

Workplace Investigations Part I: Getting Started

For some companies, the strategic planning around the workplace investigations process is preparing for the day when the company receives a catastrophic misconduct allegation, such as the apocryphal whistleblower reporting that the CFO has been shredding financial documents. Otherwise, not enough thought is given to its role in the company's operations. This shows both a poor allocation of company resources and a lack of imagination. If a critical incident occurs, the company's response will take on a life of its own regardless of how much advance thinking tried to plan for it. If the situation happens a second time, the company may not survive, regardless of how the investigation is managed.

The truth is that employee misconduct is usually of a lower magnitude. It arises in the ordinary course of business. It is comparatively minor and foreseeable from a personnel-management perspective. But employee misconduct, especially when repeated elsewhere in the company, quietly bleeds the company dry one drop at a time.

The success of the workplace investigations process depends, in great part, on the role and profile of the compliance program in your company. The challenge for resources comes from the fact that compliance programs are not profit centers. And like other cost centers, there must be some legitimate business purpose for funding the program. If your company funds the compliance program simply out of fear of prosecution or because your competitors have these programs, the future of the workplace investigations process is precarious. Created in that context, the group's continued existence within the company depends on factors outside its control. Similarly, if the program exists without concrete expectations and metrics to measure its business value, the group is also at risk because its value depends on the perceptions of business leaders that will necessarily change over time.

Process Pointer: Devote some thought to the improbable goal of putting yourself out of business in your company. It will never happen, but it is a worthy goal. If you have such ideas as goals, it is more likely that you will get closer to that goal than if you do not.

Compliance officers and investigators must, if for no reason other than self-preservation, remember their obligation to contribute to the equity value of the business—increasing the returns to its shareholding owners—and this must be a fundamental operating principle. But remembering is not enough. Your executive management is going to have to be persuaded and periodically reminded that you are not just another layer of bureaucracy to be endured.

Process Pointer: Investigators and compliance officers need to demonstrate their value to the company constantly. They need to understand how business executives think. A discussion of the management mindset and ways to highlight your value may be found in Appendix A.

A) The Workplace Investigations Process

An examination of the workplace investigations process begins by answering some fundamental questions.

What Do We Mean by an “Investigation?”

An investigation is the systematic and thorough examination into something and the recording of that examination in a report. In the workplace, an investigation has four components:

- Thoroughly documenting incidents of actual or suspected misconduct in order to maintain a permanent record of their occurrence.
- Identifying the root cause of an incident where improper conduct is suspected.
- Identifying people involved in misconduct.
- Compiling information that proves or disproves an allegation or that implicates or exonerates someone suspected of misconduct. This is especially true if the investigation is used to justify disciplinary or similar post-investigation action.

Who are the Customers of an Investigation?

It is useful to use the term “customer” in referring to those who are part of your investigations process. Some employees may voluntarily seek your assistance, such as colleagues in Human Resources or executive management, to investigate a specific allegation. These people want help with a specific problem and seek a specialist to help them accomplish something. A “customer” is the executive manager who relies on the investigation’s findings to improve business processes. A “customer” also includes someone who is involuntarily part of the process, such as an implicated employee, reluctant witness, or a manager who would prefer to wish the reported problem away.

What is the Purpose of an Investigation?

A workplace investigation should seek sufficient credible facts to allow managers to decide what action, if any, should be taken in response to substantiated allegations. Responsive action may be divided into three broad categories:

- **Corrective Action.** Corrective action includes those steps taken to “fix the system” to minimize the likelihood of future wrongdoing or other undesirable events. Examples of corrective action include establishing, changing, or augmenting procedures; training; and implementing internal controls. Inspections or audits may be used to identify effective ways to address problems identified during investigations. Managers may decide to take corrective action even when the allegations cannot be substantiated but where a deficiency in internal controls is identified.
- **Remedial Action.** In some cases, the investigation reveals that wrongdoing or deficiencies in internal controls adversely affected the reporter or others. Although redress of wrongs is not, by itself, a sufficient reason to initiate a workplace investigation when other remedies are available, basic fairness requires that individuals harmed by improper conduct or unintended consequences of “the system” be restored to their prior circumstances whenever possible. This action is an important element of management’s response to a workplace investigation. Management may decide to take remedial action even when allegations of wrongdoing cannot be substantiated.

- **Disciplinary Action.** Disciplinary action is any action short of criminal prosecution taken against a person found to have engaged in wrongdoing. Disciplinary action does not include training, counseling, or performance-based actions. Disciplinary action, however, includes such actions as: admonition, reprimand, suspension, demotion, corrective action, written warning, or termination of employment. Although some may think disciplinary action by management is the primary purpose of a workplace investigation, corrective and remedial action is actually more relevant to the business goals of the company. In some cases, other considerations may dictate that no (or limited) disciplinary action should be taken in response to substantiated misconduct. (For example, to protect the integrity of the workplace investigations process, it may be necessary to forego disciplinary action in an unusual case to protect the identity of a reporter or other confidential source.)

What Matters are Appropriate for a Workplace Investigation?

An investigation looks into matters that have some relationship to effectiveness, efficiency, integrity, ethics, and public confidence in the company. Therefore, allegations that improper conduct has adversely affected the business effectiveness of a company department are proper for workplace investigations. Because your company should recognize that improper conduct is likely to adversely affect one or more of these areas, it should be policy that all non-frivolous allegations of improper conduct are thoroughly and impartially investigated and reported. Most of these allegations will be investigated internally. However, as discussed below, some allegations should be referred to others for investigation.

Workplace investigations focus on allegations of employee misconduct. The difference among companies often depends on how the company defines “misconduct.” If your company has a detailed code of conduct—and if the investigations function is linked to ethics training—then workplace investigations will follow the scope of the code of conduct.

Most codes of conduct are substantively identical. Specifically, misconduct falls within one of these specific categories:

- Accounting Irregularities
- Antitrust and other Competitive Issues
- Conflicts of Interest
- Confidential Information
- Employment Practices
- Fraud
- Insider Trading and Information
- Internal Business Operations
- Internal Workplace Conduct
- International Trade Controls
- Kickbacks and Bribery
- Misuse of Internal Company Systems

- Money Laundering
- Political Activities
- Records Retention
- Regulatory Noncompliance
- Retaliation against Whistleblowers
- Substance Abuse

The need for an investigation, however, does not arise simply because it is believed that your code of conduct was violated. Stated differently, the business value of the workplace investigations process should be more than just as an adjunct to the ethics process. The investigations function could be expanded to cover any of these issues:

- Deliberate or reckless attempts to circumvent normal business procedures or controls;
- Violations of Sarbanes-Oxley or any other law or regulation concerning corporate governance and oversight;
- Systemic or pervasive concerted action directed toward a group of people;
- Any involvement by a corporate officer or a member of the board of directors;
- Potential material financial impact to a business group or the company;
- Likely potential harm to the company's reputation or a risk of adverse publicity; or
- Likely potential for a significant lawsuit against the company.

What Matters are not Appropriate for a Workplace Investigation?

Certain allegations are not appropriate for a workplace investigation. Those types of allegations include:

- When certain allegations have been reported to the appropriate government authorities, such as major criminal activity and securities-law violations;
- Review of management business decisions, where there is no allegation of misconduct; or
- An individual's belief, without more, that he or she has been "wronged" by the "system." Company investigators are neither ombudsmen nor are they a substitute for management's dispute-resolution mechanisms, and they should not be used for that purpose unless there is evidence those systems are nonresponsive. Complaints from people seeking relief from adverse personnel or disciplinary actions, unfavorable findings in discrimination cases, or other matters for which a statute or regulation sets forth a resolution process, should be accepted for workplace investigation only when coupled with a non-frivolous allegation that management is unable or unwilling to address the matter fairly and impartially for reasons related to conflicts of interest or personal impropriety, such as retaliation for whistleblowing, or cooperating with an investigation.

B) Structuring the Process

To ensure both functional effectiveness and a proper use of company resources, the investigative function should

be tailored to your company's specific needs, depending on your company's history, industry, and key business risks.

Tailoring the Process

There is no “one size fits all” workplace investigations process. You need a process that your leaders believe will best prevent, detect and explain violations within the organization. Several factors will determine the contours of the process:

- Size of the organization. How formal and elaborate a process depends on the size, complexity and culture of your company. The industry in which your company competes should also be considered.
- The likelihood that certain types of misconduct may occur because of the nature of the company's business. When there is a substantial risk that certain types of violations may occur, management must develop a process that meaningfully detects and prevents those types of offenses.
- The company's history. This factor considers the types of offenses the company—or those of its competitors—should have taken steps to prevent in the past. Preventing the recurrence of known problems should be foremost in the minds of executives trying to make the investigations process effective and relevant to the company.

Process Pointer: Some companies establish or restructure their investigations process to respond to a particular corporate scandal the company just survived. While past history should guide you, do not rely on it exclusively as your function's reason to exist. The process should not simply react to a specific event, and it should be sufficiently forward-looking to have a strategic purpose for the company's future. This will ensure the long-term viability of the workplace investigations function.

Funding the Process

The principal resources of an investigations function are people, information, physical assets and financial assets. The determination of the primary focus of the function dictates how the function is structured and how resources are allocated. The amount of resources the company is willing to dedicate to the function determines how many investigators can be hired, what technology and equipment can be acquired, and even how high a corporate profile can be maintained.

Investigation funding is challenging because needs may be difficult to project and the investigation process is a reactive one (depending on the volume and type of reports received). One complex investigation, especially if it requires the engagement of outside experts, can skew the budget projection—or overrun—for a particular year.

One of the best ways to help fund the process adequately is to show the value contributed to the company or demonstrate that the process pays for itself. You may strengthen your budget justifications with any of the following:

- Focusing investigative goals on the company's strategic and business needs;
- Tracking historical investigations costs accurately;
- Implementing cost-effective strategies;

- Pursuing restitution and recovery where possible; or
- Quantitative estimation of risk avoidance.

Formal Corporate Policy

If your company does not already have one, you need something from your company's board of directors or executive management to give you the necessary corporate authority to establish your process. The policy document serves as a statement from your company's leadership that the company affirmatively mandates the investigative process and that primary responsibility for this function is placed with you. A sample corporate policy may be found in Appendix B.

The statement gives the workplace investigations process credibility and authority in the company. A good policy also addresses functional needs. The policy should make your group responsible for the reporting to the company leadership of all misconduct-related matters. Even if fact-finding is handled by other departments in certain cases, all upward reporting should be done through your group.

Employees should be obligated to report matters of suspected or actual misconduct as part of their job responsibilities. Some companies give employees a number of places to report the incident, and others direct the employee to their whistleblower line. (The use of the whistleblower line is valuable when an employee wants to report misconduct but wishes to remain anonymous or feels uncomfortable using his own management chain.) There should be some internal mandate to speak up, or the workplace investigations process may not be able to detect something that might be going on because people didn't want to get involved or believed that nothing would be done.

Your group must conduct the investigations of any non-routine matters. (A non-routine matter is something that is not suspected to arise in the ordinary course of business.) Key internal departments like Human Resources should continue to handle the garden-variety personnel management matters they usually do.

Your group should be empowered to specify both the investigations process for the company and the investigation protocol to be followed. This will create the investigative benchmark for the company. Deviations from the standard are permissible as a particular investigation requires, but these articulated standards at least ensure that the deviation was the result of an informed decision and not inertia, indifference or bureaucratic turf.

The policy should specify periodic upward reporting obligations. There should be reports submitted monthly or quarterly so your company's leadership can assess the company's ethical health and areas of unacceptable business risk. (It will also let you continually showcase the value of the workplace investigations process to the company.)

The corporate policy should specify the basic structure of the workplace investigations function. But regardless of its precise contours, there are still certain considerations common to any company's investigation process, which the policy should address:

- What misconduct will trigger an internal investigation?
 - To whom should the incident or misconduct be reported?
 - When should an investigation begin?
 - Who should conduct the investigation and how should it be conducted?
 - What should be the purposes of the investigation?
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- What types of disclosures outside of the workplace investigations process are necessary?
- What are the obligations of employees to report concerns, cooperate with investigations, not interfere with the investigation process, and be truthful when providing information to investigators?

Process Pointer: If you can't get a board-of-directors mandate, why bother having a robust process? You then care more about the risks to the business than they do. You cannot survive without the board as your advocates.

You may also want to create your own Mission Statement to define—and clarify—the workplace investigations function's specific role in your company. A sample may be found in Appendix C.

Independence

An investigation cannot even appear to be influenced by management. The independence of the investigations process ensures that the results are a fair determination of the facts learned. The company should consider placing the responsibility in an independent department outside the regular management structure, such as an independent compliance department. Interference for any reason, whether regarding timing, methods, witness selection, determination of documents to scrutinize or ultimate determinations reached destroys the credibility of the investigation process. The process will be viewed as an inquisition, a management tool, or just irrelevant to the business. It will also increase the risk of liability to the company.

Consistency

Responses to allegations must be procedurally consistent and predictable. Employees must believe that the response to a report of actual or suspected misconduct will be handled the same regardless of the implicated person's management level.

Navigating the Political Winds

A workplace investigation occurs within a matrix of competing business interests. Inside the company, the boards of directors, the audit committee, management, employees and shareholders often have different goals and perceptions of their interest. Players do not always put the company's interests above their own personal or professional goals. Outside the company, competitors, the press, the company's auditors, the market, and the government all have varying motives and concerns.

One of the most important things you can do is convince upper management—and the board of directors if necessary—of the importance of understanding and solving the problem under investigation. This is crucial to obtaining adequate resources and authority for the investigation and to obtain proper credit for helping the company deal with the problem.

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