

Workplace Investigations

Contributing Editors

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

Hong Kong

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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.

[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>.

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Japan

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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.

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02. How is a workplace investigation usually commenced?



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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.

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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.

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



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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).

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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.

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



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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).

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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.

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



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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.

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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.

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?



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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.

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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.

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

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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.

^[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.

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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.

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



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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]

^[1] Usually upon execution of a warrant.

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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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09. What additional considerations apply when the investigation involves whistleblowing?

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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.

^[1] The Corporate Governance Code, Appendix 14 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited.

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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.

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10. What confidentiality obligations apply during an investigation?

Hong Kong

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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]

^[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).

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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.

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11. What information must the employee under investigation be given about the allegations against them?

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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.

^[1] *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20.

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

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



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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).

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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.

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

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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.[\[1\]](#)

[\[1\]](#) 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)

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It is possible to use NDAs in investigations.

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14. When does privilege attach to investigation materials?



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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.

^[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.

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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.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



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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.

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

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16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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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.

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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.

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17. What other support can employees involved in the investigation be given?



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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.

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There is no legally established assistance programme.

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18. What if unrelated matters are revealed as a result of the investigation?



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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.

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

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19. What if the employee under investigation raises a grievance during the investigation?

Hong Kong

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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

Japan

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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.

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20. What if the employee under investigation goes off sick during the investigation?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
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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.

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Japan

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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.

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



Hong Kong

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Where there is a parallel criminal or regulatory investigation, the employer should handle the workplace investigation with extra care and ensure that it complies with all applicable legal requirements or lawful requests made by the relevant authorities concurrently. While there may be reasons why the employer wants to progress with its investigation as soon as possible, the employer should not take any steps that hinder or obstruct the parallel investigations. Therefore, it may be appropriate for the employer to stay its workplace investigation if its continuation may prejudice the parallel investigations.

The employer may also find itself duty-bound to stay the workplace investigation if it is subject to statutory secrecy obligations vis-à-vis the relevant law enforcement agency or regulatory body. As mentioned in question 10, several laws in Hong Kong impose secrecy obligations on any person who has acquired

confidential information about certain law enforcement agencies or regulatory bodies and the investigations being conducted. The employer should assess whether they could continue with the workplace investigation without breaching secrecy obligations. The employer should take a prudent approach and may discuss with the relevant authority before proceeding further with its workplace investigation.

Depending on the nature of the matter, authorities in Hong Kong handling a criminal or regulatory investigation may be empowered to seize, or compel persons who are the subject of an investigation or assisting in such an investigation (which may include the employer) to produce, documents or evidence that are relevant to the matters being investigated. For example:

- the police or the Independent Commission Against Corruption may, under a search warrant (or in certain circumstances, without a warrant), inspect and take possession of articles or documents inside the premise of the employer they reasonably suspect to be of value to the investigation of the suspected offence; and
- the SFC or the Competition Commission may, under the SFO or Competition Ordinance (as applicable), require the employee under investigation or the employer to produce documents, attend interviews, and, specifically for the SFC, provide the investigator with all assistance he or she can give. Both authorities may also obtain a warrant from the Hong Kong courts to search the premise of the employer and obtain documents or information it reasonably believes to be relevant to its investigation.

Documents created and evidence gathered by the employer during its workplace investigation (such as witness statements or investigation reports) may be subject to production requests of, or may be seized by, the authorities mentioned above (unless legal professional privilege is attached). The employer should ensure that it complies with all lawful requests from the authorities.

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Japan

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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

22. What must the employee under investigation be told about the outcome of an investigation?

Hong Kong

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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

Japan

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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.

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23. Should the investigation report be shared in full, or just the findings?

Hong Kong

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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.

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

[2] PDPO sections 20 and 60.

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Japan

Author: *Chisako Takaya*
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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.

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24. What next steps are available to the employer?



Hong Kong

Author: *Wynne Mok, Jason Cheng, Audrey Li*
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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 dishonestly; or
 - been habitually neglectful in his duties.[2]

[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

Japan

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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.

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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

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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.

[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>>.

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Japan

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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).

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26. How long should the outcome of the investigation remain on the employee's record?

Hong Kong

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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.

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

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Japan

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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.

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



Hong Kong

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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.

^[1] Chok Kin Ming v Equal Opportunities Commission [2019] HKCFI 755

^[2] EO sections 9 and 32K.

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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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