



Checklist: Conducting an Internal Investigation

1. Take Action to Stop the Suspect Conduct

- Separate the accused employee(s) from the complaining employee(s).
- Consider suspending the accused employee(s) during the period of investigation, depending on the severity of the accusations and the evidence presented.
- Consider terminating the accused employee(s) if the evidence presented is clear.

2. Determine Whether to Conduct a Full Investigation

- Review relevant federal and state legislation to determine if there is a legal obligation to investigate. If unsure, consult with an attorney.
- Consider whether suspect conduct would trigger required investigation provisions of the Occupational Safety and Health Act (OSHA), the Drug Free Workplace Act, the Sarbanes Oxley Act or the Dodd-Frank Wall Street Reform and Consumer Protection Act, among others.
- Don't over-think it because if the evidence presented at the outset is clear and damning, a full investigation may not be necessary.

3. Choose the Right Investigator

- Do not choose the complaining employee's immediate supervisor to conduct the investigation to avoid claims of bias or lack of objectivity.
- Do not choose employees against whom allegations of misconduct were made to avoid claims of bias or lack of objectivity.
- Avoid nominating a lead investigator who has a close personal or working relationship with the employee(s) who made the misconduct claim(s).
- Make sure the individual you choose to lead the investigation is well-trained in investigative techniques, including strategy, witness interviews and documentation.
- Consider nominating an outside investigator, outside counsel, outside law firm or investigation agency to lead the investigation and think about whether:
 - o The claims raise the possibility of criminal activity;
 - o Allegations were made against a high-level company official who would normally have access to the results of internal investigations;
 - o The claims raise the possibility of widespread unlawful activity, corruption or misconduct;
 - o In-house counsel is unable to lead a completely objective investigation; and
 - o In-house counsel does not have access to the resources needed to conduct an effective investigation.

4. Craft the Investigation for the Appropriate Audience

- Determine what audience the investigation results would ultimately be used to influence (e.g., a jury, a regulatory body, the SEC, or the police).



- Consult with in-house or outside counsel to set parameters for the investigation.
- Assess public relations issues and any potential media exposure and devise contingency plans.
- Consider disclosing the investigation results to private investors or customers to maintain good relations and address business operations concerns.

5. Restrict Employee Activity During the Investigation

- Consider whether to restrict employee activity concerning the investigation.
 - Restrict employee discussion of ongoing investigations if one of the following four conditions apply:
 - A witness involved in the investigation requires protection in the form of confidentiality;
 - Crucial evidence is in danger of being destroyed if employees are permitted to freely discuss the investigation;
 - Testimony is in danger of being fabricated or changed if employees are permitted to discuss the investigation; or
 - The employer must take action to prevent a "cover-up."
- To preserve your right to restrict employee discussion of ongoing workplace investigations on a discretionary basis, include the following language in your workplace investigations policy:

"[Employer] may decide in some circumstances that in order to achieve **[the objective of lawful and effective workplace investigations]**, we must maintain the investigation and our role in it in strict confidence. If [Employer] reasonably imposes such a requirement, and we **[the employees]** do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination."

- Consider restricting employee access to crucial evidence in the form of hard-copy or digital information, stored either on the company's computers/servers or on employee equipment, including computers and smart phones.
 - Exercise caution when attempting to restrict usage of so-called "bring your own device" (BYOD) equipment.
 - Consult with in-house or outside counsel before restricting employee access to devices not provided by the employer.

6. Interview the Witnesses

- Interview the complaining witness first to obtain clarity regarding the allegations, employee involvement and scope, plus the accuracy and severity of the witness' evidence.
 - Ensure that the lead investigator reviews the complaining employee's personnel file, together with the personnel files for the accused employee(s), to determine if there is any personal history or past relationship.
 - Ensure that the lead investigator reviews any written statements or complaints made by the complaining employee.



- o Conduct the interview in the presence of at least one witness.
 - o Ensure that only the lead investigator records the witnesses' answers to questions. Do not keep two separate records of the same interview.
 - o Ensure that the lead investigator informs the witness that the company will strive for absolute confidentiality, but that it may not be possible in accordance with the law.
 - o Do not audio or video tape interviews unless absolutely necessary.
 - o If necessary, obtain employee permission to audio or video tape interviews and check with in-house or outside counsel before using any recording devices.
- Interview the employee(s) against whom accusations were made.
 - o If the employee belongs to a union, they may be entitled to be represented by a union official during the interview.
 - o Ensure that lead investigator reviews the accused employee's personnel file.
 - o Strive to conduct the interview in person, even if the accused employee is suspended or on furlough during the pendency of the investigation.
 - o Conduct the interview in the presence of at least one witness.
 - o Ensure that only the lead investigator records the witnesses' answers to questions. Do not keep two separate records of the same interview.
 - o If the employee refuses to cooperate, inform the employee that refusal to cooperate with an internal investigation may be grounds for dismissal, even if the investigation proves that all of the claims are false.

7. Consider Other Investigative Techniques

- Consider reviewing electronic data such as email, internet activity and social media posting.
- Check with in-house or outside counsel before reviewing any documents or digital information that is arguably beyond the company's legal reach.
- Consider monitoring use of other company equipment, including company landline telephones, computers, access key cards, etc.
- When considering surveillance tactics, check applicable laws concerning the legality of such devices, including the Federal Wiretap Act and the Stored Communications Act.
- Always check with in-house or outside counsel before implementing surveillance techniques.

8. Collect Data and Protect it From Disclosure

- Consider adopting a document retention policy.
- Consider using an outside investigator if you do not have a current document retention policy in place to demonstrate objectivity.
- If you have a current policy in place, follow it strictly.
- Consider trying to shield some information from later disclosure.
- Label sensitive documents as "privileged" in large, red, boldface lettering.
- Consider that in situations where witness statements have been obtained from unionized employees, but the employees have not exercised their *Weingarten* rights to be accompanied by a union representative, an employer may have to provide the witness statement to the union anyway upon request.



- Consider having an attorney review or add analysis to certain aspects of the investigation so as to benefit from the attorney-client privileges and/or the attorney work product privilege.
- Strive to conduct investigations with the goal of improving overall business practices, *not* for the sole purpose of preparing for litigation.

9. Take Action After the Investigation

- Where the investigation has yielded a clear result, consider suspending or terminating the accused employee(s) or other appropriate discipline.
- Where the investigation has yielded ambiguous results, choose which employee(s) seems the most credible and act accordingly.
- Act in good faith upon the results of an investigation at all times.