

Getting to the Bottom of Workplace Investigations

April 11, 2011

Eventually, every workplace faces the need to investigate some sort of employment issue. Be it resolving a dispute between coworkers or addressing unethical or unlawful behavior and preventing its reoccurrence, workplace investigations are an important and delicate exercise. They must be handled with the utmost care in order to ensure useful results without creating further headaches. In order to protect the company and the employees involved, confidentiality is crucial and objectivity is key. The following are some tips for effective workplace investigations.

1. Know When to Investigate.

Best practices should prompt employers to investigate suspected misconduct, rule violations, and situations where an employee's morale, behavior, or performance suddenly declines. Getting to the bottom of an employee's attitude problem may head off further problems down the road. Investigations may follow instances of suspected substance abuse that compromise an employee's performance or workplace safety, discrimination or harassment complaints, threats made by an employee against others, as well as instances of vandalism, sabotage, or workplace theft.

Turning a blind eye to misconduct or other liability-triggering circumstances is never a good idea. Employers have a legal duty to investigate in many circumstances, including whenever the employer has reason to suspect issues of unlawful discrimination, harassment, or retaliation. Workplace safety issues should also prompt action. The legal obligation is triggered not only when a formal complaint or grievance is filed, but any time an employer receives information of a questionable situation, or when the employer knows or should know about the unlawful or unsafe behavior.

2. Make a Plan.

An investigation should never be a seat-of-your-pants affair, no matter how urgent the situation. The key is to combine planfulness and preparation with flexibility to follow the rabbit hole...wherever it leads.

- **Step back.** Take a step back from the situation and try to gain a global perspective. Avoid prejudging the situation based on what little you do know and focus on what you still need to find out in order to reach a conclusion. Don't limit the investigation to facts that would tend to confirm your early theory.
- **Identify the issues.** Map the specific issues presented and what other issues may arise. Consider the possible personality dynamics that may complicate an investigation and strategize how to minimize

complications. Identify how internal politics may impact the investigation or its outcome.

- **Consider seeking legal advice.** Consider whether to involve legal counsel at the outset, especially if there are red flags of potential liabilities. Knowing what the elements are of the potential legal claims can help you identify what information you will need to obtain from the witnesses. If you decide to proceed without counsel, re-evaluate as the investigation progresses. Sufficient protective measures taken during an investigation and appropriate remedial follow-up may, for example, compel a court to dismiss an employee's later claim of discrimination. Competent employment counsel can help you navigate dangerous territory.
- **List the information you need.** Determine what information management needs to make an informed decision based on facts, rather than on gut or gossip. Identify potential interviewees and determine who should reach out to them. Consider what each interviewee would actually need to know about the investigation to provide the information you seek, and limit disclosures accordingly.
- **Keep issues confidential.** Legal issues associated with workplace investigations include, but are not limited to, claims of retaliation and defamation. Unlawful retaliation involves reprisals directed toward the complainant or anyone who participates in the investigation which could have the effect of discouraging a reasonable person from raising complaints of unlawful behavior in the future. Defamation claims can arise when false information about a person is communicated to a third party willfully, recklessly, or negligently. An employer can be liable under both theories if it negligently allows false information about an employee to be released. Since these claims are a real risk, identify those who need to know about an issue and what, specifically, they need to know to do their jobs. Keep the rest under wraps.
- **Set up a separate file.** Set up a separate file for grievance and investigation records apart from an employee's personnel file. Many state laws give employees the right to review their personnel records, but not all content is reviewable. Know the law applicable to your jurisdiction so that sensitive records are safely kept where accessibility is limited. Keep in mind that although records may not be accessible as personnel records, it is quite possible that they could later be subpoenaed in legal proceedings.

3. Gather the Information.

- **Use an objective and neutral interviewer.** Who should actually conduct the investigation deserves careful attention. Someone removed from the situation will be in the best position to ensure objectivity and neutrality. If the issue involved is political, or if the outcome may implicate higher-ups or have political fall-out, consider an investigator from outside of the organization. Anyone who conducts an investigation should be objective, should keep things confidential, and should remain neutral throughout the process.
- **Prepare interviews.** Before conducting an interview, review all pertinent documents. Prepare written questions for each interviewee reflecting on the goal or purpose of the interview. Decide in advance how to introduce the purpose of the interview to each person, as well as how to respond to questions you might be asked to avoid unnecessary disclosures.
- **Conduct interviews privately.** Do your best to keep the atmosphere as low-key as possible. Start with broad questions and then narrow to the specific issue. Try to get all the details—the interviewee's concerns, what happened, when, where, who was involved, and whether the interviewee witnessed any other concerning behavior. Ask follow-up questions such as, "Is there anything else I should know about?" and "Do you have any other concerns?" Follow up on new or incomplete information. Take

contemporaneous notes of each interview, but do not make conclusory statements or include opinions or nonfactual commentary about the witness or the situation in your notes. Remember—interview notes may be subpoenaed in a legal proceeding.

- **Follow up.** Following each interview, finalize your notes and consider whether to modify or update your investigation plan based on any new information. Contact Human Resources or other appropriate persons to follow up on issues raised.

4. Reach Conclusions and Craft a Response.

After gathering sufficient information, management decision-makers must reach conclusions about the issues or events and determine what action to take. If an adverse action is taken against an employee, only that employee needs to know the specifics. Follow up with the person who made the initial complaint to let them know that the complaint has been investigated and that action is being taken to address his or her concerns. Check in periodically to determine whether any new issues or problems have come up. Finally, be prepared to explain why you conducted the investigation the way you did and how you came to your conclusions.

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