

Workplace Investigations

Contributing Editors

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

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

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.

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Switzerland

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

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

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

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

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

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

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.

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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]

^[1] Cf. ATF 139 II 7.

^[2] ATF 140 III 6 E. 3

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

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

^[5] Decision of the Swiss Federal Court 6B_1241/2016 dated 17. July 2017 consid. 1.2.2; Decision of the Swiss Federal Court 1B_22/2012 dated 11 May 2012 consid. 2.4.4.

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

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

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Contributors

Japan

Chisako Takaya
Mori Hamada & Matsumoto

Switzerland

Laura Widmer
Sandra Schaffner
Bär & Karrer