

Your company has received a complaint involving employee misconduct, or misconduct by a third party who has contracted with the company or is on the premises. By law, the complaint requires an investigation. What steps are you going to take to ensure the investigation is objective, unbiased, and balanced?

While cost may be a consideration, ensuring that the organization minimizes risk while maximizing objectivity is crucial. These guidelines will help you to identify the right investigator for your situation.

**Regardless of whether you utilize an internal or external investigator, that person must be:**

- Neutral
- Properly trained
- Have adequate time and resources to conduct a thorough investigation

### **Internal Investigator**

Consider an internal investigator when:

- There is a fully trained internal investigator on staff who can dedicate the time necessary to conduct the investigation without neglecting other key responsibilities
- The complaint DOES NOT involve a high level executive or administrator
- The investigator WILL NOT be part of the team making decisions about the complaint based upon the report of findings (*For example, having the Director of HR investigate the complaint may create a conflict if they will later advise the company as to disciplinary options if the complaint is founded*)
- The issues in the complaint are relatively simple and quick to resolve. Keep in mind, however, that what may appear simple at the outset may involve hidden issues that specific expertise could identify early.

### **External Investigator**

You should retain an external investigator if:

- You do not have a fully trained workplace investigator
- The complaint is complex and/or may require a more time and resources than an employee acting as internal investigator can devote
- There is concern that an internal investigator cannot be impartial or will be perceived as biased because of the investigator's relationships with those involved in the investigation or their position in the company
- The matter may result in litigation and the investigator will be called as a witness

### **Options for External Investigators**

**Human Resources Consultant:** HR consultants may be an economical choice for a small or mid-size employer that do not have the resources in-house to conduct an investigation. However, not all HR consultants have specialized training in conducting investigations or understanding of the legal issues a complaint may implicate. It is important to ask what training a consultant has before your company selects this option as it may cost the company

more in the long run. A consultant may also lack the expertise to properly identify legal issues or may include recommendations that the organization cannot or is advised against implementing. In addition, an HR consultant may not be able to conduct a privileged investigation, should the company require one. Finally, the HR consultant may not be the best witness if the matter results in litigation.

**In-house or external General or Employment Counsel:** In-house counsel or outside counsel who routinely represent the company may seem an obvious choice since they know the business. However, an investigator may be called upon as a witness and, if acting as investigator, cannot represent the company if there is litigation. Conclusions of an investigation should be separate from the advice of counsel. Combining the two roles can erode the perception of impartiality and waive the attorney-client privilege.

**Independent Attorney Investigator:** Choosing an independent third-party investigator with a legal background makes the most sense, especially if the company faces a complex investigation or a potential conflict of interest as the investigation unfolds. The cost of an external investigator may be higher initially, but in many cases may save the company in terms of claim avoidance and future legal exposure.

#### **Bottom Line**

Spend the time and resources to make sure the choice of investigator fits the scope and complexity of the workplace complaint. It is important to note that an internal investigator may be subject to claims of bias or conflict of interest, especially if the complaint could lead to negative exposure for the company. In those instances, don’t risk derailing the process; an external investigator will make the most sense.

***This guide is authored by two of Bernstein Shur’s Labor and Employment Practice Group’s Workplace Investigation Team.***

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