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Workplace Investigations: Whom to Call

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As the number of employment laws has grown, so has the number of opportunities for employees to complain about violations of those laws. At the same time, courts have placed on employers increasing responsibility to conduct immediate, good faith, and complete investigations, particularly in the area of discrimination, harassment, and retaliation.

Although many employers are well aware of their duty to promptly investigate and to respond to employee workplace complaints, the web of laws complicates what otherwise should be a simple and straightforward process—get the information and act on it. To complicate matters further, various laws affect not only what and how employers must investigate, but also who may conduct the investigation. Should an employer conduct the investigation internally, or hire an outside investigator? If the employer opts to hire an outside investigator, what credentials must that investigator have? The answer to these questions in turn can affect the results of the investigation, including whether and to what extent any conclusions must be disclosed to the subjects of the investigation and whether the investigation is protected by any privilege, e.g., the attorney-client communication privilege.

The Legal Duty to Investigate

The most common employee complaints that give rise to an employer's duty to investigate include claims of discrimination, harassment,

and retaliation. Under both state and federal laws, employers have a legal duty to take "all reasonable steps" to prevent harassment, discrimination, retaliation, and other unlawful employment practices. Courts repeatedly have found employer investigations of employee claims of unlawful behavior to be an essential part of prevention.

There is limited case law regarding the scope and efficacy of workplace investigations. The California Supreme Court in 1998 in Cotran v. Rollins Hudig Hall explained that the reasonableness of the employer's investigation into an employee's claim of harassment, not whether the harassment actually occurred, determined whether the employer could be liable for wrongful termination of an accused "harasser." The same year, the California Court of Appeal in Silva v. Lucky Stores, Inc. reaffirmed the elements of a reasonable investigation outlined in Cotran. The Silva court summarized that a jury, in determining the reasonableness of an employer's investigation, need only determine whether the investigation was timely, conducted by a competent investigator, and was reasonable under the circumstances. The Silva court also explained the requirement of a competent investigator meant that the employer should designate a particular employee to investigate who is trained and well-versed in how to conduct investigations and who uses an established system to investigate claims.

Investigation Regulation

Government agencies, and some larger employers, employ staff dedicated to investigating internal complaints, because the rules relating to internal investigations are very complicated, including rights guaranteed by the federal and state constitutions, collective bargaining agreements, and a variety of special laws applicable to certain occupations such as the Peace Officers' Bill of Rights Act, and the newly-enacted Firefighters' Bill of Rights Act. However, private sector employers conducting internal investigations also have complicated legal issues with which to contend, including, for example, employee privacy, the federal Fair Credit Reporting Act (FCRA), the Fairness and Accuracy in Credit Transactions Act (FACTA), which amended the FCRA, California's parallel provisions in the Investigative Consumer Reporting Agency Act (ICRA), and the California Business and Professions Code. Inappropriate conduct allegations now often include e-mail and voice-mails. Electronic investigations may implicate the Electronic Communications Privacy Act and the Stored Communications Act. Additional requirements may apply, depending on the employer's particular industry.

Who Should Conduct Investigations?

Whether public or private, large or small, all employers have the same basic choices in deciding who should conduct investigations of its employees' workplace complaints: (1) internal employees, such as existing

human resources personnel; (2) independent contractors, such as outside human resources consultants; (3) licensed private investigators; or (4) in-house or outside legal counsel. So, given the legal requirement of a reasonable investigation, determined in part by the competency of the investigator, whom should an employer designate to conduct its investigation and why? The answer to that question depends on several factors, including an employer's personnel, resources, litigation strategy, and the complexities of the factual and legal issues involved in the complaint.

Internal Investigators

Many employers have dedicated human resources staff who are responsible for a wide variety of issues, from maintaining employment policies to compliance with an ever-expanding collection of laws and rules, to organizing the company picnic (sold to human resource managers as part of "employee relations.") Human resources employees naturally conduct internal investigations regarding possible employment law violations. But, because they wear so many hats, they may not have time to complete an investigation as timely as they would like or the courts require. The human resources department will often have a role in employment decisions about which employees complain, so there could be an inherent conflict of interest in investigating those same decisions. Conflicts and political considerations also may arise depending on the level within the organization of the persons involved. Investigating the CEO, or the Vice President of Human Resources, for that matter, may intimidate a lower level employee.

Outside Investigators

Even when HR is not involved in the underlying decision and there is no obvious conflict of interest, some will perceive anyone from management as

biased. Employees know that internal investigators are employed by the same company they are, and that an investigator may not wish to jeopardize his or her own career by making a finding that would not be favorable to upper management. Therefore, employees may be more comfortable talking to an outsider not beholden to the realities of office politics. Of course, a cynical person may say that even an outside investigator paid by the employer will not offend its benefactor.

Investigator Qualifications

Employers who choose to use outside investigators should be aware that not all investigators are created alike. The California Business and Professions Code states that any person "investigating, obtaining, and reporting to any employer, its agent, supervisor, or manager, information concerning the employer's employees involving questions of integrity, honesty, breach of rules, or other standards of performance of job duties" must be a licensed private investigator.

To qualify for a license as a private investigator, an individual must have between 4,000 and 6,000 hours (depending on formal education) of professional experience "employed as a sworn law enforcement officer, military police officer, insurance adjuster, employee of a licensed PI or reposessor, or arson investigator for a public fire suppression agency." Ironically, performing internal EEO investigations would not necessarily qualify as professional experience towards a PI license if performed directly for an employer.

Acting as an unlicensed investigator, and even employing one, can be a misdemeanor. Evidence gathered illegally may not be admissible in court, defeating the whole purpose of the investigation.

Attorneys, who are licensed under a different section of the Business and

Professions Code, are allowed to conduct investigations "in performing his or her duties as an attorney at law." Employees who conduct investigations solely within their own organization are also exempt from the PI license requirement.

Because employment law issues are different from the insurance fraud and criminal investigations that PIs traditionally perform, employers should be cautious before hiring a PI to conduct an investigation into employee relations matters such as workplace harassment or discrimination issues. Subject matter expertise is important because it helps frame the issues that an investigator will probe. A fact-finder, such as a jury, may scrutinize not only whether the investigator has relevant experience, but also the methods an investigator uses to uncover information. A few well-publicized incidents of PIs overreaching may tarnish the reputations of honest and scrupulous investigators. Moreover, in California, an individual who hires an investigator may also end up being liable for torts and negligent acts committed by the investigator.

Attorney-Investigators

Attorneys are permitted to conduct investigations under the Business and Professions Code, and should be thoroughly familiar with federal and state anti-discrimination laws.

Attorneys may conduct investigations that are protected by attorney client privilege or the work-product doctrine. There are occasions when those privileges may or even should be waived, such as when the investigation is asserted as a defense in litigation.

In-house counsel may also be involved in investigations, subject to the political pressures discussed above. In-house counsel also may wish to keep certain communications privileged, because they act as advisers to management at the same

time they act as objective investigators. Maintaining the privilege in those circumstances may be a difficult proposition.

Hiring outside counsel to conduct an investigation is not without its drawbacks. When an attorney investigates a complaint, the attorney may not be able to represent the company in a later lawsuit if the attorney becomes a fact witness on an important issue. Moreover, a lawyer must be clear in his or her role as neutral investigator, and not as a representative of the employer, so the investigation remains impartial and fact-based. Also, some attorneys may be unable to resist the temptation to reach legal conclusions, which can wreak havoc with the employer's subsequent defense. Finally, as stated above, if the employer wants to use the investigation to take disciplinary action or as a defense to harassment claims, the investigating attorney may

not invoke the attorney-client privilege.

Management may want to have privileged discussions with lawyers they already know and trust about how to handle the results of an investigation. Consequently, employers may not want to retain their "regular" defense counsel to conduct internal investigations. If an employer has regular employment counsel, those attorneys can work with the attorneys conducting the internal investigation. The employer's regular outside counsel could then retain their attorney-client privilege in communicating with the employer. Importantly, those lawyers are still free to discuss the results of the investigation, litigation strategies, and potential personnel actions with the employer without tainting the investigation or waiving the attorney-client privilege.

Conclusion

Whatever an employer's ultimate decision as to who should investigate a workplace complaint, the employer should always remember that its obligation to remedy complaints of harassment, discrimination, or retaliation does not end with selecting the right investigator. The employer must continue to work with the investigator throughout the investigation process. For that reason, any investigator should be familiar with the employer's policies and procedures regarding investigating and responding to workplace complaints, the employer's history of similar complaints, and the resulting disciplinary action taken, if any. Internal investigators should also consider who should be involved in the decision-making process regarding potential discipline and ensure that any disciplinary action is consistent with the employer's policies, procedures, and past practices.

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