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And Then There Were None: How To Investigate the Agatha Christie Way

Conducting Internal Investigations

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And Then There Were None: How To Investigate The Agatha Christie Way

Complaints by employees, customers, vendors, officers, directors and third parties have increased in recent times and undoubtedly will continue to increase going forward. Whether it is a discrimination/harassment complaint, a retaliation complaint, a SOX complaint, a whistleblower complaint, or another type of complaint, employers struggle with how best to investigate allegations of improper and illegal conduct brought to their attention.

As soon as an employer receives a complaint or becomes aware of a potential concern relating to the workplace, the employer should immediately conduct an in-depth investigation of the complaint or concern. This immediate response is imperative because employers are faced with potential liability under any number of state and federal statutes, as well as common law theories of recovery. Significantly, if an employer can establish that it considered and handled a complaint in a timely and thorough manner, courts today are very likely to allow the employer to avoid liability for many types of claims.

There are several common triggering events that warrant an assessment into whether a company should undertake an internal investigation. Examples of common triggering events are:

Employee or whistleblower complaints

Government subpoena or search warrant

Workplace accident or safety issue

External or internal auditor findings

Actual or threatened litigation by a third-party

Media attention

Allegation of misconduct by employees or corporate officers

Statutory duty (e.g. Sarbanes Oxley; Title VII)

This paper will review how and when an employer should conduct an internal investigation in order to ensure that any investigation, and any follow-up, is complete and responsive.

Conducting Internal Investigations

A. Why Investigate

Conducting a proper and effective investigation will reduce an employer's liability for harassment, discrimination and retaliation claims, as well as other types of claims. Consider the following advantages of a properly handled investigation:

- A potentially explosive situation may be diffused, saving the employer time, money, disruption, and grief in the process; i.e., a complainant or harasser will less likely become a litigant.
- The employer can discover the extent of the misconduct, determine whether other inappropriate behavior exists, and stop all offensive conduct.
- Government investigations may be completely bypassed.
- A company may be more eligible for participation in government programs or bidding on public projects if regulators determine that a company's response to employee claims, such as those involving sexual and other harassment, is adequate.
- The employer can reduce potential penalties by showing that the conduct was isolated or by mitigating the situation immediately.
- The investigation will show that the employer is truly interested in its employees and takes their complaints seriously.
- A prompt investigation increases the availability of witnesses, memory of events, and opportunities to preserve evidence.
- For investigations related to inquiries or allegations launched by a government agency, the Department of Justice Guidelines, certain SEC regulations, FINRA and other regulations provide an additional incentive to conduct an internal investigation, as those regulations and others provide for cooperation credit to those companies that turn over investigatory materials to the government.
- The employer in a case of alleged harassment, discrimination or retaliation may be able to use the affirmative defense set forth in *Burlington Industr., Inc. v. Ellerth,* 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton,* 118 S.Ct. 2275 (1998).

B. When to Investigate

Immediately! An employer's liability for sexual and other harassment, as well as other forms of discrimination and retaliation, frequently depends upon the timeliness of the investigation. For example, even if an employer eventually terminates a supervisor for misconduct, it will not escape liability if it was slow to respond to the complaint and did not engage in a serious investigation until the complainant filed a charge with the U.S. Equal Employment Opportunity Commission or the applicable state civil rights commission. Therefore, even if a claim appears frivolous, it should be treated as valid until otherwise established.

C. Who Should Investigate

More than one individual in management and/or human resources should be designated and named in the company's policies and elsewhere (bulletin boards in lunchrooms, for example) as persons to whom a complaint should be reported. By naming more than one individual, an employer reduces the possibility that a complainant will have to report certain matters, such as sexual or other harassment, to the actual harasser or person involved in the complaint. The person who receives the complaint may or may not be involved in the subsequent investigation, but this person should be trained in proper complaint "intake."

- ***Human Resources Representative, Supervisor or Manager:*** A company employee may be the ideal investigator if the employee is trained, professional and non-judgmental. An employee is familiar with the company's culture, values and past practice. An employee is also keenly aware of corporate politics, the players within it, and possible hidden motives or agendas. From a complainant's prospective, an insider is often less intimidating than an outside representative. A disadvantage to using a company employee as the investigator is that any documents generated during the investigation will probably be discoverable if a lawsuit is filed against the company.

    - ***Outside or Inside Counsel:*** The involvement of an attorney in an investigation creates the possibility of invoking the attorney-client privilege and/or work-product privilege to some portions of the investigations. However, courts have identified an incompatibility between retaining the work-product and attorney-client privileges and relying on the investigation as a defense to liability. Consequently, courts are becoming receptive to the argument that the employer waives the privileges when it tenders the investigation as a complete defense to liability or as mitigation of damages. *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996); *Fultz v. Federal Sign*, 1995 U.S. Dist. LEXIS 1982 (N.D. III. 1995); *see also Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (attorney's investigation is privileged up to the point that the employer asserts that it acted reasonably in the investigation).

D. How to Investigate

- Take the complaint seriously. Once a complaint is made, present the complainant with a copy of the company's policy regarding the basis for the complaint, such as harassment or discrimination, and reassure him or her that the company will not tolerate such action by the offending individual. Listen carefully and try not to make light of the incident by joking or chiding the employee.
- Be sensitive. Reassure the complainant that the complaint will be handled in a sensitive manner. Explain that the company will make every effort to handle the investigation confidentially, but that some information will have to be shared in order to make sure that the investigation is complete.
- Plan and Prepare for the interviews. Even the most basic employee interviews require meticulous preparation. For each interview, the interviewer should gather and review key documents to discuss with the witness. All information in the investigative file should be exhaustively reviewed. Other useful tasks include reviewing background information of the interviewee, such as any prior complaints involving this same witness, the witness's personnel record detailing prior disciplinary and job performance issues, and the witness's relationship to other witnesses in the investigation. Such information can enlighten the interviewer regarding the witness's potential agenda and reputation for honesty. Preparing an outline or checklist of all the issues to cover with the witness is a useful tool. Preparing and maintaining a chronology of events of the facts and issues as

they develop, with references to supporting documents or information provided by other witnesses, may also aid the interview process. With every interview, the interviewer must be a master of all known facts. Being prepared will be obvious to the witnesses being interviewed and might make witnesses think twice before lying or providing misleading answers. The order of interviews also requires planning. Different investigations may require different approaches, but a general rule is to interview witnesses from least important to most important, so that the interviewer has as much information as possible when conducting the most critical interviews.

- Anticipate potential questions from the witnesses.
    - *"Do I need a lawyer?"* Answering this question is tantamount to providing legal advice. Additionally, the interviewer – whether that person is a lawyer or not – is acting on behalf of the company, *not* the employee witness. So the interviewer should not advise the employee regarding whether or not to retain counsel. Rather, you can inform the interviewee that you cannot advise them as to whether or not they need an attorney, and you should not tell them that they do not need an attorney. In those situations where the person you are interviewing is not a target or has not been accused or suspected of wrongdoing, you can tell them that they are not presently suspected of doing anything wrong and are being questioned only because they may have helpful information. If the employee seems unsure, and asks for time to find an attorney, the best practice is to give the employee a reasonable amount of time to get one.
    - *"Do I have to cooperate?"* Hopefully, your company has a written policy requiring employee cooperation during company investigations. If so, bring that policy to the interview. As a general rule, employees have a duty to cooperate with their employers during investigations. So, even if your company does not have a written policy, you can still tell your employee that he or she needs to cooperate with the company's investigation.
    - *"Who will you tell?"* Never ever promise an interviewee that you will keep what they say confidential. Tell the employee that you cannot promise confidentiality because what they say may be important to the investigation and might need to be revealed to management or others outside the company. Put them at ease by explaining that this is standard practice in all company investigations, regardless of who is being interviewed.
    - *"Am I in trouble?" or "Will I be fired?"* If the person you are interviewing is not suspected or accused of wrongdoing, tell him or her so. If he or she is suspected or accused of wrongdoing, tell him or her that at this point the matter is still being investigated and the company is not in a position to make a decision until it has all the facts.

- Conduct the interviews in person. As tempting as it may be to conduct interviews over the phone, interviews should be done in person when possible, especially with key

witnesses. Observing the employees' demeanor and body language during an interview can sometimes provide helpful clues that will be missed if interviews are done by phone.

- Do not conduct the interviews alone. There are several reasons why an interviewer should also avoid conducting interviews alone. First, having another member of the investigative team in the room can protect the company against allegations of unfair treatment by the interviewer. Second, having another team member in the room can also serve to support the interviewer's documentation of what information was revealed during the interview should questions arise later. Last, but not least, having another member of the team in the room serves another important function: note taking. It is important to accurately document the answers and statements of the employee being interviewed.
- Put the witness at ease. Before diving into the subject matter of the interview, try to establish some rapport with the employee witness for a few minutes by engaging in some chit chat about unrelated topics. Then the interviewer should discuss the ground rules of the interview by explaining to the employee that the company is investigating a matter (and some general comments by the interviewer about what is being investigated are appropriate) and the purpose of the interview when warranted. During questioning on substantive issues, the best approach is to use non-leading questions that allow the employee to give narrative responses. These are the "who, what, when, where" and "why" questions. After getting the employee's answers to non-leading questions, more pointed leading questions can then be used to focus on a particular issue.
- Interviewing union employees. When dealing with union employees, be cognizant of *Weingarten* rights, which guarantee an employee the right to union representation during an investigatory interview, and any other notice requirements set forth in the applicable collective bargaining agreement. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
- Interviewing the complainant. When interviewing the complainant, the investigator should ask when and how the alleged incident occurred; whether any witnesses were present; how the complainant responded to the conduct; how the complainant was affected by the incident; whether the complainant knows of any other employees similarly affected; and whether the complainant wants to work for or with the accused. After these open ended questions, get specific. Ask about words, gestures, posture, voice and surroundings. If the complainant waited to report the incident, ask the reason for the delay. Of course, always reaffirm the seriousness of the allegation and the company's intent to conduct a thorough investigation. If alternative work arrangements are possible so that the complainant need not work with the accused, consider utilizing them.
- Interviewing the accused. Explain to the accused that the investigation is a fact-finding mission and no conclusions will be reached until all facts are examined. Give the accused enough details about the allegations so that he or she can adequately respond. If possible, the complainant should remain anonymous. The accused will probably deny the charges so be aware of the reaction to the allegation (surprised, angry, upset). Allow the accused to furnish the company with a written statement of his or her side of the

story, and remind the accused that he or she should not retaliate against the complainant in any manner whatsoever.

- Interviewing witnesses. It is important to interview all witnesses (and potential witnesses). Everyone who is questioned needs to feel that the company is listening to his or her version of the incident. At all interviews, another person besides the investigator and the witness should be present. The investigator must remain objective until all facts are gathered. Obtain statements from witnesses who support or deny the complainant's allegations. Assure them that their cooperation is critical and confidential. Remind the witnesses not to "gossip" about the investigation.
- Ensure confidentiality. Conduct the interviews in a private office, with the door closed. Assure all people interviewed that the information will be disseminated only to those with a need to know. Do not, however, promise absolute confidentiality, as it is sometimes difficult to control leaks and rumors. Maintain the investigation materials in a separate file, apart from personnel files, and limit the access to those with a need to know.
- Ensure no retaliation. Assure the complainant and witnesses that they are being asked to tell the truth and that they will not be retaliated against for doing so. Warn the accused not to retaliate against the complainant or the witnesses.
- Make a decision and act on it. In a typical case of a complainant and an accused that denies everything, you have only three options: (1) believe that complainant; (2) believe the accused; or (3) conclude that you cannot conclude. Do not let the investigation linger, and do not leave the file "open". Make a decision. In any event, inform the complainant and the accused of the result of your investigation and the action to be taken, if any. If you believe the complainant or the accused, take the appropriate action against the accused. If you conclude that you cannot conclude, explain why, and advise both the complainant and the accused that you will be watching the accused closely and that conduct of the type alleged will not be tolerated.
- Document thoroughly. In a subsequent lawsuit, it may be essential to prove that your company investigated the allegation carefully and took prompt remedial action based on the results of the investigation. The best evidence is the notes and statements prepared during the investigation.
- Identify and preserve all potential sources of information. Company-issued computers and mobile devices, accounting and expense records, time cards, personnel files, video footage and other sources often provide valuable information. Companies should always consider external sources of information as well, including records from vendors or suppliers, police reports or other public agencies, former employees, and even records of outside counsel. As the investigation proceeds, as employees are interviewed, and as other evidence is collected, keep in mind that the list of potential sources of information may be expanded or revised.
- Issue a litigation hold. A litigation hold or "do not destroy" notice should be issued immediately, even before the first piece of evidence is collected, so as to avoid not only the loss of potentially critical evidence, but also to avoid spoliation sanctions down the road. The notice should be sent to anyone who might have relevant information, as well

as to the company's IT department to preserve electronic records (including emails) that are encompassed by the company's litigation hold. The collection and preservation of electronic records should never be left to the judgment of non-IT employees. The company should also suspend routine document and record destruction practices for those records encompassed by the litigation hold, including auto-delete functions often associated with email servers. It is also important to note that the company's duty to preserve does not end with the issuance of a litigation hold. Thus, someone on the investigative team should be charged with the duty of periodically checking to make sure that everyone to whom the hold was sent is complying with the hold. In addition, as the investigation proceeds, the scope of the litigation hold should be periodically reviewed to make sure that necessary records are being preserved.

E. Investigations and the Attorney-Client Privilege

In some situations, a company will want to be in a position to claim the attorney-client privilege and assert the work product doctrine with respect to its internal investigation. The applicability of the attorney-client privilege may turn on whether the principal purpose of the investigation is to provide legal advice to the company. In either case, the decision to keep the investigation privileged must be made at the outset of any investigation, *before* the investigation begins. Even if the company foresees choosing to waive the privilege at a later time to obtain cooperation credit, to use the thoroughness of the company's investigation as a defense in litigation, to prosecute claims, or for some other strategical reason, the best practice is to structure the investigation from the beginning so that the privilege is maintained. The key ingredient to keeping an investigation privileged is involving counsel at the outset of the investigation, before any evidence is collected. Merely copying counsel on emails or providing periodic updates is not enough.

Moreover, in-house or outside counsel must *lead* the investigation. This doesn't mean that counsel must collect all the evidence and conduct all the interviews. But counsel must be leading, controlling and making strategic decisions regarding the direction of the investigation at all stages. While in-house counsel is more familiar than outside counsel with the company and its operations, the use of outside counsel to lead the investigation may better protect the privilege because it will minimize the risk that a court will later find that in-house counsel was acting in a business – not a legal – capacity – which prevents the application of the attorney-client privilege.

Furthermore, if the company decides to retain outside counsel, the company must decide between its *regular* outside counsel and *special* outside counsel. Regular outside counsel could be viewed as having less objectivity and could also prevent regular outside counsel from representing the company later, due to a conflict of interest, should the matter under investigation end up in litigation. Special outside counsel, and in particular counsel with expertise in conducting internal investigations, will appear more credible and is unlikely to be viewed as having a conflict of interest. Here are some additional practice pointers for keeping the investigation privileged.

- Make it clear to all involved in the investigation (team members, employees who are interviewed) that the investigation is being conducted at the direction of counsel.

- Mark all documents, notes taken during interviews, interview summaries, emails, reports, and everything else as "Attorney-Client Privileged."
- Limit the distribution of investigative materials and information on a "need to know" basis and don't provide materials to third-parties.
- When sending emails, memos or other correspondence about the investigation, address those items TO counsel. Simply copying counsel is not enough to create the privilege.
- Provide *Upjohn* warnings, also known as corporate *Miranda* warnings, during interviews. The purpose of *Upjohn* warnings is to make sure the employee knows that the interviewer is acting on behalf of the company, not the employee, the employee must keep the conversation confidential, and that the company may choose to waive the privilege later and disclose the contents of the interview to a third-party. *Upjohn* warnings are especially critical for those interviewees who are suspected of engaging in conduct harmful to the company and which is the subject of the company's internal investigation. The failure to provide proper warnings can result in the company's (or, when involved, the government's) inability to use any statements made by the employee during the interview to defend itself against or prosecute its own claims later. Employees should be advised of *Upjohn* warnings at the beginning of the interview, verbally and in writing. The warnings should include the following statements:

    - The interview is being conducted at the direction of counsel for the company for the purpose of providing legal advice to the company;
    - Legal counsel for the company represents the company, not the interviewee;
    - The conversations which take place during the interview are privileged and must be kept confidential;
    - The privilege belongs to the company, not the interviewee, which means the company can and may decide to disclose any information revealed during the interview to others outside the company, including law enforcement.

F. Post-Investigation Actions

After the investigation is complete, the employer must decide whether or not to prepare a written report. As already mentioned, a written report is probably discoverable in civil litigation. Therefore, if the report looks like it will be plaintiff's key piece of evidence at trial, an employer might consider foregoing the written report altogether. On the other hand, a written report can provide a clear record of the company's investigation, the determinations made, and actions taken as a result of the investigation.

Whether or not the employer decides to prepare a report, the employer must assess the credibility of the witnesses who were interviewed. Factors to be considered include the level of detail and the internal consistency of the complainant's account of the alleged wrongdoing; other incidents of a similar nature that occurred in the workplace; detail and internal consistency of the account of the alleged wrongdoer; accounts from individuals who witnessed the complainant and/or the alleged wrongdoer during and after the incident; the accounts of persons with whom the victim discussed the incident; and whether a contemporaneous complaint by the complainant is made.

If substantial evidence of wrongdoing exists, the employer must discipline the wrongdoer. Discipline can vary from oral or written warnings to termination. To determine the appropriate discipline, an employer should consider: the severity of the conduct; whether or not it was the first offense; the accused employee's total disciplinary record; and what actions would best punish the offender and yet protect the victim from future wrongdoing. In harassment cases, whether the discipline imposed was appropriate will be gauged by the effectiveness of the punishment.

If no fair conclusion can be reached, the employer should tell the complainant and the accused that no conclusion has been reached but that a confidential file of the incident will be retained. Other steps an employer might take in this situation are to separate the complainant and the accused; require the accused to attend training, such as sexual harassment training; and/or re-publicize the company's policy regarding the matter in issue.

As a follow-up, the employer should make sure that whatever action was taken worked. This can be as simple as talking to the complainant to make sure that there have been no further incidents. Also, the employer must prevent any retaliation against the complainant for making the complaint because liability for retaliation can be extremely costly whether or not the initial claim had any factual or legal basis.