

## CONDUCTING WORKPLACE INVESTIGATIONS

Workplace misconduct such as sexual harassment, discrimination and dishonesty still wreak havoc in many workplaces, despite employers' efforts at prevention and employee screening. Prompt and effective employer investigation into such conduct is often required by law, and can serve to limit liability. Moreover, employers who fail to conduct workplace investigations, or conduct poorly planned or executed investigations, run substantial legal risks. Therefore, employers must be prepared to conduct such investigations before the need to do so arises. This edition of the *Employment Law Advisor* summarizes the applicable law, and provides practical guidance on how investigations should be handled.

### THE LEGAL LANDSCAPE

The primary (and probably most familiar) areas of law imposing obligations on employers to investigate allegations of misconduct are state and federal anti-discrimination and harassment laws such as Title VII and Chapter 151B, the Massachusetts Fair Employment Practices Act. In general, these and other similar statutes make discrimination in the workplace unlawful and impose legal requirements on employers to conduct an investigation into complaints of discrimination and/or harassment, as well as require effective remedial action where unlawful conduct has occurred.

Another area of law requiring (or at least suggesting) a legal obligation on employers to conduct an internal investigation is the burgeoning area of "whistleblowing." When employees seek to "blow the whistle" on alleged unlawful conduct, certain statutes, such as the Sarbanes-Oxley Act, require that employers investigate the allegations. Other statutes requiring internal investigations include OSHA (general duty provisions mandate that employers do everything reasonably necessary to protect, life, safety and health of employees). In other situations, although there may be no statutory requirement to investigate, investigation into such claims or complaints is necessary to determine whether the alleged misconduct actually occurred and to remedy it if necessary. Moreover, a failure to investigate allegations will reflect poorly on the employer, particularly to a jury that expects employers to behave responsibly.

An investigation into employee misconduct is often required to determine whether disciplinary action is appropriate. Employers are frequently sued by former employees who have been disciplined or terminated for misconduct. Such claims are based on a variety of theories, including defamation arising out of an alleged inaccurate assertion of wrongdoing, discrimination based on a theory of disparate treatment, and wrongful discharge. In today's litigious employment environment, an effective and accurate investigation allows an employer to support and defend its employment decisions.

### CONDUCTING AN INVESTIGATION

Conducting an effective investigation requires careful consideration of the issues and thoughtful planning. The hallmarks of a good investigation include:

- Planning and effective organization
- Commitment of sufficient skill, attention and resources
- Promptness
- Thoroughness and accuracy
- Minimal business disruption
- Maintenance of confidentiality
- Effective documentation
- Protection of results from disclosure, when appropriate

Employers should take the following steps in planning and executing a workplace investigation.

#### 1. *Consider need for interim remedial action first*

Interim remedial action should be considered before all else. For example, a threat of workplace violence may be sufficiently serious that action must be taken to protect employees before any investigation can begin. Likewise, employee misconduct may be so severe that an immediate suspension should be implemented to avoid further problems. Such suspensions generally should be with pay so as to avoid the appearance of prejudice.

#### 2. *Determine goals of investigation*

A primary goal of an investigation should be to determine what happened. Another primary goal is to protect the employer from liability. Consideration must be given to these sometimes conflicting goals as the purpose of the investigation will impact its structure.

- Consider whether to involve in-house or outside counsel. Depending on the goals and nature of the investigation, it may be critical to attempt to prevent disclosure of the investigation through the attorney-client privilege.
- Consider the timing of interviews and potential tainting of the investigation. For example, interviewing one witness *immediately* prior to the interview of another may help avoid influence on the second interview.
- Prepare outlines of questioning to ensure all topics are covered and questioning is consistent.

#### 3. *Select the appropriate investigator*

Choosing the right investigator is a critical step in the process. In short, the investigator should be neutral and objective, and not appear biased. Furthermore, the investigator should have strong interviewing skills and the ability to ask difficult questions while being sufficiently sensitive to obtain honest, factual answers. The investigator must be able to understand factual issues involved in the investigation and have the time to devote to a detailed and accurate investigation.

#### 4. *Identify relevant documents*

Once an investigator is chosen, the investigator should:

- Review any documents relevant to the subject, such as any complaint documents or notes
- Review any relevant company policies or procedures, such as the employer's harassment policy
- Review any investigation files
- Review personnel records of those involved
- Review any existing witness statements
- Review prior complaint files and any other relevant documents

#### 5. *Identify relevant witnesses*

In identifying the appropriate witnesses, the employer needs to balance the need for conducting a detailed, complete and unbiased investigation against the competing interests of maintaining confidentiality, minimizing business disruption and avoiding expending unnecessary time and resources in the investigation. Employers occasionally interview anyone with any connection to the issue at hand, which can be a mistake and cause unnecessary disruption and embarrassment. Sometimes only the alleged victim and alleged harasser in a sexual harassment matter need be interviewed. In other cases, a more comprehensive investigation is necessary. The critical issue in most investigations is to identify and interview those witnesses who have significant information that will tend to either establish the allegations at issue or disprove them.

#### 6. *Conduct the interviews*

Depending on the situation, a third party may need to be present to witness the interview. Further, witnesses should be informed that: (i) confidentiality cannot be guaranteed but will be observed to the extent possible; (ii) he or she should not discuss the matter with others; and (iii) cooperation will be required throughout the course of the investigation. Interviews should be probing and detailed, and seek to determine facts, not a witness's conclusions. Accordingly, ask open ended questions - not questions that suggest a "yes" or "no" answer. The interviewer should make sure to listen carefully, follow-up, and seek clarification on a regular basis. Moreover, the interviewer's opinions and conclusions should not intrude into the questioning. Good interviewing techniques include not talking too much, as silence often elicits further information. Further, summarize and review the witness's answers to determine whether the answers were understood accurately. Another technique is to ask repetitive questions to verify the initial answer and potentially obtain more information. Finally, consider non-verbal signs of credibility, such as eye contact and posture.

#### 7. *Consider whether interview documentation is appropriate*

Depending on the circumstances, obtaining witness statements may be appropriate. Such statements can be particularly important to establish the facts and scope of the allegations at the time they

are made. All too frequently, internal complaints of sexual harassment or discrimination end up greatly exaggerated in subsequent litigation. Without a written statement from the complainant obtained at the time of the complaint, it is difficult to limit the complaint to what was actually said at the time. Moreover, exaggerated claims lose substantial credibility if inconsistent with a signed statement made at the time of the incident. If witness statements are to be used, important considerations include providing the witness with a reasonable opportunity to review and make changes to any draft so there is no suggestion of pressure to execute a draft "as is." Whether or not statements are to be used, it is important to document the interviews accurately. Immediately following the interview, notes should be reviewed and clarifications made, if necessary.

#### 8. *Evaluate the evidence*

Consider all evidence obtained. Does that information tend to establish or disprove the allegations at issue? Were the witnesses credible? If not, what factual conclusions may be drawn from the lack of credibility?

#### 9. *Take action*

Depending on the evaluation of the evidence, some action is often necessary. Where misconduct is identified, the employer must react quickly and decisively to end it. One common problem arises when the employer takes no action because the evidence is mixed (the claim could not be fully corroborated or refuted). Even where there is conflicting evidence (most cases involve some inconsistency in the evidence), it is generally a good idea to take some action to remedy the potential for future misconduct. Moreover, it is critically important not to take action that might be perceived as punishing the complaining party (for example, asking the alleged victim in a sexual harassment matter to transfer).

#### 10. *Document*

Finally, the form of final documentation must be considered. Is it intended to be privileged? If so, the report should indicate that it is a privileged communication sought for purpose of obtaining legal advice, and its distribution should be limited to counsel and those key managers with a business need to know of the matter. Moreover, all documentation should be drafted with the knowledge that the report may potentially be subject to discovery in litigation. As such, care should be taken to document the results appropriately while not unnecessarily exposing the company to liability.

#### **CONCLUSION**

Although the considerations in conducting an investigation are many, and could be the subject of a lengthy book, the key steps are careful preparation and objective fact gathering. Done correctly, an internal workplace investigation can help manage misconduct, avoid litigation, and demonstrate that the employer takes workplace concerns seriously, as well as potentially provide a defense to an employee lawsuit.

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