Employment Investigations By Independent Investigators: Priorities, Privileges and Protocol

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The complaint comes in. The allegations are serious; the odor of potential litigation is strong. An investigation is clearly warranted. Who is the organization going to ask to conduct the investigation? A Human Resources representative, in-house counsel, regular outside counsel, or a fully independent investigator?

Increasingly, employers are opting for the independent investigator – one without any affiliation with the organization. The reasons are many, and sound.

An independent investigator, unburdened by any history with the organization or any connection to this particular dispute, is well situated to provide a fresh, less incestuous, and unbiased perspective. The final result therefore is likely to be more clear-sighted and honest. An independent investigator will also more likely carry enhanced credibility with the complainant (and that person's counsel if one has been retained), a government agency, arbitrator, judge, and jury should legal proceedings ensue. On a more practical level, if the investigator is a lawyer (and generally they are), the organization's regular counsel will not be conflicted out of representing it, as would likely be the case if counsel conducted the investigation, should a legal action be subsequently filed. Also, the prospect for application of privilege to the investigation would be improved.

What follows are some key considerations for in-house counsel in retaining an independent investigator and managing the investigation process itself, as well tips for boosting the likelihood that the investigation will be a successful one.

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Selecting the Investigator

The investigator selected should be one best suited to the particular dispute at hand and the nature of the issues raised. One size does not fit all. If the risk of litigation is real, that would argue for a lawyer-investigator, and one with some litigation experience. If public relations are a concern, the investigator's reputation and credibility in the market place may trump his or her experience as an investigator. If the claim is sex-based, some argue that the gender of the investigator should be considered. And, of course, the reputation and independence of the investigator and his or her standing in the community and anticipated credibility with government officials, arbitrators, judges, and juries, is of utmost importance. Time availability is also key – there is no point in retaining someone whose schedule will not allow for him or her to conduct and complete the investigation in a timely fashion.

How do you find an investigator well-suited to your matter? The best sources for potential investigator candidates are outside counsel, who often have occasion to retain investigators for their clients, and other in-house counsel. While credentials are important, more valuable are recommendations from users of the investigator's services. Do not be afraid to ask investigator candidates for the names of counsel with whom they have recently worked.

Terms of engagement

Once the investigator is selected, the terms of the engagement must be memorialized. Most investigators have standard agreements. Those agreements generally reflect that the investigator is retained as an independent contractor and will provide for indemnification for their services. Most investigators work on an hourly basis and require that their expenses be reimbursed. If travel is required, payment for travel time, if any and on what terms, should be made clear.

It is also important to confirm that the investigation is to be conducted on a confidential basis. Return of investigatory materials at the conclusion of the investigation should also be addressed. A representation that the

investigation will be conducted on an expeditious basis is standard; the setting of deadlines is generally not standard as the identity and availability of witnesses before the investigation commences is generally not known.

Scope of investigation

One of the key decisions to be made in any investigation is as to its scope. John, an African-American in the Marketing Department, alleges that his boss discriminated against him and that the atmosphere in the office is hostile towards employees of color. The first issue to be decided is the scope of the investigation. Is it limited to John's claims against his supervisor? Will it encompass the broader hostile environment claim? Are company policies and controls implicated and should they be put to the test? Whatever the decision is, it must be made prior to the commencement of the investigation and the scope of the investigation must be clearly delineated at that time.

One common and often effective approach is to conduct the investigation in "stages". For example, a preliminary inquiry may be made by the investigator to determine, in effect, what the real issues are and whether they are worthy of being pursued further. The investigator may then report back to management which then determines what the investigator's mandate will be going forward. Staging comes in many varieties. For example, the investigator may be directed to explore individual issues first, for example John's discrimination claim, and structural concerns thereafter.

The role that the organization wants the investigator to play must also be delineated. Is the investigator only collecting facts? Is he or she finding facts and making credibility determinations? Is the investigator being asked to determine whether the facts found constitute a violation of the organization's policies or applicable law? Finally, is the organization asking the investigator to recommend remedies to any ills uncovered? These mandates are quite different and must be made clear to the investigator at the time of retention.

Point of Contact for Investigator

The investigator will generally need two points of contact – one logistical and one substantive.

The investigator, being an outsider, will need a designated "chaperone" who will assist in the gathering of information and documents, scheduling interviews, securing interview rooms, and addressing practical and logistical issues, large and small. Where that person is in the organization's hierarchy will depend on such factors as the nature and sensitivity of the dispute at hand. Generally, a lower level Human Resources professional will suffice. However, if the issue is a claim of sexual harassment involving the CEO, the universe of appropriate persons to serve the logistical role will be severely limited.

On the substantive side, there will likely be several decision-points along the way. It would be best to have someone with authority designated to interface with the investigator as issues arise. Take for example the situation where a new issue, unrelated or only tangentially related to the underlying issues, arises. The decision must be made by the organization as to whether that issue is to be addressed in this investigation, at a later time, or not at all. In addition, the investigator will generally benefit from having available to him or her someone with institutional knowledge who can add some efficiency to the process. For example, it would greatly aid the investigator who is in need of certain information to be able to consult with someone who can guide him or her as to how best to obtain it. ("Joe and Sally both could help, but Joe is disorganized and unfocused, so let me put you in touch with Sally . . .").

Confidentiality of Process – Legal and Practical Issues

During an investigation, it is tempting to promise confidentiality to witnesses as a means to encourage candor and detail. Complete and absolute confidentiality is never an attainable goal, however, for several reasons. First, even if the complainant or accused is not revealed by name, it is often not difficult for witnesses to deduce their identity either by the nature of the questions asked, or the information sought. In addition, human nature being

what it is, the "rumor mill" or "grapevine" is bound to start churning when such an investigation is being conducted. Hence, the better practice is to encourage confidentiality, and state that it will be provided to the extent possible under the circumstances.

A promise of absolute confidentiality, or instructions to witnesses to maintain confidentiality under penalty of discipline, has run into some unexpected legal hurdles over the past few years. Indeed, it has been subject to the scrutiny of an unlikely source, the National Labor Relations Board ("NLRB"). Recent rulings by the NLRB indicate that it will be considered an unfair labor practice for employers to instruct employees not to speak about internal investigations if interviewed, or to refrain from soliciting support from other employees in support of a claim that has been made, or discipline an employee for violating such an instruction. *NLRB Advice Memorandum,* 30-CA-089350 (January 29, 2013); *Banner Health Systems,* No. 28 CA-123438 (July 30, 2012). This analysis can be applied in both the union and non-union setting. The NLRB has reasoned that such direction from the employer, or the imposition of discipline, violates the employee's right to engage in conduct "for the mutual aid or protection" of the workforce. The issue is still working its way through the NLRB and the courts, however, and has been met with much criticism from employers and their representatives. Hence, it is too early to tell whether these initial rulings will gain any significant legal traction.

Gathering and Sources of Information

Again, there is no "one size fits all" approach to determine the scope of discovery. Some organizations and investigators may be tempted to search under every rock and behind every nook and cranny to gather information relating to the investigation. Others may prefer to narrow or limit the information and data obtained to the minimum possible. The nature and scope of the allegations must govern the gathering and sources of information to be employed. The investigator will want to identify the key sources of information and documents that are unequivocally relevant to the investigation, and build

from there, to identifying witnesses and documents that may be more broadly relevant. As stated above, there will be many decision points during the investigation, so an initially narrow but thorough investigation can always be expanded, if warranted.

In general, the personnel files of the complainant and the accused are typically reviewed by the investigator. If the complainant has made similar complaints in the past, or there have been other complaints against the accused, that information should be gathered as well.

But identifying witnesses or potential witnesses is usually the easy part. We live now in the information age, where information exists electronically and is maintained in many different forms and environments. This fact can be both a blessing and a curse when conducting an investigation, as the sources of potentially relevant information are varied and not always obvious. Again, the investigator will be guided by the nature of the allegations. For example, in a harassment case, do the allegations indicate that social media or e-mail was used to harass the complaining party? If so, those communications should be reviewed even before the interviews begin. Even if there are no claims that electronic communications are at issue, the investigator may choose to look to email or social media for information concerning the claim for context as to the nature of the relationship between the disputants.

Investigation strategies decided upon at the beginning of the investigation, however, should not be deemed immutable. The strategy and sourcing of relevant information can and should be flexible, and altered depending upon the information learned during the investigation. Thus, if information arises during the investigation suggesting the existence of relevant electronic data, the investigator is likely to pursue it. The same holds true for witnesses. That is, the investigator may choose to interview individuals not identified at the beginning of the investigation as possible witnesses if the information gathered indicates that they have, or may have, relevant information.

Selecting Witnesses

Speaking of witnesses, the employer should be prepared to assist the investigator in determining the identity of the proper witnesses for the investigation. There can sometimes be tension between the employer, which may want to limit the disruption to its work force by limiting the number of interviews conducted, and the independent investigator, whose goal it is to gather as much information as possible in order to conduct a thorough investigation. Even if such tension exists, it should not present an insurmountable obstacle to conducting an appropriate investigation.

Consider, for example, a sexual harassment complaint which specifies the operational unit, times, dates and locations of the relevant events; this complaint will itself suggest who the potential witnesses are, even if witnesses themselves are not specifically identified. Those names can be given to the investigator in advance. A complaint that lacks such specificity often requires a more in-depth interview with the complaining party before witnesses other than the most obvious can be identified. In either case, once the likely or potential witnesses are identified, the investigator will determine who will be interviewed, and in what order. To the extent the list of potential witnesses is larger than anticipated, the investigator of course can at the very least reassess the list, and the necessity of interviewing each witness, as the investigation progresses.

Representation of Witnesses

A question that often arises during an investigation is the right of a witness to have "representation" at the interview. The issue is often raised by the complainant as well as the accused, but from time to time fact witnesses also seek or desire to be accompanied by an attorney or other representative as well.

Many organizations reflexively object to the presence of an attorney or other outside representative during an interview. The rationale is that the

company is conducting an internal investigation that should be free of outside influence and potential disruption.

It has been our experience that the presence of a representative is not nearly as disruptive or negative as often anticipated, provided certain conditions are met. If the request for representation is from a complainant or the accused, it is generally advisable to allow the representative to be present during the interview, provided that the representative's involvement is limited to listening to the questions and answers, and not interrupting unless necessary to preserve the witness's legal rights. The investigation is the employer's and not the representative's to conduct.

If the employer happens to be unionized, a different set of rules applies. Any union member being interviewed who reasonably believes that discipline is possible is entitled to have a union representative present without any conditions attached, pursuant to a 1975 Supreme Court decision, NLRB *v. Weingarten*, 420 U.S. 251 (1975). Known as *Weingarten* rights, the NLRB and courts have gone back and forth over the years as to whether Weingarten rights apply to non-union workers. Currently, the answer is "no", but that could change.

Attorney-Client and Work Product Privileges

Many organizations that hire an attorney to investigate a claim assume that the investigator's communications with it are protected by the attorney-client privilege, and/or the attorney work product privilege. This is not necessarily the case. Indeed, many courts that have confronted the issue have ruled that the communications of independent investigators with the employer are not privileged, because the attorney was not hired to provide legal advice. Certainly, when the employer seeks to use the investigation as a shield against liability in a lawsuit connected to the claims that prompted the investigation, any privilege that may have existed will likely be deemed to have been waived.

If maintaining the existence of either the attorney-client or work product privilege is an important goal for the organization, it is best that the

independent investigator report directly to outside counsel. Under these circumstances, there is a better argument that the investigator's communications with outside counsel are protected by the work product privilege, and outside counsel's communications with the company are protected by the attorney-client privilege. Even under these circumstances, however, if the findings and conclusions of the investigation are used as a defense in a subsequent litigation, the privilege will most likely be lost, in whole or in part.

Memorializing Witness Interviews

What kind of "record" should the investigator make? The investigator's role is short-term, but his or her findings may have long-term implications. How is the investigator's work to be memorialized? In particular, how are witness accounts to be preserved?

We do not favor an obvious choice, tape recording interviews, as it tends to inhibit free discussion and may be viewed as intimidating by witnesses. That leaves two basic approaches. First, the investigator may draft memoranda to the file summarizing witness accounts. Alternatively, investigators may prepare draft statements and provide them to witnesses to review, revise, and execute. The latter approach locks in the witnesses' accounts and provides comfort to witnesses that their information has been accurately reported to management. It also, however, may serve to delay the proceedings by adding a step to the process and may compromise the confidentiality of the investigation as draft statements may make their way into circulation. The former approach is more efficient but leaves the investigator's work vulnerable to later challenge as a result of varying recollections or after-the-fact rewriting of history. ("I never told the investigator that!").

Form and Substance of Report

A related question is what form should the final report take – oral, a summary written report, OR a detailed written report? In making that determination, the risk that the report may not be privileged and therefore may be discoverable is a consideration. To whom the final report is directed and who is provided access to it must also be determined, with confidentiality and potential privilege concerns in mind.

Another practical question is whether exhibits, including witness memoranda and witness statements, should be attached to the report. One concern that is often overlooked is the possibility of a retaliation claim brought later by a witness who alleges that he or she was punished for cooperating with the investigation. That risk would be minimized if the witnesses' individual accounts are not disclosed by the investigator but are rather subsumed in the larger tapestry of the report. Of course, if the issue is a "he said/she said" scenario, that it not possible. However, where the issues are more systemic or atmospheric and a larger number of witnesses are interviewed, the investigator may be in a position to provide a thorough report without necessarily identifying particular witnesses. For example, instead of naming the witness who observed certain problematic behavior, the investigator might instead report that a "respected marketing professional observed . . ."

Final Thoughts

We have conducted many independent investigations and have had a chance to experience first-hand what works and what does not work. If the goal is solely to enhance the organization's defenses to litigation, then an independent investigation may not be the best vehicle to accomplish that goal.

An organization that proactively pursues an independent investigation must understand the implications of its decision and must be willing to risk an unfavorable investigatory result. Most significantly, control over the process is to a large degree bestowed on an outsider. The organization must accept that the process has its own logic. The mistake most commonly made by in-house

counsel is the assumption that the independent investigator, like outside counsel, takes direction from them. Certainly, the initial mandate is for in-house counsel and the organization to make, but the manner in which the investigation is conducted is generally not.

The underlying premise in agreeing to an independent investigation should be the desire to take an honest look at the issues at hand and be prepared to remedy them, if wrongdoing or mismanagement is uncovered. While the investigation will undoubtedly provide some benefit should legal action ensue, that should not be the principal goal in agreeing to an independent investigation. Rather, a problem-solving, forward-looking approach is called for, as remedying the events of the past, if appropriate, should be paired with the goal of learning from any mistakes made and reducing the litigation risk going forward. The success of an independent investigation depends, to a significant degree, on the willingness of the organization and its in-house counsel to work as a team with the investigator selected to accomplish these goals.

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