Workplace Investigation Dos and Don'ts

It's an event that no human resource professional looks forward to: While balancing performance evaluations, open enrollment, and other daily tasks, you check your email and learn that the secretary to a key executive is complaining she is being sexually harassed by her boss. Now, you need to investigate.

By Dale A. Hudson
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Workplace investigations are challenging because as the investigator you are trying to get at the truth of disputed matters under difficult circumstances. The challenges are numerous: witnesses may be uncooperative or have their own agendas. Witnesses may be afraid to speak candidly. The information available is often confusing or incomplete. Often conflicting accounts are given, putting you in the position of judging credibility. Nonetheless, despite these challenges, you are charged with the responsibility of making a factual determination as to what actually occurred.

These challenges are compounded by the fact that your findings as the investigator generally have no conclusive effect in any subsequent legal proceedings. Despite your best efforts to conduct a thorough and objective investigation, an agency, court, or jury looking at the same facts is generally free to reach its own conclusions. Depending on the context, your findings may receive little or no deference. On the other hand, a poorly conducted investigation can be very damaging to the company in subsequent legal proceedings.

So you need to begin your investigation with care. And while you need to approach each investigation individually, there are some important guidelines that can help you avoid common pitfalls in conducting workplace investigations of all types.

Some investigations will be precursors to litigation. You cannot know which investigations will later be the subject of litigation, so conduct all of your investigations with the potential for litigation in mind. In harassment cases, plaintiff's attorneys will often put the investigation itself on trial, especially if they want to distract attention from a harassment claim that is somewhat weak. The plaintiff may present the testimony of an expert whose de-facto assignment is to find fault with the investigation you conducted. Such scrutiny is never going to be comfortable, but it will be especially painful if you committed a blunder during the investigation.

The first decision to be made is whether to conduct the investigation internally, or to bring in an outside investigator. It is generally more expensive to hire an outside investigator, so companies often prefer to use internal resources when appropriate. Many factors should be considered in making this determination: How serious are allegations? Is it likely that this claim will end in litigation? What are the capabilities and experience of company personnel who are available to conduct an investigation? How would the internal investigator perform as a witness in the event of litigation? Will an internal investigator be perceived as unbiased?

If allegations of impropriety go to the highest levels of an organization, it is generally best to retain an outside investigator, as no company employee will be perceived as truly independent.

If you decide to conduct the investigation internally, your next step is to develop an investigation plan. Identify witnesses who should be interviewed, and determine the order of interviews. Generally, it makes sense to interview the complainant first, then the accused, followed by other witnesses. Before conducting the interviews, gather any relevant documents.

Schedule the interviews in a location that affords privacy, avoiding "fishbowl" offices. You should always schedule individual interviews; never conduct group interviews.

Always create a separate confidential file for all materials relating to the investigation. You should assume that the entire contents of this file will be produced in any subsequent legal proceeding, and guard its integrity accordingly. Do not discard or destroy any documents. At best this may create an impression that you are trying to hide something; at worst this can result in sanctions for spoliation of evidence

During the investigation process, it's essential to remember to always remain neutral. Treat each witness with respect and listen attentively when he or she speaks. Even if you are starting to form opinions, keep those opinions to yourself until the investigation is completed -- and there are reasons for this. First, your overall assessment may change as additional evidence is gathered. Second, premature statements about your initial impressions could be cited as evidence of bias, or that the company did not take the allegations seriously. There is nothing to be gained by jumping to conclusions.

All witnesses, including the accused, should be advised that retaliation against the complainant, or any witness, will not be tolerated.

Avoid the mistake of beginning an interview with narrow, focused questions, because such questions may sometimes miss the larger picture. Instead, use the "funnel" approach: Begin with general questions and ask each witness to describe what happened in his or her own words. Then follow up with targeted questions to fill in gaps and clear up ambiguities.

You should ask all witnesses, including especially the complainant and the accused, if they are aware of any other witnesses who should be interviewed. You should also ask if they are aware of documents (paper or electronic) or other evidence that could shed light on the matter. In harassment cases, for example, it is not uncommon for one party to have e-mail communications that tend to corroborate their account of what happened.

During such investigations, employees occasionally request that their attorney participate in their interview. Employees generally do not have the right to have counsel present. However, refusing such a request is generally not advisable, since it can make the investigation look harsh or unfair.

Under the National Labor Relations Act, non-management employees have the right to have a "personal representative" present, even in a non-union workplace. While third parties attending an interview may attempt to disrupt the process, it is generally best to tolerate and work through any obstruction.

Extreme care must be taken to accurately record what is said by each witness during the interview. Some investigators ask complainants or witnesses to prepare written statements, while others make notes as the witnesses speak. In either case, it is important, wherever practical, to meet with the witness face-to-face and to ask follow-up questions.

Regardless of the method used to memorialize witness statements, it is generally best if the witness actually signs the written record of the interview, affirming that the statement accurately captures his or her account. If a witness later gives contradictory testimony, a signed statement can serve as powerful evidence. If, on the other hand, the witness never approved, or even saw, the investigator's report of the interview, it is easy for the witness to change the earlier story and testify that the investigator did not accurately record the interview. What might otherwise have constituted powerful impeachment will likely become just one more factual dispute.

Conventional wisdom holds that witnesses should be instructed, or at least requested, to keep their interviews confidential and not to discuss the investigation with others. There are good reasons for this approach. First, the complainant (and the accused) may not want company employees discussing highly personal or embarrassing matters. Second, the investigator will always prefer to get the account of each witness before he or she has compared notes with other witnesses.

However, a recent decision by the National Labor Relations Board, *Banner Health System,*casts doubt on the legality of this practice. In *Banner Health System*, the NLRB held that an employer violated its employees' rights to engage in "concerted activity" when it advised employees not to discuss matters pertaining to an internal investigation with co-workers. The NLRB held that such instructions are permissible only where the employer can make an individualized showing that such an instruction was necessary to protect the integrity of the investigation.

Your attorney can play a critical role in guiding and enhancing the investigation. If the attorney is acting strictly as your attorney (i.e., not wearing an investigator's hat), he or she can serve as a valuable sounding board. At critical stages in the investigation, your attorney can provide guidance on many issues: Is the investigation truly complete? Are there important questions that have not been sufficiently explored? Do any witnesses need to be re-interviewed? Are there additional witnesses who should be interviewed? Is there documentary or electronic evidence that should be obtained?

In addition, if you prepare your first draft report as a privileged document addressed to the company attorney, that will generally be protected from discovery by the attorney-client privilege. Counsel can often recommend changes that will make the report better and/or less vulnerable to attack. Even minor changes in phrasing can head off potential criticisms of the report. After receiving the input of counsel, you can then issue your final report, and the initial drafts prepared for counsel will generally be protected from disclosure pursuant to the attorney-client privilege. If prior drafts are not privileged, plaintiff's attorney may have a field day cross-examining you on each and every change.

It is critical that the attorney's role be clearly defined and lines observed. If the attorney is acting as the independent investigator, the attorney-client privilege will not be available and sensitive communications could be disclosed in discovery.

It is extremely important that human resources advise both the complainant and the accused of the outcome of the investigation, both verbally and in writing.

Drafting the written communication to the complainant is sensitive. On the one hand, in most states employees have a right of privacy in personnel matters. On the other hand, if the target has been disciplined, the complainant needs to be informed of this, at least in general terms. The written communications to the complainant and the target should be carefully written to balance these concerns. The communications should avoid getting bogged down in details and should summarize the extent of the investigation conducted.

Regardless of the outcome, the written communication to the complainant and accused should always include four critical statements: (1) The company maintains a strict policy against harassment (or whatever is alleged); (2) a copy of the applicable company policy is attached; (3) the company does not permit retaliation; and (4) if in the future the employee believes he or she is being harassed, he or she should immediately report this to Human Resources, or to another appropriate company manager.

Sometimes an investigation will determine that while some inappropriate conduct occurred, it does not rise to the level of unlawful harassment. In such a case, the accused should be advised that their behavior was inappropriate and/or violated company policy. Discipline may be imposed, even if no unlawful harassment occurred.

If an employer takes adverse action against an employee based on an investigation conducted by an outside investigator, the Fair Credit Reporting Act requires that the employer provide any employee who is disciplined with a "summary containing the nature and substance" of the information upon which the adverse action is based. The employer is not required to reveal the sources of information used in preparing the report.

Workplace investigations pose many challenges, but if you conduct them properly, the benefits to the company are legion. In the worst case, the company will be in a stronger position to defend any subsequent lawsuit. In the best case, the investigation may obviate the need for any litigation at all.

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