



International Employment Lawyer

GUIDE TO WORKPLACE INVESTIGATIONS

MALAYSIA

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Starting an investigation

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

Malaysian legislations do not specifically prescribe or address the process by which workplace investigations ought to be carried out.

Workplace investigations are largely governed by an employee's contract or an employer's handbook, code of conduct, or policies relating to investigations. Where there is no guidance, recommended or acceptable practice should be adhered to.

2. How is a workplace investigation usually commenced?

Workplace investigation usually commences by identifying the issues or concerns to be investigated, forming the investigation team and communicating the terms of reference to the investigation team.

Where necessary or appropriate, evidence and potential witnesses should be ringfenced at the earliest possible time, which may include imposing suspension from work or restricting and barring access to systems and records.

The investigation team will then commence work by collating all relevant evidence, identifying persons to be interviewed and evidence to be procured.

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

Yes. Although, section 14(2) of the Employment Act 1955 ("EA 1955") states that an employer may suspend an employee for purposes of conducting an inquiry for a period not exceeding two weeks but shall pay them no less than half of their wages for such a period. An inquiry is not investigation and as such, unless otherwise provided for in contractual documents, there is no prescribed duration for suspension pending investigation and suspensions should be with full pay. It is however recommended that an initial suspension period not exceed two weeks and if necessary, be extended, preferably also for two weeks at a time.

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

Legally, there are no minimum qualifications or criteria which need to be met for persons conducting a workplace investigation. In some cases, an employer's policies, handbook, or guidelines may set out the required composition of the investigation team. In the absence of the same, investigations should ideally be conducted by individuals who have no connection with the allegations or the employee under investigation, and are assured of being independent and objective.

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

Yes, an employee under investigation is entitled to apply to the Malaysian courts to injunct their employer from continuing with the investigation. However, the employee bears the legal burden of showing that there is a serious issue to be tried and that the balance of convenience favours the grant of an order to prohibit the investigation. Such an injunction is unlikely to be granted as the employee is unlikely to prove that harm or damages will be occasioned to the employee by reason of the investigation.

Evidence gathering

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

Yes, even in the absence of an express contractual obligation to cooperate in investigations, it is an implied duty of an employee to do all things necessary or expedient in the interest of the employer so long as it is lawful and reasonable. Requiring an employee to provide evidence or information that they are aware of may be considered a lawful and reasonable request by the employer. Thus, refusal to act as a witness in an investigation may be viewed as insubordination, which would justify an employer commencing disciplinary action against the non-cooperative employee.

There is no statutorily mandated legal protection for employees acting as witnesses in an investigation but it is implied that employers should take all reasonably practicable steps to ensure that such employees do not suffer retaliation or are at any foreseeable risk.

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

The Personal Data Protection Act 2010 ("PDPA") is the main legislation governing all matters relating to collection of personal data in Malaysia. The PDPA aims to protect personal data processed in connection with commercial transactions. It is advisable for employers to bear in mind the following key principles relating to PDPA when gathering evidence from employees:

- Consent – sensitive personal data should be collected only with an employee's explicit consent. In relation to all other personal data, explicit consent is not required if it can be shown that the processing of such data was necessary under the specific circumstances set out in the PDPA;
- Notice and choice – by way of a notice, employees must be informed of the various matters set out in the PDPA relating to the information of the employee which is or would be processed;
- Disclosure – personal data may not be disclosed for a purpose and to third parties other than the purposes and parties disclosed to the employee in the notice, save in the specific circumstances set out in the PDPA;
- Security – appropriate measures must be taken to protect personal data from loss, misuse, modification, unauthorised access, or disclosure;
- Retention – an employee's personal data should not be retained longer than necessary;
- Data Integrity – an employer must take the appropriate steps to ensure that all personal data collected is entirely complete, accurate, up-to-date and not misleading in regard to the underlying purpose for storing and processing such data; and
- Access – employees have the right to access and correct their personal data.

Organisations often have internal policies and procedures related to workplace investigations, data protection, and privacy which outline the processes for gathering and handling evidence. These policies must be complied with during investigations.

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

Unless expressly consented to by an employee, an employer's right to search the employees' possessions or files is limited to accessing company-related or owned property or information (eg, email accounts and electronic devices provided by the employer or business related information and communication).

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

The Malaysian Whistleblower Protection Act 2010 ("Whistleblower Act") aims to protect individuals who disclose information of wrongdoings or corruption. Under the Whistleblower Act, a whistleblower is entitled to protection of confidential information, immunity from civil and criminal action and protection against detrimental action. However, the scope of the Whistleblower Act only extends to persons who make a complaint to Malaysian enforcement agencies, which includes any ministry department, agency or body of the Malaysian government. This protection does not extend to information on wrongdoing given to an employer, unless the complainant has also simultaneously lodged a complaint with a Malaysian enforcement agency.

It is recommended that organisations have their own whistleblowing policy that clearly provides the channel for reporting and states the organisation's stance against retaliation.

Outsourcing the whistleblowing process provides an additional layer of independence and integrity to the process.

Confidentiality and privilege

10. What confidentiality obligations apply during an investigation?

It is implicit that confidentiality should attach to the investigation and the outcome of it. Any information shared should be on a need-to-know basis only.

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

It is not mandatory for employees under investigation to be given information of the allegations against them. Depending on the nature of the matter under investigation, the employer may consider whether it would be beneficial to provide the employee under investigation with brief details of the complaint made against them and to what extent.

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

Yes, the identity of the complainant, witnesses or sources of information may be kept confidential and shared on a need-to-know basis only.

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

Yes, NDAs may be used to keep the fact and substance of an investigation confidential as there are no express prohibitions against NDAs in Malaysia. However, information or evidence within the ambit of the NDA may still be produced in court pursuant to discovery applications and may also be subject to disclosure requests by the police or other regulatory bodies.

14. When does privilege attach to investigation materials?

There are two types of legal professional privilege recognised in Malaysia pursuant to common law principles and codification under the Malaysian Evidence Act 1950 (ie, legal advice privilege and litigation privilege).

Legal advice privilege applies when the investigation materials were created to seek or obtain legal advice.

Litigation privilege applies where an investigation was conducted with a reasonable prospect of litigation pending or being apprehended, and the report was prepared for the dominant purpose of obtaining advice to be used in litigation.

Where external legal counsel undertakes investigations, privilege usually attaches to such an investigation, as the findings and conclusions are usually rendered in the form of legal advice and any such legal advice procured, is usually with a view of protecting the organisation's interests in the event of litigation at a later stage. The same privilege does not attach to investigations conducted by in-house counsel.

Rights to representation

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

Unless provided for contractually, an employee under investigation does not have a legal right to be accompanied or have legal representation during an investigation but nothing prohibits their basic rights to seek legal advice during investigations.

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

In workplaces where there is a works council or a trade union representing employees, their involvement or right to information during investigations depends largely on the terms of the collective agreement in existence between the union and the employer.

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

Employers may provide support such as:

- reminding its employees of its zero-retaliation policy;
- if need be, issuing relevant directives such as work from home to minimise potential interaction between the complainant and the employee under investigation that may further aggravate conflict; and
- provide counselling support.

Issues during the investigations

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

If unrelated matters are revealed as part of an investigation, depending on the nature of such matters, exigencies and persons involved, the unrelated matters may be handled separately, or the scope of investigation may be widened to include the new matters revealed.

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

If an employee under investigation raises a grievance which is unconnected to the matter under investigation, the employee should be advised to submit their grievance in accordance with the employer's internal grievance process. If the grievance is relevant to the current investigation, it should be considered as part of the investigation process.

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

If the employee under investigation has already been interviewed and their involvement is no longer required, the investigation may proceed while the employee is on sick leave.

However, if the employee has not been interviewed yet, the employer should await the employee's return to complete the interview though other aspects of the investigation may continue uninterrupted. An employee on sick leave should not be compelled to participate in the investigation process.

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

In Malaysia, there are no laws which prohibit employers from undertaking workplace investigations simultaneously with criminal or regulatory investigations.

However, if an employer has opted to proceed with a parallel workplace investigation alongside criminal or regulatory investigations, the employer ought to ensure that the investigations do not interfere with each other and that legal and procedural requirements are met. For example, the employer should consider engaging forensic bodies to handle and secure evidence to avoid contamination or mishandling. It is advisable for an employer to also seek legal advice to navigate potential risks and ensure compliance with relevant laws and regulations.

The police or regulators may compel employers to share evidence procured during a workplace investigation by way of a court order which an employer must comply with. Some regulators may not need a court order for this purpose.

Outcome of investigation

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

Although there is no legal requirement for an employee under investigation to be apprised of the outcome of the investigation, it is recommended that if the outcome exonerates the employee, the employee is duly notified that the investigation has closed and there will be no further action.

If the outcome of an investigation necessitates disciplinary process, the employee will be made aware when the process commences.

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

The investigation report and findings need not be shared. Where disciplinary proceedings are commenced, it would suffice only for the findings to be shared in the form of allegations framed against the employee in respect of whom disciplinary action is taken.

24. What next steps are available to the employer?

The employer should ascertain whether the findings of the investigation disclose any *prima facie* misconduct or wrongdoing, and on whose part. If misconduct by an employee is disclosed, the employer should commence disciplinary proceedings in accordance with the terms and conditions of employment, if they extend to disciplinary matters, and internal policies, if any. Local laws mandate that no punishment may be imposed without the employee being given an opportunity to provide an explanation and this should be done in accordance with applicable laws. This would ordinarily involve the issuance of a show cause letter which would set out the charges against the employee. The employee must then be given the opportunity to respond to the charges. Upon receiving the employee's response, the employer must ascertain if the said response is satisfactory. If in the affirmative, the disciplinary process concludes with no finding of misconduct. If in the negative, the employer may, if deemed appropriate, convene a domestic inquiry or proceed to impose a punishment on the employee. Depending on the severity of the misconduct and the employee's record of employment, the punishment could include, amongst others, demotion, freezing of increment and bonuses, or summary dismissal.

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?

The investigation's findings need not be disclosed to any third party and may be kept confidential. It may be disclosed to criminal or regulatory authorities if the employer would like the authorities to act on them, or if they would be helpful to the authorities in their parallel investigations. If the outcome of the investigation reveals that an employee is or was involved in criminal activity, the employer is obliged under Section 13 of the Penal Code to report such findings to the authorities.

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

The outcome of the investigation should remain on the employee's record for as long as the employee is employed by the employer. In the event that there is a termination of employment as an outcome of the investigation, it is advisable for the investigation records to be maintained for a minimum of seven years from the date of termination of employment.

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

Employers could face various legal risks for errors during an investigation. If an employee is dismissed based on an investigation conducted poorly, there is the risk of facing claims for unfair dismissal and being liable for backwages and compensation in lieu of reinstatement. If information is disclosed to third parties, there could be risk to potential defamation action. Additionally, mishandling of personal data collected during investigations, contrary to data protection laws, may result in legal penalties.