

## Wrongful Workplace Conduct: How to Investigate

There is bad news on the HR front at your company. One of a myriad of possibilities has occurred: an employee is accusing a manager of sexual harassment, a former employee is suing for racial discrimination, a supervisor is retaliating against a subordinate for complaining about a hostile work environment. Any of those scenarios (and many others) can expose a company to the risk of financial losses, loss of reputation and protracted litigation. Finding out what happened should be the first step towards dealing with the problem. It is in every employer's best interest to recognize when to conduct an investigation. No "buzz words" are required to qualify a statement as a complaint; often, mere knowledge of a problematic situation is sufficient to require the employer to take the initiative, or least inquire further. It also is important to know how to conduct an effective and efficient investigation, so as to minimize the potential for mistakes during the investigation.

### It's Definitely A Sprint, Not A Marathon, When Conducting A Workplace Investigation

Delaying an investigation may seem like a great cost-saving measure, but it is not. Any unreasonable delay in initiating an investigation may be used as a basis to demonstrate that the company failed to remedy or prevent, for example, harassment or discrimination from occurring, or permitted or ratified unlawful conduct. One of the worst things a company could face is a jury trial where a juror believes that the company lagged in looking into the issues, thus leading to the potential for ongoing misconduct that was not stopped immediately.

It may also be illegal to not conduct a prompt investigation. The Equal Employment Opportunity Commission's "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" states plainly, "If a fact-finding investigation is necessary, it should be launched immediately."

Under the same guidelines, an investigation often should be started even if the complaining employee requests that the employer not start

an investigation, particularly if mandated by law or statute.

### You Have To Get Experience Before You Get Experience

For those situations that legally require an investigation, such as a claim of sexual harassment, employers proceed at their own peril if they randomly assign the investigation to someone without experience. If that person doesn't interview all of the appropriate witnesses, or doesn't review the personnel or other files that are significant, the employer can face potential exposure for the failings of the investigation in the form of claims of an inadequate investigation or punitive damages aimed at punishing the employer. There are many considerations that must be analyzed when determining who should investigate, including: the job titles/positions of the employees involved in the conduct or wrongdoing; the type of conduct involved; and the existence or likelihood of litigation. Using in-house personnel to investigate is a good and cost effective solution. Human resources, legal department, or management can investigate a variety of claims and often have a more intimate knowledge of the company's operations and people. It is important that the investigator is not in the chain of management with the employees being investigated (or the accuser, if applicable). The investigator must be impartial in both actuality and appearance. The in-house legal department is more suited for investigations when likelihood of future litigation is high, as they are familiar with the rights and duties of employers and employees. In addition, attorney-client privilege and the work product doctrine often can protect the results of the investigation from being disclosed. For civil rights-type claims, the EEOC has issued guidance on who should be conducting investigations and employee interviews: "The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation.



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Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility."

### Don't Hate On The Player...

Often the best-intentioned employers make the knee-jerk decision to transfer the person who is bringing the complaint, or to put that person on a paid leave. Generally, separating the involved parties is the best course of action, especially when the investigation is being conducted. While this is often a good idea, taking any action that could be perceived as harmful, embarrassing, or disciplinary in nature to the "victim" can make the employer look less than sympathetic. When possible, therefore, it is better practice to temporarily transfer or suspend the accused with pay pending the investigation. This way, the person bringing the complaint does not misperceive a well-intentioned action as punishment for having come forward and lodged a complaint.

**"If you don't know where you are going, you'll end up someplace else."**

A workplace investigation is only as good as the tools you have available to you. It is prudent to set up an "investigation team" at the outset. This is so that the investigation

and any actions taken do not fall exclusively on the shoulders of one person. If there are layers of management involved, issues can be vetted by a group rather than one person, and any subsequent claims against the investigator of wrongdoing, lack of thoroughness, bias, etc. are significantly minimized.

Some of the most important and often overlooked tools for an effective investigation are your company's personnel policies. Many of these policies are quite obvious, and many companies already have them. For example, nearly every workplace should have policies prohibiting harassment or discrimination of any kind. Employee conduct and discipline policies are also important in today's workplace, and the majority of companies with written policies have these types of discipline policies. Companies should make sure they include language in these types of policies expressly stating that retaliation against another employee because of reporting discrimination or harassment is prohibited and a cause for discipline. Computer use policies are important too because electronic data can provide important information. The key to effective computer use policies is the elimination of any expectation your employees have that what they do on their computer at work is private.

### Confidentiality Was A Virtue of the Loyal... It May Not Be Anymore

Many employers have rules or policies directing employees who are involved in a workplace investigation to keep their conversations with investigators confidential

and to refrain from discussing the matter with colleagues while the investigation is ongoing. However, the NLRB recently held that this common practice is unlawful. Section

7 of the National Labor Relations Act provides that employees have a right to freely discuss work conditions as legally protected, concerted activity. According to the NLRB, employers may tell employees not to discuss an ongoing investigation only in the following circumstances when the employer has a "legitimate and substantial business justification" for requesting confidentiality that outweighs employees' Section 7 rights:

- Witnesses are in need of protection and discussion of the investigation may endanger them.
- Evidence is in danger of being destroyed.
- Testimony is at risk of being fabricated.
- There is a need to prevent a cover up.
- Any other comparably serious threat exists to the integrity of an employer investigation that would be sufficient to justify a confidentiality requirement.

This prohibition must be juxtaposed with the EEOC's directive that anti-harassment policies and complaint procedures should contain an assurance that the employer will protect the confidentiality of harassment complaints to the extent possible.

So what are companies to do now when conducting investigations of sensitive HR issues? First, immediately discontinue any standard practice of requesting employee

confidentiality during an investigation. Second, evaluate the circumstances of each investigation. Consider whether confidentiality is objectively necessary to prevent corruption of the investigation. Is there likely to be danger to witnesses, danger of evidence being destroyed or stories being fabricated, or danger of a cover-up if employees are not instructed to maintain confidentiality? Are there other reasons that justify a confidentiality request in this particular investigation? If so, the reasons for requiring confidentiality should be documented as part of the investigation notes. If not, then employees should not be told that they can't discuss the investigation with colleagues.

In the end, a good workplace investigation will identify issues and address problems before they get out of control, and position the employer to avoid or minimize liability and deter other employees from engaging in future acts of misconduct by demonstrating that the company will take seriously any evidence of wrongdoing. Ideally, you can address the bad news efficiently and effectively, and perhaps even some good can come out of an otherwise bad situation. ■

**Scott Cruz** represents both public and private sector employers in all aspects of labor and employment law, including civil litigation and preventative counseling. He not only assists employers in drafting employment policies, employment agreements, and non-competition and non-solicitation agreements, but helps companies enforce their non-competition and non-solicitation agreements and helps protect their trade secrets, proprietary information, customer relationships, investments in talent, and other valuable assets. Scott represents employers in state and federal courts and administrative agencies involving claims brought under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, retaliatory discharge, breach of contract, labor arbitration and class actions.

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