

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May

Clare Fletcher at Slaughter and May

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

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.

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Ireland

Author: *Bláthnaid Evans, Mary Gavin*
at Ogier

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

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue that any internal investigation should be put on hold, on the basis that it will harm any regulatory investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulation investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

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

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

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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).

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Wynne Mok
Jason Cheng
Audrey Li
Slaughter and May



Ireland

Bláthnaid Evans
Mary Gavin
Ogier



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer

www.internationalemploymentlawyer.com