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SEEING CLEARLY:

Practical Advice for Internal Investigations

By Monica Allen, Steve Bishara, and Matthew Schelp An internal investigation into a potential compliance, discrimination, harassment, or other personnel-related issue is always a difficult and sometimes a contentious situation. However, when combined with various factors such as outside governmental/regulatory involvement, media attention, and/or a variety of other factors, these investigations often become more difficult. This article will examine how to investigate high-level employees by providing three examples and discussing how each might be investigated to protect the company and its values.

CHEAT SHEET.

- *Handling bias.* It is critically important for anyone conducting an investigation to put aside any and all preconceived notions about the facts or parties involved. Determinations based upon reputation, performance, or justification may be difficult to defend.
- *Whistleblower allegations.* Internal compliance procedures can reduce the risk of whistleblowing by preventing regulatory violations or the perception that violations have occurred – and creating a culture of compliance should start in-house.
- *Upjohn warning.* An Upjohn warning is an effective tool that companies can use to obtain information from an employee during an investigation based on the understanding that counsel represents the company and not the employee. To enact an Upjohn warning, in-house counsel must be explicit about their intentions to avoid misunderstanding.
- *Written report.* Depending on the severity of the investigation, it may be necessary to produce a written report stating the outcome and/or any recommendations from the decision.

While it can be helpful to have a formal complaint/ reporting process, that process cannot be a crutch. It may be necessary to conduct an investigation even when employees (or others) bound by that process have not followed it or refuse to follow it.

The threshold determination to conducting a successful investigation is to identify the need for an investigation and to properly determine its scope. It's equally important that these determinations must be made promptly and should be periodically assessed throughout the investigation in order to ensure key facts and issues are not overlooked in pursuit of the original scope. In other words, the scope of an investigation should be focused but also fluid when needed.

While there is no perfect definition of a trigger for an investigation, employers should be vigilant and cautious when confronted with the potential need for an investigation. It may be necessary to conduct an investigation even if no one has formally or informally requested one, or if the requesting party is a third party (or anonymous). In fact, it may be necessary to conduct an investigation even when the party who initiates a potential investigation subsequently opposes it. Employee relations and HR professionals are all too familiar with managers and other stakeholders in the organization declining to raise something to their attention because the complaining employee was "just venting" or "speaking only as a friend."

While it can be helpful to have a formal complaint/reporting process, that process cannot be a crutch. It may be necessary to conduct an investigation even when employees (or others) bound by that process have not followed it or refuse to follow it. Finally, and perhaps most importantly, it may be necessary to conduct an investigation even when the relevant facts appear clear at first.

It is crucial for anyone identifying the need for an investigation, determining the scope of the investigation, and/or conducting the investigation to put aside any and all preconceived notions about the facts and/or players involved. Determinations that are — or may reasonably appear to have been — based upon the reputation, work performance, and/or apparent (but uninvestigated) veracity or reasonableness of the allegations may be difficult to defend.

In terms of determining the proper scope of an investigation, the report, complaint, or other source creating the need for an investigation will need to be paramount. While there is always institutional value in narrowing the scope of an investigation, it should be seen as a balancing act in which reducing institutional disruption is weighed against ensuring the situation is resolved with a sufficient and legally defensible inquiry.

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Scenario one

An employee on a performance improvement plan has been scheduled for a termination meeting. After being informed of the meeting, but not of its purpose, the employee contacts his supervisor and the entity's Ethics Point hotline to report sexual harassment by a colleague directed toward younger, female subordinates. None of the women have previously complained and the employee has long harbored a grudge against his colleague.

This hypothetical raises issues of both credibility of the complaint and the ever-present concern of the "preemptive strike" by an employee facing termination. Most employees aren't surprised when they are fired. They can often predict when termination of employment is imminent and take action to protect themselves — either by managing their performance to meet the expectation at crucial moments — or unethically attempting to protect themselves with a complaint.

In this hypothetical, it is supposed that the employer has no outside information suggesting the sexual harassment alleged has occurred. The company has reason to believe that the complainant is motivated both by his impending termination and by his personal feelings about the subject of the complaint. In a situation like this, it would be tempting to discount the allegations. However, even if completely fabricated, that presents a significant institutional risk in the future, especially if more credible complaints arise. If additional complaints arise and are corroborated by an investigation, the company will be faced with difficult questions about why it did not conduct a better initial investigation. It's clear why a proper investigation of even an obvious "preemptive strike" is valuable.

While the "preemptive strike" is a concern, it is often not as problematic as it appears. If the company can show that the termination decision was made before the complaint, then the seemingly retaliatory timing becomes much less worrisome. As a corollary, there is no reason to delay or change the termination decision. Employers are always advised to treat a complainant exactly as they would be treated had they not made a complaint. In this situation, while an investigation of the allegations is appropriate, the scope should be relatively clear and there is no need to allow the pending investigation to muddy the waters of the termination.

Handling whistleblower complaints

Another significant concern for in-house counsel is whistleblowing, both in terms of investigating and resolving the legitimate concerns raised (if any) and dealing with the potential claim of retaliation against the whistleblower. Additionally, data exists suggesting that whistleblowing is on the rise. For example, the US Securities and Exchange Commission (SEC) received 4,200 tips related to the US Dodd-Frank Act in fiscal year 2016, a 42 percent increase since 2012.

Internal compliance procedures are key to ensuring a reduced risk of whistleblowing by preventing regulatory violations or the perception that violations have occurred. While the specifics of an internal compliance program will differ from industry-to-industry, based upon the applicable regulations, creating a culture of compliance can and should start in-house. While it might seem counterintuitive to some

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employers at first glance, the goal should be to pursue something like an initiative for internal whistleblowing. While the bad apples of opportunistic plaintiffs and their attorneys often get the attention, whistleblowers who act in good faith — even if misguidedly — will be helped by having internal avenues to direct their concerns. If an employee has compliance concerns that, depending on the company, have serious consequences for the general public, then it is easy to understand how or why that employee would resort to external whistleblowing — especially if they have not been educated about the internal alternatives.

In addition to reviewing the substantive compliance concerns raised, companies should make it a priority to protect whistleblowers from retaliation. Anti-retaliation rules should be clear, available to all employees, and actively communicated in regularly scheduled training. If and when an employee raises a compliance concern, the prohibition against retaliation should be specifically communicated to the employee in a documented form, along with a request that the employee inform the appropriate individuals if they believe retaliation has occurred.

Finally, whistleblowers may request (or demand) to be kept aware of the progress of the investigation and its outcome. While it is advisable to provide a non-anonymous complainant with the progress of the investigation, generally whistleblower complaints will often differ from, for example, a complaint of harassment or discrimination in which the complainant is necessarily involved. Additionally, there is typically no requirement to provide a complainant with a report of the investigation. If processes or practices are changed as a result of a compliance investigation, it will often be necessary for the complainant to be aware, particularly if the complainant is a stakeholder who will have responsibility for carrying out remedial action or new policies.

Conducting the investigation

Conducting a thorough and prompt investigation is crucial in response to any complaint, but unusual issues may arise with "high-intensity" employees.

For example, the question of whether to retain outside counsel or other

Scenario two

An anonymous report is received by the Ethics Point hotline alleging that three employees, including the CFO, have been concealing revenue shortfalls at a public company. The assigned investigator interviews the three employees, with two subordinates conceding that the company has taken "aggressive" positions on the revenue at issue. However, neither believe that it is illegal. The CFO defends the position and states that this is a regular practice that the CEO knows about. The CFO also claims he knows which employee has made the anonymous report. The CFO concedes that the audit committee on the board is unaware of the practice and that it does not meet the materiality threshold to be reported in public filings.

This hypothetical raises issues of internal versus external investigators. This is a situation in which outside counsel should conduct the investigation, given the involvement of high-level executives and an apparent dispute about whether the issue under investigation presents a serious issue or not. In-house counsel are likely to have relationships with all the key players and be placed in a situation of determining how and when to best inform the audit committee regarding this practice.

Scenario three

A high-performing employee resigned. During the exit interview, the employee alleged that her supervisor had favored male employees in the group by going to lunch with them more frequently, attending sporting events with them on the weekends, and being generally more comfortable with them. She conceded that her reviews had always been superb, that she had received substantial bonuses, and that in the last talent management audit, she had been designated as the likely successor to her supervisor. Upon learning that an investigation has begun, she asked to participate in meetings, suggested witnesses to interview, and wanted to be kept apprised of the investigation.

The panel discussed the difficulties of investigating the "fuzzy" areas of employment, which do not (at least in this situation) translate into tangible employment consequences. Where an employee has clearly been very successful in all the tangible aspects of employment (e.g., compensation, reviews, opportunities for advancement) it may be tempting to overlook or discount the importance of seemingly minor issues such as lunches and pseudo-social outings. Additionally, the company may legitimately wonder why the employee has waited to raise these concerns until the end of her employment. While a cynical view might be that the employee must not have been too concerned with the issues, an alternate explanation (which may not come out without sufficient investigation) is that the employee now feels comfortable enough to raise her concerns. And, if a high-performing and successful employee feels strongly enough to complain then others may be experiencing these concerns more acutely and the situation may get worse. Several significant cases in recent years, such as former Reddit CEO Ellen Pao's lawsuit against her former employer, a Silicon Valley venture capital firm, have had their origins in seemingly subjective claims of exclusion from work cliques or "boys clubs," rather than an objective refusal to hire or promote female employees.

In terms of conducting the investigation, the hypothetical raises issues of complainant attempted involvement in the investigation. While it is important to take complaints such as this seriously, consideration does not require allowing the complainant to influence the investigation's direction or outcome. In a situation such as this, even if the complaint is substantiated, appropriate remedial action may be as simple as explaining the impact of the supervisor's actions to him and ensuring he is aware of how they are being perceived. The investigator or attorney should be able to determine the relevant individuals to speak with and should be aware of the complainant's potential motivations in "suggesting" individuals to be interviewed.

investigators to handle the investigation may arise. In situations in which the "C-suite" or other high-level executives may be implicated in the investigation, it is advisable to shield in-house counsel from involvement due to prior relationships with the parties.

The use of *Upjohn* warnings is a key tool for maintaining attorney-client privilege — to the extent the employer wishes to maintain privilege. Decided in 1981, *Upjohn Co. v. United States* established what has become known as the corporate Miranda warning. Like Miranda, it allows the company to obtain relevant information that it needs to conduct an investigation after providing the subject of an interview

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with an explanation of the purpose of the interview and obtaining consent to continue. In order to affect a proper *Upjohn* warning, the in-house lawyer should inform the employee that they only represent the company and that they specifically do not represent the employee. The employee should understand that the purpose of the meeting or interview is to obtain information relevant to an investigation. The employee should be specifically informed that — because the attorney only represents the company and not the employee — that there is no attorney-client privilege between them. As a result, the company may choose — at its sole option — to disclose information received from the employee to a third party.

While deceptively simple, the risks of a poor *Upjohn* warning can be serious. In a 2009 opinion, a federal district judge strongly criticized the ethics of attorneys who handled an interview of Broadcom CFO William Reuhle. Broadcom was being investigated for its stock option practices. While the attorneys represented Broadcom, they also represented Reuhle and the company in similar civil lawsuits in which Reuhle was an individual defendant. During an interview, the notes of which were later turned over to federal prosecutors, Reuhle was allegedly told that the interview was conducted "on behalf of Broadcom," which the attorneys apparently intended to mean that the interview was related to criminal defense of Broadcom. Despite that vague statement, Reuhle had good reason to believe the attorneys were interviewing him in connection with their representation of him due to the simultaneous representation of him on related civil matters.

The Broadcom example also highlights situations in which even a perfect *Upjohn* warning will be insufficient. When an attorney is representing both the company and an individual employee, a joint representation agreement containing a conflict waiver is crucial. However, there are going to be situations in which conflicts are irreconcilable and separate counsel must be obtained for an individual. In those situations, a joint defense agreement may allow conflicted counsel for separate parties on the same investigation to share information and communications without waiving privilege.

Completing and producing an investigative report

Depending on the severity or type of the investigation, it may be necessary to produce a written report stating the outcome and/or recommended actions of the investigation. Recall the allegation that the New England Patriots, a US football team, used deliberately under-inflated footballs to gain an advantage in the playoffs? Oddly enough, "DeflateGate" highlighted several important issues for in-house counsel to consider when conducting and completing an investigation.[1]

The New England Patriots' Quarterback Tom Brady requested a copy of the NFL's investigation file and the NFL claimed attorney-client privilege. Later, an attorney from the firm that conducted the investigation cross-examined Tom Brady at a hearing. As this demonstrates, insulating the counsel conducting an investigation and/or completing an

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investigation from other portions of a situation may be important, given the obvious concern with cross-examining the subject of an allegedly independent report your firm prepared. In the event it becomes worthwhile to waive any privilege applying to the investigation, or the company is compelled to do so (which may occur due to a defense raised such as "advice of counsel" or involuntarily if ordered by a tribunal pursuant to a motion), having an outside investigator who is insulated from other privileged communications can reduce the risk of a waiver of privilege beyond what the company intends or would want. On the flip side, if same attorneys — in-house or outside — are conducting the investigation, completing a report, and advising the company on what actions to take, it can become very difficult to differentiate between and/or define the potential scope of a privilege waiver, in addition to the risk of making the attorney-investigator a fact witness to the results of the investigation.

Conclusion

Any investigation into potential wrongdoing by a company, its employees, or its contractors is a serious matter that human resources, legal, and outside counsel must take seriously. In a fast-paced media and regulatory environment, unusual issues of privilege, whistleblowing, and recognizing the risk of and preventing retaliation become even more important, as serious business, civil, or even criminal penalties may be in play. However, with a conscientious effort to implement compliance programs, provide appropriate education and training on compliance to employees, recognize potential retaliation, and handle questions of how best to conduct and complete an investigation (and who is best positioned to do so), employers can effectively ameliorate the risks of even the stickiest human resources or compliance situations. **ACC**

NOTE

1 *https://en.wikipedia.org/wiki/deflategate.*

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