

Internal Investigations

Lauren A. Smith

Lanier Ford Shaver & Payne P.C.

2201 West Clinton Ave., Suite 102

Huntsville, AL 35805

256-535-1100

LAS@LanierFord.com

www.LanierFord.com

© 2017



Workplace Investigations

Internal investigations at the workplace are often necessary to discover, address, and prevent problems.



Why investigate at all?

- Corporate culture
- Employee morale
- Increase productivity
- Specific deterrence
- General deterrence
- Create legal defense



Types of Investigations

- Criminal activity
 - Stealing
 - Violence
 - Illegal drug use
- Health/Safety Violations
- Discrimination/harassment
- General misconduct
 - Absenteeism/tardiness
 - Bypassing chain of command
 - Insubordination



Who initiated the investigation?

- Employee
- Co-worker
- Supervisor/manager
- Outside government agency (EEOC, DOL, OSHA)



Steps to Take

1. Determine if an investigation is necessary.
2. Identify who will conduct the investigation.
3. Define the scope of the investigation.
4. Interview key fact witnesses and review documents.
5. Write report summarizing investigation.
6. Take action based on results of investigation.

Steps:

1. **Determine if necessary**
2. Scope of investigation
3. Identify investigator
4. Interview witnesses/review documents
5. Write report
6. Take action

- Who initiated the investigation?
 - Government agency
 - Actual or credible allegations of wrongdoing
 - Lawsuit
- Timing of investigation = as soon as possible!

Needs to be prompt



Steps:

1. Determine if necessary
2. **Scope of investigation**
3. Identify investigator
4. Interview witnesses/review documents
5. Write report
6. Take action

- Does the complaint allege a violation of company policy or state/federal law?
- How serious are the allegations?
- Who is involved?
- Who would have the most knowledge?
- What is the potential exposure/liability to the company?

Steps:

1. Determine if necessary
 2. Scope of investigation
 3. **Identify investigator**
 4. Interview witnesses/review documents
 5. Write report
 6. Take action
- Lawyer v. non-lawyer
 - HR Director/Manager
 - Subject of investigation
 - Time/availability
 - Experience
 - Objectivity

Steps:

1. Determine if necessary
2. Scope of investigation
3. **Identify investigator**
4. Interview witnesses/review documents
5. Write report
6. Take action

- Lawyer v. non-lawyer
- In-house v. out-of-house counsel
 - Attorney-client privilege
 - Neutrality
 - Credibility
 - Experience

Steps:

1. Determine if necessary
2. Scope of investigation
3. **Identify investigator**
4. Interview witnesses/review documents
5. Write report
6. Take action

- Lawyer v. non-lawyer
- In-house v. out-of-house counsel
- Consultant
 - May detect potential problems
 - Neutral
 - Objective
 - Types: forensic accountant, e-discovery consultants, subject-matter experts

Steps:

1. Determine if necessary
2. Scope of investigation
3. Identify investigator
4. **Interview witnesses/review documents**
5. Write report
6. Take action

- Document review process
 - Start immediately!
 - Collect and preserve documents
 - Image hard drives
 - Copy entire email accounts
 - Collect documents before notifying employees
 - Document hold or litigation hold letters
 - Coordinate with IT
 - Employee-owned devices

Side issue

- Privacy policy can assist in document collection.
- Want employees to know their computer, phone, emails, etc. are not private and may be monitored/accessed by employer

This should be put in place **BEFORE** any investigation.



Steps:

1. Determine if necessary
 2. Scope of investigation
 3. Identify investigator
 4. **Interview witnesses/review documents**
 5. Write report
 6. Take action
- Create list of witnesses
 - Identify order of witnesses
 - Best practice: more than one person present during interviews
 - Take notes during interviews
 - Type up detailed summaries shortly after interview while memory is fresh

How to approach employee witnesses

- Formally v. informally
- Provide minimal details
- Accommodate scheduling if possible
- Ask for discretion

April 17, 2017

Dear Michael Scott:

Dunder Mifflin is conducting an internal investigation and would like to interview you in connection with this investigation on April 21, 2017 at 11:30 a.m. at Dunder Mifflin's office in Scranton, Pennsylvania to discuss any relevant knowledge you may have. The interview will be conducted by Toby Flenderson, Human Resources Director, and should take approximately 30 minutes. If necessary, we will schedule additional time to complete the interview.

We are conducting this investigation in response to complaints of inappropriate statements made during the company Christmas party. It is our policy to thoroughly investigate all complaints of employee misconduct and violations of company policy. Dunder Mifflin will gather all relevant facts through an impartial investigation and will carefully consider all evidence before making any decision. We will keep this investigation as confidential as possible.

Dunder Mifflin also has a strict policy prohibiting retaliation against any employee for participating in an investigation. If you believe you have been retaliated against for being interviewed or otherwise participating in this investigation, please inform Toby immediately.

[Although your interview will be conducted by an attorney, [NAME OF COUNSEL] does not represent you personally. [NAME OF COUNSEL] represents Dunder Mifflin, and will be conducting your interview to gather facts to provide legal advice to Dunder Mifflin. Your communications with [NAME OF COUNSEL] are protected by the attorney-client privilege, but the privilege belongs to Dunder Mifflin, not you. This means that only Dunder Mifflin may waive the attorney-client privilege.]

Dunder Mifflin expects you to cooperate fully in this investigation and to use your best judgment and discretion when discussing the investigation with others. If you have any questions or need to reschedule your interview time, please contact Toby as soon as possible. We appreciate your time and cooperation.

Very truly yours,

Name: Ryan Howard

Title: Vice President, North East Region



Steps:

1. Determine if necessary
2. Scope of investigation
3. Identify investigator
4. **Interview witnesses/review documents**
5. Write report
6. Take action

THE INTERVIEW

- Be professional and courteous
- Explain the scope of investigation
- Identify who investigator represents
- Take notes
- Ask for clarification
- Give opportunity to add anything else
- Notify witness of who he/she can talk to if remember anything further
- Explain next steps

Steps:

1. Determine if necessary
2. Scope of investigation
3. Identify investigator
4. **Interview witnesses/review documents**
5. Write report
6. Take action

- Do say:
 - Truth and candor are required.
 - Ask employee to cooperate fully.
 - Ask employee to use best judgment.
 - Ask for discretion in discussing the investigation.
 - Assure the witness no retaliation will be taken against him/her for participating in investigation.

Steps:

1. Determine if necessary
 2. Scope of investigation
 3. Identify investigator
 4. **Interview witnesses/review documents**
 5. Write report
 6. Take action
- Ask open-ended questions
 - Who, what, where, when, how, what happened next?
 - Stay focused on scope of investigation.
 - If something sounds fishy, follow up with clarifying questions.
 - Allow witnesses an opportunity to speak
 - Ask for corroborating evidence
 - Do NOT promise confidentiality

Steps:

1. Determine if necessary
2. Scope of investigation
3. Identify investigator
4. **Interview witnesses/review documents**
5. Write report
6. Take action

- Aside from introduction, do NOT answer questions regarding substance of investigation
- Do NOT get angry or emotional
- Do NOT provide legal conclusions

What if...?

An employee refuses to participate?

- Unless contract or union says otherwise, may compel participation.
- Consider progressive discipline.

An employee wants to record the interview?

- Consider whether recording the interview would have a chilling effect on witness.
- Want witness to be candid and truthful

What if...?

An employee asks to have a lawyer (or friend or family member) present?

- No obligation to allow employee's attorney (or others) to be present
- Often impedes the search for truth
- Confidentiality issues

A non-complaining witness raises his/her own complaint?

- Encourage witness to use company procedure for making complaints.
- Consider whether it is necessary to re-interview any witnesses

Steps:

1. Determine if necessary
 2. Scope of investigation
 3. Identify investigator
 4. Interview witnesses/review documents
 5. **Write report**
 6. Take action
- Organize collected information
 - Make credibility determinations
 - Make factual determinations
 - Prepare written report
 - **BE THOROUGH!!**

Steps:

1. Determine if necessary
 2. Scope of investigation
 3. Identify investigator
 4. Interview witnesses/review documents
 5. **Write report**
 6. Take action
- Report should contain:
 - Initial complaint
 - List of witnesses and summary of interviews
 - Summary of all evidence reviewed
 - Any evidence not reviewed and why
 - Suggested course of action (optional)

Steps:

1. Determine if necessary
 2. Scope of investigation
 3. Identify investigator
 4. Interview witnesses/review documents
 5. Write report
 6. **Take action**
- Determine proper response
 - Were allegations corroborated?
 - Were they disproven?
 - Was the employer unable to reach a definitive conclusion?

Allegations Corroborated

- Inform complaining employee and accused of investigation results
- How serious was the misconduct?
- Look to disciplinary policy
- Consider employee's disciplinary history
- Need to take prompt remedial action after close of investigation

Allegations Were Disproved

- Inform complaining employee and accused of investigation results
- Ask why employee made the allegations
- Do NOT retaliate
 - Exception = allegations were made in bad faith
 - Tread very carefully

Inconclusive Results

- Inform complaining employee and accused of investigation results
- Continue to monitor situation
- Change in supervisory relationships?
- Workplace training

Post-Investigation Take Aways

- Policy modifications
- Strengthen employee communication
- Additional training



Remember that a well-handled investigation can improve employee morale and productivity!



Questions?

