

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
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08. Can the employer search employees' possessions or files as part of an investigation?

Japan

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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.

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Portugal

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The employer is allowed to search an employee's possessions or files, provided that they are work instruments or of a professional nature.

When performing these searches, employers should consider the specific provisions of the Data Protection Regulations as well as Resolution No. 1638/2013 of the Portuguese Data Protection Authority (CNPD), which contains rules on monitoring phone calls, e-mail and internet usage by employees. The CNPD understands that for the employer to access the employees' professional data (e-mails, documents and other information stored on electronic devices), the latter should be present during the monitoring, to identify any information of a personal nature that should not be accessed by the employer (the employer must comply with these directions and should not access that email). In addition, review of the data should respect specific protocols to avoid potential access to personal data (eg, review of subject, recipients, data flow and type of files attached).

Body searches or the seizure of personal belongings or documents belonging to the employee are not permitted within the scope of a disciplinary procedure.

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Switzerland

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

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

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

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

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