

## 10 Tips for Conducting an Internal Investigation

December 12, 2011 by [Catherine Wright](#)

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The recent news involving Penn State highlights how high the stakes can be when conducting an internal investigation. In fact, Penn State has hired former FBI director Louis Freeh to lead its internal investigation into alleged criminal conduct by a former employee. But while most employers do not face circumstances this challenging, the reality is that employers are presented with circumstances on a regular basis that must be investigated effectively to avoid significant legal liability.

Of course, this begs the question of when an employer needs to investigate. The simplest answer is when the employer has knowledge of misconduct. Misconduct can include a breach of an employer policy, violation of a drug or alcohol policy, theft or other criminal activity, or even misuse of company property. Employers should not, however, too narrowly construe what constitutes "knowledge," which can include formal and informal complaints, information obtained during exit interviews, anonymous tips and third-party information.

Employers should also keep in mind that an internal investigation may become your defense in any subsequent litigation and therefore may be subject to significant scrutiny by the plaintiff, the plaintiff's lawyer and possibly a jury. For example, in a sexual harassment lawsuit, the employer's investigation is what typically shows that the employer exercised reasonable care to prevent and correct any harassing behavior. Another defense used by employers in wrongful termination lawsuits is the "honest belief" rule. Specifically, if the employer can show that it reasonably relied on the particularized facts that were before it at the time the decision was made, it can potentially avoid liability over a challenged decision. The investigation does not need to be perfect, but the employer must make a reasonably informed decision before taking an adverse employment action.

As a result, conducting an effective internal investigation is critically important. Every investigation comes with a unique set of facts and challenges, but the following 10 principles serve as a guide for conducting an effective investigation.

### **1. Determine the objectives and strategy for the investigation.**

At the outset, employers must establish the objectives of the investigation. Questions that should be addressed include:

- Are you trying to develop a complete record to justify a decision?
- Are you attempting to avoid litigation?
- What are your legal obligations?
- Do you need an attorney involved?

Evaluating the answers to these questions will allow you to tailor your investigation.

## **2. Maintain confidentiality.**

A guiding principle in any investigation is confidentiality, which employers should maintain to the extent possible. However, don't promise what you can't deliver. Absolute confidentiality when employees will be interviewed is virtually impossible. Also, employers need to be vigilant when it comes to thoroughness and promptness. For example, if you had to answer questions one year later in a deposition, can you give a reasonable explanation of why it took the amount of time it did to complete the investigation?

## **3. Determine if immediate actions need to take place to protect the workforce.**

Based on what you know at the time the investigation begins, you may need to take immediate steps to protect the complaining party, alleged victim or the workforce in general. For example, an accused harasser may be put on a paid or unpaid leave, supervisory responsibilities could be changed or an employee could be temporarily transferred pending an investigation, but in no case should an employer penalize the alleged victim.

## **4. Review company policies.**

Take an inventory of employer policies that may impact the investigation process. For example, a collective bargaining agreement may provide an employee the right to have a representative present at any interview.

## **5. Conduct a preliminary search of available records.**

This includes reviewing personnel files and any documents relating to the misconduct. Act quickly to retrieve what electronic information is still available, including emails and text messages.

## **6. Select the appropriate personnel to conduct the investigation.**

Investigators should be unbiased and unprejudiced — and perceived as such. Good investigators are skilled at setting people at ease and drawing out reticent witnesses in order to collect facts. They also need knowledge of company policies and procedures, the ability to maintain confidentiality and a level of authority consistent with the significance of the matter being investigated.

## **7. Control the interview process.**

Obtaining detailed statements from interviews with the complaining party and the accused are a critical part of any investigation. Documentation should include the facts, not legal conclusions, or your interpretations and assumptions. Give witnesses ground rules: No conclusion has been reached, no reprisal will be taken, and no discussions about the interview are allowed with anyone.

## **8. Communicate throughout the process.**

Many employers launch an investigation, only to fail to keep the complainant reasonably informed during the process. Unfortunately, this results in the complaining party believing their complaint was ignored, which may prompt them to involve an attorney.

## **9. Close the investigation properly.**

Having invested the time and cost associated with the investigation, protect your investment by properly closing out the investigation. Make a decision, communicate the decision and document the process.

## **10. Ensure against retaliation.**

Employees who make complaints may be legally protected from experiencing an adverse employment action. This includes complaints involving discrimination, harassment, safety violations, wage and hour violations and more. Do ensure against retaliation by continuing to monitor the situation.