

# **Legal Issues for HR Professionals: Workplace Investigations**

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*In 2007 the author addressed critical issues concerning pre-employment investigations ( reference checking and background) in an article published by the International Public Management Association for Human Resources.<sup>1</sup> This article addresses the post-employment investigation process incumbent upon management as a result of incidents occurring in the workplace.*

## **Introduction**

Workplace investigations may be a two edged sword with respect to the employer. On one hand, an employer has a duty to investigate a situation following a report of a workplace incident that violates an employer's rules, regulations, policies, or procedures. Conversely, an investigation that is performed by an unqualified individual, or performed in a negligent manner, or even the findings resulting from the investigation, may result in litigation and liability to the employer.

Workplace investigations occur for many different reasons. Some investigations are not related to employee misconduct but to safety or other issues. Others relate to employee caused situations. For example, an employer must conduct an investigation of any harassment complaint in order to avoid liability for any such harassment that may have occurred.<sup>2</sup> If a confrontation occurs between individuals, an investigation will normally follow to determine if disciplinary action is appropriate. If an individual is reported to be under the influence of alcohol or drugs, drug testing may follow. Security breaches involving trade secrets, inappropriate use of a company's computer or other equipment, misappropriation of equipment, negligent use of equipment, and other

reasons, result in workplace investigations to determine the appropriate action to be taken against an employee.<sup>3</sup>

### **Employer Has a Duty to Perform An Investigation**

Workplace investigations are performed for many different types of situations that occur in the workplace. Some of the reasons for workplace investigations include:

- Violation of workplace rules and procedures
- Substance abuse
- Discrimination complaints
- Harassment complaints
- Threats against others
- Abusive behavior
- Workplace theft
- Vandalism and other sabotage
- Safety issues
- Attitude problems
- Retaliation claims
- Security breaches

An employer has responsibility for managing the workplace. With this responsibility comes an obligation to be knowledgeable of what is happening in day to day operations within the workplace. An employer who knows or should have known of workplace situations involving drugs and alcohol, health and safety, harassment, threats, and other problems has a general duty to take prompt and effective remedial action to resolve the problem.<sup>4</sup> Immediate and appropriate

action is required to avoid liability for harassment claims.<sup>5</sup> In order to know what action, if any, is necessary, the employer must conduct an investigation to determine the facts and limit potential liability. Failure to do so will likely have a significant impact on the outcome of a subsequent claim or lawsuit brought by an employee.

Failure to conduct or properly perform a workplace investigation may lead to a negligent employment practice claim or other action against the employer.<sup>6</sup> A negligent employment practice revolving around a workplace investigation may include failure to provide an experienced or unbiased person to conduct the investigation, negligence in performance of the investigation which led to wrongful findings, failure to conduct in a timely manner resulting in the loss of evidence, and similar reasons.

### **Need for Confidentiality**

Confidentiality is a critical issue when addressing employee related situations. When a complaint is received concerning employee misconduct it is incumbent upon management to look into the matter. The fact that management is often required to interview co-workers and others when conducting an investigation makes it difficult for information not to leak out concerning the situation. Nevertheless, all individuals who become a part of the investigation should be advised of the need for confidentiality in order to eliminate rumor and innuendo and to provide a fair and open forum during the fact finding process.

When interviewing an employee, the investigator should explain that confidentiality may be provided with respect to witnesses, but absolute confidentiality of information obtained cannot be promised since it may be necessary as the investigation proceeds to disclose previously unknown information to reach findings and conclusions concerning the matter. Furthermore, information received from witnesses may be required to be used in a hearing or litigation. Individuals should be advised that the discussion with the investigator is not to be disclosed by the employee to anyone. Each employee should be reminded that disclosure of information may result in disciplinary action.

### **Steps Involved**

There are a number of issues that must be considered prior to beginning a workplace investigation. Although the procedure and steps involved may have slight variations, depending on the reason for the investigation, the following provides a general outline for planning an internal investigation.

- **Reason for Investigation**

An employer has a general duty to conduct an investigation when a complaint is filed or the employer becomes otherwise knowledgeable of a violation of the rules, regulations, policies, or procedures of an organization concerning employee conduct, safety, and related issues.<sup>7</sup> Failure to do so may result in liability to the employer. Whatever the misconduct, the sooner it is addressed, the sooner the worksite where the situation occurred can return to normal

When an individual reports an incident that may involve some type of employee misconduct, it is important that management encourage the person to file the complaint in writing. If the individual refuses to do so, a confirmation letter should be sent regarding the facts as understood and providing the complainant the opportunity to correct inaccurate information.

With respect to management involvement in a reported incident, even though the complainant does not wish to follow through with respect to the issue, the employer should advise the individual that management must act when it becomes aware of a situation involving wrongdoing, or has constructive knowledge thereof. Management must then act promptly to remedy the matter.

- **Determine the Goals of the Investigation**

The primary goal of an investigation is to provide the employer with the appropriate findings and facts to make a decision regarding the matter. In addition to determining the guilt or innocence of the individual named by the complainant for violating workplace rules, the employer may have other goals. These may include issues concerning whether workplace rules and policies are appropriate, in need of revision or clarification, or the need for new policies. The employer's goals must be clearly identified prior to the beginning of the investigation.

The employer should also immediately determine if some type of interim action is necessary. For example, a safety complaint about a vehicle with faulty brakes would result in an investigation to determine the accuracy of the complaint. However, the employer may want to immediately remove the vehicle from the active fleet while the complaint is being investigated.

- **Choosing the Investigator**

The selection of an investigator is a critically sensitive issue. The investigator must be thorough and objective, understand relevant laws and workplace rules, policies and regulations, have organizational, communication, and interviewing skills, and sensitivity with respect to the situation and persons involved. The investigator should be viewed as neutral and unbiased.

The significance of legal issues may directly impact the selection of the investigator. As part of the preparatory process for an investigation, the rules, regulations, procedures, handbooks, labor agreements, and state and federal laws impacting the matter must be identified and reviewed. If there are numerous documents subject to review, an individual with a legal background may be best qualified to conduct the investigation.

Employers must also be knowledgeable of the requirements of the federal Fair Credit Reporting Act (FCRA) and related state statutes.<sup>8</sup> The FCRA addresses in relevant part an “investigative consumer report” which is defined

as “. . . a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews . . .”<sup>9</sup>

The FCRA has been amended to exclude from disclosure “. . . an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview . . .”<sup>10</sup> The FCRA’s advance notice and consent requirements do not apply to communications made to an employer that are not used for credit purposes and instead concern investigations of suspected employee misconduct or violations of written employment policies. However, if an employer takes an adverse action against an employee based on such communications, it must give the employee a written summary outlining the nature and substance of the information obtained from the investigation. While this summary must supply investigative findings, it does not have to reveal the source of the information.<sup>11</sup> Inasmuch as an internal investigation concerning wrongdoing may be subject to the FCRA, it is suggested that employers review with counsel the provisions of the law with respect to disclosure requirements concerning the investigation.

If it is determined that the workplace investigation is subject to the FCRA or related state statutes, a licensed investigator may be required when the information concerns the employer’s employees involving questions of “. . .

honesty, integrity, credibility, trustworthiness . . . or character of any person.”<sup>12</sup> Exceptions to the license requirement include in house investigators, attorneys, insurance adjusters, and peace officers.<sup>13</sup>

## **Preparation**

- **Understanding the Complaint/Circumstances**

As a part of the preparation process, the investigator must ascertain that he/she is knowledgeable of organizational, supervisory, reporting, applicable rules and regulations, hours of operation, and other particulars as related to a complaint of misconduct, and specifically to the department, division, or work section where the incident reportedly occurred. Once there is an understanding of the general workplace environment, a game plan may be developed with respect to preparing questions, witnesses, order of interviews, and other strategy with respect to the investigation.

- **Identify the Laws that Apply**

Preparation for the investigation requires that the investigator identify state and federal laws and regulations that may affect the investigation. In addition, the company will probably have rules, regulations, policies, employee handbooks, and other documents that must be reviewed. If unions are involved, it will be necessary to be knowledgeable of the provisions of labor agreements. Certain types of reported workplace problems, such as safety issues, may include the review of both state and federal laws and regulations. The kind of workplace violation (e.g. safety versus absenteeism) may directly



impact the review of applicable rules and laws. Also, the employer's policy concerning workplace searches may become critical as the investigation is performed inasmuch as the employee's expectation of privacy can constitute a violation of his/her rights.<sup>14</sup>

The United States Constitution provides the right to privacy for public sector employees.<sup>15</sup> Certain occupations have specific rights provided to employees through state and/or federal legislation. These include police officers and firefighters in addition to some non-safety employees. The investigator must be knowledgeable of these rights for specific occupations.<sup>16</sup>

- **Identify Potential Witnesses, Documents, Strategy**

A list of potential witnesses should include individuals who were working in the immediate and general vicinity where the reported incident occurred.

There should be no delay in beginning the investigation and approaching individuals who witnessed or may have knowledge concerning the incident.

Any delay may result in potential witnesses no longer being available because of intimidation, peer pressure, a union environment, or turnover. Furthermore, the longer it takes to interview individuals the greater the possibility that they forget or cannot recall with specificity important information.

Once potential witnesses are identified, it is important that they be scheduled consistent with known or reported matters regarding the incident. The scheduling of witnesses may be important with respect to the findings of fact

developed during the investigation. Additionally, it is often found that after interviewing known witnesses, previously unknown persons are identified that may have information regarding the incident. Establishing a time and event through the testimony of witnesses assists in understanding the evidence.

In addition to witnesses, it is necessary to identify the documents and other information that must be reviewed during the investigation. It may be necessary to review sign-out sheets, time cards, policies and procedures, electronic documents such as intra-office or e-mail communications, journals, and other information. The importance of the initial planning concerning documents becomes critical considering the preservation of electronic information.

- **Identify Questions to be Asked (The Five W's)**

The investigator should prepare a list of questions that must be answered for the type of investigation being done. Each situation will demand different questions since the elements of each problem are rarely the same. Generally, each witness will need to answer questions relating to *what* they saw, *when* they saw it, *who* else was there, *why* something happened, what happened next, *where* did it happen, and how did it happen. These are often referred to as “the five W’s” when interviewing witnesses. These questions lead to other questions, other potential witnesses, and unknown circumstances as a better understanding of the situation develops. The presentation, or order of questions, is also developed pursuant to the situation.

The investigator will also have to use discretion with respect to the questions asked of a witness. Not all witnesses will necessarily be asked the same questions since knowledge of the incident may very well be different. In addition to prepared questions, the investigator must have the ability to ask follow-up and new questions as information is received during the interviews.

- **Recording Information**

During the course of questioning witnesses and other persons during the investigation, the most accurate account of information obtained is through the use of a recording device. The recorder is essential to the investigator providing him/her an opportunity to better focus on the interview, phrasing and order of questions, and follow-up responses. The recording further eliminates intensive note taking during interviews and provides the investigator the opportunity to review information as the investigation proceeds. Although the investigator has the discretion to record interviews, a decision must be made considering the circumstances of the investigation as to whether it is prudent to do so.<sup>17</sup>

At the beginning of an interview with witnesses, the investigator should ask permission to record the interview. Some witnesses may be uncomfortable with recording their interview and may not consent. If the investigator is unable to obtain consent, he/she will have to make a decision as to the benefit

of recording the interview considering the more limited responses that would likely occur through a recording.

## **The Investigation**

- **Interviewing the Complainant**

The investigator must be sensitive to the complainant's situation. Individuals filing complaints are often uncomfortable and concerned about the consequences of the complaint including rumor, innuendo, retaliation, impact on relationships with others, impact of future opportunities, and related issues. The investigator's demeanor and sensitivity may directly affect the information obtained and subsequent investigation.

The investigator would want to reassure the complainant that the employer is taking the allegations seriously. Furthermore, if the complaint includes another employee, that he or she will be meeting with the respondent, witnesses, supervisors, and others that may provide information concerning the matter. The investigator will want to obtain a clear understanding of what happened before, during, and after the incident and whether there were any witnesses to those events. The investigator will emphasize the need for confidentiality.<sup>18</sup>

Upon completion of the interview, the investigator will want to review and confirm the information obtained from the complainant. Furthermore, the

investigator will want to report that upon completion of the investigation, he/she will brief the complainant with respect to the findings.

- **Questioning the Accused**

The investigator should confirm that the respondent fully understands the allegations that have been made against him/her. It is important that the accused understands the investigator's neutrality with respect to the matter and provided with the opportunity to provide his/her version of the events leading to the complaint and to state facts showing the allegations are not true. The respondent may also provide information with respect to witnesses and other persons that will further clarify the situation leading to the charges.

The investigator should reassure the respondent that the complaint is being dealt with in as confidential a manner as possible, and advise him/her to maintain that confidentiality.<sup>19</sup>

- **Questioning Witnesses**

Since memories fade with time, it is important to meet with witnesses as soon as possible. Witnesses should be provided with enough information so that they may comment on the incidents that they have observed concerning the incident. The investigator must be sensitive to displaying neutrality during interviews with witnesses and attempt to clarify discrepancies between the complainant's and the respondent's version of events leading to the investigation. Once again, the confidentiality of the investigation should be emphasized.<sup>20</sup>

## **Confirming Information and Findings**

Upon completion of interviews the investigator should assess the credibility of each witness, including the complainant and the respondent. Consideration must be given to discrepancies in statements made, evidence gathered and or missing, and a determination made as to whether follow-up interviews are necessary.

With respect to missing information, there may be physical evidence including financial statements, telephone records, electronic communications, letters, memoranda, and other documents in the possession of third parties. A determination must be made as to the best method in obtaining missing evidence important to the outcome of the investigation.

The investigator must also be sensitive to privacy issues with respect to obtaining and/or the use or disclosure of information relevant to the investigation. Federal and state legislation, in addition to case law, impact personnel records, medical information, polygraph examinations, drug testing, and workplace searches.<sup>21</sup> Employees have a reasonable expectation of privacy in certain things or areas where they work, unless they have been given reasonable notice that no such expectation or privacy exists and that they may expect such areas to be viewed, inspected, or monitored in some way.<sup>22</sup>

## **Finalizing the Investigation**

It is important to complete the investigation as soon as possible. Detailed written records should be maintained regarding each step of the investigation including witness interviews. All notes, evidence, tapes, and other material obtained during the investigation should be secured for future use. While some courts have given privileged status to records of internal investigations, other courts allow discovery either because they find that they are not privileged or a finding that the privilege has been waived by reliance on the investigation as a defense to liability.<sup>23</sup> Since the record of the internal investigation may be subject to discovery in litigation, it is critical that the employer review with counsel the findings and related information concerning the investigation to obtain guidance regarding finalization of the record.

- **Investigation Report**

Upon completion of interviews, gathering evidence, and related fact finding activities, the investigator will prepare his/her report concerning the investigation. Although the final report may vary, contents often include an introduction, background, facts, chronology of events, methodology, persons interviewed, allegations, findings of fact, conclusions, and recommendations. The section of the report addressing “recommendations” does not normally include action, if any, to be taken against an individual, but rather the need for safety improvements, or new or amended rules, regulations, and policies.

Based on the investigator’s findings of fact and conclusions, the person responsible for decisions concerning discipline or other action, must decide

what action, if any, to be taken. The determination is based on all the evidence and whether it is more probable than not that the reported misconduct occurred. The standard of proof in a workplace investigation is referred to as the “preponderance of the evidence.” This standard generally means that a party will be successful if they can show that there is more than a 50 percent chance that the alleged misconduct took place.<sup>24</sup>

In situations where it is determined that termination is the action to be taken, counsel may recommend that the next higher standard of proof be used which is called “clear and convincing evidence.” To prove a case under this standard it must be shown something more than “it is more likely than not” that the respondent is responsible for the alleged misconduct.<sup>25</sup>

Factors to be considered in making a determination include the demeanor and credibility of the parties and witnesses involved, whether any witnesses were able to corroborate the facts or allegations, and the adequacy and consistency of the facts provided by each individual. Additionally, evidence gathered during the investigation that directly impacts the parties involved will be important with respect to the final determination.

- **Communicating with Parties**

If a workplace investigation is conducted resulting from a complaint by one employee against another, upon conclusion of the investigation the individuals involved should be informed of the findings. The individuals are generally



provided an overview of the investigation and the findings based upon the findings of fact and evidence acquired.

If an employer is using an outside source to conduct the investigation, it must report investigatory findings to an employee if it takes an adverse action.<sup>26</sup>

This provision of the FCRA applies only when an employer is using a non-employee to conduct the investigation.<sup>27</sup>

### **Was the Investigation Appropriately Conducted?**

It is not unusual for challenges to occur when the severity of the action taken against an individual results in severe discipline or termination, especially in a union environment. The length of employment and the charges against the individual may directly impact future employment opportunities. As a result, the investigator, methodology used for the investigation, findings, and other conclusions may be challenged and subject to arbitration, litigation, or other third party determination.

The question with respect to the investigation is whether the employer made a reasonable investigation to discover what happened? Furthermore, did the employer believe the investigator's conclusion that the respondent engaged in the alleged conduct?<sup>28</sup> "The issue is not whether the (respondent) committed (the alleged acts) but whether the (employer), acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing the (respondent) had done so."<sup>29</sup>

## Conclusion

The primary goal of a workplace investigation is to produce findings of fact and evidentiary findings to provide the employer the basis to make a decision concerning the action to be taken regarding the incident. By taking the necessary steps to determine what happened, and subsequently having the information to make a determination of the appropriate action to be taken, the employer is provided a solid foundation to defend the action with respect to a subsequent challenge. Keep in mind that the issue is not whether the wrongdoer had committed some type of violation of workplace rules, but whether the employer, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing that the individual had done so.<sup>30</sup>

With respect to employer liability, the adequacy of a workplace investigation often narrows down to two very simple outcomes when the findings are challenged:

1. An inadequate investigation plus ineffective remedial action may result in employer liability
2. A prompt and effective investigation plus appropriate remedial action will likely result in a judgment for the employer.

The process in which an employer responds to a report of employee misconduct or other complaint requiring an internal investigation must show that the complaint was taken seriously, with an appropriate response, resulting in a documented good faith basis for any action that is subsequently taken.

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<sup>1</sup> William J. Woska, J.D., “Legal Issues for HR Professionals: Reference Checking/Background Investigations,” *Public Personnel Management*, Vol. 36 No. 1, p. 79 (Spring 2007).

<sup>2</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 74 (1986).

<sup>3</sup> See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; The Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*; The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

<sup>4</sup> *Id.*

<sup>5</sup> *Meritor*, 477 U.S. at 57, 74.

<sup>6</sup> *Bator v. State of Hawaii*, 39 F.3d 1021, 1029, (9<sup>th</sup> Cir. 1994); *Bohen v. City of East Chicago*, 799 F.2d 1185 (7<sup>th</sup> Cir. 1986).

<sup>7</sup> See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

<sup>8</sup> 15 U.S.C. §1681 *et seq.*; 15 U.S.C. §1681(t) *et seq.*

<sup>9</sup> *Id.* at §1681(a).

<sup>10</sup> *Id.* at §1681(d).

<sup>11</sup> *Id.* at §1681(g).

<sup>12</sup> See, e.g., California Business and Professions Code §7521 *et seq.*

<sup>13</sup> *Id.* at §7522 *et seq.*

<sup>14</sup> *O’Connor v. Ortega*, 480 U.S. 712 (1987); *K-Mart Corp. Store No. 7441 v. Trotti*, 677, S.W. 2d 632, 637 (Tex. App. 1984).

<sup>15</sup> U.S. Const., 4<sup>th</sup> Amend.; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>16</sup> Federal and State legislation and court decisions have provided rights to certain public sector employees. See e.g., *Lybarger v. City of Los Angeles*, 40 Cal.3d 822 (1985); *NLRB v. Weingarten*, 420 U.S. 251 (1975); *Garrity v. New Jersey*, 385 U.S. 493 (1967); California Gov. Code §§3250, 3300.

<sup>17</sup> 18 U.S.C., §2511.

<sup>18</sup> See discussion *infra* ” Need for Confidentiality.”

<sup>19</sup> *Id.*

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<sup>20</sup> *Id.*

<sup>21</sup> Public employees' expectation of privacy, like similar expectations of privacy in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. See e.g., *O'Connor*, 480 U.S. 717; *Doyle v. State Bar of California*, 32 Cal.3d, 12, 20, (1982); 29 U.S.C. §2006(d).

<sup>22</sup> *Id.*

<sup>23</sup> *Harding v. Dana Transport Inc.*, 914 F.Supp.1084 (1996).

<sup>24</sup> *United States v. Fatico*, 458 F. Supp. 388, 403 (1978).

<sup>25</sup> *Id* at 405.

<sup>26</sup> See discussion *infra* "Choosing the Investigator."

<sup>27</sup> *Id.*

<sup>28</sup> *Waters v. Churchill*, 114 S.Ct. 1878 (1994).

<sup>29</sup> *Coltran v. Rollins Hudig Hall International, Inc.* 17 Cal.4<sup>th</sup> 93 (1998).

<sup>30</sup> *Id.*

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