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Labor and Employment Alert: Five Frequent Issues With HR-Related Internal Investigations

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HR professionals know that conducting timely and effective internal investigations is vital in order for the company to make better decisions when facing contentious allegations. Employees are more likely to use internal complaint resolution processes if they know matters are handled quickly and fairly. It is always better to encourage internal handling than allow matters to fester until they are reported elsewhere (like to the EEOC, OSHA, or NLRB). However, most HR professionals are not full-time investigators, and may only occasionally be called upon to investigate. Below are five problem areas that often arise with internal investigations.

1. Failure to Plan

Planning is both the most basic step and the most often ignored step for handling a matter. There is a desire to act quickly, or someone may think they “know” what to do. It is important to take time to plan the who, what, when, where, and how of your investigation before starting. Who should be interviewed? How and who will do the interview? Where and how will you do the interview? What do you need to know before starting any interviews? Who needs to know about the investigation and how will you insure confidentiality of your process? Who will be the decision makers and how will you keep persons who need to know informed of your progress? As you gather facts, you will change some parts of your plan, so keep it flexible. But have a plan and stick to it in order to have a thorough investigation.

2. Notes, Witnesses, and Write-ups

Every good investigator takes notes. A dedicated note-taker is a luxury if you have access to one. But typically, for all but the most complex matters, you will be asking questions and taking notes at the same time. It is not necessary to write down everything. This is not litigation; you are learning facts for a business decision at this point, so don't panic if something is missed. A good practice is to use an outline of your questioning for each person and make notes on that outline. Resist the temptation to record interviews as it rarely is effective and

creates its own problems. And be sure to tell witnesses that they may not record the interview and that any devices for doing so must be shut down or else there will be no interview. (Do not interview someone who insists on recording—see the non-cooperative witness below.) Save your notes (never destroy them) and write a report summarizing the facts you found. Keep the report simple about the relevant facts.

3. Non-cooperative Witnesses

If your company has not already addressed this issue in a code of conduct or other rules, try to develop a consistent approach to witness cooperation. Ascertain from the witness why he or she is not cooperating. Remind the witness the company will not tolerate retaliation against anyone cooperating in the investigation. Inform the witness that knowing all of the facts is vital for the company to make an informed decision, this is how the company is gathering those facts, and the company will make a decision with or without cooperation. Take reasonable steps to assist someone to cooperate. But unless the witness has a right for a representative to attend an interview with him or her (as is sometimes the case in union settings), take charge of your interview and don't be derailed.

4. Confidentiality

“Confidentiality” is often expressed but little understood. Resist the temptation to tell a witness that everything is confidential because often that cannot be assured. Stress, instead, that the company limits access to your work to those with a legitimate and business-related need-to-know. This is fair to everyone involved. Anonymity is trickier. It is difficult to provide assurances of anonymity. Legal proceedings are only one way this veil may be pierced. One recommendation is to say that the witness's identity will not be revealed unless necessary and that you will let the witness know if that changes. Remind them again that retaliation is not permitted and to report any perceived retaliation to you.

5. Finding Facts and Making Conclusions

The most effective investigators are those who find facts and let decision makers make decisions. Wearing both hats is not a good practice. (Managers often cannot resist the temptation to wear both). A good decision maker will ask for your conclusions about the facts, which you will provide in a written summary. If the decision maker wants recommendations, do so only if you separate that activity from the factual conclusions that you provided to insure your primary role of reporting the facts is preserved. Of course, reporting facts typically means you will report observations as well, including credibility of witnesses and other relevant things you observed.

Conclusion

This is not an exhaustive list, but these questions are very common in typical HR matters. Be polite but firm as an interviewer and do your job professionally. Contact your Vorys lawyer for assistance in internal investigations or for more in-depth training on these skills.