

Workplace Investigations Part III: Other Investigation Issues

A) Special Concerns of Investigation

An overriding principle in conducting workplace investigations is “do no harm.” Problems have been made worse by poor investigations that make the investigation process look incompetent at best and as a cover-up at worst.

All workplace investigations have risks. Be mindful of possible tort claims arising from how the investigation is conducted, regardless of its outcome.

Unethical Investigator Behavior

Unethical investigator behavior undermines any value that the process brings to the company. It damages the quality of investigations as well as the respect the compliance professionals enjoy within the company. Any of the following behaviors are unacceptable:

- Selectively opening, closing, rushing or stalling an investigation based on a relationship with or pressure from a reporter, implicated person, witness or executive;
- Improperly handling evidence to influence the outcome of an investigation;
- Improperly handling evidence or testimony through incompetence, carelessness or lack of training;
- Fabricating information;
- Using interrogation tactics instead of interviewing tactics (except where appropriate);
- Treating each witness as though he is culpable, with little or no regard for the damage inflicted on blameless people;
- Making inappropriate threats or promises to employees;
- Compromising sensitive information or disclosing it improperly.

Unethical behavior exposes the company to civil and criminal liability. Make ethics a pillar of your operations. Ethical behavior enhances the value of your investigations rather than hindering it.

Opening Pandora’s Box

When a company is a victim of employee misconduct, and when that misconduct becomes public, the company faces harm beyond its immediate losses. For example, an investigation may be so effective in discovering misconduct that it develops information that might never have otherwise been learned by government or private litigants. The investigation process may also encourage disgruntled employees to make accusations that otherwise would not be disclosed. The investigation likely disrupts company operations. Finally, the investigation may create adverse publicity or internal divisiveness by employees who are being asked to report on

the conduct of their colleagues.

Common Investigator Errors

There is no single way to conduct a proper investigation. Methods vary depending on investigators and investigations. Despite these differing methods, some common problems may arise:

Promptness. Companies should not wait too long to investigate. This may result from delays in contacting reporters, referring the matter to investigators or delays in management reporting the matter to you. Delays compromise witness recollections and other proof. Delays also undermine employee confidence because delays may imply that the company does not care.

Impartiality. Companies may use an investigator who is somehow vested in the outcome of the investigation. This could be an investigator who is connected to the incidents under investigation (such as a Human Resources manager who has dealt with the parties before). It could be an investigator who is in the management hierarchy for that business group and might feel pressure to sway findings towards what he thinks his bosses expect. You may not be neutral in the outcome of the investigation. If your neutrality is compromised, so is the investigation. Even an investigation conducted to “clear” a subject may be compromised by an investigation’s bias to reach a particular finding.

Confidentiality. You must maintain confidentiality of the subject and the witnesses to the extent possible. This must be balanced against the need to conduct a thorough investigation and to afford the subject a full opportunity to respond. The investigator must be sure that the investigation is not compromised by witnesses talking to or trying to influence others.

Training. A common error is the use of untrained—or under-trained— investigators. Do not choose someone who has little understanding of the substantive issues and no training or experience in conducting investigations and making credibility determinations. Experience acquired on the job is not a substitute for training. It may just be accumulated bad habits.

Thoroughness. Inexperienced investigators often have trouble understanding who they should interview, and in what order. They also frequently do not know how far to go. Their investigations may be merely superficial—emphasizing process over substance—with few witnesses interviewed and no real attempt to determine the facts. Conversely, they may wish to talk to every witness who has been mentioned in the investigation because they fear overlooking something.

Questioning. This is a critical part of the investigation process. Some investigators may ask questions that are too narrow. There is nothing wrong with asking narrow questions, but narrow questions elicit a different response than open-ended questions. Poorly trained investigators may ask few questions. They may simply ask the reporter to tell his or her side of the story, and then they may do the same with the subject of the investigation. These investigators usually do not understand the law and the fact issues.

Determining Credibility. Untrained investigators frequently are unable to determine credibility, and sometimes do not even try to do so. Even where it is one word against another and differing witness accounts cannot resolve the matter, you must still resolve credibility issues.

Making a Determination. Sometimes it is the word of one witness against another, and their stories are diametrically opposed. Some investigators simply conclude, as a result, that no determination can be made. There may be times when you cannot decide what you think happened. But this should be the exception and not the rule. You are expected to make a determination in your investigation. Typically, a number of people are

depending on your findings.

Do not avoid reaching a conclusion out of the fear of being wrong. Unless your implicated person has admitted each of the material facts, you have no choice. Reach a reasonable conclusion as to the matters under investigation. As we know, this does not mean that it has to be the same amount of certainty that would apply in a criminal prosecution.

Offering Opinions. Do not offer opinions regarding the guilt or innocence of anyone involved. Observations are permissible, but the focus should be on whether the facts elicited during the investigation make your conclusions self-evident.

These errors may, in some jurisdictions, lead to claims for negligent investigation. Even if the claim cannot be made, the results of the investigation are compromised because of these mistakes.

Process Pointer: By understanding the legal landmines, a conscientious investigator can step carefully in his pursuit of relevant information.

Poor Planning

The investigation must be well-planned and executed with a definite objective and strategy. The failure to plan each step of the investigation and consider the potential consequences of each step places the company at risk for serious problems including:

- Damage to the company's reputation;
- Damage to employee morale;
- Damage to the company's compliance efforts;
- Creation of evidence that can be used in future criminal or civil cases;
- Possible full-blown government investigation and sanctions;
- Provision of no protection in private litigation;
- Enabling the possibility of future misconduct;
- Waste of company resources.

Obstruction of Justice

Responding to allegations of misconduct requires skill to avoid making a bad situation worse. Obstruction of justice arises when the government is involved, and the government's inquiries are somehow impeded or hindered. If improper or careless methods are used in a workplace investigation, it might appear later on as if the company was trying to cover up violations or distort a witness's testimony.

Compounding a Felony

The right to punish or to forgive a criminal is reserved to the state and federal governments. Individual and corporate victims do not have the right to do that. Agreeing to accept something of value in return for not

prosecuting—or for not reporting the crime to prosecutors—is itself a crime. It can result in legal problems for both the investigator and the company.

Process Pointer: In some states, the promise not to report the matter to the police in exchange for something of value—money or information—is also considered extortion. It is a crime. Never promise the implicated person that you will or will not contact the police. Make your decision independent of his assistance, fears or preferences.

Whistleblower Protection

A variety of federal and state laws exist to protect whistleblowers. If an investigation shows that someone who is a whistleblower is also someone who completely fabricated a claim to harass another person, the company should still weigh the effects and application of any whistleblower statute that may apply. A possible situation may involve a person who has properly engaged in some improper conduct and fears that it is about to be discovered. The reporter may file a whistleblower claim with managers to cloak themselves in the whistleblower protections.

Retaliation

Those who are the source of a report and those who cooperate in an investigation are legally protected from retaliation. (This is in addition to the protections given by your company policies.) Ensure that the company does not take any unwarranted action against the employee that might appear to be retaliation for filing a report or cooperating with an investigation. Regardless of the legal implications of retaliation, the practical effect is that employees will only provide information in an investigation if they believe that they will not be penalized for doing so. When you investigate, remain alert to any signs of retaliation.

Retaliation may take a variety of forms:

- A negative performance evaluation;
- A failure to receive a promotion;
- Receiving lower quality work assignments;
- Being excluded from meetings and decision making;
- A reduced level of salary increase, bonus or other pay treatment;
- Being openly criticized or ostracized by colleagues or a manager.

You should be sufficiently conscious to the risk of retaliation and how to deal with it:

- Anticipate in your investigation who may be the target of possible retaliation.
- Remind the relevant managers of individuals who may be the target of retaliatory behavior to be aware of the risk and of their obligation to prevent and/or stop retaliation of any kind.
- Remind each person interviewed that any person who, in good faith, seeks advice, raises a concern, reports misconduct or cooperates in an investigation is following the company's code of conduct and doing the right thing.

- Make sure each witness understands the company's non-retaliation policy, and that the company will enforce it vigorously.
- If an individual alleges that he has been the victim of retaliation, the Investigations Manager or your compliance officer should be contacted immediately.

Discrimination

The workplace investigations process must be consistently applied. This can be a particular problem when the process is first implemented, and where discipline is imposed in situations where it had not been before. Differences in treatment of employees invite allegations of discrimination of one form or another. There is also the risk that the sanctions applied later on to particular types of violations could have a disparate impact on the workforce and add to the appearance of discrimination.

When investigating claims of discrimination in the workplace, investigators must avoid the risk of discriminating themselves. For example, a worker complaining of religious discrimination may, in turn, claim that the employer engaged in religious discrimination by willingly failing to conduct an adequate investigation. Conversely, over-investigating could lead to complaints of "profiling" certain employees as possible investigation targets.

Process Pointer: The failure to conduct a reasonable investigation risks a lawsuit by the implicated person—or even an implicated person in another similar investigation—for a variety of legal claims.

Invasion of Privacy

During investigative interviews, especially those involving sexual harassment, investigators may have to explore sensitive areas of personal conduct. Recognize and appreciate your employees' reasonable expectations of privacy. Questioning employees concerning activities that are not sufficiently related to their conduct at work may constitute an invasion of privacy. Violating the right of privacy exposes the company to liability. The key here is to be cautious.

This claim generally has three elements: (i) an intentional intrusion, (ii) upon the claimant's private affairs or concerns, and (iii) that a reasonable person would find offensive. A well-recognized defense to an invasion-of-privacy claim is consent. However, the truth of the information is not the same thing as consent. Companies should draft appropriate policies and procedures to minimize privacy expectations. Initiate investigations only on the basis of documented factual allegations that objectively justify the investigation, rather than gossip, innuendo or "urban legend." Narrow the scope of any investigation to what is reasonable and necessary to protect the company's business interests. Finally, the information should be kept confidential and shared only with those who need to know it. Remember that your company has a legitimate right to conduct investigations in the workplace, but that right must be balanced against the rights of employees.

Defamation

Investigators must be sensitive to the risks of defamation claims. Investigators must be careful not to draw unwarranted conclusions or make unfounded accusations against investigation subjects. Defamatory communication is communication which, among other things, injures that person's reputation as to diminish

respect, goodwill or confidence in which that person is held. Defamation may arise in the context of investigation-related communications. Communicating those conclusions and accusations to third parties constitutes “publication” of that information for defamation purposes. This can include warning statements, investigative reports, performance evaluations and statements in management meetings.

To minimize this risk, investigators should explicitly detail the factual basis for any conclusions about an employee’s culpability. Cautionary language should be used where possible. Supporting facts should be verified. The conclusions drawn should be reasonably justified by the facts. Do not use caustic, hyperbolic or otherwise colorful language. The report should also be distributed on a limited basis to avoid a claim of excessive publication.

Truth is a defense to a defamation claim. A qualified privilege may also exist where the statement was believed by the employer in good faith when it was made, the statement served a legitimate purpose, the statement was limited in scope, and was “published” to an individual who also had a legitimate business interest in receiving the communication. Additionally, the company must not have reason to believe that the statements or questions are false and must not be acting with reckless disregard for the truth. But the company must also not exceed the scope of that privilege. Careful investigating, especially the reporting or discussion of investigation findings, reduces the risk to the company.

Libel

Many of the same considerations regarding defamation also apply to a possible libel claim. Useful investigation reports are both meticulous and frank. Questionable activities must be described in detail. In some investigations, the factual descriptions will be the equivalent of accusing someone of a crime or at least dishonesty.

False Imprisonment

An employee establishes a claim for false imprisonment when an employee establishes that he was confined unreasonably during the investigation. The risk of such a claim during an investigation is greatest when the subject is being interviewed. You have the authority to question employees regarding conduct connected at work, and your company should require cooperation as a condition of employment. However, you may not detain an employee against his or her will, either physically or through threats (such as termination or a call to the police). Unlawful detention may be accomplished by violence, threats or any means that restrain a person from moving from one place to another. You must be careful never to give the impression that the employee will be physically confined or restrained during the interview. You must always advise a witness that they have a clear option to leave the interview at any time. You should never attempt to prevent a witness from leaving the room or try to restrain the witness with threats. If the witness can show that the threat caused just fear of injury to their person, reputation or property, the company may be liable for damages.

That being said, there are consequences for the employee’s decision not to submit to an interview. In many private-sector companies, this is grounds for dismissal.

Emotional Distress

An employee may claim emotional distress if an aggressive investigator conducts an interview in such a way that the employee feels unusually humiliated or threatened. These claims can be successful if the action is seen as offensive to a reasonable person and would be viewed as outrageous by a reasonable society. There is generally no valid reason for an investigator or anyone else to shout at a witness, use slurs or other demeaning language, or

humiliate the employee.

Malicious Prosecution

Employers may be sued for malicious prosecution if they are not judicious regarding the criminal prosecution of an employee. If an employee is reported to the police and portrayed as some sort of criminal, but for some reason there turns out to be no basis for criminal charges, that employee may sue the employer for malicious prosecution. If an employee is suspected of wrongdoing, and under the circumstances it would be appropriate to get law enforcement involved, the better approach is to report to the law enforcement managers whatever the problem is and make the information available. If the information happens to include the names of employees who may have material knowledge of a crime, the company should be able to defend against such a claim. It is not malicious prosecution to simply give factual information to the police and request their assistance.

Wrongful Discharge

If the investigation is not conducted thoroughly, reasonably, and with conclusions supported by the facts, an employee who is dismissed based on information discovered in the investigation may subsequently file a claim of wrongful discharge. A similar result may occur if the investigation is not conducted according to your established procedures. And while a company may decide to fire an employee based on the results of an investigation, there is no guarantee that a jury, looking at the findings with the benefit of hindsight, will agree with the company's conclusions.

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