months' pay for the employee (article 336 paragraph 1 (lit. b) and article 337c paragraph 3, Swiss Code of Obligations). Furthermore, a termination by the employer may be challenged if it takes place without good cause following a complaint of discrimination by the employee to a superior or the initiation of proceedings before a conciliation board or a court by the employee (article 10, Federal Act on Gender Equality).

Last updated on 15/09/2022

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



## 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.

Last updated on 15/09/2022



## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

The investigation would be suspended until the employee returns from sick leave. The investigation will immediately restart upon the return of the employee.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

If the employee under investigation has already responded to the allegations made against him or her and his or her participation is no longer required at this stage in the investigation, the employer may proceed with the investigation even while the employee is off sick.

However, if the employee under investigation has not responded to the allegations made against him or her and his or her participation is still required in the investigation, the company may exercise its discretion to pause the investigation until the employee can assist in the investigations. To prevent an employee from using a medical condition as an excuse to delay or avoid the investigation, the company may require the employee to provide specific medical documentation to address the issue of the employee's ability to participate in the investigation and to adjust the investigation process accordingly. For instance, instead of scheduling an in-person interview, the company may send a list of written questions for the employee to answer, and may also extend timelines for responding, etc.

If the employee is unable to return to work for the foreseeable future, the employer may consider reaching a provisional outcome based on the available evidence, which would be subject to change when the employee under investigation can return to work.

Last updated on 15/09/2022



## Switzerland

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

The time spent on the internal investigation by the employee should be counted as working time<sup>[1]</sup>. The general statutory and internal company principles on sick leave apply. Sick leave for which the respective employee is not responsible must generally be compensated (article 324a paragraph 1 and article 324b, Swiss Code of Obligations). During certain periods of sick leave (blocking period), the employer may not ordinarily terminate the employment contract; however, immediate termination for cause remains possible.

The duration of the blocking period depends on the employee's seniority, amounting to 30 days in the employee's first year of service, 90 days in the employee's second to ninth year of service and 180 days thereafter (article 336c paragraph 1 (lit. c), Swiss Code of Obligations).

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<sup>[1]</sup> 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?





## 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



## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Where an employee has committed misconduct at work that is also the subject of a police investigation, the employer can conduct its own investigation and does not have to await the outcome of the criminal proceedings. The Supreme Court, in the case of *Dongtoe v CSC Plateau State* (2001), held that it is preposterous to suggest that the administrative body should stay its disciplinary jurisdiction over a person who had admitted criminal offences.

Further, the police or regulator may compel the employer to share evidence with it in the interests of

justice.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

Generally, there are no issues with an internal investigation being conducted in parallel to a criminal or regulatory investigation. The employer should inform the authorities of the ongoing internal investigation and comply with lawful directions from the authorities, for example, to share evidence gathered during the investigation with the authorities.

Last updated on 15/09/2022



## Switzerland

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

The actions of the employer may carry through to a subsequent state proceeding. First and foremost, any prohibitions on the use of evidence must be considered. Whereas in civil proceedings the interest in establishing the truth must merely prevail for exploitation (article 152 paragraph 2, Swiss Civil Procedure Code), in criminal proceedings, depending on the nature of the unlawful act, there is a risk that the evidence may not be used (see question 27 and article 140 et seq, Swiss Civil Procedure Code).

Last updated on 15/09/2022

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



## Hong Kong

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

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.

Last updated on 15/09/2022



## Nigeria

Author: *Adekunle Obebe*

at Bloomfield LP

The employee under investigation must be informed of the outcome of the investigation as soon as a decision is reached.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

The employee under investigation should be told of the findings that have been made against the employee, the disciplinary action (if any) that will be taken against the employee and any avenue or timeline for the employee to appeal the outcome of the investigation.

Last updated on 15/09/2022



## Switzerland

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

Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the investigation report, provided that the report and the data contained therein relate to the employee.<sup>[1]</sup> In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.<sup>[2]</sup>

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

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

Last updated on 15/09/2022

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



## Hong Kong

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

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.<sup>[1]</sup> 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.<sup>[2]</sup>

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.

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<sup>[1]</sup> PDPO sections 20 and 58(1)(d).

<sup>[2]</sup> PDPO sections 20 and 60.

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

The employer needs to balance the interests of the employee investigated, and the interests of other persons involved in the investigation such as the complainant and witnesses. Thus, the employer may either share the findings of the investigation or the full investigation report, provided that the identities of all other persons involved in the investigation are kept confidential.

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

It would suffice for a summary of the investigation's findings to be shared with the complainant and the respondent employees.

Last updated on 15/09/2022

## Switzerland

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

In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).<sup>[1]</sup> Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.<sup>[2]</sup>

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<sup>[1]</sup> Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, in: *HR Today*, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

Last updated on 15/09/2022

## 24. What next steps are available to the employer?



### Hong Kong

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

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);<sup>[1]</sup> 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.[\[2\]](#)

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[\[1\]](#) 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.

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Upon the completion and receipt of the findings of the investigation, the employer may affirm the employee's innocence or take disciplinary action against them.

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

The employer should take any follow-up steps required and keep track of whether any appeal against the outcome of the investigation is lodged. If any appeal is lodged, the employer should handle this appeal following its internal procedure. To the extent necessary, any disciplinary measures against the respondent employee should be stayed pending the outcome of the appeal.

Last updated on 15/09/2022

## Switzerland

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

If the investigation uncovers misconduct, the question arises as to what steps should be taken. Of course, the severity of the misconduct and the damage caused play a significant role. Furthermore, it must be noted that the cooperation of the employee concerned may be of decisive importance for the outcome of the investigation. The possibilities are numerous, ranging, for example, from preventive measures to criminal complaints.[\[1\]](#)

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

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

## 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?



### Hong Kong

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

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<sup>[1]</sup>, drug trafficking<sup>[2]</sup>, or terrorism<sup>[3]</sup>, 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<sup>[4]</sup>.

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.

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<sup>[1]</sup> OSCO section 25A(1).

<sup>[2]</sup> DTROPO section 25A(1).

<sup>[3]</sup> UNATMO section 12(1).

<sup>[4]</sup> 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>>.

Last updated on 27/11/2023



### Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

Investigation findings may be disclosed to the employee and every other person having an interest in the investigation. Where it is discovered that a crime has been committed, the investigation findings may be

disclosed to the regulators or police.

Typically, interview records are kept private and will not be disclosed unless it is interest of justice.

Last updated on 15/09/2022



## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

A summary of the investigation's findings should be disclosed to the employee who lodged the grievance and the employee under investigation.

If there are parallel criminal or regulatory investigations, the investigation findings should also be disclosed to the authorities.

Interview records or transcripts should be kept private unless disclosure is required by a court order or at the direction of the authorities.

Last updated on 15/09/2022



## Switzerland

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

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

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

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

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

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

Last updated on 15/09/2022

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



## Hong Kong



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

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.<sup>[1]</sup>

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.

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<sup>[1]</sup> DPP2 (in Sch. 1) and PDPO section 26.

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

The law does not provide for the time the outcome of the investigation may remain on the employee's record. However, this will depend on the employer's record-retention policies, which must comply with applicable data protection laws.

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
at Rajah & Tann Singapore

This depends on the company's internal disciplinary policy and the severity of the offence. For instance, a written warning issued against an employee for minor misconduct is usually kept in the respondent employee's file for one year and if the employee does not commit any further breaches during this time, the written warning will be expunged. However, if there is a finding of serious misconduct, particularly if such a determination results in the dismissal of the employee, these records are generally kept in the employee's file for the duration of time such records are statutorily required to be maintained.

Last updated on 15/09/2022

## Switzerland

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

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

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

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

Last updated on 15/09/2022

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



### Hong Kong

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

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.<sup>[1]</sup> 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).<sup>[2]</sup> 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.

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

[2] EO sections 9 and 32K.

Last updated on 15/09/2022

## Nigeria

Author: *Adekunle Obebe*  
at Bloomfield LP

- Violation of Fundamental Rights of the Employee
- Breach of Contract of Employment or wrongful termination

Last updated on 15/09/2022

## Singapore

Author: *Jonathan Yuen, Doreen Chia, Tan Ting Ting*  
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The employer may be exposed to legal action for a failure to properly conduct the investigation, including having such portions of the investigation set aside or held to be void by the courts, and be made to pay damages to the affected employee; or face investigation and administrative penalties by regulatory authorities such as the MOM.

In addition, after the Workplace Fairness Legislation comes into force, breach of its requirements may also expose the employer or culpable persons to potential statutory penalties. The Tripartite Committee on Workplace Fairness recommended, among other things, for the Workplace Fairness Legislation to provide for a range of penalties including corrective orders, work pass curtailment and financial penalties against employers or culpable persons, depending on the severity of the breach. It is thus expected that employers or culpable persons may be exposed to potential statutory penalties if the requirements of the Workplace Fairness Legislation are not complied with.

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## Switzerland

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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]

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[1] Cf. ATF 139 II 7.

[2] ATF 140 III 6 E. 3

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

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

[5] Decision of the Swiss Federal Court 6B\_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B\_22/2012 dated 11 May 2012 consid. 2.4.4.

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

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

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