

Workplace Investigations

Contributing Editors

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



Australia

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Once the decision to undertake a workplace investigation has been made, it is important to decide who is the most appropriate person to conduct the investigation. For the investigation process to run smoothly a single lead investigator should be selected, although they may work with a larger team. The lead investigator and investigation team can be internally or externally appointed.

In deciding whether to appoint an external investigator an employer should consider:

- the nature of the allegations;
- the seniority of the respondent;
- whether a fair investigation can be conducted internally without any actual or perceived bias;
- whether there is a dedicated HR department with someone who has the required capability, skills and experience to conduct the investigation; and
- whether the employer wants the investigation to be covered by legal professional privilege.

If the employer decides to investigate the matter internally without appointing a third party, then the investigator does not need to have any specific qualifications. However, it is prudent to confirm that the investigator has the time and skills to conduct the investigation and that they can be objective.

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Austria

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There are no prescribed minimum standards for this procedure. The responsibility for conducting these investigations lies with the employers. Internal compliance or legal teams are often entrusted with this task, as they are familiar with internal protocols. In practice, these investigations are often overseen by an

internal team, occasionally with the assistance of law firms or auditing firms. Those involved in the investigation must remain impartial. Potentially biased persons, such as those under investigation and their close associates, should be excluded from participation.

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Belgium

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In general, there are no legal minimum qualifications, the employer can delegate the investigation task to anyone. Of course, it is strongly recommended to appoint someone who is not involved in the case and who can lead the investigation objectively with the necessary authority to take investigative measures.

However, in the specific case of an official complaint due to sexual harassment, violence or bullying at work, the investigation will be conducted by the prevention advisor for psychosocial aspects. Next, if the investigation is based on an internal whistleblowing report, there will have to be an independent reporting manager responsible for receiving the report, giving feedback to the whistleblower and ensuring a decent follow-up to the report. Logically, the reporting manager will lead the investigation in this case, but he can be assisted by other persons or a team who are bound by a duty of confidentiality.

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Brazil

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There is no statutory rule, and therefore the investigator can be chosen by the company.

In sensitive matters, it is recommended that attorneys undertake the investigation due to legal privilege. Engaging external lawyers increases the confidence of witnesses and parties in the independence and lack of bias of the investigation process, especially when the allegations involve senior employees.

Additionally, attorneys are trained to collect information based on legal thresholds that apply to the allegations, allowing the decision-makers to understand the events as they would be posed before a labour judge or a prosecutor, and enabling them to clearly assess the legal risk involved in the situation.

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China

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In some laws and regulations for specific industries, enterprises or personnel, there are certain requirements for the qualifications of investigators. For example, according to the Interim Measures for Investigating and Dealing with Disciplinary Violations of Professional Personnel by Medical Institutions, the personnel conducting an investigation and evidence collection shall not be less than two. If the investigator is a close relative of the investigated person, or a tip-off person or a key witness of the issue to be investigated, the investigator shall withdraw from the investigation.

However, at present, there are no unified and detailed national rules and regulations on the qualification of

the investigators and organizations. In practice, the selection of the personnel and organizations responsible for internal investigation is usually based on the relevant provisions in the internal rules and regulations of the employer. The personnel conducting internal investigation are usually internal functional departments of the employer and are independent to some extent, including the personnel department, legal department, compliance department or risk control department. For significant or complex issues or senior management investigations, in order to ensure professionalism, accuracy and compliance, external law firms, consultants and accounting firms are also frequently hired to conduct investigations.

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Finland

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The employer must conduct the investigation, but the actual work can be done either by the employer's personnel or by an external investigator, for example, a law firm. Either way, there are no formal criteria for the persons executing the investigation; however, impartiality is required from the person conducting the investigation

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France

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In determining who is to conduct a workplace investigation, the main objective is to ensure that the team is independent or at least that it is perceived as being independent. The key people in the investigation team can be identified in a pre-established procedure. It is good practice to give decision-makers the possibility to set up, on a case-by-case basis, the team most appropriate to the situation.

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Germany

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It is up to the company to decide who should carry out the workplace investigation and individual investigative steps. If their staff is used, the question arises of which person or department (compliance, legal, internal audit, HR or management) should take the lead. The answer to this question may depend on various factors such as the number of employees affected by the workplace investigation and the nature of the alleged misconduct. In any event, due to various employment law and data protection issues, the HR department and the legal department should be involved.

Further, it may make sense to bring in external advisors to lead the investigation together with an internal investigation team of the company. The engagement of an external investigation team can also be advantageous concerning the two-week exclusion period for termination for cause. This period does not start to run as long as the external advisors are investigating, but only when the persons authorised to terminate employment receive the investigation report.

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Greece

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As far as the persons in charge of an internal investigation are concerned, L. 4990/2022 on the protection of persons who report breaches of Union law provides for certain conditions that should be met when exercising their duties (ie, being impartial and abstaining when there is a conflict of interest), which also apply as general principles in all disciplinary procedures. Whistleblowing legislation stipulates that persons appointed to receive and investigate a whistleblowing procedure should meet certain conditions, including no penal proceedings against them, no disciplinary proceedings or convictions for specific offences, and no workplace suspensions.

Official disciplinary procedures are conducted by the competent bodies as described in the respective internal labour regulations.

Although not specifically regulated, support from external advisors (eg, lawyers) is allowed.

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Hong Kong

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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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India

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Complaints pertaining to sexual harassment can only be investigated by the IC constituted under the SH Act.

For other kinds of misconduct, employers usually constitute a fact-finding investigation team with members who are independent and unbiased. The fact-finding team can be appointed internally, or the employer could also engage an external agency, depending upon the gravity and sensitivity of the matter, the nature

of the issues being investigated or a desire to try and maintain legal privilege regarding the findings of the investigation.

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Ireland

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An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

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Italy

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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.

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Japan

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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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Netherlands

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Workplace investigations, if they are to be of value, must be conducted by an expert, professional and independent party. To safeguard the independence of the investigation, it is crucial that neither the contractor nor any other third party can influence how the investigation is to be conducted or how the outcome should be reported. The investigation must be conducted according to the protocol drawn up at the start and the investigator must not be involved in the follow-up to the outcome.

There is an ongoing discussion of whether lawyers can conduct an objective and independent investigation, due to the bias inherent to their profession. On the other hand, investigation bureaus or committees are also not necessarily independent, as they are not regulated and not subject to disciplinary law.

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Nigeria

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Typically, the legal department, the chief compliance officer, the HR manager, the audit committee or any other committee as may be set up by the company may conduct a workplace investigation. However, in other instances, the company may engage the services of independent external personnel to assist with conducting an internal investigation.

The minimum qualification or criteria of the person conducting the investigation should be as contained in the relevant company policies. Criteria may include independence, objectivity and impartiality.

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Philippines

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Under the Safe Spaces Act, an employer should create an independent internal mechanism or a committee on decorum and investigation to investigate and address complaints of gender-based sexual harassment, which should:

- adequately represent the management, the employees from the supervisory rank, the rank-and-file employees, and the union, if any;
- designate a woman as its head and no less than half of its members should be women;
- be composed of members who are impartial and not connected or related to the alleged perpetrator;
- investigate and decide on the complaints within 10 days or less upon receipt thereof;
- observe due process;
- protect the complainant from retaliation; and
- guarantee confidentiality to the greatest extent possible.

For other types of offences, it is the prerogative of management as to who will conduct the investigation and how it will be conducted, provided the proceedings remain impartial.

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Poland

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There are no legal requirements in this regard but it is good practice if the team of investigators or individuals who deal with the case consists of:

- a person who has specific knowledge in a given field (concerning the violation);
- a member of the HR team; and
- a lawyer (it is recommended to engage an independent, external lawyer who can maintain the objectivity of the investigation, especially in complex matters or where a conflict of interest arises or may arise).

It is crucial that the investigators are independent (and they must be allowed to act independently).

Also, certain personal features are useful (eg, the ability to objectively assess a situation, empathy, and managing skills).

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Portugal

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According to article 356(1) of the Portuguese Labour Code, the employer can appoint an instructor, who shall be responsible for the probationary proceedings. Usually, workplace investigations are conducted by external advisors (eg, lawyers), appointed by the employer.

However, regarding disciplinary powers, there is a legal limitation in article 98 of the Portuguese Labour Code. As such, only the employer (or the immediate superior of the concerned employee, if the employer has delegated its powers, as per article 329(4) of the Portuguese Labour Code) has disciplinary powers.

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Singapore

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While there are no prescribed minimum qualifications or criteria that need to be met for any person conducting a workplace investigation, the person handling employee grievances should be someone who:

- has been authorised and empowered to do so by the employer;
- is not in a position of actual or potential conflict; and
- is independent and impartial.

The grievance handler should be familiar with the organisation's investigative procedure, have attended the relevant training to ensure full compliance with the same; and have a good understanding of the expectations and norms set out by the Tripartite Guidelines on Fair Employment Practices.

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South Korea

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While there are no laws that set minimum qualifications for who should conduct a workplace investigation, companies often engage external legal counsel to ensure the investigation is conducted in an unbiased and professional manner. If the company itself undertakes the workplace investigation, the company should take precautions such as ensuring that the person conducting the investigation is not biased and not involved in the alleged wrongdoing. If the person conducting the investigation cannot converse in the native language of the employee under investigation, the company may consider arranging for an interpreter when conducting interviews, to minimise the risk of misunderstanding.

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Spain

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As set out in question 1, workplace investigations must be proportional and companies must use the least intrusive means to affect employees' rights. This translates into the following principles on who conducts the investigation:

- the enquiry must involve a minimal number of employees;
- only those employees with competencies on the investigated matters should be involved (normally human resources or compliance); and
- employees conducting the investigation must be qualified and have the power and seniority to do so proficiently (although a formal qualification is not required).

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Sweden

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If the workplace investigation falls under the Swedish Whistleblowing Act, the investigation has to be conducted by independent and autonomous persons or entities designated under the Swedish Whistleblowing Act as competent to investigate reports.

If the workplace investigation is not governed by the Swedish Whistleblowing Act, there are no minimum qualification requirements. When appointing an investigator, one should consider who would be most suitable in the given situation. For example, it may in some situations be more suitable to have an external investigator to ensure impartiality.

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Switzerland

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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.

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Thailand

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The employer should conduct a workplace investigation on its own; however, an outside firm experienced in interviewing witnesses and assessing the credibility of evidence may also be appointed to assist with the workplace investigation.

There is no minimum qualification or criteria provided under Thai laws. It is worth noting that anyone who has been accused of misconduct or potentially has a conflict of interest should be excluded from any role in the investigation. This is to avoid a challenge from the subject employee that the investigation was not conducted fairly.

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Turkey

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There is no compulsory requirement or qualification arising from the law as to the selection of the investigation team. The number and the profile of the investigation team need to be decided according to

the characteristics of the case, whereas the head of the investigation team needs to be a competent and experienced investigator. A conflict of interest review is required to be conducted for the whole investigation team to protect the interests of the company. As conflicts of interest can also arise during an investigation process, relying on the support of an outside legal team should be considered, particularly for internal investigations that are likely to expand.

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United Kingdom

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The investigator would typically be a line manager or HR representative. Complex cases, particularly if criminality is suspected, or cases where a senior employee is accused of misconduct, may require the investigator to be someone more senior within the organisation, or someone from the in-house legal team. Employers should bear in mind the need for someone more senior than the investigator to act as a disciplinary decisionmaker, if disciplinary action is found to be warranted.

Check the organisation's policies and procedures, which may stipulate who can act as an investigator.

The investigator should be someone without any personal involvement in the matters under investigation, or any conflict of interest, but with sufficient knowledge of the organisation and where possible with both training and experience in conducting investigations.

The business should consider how any prospective investigator may appear if they are called as a witness in court, or to give evidence before any governmental committee or regulatory panel. They should also consider whether the employee accused of wrongdoing should have any say in the choice of investigator; this would not typically occur, but having the employee's buy-in can increase the chances of a successful outcome to the investigation.

It is becoming increasingly common for businesses to use an external consultant or lawyer to conduct workplace investigations. This may be beneficial where it is not operationally viable within the employer organisation to have a different person conducting the investigation and the disciplinary hearing, or if the investigation is particularly sensitive or complex, or relates to a very senior employee. If an external investigator is appointed, the employer remains responsible for that investigation.

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United States

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While every internal investigation should be carried out promptly, thoroughly and in a well-documented manner, employers should appoint one individual or team of individuals to oversee all complaints regardless of how they are received. Doing so helps to ensure that all allegations are documented, reviewed and assigned for investigation as consistently as practicable.

Once a complaint is received and recorded, the company should undertake an initial triage process to determine:

- the risk of the alleged misconduct from a reputational, operational and legal perspective;
- who is best suited to conduct an investigation based on the nature of the alleged misconduct and the perceived risk level (potential candidates may include members of human resources, legal or compliance departments, or outside counsel); and

- a plan for investigating the factual allegations raised in the complaint.

The appropriate investigator should be able to investigate objectively without bias (ie, the investigator cannot have a stake in the outcome, a personal relationship with the involved parties and the outcome of the investigation should not directly affect the investigator's position within the organisation); has skills that include prior investigative knowledge and a working knowledge of employment laws; has strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair; is detail-oriented; has the right temperament to conduct interviews; can be trusted to maintain confidentiality; is respected within the organisation; and can act as a credible witness.

At this triage stage, an employer may also wish to use the information collected from the complaint to proactively identify potential patterns or systemic issues at an individual, divisional or corporate level and react accordingly. For example, if a company receives a complaint against a supervisor for harassing conduct and that same individual has already been the subject of previous complaints, the company should consider whether it may be appropriate to engage outside counsel to carry out a new investigation to bring objectivity and lend credibility to the review – even if the prior complaints were not ultimately substantiated following thorough internal investigations. Similarly, the engagement of outside counsel is often appropriate where a complaint involves alleged misconduct on the part of a company's senior management or board members.

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Vietnam

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There are no statutory minimum qualifications or criteria for someone to conduct a workplace investigation. The employer can simply delegate the investigation task to anyone. However, it is good practice for qualified persons with proper training in workplace investigations to conduct the investigation as these involve intricate issues. It is also important that investigators are fair, unbiased, and impartial. In addition, they should not be related to any parties involved in the investigation.

In complex cases or cases involving a senior or high-ranking employee, the employer should appoint a person with a higher authority or rank in the company to lead and oversee the conduct of the investigation. This also applies in instances where it is foreseeable that the investigation may lead to disciplinary action, summary dismissal of the employee, or a report to an authority.

There are instances when engaging with external parties or professional advisors may be necessary. This is especially the case if the conduct under investigation is serious or widespread, which may lead to regulatory consequences if the employer does not have the expertise to handle the investigation.

Last updated on 25/09/2023

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



Australia

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The starting position is that there is no general right for an employer to search an employee's possessions.

However, an employer may be able to undertake a search in circumstances where:

- the employee consents to the search;
- there is a “right to search” contained in a contract, policy, procedure or industrial instrument; or
- the request to search constitutes a lawful and reasonable direction.

If an employee agrees to a search of their possessions, this consent should be confirmed in writing. If the employee does not consent then the employer can issue a direction to the employee. If the direction is lawful and reasonable, and the employee does not comply, then disciplinary action may be considered.

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Austria

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In general, it is advisable to back up data, documents, emails and other records promptly to prevent their deletion. Admissibility depends on whether the data originates from personal or professional records and whether they are legally relevant. If internal investigations are carried out based on a specific suspicion of a criminal offence, it is the processing of legally relevant data. In general, the processing of professional emails or documents is permissible. If there is no professional connection, access to private files and documents is only permitted in exceptional cases.

If, for example, using a business email account for private purposes is not allowed, the employer can usually assume that the data processed is only "general" data within the meaning of article 6 GDPR and that such data processing is justified by a balancing of interests. However, if private use is allowed, the data may still be part of a special category within the meaning of article 9 GDPR. In such cases, the justification for its use must be based on one of the grounds explicitly mentioned in article 9(2) GDPR.

The employer must protect the employee's rights under section 16 of the ABGB and must consider the proportionality of the interference. Only the least restrictive means – the method that least interferes with the employee's rights – may be used to obtain the necessary information. The employer's interest in obtaining the information must outweigh the employee's interest in protecting his or her rights. The implementation or initiation of controls by the employer does not automatically constitute an interference with personal rights, as being subject to the employer's rights of control is part of the position as an employee.

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Belgium

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The employer is, in principle, not entitled to search the employee's private possessions, except with the explicit consent of the employee. Digital files on the computer or laptop of an employee can be searched under the rules of CBA No. 81 (see question 7) and other privacy rules.

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Brazil

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No; employers are only generally allowed to search the work tools they provide to employees, such as company mobile phones, electronic files, and company email and other electronic communications. However, they may also request that employees turn over any company documents in their possession.

Searches of employees' private possessions or files during an investigation can only occur with the verifiable consent of the employee.

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China

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Article 13 of the Constitution of the PRC provides that the lawful private property of the citizens shall not be violated. Therefore, during the process of investigation, without the employees' consent, the employer has no right to search the employees' personal possessions or files. If it is necessary to search the employees' personal possessions or files, the employer may require the employees to sign a Letter of Informed Consent before searching; or the employer may call the police and the search will be conducted under the escort of the public security authorities or directly by the public security authorities.

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Finland

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Only the police can search employees' possessions (assuming that the prerequisites outlined in the legislation are met).

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France

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In internal investigations, the fundamental rights and freedoms of employees are at stake, including the right to privacy, respect for the privacy of home life and correspondence, freedom of expression, and the obligation of loyalty in searching for evidence.

In principle, work emails and files can be reviewed, even without the employee's consent, prior knowledge or warning. This includes: work email accounts; files stored on a work computer or a USB key connected to a work computer; and SMS messages and files stored on a work mobile phone and documents stored in the workplace unless they are labelled as "personal". On the other hand, it is not permissible for an employer (or an investigator) to review "personal" emails and files, such as documents or emails identified as "personal" by the employee, or personal email accounts (Gmail, Yahoo, etc), even if accessed from a work computer.

There are certain exceptions to the above principle. An employer is allowed to check "personal" emails or data in any of the following cases:

- if the employee is present during the review;
- if the employee is absent, but was duly notified and invited to be present;
- if there is a particularly serious “specific risk or event”;
- if the review is authorised by a judge (this means having to prove a legitimate reason justifying not informing the employee).

When documents or emails are not marked as “personal” but contain information of a personal nature, the employer may open and review the data but may not use such documents or emails to justify applying disciplinary measures to the employee or use such documents or emails as evidence in court if they indeed relate to the employee’s private life.

Special attention must be given to employee representatives who must be entirely free to carry out their duties.

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Germany

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Files and documents that are purely business-related – whether in physical or digital form – may, in principle, be inspected by the employer without restriction. The employee has no right to refuse inspection.

When searching business laptops, computers, phones and e-mail accounts, a distinction must be made as to whether private use is permitted (or at least tolerated) or not: if the employee is allowed to use the items exclusively for business purposes, the employer may monitor and control them. If private use is permitted, the employee's right to privacy must be observed for private files, as must the protection of the secrecy of correspondence. Accordingly, the employer must avoid accessing private documents, files and e-mails. However, a review of private documents, files and e-mails may be permissible in the event of particularly serious violations if the employer's interest in the review outweighs the employee's interest in safeguarding his right to privacy. Generally, employers should allow private use of electronic devices only if employees have previously consented to the terms of use (including searches in certain cases).

A search of the employee's workplace by the employer is, in principle, permissible. However, a search of personal items (eg, bags, clothes, personal mobile phone) is generally only permissible with the employee's consent. Similarly to the review of digital personal data, a search of personal items may be permitted, however, in the event of particularly serious violations if the employer's interest in the search outweighs the employee's right to privacy.

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Greece

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As a first step, the employer should ask for the employee’s permission to access their possessions and files. Employment contracts and internal labour regulations may include provisions regarding an employer’s access to employees’ documents created and kept for business purposes or related to business activity.

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Hong Kong

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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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India

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Yes, an employer can search its employees' official possessions and files as part of an investigation. It may be difficult, however, to seize personal assets or possessions of an employee (such as the individual's mobile phone or personal laptop).

Employers should expressly create policies that address key issues associated with employee surveillance, forensic searches and investigations, such as:

- whether or not the official assets and infrastructure of the company can be used for personal purposes by employees;
- the organisation's right to monitor, surveil or search any authorised or unauthorised use of its corporate assets; and
- that the employee should not have any expectation of privacy when using the companies' resources, etc.

Any forensic review of digital data must be carried out with due regard to Indian rules of evidence to avoid situations where such evidence becomes unreliable in a future legal claim or dispute.

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Ireland

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The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

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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.

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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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Netherlands

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When conducting an internal investigation (which must have a legitimate purpose), the employer must act in accordance with the principles of proportionality and subsidiarity. In line with these principles, the means of collecting and processing personal data during an internal investigation as well as the data that is searched, collected or processed, should be adequate, relevant and not excessive given the purposes for which the data is being collected or subsequently processed. These principles can be complied with by, for example, using specific search terms when searching electronic data, limiting the investigation's scope (subject matter, period, geographic locations) and, in principle, excluding an employee's private data.

The employer is, in principle, allowed to access documents, emails and internet connection history saved on computers that were provided to the employees to perform their duties, provided the requirements of proportionality and subsidiarity are taken into account. In other words, reading the employee's emails or searching electronic devices provided by the employer must serve a legitimate purpose (e.g. tracing suspected irregularities or abuse) and the manner of review or collecting and processing the data contained in such emails should be in accordance with the principles of proportionality and subsidiarity.

The employer can ask the employee to hand over an employee's USB stick for an investigation. Depending on company policies and (individual or collective) employment agreements, an employee is, in principle, not obliged to comply with such a request. A refusal from an employee, when there is a strong indication that this USB stick contains information that is relevant to an investigation into possible irregularities, may be to the disadvantage of an employee, for example in a dismissal case.

The following factors, which derive from the *Bărbulescu* judgment of the European Court of Human Rights, are relevant to the question of whether an employee's e-mail or internet use can be monitored:

- whether the employee has been informed in advance of (the nature of) the possible monitoring of correspondence and other communications by the employer;
- the extent of the monitoring and the seriousness of the intrusion into the employee's privacy;
- whether the employer has put forward legitimate grounds for justifying the monitoring;
- whether a monitoring system using less intrusive methods and measures would have been possible;
- the consequences of the monitoring for the employee; and
- whether the employee has been afforded adequate safeguards, in particular in the case of intrusive forms of monitoring.

These requirements can sometimes create a barrier for employers, as seen in a ruling by the District Court Midden-Nederland (16 December 2021, ECLI:NL:RBMNE:2021:6071) in which the employer had used information obtained from the employee's e-mail as the basis for a request for termination of the employment contract. In the proceedings, the employee argued that his employer did not have the authority to search his e-mail.

According to the District Court, it was unclear whether the employer had complied with the requirements of *Bărbulescu* regarding searching the employee's e-mail. The regulations submitted by the employer only described the processing of data flows within the organisation in general. Therefore, the District Court found that the employer did not have a (sufficient) e-mail and internet protocol and the employee was not properly informed that his employer could monitor him. In addition, according to the District Court, it was unclear what exactly prompted the employer to search the employee's e-mail, as the employer did not provide any insight into the nature and content of the investigation. As a result, the District Court was unable to determine whether the employer had legitimate grounds to search the employee's e-mail. On this basis, the District Court disregarded the (possibly) illegally obtained evidence and ruled against the employer's termination request.

Last updated on 27/11/2023

Nigeria

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Yes, an employer can search the possessions or files of an employee as part of an investigation where the employee's contract or handbook authorises such a search and there is a reasonable suspicion of wrongdoing.

Last updated on 15/09/2022

Philippines

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Subject to the employees' reasonable expectation of privacy, gathering physical evidence within the premises of the workplace and through company-issued property has been upheld to be legally permissible in pursuit of the employer's right to conduct work-related investigations. The search, however, should be limited to the alleged acts complained of and must not be used as a fishing expedition to find incriminating information about the erring employee.

Last updated on 26/01/2023



Poland

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It depends on whether the employer implemented rules of personal control at the workplace. If yes, such rules are applicable. If not, in our opinion if there is suspicion of a serious violation, it is possible to carry out an ad hoc inspection but its scope should be limited only to necessary activities and should not concern an employee's private files or correspondence, so as not to infringe on personal rights. If there is an ad hoc inspection, an employee should be informed in advance, and it should take place in the presence of the employee or employee's representative, observing the rules of fairness and equity.

Last updated on 20/04/2023



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.

Last updated on 15/09/2022




Singapore

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The employer is not allowed to search employees' personal possessions or files as part of an investigation without the employee's consent. However, such consent may be explicitly provided for in the terms of employment (as may be contained in the employment contract, employee handbook or the employer's internal policies and procedures in dealing with the investigations, etc). The employer may, however, search the employees' company email accounts and files if these are stored on the company's internal systems or devices.

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South Korea

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As discussed in question 7, it may be difficult for a company to search an employee's personal possessions. The company may search and gather electronic data stored in work laptops or company servers, subject to legal requirements and restrictions (eg, obtaining consent).

The PIPA provides specific guidance on the requirements for obtaining consent. Under the PIPA, to collect or use an individual's personal information, the information holder must be informed of and consent to:

- the purpose of the collection or use;
- the personal information that will be collected;
- the period of retention and use; and
- his or her right to refuse to provide consent and any disadvantages that may result from such refusal.

There are separate requirements for obtaining consent to provide an individual's personal information to a third party. Also, consent must be obtained separately for the collection, use or provision of sensitive or unique identification information.

Under limited circumstances, personal information may be collected, used, or provided to third parties without obtaining the consent of the information holder. For instance, a company may collect and use personal information without obtaining consent where obtaining the information is necessary to achieve the company's "legitimate interests", which clearly exceed the information holder's right to his or her personal information, and the collection and use are carried out within reasonable bounds. The term "legitimate interests" in this context is generally understood as a concept similar to "justifiable act" under the Criminal Code. The Korean Supreme Court has held that under exceptional circumstances such as the following, the company's collection and review of employee data may constitute a "justifiable act" under the Criminal Code:

1. the company had specific and reasonable suspicion that the employee had committed a crime and the company had an urgent need to verify the facts;
2. the scope of the company's review was limited to the suspected crime through the use of keywords, etc;
3. the employee had signed an agreement stating that he or she would not use work computers in an unauthorised manner and that all work products would belong to the company; and
4. the company's review uncovered materials that could be used to verify whether the employee committed the alleged crime.

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Spain

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Please see question 7.

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Sweden

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An employer can search an employee's personal possessions (eg, handbag, pockets and locker) if the employer has a legitimate interest in a search. This could, for example, include a reasonable suspicion of

theft of employer property. Furthermore, an employer may search, but not continually monitor, an employee's computer and email provided that it is in accordance with GDPR requirements. For the processing to be lawful under the GDPR, the employer has to establish a purpose and a legal basis for the processing of personal data. Furthermore, data subjects must have received information on the legal basis for and purpose of the processing of personal data beforehand. If the data subjects have not received such information, the employer's right to process their data is limited. However, if the employer has reasonable grounds to believe that trade secrets or similar has been copied and stolen, no such requirements would typically apply.

Investigations into an employee's possessions may, under certain circumstances, also be carried out by the Swedish authorities.

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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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Thailand

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Electronic information created during employment would generally be owned by the employer and would be the employer's assets. If an employee is given a computer or laptop to use for work, the employer has the right to log into that device and take any data that is stored therein, provided that the data does not contain sensitive information of that employee and PDPA requirements are met.

To avoid any potential issues regarding physical data such as documents on the employee's desk, it is advisable to search those areas with the subject employee to show good faith. In practice, the employee normally agrees to search those areas with the employer, or allows the employer to search alone.

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Turkey

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There is no explicit answer to this question. However, it is important to make a distinction between employees' possessions and files that are strictly personal and employees' possessions and files that are found on devices or files provided for company use. For the first category, the employer does not have the right to search employees' possessions and files. For the latter category though, justifications need to be established, by observing the requirements explained in question 7. Furthermore, the employers must also ensure that employees are fully and explicitly informed in advance of the monitoring operations, either through a provision included in the employment agreement, or in a separate notice or employee policy, the receipt of which should be duly acknowledged by the employee.

Last updated on 15/09/2022



United Kingdom

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

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

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

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

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

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United States

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As there is no unified data protection regime, privacy protections stem from a patchwork of federal and state privacy laws which impose limits on the extent to which an employer can collect information from its employees in connection with an internal investigation. Whether specific conduct violates an employee's rights is a very fact-specific inquiry requiring the application of relevant state laws and a regulatory regime.

In most circumstances, an employer is free to conduct searches of its workplace and computer systems in the course of investigating potential wrongdoing. Such searches are generally not protected by personal

privacy laws because workspaces, computer systems and company-issued electronic devices are often considered company property. Many companies explicitly address this in written corporate policies and employment agreements. Employees who use their own electronic devices for work should be aware that work-related data stored on those devices is generally considered to belong to the employer (as a matter of best practice, employers should generally prohibit or at least advise employees against using personal devices for work and to maintain separate work devices, where possible).

These broad investigatory powers notwithstanding, the ability of an employer to conduct searches in furtherance of an internal investigation is not unlimited. For example, if an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data. Certain states also prohibit an employer from requiring an employee to disclose passwords or other credentials to his or her personal email and social networking accounts, but permit an employer to require employees to share the content of personal online accounts as necessary during an interview while investigating employee misconduct.

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Vietnam

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As part of an investigation, an employer may search the objects or files that are part of the company's property (eg, company or employers' laptops or phones for business purposes and emails or messages stored on the company's servers) without prior notice and without the need of the consent of the employee. However, the employer has no right to search an employee's personal possessions without consent.

To further avoid arguments or conflicts as to the right of ownership of a particular object or property, employers may specify in their internal policies, labour contracts, and handover documents what is to be regarded as the company's assets and subject to a search in a workplace investigation.

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