Growing importance of fact-finding and investigations in the global workplace

The concept of workplace fact-finding or investigation is not a new one as employers have long experienced the need to gather reliable information about employees in order to make reasonable decisions concerning them. In the past, however, most workplace investigations concerned such individual employee issues as theft, violation of work rules, and other misconduct. Now, with the rise and global spread of significant corporate fraud, whistle-blowing, discrimination, retaliation and other more serious corporate responsibility issues, conducting effective and appropriate internal investigations has taken on a new importance.

Just what constitutes an “effective and appropriate” investigation will vary, of course, as such judgments are affected in the first place by the facts and circumstances that initiate them. Some investigations are “bet the corporation” matters in terms of regulatory or reputational risk. Clearly, these require pulling out all the stops to achieve an effective and fully defensible investigation. Others, more limited in terms of their potential risks, will still require prompt, thorough efforts, but will be considerably less involved. Certainly, investigations triggered by specific complaints will usually require more extensive and formal practices than those triggered by an organization’s mere intention to determine “what’s going on” with respect to a particular issue in its workplace. Internal investigations are also affected by the law, culture, and norms of the region or nation in which the investigation is conducted as well as by the norms and culture of the organization that is undertaking the investigation.

Certain practical principles are reasonably common to all investigations, however, and can at least serve as the basis for discussion as to what workplace investigations generally do – and should- look like in the increasingly global workplace. One necessary qualification to this discussion, however, is that this paper addresses “best practices,” that is, particularly excellent or aspirational management policies, procedures, and practices, and not “minimal” or necessarily legally mandated practices. Many of the practices addressed do constitute “usual and reasonable practice,” that is, “known, feasible, and common or customary practice,” or “industry standard” at least among US-based employers. Whether or not a given practice can, should, or must be adopted in any specific organization, however, will depend upon a number of circumstances such as the organization’s size, location, structure, and resources. In addition, of course, this paper cannot constitute specific legal advice. To implement appropriate, or multiple appropriate,
internal investigations or investigations programs, readers should consult with legal counsel in each jurisdiction in which such program or programs are established or an investigation is conducted.

KEY CONCEPTS IN LEGAL AND EFFECTIVE INVESTIGATIONS

The result of world-wide developments in the legal and business rationales for conducting internal investigations is that responsible employers across the globe are now investing substantial resources in developing the capabilities necessary to conduct effective investigations. This includes reviewing the employer’s entire approach to investigations, including resources devoted to the effort; evaluating and if necessary restructuring policies and procedures related to investigations; establishing programs for maintaining effective enforcement of policies, and educating managers and employees about their responsibilities under the employer’s complaint and investigation policies and procedures. Particularly in view of Sarbanes-Oxley in the US, other new regulatory compliance rules, and similar world-wide legal developments, most larger employers across the globe, are creating new in-house investigation teams as well as establishing hotlines and other effective procedures for fielding complaints. Many employers are also developing a network or database of outside investigators to handle complaints that cannot be effectively handled in-house.

A complete description of all of the issues to consider in arriving at an effective workplace investigation plan would be beyond the scope of this paper. However, following are some of the most important considerations and concepts in designing an investigation program.

Hallmarks of Reasonable Investigations

Review of investigations-related legal and regulatory decisions, guidelines, and investigators’ experiences, as well as common sense, suggests that those who evaluate internal workplace investigations and internal handling of complaints (among them, regulatory agencies, judges and juries) expect them to evidence the following:

a. **Planning and organization**

The need for investigation often arises suddenly, but an ill-considered response creates more problems than it resolves. Thoughtful, proactive planning will reduce mistakes, ensure conformity to other important investigatory standards, and help persuade post investigation reviewers that the employer made a sincere effort to identify and fairly resolve an actual problem. Pre-investigation planning should include:

(1) Assessment of the actual purpose and objectives of the investigation.
(2) Review of relevant law and employer policies and procedures.
(3) Identification of the specific factual and legal questions to be resolved.
(4) Careful selection of an appropriate investigator or investigation team.
(5) Establishment of a preliminary logical order and timeline for interviews.
(6) Preparation of a tentative list of questions and matters to cover in interviews.
b. Commitment

Reasonable investigations also require demonstration of serious organizational commitment to resolving the problem and doing so in a fair and appropriate way. Accordingly, employers must be willing and prepared to devote sufficient attention, skill and resources to these investigations. Ignoring a complaint or telling a complainant to “just learn to live with it” is, of course, disastrous when it comes to after-the-fact scrutiny. Similarly dangerous are half-hearted or slapdash efforts or those designed to make a mere show of compliance. Juries and regulators are particularly good at sniffing out evasion and may be even harder on an employer that they believe to be dishonest.

US regulators such as those charged with enforcing Sarbanes-Oxley and the Foreign Corrupt Practices Act, for example, have made it very clear that in assessing organizational practices or responses relevant to potentially illegal behavior, they will focus heavily on certain commitment issues. These include evaluating the “tone at the top”, that is, the demonstrated attitude and commitment of the organization’s top leadership to preventing or correcting illegal behavior. They will also scrutinize the organization for signs, or lack thereof, of a “compliance culture”, that is, an appropriate organizational commitment to abiding by the law. As organizations cannot act effectively absent sufficient, accurate and relevant information, demonstration of organizational commitment to the investigation process is, accordingly, crucial.

Appropriate “commitment” in such circumstances includes:

1. Giving investigations immediate attention and high priority;
2. Carefully selecting investigators (in terms of their skill, knowledge, impartiality, and personal qualities);
3. Thoroughly educating in-house investigators in investigations-related skills and relevant laws and/or identifying skilled, outside investigators if development and deployment of in-house investigators
4. Preparing a sufficient number of investigators so that the inquiry is not dependent upon the availability of a single individual;
5. Preparing investigators at all levels of the hierarchy so that the investigator is not of a markedly lower level of authority than (ordinarily) the accused;
6. Allowing investigators sufficient authority, time and access to achieve a reasonable conclusion;
7. Taking action in conformance with the findings and conclusions.

c. Promptness

The U.S. Supreme Court, in Meritor Savings Bank, F.B. v. Vinson, 497 U.S. 57, 106 S.Ct. 2399 (1986), directed employers to take “prompt” and effective action to remedy sexual harassment in the event of a complaint. More important, perhaps, juries seem almost instinctively to demand promptness not only in initiating but also in concluding an investigation. See, for e.g., Baker v. City of Oceanside, supra, where more than a year’s delay in finishing the inquiry resulted in a
$1.2 million award. as to how long an internal inquiry will be permitted to drag on. Collective agreements between employers and employee representatives or the employer’s own written policies may also specify the length of time in which an investigation must be initiated and/or concluded. At the same time, however, investigations must never be “hasty.” Taking time to identify and organize the relevant policies and procedures; understand the issues; identify appropriate sources of information; identify and sequence witnesses and the like is vital to an effective investigation.

How “prompt” is “prompt” therefore depends upon many circumstances, but, aside from legal or contractual constraints, most important is probably the situation of the parties. If the accused is supervising the accuser and/or the accuser is experiencing significant distress, “prompt” means “immediate.” Even in a situation that does not necessitate extraordinary speed, employers must proceed more expeditiously than with other business matters: juries and regulators are not impressed with employers’ arguments like “a key manager was out of town” or “I left a message but he didn’t get back to me” when it comes to investigating and relieving the distress caused by illegal conduct in the workplace.

d. Thoroughness

Jurors and regulators are also especially quick to notice - and disapprove - when an employer fails to perform a thorough inquiry. An employer’s omitting an important witness or neglecting to pursue an important contradiction, however inadvertent, looks to a suspicious post-investigation reviewer like evasion or cover up.

Creating a preliminary investigation plan will help reduce mistakes but it is also important to check and recheck during the course of an investigation for gaps in needed information, for avenues which remain to be pursued and concluded and for relevant new matters that have arisen during the course of the investigation. It may also be useful to “brainstorm” with another or others (usually only those who have a “need to know,” of course) to get additional perspective during the course of the inquiry. Certainly, a careful review of the entire investigation must be undertaken - and oversights corrected - before any final conclusions are drawn. Investigators must remain painstaking but flexible until the real end of the inquiry. Ordinarily, the investigator should serve as the fact finder and actual decisions based on the facts should be made by those not invested in the investigation.

e. Fairness

Fairness, and more precisely, the appearance of fairness, is to post-investigation reviewers like jurors the single most important requirement for workplace investigations. While “fairness” is a relative term, and one that will be affected by cultural and legal context, jurors and regulators are surprisingly capable of detecting its absence and united in their antipathy toward an employer whose investigation deviates from their standard.

Fairness must apply to all phases and details of an investigation. An employer who promptly and properly initiates a needed investigation can still fail in the reviewers’ eyes if, for example, it
unfairly neglects to follow up with appropriate discipline and/or protection for the accuser or witnesses. Lawsuits filed by alleged harassers or targets of an investigation who have been treated unfairly, for example, disciplined more harshly than similarly situated individuals, defamed or otherwise unnecessarily humiliated, are also on the rise.

In the US, consultants are unanimous: in this era of downsizing, mergers, outsourcing, and increasing gaps between haves and have-nots, jurors, some employee representatives, and even some government regulators are eager to ameliorate their increasing sense of powerlessness in their own or their families’ employment situations. If they believe that an employer has behaved “unfairly” regarding any but the least significant details of workplace complaint handling, they often will lash out to the best of their ability. Employers who persecute whistle-blowers or try to cover-up corporate fraud are increasingly vilified all over the world. Employers must thus bear in mind that the standard of requisite “fairness” to each of the employees involved in a workplace investigation and/or complaint handling is set extremely high. Employers must check and recheck each of their actions in this context against that very high standard.

**f. Accuracy and precision**

To withstand later scrutiny, investigations must be accurate and precise. Conclusions must be backed by sufficient and specific facts, and investigators must reject euphemisms and pin down evasive answers. Witnesses must be pressed for details such as times, dates, places, and the exact facts underlying their “feelings” or “beliefs.”

Whether or not they create a written report, investigators should identify findings of fact and link them to conclusions. Findings and related conclusions should be reviewed for accuracy, preferably by someone other than the fact finder, before an ultimate decision is reached. This is particularly the case when an in-house investigator or non-independent investigator is used for the fact finding.

**g. Minimizing intrusiveness/maximizing confidentiality**

Privacy concerns are affected by differing laws and norms across the world, but there is no doubt that most cultures place some value on aspects of individual, and thus employee, privacy. In the US, for example, the “privacy” of public employees is protected by the federal Constitution; California employees are protected by the California constitution; and other states’ employees, to varying degrees, are covered by a combination of common and state statutory law. The EU imposes substantial restrictions on invasions of employees’ data privacy. Achieving the balance between obtaining requisite information for taking action and avoiding invasion of privacy is often difficult but is another aspect of effective investigations that ordinarily must be addressed.

Laws in most jurisdictions generally treat privacy questions as a matter of balancing the need for the intrusion with the nature and degree of the invasion. Thus, employers have several important avenues for reducing privacy invasions. First, they can minimize problems by intruding, especially into delicate or personal matters, only when the need is substantial. Second, they should seek always to utilize the least intrusive form of information collection, e.g., consulting, where possible, company-held files and documents for a given piece of information rather than
interviewing a non-party witness. Third, they should seek to reduce the degree of the invasion by collecting only that information, if it is of a personal or delicate nature, that they absolutely need to know to accomplish their appropriate objective. Finally, they can reduce the degree of the invasion by disclosing information only to those with a clear need to know it.

h. Adequate documentation

“Documentation” poses difficulties in many aspects of management, and internal investigations are no exception. It is generally the case that some written record of an investigation is required - juries and regulators are too aware of the concept of “documentation” to accept it when none is created or retained. What is required, however, is to remember that fact-finding is not undertaken for its own sake; rather, it is undertaken to obtain sufficient information that the decision maker can make a good decision. Particularly when the investigator is an experienced outside professional who is merely finding facts to present to the ultimate decision maker, a written report may be unnecessary because the investigator will be able to remember and recreate for after-the-fact scrutiny the essential findings of the investigation and thus the basis of facts underlying the decision.

Whatever outside lawyers think, it has proven very difficult effectively to protect much of the documentation associated with any investigation from later outside scrutiny. Not only are attorney-client and work-product privileges ordinarily difficult to apply to internal investigations, but given the employer’s normal obligation to take prompt corrective action with respect to most workplace complaints (which ordinarily includes an investigation), and to demonstrate that it has done so, it is difficult to imagine that an employer would invariably be successful in avoiding disclosure of all or part of the investigation. Certainly, all workplace investigations should be performed with the idea in mind that whatever the early determination respecting privileges or disclosure, disclosure may ultimately be made at some later stage if the matter proceeds to litigation.

Accordingly, employers should prepare well in advance for careful, effective documentation of each stage of an investigation. This includes creating a preliminary investigation plan; documenting adjustments and amendments as the inquiry progresses; documenting the complaint and/or response; witness factual statements; findings and conclusions; (possibly) a report; and follow up discipline and subsequent monitoring efforts. Each type of document carries particular benefits but possible risks, so employers would do well to pay careful attention to training potential investigators in this area.

PRACTICAL ISSUES IN CONDUCTING WORKPLACE INVESTIGATIONS

General Suggestions

The following are general suggestions only. Obviously, each may not be appropriate in every case.
**First Response.**

Workplace crises that require investigation usually begin with a complaint from the alleged “victim” or “accuser.” Whether the issue begins that way or through a supervisor’s observation or some other form of learning about misconduct in the workplace, it is extremely important that the employer take the problem seriously and give it top priority.

Management should, on its own accord, evaluate every circumstance of potential misconduct, and, if necessary, conduct a thorough, effective investigation to determine the identity of the responsible parties, and proceed further if appropriate. It simply is not enough for an employer to decide that it will be impossible to identify the perpetrator. The message is clear: employers have a duty to try to conduct an effective investigation even when no complaint has been filed and/or even when they are not guaranteed success.

**Choosing the Proper Investigator**

What “type,” that is, the appropriate discipline of the investigator will depend on many factors and the unique factual circumstances of the matter to be investigated. One matter may call for an investigator experienced in discrimination and harassment prevention practices, for example, but another might demand a sales practices or a fraud expert. The determination as to type of investigator should in any case be made carefully, however, as the investigator’s familiarity with and expertise concerning the principle subject matters involved in the investigation will usually prove critical to an effective, accurate, and ultimately, defensible, investigation. Where resources allow, team investigations comprised of a highly trained and experienced investigator and a subject matter expert are often preferable, but, again, each investigation will depend upon the unique circumstances involved.

Among the “usual suspects” in the pool of possible internal investigators or investigative team leaders are in-house human resources; legal; internal audit; or security personnel. Outside the organization, regular outside counsel, whether business, criminal, or labor and employment lawyers; accountants; or security firms have, at least in the past, often acted as internal investigators.

More recently, several new groups have arrived upon the scene. In-house, this includes compliance or ethics personnel and, in some larger organizations, specially-designated multidisciplinary investigation personnel. Outside, more and more of the larger law firms are offering, often to non-regular clients, specialized investigation teams consisting of business, criminal, ex-government, and labor and employment lawyers. In addition, an entirely new breed of professional independent investigators, usually former attorneys but occasionally experienced HR or compliance professionals, has also arisen to handle the need for impartial and independent internal investigations.

Each of these different types of personnel offers advantages and disadvantages. Briefly, they include the following:
1. Inside human resources, legal, internal audit, or security personnel. First among the advantages offered by these personnel is low cost. Because they are typically already on the payroll, their principal additional expense to the organization in an investigation is their time and travel. Speed of deployment, both because they are conversant with the organization and may already be located in or near the locus of the necessary fact-finding, is another key advantage of choosing such personnel as investigators.

Among the principal disadvantages is the potential lack of impartiality and independence of such investigators. Where these issues are implicated, or the investigation will be evaluated by a critical outside party like a jury or regulator, such a deficiency can be serious. The problem can be minimized, of course, by using only highly trained and experienced personnel for conducting investigations and by utilizing personnel who do not have a relationship with the parties to the matter being investigated. Also, the issue is not always terribly significant, for example, with more routine problems that do not pose major risk to the organization’s reputation, attainment of key business objectives, legal compliance or liability.

Another disadvantage is lack of speed in completion of the inquiry. Unless the organization is large enough to dedicate sufficient numbers of these employees to investigation work, the regular duties of such persons, ordinarily already full-time, make efficient conduct and completion of complex investigations difficult. Although creation of a multi-disciplinary investigation team can minimize the problem, another drawback of using such in-house personnel is that such employees’ knowledge or training may be too narrow to achieve the necessary accurate, thorough, and reliable fact-finding in many internal investigations.

2. In-house compliance and ethics personnel or specially-designated internal investigators. For the organizations that have sufficient resources to train and support these types of employees, the disadvantages are few and the advantages great to using these individuals as investigators. Such professionals possess all of the attributes of the in-house employee, and, at least if the organization is willing and able to afford them the authority, access, and independence that effective internal investigations require, few of the disadvantages. Finding, training, and supporting such professionals as regular employees is still difficult for many organizations, however, as dedicated compliance and ethics professionals are a relatively new phenomenon in many industries. Nevertheless, the number of these employees is increasing and as investigations continue to grow in frequency and importance, such professionals will often prove to be the most appropriate selection for achieving effective internal investigations.

3. Non-regular outside lawyers, accountants, and security firms. These types of investigators, who typically act in multi-disciplinary teams, are a growing phenomenon in the US, at least. They offer the advantage of availability and extensive expertise.

Although their prime disadvantage is usually extreme cost, for bet-the-corporation reputational, liability, or criminal investigations, they are the usual investigators of choice. Serious governmental investigations, particularly when criminal charges are
involved are among the type of situations where such representation is called for. For certain other circumstances, however, particularly in the US where, for example, discrimination, wrongful termination, and many retaliation cases are determined by juries, investigations conducted by such outside investigators can suffer from at least the appearance of lack of impartiality and independence. This is because even though investigators from such firms do not have the same responsibilities to their clients that regular counsel, accountants, or security professionals may have, they are often perceived by juries or critical outside parties such as regulators to possess experience and mindsets that are not conducive to independence and impartiality in investigations. Further, they can be tainted by the suspicion that they are seeking future business in undertaking such investigations and may be inclined as a result to avoid difficult findings and conclusions.

4. Independent professional internal investigators. Like in-house compliance and ethics personnel, these investigative professionals are a relatively new phenomenon. They tend to possess the disadvantages of any other outsiders such as high cost, lack of deployment speed, and lack of familiarity with the organization. Qualified and experienced independent investigators are also sometimes difficult to identify and vet, and they often lack ready availability.

These investigators possess the advantages of specialized investigative expertise and are (or should be) well grounded in the concepts they are handling. The successful ones, at least, also tend to possess the personal characteristics required of effective investigators and generally produce high quality results. Most important, they provide the assurance and appearance of impartiality and independence. Like in-house compliance and ethics professionals, the numbers of such investigators are growing, and, at least in circumstances placing a premium on independence, will likely often in future be the professionals of choice for effective internal investigations.

5. Regular outside counsel, accountants, or security personnel. These individuals offer certain of the advantages of in-house employees as investigators. They tend to be familiar with the organization and already deployed in the geographical areas where the company regularly does business. They do not typically suffer from the problem of being otherwise unavailable when the need for sustained attention to an investigation arises.

However, they possess two distinct and substantial disadvantages, of which the first is obviously high cost. The second is less obvious and will not invariably prove a problem but in some cases will be serious. That is also the potential lack of apparent impartiality and independence that is inherent when such professionals act as investigators. Because lawyers and certain accountants and security personnel in many countries, but particularly in the United States, have significant duties to represent the interests of their clients, to “zealously advocate” for their interests, for example, actively seeking facts that will prove wrongdoing or could damage the reputational, financial, legal or other interests of their clients may well prove difficult or even a conflict of interest for them. Certainly, in the US for example, lawyers who perform defensive investigations for clients are often “conflicted out” of representing them in subsequent litigation. Juries and other outside
evaluators may also harbor significant doubts about the ability of such regular company advocates to be impartial.

The issue is currently the focus of some attention in the courts. Recently, one major law firm was sanctioned for improperly disclosing matters the witness thought were privileged or part of the attorneys’ representation of the witness. Another was sued for malpractice for failing to disclose or even deliberately withholding documents and evidence discovered by the firm during its investigation. Finally, in this writer’s experience, several employers lately have experienced large adverse jury verdicts in employment litigation because juries believed that the employer’s regular outside counsel performed a biased, unfair, insufficient, or even deliberately intimidating investigation.

An additional disadvantage for accounting and security professionals is, on the other hand, is often lack of knowledge of relevant laws or legal principles that underlie the matters they are investigating. Limited knowledge of fair process issues, including opportunity to know and contest the charges against one; as well as privacy and confidentiality matters; defamation; false imprisonment are among the concepts that are often less well understood by such professionals.

Privilege in Investigations

Another issue that occasionally arises in investigations, particularly those performed by attorneys, is whether an investigation can be protected from disclosure in subsequent proceedings including litigation. Although it is sometimes asserted, it is not clear in most jurisdictions whether there is a special privilege “of self-examination.” More often, the privilege asserted is either the “Attorney-Client Privilege” or an attorney “Work-Product” privilege.

1) The Attorney-Client Privilege

The attorney-client privilege protects the functioning of the attorney and client relationship and, in essence, requires a) an attorney; b) a client; c) a relationship between them for the purpose of rendering and receiving legal advice; d) a communication between them; and, e) an intent that the communication be confidential.

While employers in most employment law cases will wish to disclose the results of an investigation as a basis for their actions and thus will end up waiving the privilege anyway, in the unusual case where protection is strongly desirable, employers must take careful precautions from the beginning. Not all courts have been receptive to assertion of the privilege in investigations, either on the ground that investigations need not be performed by attorneys but can also be performed by laymen, or do not constitute the rendering of legal advice. The better view, however, is that use of an attorney to perform an investigation is prima facie evidence of the purpose to secure legal advice, because, although laymen can perform investigations, only a lawyer has the “training, skills, and background necessary to make the independent analysis and recommendations” which an employer might desire.
In such cases, in addition to undertaking to keep communications confidential, if the organization intends to rely upon attorney-client privilege to protect against disclosure it is critical that a lawyer-investigator’s notes and report contain “advice” rather than mere facts. A number of courts of concluded that mere facts “belong” to the witness, not the attorney investigator so may always be disclosed. Moreover, since this privilege protection is rather fragile, and often undesirable in employment cases, however, the risks may well outweigh the benefits, at least in employment discrimination cases.

2) The Work-Product Privilege

The work-product privilege, which is qualified rather than absolute, protects from discovery the mental impressions, conclusions, opinions, and legal theories of an attorney (or his/her delegate), created in anticipation of litigation.

While work-product privilege may more regularly offer protection than the attorney-client privilege in investigations, it also may prove difficult to establish as well as ultimately undesirable in most employment cases. Written statements by witnesses will almost certainly not qualify as “mental processes” of the attorney; even oral statements, if recorded in notes or a report, must contain liberal amounts of attorney analysis and opinion to be considered privileged. Again, the difficulties of establishing and the likely desirability of ultimate disclosure ordinarily outweigh the advantages of using this privilege in employment cases.

Key Personal Qualities of Effective Investigators

Regardless of the “type” of investigator chosen, all good investigators will and should manifest certain personal characteristics. These include:

- impartiality, fairness, and objectivity;
- integrity and courage;
- analytical ability;
- empathy, sensitivity, perceptivity, and general emotional intelligence;
- persistence and determination;
- tough-mindedness;
- quickness;
- patience;
- common sense;
- subject matter and investigative expertise

Planning the Investigation

Following selection of an appropriate investigator, his or her next step should be carefully planning the investigation. An investigator should take the following steps before proceeding with the investigation:
a. Thoroughly review the relevant policies and procedures at issue; deviations from the employer’s asserted policies will cause significant difficulties later.

b. Review appropriate documents such as the accuser’s complaint, the parties’ personnel files, and any investigations files or relevant company archives.

c. Identify key issues and provisionally determine what will need to be discovered and what are likely sources of needed information. Utilize the least intrusive methods where possible (e.g. documents, rather than witnesses).

d. Identify and appropriately sequence as many likely witnesses as possible. Establish an appropriate method of contacting them, and plan what will be communicated to them in advance of the meeting.

e. Document the planning stage carefully but be prepared to adjust the plan during the investigative process.

Interviewing the “Accuser.”

When interviewing the complainant or accuser, among other things, investigators should:

a. Assure the accuser that the company takes the matter seriously and is working to effect an appropriate resolution; however, the investigator should not promise specific results.

b. Refrain from using words like “illegal harassment” or “victim” - at the outset, there is at most potential “misconduct” or “violation of company policy”.

c. Start with open-ended questions but later move to planned and pointed questions, making sure to cover everything that is needed to proceed.

d. Refrain from promising strict confidence or anonymity; it can’t be given. The investigator should explain that every effort will be made to keep the matter confidential and that there will be no retaliation by the employer or supervisors against the complaining party. It is very important that the investigator never agree to refrain from “doing anything” or using the “victim’s” name.

e. Remember that it will almost certainly be necessary to interview the complainant again, and possibly multiple times, as conflicting or corroborative evidence is obtained. Establish that idea in the complainant’s first interview and provide a way that the complainant can contact you if he or she thinks of additional helpful information.
Interviewing the Accused or Target Employee

Promptness is sometimes an issue in interviewing an accused employee, but sometimes it is more conducive to an accurate investigation to obtain and prepare with other corroborating or conflicting evidence before tackling the accused. Certainly, however, the accused employee must be thoroughly interviewed before you reach a conclusion, as well as be given an opportunity to respond to the charges in detail. Remember that local law will often have a great deal to say about when and how an accused is to be notified. After local laws are complied with, and when interviewing the target employee, the investigator should generally:

- Be especially careful about observing the accused individual’s rights, such as the right to a representative.
- Indicate to the accused the seriousness with which the employer views the situation and its intention to effect a thorough, fair, accurate investigation and appropriate solution.
- Approach the interview with an open mind, making sure the accused employee has an opportunity to fully explain before the investigator reaches a conclusion.
- Refrain from communicating any conclusions to the accused. Rather, the investigator should indicate that he/she will be contacted upon completion of the investigation. If it is necessary to protect one or the other of the parties, the investigator should recommend that the employer suspend the accused (never the complainant) “pending investigation.” Ordinarily this should be with pay, at least in the US, but each case is different.

Interviewing Other Employees. When interviewing others, the investigator should:

- Determine whom to interview on a case-by-case basis and involve only those who have a genuine “need to know” in this case.
- Refrain from unnecessarily disclosing information to witnesses or others from whom information is being sought.
- Prepare uniform confidentiality and other requests, warnings, and explanations and utilize them consistently.

APPROPRIATE REMEDIES

Ordinarily, it is best to separate the ultimate decision maker from the fact finder. In all cases, however, a competent investigator will evaluate all of the results of the investigation carefully before deciding what to recommend or “find”. In this evaluation, the investigator should weigh all of the evidence (i.e., consider it for what it is worth) not just that which is provable in a court.
of law. The investigator should also consider key employees’ situations, possible motives, and work records, while being careful not to carelessly make faulty assumptions. A good investigator will critically examine all alternatives and possible consequences of each of those alternatives.

**PRACTICE TIP:** Employers and their attorneys must remember that each situation is unique; workplace investigations are important, delicate, and difficult and each one should be handled open-mindedly and with close attention to its specific circumstances. The key is careful "critical thinking" in each case, whether by the employer’s own internal investigator, outside investigation professional or legal counsel.

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