



Internal Investigations: Best Practices and Recent Developments

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Receiving the Complaint

- Take all complaints seriously – as frivolous as they may seem
- Respond promptly and thoroughly.

Forms of Complaint

- Internal complaint to a supervisor, to Human Resources, or to other
 - Can be by employee or non-employee
- Anonymous complaint
- Observation of Supervisor
- Hotline Complaint
- “This isn’t a complaint” complaint
- Notice from government agency

Special Issue – Obtaining A Written Complaint

- Generally, it is best to obtain a detailed, signed, written complaint
- Whether or not to press a reluctant complainant to put his/her complaint in writing will depend on a number of considerations, including:
 - The individual's willingness to do so, and
 - The seriousness of the complaint

Special Issue – Should Interim Action Be Taken?

- In most cases, no action taken until the investigation is conducted
- Exceptions include
 - Harassment cases involving ongoing interaction between the complainant and the alleged harasser
 - Any other instance where the failure to take initial precautionary steps could have untoward consequences
e.g., cases involving threats/injury to a person or property

Developing the Investigation Plan

Scope of the Investigation

Identify the specific factual and legal questions to be answered, depending on:

- Nature and seriousness of allegations
 - Limit to allegations themselves or expand to broader issues?
 - Employee-specific or systemic issue?
- Laws and policies involved
 - Criminal or civil exposure to the Company
 - Possibility of shareholder litigation
- Level of alleged offender
 - Upper management, Board?

If Board Is Involved

- Does Board committee have authority to make decisions for full Board?
- Do committee members receive additional compensation?
- Who serves on the committee?
 - Expertise, history, relationships with parties involved
- Who chairs the committee?
 - May need to stand up to public scrutiny

Whether and When to Involve Outside Counsel

- Familiarity with company – pros and cons
- Independence and objectivity
- Expertise
- Public/agency perception
- Cost
- Privilege

Special Issue – Counsel for the Employee?

- If both the company and an employee are facing potential criminal charges, the employee should retain separate counsel.
- The employer and employee may enter into a joint defense agreement, in order to share information necessary for their defense.

Identifying the Goals of the Investigation

- Generally:
 - Determine facts
 - Determine potential liability
 - Develop strategy for future compliance
 - Determine remedy
- Specific goals depends on the complaint
 - Breach of company policy
 - Illegal conduct
 - Issues with company procedures and controls

Possible Goals

- Identifying weaknesses in operations
- Identifying compliance issues
- Removing problem employees
- Identifying and recovering missing assets
- Protecting company reputation
- Preparing for government investigation or for litigation

Setting a Timetable for the Investigation

- There may be statutory or regulatory deadlines
- Government requests
- Delay may create perception of indifference
- Delay may erode ability to conduct thorough investigation (e.g. loss of memory, loss of documents, collusion of witnesses)

Developing the Investigation Team and Structure

- To whom does the investigation team report?
 - Keep any alleged wrongdoers out of the loop
 - CEO, GC, Board member, etc.
 - Potentially report to the Board or special Board committee?

Privilege Concerns

- Attorney-client and/or work product
- Privilege applies if counsel does the investigation or hires outside investigator
- Company holds/waives the privilege
- May not know if wish to waive privilege until end of investigation
- Potential release of information to government, employee's counsel, shareholders, etc.

Factual v. Opinion Work Product

- Factual – objective facts
 - May be disclosed upon showing of “substantial need”
- Opinion – legal analysis and impressions
 - Stronger protections

Upjohn Warning

- Counsel represents company, not employee
- Communications are privileged, but privilege applies to company
- Company may waive privilege and share information with third parties, including government
- Employee must keep information discussed confidential

Involve IT

- Prevent automatic destruction of documents and preserve relevant documents
- Identify and collect relevant documents
- Analyze data

Consider Whether You Need Experts

- May be useful for particular issue
 - Computer forensic experts
 - Forensic accountants or economists
 - Medical or scientific experts

Select the Appropriate Investigator

Criteria for selection:

- Reputation for honesty, credibility and confidentiality
- Unbiased
- General knowledge of law governing the complaint
- Training or experience in conducting investigations
- Analytical ability
- Sensitivity and empathy
- Ability to serve as Company witness, if necessary
- Attorney-Client privilege

Who May Be the Appropriate Investigator

- Member of Management
- HR representative, Legal/Compliance, Internal Audit, Security
- Outside counsel
- Third-party investigator or consultant

NOTE: Ideally, there should be two investigators present – one to ask questions and one to take notes

When You May Want Outside Counsel/Investigator

- If allegations involve high-level official and company needs to ensure that the investigation is above reproach;
- If allegations are extremely serious;
- If litigation is anticipated.

FCRA Requirements for Third Party Investigations

- No notice/disclosure requirements
- Provide summary of nature and substance of investigative report to employees who are disciplined because of report

Planning for Witness Interviews

Identifying Those to Be Interviewed

- Complaining party
- Alleged offender
- Anyone who directly observed a relevant incident
- Other witnesses identified by the complaining employee or the alleged offender or other witnesses
- Supervisors
- Former employees
- Third party witnesses – clients, customers, vendors, etc.

Interview Logistics

For each individual being interviewed, consider:

- In person v. phone v. teleconference
- Location of interview – onsite v. off-site
- Timing
- Presence of others?

Special Issue – Confidentiality Is Not Absolute

- Interviewee may want discussions kept absolutely “confidential.”
 - Such requests cannot always be honored.
 - The company needs to get complete information.
- Nonetheless, investigations should be handled with “discretion.”
 - Only involve/disclose to those with “need to know”
- Certain whistleblower laws may protect the identity of the whistleblower.

More Special Issues

- When interviewee won't cooperate in investigation:
 - Make it clear that you will investigate anyway.
 - Note: 5th Amendment rights in criminal investigation
- If interviewee asks to tape record your interview:
 - Say no. Two party consent is required in many states. But assume recording nonetheless.
- If interviewee wants his/her lawyer present:
 - An investigation is an internal personnel matter. No need to allow outside lawyers.
 - Union member is entitled to presence of union representative for investigatory meeting that could lead to discipline.
- If an interviewee says she is telling you "off the record" :
 - No such thing as "off the record".

Start the Investigation with the Complainant

- Let the complainant tell his/her story – ask open-ended questions
- Explain role, parameters of confidentiality
- Stress company’s policy against retaliation
- Ask for any notes/writings
- Take notes during the interview – no recordings
- Let them know that may have to interview more than once as investigation develops

Identify Documentation to Review

There may be documentation needed to assess the complaint, including but not limited to:

- Policies, procedures, manuals
- The complainant's file
- In cases involving discrimination, the files of any comparators identified by the complainant
- Email, notes, other documentation – electronic and hard copies
- Board materials

Review The Core Documentation Before Conducting Witness Interviews

- The basic documents relevant to a claim may indicate that persons should be added or eliminated from the list of potential interviewees
- The more the facts are mastered, the more likely the interviews will be done efficiently and productively

Order of Witnesses

- Start with fact witnesses, typically lower level employees
- Hold high level officials until later
- Other factors – availability, government requests, etc.

Prepare for and Conduct Witness Interviews

- Obtain relevant information about witness background
- Draft the questions beforehand
- Assemble documents to show witness
- Let the employee talk freely
- Use “clarification” techniques
- Do not talk too much
- Do not signal the “right/wrong” answers
- Do not interrupt
- Save the tough questions for the end (otherwise the witness may become too defensive)

Conducting Witness Interviews

- Ask who, what, when, where, how and why type questions
- Avoid offering opinions or conclusions yourself
- Don't stop with the pre-planned questions
- Ask the follow-up questions: “anything else?”
- Before concluding the interview, be sure you have everything the witness knows about the issues

Advise Witnesses of No Retaliation Policy

- Tell employees who are involved in the investigation that there will be no retaliation for participating in investigation (including providing information)
- Remind management employees that they cannot retaliate against complainant or any employee who is involved in the investigation

Be Prepared to Address Witness Concerns

- Do I need a lawyer?
- Will I be disciplined if I don't cooperate?
- Whom will you tell about what I said?
- Can I talk to you off the record?

Ending the Interview

- Request that confidentiality be maintained
- Preserve relevant documents and data
- Provide contact info for follow up or questions
- Reiterate no retaliation
- Provide guidance on what to do if contacted by media or government investigator

Interviewing the Alleged Wrongdoer

- Generally, wait until have as much information as possible
- Indicate seriousness of situation and company's intention to conduct fair and impartial investigation.
- Give chance to tell his/her side of the story
 - May require further interviews of additional witnesses afterwards
- Emphasize no retaliation permitted against complaining employee

Things To Assess In Making Credibility Determinations

- The absence or presence of a personal motive
- Internal consistency of a witness' recollections
- Consistency of a witness' recollections with the recollections of other credible witnesses
- Consistency of a witness' recollections with the written documentation and compiled data
- History

Documenting the Interview

- The interview summary should be detailed, factual, and thorough.
- Identify those present, date, time and location.
- Indicate if Upjohn warning given.
- Include mental impressions and thought processes, and clearly indicate these.

Form of the Final Report

- Oral
 - Limited to recipient
 - Better protected by privilege
 - Perception of concealment
- Written
 - Establishes thoroughness and objectivity of investigation
 - Documents potentially damaging information
 - Can be distributed or forwarded
 - May require waiver of privilege
 - Can be used in litigation

Contents of Report

- Summary of complaint/claim/mandate of investigation
- Executive summary of investigation results
- Itemization of relevant facts – documents, witnesses
 - Including unsuccessful efforts to procure facts, and explanation for same
- Findings
- Recommendations for action
 - Carefully considered before placed in writing, taking into account the circumstances and capabilities of the company

Disclosure to the Government?

- Company may be required to disclose
- Company may voluntarily disclose
 - Government may already be or likely to be involved
 - Perception of transparency and integrity
 - Prosecutorial discretion may lead to more favorable resolution
 - May require waiver of attorney-client privilege
 - Roadmap to outside investigation or litigation?
 - Disclose in context of settlement?
 - Seek confidentiality agreement!
 - May chill employee participation?

Take Action

- Even in situations in which firm conclusions cannot be drawn, there are typically valuable lessons to be learned and preventive actions to be taken
- The ranges of responses may include:
 - Training or educational programs
 - Discipline (verbal counseling, warning, suspension to termination?)
 - Changes in policies, procedures, operations

Close The Loop

- When an investigation is concluded, complainants should be told that an investigation was done
- The complainant should be told that appropriate action has been or will be taken
 - Whether they should be told the substance of the corrective action is a judgment call that has to be made on a case by case basis

Publicity

- Monitor social media for discussion about complaint/investigation
- Be prepared for negative publicity during and after investigation
 - Consider engaging experienced PR firm
- Make sure PR is coordinated with legal strategy

Questions

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