



An Employer's Guide to Conducting Internal Investigations

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Disgruntled employees raise issues every day, and every day employers respond by conducting some type of internal investigation. To warrant an immediate and thorough internal investigation, employee complaints need not be in writing or "formally" made. The key ingredient in any investigation is preparation.

Be mindful that a complaint is not always the event that triggers a company's duty to investigate. The duty arises when an employer observes acts or statements that suggest prohibited activity. Prudent employers often investigate even without a clear legal mandate. An employee complaint can be about virtually any aspect of the employment relationship, but the most frequently raised concerns deal with harassment, discrimination, ethical violations and retaliation. Whatever the complaint, recent legal decisions have made certain that employers have an unequivocal duty to investigate promptly and thoroughly as soon as the employer is put on notice of possible wrongdoing. See *Hardage v. CBS Broad, Inc*, 427 F.3d 11 (2005).

In addition to general employment statutes, the Sarbanes-Oxley Act provides a broader level of protection for employees who file internal complaints. While relevant to publicly traded companies, these complaints apply to private companies pursuant to various federal and state "whistleblower" regulations. See *Bechtel v. Competitive Tech. Inc.*, 2005-SOX-00033 (5/29/05). Further, filing a SOX complaint does not preempt other causes of action so an individual with a whistleblower issue is likely to file a claim under other employment laws. Whatever the complaint, the investigation should focus on rendering a proper business decision.

How to Prepare for an Investigation

When a complaint is received, the employer should set goals for the investigation. Goals should include gathering the facts, determining the merits of the complaint, complying with legal obligations, maintaining confidentiality to the greatest extent possible, preserving the reputations of individuals and company, taking proper remedial action, avoiding liability, and preventing future claims. The goals of a particular investigation must be accomplished with integrity, fairness, impartiality and respect.

Once it is clear that an investigation is warranted, give careful thought to who should conduct the investigation. The same individual is not going to be right for every company investigation. In fact, multiple investigators could be useful in highly complex cases, or where timing is a critical factor. Give consideration to the positions and authority of the complainant and accused; any perception of bias a proposed investigator might evoke among witnesses; and potential impacts on business operations. Generally, a good investigator must actively listen, be able to process and rapidly respond to new information, possess critical thinking skills, and have a solid knowledge of company policies and practices. Other technical qualifications will depend on the type or complaint at issue. For example, an accounting background might be necessary for charges of financial mismanagement.

After an investigator is assigned and goals set, the first order of business is to conduct a thorough document review. The employer must preserve all electronic data; everyone participating in the investigation should be instructed not to delete any electronic communications and the IT department should preserve all archived and taped materials. Relevant physical evidence usually includes the complaint, witness statements, personnel files written policies and computer records. This will assist in developing relevant background information and placing the complaint in the proper context as related to the business.

Reviewing personnel history of the potential interviewees will help clarify relationships and potential biases. These documents provide a foundation to build an investigation, but the investigator should continually seek additional documents throughout the course of the investigation.

At this stage, the investigator is prepared to identify key witnesses. The investigator should generally interview the complainant first, accused next, key witnesses and then other possibly related witnesses. Once the order has been established, the investigator should prepare a chronology of events and an outline for each witness. Outline topics may include:

- Review of applicable company policies, including how they are communicated to employees, whether followed, etc.;
- Summary of the complaint, including how the employer received notice, as well as a chronology of important events;
- The names and identities of all relevant witnesses with notes on relevant background and relationships to complainant and accused;
- Relevant employment information of the complainant, the accused and the key witnesses;
- Specific information for each identified incident (who, what, when, where, why);
- Identity of other possible witnesses, new leads and new documents;
- A conflict check procedure to resolve conflicting witness accounts without identifying the witness; and
- Potentially related claims and relevant information.

To summarize, an investigator should always consider the following before investigating an employment complaint:

- Identify the goals of the investigation;
- Identify legal and factual issues to be resolved before reaching a decision;
- Identify the time frame to conduct the investigation;
- Identify and review all relevant physical evidence and communicate a clear directive to preserve all electronic data;
- Identify potential witnesses and the order in which they should be interviewed; and
- Identify general interview topics.

