Creating an Organizational Investigations Program and Conducting Effective Workplace Investigations


Introduction

The use of investigation as a sword to ferret out and cut down wrongdoing remains far more important (and more common) than the use of an investigation as a shield from liability. A good investigation can act as a shield, bolstering a company’s defense and helping to avoid liability or mitigate damages. However, it is far more common that an investigation is a sword to find and cut out wrongdoing in an organization before an outside party or agency comes in.

Complaint intake and investigation are a company’s first (and possibly only) opportunity to hear about an allegation, check it out and, as necessary, fix it. No compliance program is foolproof—there is always some person that slips through the cracks and behaves badly (often called the “bad apple”), or some system of controls that breaks down. While much of ethics and compliance is about prevention, detection is its twin, and the best tools of detection are often effective complaint intake and investigation. In hindsight, a government agency, judge or even jury will ask of your investigation: What did you know?, when did you know it?, how quickly did you undertake an investigation?, was the investigation adequate?, and did you detect and adequately address any wrongdoing in a timely and appropriate manner?

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There are certainly many familiar cases in the news about recent organization ethics and compliance failures related to financial misconduct, intentional misleading of investors, and bribery and other unseemly corporate conduct. In our experience, however, the vast majority of workplace investigations are related to employee or external party behavior allegations: harassment, discrimination, retaliation, threats and violence, theft and the like. Although it is the rarest case that an investigation is ever examined by a government agency, judge, jury, or the public, it is certainly the business ethics and compliance matters in areas such as financial misconduct, investor relations, bribery, corruption, and the like that have the greatest potential for external scrutiny. Thus, having an effective framework for complaint intake and investigations is not as much about the liability shield; rather it helps an organization cut down risks at an early stage, manage employee and external issues, and message the expectations employees and the public can have about how the organization manages such matters and those involved.

The framework and tools for investigations should reflect the values, philosophy, risks, and goals of the organization. In order to make good decisions, you need information. Complaints and investigations provide access to information and can be valuable tools in analyzing data, correcting problems early, and spotting possible trends. The following chapter discusses both how to approach and undertake the creation of an organizational investigations program and how to move from complaint intake through an actual investigation, including interviewing witnesses, analyzing data, writing a report and monitoring future compliance.

Creating an Organizational Investigations Program

Regardless of the organization’s size, most organizations have investigations occurring—whether as part of a structured and thought-out formal program by trained personnel, or as done on the front line by managers who hear issues of concern. Therefore, it is important to identify the current personnel who undertake organizational investigations and get their input, buy-in, and alignment as you seek to create a formal organizational investigations program. Further, organizations should consider any change management needed to move from the current state to an implemented investigations
There are several basic steps to undertake as organizations consider and develop an organizational investigations program:

- Identify the organization’s information points and possible sources of information for issues and complaints of all types;

- Identify the investigations framework currently in place;

- Conduct a skills assessment of those who have or could potentially be asked to conduct investigations and develop or identify a training program for internal investigators;

- Design or evaluate the investigations framework, with an eye to the organization’s risk profile;

- Consider the organizational philosophy and strategic goals regarding investigations and the rights and expectations of witnesses and investigators;

- Consider with other key risk-management functions whether any additional policies or procedures are needed and develop accordingly with any necessary training modules or implementation support;

- Schedule a timeline for the implementation of the investigations framework considering existing investigative activities (and the input and buy in of those stakeholders) and organizational culture with change management in mind; and

- Implement the designed organization structure, measure and monitor effectiveness, and adapt to changes in organization and environment as needed.

In addition to these steps, there are a few other matters to consider in creating an investigations program including: the need for an investigations case management system, the issues of attorney-client privilege, the possibility of the need to report an issue to a government agency, and global issues. Each of these will be discussed further below.

What Are the Organization’s Information

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Employees always have information about where the issues and systems breakdowns are; the real trick is obtaining and effectively harnessing that information. Effective Ethics and Compliance functions tap into the organization’s many information sources and provide employees and others a safe place to share important information about suspected problems and issues. Then the organization must have a mechanism to sort the chaff from the wheat to determine which information and issues merit investigation and manage those investigations accordingly.

Thus, the first task for organizing an investigation framework is to identify the various information points in an organization (those persons and functions likely to be frontline recipients of complaints and reports). Following, the Ethics and Compliance function should create or utilize the various paths to reporting and encourage that reporting. Finally, the organization must determine how and where to handle the different types of investigations.

Organizations need to consider, based on their size and organizational structure, where there are information points for employee complaints. Most organizations have a variety of sources of information and information points which will include some or all of the following:

**Possible Issue Information Sources**

- Employee or partner/vendor background checks;
- Personal reporting by an employee, vendor, consultant or other party to a manager to or to human resources, security, compliance, management or other personnel;
- Compliance helpline reporting (phone/electronic);
- Workplace rumors;
- Audit reviews;
- Expense report incongruities;
Calls, emails, or letters from friends/family of employees or vendors, consultants, partners or competitors;

Anonymous calls, emails, texts, or letters;

Websites, blogs, apps, and other social media posts/communications;

Exit interviews;

Information from the Employee Assistance Program;

Contact from law enforcement, government investigators, or news personnel;

Employee disciplinary actions;

Litigation trends;

Liability insurance trends;

Risk assessment or other employee surveys; and/or

Other sources.

Increasingly, because social media channels allow such broad communication by nearly anyone, it is important to consider whether and how to engage in social listening/monitoring about issues which may be published about the organization. The reality is that much information about possible compliance violations or issues is still transmitted directly person to person and the company and Ethics and Compliance function need to take care to ensure that the information makes its way to the appropriate location for issue management, investigation, and resolution. It is important for the Ethics and Compliance function to have insight into these reporting avenues and understand who controls the information flow from them. Based on that assessment, the organization needs a mechanism to make decisions about which matters need to be funneled where and create effective processes or procedures to ensure proper handoff.

Once the information sources are determined, and the investigations program is designed, it is important that — at a minimum — those persons in a position to receive information related to complaints or possible ethics and compliance issues be trained on:
1. Spotting the issues and the significance,

2. Responding appropriately to the person raising the complaint, including addressing employee concerns about confidentiality,

3. Getting the issues to the right party to manage and possibly investigate in a timely fashion, and

4. Preparing for ongoing monitoring to ensure that the issues have been effectively resolved and no retaliation is occurring.

**Conducting an Investigation Skills Assessment**

In addition to identifying the key organizational information points, it is important to understand the current skill set and experience of those in the organization as to investigations. Those skills may exist within the organization and/or with outside investigators the organization may opt to utilize. Regardless of whether investigations are to be done by internal or external resources, it is important to understand the skills and experience of investigators working on behalf of the organization and develop a training/onboarding program to ensure they are acting in a manner consistent with the organization’s intentions and desires as they are the front line in contact with persons providing potentially critical information and how they manage the person reporting and this issue can have significant consequences for the organization and its reputation.

A checklist for assessing your organization’s investigations capabilities is included at the end of the chapter as Appendix 3-R. It covers the subject matter expertise or function of the person, the level of experience and number of investigations in the past year, and the subject areas of those investigations. In addition to these items, you may want to ask about the outcomes of these matters and how they typically document their findings and conclusions and/or track and compare their investigations in each function. This assessment can be helpful in determining the ultimate structure and personnel for the investigations program, and how to help develop the necessary skills for the future.

**Designing or Evaluating an Investigations**
The Ethics and Compliance function is rarely resourced enough to conduct every workplace investigation—nor is that a requirement or necessity for an effective program. What is critical is that the Ethics and Compliance function have insight into the types of investigations being conducted in the organization with some nexus to the compliance function, and that it has the opportunity to provide insight and oversight into the management of such investigations to ensure appropriate management and effective and consistent responses to issues, particularly those of a higher risk profile such as executive misconduct allegations, financial misconduct, fraud and bribery claims. At the very least, the Ethics and Compliance function should be involved in the creation of any investigations policy, standard operating procedure for report intake, and investigator protocol, and in the communication loop as to ongoing investigations and participate in monitoring resolution of the issues.

Ultimately the structure of an investigations program is a question of oversight, roles and responsibilities. Once the information points are identified, decisions must be made as to which matters will be investigated and which teams will be responsible for each type of investigation. For example, some organizations have determined that investigations about claims of discrimination, harassment and the like should be managed by the Human Resources and/or Employee Relations functions, while issues of fraud, abuse and corruption likely need someone with more general compliance experience or oversight. Regardless of the division, it is important that the Ethics and Compliance function have, at least, visibility, communication and coordination with those conducting all types of investigations as issues often are not clear cut. Nonetheless, each report of actual or suspected misconduct must be resolved appropriately.

Structures to consider for an investigations program include: Centralized Investigations Management; Semi–Centralized Investigations Management; Decentralized Investigations Management; and Outsourced Investigations Management. The formats might look something like one of (or some variation of) the following:
<table>
<thead>
<tr>
<th>What Type of Investigations Program Is It?</th>
<th>Who Performs Investigations and Training on Conducting Investigations?</th>
<th>What Is its Relationship to Ethics and Compliance Function?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Centralized Investigations Program</td>
<td>All investigations are performed by one central investigations group who trains its investigators on conducting investigations.</td>
<td>The investigations group is either part of the Ethics and Compliance function or reports its investigations findings to the Ethics and Compliance function.</td>
</tr>
<tr>
<td>Semi-Centralized Investigations Program</td>
<td>Investigations are performed by more than one group, depending on the nature of the allegation, and training on conducting investigations is done by each group for their own investigators.</td>
<td>Each investigations group reports in some form to the Ethics and Compliance function about the investigations they complete.</td>
</tr>
<tr>
<td>Decentralized Investigations Program</td>
<td>Individual groups perform investigations and training (if any) on how to conduct investigations.</td>
<td>There is little or no reporting to or oversight from the Ethics and Compliance function.</td>
</tr>
<tr>
<td>Outsourced Investigations Program</td>
<td>Skilled external resources perform investigations.</td>
<td>There is oversight by organizational functions, which may include subject matter experts such as Employee Relations and/or Ethics and Compliance.</td>
</tr>
</tbody>
</table>

In all of these structures, there is also the question as to the role of Legal. It is best practice to have a trained attorney involved and/or responsible for the oversight of investigations to assist in managing the legal considerations and to help ensure the process of an investigation is thorough, programmatic, and defensible. Again, those matters with a higher risk profile, and the possibility of the requirement for public disclosure, should generally involve in-house and/or outside counsel at some point; these would include matters of financial misconduct, as well as allegations of fraud, bribery and the like. The attorney involved should also have his/her own skills and experience conducting...
investigations so that the oversight and assistance is tailored to the organization’s investigative needs.

Creating an Internal Investigations Philosophy and Policy Reflecting the Investigations Program

At the very least, organizations should develop a philosophy around how internal investigations are to be accomplished and the methods and means which are considered appropriate or not. The philosophy should address some basic questions such as will a subject always have an opportunity to respond to the accusations, is one “innocent until proven guilty,” and what techniques are acceptable for investigators.

This includes:

- Investigation processes and standards;
- Qualifications, expectations and authority of investigators;
- Treatment and expectations of witnesses;
- Issues of cooperation and confidentiality;
- Communications related to the investigations and to whom;
- Investigation working papers, draft reports, final documents;
- Access to investigative information and files; and
- Appropriate retention and destruction periods for investigative data.

Organizations also should consider implementing a written policy and procedure on internal investigations to address some or all of the following matters:

The investigation process and standard

- What is an investigation?
○ Who is authorized to conduct investigations? In what areas?

○ What is the investigator’s role (i.e., neutral fact-finder, decision-maker)?

○ What rights do witnesses have (including access to information about the allegation)?

○ What is expected of witnesses (e.g., cooperation, confidentiality, evidence preservation)?

- Reporting/communicating about investigations to senior management/others

- Complaint reporting channels (where and how complaints can be made)

- The policy against retaliation/retribution.

A Sample Internal Investigations Policy is included at Appendix 3-S.

Confidentiality

Organizations have long recognized the critical importance of maintaining confidentiality with respect to internal investigations. Confidentiality is important to protecting the integrity of evidence and the investigation itself. It can help minimize the possibility of retaliation against reporters and witnesses, and of employees’ tampering with evidence or speaking to potential witnesses before the company’s investigators have an opportunity to do so. It also respects the privacy rights of the employees involved in the investigation. However, the National Labor Relations Board (NLRB) has called into question company practices of requesting blanket confidentiality for all internal investigations.

In the case of Banner Health, the NLRB found that an organization’s interest in maintaining the confidentiality of all investigations is insufficient to outweigh employees’ Section 7 rights to concerted activities for their mutual aid and protection. In order to minimize the impact on Section 7 rights, the NLRB held that companies must first establish, with respect to any particular investigation, that confidentiality is appropriate because of the need for witnesses or evidence protection, or for some other legitimate business
Organizations should consider the *Banner* decision in formulating their investigations procedures. It should be noted that the scope of the ruling applies only to non-management witnesses. More specifically, investigations procedures, such as the standard instructions given at the beginning of an investigative interview, should include consideration of the need for confidentiality (and, where there is a need, documentation of that) with respect to all investigations.

Creating a Case Management System for Investigations

Another important consideration in the creation of an investigations program is whether to implement a case management system for documentation of organization investigations, and, if so, what type of system. These systems can range from a simple Excel spreadsheet, documenting relevant information about such investigations, to home grown databases, or off-the-shelf or customized solutions provided by large vendors for investigation tracking, management, and report generation. While these case management systems can help with tracking metrics and identifying trends, they also are potentially discoverable in the event of litigation. Consider both the value and risk of having such a system and then determine the desired content and access rights.

Issues of Attorney-Client Privilege

Because the vast majority of investigations involve claims of harassment, discrimination, retaliation, threats and violence, theft and the like, generally an investigator need not be an attorney. However, there may be times when an organization determines that because of the risk profile of the allegation, the use of an attorney (external or in-house) as an investigator or an outside investigator working at the direction of in-house counsel is desired in order to create the attorney-client privilege for the investigation content. Notably, in many cases, the organization may later determine that it wants or needs to waive any privilege (for example when the organization discloses a compliance issue to a government agency and seeks leniency).
An important point should be stressed here. It is the purpose of the inquiry and not the job function of the investigator that is dispositive. In other words, a lawyer who conducts the investigation is doing so because of his/her skills and experience, not necessarily his/her job title.

An organization is entitled to the protections of the attorney-client privilege. The privilege belongs solely to the corporation, not to any specific employee. There are several factors relevant to the availability of the attorney-client privilege in the context of a workplace investigation:

1. The communications were made by organization employees under instructions from superiors in order for the organization to secure legal advice from counsel;

2. The information needed by organization counsel in order to formulate legal advice was not otherwise available to executive management;

3. The information communicated concerned matters within the scope of the employee’s corporate duties;

4. The employees were aware that the reason for the communication with counsel was to enable the organization to obtain legal advice; and

5. The communications were ordered to be kept confidential and they remain confidential.

The attorney-client privilege only protects the investigation communications from discovery; the underlying information contained in the communication—witnesses and business documents—is discoverable; the privilege does not extend to the underlying facts.

Communications that merely transmit business-related facts may be discoverable, because the privilege most often applies to requests for legal advice. The transfer of non-privileged documents from the corporation to the attorney similarly does not make the documents privileged. Communications made for purposes other than to obtain counsel’s legal advice, including communications made to third parties, are not privileged. Consequently, simply funneling communications through a lawyer will not shield an investigation from disclosure because communications for business purposes are not privileged.
Attorney involvement in investigations can be tricky. Even if the attorney takes all appropriate precautions to maintain the privilege, a court may later determine that the communications at issue are discoverable (because, for example, the court may determine that the communications relate to business and not legal advice). In addition, government agencies may demand access to privileged reports as a form of cooperation when an organization seeks leniency for a detected ethics and compliance failure.

Attorneys who conduct investigations should be careful to explain their role as attorney for the organization (and not as attorney for the employee) to those employees whom they interview. Attorneys conducting investigations should always consider and determine when and how to provide appropriate warnings to witnesses about their role. While these so-called Upjohn warnings can take many forms, a sample of the suggested content is provided in Appendix 3–T.

The work product doctrine may also apply to shield materials generated in the context of internal investigations from disclosure. This doctrine protects documents and other tangible items that were generated in anticipation of litigation by or for the company or its representative. Thus, if there is a reasonable prospect of litigation related to the matter under investigation, the work product protection may apply.

Conducting an investigation subject to the attorney-client privilege is done because the purpose of the inquiry is to allow the organization to receive legal advice and not for risk- or personnel-management. It is not just because the investigative issues are sensitive. It’s because the investigation purpose is different that the common compliance matters.

**Reporting an Investigation to a Government Agency**

As discussed above, in certain cases an organization (particularly those publicly traded on the U.S. stock exchanges) must disclose organizational ethics and compliance failures in public filings and by contacting government agencies to report the matter. Certainly, publicly traded companies should consult with legal experts on the likely circumstances for such disclosures, including but not limited to financial misconduct, certain conflict of interest situations, or bribery and corruption. But they should also ensure that before an investigation
occurs in any realm with the potential for such a disclosure, they have appropriate mechanisms in place to investigate and manages such claims and connect with in-house and outside legal experts promptly before undertaking those investigations.

Global Issues

There are several important issues to consider in an investigations program if your organization has a global reach. Knowledge and understanding of the local culture, local laws and regulations, and sensitivities around witness questioning and other behavior in a location is helpful. Likewise, language barriers and possible translation issues must always be considered in global investigations. All of these can be important factors in choosing the right investigator. Further, data collection, privacy concerns, and employer/employee rights can be significantly different around the world and must be considered and understood for any location before an investigation begins. Additionally, not all jurisdictions recognize the attorney-client privilege of in-house attorneys.

Conducting Effective Workplace Investigations

Once the investigations program structure and philosophy have been established, the actual investigation must be conducted. The first step for any investigation is receipt of the complaint and complaint intake. Then a decision must be made as to whether an investigation is required or desired. Finally, once a decision is made to investigate, the appropriate investigator must be selected, and the investigation should be planned and begun. Each of these steps in the process is discussed further below.

What Is 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 basic 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 the improper conduct occurred,

• Identifying people involved in misconduct, and

• Compiling information that proves or disproves an allegation or that implicates or exonerates an employee suspected of misconduct. This is especially true if the investigation is used to justify disciplinary or other post-investigation action.

What is the Purpose of an Investigation?

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

• Corrective Action. Corrective action includes those steps taken to “fix the system” to reduce 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 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 the wrongdoing or deficiencies in internal controls adversely affected employees. 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 includes such actions as: admonition,
reprimand, suspension, demotion, corrective action, written warning, and/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 organization. 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 whistleblower or other confidential source.)

**Tailoring the Process**

There is no “one size fits all” workplace investigations process. The right process for an organization is one which management believes will best prevent, detect and explain incidents of non-compliance within the organization. Several factors will determine the contours of the process:

- **Size of the organization.** How formal and elaborate a process is depends on the size, complexity and culture of the organization. The industry in which the organization competes should also be considered.

- **The likelihood that certain types of misconduct may occur because of the nature of the organization’s business.** When there is a substantial risk that certain types of violations may occur, management must develop a process which meaningfully detects and prevents those types of offenses.

- **The organization’s history.** This factor considers the types of offenses the organization—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 managers trying to make the investigations process effective and relevant to the organization.

**Business Goals of an Investigation**

The investigations process has its own business objectives. An understanding of these purposes helps establish the workplace investigations process in the organization. Investigators are no different than any other organization employee; the investigator’s job is to serve a business purpose designed to
Business-Focused Objectives. No investigation of any complexity can be successful unless specific objectives are determined in advance. The objectives of the investigation decide the investigation’s starting point and where it is intended to finish.

Properly articulated objectives actually protect the organization. They lay a defensive foundation against possible claims later on that the investigation was improperly motivated, a “witch hunt” or a rambling inquisition against imagined wrongdoing with no beginning or end. The organization is protected when it can be demonstrated that, from the beginning, the intentions and objectives of the investigation were legitimate, professional and proper.

Identifying the Truth. Many organizations treat the fact-gathering process to investigate a misconduct allegation as just a personnel-management matter. There is often little focus on professional fact-gathering in methods, which tend to assure the credibility of the evidence. In the absence of a professional process—one that can be examined to determine the equity of the process and outcomes—the accuracy of the fact-gathering, other than as a way to justify terminating employment, remains a shortcoming in many organizations.

The context in which the investigation is conducted must be to answer two basic questions: what happened (the truth) and why did it happen? The investigative process determines the facts which are sufficient to cause a reasonable person to recognize that the true facts are what they are reported to be.

In a misconduct investigation, the accusations must be credible, relevant and truthful to bring the level of proof to a standard where management should be expected to conclude whether a business-conduct standard was violated. The investigation also determines whether any other people were involved besides the Subject. By identifying the Subject’s modus operandi if misconduct is proven, the investigator will identify gaps in internal controls.

Establishing Accountability. An investigation establishes accountability as to how an event happened and what mitigating circumstances may exist that affected the outcome of the event. The investigation does not critique management style unless specific management actions contributed to the circumstances that permitted the incident being investigated to occur.