



Launching Internal Investigations

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Agenda



Setting Scope and Goals of Internal Investigation

Initial Steps in Conducting Investigation

Special Considerations

A person wearing a dark blue suit jacket and a light blue shirt is shown from the chest down. Their hands are clasped together in front of them. Above their hands, several white, stylized icons of people in business attire are floating. The background is dark and out of focus.

SETTING THE SCOPE OF AN INTERNAL INVESTIGATION

Scope of Internal Investigation

“Informal” Investigation?

Minor policy violation

Resolve the issue quickly
without many interviews
with witness

“Formal” Investigation?

If there is a legal exposure

Serious policy violation

Need to document result

In both instances, evaluate who to bring in to conduct the investigation depending on complaint

Formal Internal Investigations

- How serious is the policy violation or conduct?
- How many employees are involved?
- Is there an immediate threat to loss of company information or danger to employee(s)?
- What area of law is implicated?
- Does the investigation need to be completed immediately?



Considerations for Formal Investigations

- 1 Number of investigators
- 2 Lock in witnesses' stories and recollections
- 3 Documents / E-mails / Texts can be lost or destroyed
- 4 Prevent spoliation and potential adverse inference at trial
- 5 Witnesses may leave the company
- 6 Ensures compliance with legal duty to investigate promptly and thoroughly

Goals of Internal Investigation

Evaluate whether allegations of misconduct have merit

Demonstrate appropriate response to complaint

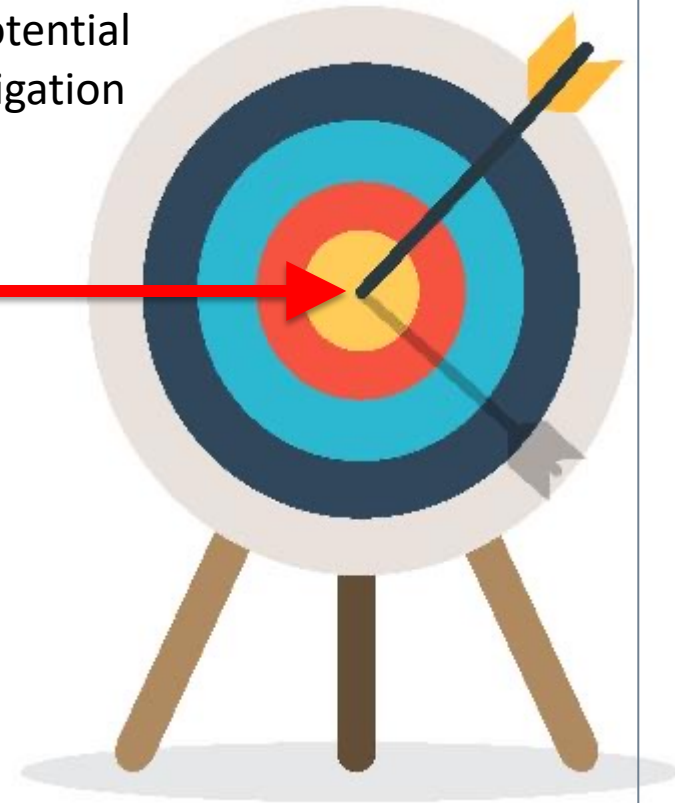
Improve employee morale, productivity, and turnover rates

Avoid potential litigation

Determine whether and what disciplinary action or other measures necessary to address complaint

Prevent future complaints/similar incidents

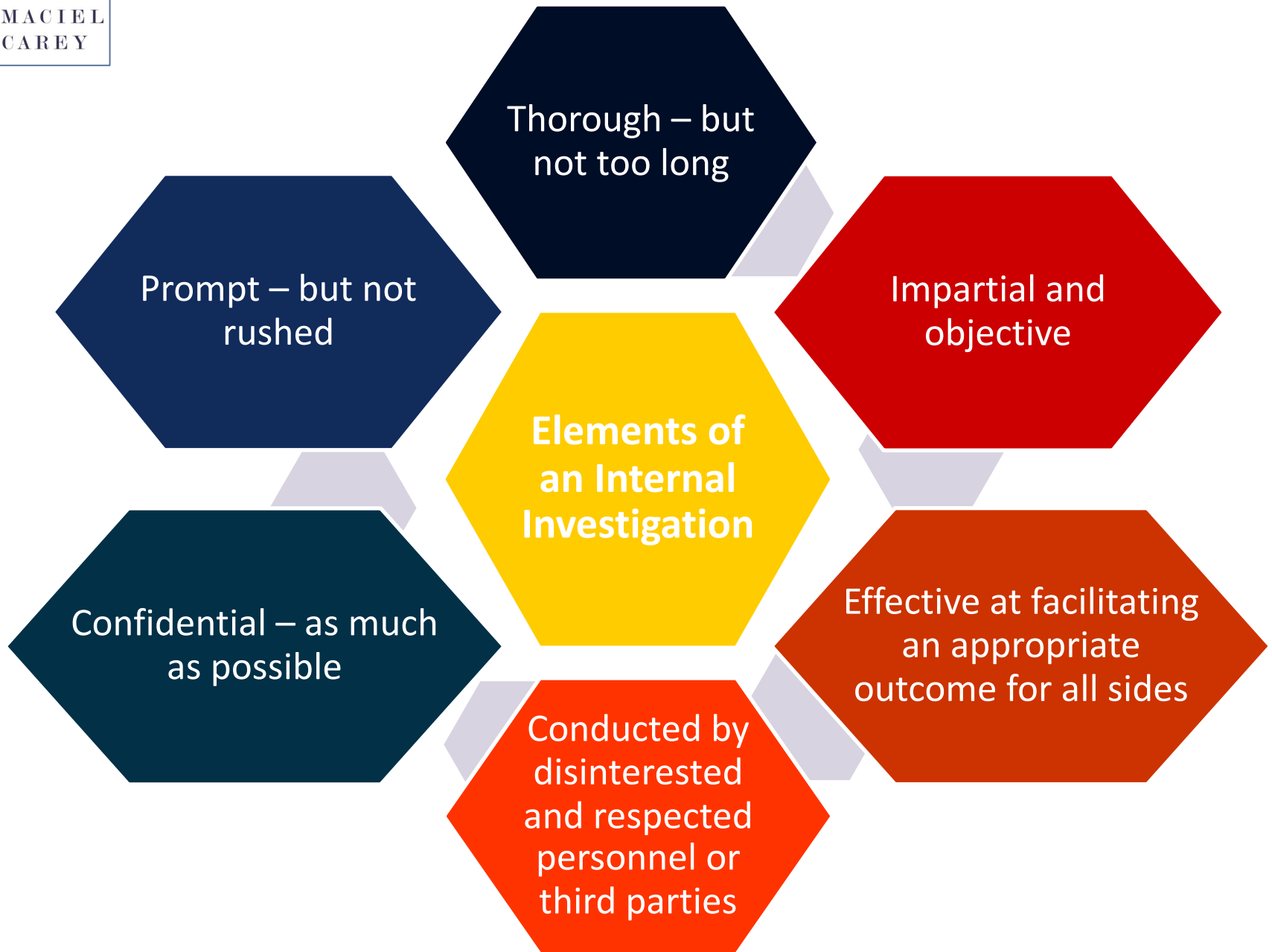
Prepare defense against potential liability



Any Mitigation Needed?

- Depending on type of complaint, evaluate whether any mitigation measures needed prior to completion of investigation
- Scenario: Complaint of sexual harassment by direct supervisor
 - Should Company assign different supervisor to employee while investigation is ongoing?
 - Should Company shift supervisor/employee schedules to limit interaction?
 - Should supervisor be put on leave pending investigation?
 - Should Company allow paid time off for employee if requested?
- Consider what to do if contact between complainant / victim and accused cannot be avoided
- BUT avoid perception of retaliation





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INITIAL STEPS IN CONDUCTING INVESTIGATIONS

Outline Plan for Investigation

Components of Plan for Internal Investigation

- Identify scope and goals
- Outline the elements of the claim(s)
- Identify investigator or team of investigators
- Gather documents
 - Personnel file
 - Prior complaints
 - E-mails, documents, correspondence, texts
 - Employee handbook or policies implicated by CBA if unionized
- Maintain investigation file
 - Interview notes of all witnesses
 - Signed statements
 - Final report with conclusions and recommendations

Components of Plan for Internal Investigation

- Consider external resources
 - Outside counsel
 - Private investigators
 - IT
- Close out the investigation
 - Document investigation – investigation report?
 - Develop messaging to share outcome of investigation as needed
 - Contact complainant and accused to inform of outcome

Who Should Investigate?

Human
Resources

Good for
minor
violations of
policy

Counsel – In-
House vs.
Outside
Counsel

- If a threat of litigation
- Can also direct HR's investigation

Outside
consultant /
investigator

Particularly if
there could be
a conflict of
interest or you
want
appearance of
impartiality

Forensic
examiners

- Electronic data or misappropriate of proprietary information
 - FLSA claims

Law
enforcement

If violence or
theft is
suspected

Should an Attorney Conduct the Investigation?



- Investigation materials will probably be discoverable during litigation
- Consider attorney investigator if:
 - Type of complaint could result in litigation; and
 - Investigation likely to reveal information harmful to Company
- Attorney as investigator permits claim that investigation results protected by:
 - Attorney-client privilege
 - Work product doctrine
- Can waive privilege to rely on investigation results

In-House vs. Outside Counsel

Consider using outside counsel when:



In-house counsel could be perceived as conducting the investigation primarily for a business purpose



Interviewer likely to be called as a witness during litigation



Concern with perception of bias from internal investigator (sensitive investigation, investigation of high-level manager)



Need for attorney with expertise / experience not possessed by in-house counsel

Deciding on Interviews

- Decide who to interview and when
 - Complainant/Victim (if not the complainant)
 - Accused
 - Witnesses
 - Employees in the same department
 - Employees other witnesses identify as knowledgeable
 - Authors of documents
 - Management
 - HR
 - Experts within the company
- Typically interview the complainant, then the accused, then witnesses and conclude with the complainant again
- Consider also re-interviewing accused to maintain perception of fairness
 - Opportunity to respond to allegations of others
 - Any additional witnesses identified by accused



Rights of the Interviewee



- Right to counsel?
 - If accused is facing possible criminal charges
 - If employee reasonably believes answer would incriminate them in a criminal case
- Right to a “friend?”
- Right to union representative?
 - Consider whether CBA applies to investigations of complaints
 - For unionized locations, investigators should be familiar with Weingarten Rights
- Can an employee refuse to participate?

Documents to Collect/Review

01

Complaint(s)

02

Contemporaneous notes
prepared by complainant

03

Emails

04

Text messages

05

Instant messages

06

Voicemails/telephone
records

07

Home computers

08

Personal electronic
devices

09

Video / audio
surveillance

10

Social networks

Plan to Address Retaliation Concerns

Evaluate whether
there is a concern of
retaliation

- Are complaints being filed?
- Are complaints being filed anonymously?

Remind
management
employees of:

Policy against
retaliation; and
Importance of
taking no action
that could be
considered
retaliatory

Remind non-
management employees
they are protected from
retaliation per Company
policy

Should report
any retaliatory
conduct
immediately

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SPECIAL CONSIDERATIONS FOR INTERNAL INVESTIGATIONS

Establishing Privileged Investigation

Attorney tasked with conducting investigation to obtain / provide legal advice

- ☒ In-house counsel tasked with conducting investigation
- ☒ Company retains outside counsel to task with conducting investigation
- ☒ Counsel directs Human Resources or other representative to conduct the investigation

Counsel must

- ☒ Direct and supervise complete investigation process
- ☒ Use their legal skills and expertise

Assertion of Attorney-Client Privilege

- Investigation will only maintain protection of privilege if **primary or significant purpose is obtaining legal advice**
- Investigation-related materials must also show primary purpose being legal advice
- Privilege will not apply to communications that provide:
 - Business or other nonlegal advice
 - Legal advice that is merely incidental to business advice



Attorney-Client Privilege

- Attorney-Client Privilege
 - *Upjohn v. United States*
 - Must give a corporate “Upjohn” warning
 - Counsel represents the company, not the individual
 - Employee being interviewed to assist counsel in providing legal advice
 - Statements made by employee will be shared with company
 - Communications are privileged
 - Company alone owns the privilege

NOTE: Labeling communication “Attorney-Client Privileged” is useful to remind of need for confidentiality, but the content is what matters

Remote vs. In-Person



- Advantages to Remote Interviews:
 - Greater flexibility
 - Ease of Participation – 2 investigators, employee representative, etc.
 - Decreases delay in interviews
 - Interviews can be conducted from anywhere
 - Can stack interviews on top of each other
 - Interviewees may feel more comfortable in own home or space

Remote vs. In-Person

Drawbacks of Remote Interviews and How to Address:

Threats to privacy and confidentiality

- Ask witness to use private, closed space for interview
- Confirm in private space and not recording before beginning interview

Decreased ability to assess facial expressions and body language in evaluating credibility

- Inform witness that the interview must be conducted using video function

Less immediate control over property and documents

- Work with IT and Security departments to ensure you can obtain/preserve relevant documents and information upon initiation of investigation

Reliance on WiFi/internet capabilities

- Conduct interview using private, strong WiFi connection
- Establish plan with witness for what to do if disconnected

Managing Expectations

- Strategize how to address employee morale and relations during investigation
 - Respond to complainant to notify that complaint has been received and an investigation initiated
 - Explain process to complainant, accused, and witnesses
 - Do not make any promises (other than your company is undertaking a thorough investigation)
 - Plan description of complaint you plan to provide to interviewees – provide just enough information to give context without validating accusations against accused
- Keep complaint and discussions confidential to extent possible



Use of AI in Investigations

Potential uses of AI to make internal investigations more efficient and effective:

Review saved or categorized searches from prior investigations to determine potential sources of data

Use of AI to filter out extraneous data or documents from the various data sources used by employees; i.e., email, instant messages, text messages, etc.

Use of active learning technology to track how investigation was conducted, including information reviewed, analysis used, decisions made by investigators and attorneys

QUESTIONS?

