

## Best Practices When Current Employee Complains

Article By:

Misti Mukherjee

Alyson J. Guyan

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It is vital that all employers investigate internal complaints that may be covered under a variety of laws, including EEO laws (for example, Title VII, ADA, ADEA, and state EEO laws), whistleblower laws such as, Sarbanes-Oxley, Dodd Frank (and state whistleblower laws), OSHA, the False Claims Act, and the NLRA. Additionally, employers conduct investigations in response to employee misconduct and violations of company policies, procedures and codes of conduct. Once an employer is on notice of a complaint, it has the duty to investigate promptly and thoroughly. When the individual raising the concern is a current employee, additional practical considerations should be considered.

The employer first needs to decide who will conduct the independent investigation – human resources personnel, legal counsel, or outside counsel or consultant. The role of the investigator is to determine, independently and in good faith, whether the alleged conduct did occur. The investigator must be unbiased and unprejudiced, and perceived that way by all stakeholders. Therefore, when the complainant is an existing employee, it is often best to outsource the investigation to an independent third party.

Once an investigator has been selected, the investigation begins. There are generally three phases in the process.

*First, the investigator should prepare an investigation plan.* This plan identifies the objectives and the scope of the investigation. When the complaining individual is an existing employee, the employer must carefully consider each step of the investigation to ensure the company is balancing the need for cooperation and fact-finding with the need to preserve evidence, protect the employee's confidentiality (to the extent possible) and refrain from any actions that could be perceived as retaliatory. The employer should be selective about who should be interviewed (and in what order), and limit the number of employees who are aware of the complaint. Additionally, the employer should consider whether interim actions are needed to preserve information or protect the complaining employee, the alleged victim or other employees in the workplace. The investigator should evaluate the personnel files of the subject of the complaint, the complaining employee and all witnesses, and identify trends, prior relevant complaints, and corroborating information.

*Second, the investigator conducts the investigation.* This process includes reviewing applicable documents, interviewing the complaining employee(s), interviewing witnesses, and interviewing the

alleged wrongdoer. The investigator should find a discreet location for the interviews, and limit, as appropriate, disclosure of the identity of the complaining employee. During the investigation, an investigator may learn new facts that reveal additional claims beyond the scope of the original investigation. These new facts and allegations may result in a separate, parallel investigation. If performance issues come to light during the investigation, an employer may consider a different investigator review those issues, particularly someone who does not have knowledge of the original complaint, in order to reduce the likelihood that the review (and any corrective actions taken as a result) will be viewed as retaliatory.

*Third, the investigator evaluates the facts and finalizes the investigation by carefully analyzing the information obtained and drawing reasoned and logical conclusions.* In concert with the employer, a decision is made whether the investigation should be finalized in writing and the investigator's charge. The employer should determine at the outset its expectation of the investigator. Does the employer simply want the investigator to make findings of fact? Is the investigator being asked to come to a legal conclusion about the factual findings? Does the employer want the investigator to make recommendations of potential corrective action? Ultimately, these are the decisions that the employer must own. For example, this last step may involve credibility determinations, a summary of findings and a list of recommended corrective actions. When addressing corrective actions, the investigator should review past company practice and consider the seriousness of the infraction, the frequency of the violation, the employee's work history, and any extenuating factors. Remedial action must be closely monitored to ensure that it has the intended effect. The investigator or employer should follow-up with the complaining employee to inform him or her that the matter has been investigated, that appropriate action has been taken, and that it is expected that the inappropriate conduct will not reoccur. Continuous monitoring should be implemented to ensure that the employee is not experiencing any retaliation. Moreover, after the decision has been made, employers should continue to communicate with the complaining employee to make certain that she/he does not believe retaliation has taken place.

A timely, thorough and thoughtful investigation, accompanied by prompt and appropriate remedial action, will generally provide an employer with an effective defense to subsequent litigation, reduce the likelihood of retaliation, inspire employee confidence and encourage an open workplace where employees are comfortable raising issues of conduct that are inconsistent with legal requirements and company values.

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