Conducting Internal Investigations of Executives for Workplace Misconduct: Legal and Ethical Considerations

Determining Who Should Conduct Investigation, Navigating Right To Counsel, Privilege, Privacy and Joint Defense Issues

THURSDAY, JULY 13, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Lynne Eisaguirre, Founder, Workplaces that Work, Denver

Rachel Fendell Satinsky, Esq., Littler Mendelson, Philadelphia

Lorene F. Schaefer, Managing Partner, Schaefer and Associates, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Tips for Optimal Quality

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial 1-866-819-0113 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
Continuing Education Credits

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.
“Conducting Internal Investigations of Executives for Workplace Misconduct: Legal & Ethical Considerations”

Strafford Live Webinar
July 13, 2017, 1:--pm-2:30pm EDT

Part I: Latest Developments Regarding Allegations Against Executives

By

Lorene F. Schaefer, Esq.
Schaefer & Associates, LLC
WinWinHR.com
Increasing External Scrutiny of Internal Investigations....
Social Media, Plaintiffs’ Bar

Workplace Investigations: $300,000 in Sanctions Highlights Risks of Using Employer’s Regular Counsel

IBM Hit with $1.5M Age Discrimination Verdict Despite Sham Investigation

Exclusive: Federal probe of Fox News expands
Would Your Investigation Withstand Scrutiny?

- Existing & Potential Employees
- Existing & Potential Shareholders/Investors
- Social & Mainstream Media
- Plaintiff’s Attorney
- Enforcement Agency
- Judge
- Jury
Role of Investigator

Rachel Satinsky
Littler Mendelson
rsatinsky@littler.com
A “Good” Investigation Defined:

- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected & secured
Understanding the Investigator’s Role

• Has the investigator reached reasonable findings concerning the facts?

• Has the investigator properly documented the investigation?
Your Role as an Investigator

- Impartial fact-finder (no biases)
- Good listener
- Appropriate investigation
- Attention to detail
- Protect the record
- Properly document investigation
- Fairness
- Take off your HR/ legal /safety and compliance hat
- Take out the emotion
Understanding the Investigator’s Role

Gather and Evaluate Information
Goals of an Investigation

Determine the facts: No personal opinions

• Treat all involved with respect
• Comply with legal requirements
• Provide defense to legal claims
• Support good workplace climate
• Protect the record
Planning and Conducting the Investigation
Complaint Intake
Does There Need to Be a Formal Complaint to Trigger an Investigation?

No! Its all about NOTICE
Scenario—The Complaint
Do You Investigate?

- EEO Allegations – hiring process focus
- Significant violations of policy
- Potentially unlawful
- Potential for risk to the company or other employees
Exercise

- What is being alleged?
Receiving the Complaint

• Get as much detailed information from the Complainant as possible

• Listen impartially without committing yourself

• Ask open-ended questions

• Evaluate the complaint from the Complainant’s perspective
Receiving the Complaint

• Emphasize complaint will be taken seriously

• Advise the Complainant appropriately about what you intend to do

• Address confidentiality and retaliation issues
Understanding the Allegation

Meeting the Complainant/Reporter

• Determine who, what, where, when, why and how

• Ask the Complainant with whom do they think you should talk to

• Ask whom the Reporter has spoken to about the issue

• Ask whether the issue has affected the Reporter’s job

• Get as much detailed information as possible to prepare a good, efficient investigation plan

• Review key documents before meeting
Allegations Are Not Facts

• Don’t accept the Complainant allegation at face value

• You must analyze the facts you are offered and make your own determination regarding the category in which it fits

• The report from the person who made the allegation is just a report

• Offer no opinions to the Reporter
  – You probably don’t know the motives, personalities or histories of the people involved
Anonymous Reports

• Consider the form of the report

• Was it anonymous, or did it come from an identified party? Anonymous reports, however, should not be discounted unfairly. An anonymous report maybe malicious, or may be valid and accurate.

• Most employees do not trust management to keep their names confidential. Most people do not want to be identified as the person responsible for bringing the matter to the attention of the management. The detail provided in the anonymous report may either validate or invalidate the report.

• Keep an open mind and don’t jump to conclusions.
How to Plan an Investigation
Identifying Issues and Allegations
Steps in Planning

Identify The Allegations

Laws and Policies

The Specific Issues

Then...

Select The Means

Documents

Other

Interviews
Timing of the Investigation

• Investigations vary in complexity and the length of time to complete

• All investigations must be conducted promptly

• Promptness may be a mitigating factor
  – In almost every level of government enforcement, and delay or indifference can be seen as an aggravating factor
• **Safety:** Is the health or safety of anyone put in jeopardy by this situation?

• **Company Impact:** Will this matter have an immediate impact on the company financially or from a brand perspective?

• **Communications:** Who needs to know about the matter or any part thereof? If applicable, how quickly can you speak to the Complainant for an initial discussion and to let them know you are taking their concerns seriously?
• What are the allegations?
• Are there legal issues for the law department?
• What are the ethical issues?
• What is the best strategy to proceed?
• Any potential liability? For whom?
• PR and communication issues?
• Whistleblower concerns?
Develop a written investigation plan

• Summarize allegations and relevant issues (legal and factual)
• Describe the scope of the investigation
• List business/management contacts
• Evaluate need for assistance (internal or external)
• Identify those who will be assisting
• Evaluate actions necessary to secure relevant files
• Propose schedule/timeline for investigation
• Determine if any prelim disclosures are needed
• ACP??
The Plan

• An investigation plan should set the scope properly so you will have the right parameters to guide you.

• You always must be prepared to explain why you did what you did.

• Never put yourself in the position of explaining your plan by saying that you never considered any other course of action.
Once the scope has been determined, make your plan

- This is more than just a blueprint. It should incorporate a proposed strategy.

- The strategy of the investigation should move from the general to the specific, gradually zeroing in on the subject by carefully acquiring and analyzing information.

- As information is gathered, your theory should be refined to focus the investigation on the most logical source of misconduct and/or business process failure.
Steps in Planning

Identify The Allegations

The Specific Issues

Laws and Policies

Select The Means

Documents

Other

Interviews
Types of Evidence

- Property - desks and lockers
- Private investigations
- Workers’ compensation carriers
- Criminal records
- Drug and alcohol tests
- Financial reports/records
• Personnel files
• Time cards
• Emails, texts
• Other electronic files
• Medical files
• Expense files
• Project files
• Documents in possession of the Claimant and witnesses
Electronic Evidence

• Text messages
• Social media
• Outside work emails/personal accounts
What About...

Should You Use Google, Check Emails and Other Online Search Tools to Check into Personal and Non-Work Related Activity?
Electronic Data and Communications

- Computer disks
- E-mail on the system
- E-mail stored
- Cameras/videos
- Recordings
- Internet searches
- Voice mail
- Social media
- Text messages
“Conducting Internal Investigations of Executives for Workplace Misconduct: Legal & Ethical Considerations”

Strafford Live Webinar
July 13, 2017, 1:--pm-2:30pm EDT

Part III: Conducting the Investigation

By

Lorene F. Schaefer, Esq.
Schaefer & Associates, LLC
WinWinHR.com
Yes – I know this is a CLE Course . . .
But Let’s Talk Fairness Not Law for a Minute

*Procedural Fairness* – Why Should Lawyers Care About it?
Here’s Why: Key Takeaways from Procedural Fairness Research

- **Individuals prefer to resolve their concerns internally and privately.**

- **Individuals will report their compliance concerns first internally if they perceive their organization’s investigation and resolution process as procedurally fair.**

- **Individuals will accept the outcome of an internal investigation – even when the outcome is disappointing or legal constraints limit what the organization can tell the individual about the outcome --- IF the individual perceives the investigation and resolution process as procedurally fair.**


4 Keys to *Procedural Fairness*

**Voice** – People want to have the chance to tell their side of a story and in their own words to the decision maker.

**Neutrality** – People want to feel that the decision maker is making the decision based on facts and rules and not the decision maker’s own personal opinions. They also want to feel that the rules are applied consistently across people and cases.

**Respect** – People want to feel that their concerns are taken seriously by the decision maker and that they treated with respect when they raise their concerns.

**Trust** – People want to feel like the decision maker is listening to them and considering their views. They want to feel like the decision maker is trying to do what is right for everyone involved and that the decision maker is acting in the interests of the parties and not in the decision maker’s self-interest.
So, How Do You Demonstrate Procedural Fairness in an Internal Investigation?
Explaining the Role of the Investigator

Fan?

Rope?

Wall?

Tree?

Spear?

Snake?
Recurring Issues in Interviewing Executives Accused of Harassment, Discrimination or Retaliation

- Request for Counsel to Attend Interview
- Request for Indemnification or Advancement of Attorney Fees
- Preserving the Attorney-Client Privilege and Work Product Protection
- Privacy – company paid phones, computers, email
- Public Relations
Request for Counsel to Attend Executive Interview

Absent state action or a special statute, employers are not legally required to allow a private employee’s attorney to attend an investigatory interview. *Buerger v. Southwestern Bell Telephone Co.*, 982 F.Supp. 1247 (E.D.Tex 1997)(6th Amendment right to counsel does not extend to private employees during internal workplace investigations).

But . . . May be required if executive has been accorded indemnification or advancement rights.

Also consider whether there are strategic reasons to allow attorney to attend – Preclude executive from later challenging the investigation; strengthen credibility and procedural fairness of investigation.

*Two Practice Tips:*

- Be consistent in policy/practice re whether to permit counsel at interviews.
- Remind executive and counsel that if litigation ensues, counsel may be called as a fact witness and thereby precluded from serving as litigation counsel.
Request for Indemnification or Advancement of Attorney Fees

Indemnification

*Company Documents* - Many companies grant indemnification and advancement right to executives as an attraction & retention tool. E.g., Corporate By-Laws, Operating Agreements, Indemnification Agreements, Employment Agreements

*State Law* - Some state statutes provide a baseline for the obligations of a company to indemnify its executives.

Advancement

Advancement rights exist only if conferred in a corporate document or contract and the scope of the rights will be determined by the contract’s language.
Preserving Attorney-Client Privilege & Work Product Protection

- No one-size-fits-all solution. Evaluate on a case-by-case basis. Privilege does not apply to documents generated in ordinary course of business.

- Privilege protects only the attorney-client communication, it does *not protect* the facts from disclosure.

- If employer wants to protect the investigation with the attorney-client privilege and work product doctrine, investigation must be carefully structured and executed.
Practice Tips for Preserving Privilege

❖ Formally document when an internal investigation is being initiated to gather facts necessary to give legal advice.

❖ Plan for possibility that employer will waive privilege and rely on attorney’s investigation as part of its defense -- limit investigating attorney’s involvement to investigation, and do not use same attorney for legal advice to company re what actions to take or not take based on the findings of fact.

❖ Maintain investigation files in confidential manner.

❖ Do not discuss the investigation except with those with legitimate need to know.
Practice Tips for Preserving Privilege, con’t

- Give all witnesses *Upjohn* warnings. Limit investigating attorney’s involvement to investigation and do not use same attorney for any legal advice for the company’s response to the investigation findings or related matters.

- Mark all documents created during the course of investigation as attorney-client privileged & attorney work product.

- If employer wants to protect the investigation with the attorney-client privilege and work product doctrine, must establish protocols and maintain them.
Cell Phones Raise New Privacy Concerns – Supreme Court has signaled more pro-privacy approach to mobile device use. See Riley v. California, 134 S.Ct. 2473 (2014)(unanimous decision holding that privacy expectations for cell phones are greater than other physical objects one carries and, therefore, warrantless search and seizure of cell phone during arrest is unconstitutional).

Balancing Executive’s Privacy Rights with Employer’s Right to Protect Legitimate Business Interests:

1. Has employer provided clear notice to employees regarding potential for inspections and monitoring of mobile devices used for work?
2. Is there a defensible and legitimate business interest in conducting the search?
3. Has or will the executive consent to investigator’s inspection of the device used for work-related purposes?
Public Relations

Prepare a Comprehensive Crisis Management Plan – Uber is Poster Child for Why This is Critical

- A Media Spokesperson
- Pre-Screened List of Well-Qualified Investigators
I am legal counsel for ______(insert company name) and am conducting this interview to gather facts in order to provide legal advice to ______(insert company name). This interview is part of an investigation to determine the facts and circumstance of _____(insert brief description of allegation(s)) in order to advise the company how best to proceed.

Your communications with me are protected by the attorney-client privilege. The attorney-client privilege belongs solely to the Company and not you. That means that only the Company may elect to waive the attorney-client privilege and reveal our discussion to third parties.

In order for this discussions to be subject to the privilege, it must be kept in confident. In other words, with the exception of your own attorney if you have one, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.

Acknowledged:
Name _________________________________

Print
Signature______________________________ Date________________________
PREVENTING RETALIATION AND REBUILDING THE TEAM AFTER AN INVESTIGATION

Strafford Webinars
Thursday, July 13

lynne@workplacesatwork.com
www.workplacesatwork.com
(303) 216-1020
Possible Remedial Measures After an Investigation is Completed

- An apology to the complainant(s).
- Restoration of leave time taken because of the complainant(s) treatment.
- Removal of any negative evaluations that arose from the alleged behavior.
- Reinstatement if the complainant(s) quit or lost his or her job.
Monitoring treatment of the complainant(s) to make sure that they are whole.

Correction of any other harm caused by the alleged behavior – for example, compensation for any losses directly resulting from the behavior.

Rebuilding the team.
Communicating Investigation Results

- On a need-to-know basis.

- To the complainant, the executive, and as appropriate, all others directly concerned.

- The employer must also communicate to the complainant that action has been taken to stop the behavior from recurring.

EEOC Harassment Enforcement Guidance and DFEH 185
Defining Retaliation

- Discrimination or harassment.
- From a supervisor, peer, subordinate or outsiders.
- In revenge for refusing sexual advances or other inappropriate behavior, for complaining about inappropriate or illegal behavior or assisting in a claim (such as being a witness).
Defining Retaliation - continued

Retaliation may be job related or not:

- Demotion, poor appraisals, bad job assignments, threats or violence.
- Telling others about the complaint without a need to know, including new employees.
- Subtle retaliation from peers such as sabotaging work, excluding the complainant(s) from meetings, failing to pass along messages and so on.
Retaliation Claims May be Easier to Win Than the Underlying Claim

- Retaliation is broader than the underlying claim.

- A court can rule that the employee was not harassed or discriminated against, for example, but that there was retaliation and award compensatory and punitive damages.

With regard to harassment and retaliation, see Burlington Northern & Santa Fe Railway Co. v White, 548 US 53 (2006).
Employees Are Protected From Retaliation Who:

- Turn down sexual advances or object to other inappropriate behavior.
- Refuse to participate in discrimination, harassment or other illegal behavior.
- Complain about harassment, discrimination or other illegal behavior.
Employees Are Protected From Retaliation Who:

- Ask for reasonable accommodation for disability or religious belief.
- Help a complainant (e.g., be a witness).
- Participate in an investigation.
How Executives Can Protect Against Retaliation Claims

- Resist the natural urge to get defensive or angry and try to understand the complainant’s concerns.

- Don’t take any adverse action against a complaint without advice from HR.

- Be aware of standards of confidentiality and defamation.

- Use an outside investigator to ensure neutrality and protect the internal investigator from retaliation.
Rebuilding the Team After an Investigation

- Investigations frequently ignore the fall-out from investigations (including rumors and gossip) that can damage the participants and create team dysfunction.

- Use an experienced neutral facilitator (not the investigator) to meet individually with the complainant(s) and the executive to understand current issues and determine what they need to continue to work together.
Rebuilding the Team After an Investigation

- Hold a session with those who were involved in, or aware of, the investigation to review the legal reasons and standards for conducting investigations, confidentiality, defamation and retaliation.

- Talk about the general kinds of behavior that were alleged, without revealing the specifics or the parties involved.
Rebuilding the Team After an Investigation — continued

- Answer questions and address rumors, without revealing confidential information revealed during the investigation.

- Assess what the team needs to function effectively in the future.

**NOTE:** HR or in-house legal frequently resist these efforts over concerns about confidentiality and retaliation but when these steps are not taken, the team may be dysfunctional, may take sides, may unintentionally retaliate against the complaint(s) and continue to gossip about the investigation.