

Internal Investigations

By Wes Bearden



Organizations from corporations to nonprofits are required to police their own conduct. The use of internal investigations are an effective tool to uncover and stop wrongdoing within an organization. Here are some thoughts when your client comes calling for an internal inquiry.

First, decide whether you need an investigation. Internal investigations are great tools when dealing with various scenarios, but you need to know the main reason and force behind the request. The origination of such investigations are usually written formal complaints whether internal or as a result from litigation. However, notice or knowledge of a government or regulatory investigation may be a sufficient basis for an organization to begin its own internal inquiry. Employers may have a duty to begin an investigation even if they have merely been placed on notice of potential wrongdoing. See *Hardage v. CBS Broad., Inc.*, 427 F.3d 11 (2005). In such instances, it can be difficult to determine whether an investigation is warranted or not. Remember, internal investigations can be messy, time consuming, expensive and demoralizing if done improperly.

Second, understand your investigation's scope. There is no definition or standard playbook for an internal investigation. A decision of the scope of the investigation and your client's desired outcome should precede any action. Additionally, some thought should be given regarding the permissible waiver of that scope. Many times, internal investigations uncover other wrongdoing not typically anticipated. Some of those additional allegations may warrant investigation in their own right. However, scope creep is a common occurrence and should be carefully monitored so as not to allow the investigation to become punitive, never-ending, retaliatory or frivolous.

Third, pick the investigators. Most times, experienced company managers, human resource personnel and in-house counsel can successfully complete the job. However, use of outside investigators can be beneficial. First, investigators who routinely conduct these investigations are much more effective in uncovering the facts. Second, outside investigators many times present a much more unbiased, third-party review that tends to be less demoralizing than supervisory manager or corporate advocates. Finally, the involvement of outside lawyers and outside investigators helps maintain the corporate client's attorney work-product privilege and attorney client-communications privilege as to the result of the investigation. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Next, conduct your investigation thoroughly. We usually assume that an internal investigation is nothing more than a few interviews. Interviews are important. However, they are only one of the

many strategies that should be applied. Background research, surveillance and expert review of internal documents can yield more concrete information. Those efforts in coordination with appropriately timed interviews can be invaluable. Careful consideration should be taken when interviewing witnesses. Thoughts about voluntary disclosure, recordings, retaliation, confidentiality and subsequent discovery should be weighed well before the interview takes place. When conducting these interviews what is the organization's policy, if any? Should additional materials, backgrounds or pertinent information be prepared in advance? Unlike the deposition, the interview is purely voluntary, the questions open ended, and the format always changing.

Afterward, diligently and carefully report your findings. Investigative reports should be carefully crafted to address the scenario at hand. Consider the format of reports and whether they should stand in solo or summarize work over a period of time. Reports should be addressed and presented to decision makers in order to maintain confidentiality and maintain an attorney work-product privilege claim. Determine whether detailed statements, notes and recordings should be present in a report at all. Finally, consider if written recommendations are appropriate. If your client corporation fails to follow the suggestions, it may lend some evidence to notice and lack of aggressively resolving the issue or passive acknowledgement of culpability.

Lastly, understand the results and purpose of your investigation. For many litigators, the purpose of an investigation is to uncover only information favorable to your client's defense or claim. The initiative and existence of an investigation may also be used to mitigate against imposed penalties or to argue attempts at internal policing. However, for many boards, executives and managers, its purpose is to root out undesirable practices, stop bad actors or change a corporate culture. Furthermore, the results may be used to hone and develop new policies or procedures and develop intelligence regarding business activities. Whatever the result, stick to the guidelines above and hopefully your client will get the answers they are looking for.

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