

Best Practice for Conducting an Effective Internal Company Investigation

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Today's businesses are subject to increasing workplace scrutiny concerning possible misconduct of their owners, officers, management, and personnel. When faced with an allegation that can potentially expose the company to legal, financial and reputational harm, it is critical that the company promptly investigate the facts and assess the business risk in order to make an informed decision on the best course of action.

Is an Internal Company Investigation Warranted?

Employee complaints, or even allegations from third parties, concerning improper workplace conduct should always be taken seriously. Whether the claims involve an entry level employee, a manager, a corporate officer, or anyone in between, the company should assess whether the allegations, if true, would constitute violations of law or company policies, or otherwise materially impact the company's finances, culture, reputation, or workforce.

Workplace investigations are often sensitive. Employees may be reluctant to step forward and become the center of an investigation. They may also fear backlash from the individual(s) being investigated, particularly if they carry significant clout within the company. The company can assuage those concerns by reminding employees involved in the investigation of the company's obligation to comply with applicable anti-retaliation laws and company policies. The company should also explain that it will perform the investigation with impartiality and (as much as possible) confidentiality, and that it will comply with the organization's policies and procedures while minimizing business disruption.

Planning for and Conducting the Investigation

At the outset, the company must define the scope and purpose of the investigation (i.e. identify the allegations and the reasons for undertaking the investigation), select an investigation team, and determine a timeline for the investigation. It is important to recognize that the scope may shift as the investigation progresses and information is gathered. The team needs to implement measures designed to protect the attorney-client privilege and the attorney work product doctrine, including defining the roles of both internal and/or external attorneys and determining whether counsel will lead the investigation. The company should also identify the employees who will serve as the points of contact with the investigation team and the frequency and manner in which they will be kept informed of the investigation's progress.

Another critical consideration is the preservation, collection, and review of key documents, including e-mails and text messages. In that regard, the organization's document retention policy must be reviewed, and a notice issued to ensure the preservation of relevant communications and other documents that could become evidence in potential subsequent litigation. The team should also evaluate whether to engage a third-party to collect documents in a forensically sound manner from company-issued electronic devices. It is helpful to compile at the outset a list of potential people to be interviewed, including current and former employees, consultants, and any other individuals with pertinent information, including the person(s) who is the target of the investigation. Typically, the target of the investigation will be interviewed near the conclusion of the other interviews.

When planning for interviews, the investigation must balance the need for a thorough investigation while maintaining confidentiality and meeting timelines. How many interviews should be conducted and which interviews are critical to the investigation? It is recommended that the investigation team explain during the interviews the importance of confidentiality and, if counsel is conducting the interview, also emphasize that counsel represents the company, not

the individual being interviewed. It is critical to exercise care concerning the manner in which the records witness statements or facts in interview notes, as those notes may become discoverable in potential subsequent litigation. Moreover, attorneys' impressions or communications of the interviews should be separately recorded and protected.

Concluding the Investigation

As the investigation proceeds, the company should determine whether to prepare a written or verbal report, or materials for a presentation. If issuing a written report, the company should take appropriate steps to ensure confidentiality and privilege where appropriate. The company must then decide whether the investigation team will simply report its findings or take the additional step of recommending a course of action, up to and including disciplinary measures. Ultimately, management, the board of directors, or other decision makers must act in the best interests of the organization and decide what, if any, action is necessary to address the allegations that led to the investigation. At the investigation's conclusion, the company should inform the complaining employee(s) as well as the target(s) of the outcome while reminding them of the company's interest in maintaining confidentiality.

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