Workplace Investigations

Contributing Editors

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

01. What legislation, guidance and/or policies govern a workplace investigation?

Hong Kong

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

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[1] 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.[2] 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>.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

From an Italian employment law perspective, there is no specific body of legislation that governs investigations. However, several legal and case-law principles may be relevant concerning various specific aspects of investigations, and to which reference will be made below (eg, provisions under Law No. 300 of 1970, the so-called Workers' Statute regarding "controls on employees", both physical and "remote", or regarding "disciplinary proceedings").

In addition, and outside of the specific scope of employment law, other law provisions may have an impact on investigations, including those regarding privacy law (eg, Italian Legislative Decree No. 196 of 2003 and the Regulation (EU) No. 679 of 2016 (GDPR), regarding data protection and the related policies), whistleblowing (Law No. 179 of 2017 and Directive (EU) No. 1937 of 2019, regarding whistleblower protection) and criminal law (eg, Italian Criminal Procedure Code, providing rules for criminal investigation and Italian Legislative Decree No. 231 of 2001, regarding the corporate (criminal) liability of legal entities).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There is no specific legislation, guidance or policies covering investigations in the workplace. Issues such as the Personal Data Protection Law, invasion of privacy, and infringement of freedoms may arise regarding the related parties, subjects, methods, and results of investigations. In addition, court decisions have stated that "when there has been a violation of corporate order, an investigation of the facts may be conducted to clarify the nature of the violation, issue business instructions or orders necessary to restore the disturbed order or take disciplinary action against the violator as a sanction". The investigation or order must be reasonable and necessary for the smooth operation of the enterprise, and the method and manner of the investigation or order must not be excessive or restrain an employee's personality or freedom. In such a case, the investigation may be considered to be illegal and may constitute a tort.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

02. How is a workplace investigation usually commenced?

Hong Kong

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

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.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Generally speaking, a workplace investigation can commence either as a consequence of facts reported by employees or third parties (either anonymous or not), for instance within a whistleblowing procedure or as part of normal and periodical activity carried out by internal auditing.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

The trigger for an investigation in the workplace may be:

- when an employee makes a report (eg, a report of harassment, a report of misconduct by another employee, etc);
- when an investigation is conducted by the Labour Standards Inspection Office or another regulatory agency;
- when a criminal or illegal act is discovered in the workplace; or
- when an internal audit conducted by the company reveals a problem.

Last updated on 15/09/2022

Switzerland

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

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).[1] If no such grounds exist, the employer must ask the informant for further or more specific information. If no grounds for reasonable suspicion exists, 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.[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. 21.

[2] Klaus Moosmayer, Compliance, Praxisleitfaden für Unternehmen, 2. A. München 2015, N 314.

Last updated on 15/09/2022

03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

Hong Kong

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

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).

Last updated on 27/11/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*

at BonelliErede

In general, from an Italian employment law perspective, there is no specific legal rule governing the suspension of an employee during a workplace investigation.

However, it should be noted that:

- certain National Collective Bargaining Agreements (NCBAs) may provide, in particular circumstances, for the possibility of suspending (with pay) an employee (eg, when the employee is under criminal proceedings – as stated, for example, in the NCBA for executives of credit, financial and investment companies);
- according to well-established case law, the employer may suspend the employee from work (with pay) in the framework of a disciplinary procedure (which, according to Italian law, must be followed before applying any disciplinary sanction, including dismissal[1]), where the facts behind the procedure are sufficiently serious;
- certain case-law decisions have also stated that – even in the absence of a disciplinary procedure – the employer may suspend (with pay) the employee when it has very serious suspicions of an employee's unlawful conduct, and for the time that is strictly necessary to ascertain his or her liability.

The above may be done by the employer, for instance, if keeping the employee in service may cause a risk of tampering with evidence or a risk of damage to the physical safety of other employees or company property.

Normally, in the above-mentioned circumstances, the suspension is with pay and with job security.

[1] The steps of the disciplinary procedure can be summarised as follows: (i) the employer must send a letter to the employee in which the disciplinary facts are described in detail and precisely; (ii) the employee can submit his written or oral defence to the employer within five days from receiving the letter (or different term provided under applicable collective bargaining); during this period, the employer cannot take any punitive measures against the employee; (iii) after receiving the employee's defence (or, if the employee has not submitted any defence within the relevant term), the employer may serve the executive with a notice of dismissal (certain NCBAs set a term within which a sanction, if any, should be applied by the employer). Failure to comply with the procedure results in the dismissal being null and void. According to the law, the dismissal takes effect from the commencement of the disciplinary procedure itself.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Court precedent states that a valid requirement for a stay-at-home order is it "would not be considered to put employees at a legal disadvantage (deprive them of their rights and imposes obligations on them), except in exceptional cases where employees are legally entitled to request work, unless there are special circumstances such as discrimination in salary increases and the like." (Tokyo High Court decision 25 January 2012, All Japan Mariners' Union). Therefore, it is considered possible to order the employee to stay at home during the investigation period if necessary. Some companies stipulate in their work rules that they may order employees to take special leave or stay at home when an incident occurs that could be the subject of disciplinary action.

In principle, the payment of salary in full during the stay-at-home period is required. However, work rules may stipulate that an employee will not be paid during the investigation period, and in cases where the employee is clearly responsible and it is inappropriate to allow the employee to work (eg, where it is almost certain that the employee has embezzled money on the job), the employee may be ordered to stay at home without pay. In addition, if the work rules stipulate that an absence allowance under the Labour Standards Law (60% or more of wages) must be paid for the stay-at-home period, such an allowance may

be paid under the said rules.

Last updated on 15/09/2022

Switzerland

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

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

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

Last updated on 15/09/2022

04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

Hong Kong

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

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).

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*

at BonelliErede

In general, from an employment law perspective, there is no specific legal rule governing the minimum qualifications of who should conduct a workplace investigation. Generally speaking, a workplace investigation is carried out by the internal audit function, when there is one (generally in large companies), or by the HR or legal departments.

Outside the workplace, the employer may carry out investigations on the employee – normally without the latter knowing – through a private investigator. This investigation should be carried out to verify that the employee does not engage in conduct contrary to the company's interests (eg, unlawful competition, disclosure of confidential information, criminal breaches). In such cases, the private investigator must comply with specific rules, mainly found in Italian Royal Decree No. 773 of 1931, according to which the investigator must, among other things: hold a licence issued by the competent authority; and keep a register of the activities conducted daily.

In addition, if there is a suspicion that a crime has been committed, the company may appoint a criminal law lawyer to conduct their own defensive criminal law investigation, as provided by article 391bis and the Italian Criminal Procedure Code.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There are no specific qualifications or requirements for an investigator. In many cases, the investigation is handled by a department or employee as deemed appropriate by the company. In some cases, an outside attorney may be asked to handle the investigation. Also, when it is a serious matter for the company, a third-party committee may be formed and commissioned to conduct an investigation.

However, under the revision of the Whistleblower Protection Act, which came into effect in June 2022, entities employing 300 or more employees must designate a person (whistleblower response service employee) in charge of accepting internal whistleblowing reports, investigating internal whistleblowing reports, or taking corrective measures as a whistleblower response service provider. Entities with less than 300 employees must also make an effort to do the same.

The person designated as a whistleblower response service provider must not divulge the name, employee ID number, or other information that would enable whistleblower identification without a justifiable reason. Criminal penalties (fines of up to 300,000 yen) have been established for violations of this confidentiality obligation.

Last updated on 15/09/2022

Switzerland

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

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

[1] David Rosenthal et al., Praxishandbuch für interne Untersuchungen und eDiscovery, Release 1.01, Zürich/Bern 2021, p. 18.

Last updated on 15/09/2022

05. Can the employee under investigation bring legal action to stop the investigation?

Hong Kong

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

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.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

In principle, no. However, if the employee believes that, during the workplace investigation, there is a breach of his or her rights, he or she could act to protect them before the court (eg, through precautionary urgency proceedings under Article 700 of the Italian Civil Procedure Code.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There are very few cases in which an employee subject to an investigation can file a legal proceeding to have the investigation stopped. Theoretically, an employee may be able to file a lawsuit or a provisional disposition to stop the investigation if he or she has a legal right to request that the company stop the investigation, but usually a lawsuit or a petition for a provisional disposition alone will not stop an investigation from proceeding. Although a provisional injunction would conclude in a relatively short period, such a provisional injunction would be unlikely to be issued if the investigation is conducted properly.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

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*
at Slaughter and May

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.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

In general, employees must cooperate with a workplace investigation (as it is part of their general duty of diligence, as provided under article 2104 of the Italian Civil Code), and this may also include a duty to act as a witness.

In this respect, it must be pointed out that, even if the employee has a contractual duty to provide information requested by the employer, one limit to this principle could be, for example, self-incrimination.

However, caution is necessary during the interviews both with the employee under investigation and with co-workers, to avoid the risk of transforming the interview into what could be considered the de facto start of a disciplinary procedure. In other words, during the interview, the employer should only gather information on certain facts, and not put forward charges against the employee; otherwise, this could prevent or limit the employer’s possibility to take disciplinary action regarding the same facts.

Furthermore, employees who cooperate within the workplace investigation must be protected against any

retaliatory action directly or indirectly linked to their testimony (eg, as far as is possible, anonymity should be guaranteed, and disciplinary measures should apply to those who breach measures in place to protect the employee).

Apart from workplace investigations, employees are protected against retaliatory measures of any kind, which are always null and void and subject to appeal.

For a defensive criminal law investigation (see par. 4), the witness can refuse to testify; in this case, the criminal law lawyer may ask the prosecutor to interview the witness.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Interviewing co-workers is often conducted in internal investigations. Company employees are generally required to cooperate with company investigations, especially those who are in a position to instruct and supervise employees, or those who are responsible for maintaining corporate order, since cooperation with an investigation is itself the fulfilment of their duty to the company. Other employees are not compelled to cooperate with such an investigation unless it is deemed necessary and reasonable. No specific legal protection is provided for testifying in an investigation.

Last updated on 15/09/2022

Switzerland

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

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.[1] 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).[2]

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

[2] 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.

Last updated on 15/09/2022

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

Hong Kong

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

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

- 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.[3] 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.[4] 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>.

[4] Ibid at paragraph 2.3.3.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Several legal and case-law principles may be relevant depending on the kind of investigation, including the following:

- gathering evidence through employee "physical inspections and inspections on the employee's belongings": according to article 6 of the Workers' Statute, these inspections are generally prohibited. They are permitted only where necessary to protect company assets (in such cases, corporal inspections may be carried out, subject to trade union agreement or National Labour Inspectorate authorisation, provided that, for example, they are carried out outside the workplace, that employees are selected with an automatic selection tool, and that the dignity and confidentiality of employees are protected);
- gathering evidence through "audiovisual equipment and other instruments from which the possibility of remote control of employees' activities arises": according to article 4 of the Workers' Statute, remote systems cannot be directly aimed at controlling employees' activity, but can only be put in place for organisational, production, work safety or asset-protection needs (which may result in an indirect control over employees' activity), and may be installed before a trade union agreement or with previous authorisation from the National Labour Inspectorate; however, these rules do not apply to working tools in an employee's possession (see question 8) and, in any case, employees must be informed of the possibility of remote control;
- gathering physical evidence through so-called defensive controls: according to the most recent case law, "defensive controls" can be defined as investigations carried out by the company where it has a suspicion of unlawful conduct by its employees. These controls can be carried out within certain limits and restrictions provided by case law – even in the absence of the guarantees provided for in article 4 of the Workers' Statute.

In addition, when gathering physical evidence, there may be other provisions of law not strictly related to employment law that must be followed, for example, regarding privacy regulations (eg, minimisation of the use of personal data, collection of data only for specific purposes, and adoption of safety measures).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

When collecting physical evidence that contains personal information, the Personal Information Protection Law and its related guidelines apply. In addition, when collecting physical evidence that contains privacy information or an employee's photograph, care must be taken to ensure that the right to privacy and the image rights are not violated.

Last updated on 15/09/2022

Switzerland

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

The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.[1]

It can be derived from the duty to disclose and hand over benefits received and work produced (article 321b, Swiss Code of Obligations) as they belong to the employer.[2] The employer is, therefore, generally

entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

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

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

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

Last updated on 15/09/2022

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

Hong Kong

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

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.[1]

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[1] Usually upon execution of a warrant.

Last updated on 27/11/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*

at BonelliErede

In light of the legal and case-law principles as outlined above:

- see question 7 regarding employee “physical inspections and inspections on the employee’s belongings”;
- regarding “audiovisual equipment and other instruments from which the possibility of remote control of employees’ activities also arises”, article 4 of the Workers’ Statute provides for:
  - the prohibition of the use of audiovisual equipment and instruments of “direct” remote control (ie, whose sole purpose is to verify the manner, quality and quantity of working performance (eg, a camera installed in an office to film employees’ working activities, without any other purpose));
  - the possibility of carrying out controls through audiovisual equipment and “indirect” remote instruments (ie, instruments that serve different needs (organisational, production, work safety or company assets’ protection), but which indirectly monitor working activities (eg, a camera installed in a warehouse to prevent theft, but which indirectly monitors the activity of warehouse workers), which may only be installed with a trade union agreement (or National Labour Inspectorate authorisation);
  - the possibility of carrying out checks using working tools in the employee’s possession (e.g., PCs, tablets, mobile phones, e-mail), which may be carried out even in the absence of any trade union agreement, provided that the employee is given adequate information on how to use the tools and how checks may be carried out on their use (according to privacy law strictly related to the employment relationship).

Furthermore, based on case law, the employer can carry out so-called defensive controls (ie, actions carried out in the absence of the guarantees provided for in article 4, to protect the company and its assets from any unlawful conduct by employees). These “defensive controls” can be carried out if:

- they are intended to determine unlawful behaviour by the employee (ie, not simply to verify his or her working performance);
- there is a “well-founded suspicion” that an offence has been committed;
- they take place after the conduct complained of has been committed; and
- adequate precautions are nevertheless put in place to guarantee a proper balancing between the need to protect company assets and safeguarding the dignity and privacy of the employee.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Since inspections of personal belongings may potentially undermine employees' fundamental human rights, they would not become lawful simply because they are conducted under employment regulations.

Inspections of personal belongings must be conducted uniformly among employees in the workplace based on reasonable grounds, in a generally reasonable manner and to a generally reasonable degree, and based on the work rules, etc.

When inspections of personal belongings are conducted under employment regulations, etc, employees must agree to the inspection except in special circumstances, such as the method or degree of the inspection being unreasonable.

On the other hand, an investigation of information stored on a company network system may constitute an infringement of the right to privacy. If there is a provision in the employment regulations regarding the use of the internet and monitoring, it is possible to investigate under such a provision. A Japanese court case on the illegality of reading e-mails in the absence of a monitoring provision stated that private use of e-mails also carries a certain right to privacy, but also stated that "considering the fact that the system is maintained and managed by the company, the protection of the employee's privacy can only be expected

within a reasonable range according to the specific circumstances of the system," and that the act of reading e-mails was not illegal because the extent of private use of e-mails was beyond the limit, which was outside the reasonable range of socially accepted ideas. The court also ruled that the monitoring of the employee's abusive private use of e-mail, which was discovered in the course of an investigation of slanderous e-mails within the company, was not illegal because even if the monitoring was conducted without notice, there was suspicion of a violation of the duty of devotion to duty and corporate order. The court also stated that the investigation was necessary and that the scope of the investigation did not exceed its limit.

Last updated on 15/09/2022

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]

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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.[1]

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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[1] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

The regulations on whistleblowing in the private sector were originally outlined in article 6 of Italian Legislative Decree No. 231 of 2001 (as amended by Law No. 179 of 2017), which state that the models of organisation must provide for one or more channels that allow persons in positions of representation, administration and management of the entity (and persons subject to their direction or supervision) to report unlawful conduct according to Italian Legislative Decree No. 231 of 2001 and violations of the entity's organisational and management rules.

Currently, Italy has implemented Directive (EU) No. 1937 of 2019, which provides for the adoption of new standards of protection for whistleblowers, through the Italian Legislative Decree No. 24 of 2023 (WB Decree)[1].

In line with the Directive, the WB Decree states, inter alia, that[2]:

- an internal whistleblowing reporting channel must be put in place by all private legal entities (and legal entities in the public sector) that have employed, during the previous year, an average of 50 employees or, even below this threshold, operate in certain industries[3] or have adopted an organizational model in accordance with Legislative Decree no. 231 of 2001;
- the WB Decree prescriptions apply to reports concerning breaches of certain national/EU[4] legal provisions (varying depending on features such as the private or public nature of the employer and its dimensions), and not to claims or requests linked to interests of a personal nature of the reporting individuals (pertaining to their individual employment contracts or to relations with their superiors)[5];
- whistleblowers' reporting may take place through:
  - the company's internal reporting channels and internal reporting procedures (with the possibility – for entities employing up to 249 employees, even if not part of the same group – to share whistleblowing reporting channels); or
  - external reporting channels and external reporting procedures established by the member states' competent authorities (in Italy, ANAC, i.e. the National Anticorruption Authority); or
  - in certain circumstances, public disclosure;
- whistleblowing systems must provide:
  - a duty of confidentiality regarding the whistleblowers' identity (which generally may not be disclosed to persons other than those competent to receive or investigate on the reports, except in specific case and with the whistleblower's consent; see also answer to question 12 below); and
  - ways of protecting collected data according to the GDPR, as well as tight deadlines for communication with whistleblowers[6]; and
  - an integrated system of protection of whistleblowers against any retaliatory action directly or indirectly linked to their reports or declarations, with a reversal of the burden of proof (meaning the employer must give proof of the non-retaliatory nature of measures adopted vis-à-vis whistleblowers); and

- the procedures to be taken in case of anonymous whistleblowing report.

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[1] The provisions of the Decree are binding since July 15, 2023, for larger companies, and as of Dec. 17, 2023, for entities employing an average of from 50 to 249 employees.

[2] This is only a brief and non-exhaustive summary of some of the main provisions under the WB Decree.

[3] In particular, companies that fall within the scope of application of EU acts listed in Annex (part I.B and II) of the WB Decree (for instance, financial services, products and markets; money laundering/terrorism prevention; transportation security; etc.)

[4] Listed in art. 2 and in Annex 1 of the WB Decree (for instance, regarding financial services, products and markets sector) or protecting the EU financial interests or internal market.

[5] Listed in art. 2 and in Annex 1 of the WB Decree (for instance, regarding financial services, products and markets sector) or protecting the EU financial interests or internal market.

[6] In greater detail: (i) a notice acknowledging the receipt of the WB report must be released within seven days; (ii) contacts must be kept with the whistleblower for any additions needed (if the identity is known); and (iii) within three months of the notice of receipt of the report, a follow-up notice must be given to the whistleblower (which may also be non-definitive, with a status update on activities in progress).

Last updated on 10/01/2024

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

See question 4 regarding amendments to the Whistleblower Protection Act.

The person designated as a whistleblower response service employee must not divulge the name, employee ID number, or other information that would allow a whistleblower to be identified without a justifiable reason, and there is a criminal penalty of up to 300,000 yen for violating this duty of confidentiality.

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[1] or drug trafficking[2], or is terrorist property[3], 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.[4]

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[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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

From an employment law perspective, confidentiality obligations may be seen from two different points of view:

- as a general duty of the employee related to the employment relationship, according to article 2105 of the Italian Civil Code, a "loyalty obligation", which includes confidentiality obligations. On top of these, there are usually further confidentiality clauses in individual employment contracts; and
- as a general duty (linked to the outcome of the investigation) of the employer to keep confidential the

identity of the employee who cooperates during the investigation (as whistleblower or a witness) to protect him or her.

In defensive criminal law investigations, the witness can't reveal questions or answers given in his or her interview to a third party.

With regards to the confidentiality applicable to the whistleblower, see above under question 9 and below under question 12.

Last updated on 10/01/2024

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

See question 9 for the confidentiality obligations of a whistleblower response service employee.

Other than the above, there is no specific legal obligation to maintain confidentiality for persons in charge of investigations, etc. However, if the information falls under the category of confidential information obtained by employees in the course of their work, compliance is required as an obligation attached to a labour contract, and many employment regulations stipulate a duty to keep information obtained in the course of work confidential.

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.[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]

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[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.

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.[1] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

From an employment law perspective, our legal system does not provide a specific duty for an employer to inform employees that a workplace investigation is in progress.

In addition, disclosing such information could put at risk the outcome of the workplace investigation (eg, destruction of evidence), and it would therefore be arguable that no information should be provided to employees.

On the other hand, if, upon completion of the investigation, the employer decides to bring disciplinary action against the employee, then the latter must be informed of the complaints with a letter stating the procedure (see questions 3 and 12).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There are no specific legal stipulations or requirements regarding information, etc, that must be provided to employees who are the subject of an investigation.

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)).[4] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Yes, in principle the identity of the complainant, witnesses or sources of information for the investigation can be kept confidential.

On the other hand, if the employer – after having concluded the investigation – brings disciplinary action against the employee, the employer must send a letter to the employee in which the facts are described in detail, objectively and in a precise way, identifying when and where they have taken place, to allow a proper defence for the employee.

Even at this stage, however, the employer has no obligation to provide the employee with the evidence underlying the facts ascribed to him (ie, the employer has no obligation to specify the identity of the individuals through which they gained knowledge of the facts reported in the disciplinary letter).

However, if the employee subsequently challenges the disciplinary sanction before a judge, the employer bears the burden of proof, which may mean having to call the individuals interviewed within the internal investigation to stand as witnesses in court.

Moreover, in case of whistleblowing reports falling within the scope of the WB Decree, the employer is requested to generally keep the whistleblower’s identity confidential (according to art. 12 of the WB Decree). More specifically: (i) if the disciplinary charges are grounded on investigations which are different and additional to the whistleblowing report (although arising as a consequence of the report), the whistleblower’s identity may not be disclosed; (ii) if the disciplinary charges are grounded, in whole or in

part, on the whistleblowing report, and knowing the identity of the whistleblower is indispensable for the defendant, such report may be used for the purpose of the disciplinary proceeding only if the whistleblower gives consent to his/her identity being revealed.

Last updated on 10/01/2024

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

For whistleblowing investigations, whistleblower protection is required (see question 9).

Witnesses and other sources of information are not protected by the Whistleblower Protection Act.

In addition, as a response to a report of harassment, the Ministry of Health, Labour and Welfare guidelines require that necessary measures be taken to protect the privacy of the reporter, the offender, and others, and that these measures be announced to the company.

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' 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Yes, in principle, NDAs can be used to keep the fact and substance of an investigation confidential, even if it is not strictly necessary (and not often done in our experience).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

It is possible to use NDAs in investigations.

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.

Last updated on 15/09/2022

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).[1] 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.[2] 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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[1] 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).

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

Last updated on 27/11/2023

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

In general, from an employment law perspective, workplace investigations made by corporate departments (eg, HR and legal counsel who do not operate in their function as lawyers) are not covered by privilege. Generally speaking, privilege covers correspondence and conversations between lawyers.

In defensive criminal law investigations, legal privilege applies.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There are no specific laws or rules for the provision of confidentiality privileges other than that provided by the Fair Trade Commission Rules, which allow companies that are the subject of investigations into cartels, bid rigging, etc, to treat communications with their lawyers as confidential. However, when a motion for an order to produce documents is filed in a court proceeding, if the requested documents are "documents exclusively for the use of the possessor of the documents", the obligation to produce the documents is not recognised. If the investigation materials fall under this category, it is possible to exclude them from the scope of the court order to produce documents.

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).[1]

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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[1] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

In principle no, because the investigations' interviews should only deal with the collection of data/or information and not have any disciplinary or accusatory purpose.

However, if the investigation leads to a disciplinary procedure, the employee – under article 7 of the Workers' Statute – has the right to ask for a meeting to present his or her justification and, on that occasion, to be assisted by a trade union representative. Employees sometimes ask to be assisted by a lawyer and companies usually accept, as a standard practice.

In defensive criminal law investigations, if the employee is suspected of having committed a crime, he or she must be interviewed with the assistance of a criminal lawyer.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There is no legal right to have a legal representative present or appointed during the investigation.

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.[1]

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.[2] 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.[3]

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.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Generally speaking, a workplace investigation does not require the involvement of a trade union (on the assumption that no specific union agreement has been reached at a company level to entitle trade unions to specific forms of consultation or involvement in workplace investigations, which is not common).

According to section 4 of the Workers' Statute, as stated above, the involvement of the trade union is necessary regarding the installation and use of specific equipment (such as cameras, switchboards, software) that potentially allows the employer to remotely monitor working activity, and which can be done only with prior agreement of the unions (or authorised by the labour inspectorate). The union agreement must be made before the installation of the system, and therefore would normally be already in place when an investigation starts.

Pursuant to the WB Decree (Art. 4), union representatives (or external unions) should be "heard" before the employer activates a WB reporting channel[1].

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[1] According to certain guidelines issued by the industrial trade association (Confindustria), the involvement should be purely for information purposes.

Last updated on 10/01/2024

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

A labour union has no legal right to be involved in the investigation. However, if there is a provision in the collective bargaining agreement between the company and the labour union that allows the labour union to be involved in an investigation conducted by the company or to receive disclosure of the results of an investigation, then such a provision should be followed.

Last updated on 15/09/2022

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.

Last updated on 15/09/2022

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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

According to the law, there is no other specific kind of support other than what is mentioned above.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There is no legally established assistance programme.

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.[1] 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.[2]

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

[2] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

If further misconduct (unrelated to the investigation matters) is revealed, the company may start a new investigation.

Furthermore, even if the employee has a contractual duty to provide the information requested by the employer, one limit to this principle could be, for example, self-incriminating statements of the employee acting as a witness. However, if an employee nevertheless makes self-incriminating statements, the company could decide to start a new investigation.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Even if a matter arises that is not subject to the investigation, it can be used as an opportunity to conduct another investigation.

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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Generally speaking, grievances from the employee do not per se automatically entail an interruption of the investigation. This conclusion, however, should be double-checked on a case-by-case basis, depending on what kind of grievance the employee under investigation raises, and on the potential effect of that grievance (if grounded): for example, should the grievance concern alleged unlawful processing of personal data, the employer could consider suspending the investigation while checking if the grievance has grounds, to avoid collecting data that cannot be used.

Grievances may be raised "internally" vis-à-vis the employer, possibly through procedures regulated by internal policies or codes (including, for example, whistleblowing procedures), if any, or brought to external authorities (which, depending on the kind of issue, could be a labour court, the Data Privacy Authority, law enforcement authorities, etc).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Whether or not an investigation should be suspended when an employee under investigation files a complaint depends on the specific circumstances. There is no legal requirement to suspend the 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Although there are no specific rules stating an investigation must be suspended if the employee under investigation goes off sick, practically speaking, this may slow down the process. Indeed, the employer would not be in the position to "force" the employee, while he or she is absent from work, to physically attend meetings, although they may ask for the employee's availability to attend remote interviews (eg, via videoconference).

There is case law regarding an employee's sickness during a disciplinary procedure (i.e. the procedure described above in point 3): according to certain rulings, if an employee, as per his or her rights, asks to submit an oral defence, but then falls sick, this does not prevent the employer from completing the procedure (and taking disciplinary action), unless the employee proves that his or her sickness prevents him or her from physically attending the meeting (being said that, above all if the procedure ends with a dismissal, a case-by-case analysis on how to manage such situations is highly recommended).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

The company will seek a physician's diagnosis and opinion and determine whether to proceed with the investigation. If an employee's mental health suffers because of the investigation, the company may be charged with a violation of its duty of care.

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[1]. 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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[1] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Generally speaking, internal investigations and those performed by external authorities are autonomous.

In addition, there are no general rules under which the employer must wait for the completion of a criminal investigation before completing its investigation and taking disciplinary action; if the employer believes it has sufficient grounds and evidence to take disciplinary action, it does not have to wait.

That being said, criminal investigations – given the wider investigation powers that public prosecutors or regulators have – may help to gather further evidence on the matter. From a practical point of view, the employer may decide to suspend (with pay) the employee apending the outcome of the criminal investigation, although this option must be evaluated carefully, given the potentially long duration of criminal proceedings, and the fact that the employer normally would not be in a position to access the documents and information about the criminal investigation (unless the company is somehow involved in the proceeding).

Lastly, in very general terms, police or public prosecutors have broad investigatory powers during criminal investigations, which could in certain circumstances make it compulsory for an employer to share evidence (but a case-by-case analysis is necessary regarding specific situations). Moreover, public prosecutors usually do not appreciate that, pending criminal proceedings, internal investigations are being conducted, because it can interfere with the criminal investigation.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

It is possible to proceed with an investigation of a company even if there are concurrent criminal proceedings. It is up to the company to decide whether or not to proceed. The company may submit collected evidence collected to the police. The police will rarely disclose or provide the company with evidence they have collected. Usually, upon request by the police or regulator, the workplace investigation would be stayed. The police or regulator has to take legally required steps if compelling the employer to share evidence.

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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

If the outcome of the investigation does not lead to a disciplinary procedure, there is no specific obligation for the employer regarding this.

However, to a certain extent, under privacy laws, the employee may exercise his or her right of access to information strictly related to him or her, arising from the investigation (which is, however, a wider privacy issue to be assessed under the GDPR.)

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Although there is no legal obligation to report the results of the investigation to the employee, when taking disciplinary action it is generally necessary, from a due process point of view, to explain the facts of the disciplinary action and the results of the investigation, and to allow the employee to explain him or herself. Particularly in the case of serious disciplinary actions such as dismissal, failure to provide an adequate opportunity for an explanation is a possible ground for denying the validity of the disciplinary action.

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.[1] 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.[2]

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

[2] 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.[1] 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.[2]

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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[1] PDPO sections 20 and 58(1)(d).

[2] PDPO sections 20 and 60.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

There is no general obligation of the employee to share an investigation report with the employee: only if and when disciplinary action is brought against the employee, the latter must be informed precisely of the allegations (but, once again, without being entitled to review the investigation report). In court, employees may ask for an exhibition of documents, including the investigation report, if not already filed by the employer, to use in its defence (but such request is not necessarily automatically granted by the court, as certain requirements must be met.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

There is no legal obligation to share reports of findings. Therefore, the company may share only the summary or the entire report at its discretion.

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).[1] 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.[2]

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[1] 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);[1] 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 dishonesty; 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Upon completion of the investigation, the employer – if misconduct by the employee emerges – may bring disciplinary action against him or her (which may be either dismissal or a “conservative” measure such as an oral or written warning, a fine, or a suspension, within the limits provided under the law and possibly the applicable NCBA).

If a criminal offence by the employee emerges, the employer may also decide to report the crime to the public authorities (see question 25).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

In an investigation into an employee's misconduct, based on the results of the investigation, disciplinary action will be considered if there are grounds for disciplinary action, and dismissal will also be considered. Personnel actions (eg, dismissal, reassignment) may also be taken.

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.

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

Last updated on 15/09/2022

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[1], drug trafficking[2], or terrorism[3], 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[4].

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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[1] OSCO section 25A(1).

[2] DTROPO section 25A(1).

[3] UNATMO section 12(1).

[4] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

Generally speaking, even if the investigation leads to evidence of a criminal offence, the employer does not have to inform public authorities (citizens and private entities do not have an obligation to report crimes they discover). The existence of any obligations to report to regulatory authorities (eg, banking and insurance regulatory authorities) should be investigated on a case-by-case basis.

The internal procedures of the company – as adopted by the company in the framework of legislation on the administrative or quasi-criminal vicarious liability of legal entities – may require the findings to be disclosed to certain internal bodies or committees.

As said above, the police or public prosecutors (and possibly other public authorities) may have, within their investigatory powers, and in certain circumstances, the power to access internal investigation outcomes (but a case-by-case analysis would be necessary).

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

If it is information related to a crime, and if it is necessary to report it to the supervisory authority, it is necessary and possible to report it even if the content relates to personal information. There is no obligation to report to the police even if one is aware of a criminal fact. However, it is possible to use the results of an investigation to file a complaint or charge with the police. It is also possible to use the results of the investigation to realise the company's rights (eg, to claim damages based on tortious behaviour).

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.[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.[2]

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

[2] 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.[1]

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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[1] DPP2 (in Sch. 1) and PDPO section 26.

Last updated on 15/09/2022

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

The employer would normally keep the outcomes of the investigation for the entire duration of the employment relationship with the involved employee.

After the termination of the employment relationship, it appears reasonable to conclude that the employer would be entitled to retain this information for the time necessary to exercise its defence rights in litigation (taking into account that 10 years is the statute of limitations for contractual liability). Further requirements or restrictions under general privacy laws (and particularly the GDPR) should also be checked.

According to Art. 14 WB Decree, internal and external whistleblowing reports (including related documents) must be kept for as long as necessary for report processing, but no more than five years from the date of transmission of the procedure's final outcome.

Last updated on 10/01/2024

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

Records related to responses to whistleblowing must be kept for an appropriate period, but there is no legal stipulation on the retention period. Each entity is required to set an appropriate period after

considering the need for evaluation and inspection, and the handling of individual cases. There is no legally stipulated retention period for other investigation results.

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).[1]

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[1] 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.[1] 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).[2] 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

Italy

Author: *Giovanni Muzina, Arianna Colombo*
at BonelliErede

It depends on the kind of error or breach. For example:

- a breach of privacy laws (eg, acquiring data from working instruments in lack of due requirements) would lead to the application of privacy law sanctions (including monetary fines); and
- breach of provisions regarding “remote” control of employees would lead to criminal sanctions and to the inadmissibility, for disciplinary purposes, of the data collected (and thus potentially to the unlawfulness of a dismissal based on such data).

Furthermore, if the employee has suffered damages as a result of the employer’s errors or breaches (and can specifically prove such damages and their amount), the employer may be held liable in court.

Last updated on 15/09/2022

Japan

Author: *Chisako Takaya*
at Mori Hamada & Matsumoto

If the company deviates from appropriate social rules in its investigative methods and means, it will be liable for tortious behaviour. If disciplinary action or dismissal is taken based on erroneous investigation results, the validity of such action or dismissal will be denied, the employee will be able to claim for back wages, and, in some cases, claim for compensation.

Last updated on 15/09/2022

Switzerland

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

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.

Last updated on 15/09/2022

Contributors

Hong Kong

Wynne Mok
Jason Cheng
Audrey Li
Slaughter and May

Italy

Giovanni Muzina
Arianna Colombo
BonelliErede

Japan

Chisako Takaya
Mori Hamada & Matsumoto

Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer