

Effective Workplace Investigations

Simple Guidelines for Employers to Consider

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All businesses, big and small, are faced with employee complaints that focus on compliance issues. Companies that take preventative measures, such as developing meaningful policies and training employees on compliance, have a distinct advantage over those that do not. Still, every company receives complaints. Those that respond quickly at the first sign of trouble, conduct prompt and thorough investigations, and take remedial action when necessary, are sure to foster a positive working environment and reduce their legal risks. Moreover, if the facts of a complaint evidence a possible violation of criminal law, conducting an effective internal investigation becomes critical in avoiding prosecution and mitigating loss.

The following steps serve as a guide to conducting an effective workplace investigation.

Step 1: Identify the Specific Allegations

After Sam Supervisor tells Emily Employee that she will be promoted only if she submits to his sexual advances, Emily knocks on the door of Henry HR Manager, tearfully reports Sam's inappropriate and unwelcome behavior and hands Henry a detailed written complaint. Henry embarks on a targeted investigation that leads to Sam's discipline. Sounds perfect, right? Unfortunately, this scenario is not how most workplace complaints unfold. In the more typical situation, Henry listens sympathetically as Emily describes various events over many months that may be easily subject to interpretation. In other situations, the complaint comes not from the victim but from a coworker (or is anonymous) and is made not to human resources but to a supervisor or co-employee.

The simple reality is this: Complaints come in many forms and from many sources. Regardless of the form or source of the complaint, employers should ensure they have a clear

understanding of the specific allegations before moving forward with an investigation.

Step 2: Is an Investigation Necessary? If So, What Type of Investigation?

Although it is important for employers to respond quickly to a complaint, how the company responds will vary. Not all complaints require a full-blown, lift-every-rock investigation. Instead, in determining whether an investigation is necessary and the appropriate type of investigation, employers should consider the following:

- Are key facts in dispute?
- If not, is there reason to believe there may be other victims, or a need to determine the extent of harm?
- Is there a potential violation of a civil or criminal law?
- Is there a legal obligation to investigate?
- Is the complainant a member of a protected class?
- Would the conduct violate the employer's code of conduct or ethics?

An investigation may not be necessary where there is no question that the conduct occurred, such as when the alleged bad actor admits the conduct, or when, on its face, the complaint does not allege any violation of company policy or law. However, before concluding that an investigation is not necessary, the employer should examine carefully the facts and circumstances. To be clear, it is certainly safer to conduct an investigation in some form than to forego it. If the company elects not to conduct an investigation, the decision and reasons for it should be documented. The employer also should follow up with the complainant and encourage the complainant to report any new or additional information or conduct.

The formality of the investigation also can vary. Sometimes, a relatively quick and informal investigation is sufficient to gather the information necessary to reach a conclusion and effectuate an appropriate resolution. Other times, the investigation is more complex. When the complaint is lodged by law enforcement or involves allegations of criminal conduct, certain actions should be taken. The company should retain a white-collar criminal defense attorney to conduct the investigation. Allegations of illegal activity have the potential to severely damage a company, so it is imperative to have an investigator who will ensure that management and/or the board knows how best to proceed.

Where there are allegations by law enforcement, gaining credibility with the government is often critical. The government will review the actions taken by the company in considering whether to charge the company and also in evaluating fines and penalties. The United States Department of Justice guidelines (DOJ 2008 guidelines), which also may come into play, contain policies concerning corporate cooperation with the government and are incorporated into the United States Attorneys Manual. The DOJ 2008 guidelines focus on the DOJ's policy that corporate cooperation credit be based on disclosure of relevant facts about the underlying criminal conduct. Credit for cooperation does not depend on the waiver of the attorney-client and work-product protections. For example, credit does not depend on whether a corporation has produced materials protected by attorney-client privilege or work product, such as notes or memoranda generated by attorneys during witness interviews of witnesses. Moreover, prosecutors may not consider whether a company terminated or disciplined an employee for purposes of determining cooperation.

No company wants the Federal Bureau of Investigation or another government

agency knocking on its door; however, it is important to prepare for the worst. A company's general counsel, management or compliance officer should have a plan in place that includes retaining an experienced white-collar criminal defense attorney at the first sign of trouble.

Step 3: Select the Proper Investigator(s)

Choosing the right investigator is critical. Regardless of who is selected, the investigator or investigative team must be credible, unbiased and objective (and perceived as such) in order to uphold the integrity of the investigation. Naturally, an investigator should possess the requisite skills and training to conduct a proper investigation. Simply put, the job of the investigator should be reserved for actual, experienced investigators. If the allegations are criminal in nature, a white-collar criminal defense attorney may be the right choice to hire as the investigator.

Sometimes an investigative team makes sense. An investigative team offers several advantages. The members of the team work together to ensure that all necessary tasks are completed thoroughly and in a timely fashion. Additionally, having two investigators present during interviews enhances thoroughness, since one investigator can lead the questioning while the other investigator acts as the note taker and identifies areas for follow up. Finally, bringing investigators with different perspectives together on an investigation offers diversity in communication style and approach.

Additional considerations when selecting an investigator include the nature of the complaint, the objectives of the investigation, and the size of the company. For some companies, using a member of the employee relations or human resources staff is preferred when investigating complaints of discrimination or harassment because of his or her knowledge of the company's policies and

governing laws, and of the work environment. When choosing an internal investigator, the employer should pay attention to the investigator's role and position within the company to avoid the appearance of bias or partiality. An outside investigator, such as an attorney or consultant, is often preferred, particularly in sensitive investigations.

The investigator must be an effective interviewer and communicator and able to gain the trust of interviewees. The purpose of the investigation is to gather facts, and witnesses must feel comfortable revealing those facts.

Step 4: Define the Scope of the Investigation

An inadequate or incomplete investigation can be as detrimental as no investigation. For example, a sham investigation, or one conducted simply to create a paper trail, will undoubtedly be viewed as such. The goal of the investigation is to resolve the problem and to help avoid or limit liability. Let's face it, investigations are often challenged, whether justified or not. Companies that conduct prompt and thorough investigations are better able to defend themselves.

At the start of the investigation, the investigator should determine the scope of the inquiry, which will keep the process on track. Flexibility is important, since new issues may arise during the course of the investigation that require a change of or expansion in the scope. Documenting the scope of the investigation at the outset, and any changes, is an important step in the process. On occasion, the investigator and the company may disagree over the scope of the investigation. Whenever possible, it is best to come to an agreement over the scope to avoid a future attack on the investigation.

After determining the scope, the investigator should develop an investigation plan. The plan should include who will be interviewed and in what

order, where the interviews will take place, and what documents or other evidence will be collected. It bears repeating that the investigator's plan must remain flexible throughout the process. Neglecting to be as thorough as possible during the interview stage of the investigation is a common mistake.

The company should consider whether interim measures are necessary while the investigation is being conducted. Interim measures may include paid administrative leave for the complainant or the accused, or temporary re-assignment to another position or supervisor. For investigations involving alleged criminal conduct, identifying employees who need to be removed from the office and denied computer access may be critical. Each situation requires an individualized assessment that takes into account what is best for the individuals involved under the circumstances.

Step 5: View All Relevant Documents and Company Policies

The collection and review of documents is essential to any investigation and should begin as soon as practicable. The documents to be gathered depend on the nature of the allegations but may include documents provided by (or referenced by) the complainant and accused, written policies and procedures, codes of conduct or ethics, personnel files, prior relevant complaints and investigation files, organizational charts, and supervisor files. For investigations involving alleged criminal conduct, collecting information about the computer system and retention policies may also be important.

With increased reliance on electronic forms of communication, emails, text and voice mail messages, as well as photographs, are front and center in many investigations. Hitting the "send" button forever memorializes thoughts and actions. Because these communications often figure prominently in workplace investigations involving harassment

and discrimination, they must be pulled into the investigator's file.

An entire article can be written about social media and how it has come to impact nearly every aspect of work life. Investigations are no exception. Relevant information about workplace conduct is often found on social media sites, and reviewing social media posts in the public domain is acceptable. However, some states have made it unlawful for an employer to request or require an employee to provide a password or otherwise to grant an employer access to a personal account or service. On Aug. 28, 2013, New Jersey passed legislation that prohibits an employer from requesting social media usernames and passwords from job candidates and employees.¹ Investigators and employers should be guided accordingly.

Whether and when to issue a litigation hold as a result of an internal employee complaint is a topic best left for another discussion, as the question cannot be answered in a vacuum. However, an attorney demand letter, lawsuit, or subpoena would seem to necessitate a litigation hold, so if the investigation is being conducted under those circumstances the employer should consult with counsel about the steps to take to effectuate an appropriate hold.

Step 6: Interview Witnesses

The investigator will determine who should be interviewed and in what order, again keeping the need for flexibility in mind. Generally speaking, the complainant should be interviewed first so the investigator can understand the allegations. The alleged bad actor should be interviewed soon after the complainant to provide an early opportunity to address the allegations. To determine other possible interviewees, the investigator should consider those who observed the incident, individuals identified by the complainant and accused, and anyone else who may have

relevant information. A company's desire not to 'bother' employees or to usurp the time of high-level executives must give way to the needs of the investigator to collect relevant facts.

The investigator should consider whether the target/subject of the investigation or other relevant witnesses are aware of the investigation. If the investigation concerns potential criminal conduct, certain witnesses may individually or collectively modify their versions of the incident or falsify information or potential evidence. Counsel also should be aware of which potential witnesses are obligated to cooperate due to their employment or as a result of an employment contract.

When a privileged investigation is being conducted, counsel is acting to gather information and provide legal advice to assist the company. The company's interests may be contrary to or conflict with the interests of individual officers, directors and employees. For these and other reasons, it is important for counsel to clearly describe the ground rules for the interview at the outset, before substantive questioning begins. Specifically, counsel should advise every witness that: 1) outside counsel was hired to act on behalf of the corporation only, is not the employee's attorney and does not represent the employee's individual interest; 2) the interview is protected by attorney-client privilege and that privilege belongs to the company, not the employee; 3) only the company has the right to waive the privilege, and the company may disclose all or part of the employee's statements to law enforcement or a third party; and 4) the interview must be kept confidential (except for the personal attorney of the witness) in order to maintain the privilege.²

The interviewer should confirm that the witness understands the instructions and document that fact in any memoranda relating to the witness. Most companies have an anti-retaliation

policy, which should be reviewed with witnesses at the time of the interview.

Often interviewees ask that a third party (such as a coworker, union representative or attorney) be present during the interview. In such a case, the investigator should consider whether the interviewee is a target of the investigation, the nature of the relationship between the interviewee and the third party, and the impact the third party's presence will have on the confidentiality and privacy of the investigation. If a third party is permitted to attend an interview, the investigator must make it clear that the third party is not permitted to participate in or interfere with the interview.

Step 7: Properly Document the Investigation

In order to create a reliable and complete record, the investigator should document every step of the investigation. Except in privileged investigations, the investigator is the fact gatherer whose purpose is to develop and record facts. The investigator should avoid making assumptions or engaging in speculation.

When documenting witness interviews, the investigator should reference directives or warnings given to the witness at the outset of the interview, and record the facts provided. Some investigators prefer to share their notes with the witness, ask the witness to confirm their accuracy, and then secure the witness's written approval. If a potential witness was not interviewed, the investigator should document the reasons why.

A written investigation report is an effective means of organizing the facts gathered during the investigation. The report should describe the scope of the investigation as well as the facts gathered and the investigation process. It is also helpful to identify the documents reviewed, witnesses interviewed, and relevant company policies or guide-

lines. The report generally should not contain any legal conclusions, and distribution should be limited to those individuals responsible for making a final determination regarding any remedial action.

Step 8: Properly Maintain Confidentiality

In order to safeguard the integrity of the investigation, the investigator should consider a request for confidentiality at the outset of each witness interview. However, in light of recent National Labor Relations Board (NLRB) decisions and Equal Employment Opportunity Commission (EEOC) guidance, the investigator should refrain from imposing a blanket confidentiality requirement. The NLRB's 2012 decision in *Banner Estrella Medical Center* suggests that imposing confidentiality may be appropriate when the investigator has a legitimate need to: 1) protect witnesses, 2) avoid spoliation of evidence, 3) avoid fabrication of testimony, or 4) prevent a cover-up.³ The investigator should document when these circumstances exist.

Step 9: Take Corrective Action Where Necessary

Finally, the employer should act upon the results of the investigation. For example, if the complaint is substantiated, the corrective action should be designed to stop the inappropriate conduct and prevent it from occurring in the future. When taking remedial action, the company should ensure that its policies are uniformly and consistently applied. In an investigation relating to a potential criminal matter, the government may consider the discipline imposed by the company against the employee found to have acted unlawfully when evaluating the company's compliance program.

Even when a complaint is not substantiated, the investigation may reveal a workplace issue that requires the

employer's attention. For example, the investigation may reveal that the accused would benefit from training to improve his or her management style, that the complainant needs a refresher on performance standards, or that the company needs to train its employees on a particular policy.

The employer should follow up with the complainant and remind the participants of the company's anti-retaliation policy. Even though the investigation has concluded, monitoring the work environment may be necessary, particularly where the complainant and accused continue to work together. ☞

Endnotes

1. See "An Act prohibiting the requirement to disclose personal information for certain electronic communication devices by employers," L. 2013, c. 155.
2. *Upjohn v. United States*, 449 U.S. 383 (1981).
3. *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, Case 28-CA-023438. 350 NLRB No. 93 (July 30, 2012).

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