

Outside Counsel

Internal Investigations: Workplace Culture Temperature Check

While most employers do not relish the task of conducting internal investigations in response to employee complaints, such investigations provide an opportunity to take the temperature of a company's workforce. The process of seeking to uncover facts relating to a complaint can reveal a trove of valuable information regarding the perspectives and experiences of staff and management. If used wisely, this information can serve as the genesis for revised company policies, improved procedures and corrective actions that will promote a more positive work environment and foster the desired workplace culture.

Trigger for Investigation

Historically, workplace investigations have typically been triggered by an employee complaint. When



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receiving such a complaint, employers should be mindful that it takes courage for an employee to voice their concerns about workplace issues and report misconduct. How a company initially responds to a complaint often sets the tone for the communications between the employer and the complaining employee and impacts the latter's decision of whether or not to further escalate the matter and commence legal action. Conducting prompt and thorough internal investigations into the complained of behavior not only minimizes a company's potential exposure to liability, but also sends the message to employees that their concerns and complaints matter and will be timely addressed with corrective or remedial action taken if warranted.

Moreover, investigations clearly indicate to employees that conduct violative of the law and/or company policies will not be tolerated.

Engineering a company culture that comports with identified goals and values allows companies to maintain their competitive edge. A positive workplace culture and morale incentivizes employee productivity and helps retain talent. The COVID-19 pandemic, which abruptly converted many workplaces into remote environments, emphasized the need for companies to evaluate and proactively foster company culture. Understandably, employees at all corporate levels, whether support staff or executives, are hesitant to openly critique existing culture or leadership. An investigation, undertaken as confidentially and anonymously as possible, for the explicit purpose of identifying workplace culture issues, allows leadership to receive transparent feedback from their employees. It is therefore not surprising that many companies are acknowledging that their workplaces

can be improved and engaging in this type of fact gathering.

Conducting Investigations

Once the decision has been made to move forward with a workplace investigation—whether in response to a complaint or to gather employee feedback, the parties involved should define the purpose and scope of the investigation. The purpose may be as narrow as “*determine who defaced our required workplace posters*” to as broad as “*determine whether employees are satisfied with our culture and are committed to our long-term goals,*” but more commonly the purpose of a workplace investigation may be to “*determine the merits of Employee A’s complaint of harassment against Employee B.*” While the purpose and primary goal of the investigation should be decided and remain fixed from the start, the scope may shift during the course of interviews and as evidence is gathered.

The next decision is who should conduct the investigation. On one hand, in an instance of stolen lunches from the workplace refrigerator, an investigation handled exclusively by the internal human resources department is entirely appropriate. On the other hand, a company may want to retain a neutral third-party to investigate an employee complaint of sexual harassment against a supervisor or to conduct an open-ended exploration of workplace culture. Interviewees tend to be more

tightlipped with fellow employees with whom they work on a daily basis. It is often easier for employees to share information with an outside interviewer who is free of workplace alliances and has no prior working history with the interviewees. Employees tend to view third-party investigators as true neutrals, whose role is to uncover facts free from pre-existing biases, and let down their guard more so than they would with another company employee. Attorneys are often selected to serve as third-party investigators due to their understanding of and sensitivity to potential legal claims that may be involved, as well as their knowledge of best practices for minimizing the com-

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pany’s liability while still achieving the goal of the investigation.

Investigations should be both timely in light of the purpose and thorough in light of the scope. Individuals with potentially relevant information and evidence should be promptly identified and steps should be taken to preserve evidence in their possession or under their control. The investigator should become familiar with who the appropriate initial interview subjects are and gather any relevant background information. Instances of harassment may be discrete incidents or may be just

the tip of an iceberg and indicative of a flawed culture existing just beneath the surface, visible only to those on the lower decks, who are not in a position to effect meaningful change. Companies would like to avoid employees resorting to litigation in order to sound the alarm that the ship has hit an iceberg and should be proactive in assessing company culture at all levels. Every investigation affords an opportunity to peel back the covers to a degree, check the health of the workplace culture and right the ship, although for various valid reasons sometimes companies just want to know who scribbled on those company posters.

While the remote nature of most investigatory interviews conducted today presents an added challenge to establishing a personal rapport with the interviewee, there is a benefit to the subject speaking from the relative comfort of their own home. Achieving the goal of putting interviewees at ease and relaxing their guard enough to share relevant information has not been meaningfully hampered by the use of video interviews as opposed to face-to-face conversations, which typically would have occurred within the company’s offices.

The remote nature of interviews does present unique challenges, including an inability to see what materials or other individuals the subject may have in their line of sight or within earshot while being interviewed. After issuing an *Upjohn*

warning and all other appropriate disclaimers, it often makes sense to begin an interview by confirming the subject is not in a public place and is alone in the room. For context and as a means to identifying any relevant evidence, the interviewee should be asked to move their camera to allow the interviewer to see the interviewee's desk and the space they are conducting the interview from. This formality may not be necessary in an interview solely exploring the employee's view of company culture and experiences in the workplace.

The final product of an investigation is often a report, which should be written with the intended audience in mind. For instance, The New York Times workplace evaluation report, mentioned below, was written with the intent that it would be published. More often the only eyes that are laid upon a workplace report belong to employees of the company who commissioned the report, but depending on the circumstances, a report may be discoverable in a litigation. Absolutely key to successfully concluding a workplace investigation is ensuring the purpose of the investigation is fulfilled, the ultimate scope is satisfied and the report reflects information gathered in a way that is useful for the company.

Workplace Culture Temperature Check

Internal investigations are no longer limited to responding to

employee complaints. More and more employers are initiating self-audit style internal investigations to explore the contours of their corporate culture. This can be a useful tool to facilitate honest and frank employee feedback and facilitate the implementation of beneficial workplace policy changes.

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Earlier this year, the New York Times publicly released a report based on an extensive internal investigation into its workplace culture. This report outlined the investigation's findings and The Times' plan for building a more diverse, equitable and inclusive workplace. In no uncertain terms, the report notes that "The Times is a difficult environment for many of our colleagues, from a wide range of backgrounds. Our current culture and systems are not enabling our workforce to thrive and do its best work." According to the report, colleagues of color, and especially Black and Latino colleagues, were adversely impacted by The Times' work environment. The report outlines The Times' commitment to transform its workplace culture

by implementing directives, including interview training to ensure fair and competency-based hiring, the creation of clear career expectations and pathways, and the creation of a diversity, equity, and inclusion office. The Times' internal investigation and corrective plan were intended to allow the organization to maintain its reputation, define its commitment to diversity and strengthen its competitive edge, during a period when its workplace culture was being scrutinized internally and externally.

The COVID-19 pandemic posed unprecedented challenges for employers. Workforces became remote overnight; Zoom and Microsoft Teams meetings replaced in-person meetings. Many employees now communicate with their coworkers only electronically. These changes have taken a toll on day-to-day worklife and on company culture. As we emerge from the pandemic, companies with high employee morale are more likely to retain talent and be in a position to benefit from opportunities that arise during the post-pandemic transition. Internal audits of employee satisfaction conducted sooner rather than later will help employers stay competitive and compliant.