

## INTERNAL INVESTIGATIONS: CREATING THE PROCESS

What might trigger an internal investigation? The long-standing issues of harassment, discrimination, conflict resolution are accusations that historically result in internal investigations. Internal investigations are one of the most sensitive tasks that a human resources professional has to perform. The deft hand that is needed to seek information without violating privacy requires careful planning. Things to consider when starting an investigation are:

1. Determine the question that the internal investigation is designed to answer?
  - There can be more than one question that needs to be answered. For instance, when multiple people may be involved, or multiple potential policy violations are being investigated, more than one question may be involved.
  - Is the investigation seeking to uncover potentially criminal activity?
    - **If so, then the investigation should NOT be internal and should be referred to outside counsel, who can determine if law enforcement should be involved.**
2. Who are the people that may have knowledge of the facts related to the question?
  - Get all contact information for people who may have information about the subject of the investigation.
3. What privacy issues surround the investigation?
  - How can the company protect the identity of the person who has made an accusation or provided information leading to the investigation?
4. Who should lead and participate in the investigation?
  - Choose a person who has the trust of the employees and can be seen as a neutral person to evaluate the information s/he will be gathering. Human Resource professionals are often the first choice in the absence of internal legal counsel or using outside counsel or investigators.

- The person that interviews the employees who are interviewed needs to have a “poker face” and be able to control their emotional responses to whatever information they may learn.
  - Two people should be involved in planning and reviewing the information gathered in the investigation. That person should make sure they don't rubber stamp the investigation plan or any part of the process.
  - While the internal investigation does not have to be performed by anyone from HR, the HR person should be made aware of the results of the investigation and a report of the results of the investigation should be placed in the employee's personnel records.
5. Third-party investigators should be used if the company does not have an appropriate or willing person on staff to lead the investigation.
  6. Outside counsel performing the investigation may be protected by attorney-client privilege, which could be helpful in the event of future litigation.
  7. Consulting with outside counsel before embarking on the internal investigation is a worthwhile investment to make sure that your investigation plan and questions do not violate federal, state, or local laws.

A very important task is to make sure every part of the process is carefully documented in real time. Postponing documentation will result in a fatally flawed process and the result will be questioned as potentially biased and untrustworthy. Interview notes taken during the investigation must be documented contemporaneously. These should be dated and state who created the notes. If handwritten, scan into an electronic document that will then reflect the date it was created. Any subsequent edits of the documents should be saved as a different version, with an explanation about why the version was created. All electronic data and documents must be carefully gathered and reviewed, and any notes made about those documents or data should be created and saved in the same manner as interview notes.

Investigations should be closed when all employees with knowledge of the incident or issue under investigation have been interviewed and any follow-up questions have been answered, and after all electronic data and electronic and hard copy documents related to the investigation have been reviewed.

These should provide an answer to the question that the investigation was designed to answer. Rarely, if ever, will an investigation result in 100% of the information pointing to a single answer. However, when the veracity and trustworthiness of the information weighs in favor of a particular answer, that is enough for a determination. Occasionally, no conclusive answer can be reached. No matter what determination is made, it should be part of a written report that is placed in the personnel file of the employee who was the subject of the investigation.

Once the report is final, disciplinary action may be required, including termination of employment. Be sure to abide by any employment contracts or disciplinary policy that covers the situation. If the report absolves the employee of wrongdoing, be sure to meet with the employee and let them know the outcome.

The results of the investigation should not be shared with anyone who does not have a "need to know". Those who were interviewed as part of the investigation are likely not "need to know" employees and despite their probable curiosity, the result of the investigation should not be shared with them on this basis.

Internal investigations are one of the most difficult tasks that HR professionals perform, but creating a plan and trusting the process created for the investigation will result in a trusted conclusion upon which to base subsequent employee decisions.

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