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Employment Law: Workplace Investigations

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INTRODUCTION

Do not underestimate the importance of an effective investigation. Impact of a bad one can increase litigation volume and cost, decrease employee morale, increase voluntary attrition, reinstate discharged employees and other undesirable consequences. The comprehensive approach discussed below may benefit your organization.

BEFORE A COMPLAINT IS SUBMITTED

Draft, publish and train on policies

The outcome of an employment misconduct investigation depends in part on actions an employer takes before a complaint is submitted. For example, employers who have clear policies, publish their policies, provide training on the policies, foster a culture of mutual respect, actively supervise the workforce and enforce the policies uniformly reduce complaint volume and increase success in litigation and administrative hearings.

Regarding policies, it is important to know what an employer's policy intends to do and what it does not intend to do. For example, employers should know whether any policy they have prohibiting discrimination, harassment and retaliation constitutes a "dispute resolution process." This could become important for determining whether a statute of limitations has run on a potential plaintiff's claims.

In *Peterson v. City of Minneapolis*, 892 N.W.2d 824 (Minn. 2017), the Minnesota Supreme Court held that a Minneapolis police officer who had submitted a complaint alleging a violation of Minneapolis' Respect in the Workplace Policy tolled the one-year statute of limitations for initiating a lawsuit under Minnesota's Human Rights Act (MHRA). The court reasoned that Minneapolis' policy was a dispute resolution process because it provided a process capable of providing relief. Under the MHRA, entering into a dispute resolution process tolled the statute of limitations.

Create And Implement An Incident Response Protocol

In addition to establishing and publishing clear policies, government employers should have a protocol in place for complaint filing, following up on complaints, tracking progress of complaint investigations and providing status updates to the person who submitted the complaint.

Technology can assist with intake and tracking. Consider a hotline and/or online form. Allow complaints to be filed anonymously or by a complainant who self-identifies. As long as accurate tracking and timely follow up can occur, multiple avenues for complaint filing should be offered to reflect the diversity of the

workplace. For example, a cement raker or others working in the field might not have access to a work computer. As the *Peterson* case cited above instructs, an investigation that takes a long time could unintentionally have the effect of keeping claims alive.

At minimum, an effective incident response protocol considers:

1) Take intermediate action as necessary, but consider: how to impose intermediate action without violating any constitutional right to due process or other rights.
2) Identify immediately who has authority to decide whether to take intermediate action. Ensure that that authority knows to consult with the government entity's counsel for legal advice.
3) Establish and communicate to the complainant their sole point of contact during the investigation and after the complaint is closed
4) Vet and retain qualified resources to gather and retain evidence (Ex. computer forensics).
5) Secure ample resources to conduct quality investigatory interview that is completed timely (how deep is the roster of investigators?).

Legal risk can occur if any portion of the protocol is missed or insufficient.

CONSIDERATIONS FOR EFFECTIVE INVESTIGATIONS

Selecting the Investigator

Carefully decide who should conduct the investigation. To ensure a fair and thorough investigation, the investigator should be someone who is neutral. In 2014, for example, the Canada Labour Court held that a manager was not a "competent person" to conduct a workplace harassment investigation because the employee who filed the complaint had not agreed that the manager was an "impartial party." *Public Service Alliance of Canada v. Canada*, (Attorney General), 2014 FC 1066 (CanLII). The court's decision essentially rendered the manager's investigation unusable. The court referred the matter back to the Appeals Officer for re-determination of the issues in accordance with the court's decision. The court's decision is published at:

https://www.canlii.org/en/ca/fct/doc/2014/2014fc1066/2014fc1066.pdf

Not every jurisdiction requires agreement by the complainant and the employer regarding who will conduct the investigation. However, personnel decisions where cause is required, for example, could rise or fall on any perception that the investigator has not gathered and summarized all relevant evidence, whether inculpatory or exculpatory.

Legal or Contractual Requirements Regarding Who May Attend the Interview and Roles at the Interview

Investigators and/or those planning investigation protocol should research and determine in advance who, if anyone, is entitled to accompany the subject or focus employee at their investigatory interview. The seminal case in this area of labor law is *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). Jurisdictions may vary, however. If the workforce is unionized, check the applicable labor agreement. Review state law and local ordinances.

An emerging scenario involves proliferation and rising influence of employee resource groups (ERG). Check state laws regarding roles. Is this concerted activity? What do you do if the subject of a complaint wants their ERG at the investigatory interview? What if the person advocating for intervention by the ERG discloses that the reason for such preferred engagement is that the union does not represent that person's interests?

Integrity of the investigation matters. Ensuring that witnesses are providing their independent recollection, allow only the minimum amount of people in each investigatory interview.

Research Whether An Employee "Bill of Rights" or Other Formalities Exists

Prior to embarking on the investigation, the investigator should know whether any federal, state or local law requires formalities such a signed complaint or audio-recording the interviews. For example, Minnesota has a "bill of rights" for peace officers, codified as the Peace Officers' Discipline Procedures Act, Minn. Stat. §626.89.

Special Considerations Regarding Attorneys and Investigations

Attorneys conducting or advising on investigations should be clear on their role. A key question in this area is whether and when attorney client privilege exists. Consider the case of *In re Polaris, Inc.*, 967 N.W.2d 397 (Minn. 2021). In *Polaris*, the Minnesota Supreme Court announced that Minnesota will follow the "predominant purpose" test for determining whether a document containing both business and legal advice is protected. The court stated: "We hold that, when a document contains both legal advice and business advice, for the attorney-client privilege to apply to the document in its entirety, the predominant purpose of the communication must be legal advice. The privilege does not protect the entirety of the document if legal advice is merely one purpose and not the primary purpose of the communication." *Id*. at 408.

Advisories Prior To Questioning

Attorneys advising on or conducting employment misconduct investigations should research and determine what advisories, if any, are required. State data

privacy laws may require advisories, as well as restrict access to investigation data. The investigator should be prepared to refer anyone seeking access to investigatory data to a governmental entity's responsible authority for determining access to data. The investigator does not make determinations about what access the requestor may have. Investigators should also be mindful of legal requirements regarding advisories if the subject employee is accused of conduct that could be a crime. The seminal case in this area is *Garrity v. New Jersey*, 385 U.S. 493 (1967).

At the onset of any investigatory interview, investigators should also consider what a witness will be directed to do or not do. A subject of debate among labor and employment attorneys over the years is whether a witness should be directed to not discuss the interview with anyone, or to not discuss the interview with anyone other than their union representative. In 2012, the National Labor Relations Board issued a decision barring such outright prohibitions because it was deemed impingement on the right to engage in concerted activity. *See Banner Health*, 358 NLRB No. 93 (N.L.R.B.), 2012 WL 3095606.However, the *Banner Health* decision was vacated in 2014. Some state laws contain broad language about the right to engage in concerted activity, even if the employee(s) involved is not represented by organized labor. If a person is advised not to discuss the interview, or advised to discuss it with limited individuals, the employer should be prepared to explain the reason for the directive.

Research should be conducted, and legal advice provided, regarding what topics might off limits. For example, if an employee is alleged to have violated a work rule that might impact that employee's First Amendment rights, careful consideration needs to be given regarding what questions to ask and how to frame the question. Generally, work rules can regulate workplace conduct, but not personal beliefs. *See, e.g. Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

IDENTIFY POSSIBLE EVIDENCE, COLLECT EVIDENCE AND PRESERVE EVIDENCE

Consequence for lacking persuasive and reliable evidence can be severe. One of the first steps that should occur following receipt of a complaint is preserving evidence, in part to avoid spoliation claims. Lawyers representing government entities should make sure their customers know when to consult with them and the meaning of a litigation hold notice.

A 2021 chapter in Litigating Tort Cases, for example, offers a start-to-finish guide for conducting an investigation involving electronic data. *See* "Computers, the internet and the future of investigations—Exposing fraud and spoliation," at 1 Litigating Tort Cases § 1:44. The chapter's introduction states it best: "Nothing obstructs the full finding of facts more than fraud and the destruction of evidence. It is difficult to prove, but devastating for the party against which it is proved. If

you have been in a litigation in which a party is shown to have destroyed or even hidden evidence, you know that the court often becomes deaf to its subsequent arguments and defenses. Its only recourse is settlement. Unfortunately, this happens too often."

Examples of costly outcomes are visible in at least two cases. A British Columbia employer must pay a worker more than $15,000 in aggravated damages for firing a worker before her resignation date and then making unfounded allegations of theft and fraud. See *Austin v. Kitsumkalum First Nation,* 2020 BCSC 2298. An Ontario brewery's false allegations of fraud and theft lead to $35,000 in aggravated damages as part of wrongful dismissal award. *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640 (B.C. S.C.).

CONDUCTING THE INVESTIGATORY INTERVIEW

Effective investigations involve more than drafting questions in advance and following a script or outline. Investigators should put thought into the room set up, for example, to encourage the witness to feel comfortable providing information. The investigator should be able to observe body language, including when the investigator is taking notes. Investigators should try to maintain eye contact with the witness, so it may be advisable to have a person in the interview room whose role is dedicated primarily to listening and note-taking.

MITIGATING LEGAL RISKS

The impact of not conducting an investigation or conducting a poor one can lead to defamation, retaliation, whistleblower, discrimination, harassment and other costly claims. Other investigatory search-based claims could be invasion of privacy, the Computer Fraud and Abuse Act, the Stored Communication Act, laws regarding lawful consumable products, and the Fair Credit Reporting Act.

An emerging area of the law is claims regarding breach of the terms of use or service of social networking sites. Therefore, conduct research before evidence is gathered. On balance, some evidence might not be worth pursuing if it could create more legal risk for the employer than the impact of the employee's alleged misconduct on the community or the governmental entity.

Identifying elements of these claims is beyond the scope of this paper, but they are discussed in some of the resources listed in the Resources section below. Also, be aware that some courts have expanded past definitions of what constitutes adverse personnel action. Employment lawyers should be aware of cases in their jurisdiction. *See, e.g.*, *Moore v. City of New Brighton*, 932 N.W.2d 317, (Minn. App. 2019).

CASES TO WATCH – Issued March 2022- Unrelated to Investigations

Independent Contractor Rules

Coalition for Workforce Innovation, et al., v. Walsh, Looman and United States Department of Labor, 9th Cir., U.S. Dist Ct, Eastern District of Texas (March 14, 2022).

Americans With Disabilities Act

LaCroix v. Boston Police Department, U.S. Dist Ct, District of Massachusetts, (March 24, 2022).

RESOURCES

Treatise: *How Arbitration Works*, Elkouri & Elkouri, Kenneth May, Edit-in-Chief, 8Bloomberg BNA, (Chapter on Evidence)

Discipline and Discharge, Norman Brand, Editor-in-Chief, BNA

Internal Employment Investigations Handbook, Edited by Patricia Y. Beety, Donald M. Lewis & Lawrence P. Schaefer, Minnesota Continuing Legal Education. Available for purchase by visiting: http://www.minncle.org

Minnesota Arbitration Awards: https://mn.gov/bms/arbitration/awards/

Association of Workplace Investigators: https://www.awi.org/?

Computers, The Internet and the Future of Investigations—Exposing fraud and spoliation, 1 Litigating Tort Cases § 1:44 (start-to-finish approach to investigating cases involving electronic evidence)