

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

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

Switzerland

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

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

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

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

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

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United Kingdom

Author: *Phil Linnard, Clare Fletcher*
at Slaughter and May

It may sometimes be difficult to draw a clear distinction between the property of the employer and employees' personal property, both physical and electronic, particularly where employees are increasingly working from home. Employers should ideally have a clear policy to delineate what is the employer's property.

Employees typically have a reasonable expectation of privacy at work, although how far this extends will depend on the circumstances of each case and the employer's policies.

When it comes to employees' personal possessions, a search should only be conducted in exceptional circumstances where there is a clear, legitimate justification. The employer should always consider whether it is possible to establish the relevant facts through the collection of other evidence. Even if the employee's contract specifies that it is permitted, employers would usually require explicit employee consent for the search to be lawful. The employee should be invited to be present during the search; if this is not feasible, another independent third party (such as a manager) should be present.

If the employee refuses to consent to a search of their personal possessions, their refusal should not be used to assume guilt; the investigator should explore why the employee has refused and seek to resolve their concerns if possible.

If the employer believes that a criminal offence has been committed it should consider involving the police, since they have wider powers to search individuals and their possessions.

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10. What confidentiality obligations apply during an investigation?



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.^[1]

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

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

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

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

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

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United Kingdom



Author: *Phil Linnard, Clare Fletcher*
at Slaughter and May

Workplace investigations should usually be conducted on a confidential basis, so that only those involved in the investigation are aware of its existence and subject matter. The need to maintain confidentiality about both the fact of the investigation, and any content discussed with an investigator, should be emphasised to all those involved. It may also be necessary to explain that a breach of confidentiality could be viewed as a disciplinary matter. Appropriate exceptions must, however, be made to allow employees to speak to any relevant employee or trade union representative, legal adviser and potentially the police or other regulators. Confidentiality provisions cannot override the rights of workers to make protected disclosures (see question 9).

In some situations, such as those involving a wide-ranging investigation into the organisation's working practices and culture, it may be more appropriate to investigate a more "open" basis, and inform employees and other stakeholders.

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Contributors



Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer



United Kingdom

Phil Linnard
Clare Fletcher
Slaughter and May