



## Workplace Investigations

### Who, What, Why . . .

*Who does it apply to:* All employers – who have ever wondered whether an investigation of some sort should be made regarding an issue involving employees.

*Should I investigate:* Let's face it, not every dispute will merit an investigation, and sometimes, the investigation merited will not require all of the steps below. Like so many issues in business, it comes down to an evaluation of risk, and in some cases that might mean intentionally not investigating. For example, it is tempting to always conduct a post-accident investigation, but what if your employee has injured a non-employee who might sue? It might be wise not to have a drug test as part of the investigation. Keep all of these considerations into mind.

*Who should do it:* This question may be more complicated than you think. Impartiality, professionalism, and credibility are the keys. How would a jury perceive your decision? Should it be someone of the same race, color, or religion (as an example) for a discrimination claim so a jury will find the investigator more credible? Should it be a team to double the potential credibility? If the head of the company or an executive is under investigation, it may be better to choose an outside investigator. An outsider is also worth considering if the situation already seems headed toward litigation, i.e. a claimant has filed an EEOC charge or hired a lawyer. Should your investigator be your lawyer, or a lawyer? Attorney client privilege attaches to your discussions with a lawyer and that can be a powerful protection if you don't want your investigator to be forced to discuss their private conversations with you about the investigation.

*What is the plan:* Take time to think before you act. It may be tempting to jump right in and start talking to folks, but Mom always said to think before you speak. What do you already know? What do you need to fill in the blanks? Who should you interview? What order should you interview? What should I ask? When should I start? Do I need outside help, i.e. should I involve the police in a theft or violence investigation or a forensic accountant in an embezzlement investigation? Does anyone need to be suspended until the investigation is concluded? This could be appropriate in a number of instances such as letting a thieving, drunk, or violent employee back into the office.

*How should the interviews be conducted:* If you are not going to use the assistance of a lawyer or experienced investigator,

you should think about how you will ask questions of your interviewees. Things lawyers naturally take into account when interviewing or questioning a witness include: asking open-ended questions; avoiding accusatory questions that put a witness on the defensive; repeating the story as you understand it to be sure it was understood initially; whether you have gotten the facts or just a string of opinions; and what contradictions in the story need to be ironed out. While interviewing keep your opinions, observations, and the results of your investigation to yourself. Finally, if you are in a union environment, be alert of the interviewee's rights to representation.

*What about recordings:* It may seem convenient or the best possible evidence to record interviews. After all, no one can argue with a recording. That is true, but it means your words as questioner will be put under the microscope, too. Recording interviews also may stunt the interviewee's responses. I personally prefer clients to take copious notes. That said, if an employee wants to record the interview you should allow it on condition that you receive an immediate copy. Because Texas allows a conversation to be recorded as long as one side knows it is being recorded, ask the interviewee if they are recording to be sure you know what you are up against.

*Where else will there be evidence:* Though the outcome of a lot of investigations will turn on the interviews, there are a myriad of other places that evidence may show up. Emails will often play a part, but consider these other additional sources of evidence: electronic documents, voicemails, texts, pictures, sales receipts, equipment logs, notes, expense reports, inventory records, payroll records, customer complaints, prior warnings, productivity reports, and any other place you might find something to support the final determination. Remember, from our prior EH edition on polygraphs that they can be used in appropriate circumstances, but strict procedures must be followed.

*Are there privacy or confidentiality issues:* As you know from the previous EH edition on privacy, there are few privacy rights in the workplace, but you have to be careful. Searches of areas where you have created an expectation of privacy are prohibited as is listening to telephone calls without consent. You should maintain confidentiality of your investigations and be careful who is in the

loop to avoid rumors. Under the National Labor Relations Act, you can ask employees to maintain the confidentiality of their interviews or put a “gag-order” over discussion of the incident at issue only when you can demonstrate that such confidentiality is essential to the investigation. And, when the investigation is over, you must release employees from the confidentiality obligation unless it remains justified.

*What should I do (the result):* Only you can decide the right answer, but whatever the result may be, you must document it. Prepare a final assessment commensurate with the severity of the investigation documenting your reasoning and final decision. Depending on the circumstances, it is always good to consult with your employment lawyer about the legally correct result under the circumstances.

### **Common Situations:**

*Regimented mistake:* The HR VP at Smiley Face, LLC decided to have the department manager where a discrimination claim arose conduct an investigation. Because the manager was not experienced in handling discrimination claims, the HR VP provided him very strict guidelines for the investigation and the questions to be asked. The manager followed the HR VP’s instructions to the letter interviewing the employees listed and collecting documents requested. Because Suzy was not on the list to be interviewed, the manager did not follow up on the observation she might have valuable information. In fact, Suzy knew specific facts to support the discrimination in an otherwise close case. Business owners have to guard against such a regimented approach. Go where the investigation takes you.

*Be wary:* Melvin has just taken ownership of Shady Pines Nursing home. The prior owners warned him that the residents often complain of mistreatment by the staff when nothing really happened. Mel takes this to heart and looks the other way when

Sophia complains about the staff locking her in her room to keep her from riling up the other residents. Has Mel made a bad decision? Of course. He is required, by law, to investigate all claims of patient abuse even if Sophia is just making it up. Workplace investigations are not always optional. Know the legal requirements for your industry and conduct tests when they are necessary.

### **What should I do:**

*Good:* When an issue arises, take a moment to determine whether an investigation is appropriate and the scale of the investigation. Let the right person handle it and record the result. Investigate when legally required to do so in your business.

*Better:* All of the above, plus, preserve copies of all physical evidence and document the results and any interviews. Be sure to document delays in starting to be able to justify later. Make sure your employee handbook provides for all manner of searches and surveillance to compliment your investigations.

*Best:* That is all. Good and Better get it done this month.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**