

Bird & Bird

# Workplace Investigations – What HR and Legal Needs to Know

*January 2025*



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# Foreword

A recent high-profile case involving a Singapore listed company has turned the spotlight on corporate governance and employee duties. Several interesting and important questions in the context of internal investigations have arisen for comment:

- What are the duties of management personnel in response to a whistleblower report?
- Is it appropriate for management to be involved in internal investigations?
- What is considered a truly independent investigation?
- What is a decision-maker or fact-finder entitled to consider in the deliberation process?
- Can a decision-maker be held liable for arriving at the “wrong” conclusion?
- Is there an evidentiary threshold akin to the civil courts’ standard of “balance of probabilities” that applies in internal investigations?

There are no easy or straightforward answers. Having worked as Investigations Counsel or Independent External Investigator, we have seen how the investigations process, many times more so than substance, is key to establishing a credible corporate governance framework. The recent case in point underscores why genuine independence in an investigation is crucial from a governance viewpoint, as it is sometimes that the “threats from within” are harder to tackle than external threats.

While most employment disputes connected with internal investigations present themselves as objections to the investigation procedure, the substance and content of the investigation can also come under scrutiny. **This guide serves as a timely reminder of the key dos and don’ts when conducting an internal investigation.\***

*\*This guide provides general guidance only and is not legal advice: the law and practice on investigations varies between countries and we would always recommend that you obtain legal advice from your usual Bird & Bird contact for specific cases.*



# Getting started

An investigation may be necessary for a range of reasons. You may have received an internal complaint from a member of staff or an external complaint from a customer or a member of the public. The complaint could be anonymous, and it might have been submitted via a whistleblowing program. An investigation may also be necessary following an audit of a company's systems and processes.

## Before getting the investigation underway

- Review any relevant internal policies or agreements as these may contain requirements beyond the legal minimum, including in company or sector collective bargaining agreements. Absent any such internal policies, please also consider any guidelines / advisories published by national agencies.
- Consider how the company has handled similar issues in the past, to ensure a consistent approach.
- Consider and document the key questions, facts and allegations that you will be investigating, and consider whether there could be legal ramifications for the company if the allegations are found to be factually correct.
- Take steps to ensure that any potentially relevant documents (whether physical or electronic) are preserved and not deleted or destroyed (while considering any applicable data protection rules).
- It may be appropriate to send a 'legal hold' notice to certain individuals.
- Consider if anyone needs to be notified within the organisation and if employee/trade union representatives<sup>1</sup> need to be involved, whilst keeping in mind confidentiality and data protection issues.



<sup>1</sup> For Singapore, the list of trade unions may be accessed here: [Ministry of Manpower - Trade union directory](#)

## The investigator

Depending on the country and circumstances, the investigator is usually someone from HR, management or the Compliance or Legal teams. The circumstances may require Board involvement or the setting up of an independent audit committee e.g. where the complaint touches upon serious corporate governance issues. It may be appropriate for a second person to attend investigation interviews as a note-taker, in case of any dispute regarding the content of the meeting. Sometimes an external investigator is appointed, especially if the matter is particularly sensitive, gives rise to potential internal conflicts of interest, or if there is limited internal resource and capacity to handle it. Appointing an external investigator provides assurance to key stakeholders that the investigation is independent and builds confidence in the process.

## Privilege

Privilege is a complex area, which may apply where internal or external lawyers are involved. [See further guidance on privilege here.](#)

## Suspension

Suspension is a complex area, which should be considered carefully. [See further guidance on suspension here.](#) Depending on the circumstances, you may consider the following alternatives to suspension. Some of these might need the employee's agreement:

Working from home

Temporarily moving to a different role

Agreed paid leave

Taking accrued holiday

It may also be appropriate to allow the employee who raised the complaint to take paid leave (or modify their activities or working hours) if there are concerns regarding their wellbeing. At the same time, employers should be careful about any such discussions being intrusive or being perceived as retaliation.

## Notifications to third parties

Notifications to the police or to a regulator may be necessary depending on the facts (for example if there is any criminal conduct involved) and whether the employer is subject to external regulatory controls (e.g. competition or financial services authorities). Such a notification may be appropriate at various stages, including at the start or end of an investigation, or subsequent disciplinary process. Any notification should be considered carefully and specialist advice should be obtained, especially in light of the possible wider impact on relevant employees and the company.

## Strengthened protection for whistleblowers in Asia Pacific

Whistleblowing programs are useful tools for employees and members of the organisation to raise concerns about workplace misconduct. With the rise in whistleblowing, the pressure is on companies to effectively respond to such complaints. In doing so, companies ought to offer adequate protections for whistleblowers to ensure confidentiality and protection against retaliation. [See further guidance on whistleblowing protections here.](#)

# Investigation process

In most countries there are no time limits for investigations,<sup>2</sup> and in general the investigator should not commit to employees that they will complete their investigation within a particular timescale. It is generally recommended not to insert a time limit in a company policy, unless this is required by law.

Investigations should always be conducted without unreasonable delay. Any delay could increase legal risk, through important information being lost or forgotten, participants losing confidence in the process, or impacting the legitimacy or fairness of any subsequent disciplinary sanction.

In general, the individual who raised the complaint should be kept up to date on the progress (but not the current findings) of the investigation, to reassure them that the company is taking a proactive approach. **The two main sources of evidence are:**

1. **Witness evidence** — the individual who made the complaint might have provided a written complaint or statement. The investigator should follow up with a meeting. They should also arrange meetings with other witnesses and with the employee under investigation.
2. **Other evidence** — this could include CCTV recordings, internal company records and “e-discovery” of emails and messages (for example on the employee’s work phone and laptop). It may be appropriate to consider forensic imaging of devices, to ensure data is not deleted or transferred. You should consider any applicable requirements, such as notification to employees and employee consent.

## Data Protection

When reviewing evidence and sharing information, it is critical to consider data protection rules. [See further guidance on data protection here.](#)

## Interviews

It is normally appropriate to interview the individual who raised the complaint first, in order to fully understand the allegations, before interviewing the employee under investigation or any other witnesses.



Investigation documents should be **stored and shared securely**, and you should consider applying **password protection**.

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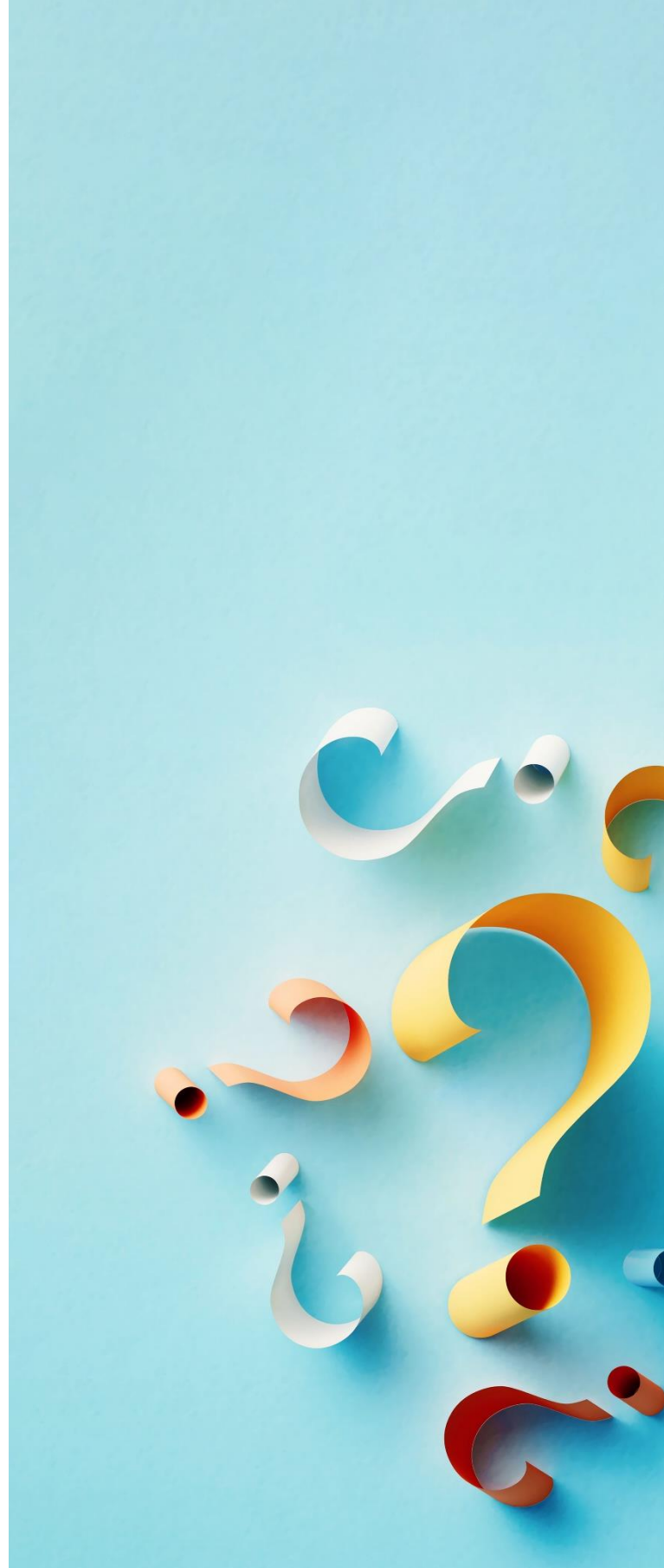
<sup>2</sup> For EU, please refer to our article on the timescales here: [The EU Whistleblowing Directive - Implementation of the EU Whistleblowing Directive - Timescales](#)

## Points to note when meeting with the individual who raised the complaint and other witnesses:

- Be clear about what will happen with the notes from their interview, for example, that they may be shared with the employee under investigation if a disciplinary hearing takes place. Even if they are not shared, meeting notes may be disclosable as part of any future litigation.
- Reassure witnesses that the information they provide will be treated sensitively and stored carefully, and that the company has a policy against retaliation.
- In exceptional circumstances, it may be appropriate to anonymise the witness' meeting notes. However, the employee under investigation will have the right to fully understand the case against them, and an anonymised statement may make this more challenging.
- If appropriate, be clear that the internal investigation and investigators are not public authorities. The employer is not replacing the courts or any other law enforcement authorities (who may initiate their own investigations) and is not entitled to make enforceable judgments.

## Document management and forensic review

Investigation documents should be stored and shared securely, and you should consider applying password protection. For more complex investigations, consider whether secure document management platforms could assist in organising the documents. [See further guidance on conducting a forensic review here.](#)



# Meeting with the employee under investigation

## Duties of the employer:

- Treat the employee fairly and consistently.
- Follow a fair and reasonable process.
- Comply with relevant policies and any collective agreements.

## Duties of the employee:

Co-operate with any investigation and obey reasonable instructions from the employer, including:

- Providing any documents or evidence.
- Answering questions and attending any investigatory meetings.

If the employee fails to cooperate with the investigations and/or provides false / misleading information, depending on the company's policies, this may also call for disciplinary action.

Once the investigator has information regarding the allegations, they should explain them to the employee under investigation, to understand whether they admit or deny them. In some countries employees have the right to be accompanied at the investigation meeting, and in other countries the position should be considered based on the circumstances. For example, it may be appropriate to allow the employee to be accompanied if there is a possibility of criminal liability in connection with the findings of the investigation.

Similarly, whether to give advance notice of the meeting, or details of the complaint in advance of the meeting, should be considered on a case-by-case basis and depending on local laws. It might be necessary to hold follow-up meetings if you receive further detail regarding the allegations.

## Conducting the investigation meeting:

- **Make clear the purpose** of the meeting at the start.
- **Remain neutral and objective.** Focus on understanding the facts.
- **Confirm that the meeting is for the purposes of an investigation** and is not a disciplinary meeting.
- **Understand any mitigating factors** or explanations for the suspected misconduct.
- **Explain that the meeting is confidential.**
- **Take a detailed note** of the meeting.
- **Ask whatever questions are reasonably necessary** to establish the facts of the situation. The employee's comments may require you to react quickly and ask new questions that you had not previously considered.
- **Consider whether to ask open or closed questions.** It is often best to start with open questions and then ask closed questions.



# Arriving at a decision

Depending on the country and the circumstances, there may be local legislation and/or decisions that prescribe specific standards for internal investigations. Local advice should be taken. In most countries, while it is unlikely that employers are expected to arrive at the same decision as civil courts, employers should still apply the civil standard of proof – "balance of probabilities" – that is, it is more likely than not that the event occurred. Ultimately, in the event that an employee wishes to challenge the employer's decision with the local courts, it is the employer who has to show that the decision it had made was justified.

In **Singapore**, the High Court observed that in conducting internal investigations, amongst other things, employers should not carry any pre-judgment, avoid prejudice in the process, allow the subject of the investigation a fair opportunity to respond to the allegations, and to inform the subject of the investigation's outcome.

Investigators generally have freedom to weigh up the evidence gathered in the fact-finding process but it is possible for their conclusions to fall under scrutiny by Courts or another reviewing body, especially in clear and obvious cases where the investigator failed to consider material facts that compromised their decision-making and/or failed to perform their duties responsibly and reliably and/or gave undue weight to questionable sources of evidence. In our view, the investigators' factual findings can only be challenged in rare and exceptional cases, where the investigation process was duly followed.

Should the subject of such internal investigations be unhappy with the decision, mediation is recommended. However, if the matter remains contested, the employer must be cognisant of the possibilities of court proceedings / claims being brought forward by the subject for wrongful dismissal and/or salary-related disputes.



# Next Steps

At the end of the investigation, depending on the case, the employer may provide the employee under investigation with a report summarising the findings from the investigation, and possibly copies of any witness statements/interview notes and other evidence obtained or reviewed as part of the investigation. However, the precise information that is provided will depend on the country in question and specific circumstances of the case.

Local advice should be taken. For example, in **Singapore**, whistleblowers for certain offices e.g. corruption / use of drugs, are granted anonymity in both civil / criminal proceedings. Any evidence / notes that may lead to the reveal of such a whistleblower's identity, is to be concealed. Depending on the case, the company may wish to keep the investigation findings confidential (and rely on legal privilege where available).

The company should carefully consider what information it is appropriate to give to the individual who raised the complaint, including whether it is appropriate for them to see the full investigation report, witness statements/ interview notes and other evidence, and what further action is needed (if any).

In some cases, it may be there is nothing further to be done, or informal action may be sufficient, such as a mediation meeting between two employees or an informal verbal warning. In other cases, if the employer is proceeding to a disciplinary hearing, this should be conducted without unreasonable delay and in accordance with the company's disciplinary procedure and local legal requirements.

**In disciplinary circumstances, at a minimum, the company should typically:**

- Inform the employee of the allegations in writing (and provide relevant supporting evidence).
- Invite the employee to a disciplinary hearing with reasonable prior notice.
- Give the employee a written decision after the hearing.

**Depending on the country and the circumstances:**

- It might be standard for the disciplinary process to be chaired by someone who was not involved in the investigation.
- The employee might have a right to be accompanied to the disciplinary hearing.
- The employee might have a right to respond to the disciplinary allegations in writing, or to appeal the decision.

Regional variations apply. For example, in **China**, it is not typical or required to inform an employee of the allegations or hold a disciplinary hearing before issuing a written decision.

The appropriate disciplinary sanction will depend on factors including the severity of the actions, the employee's response to the allegations (including any mitigating factors), their length of service, seniority and any history of good conduct. Possible subsequent actions following a disciplinary process may include the following, although local legal advice should be obtained based on the specific case, and some of these actions may not be permissible in some countries:



## Suspension

Suspension of staff members may be appropriate, for example to stop the alleged misconduct or if there is a risk to any employee's health and safety or to the company's property or business interests. If the company is regulated, suspension may be necessary to prevent the employee from continuing in a regulated role.

**Many countries have specific rules around suspension and local law advice should always be obtained. For example:**

- In **Singapore**, the maximum period of suspension is **one week** (for longer periods, an employer must submit an application to the Ministry of Manpower). The employer is also required to pay the employee at least half of his / her salary during the suspension.
- In **Hong Kong**, an employer may suspend an employee for a period not exceeding **14 days** without notice / salary pending a decision.

The following general points are also worth noting:

- In some countries, a contractual right to suspend may be required, in which case individual employment contracts or relevant policy documents should be checked. In some cases, it may be appropriate to obtain the employee's consent to be suspended.
- In some countries there are no fixed limits on the duration of suspension, but it is not usually seen as a 'neutral act' and any decision to suspend should be regularly reviewed to ensure that it does not last longer than is reasonably necessary.
- You should inform the employee about the reason for suspension, the expected length of time, and whether the employee will remain on full pay (which will normally be the case).
- The reasons for continuing suspension should be recorded in writing.
- It is generally best to say very little (if anything) to other employees about suspension or the investigation process.



Suspension is not usually seen as a 'neutral act' and any decision to suspend should be **regularly reviewed** to ensure that it does not last longer than is **reasonably necessary**.

## Privilege

Investigations are normally conducted on an 'open' basis. This means that, if there is subsequent litigation relating to the issue (for example if the investigation results in an employee being dismissed), the fact of the investigation and the content of any investigation documents or discussions can be relied on by the parties, and they may also be visible to the general public.

However, in some countries, it is possible for investigations to be conducted by internal or external lawyers on a 'legally privileged' basis. This might be preferable if there are possible legal or regulatory consequences of the investigation, including possible disclosure to a regulator or claims by third parties against the company.

### **Conducting the investigation on a privileged basis may assist in:**

- Assessing possible liability for the company.
- Retaining control over potentially damaging evidence.
- Exempting documents from disclosure under a data subject access request.

Where you wish to treat an investigation as privileged, it may be appropriate to label documents as "confidential and legally privileged".

Conducting the investigation on a privileged basis could have drawbacks. If the report is negative and not disclosed, but the company still relies on the fact of the investigation in any subsequent litigation (for example to prove that the matter was not ignored), some courts may not give much credit for a company having obtained a privileged report or may infer that something negative is being hidden.

Also, privilege may not apply to parts of the investigation that do not include the provision of legal advice, for example records of the interviews with current and former employees.



## Whistleblowing protections

Whistleblower protection varies across the globe. Unlike the EU Whistleblower Directive, there is no Asia-wide protection mechanism against for whistleblowers. It is important for employers to be aware of the perimeters of such protections to ensure that they effectively handle whistleblower complaints. Local advice should be taken.

- In **Japan**, there is a Whistleblower Protection Act that protects corporate whistleblowers by imposing certain obligations on employers to implement an adequate whistleblowing system.
- In **Singapore**, there are no specific whistleblowing legislations. However, certain whistleblowers are protected from having their identities / personal information revealed. Employers may also expose themselves to criminal sanction if they dismiss and/or threaten to dismiss an employee for blowing the whistle in relation to health and safety breaches. Most organisations typically also have their own set of whistleblowing policies.
- In **Hong Kong**, while there are no specific whistleblower legislations, the Hong Kong Monetary Authority has a comprehensive set of circulars, guidelines, and guidance notes on proper standards of conduct and prudent business practices among Registered Institutions, including having a whistleblowing and escalation policy.



## Data protection

Data protection rules could apply to various activities connected to the investigation, for example (a) monitoring an employee's emails and (b) sharing the names of the individual who raised the complaint and of other witnesses with the employee under investigation.

- Data protection is a complex area. Local specialist data protection advice should be obtained.
- It is usually necessary to consider whether the relevant personal data includes 'sensitive' personal data, such as data about an employee's health, personal data of minors, which are subject to more strict conditions and will require an additional legal basis.
- Depending on the circumstances and country, you may need to check what the privacy policy or privacy notice states, conduct a data protection impact assessment, or consult with trade unions.
- You should consider your obligations around whether and when to retain or delete/destroy documents that you produce or collect as part of the investigation (including documents that were ultimately not relevant).
- Employees could also make data subject access requests or requests for deletion. These can be challenging to address and may need to be handled within short time frames.

Bird & Bird's HR Data Essentials microsite has a range of information to help employers navigate data protection issues around the globe. [To access the Microsite, click here.](#)



## Forensic review

In some cases, it may be appropriate to conduct a forensic review of documents and other data. This often necessitates engaging forensic specialists. Forensic experts use specialised

hardware and software for handling of data, to ensure that data integrity is preserved and that materials can be accepted by courts in the event of legal proceedings.

A forensic review typically starts with preparing a “data map” of potentially relevant data sources to be reviewed (e.g. emails, corporate systems). The data collected from these sources usually includes a large number of irrelevant documents not relevant to the investigation. Therefore, it may be appropriate to use an e-discovery platform. Such platforms allow the application of data ranges, de-duplication, keyword searches or more advanced analytics, in order to select the most relevant documents, and keep the review proportionate and manageable.

Bird & Bird has a dedicated Forensic Services team. [Please see here for further information.](#)



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# Key contacts

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Watch Seow Hui Goh and Rob Briggs talk about international workplace investigations, including practical tips for the conducting of interviews.



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# Thank you

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