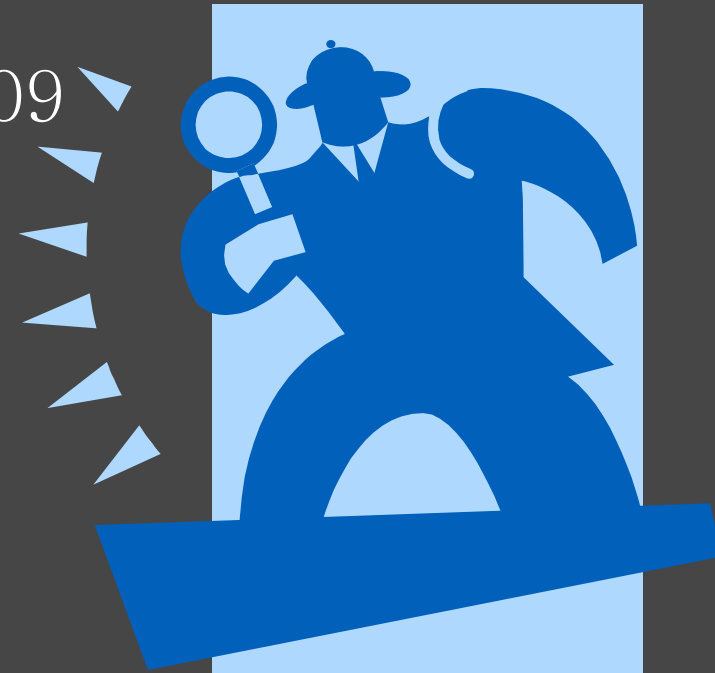


ACC OF WESTERN PENNSYLVANIA

What In-house Lawyers Need To Know About Internal Workplace Investigations

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jackson lewis
Preventive Strategies and
Positive Solutions for the Workplace™



Can be sued if you do...

don't

And sued if you



Why Investigate?

Why Investigate?



- Duty to Do So
- Faragher / Ellerth
- Kolstad v. ADA
- Employee Morale

How Might An Employer Be Put On Notice Of A Possible Claim?

- ❑ Internal complaint (written or verbal)
- ❑ Informal reports
- ❑ Anonymous letters/e-mail messages
- ❑ Observation
- ❑ Union grievance on behalf of union member
- ❑ Exit interview
- ❑ Complaint letter
- ❑ EEOC or PHRC complaint

When Employer Is Put On Notice Of A Possible Claim:

- Establish protocol for legal to be contacted immediately
- In consultation with Legal, determine who else should be notified on a need to know basis


Conducting the Investigation

- The aim of the investigation is to find out:
 - ▣ Who
 - ▣ What
 - ▣ When
 - ▣ Where
 - ▣ What should be done, if anything, as a result of the investigation



Oh, the Places You Will Go...

Causes of Action Involving
Investigations

- 
- Constructive Discharge
 - Defamation
 - Post-Termination Defamation
 - False Imprisonment
 - Intentional Infliction of Emotional Distress
 - Loss of Consortium
 - And More...

Practical Considerations For Conducting Internal Investigations

- Businesses should keep in mind the following:
 - All investigators must be trained
 - Make it clear that corrective action should be taken, even if no complaint has been received
 - Upon receipt of a complaint, it is imperative to conduct a prompt, impartial, fact-gathering investigation
 - Determine if interim action is necessary while the investigation is ongoing.
 - Clearly establish the ground rules of the investigation when interviewing witnesses

Practical Considerations For Conducting Internal Investigations

- Advise the witness that no retaliatory action will be taken against him/her for participating in the investigation
- Consider requests by witnesses to have counsel present during the investigation carefully
- Do not guarantee confidentiality
- The investigator must not be a subordinate of the subject of the investigation
- Document, in writing, any failure of the complainant to cooperate in the investigation

Practical Considerations For Conducting Internal Investigations

- The investigation notes should summarize facts, and avoid editorializing and/or legal conclusions
- Once the investigation is completed, a conclusion must be made on the basis of the party statements, witness testimony, and physical evidence
- Be careful that the severity of the corrective action fits the wrongful conduct.
- Upon conclusion of any investigation, a thorough but concise report, setting forth the reasons for the determination, should be delivered in either written or verbal form.

Practical Considerations For Conducting Internal Investigations

- After the investigation is concluded, appropriate remedial action must be taken, and the Company must monitor the situation, including making certain no retaliation exists
- Provide the subject of the investigation with an oral summary of the results of the investigation and allow him/her to respond. Conduct follow up investigation, if necessary

Practical Considerations For Conducting Internal Investigations

- Do not take disciplinary action against the subject of the investigation if the results of the investigation are not clear
- Do not communicate information obtained during the investigation to those who do not have a legitimate business need for the information
- Maintain investigation files separate from employee personnel files
- Encourage the complaining employee to bring any future issues to the company's attention

Practical Considerations For Conducting Internal Investigations

- Employers should also take the following precautions to help in the defense of any potential employee whistleblower claims:
 - When hiring prospective employees, advise each new employee of the company's compliance policies, and provide an employee manual which sets forth the policies.
 - Obtain each employee's signature that he or she has fully read and understood the policies.
 - Screen each prospective employee to determine if he or she has a record of engaging in improper conduct.

Practical Considerations For Conducting Internal Investigations

- Keep a record of all complaints and investigations of wrongdoing.
- At performance evaluations and exit interviews, ask employees about any improper conduct they may have observed.
- Analyze all employment decisions taken as a result of investigations of complaints to ensure the decisions are based on legitimate reasons.
- Be cognizant of potential retaliation claims.
- **BE PROACTIVE AND USE COMMON SENSE.**

Documenting the Investigation

- Notes and other writings are the most lasting records of who said what and the actions taken. Before conducting the investigation, formulate a general plan to include:
 - ▣ Notify Corporate Legal of the situation
 - ▣ Reach an understanding of the allegations being made
 - ▣ Prepare an investigation file
 - ▣ Prepare a plan for the investigation

Investigation Plan

- The specific investigation plan should include:
 - Time table
 - Include the preparation for the investigation, the investigation itself, the evaluation of the investigation, and the final report of the investigation
 - Time line (including order of when Complainant, Alleged Harasser and Witnesses will be spoken to)

Potential Documents To Review

- ❑ Written complaint or documentation concerning the situation
- ❑ Prior relevant investigation files
- ❑ Prior relevant complaints or corrective action
- ❑ Personnel files of the individuals involved
- ❑ Collective bargaining agreements, if applicable
- ❑ Other relevant business records

Investigation Plan



- Identify those who may have information pertinent to the complaint – which employees or others will be interviewed
 - Determine the position held by such persons, their job duties, and the relationship between them
- Use an organizational chart to establish the formal reporting requirements

Investigation Plan



- ▣ Identification of the issues
 - For each allegation, the factual issues must be identified
 - Understand the issues to be investigated
 - Consider if there might be any potential motivations for the Complaint

Investigation Plan

- Investigation Schedule
 - Goal should be to conduct the investigation “promptly” – as soon as possible
 - Goal should be to resolve it within a reasonable period of time consistent with the scope of the investigation and the significance of the issues
 - The longer an investigation is open, the more difficult it is to resolve



What is an Adequate Investigation?

Documenting the Investigation

- Documentation of the investigation should be segregated from the personnel file and should include:
 - ▣ The employee's complaint
 - ▣ Relevant Employer policy statements
 - ▣ A written plan of who is to be interviewed
 - ▣ Other documents and notes relevant, recorded or memorialized during the investigation

Documenting the Investigation


- At the conclusion of the investigation, a report should be prepared and should include:
 - A summary of the allegations
 - A summary of those individuals interviewed
 - All the interview forms utilized
 - A summation of the findings of fact but not any conclusions of law
 - A discussion of the recommended conclusions drawn about the allegations; i.e. did alleged harasser violate Company Equal Employment Opportunity and/or Anti-Harassment Policy?

Documenting the Investigation

- What is the recommended corrective action?
- A discussion of the recommendations for remedial or corrective action to be taken
- Be careful to avoid defamatory, derogatory or editorial notations
- Avoid personal opinions



Credible and Defensible

- 
- Prompt
 - Interviews
 - Review Documents
 - Evaluate Information Obtained
 - Timeline
 - Credibility Determinations



Negligent Investigation Cause of Action

Negligent Investigation



- Good Faith Belief
- Honest / Reasonable Belief
- Employment at Will

Employment Practices Experts



- Monday Morning Quarterbacks
- Where You Went Wrong



When a Complainant Asks You to Do Nothing



When an Employee Wants a Co-Worker Present



When an Employee Wants Attorney Present



When an Employer Hires an Investigator



Myriad of Potential Privacy Issues

Searches



- Desks, Files, Lockers
- Cars
- Mail
- Strip Searches
- Testing
- Off-the-Job Conduct
- Undercover Investigators

Electronic Privacy Issues



- E-Mail / Internet Issues
- Eavesdropping
- Recording Phone Calls
- Electronic Monitoring
- Taping



ADDRESSING WHISTLEBLOWERS AND CLAIMS OF BUSINESS FRAUD

WHILE EFFECTIVELY MANAGING
CORPORATE INVESTIGATIONS

Whistleblowers

- A key component of corporate governance statutes such as the Sarbanes–Oxley Act (“SOX” or the “Act”) and various other federal and state laws regulating employer conduct are protections for individuals who report or object to suspected illegal activity.

Whistleblowers



- A key concept behind corporate governance legislation is the development and implementation of procedures to ensure the receipt, investigation and resolution of employee complaints regarding suspected corporate wrongdoing.

Whistleblowers



- It is strongly recommended that all employee complaints, whether concerning accounting fraud, sexual harassment, or other alleged wrongdoing, be promptly and effectively investigated and any improper conduct addressed.

Whistleblowers

- For example, Section 301 of Sarbanes-Oxley mandates that the Audit Committee of a covered entity's Board of Directors establish procedures for the receipt, retention, and treatment of confidential, anonymous complaints regarding accounting, internal auditing controls, or auditing matters.

SOX– Civil Liability

- Plaintiffs' attorneys have alleged a wide range of activity by their clients was protected under the Act.
 - Including complaints regarding such activities as fixing a supervisor's personal car on company time, the quality of air in the company's offices and refusal to participate in a random survey by a state insurance commission.

SOX – Criminal Liability

- For example, in 2006, a church in Greenwich, Connecticut approached a local attorney for advice after it discovered child pornography on a computer assigned to the church's organist.
- The attorney advised the church to terminate the organist, and then destroyed the computer's hard drive.
- The United States Attorney's office subsequently filed criminal charges against the attorney. Among the charges in the indictment was violation of 18 U.S.C. § 1512(c)(1), a statute modified by SOX.

Practical Considerations To Prepare For Internal Investigations

- Attorney-Client Privilege Considerations
- Identify Who “Speaks” for the Corporation
- The Subject Matter Test
- The Control Group Test
- Intracorporate Routines

Investigating Workplace

Accidents: OSHA

Considerations

- Obviously, EMS should be called immediately in the event of an accident involving injuries. In the case of a fatality, the police department should also be contacted so that a report can be prepared and the coroner's office can investigate.
- Immediately abate any hazards which may pose an imminent risk of injury to others.
- Taking prompt remedial measures will not be deemed an "admission" by OSHA, but to the contrary, may help reduce any monetary penalty based on good faith compliance. (Remedial measures are also not admissible under Rule 407 of the Federal Rules of Evidence.)

Investigating Workplace

Accidents: OSHA

Considerations

- Report the accident to your local OSHA office within 8 hours if the accident involves a fatality or the hospitalization of three or more employees.
- If an accident involved an injury to an employee that required medical treatment beyond first aid, the employee to be absent from work, or unable to perform full duty, the incident must be recorded on the employer's OSHA 300 log within 7 days of the event.
- Consider the immediate retention of a safety consultant and potentially outside counsel to investigate serious accidents. Take proper steps to ensure that the investigation reports are protected as attorney work product. Any safety consultants

Investigating Workplace

Accidents: OSHA

Considerations

- If OSHA investigates, cooperation with the OSHA compliance officer is highly recommended. However, your managers and supervisors do not have any obligation to provide statements to the investigator or respond to questions, other than to produce OSHA logs and other relevant data requested.
- Managers and supervisors are entitled to have counsel represent them at any interviews by the OSHA compliance officer.
- Managers and/or counsel are not permitted to sit in on the interviews of non-supervisory employees conducted by the OSHA compliance officer. Nor are you permitted to record these interviews

Investigating Workplace

Accidents: OSHA

Considerations

- Employees can and should be interviewed by the company's investigator before and after their interviews with the OSHA compliance officer.
- On his first visit, the OSHA compliance officer will normally limit his inspection to the work area where the accident occurred. You should take steps to limit the compliance officer's clear view of other areas of the facility. In all likelihood, the compliance officer will schedule another time to do a wall-to-wall inspection. Normally, the compliance officer will cooperate with you in terms of scheduling a follow-up wall-to-wall inspection on a mutually agreeable date and time.

Investigating Workplace

Accidents: OSHA

Considerations

- Getting signed statements from all of our potential witnesses before they are interviewed by the OSHA compliance officer is preferred. Obtaining sworn statements is even better. If the statements are compiled by legal counsel, they constitute attorney work product and do not need to be produced to OSHA.
- Union representatives must be permitted to accompany the OSHA compliance officer if they so desire.

Investigating Workplace

Accidents: OSHA

Considerations

- Photograph and videotape all areas that are photographed or videotaped by the compliance officer.
- Consider having maintenance staff on standby to immediately abate any hazards identified by the compliance officer during the inspection.

Conclusion



More investigations
are coming...

Sound legal principles are
the tools of the trade