Compliance investigations, step by step

By Gail Gibson

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Businesses regularly confront allegations of internal misconduct. These allegations can involve breaches of the law or the business’s policies or procedures. The first basic step is to determine if a misconduct allegation has merit and if a comprehensive investigation is required. The compliance officer, human resources management, privacy and security officers, legal counsel, and others may bear responsibility, either individually or collectively, to resolve issues and problems arising from concerns, complaints, and allegations.

If the compliance function receives the whistleblower complaints, then the compliance process begins with the steps to determine if an investigation is needed, the cost effectiveness, and in which area the steps required should be done.

Step 1: Assessing credibility

Look carefully at the person or persons reporting the misconduct. If the whistleblower is anonymous, see which department these allegations stem from. Do you think this information is due to personal feelings or professional jealousy? Normally if the allegations are specific and the reporter(s) do not have a stake in the outcome, then there is a likelihood that the allegations have merit.
Do your homework before action is taken: Investigate both the reporter, if known, and those suspected of misconduct. This may include the review of personnel records, criminal and civil litigation histories, media research, and analysis of social media.

For example, if the allegation is fraud, then this investigation may show the subject of the investigation and their family members have multiple business affiliations or own homes, vehicles, and other assets that are not commensurate with the income they receive. Another red flag is travel to expensive resorts and exotic places.

At this point, avoid talking to the persons concerned. Confronting someone suspected of wrongdoing may give them the tools they need and time to create an alternative explanation or sufficient doubt and confusion to unravel the investigation. It can also provide the suspect with enough knowledge to notify others involved who can then cover their tracks. Make sure the wrongdoer is only confronted when the time is correct and the situation is manageable. (Suggest all concerned are immediately removed from the workplace and have limited or no system access.)

Doing a high-level investigation may show that those suspected of misconduct are not in fact culpable of any wrongdoing and can save valuable resources. Such an investigation can protect the business from negative effects of declining staff morale. This reaction will prove the value of a proactive compliance reaction to a situation, which does not simply allocate blame but finds solutions.

**Step 2: Obtain and review all pertinent data and documents**

Compliance’s primary function is to protect the business itself. Compliance is not a policing authority. Keeping business needs in mind, consider certain facts:

- Is the situation a potential violation of a company policy? The chances are that this can be handled by a department other than compliance.
  - Refer the situation to the correct department.
• Is the situation a violation of the law?
  ◦ What is the risk and liability to the company and its employees?
  ◦ What are the international issues and concerns around the facts?

Compliance needs to complete this step before deciding on an investigation based on the facts before them.

A simple disciplinary action by HR will be less costly than a compliance-run investigation and may have the same outcome. The aim of this investigation will always be to protect the business in the most cost-effective manner at that point. If the situation must be taken further, then step three will be needed.

**Step 3: Preliminary investigations**

When compliance determines there is a potential case, then compliance should begin a preliminary investigation in which they:

• Conduct discreet background research on significant parties and subject(s)
• Interview knowledgeable persons
• Assess if internal controls and procedures can be improved to avoid future problems

If this investigation shows the matter must be reported to a regulatory authority, then compliance must determine if the authority will establish the scope of the investigation.

**Step 4: Start the investigative process**

If an investigation is needed, then the following must be planned:

• Strategy for the investigation
  ◦ External and internal resources required
  ◦ Available resources
Budget

- Documents needed for the investigation
- What standard should be used
  - Will compliance or audit analyze the facts, assumptions, and perceptions related to investigation?
  - What are best practices?

At this point, compliance should ensure they draw up an action plan focusing on evidence needed. Interested parties, such as internal audit or forensics, should be consulted. An action plan determines what evidence is needed—what will be considered proof, and how to keep the correct standards in handling this proof—and the areas to obtain the evidence.

In some cases, sufficient evidence may have been obtained from this process that warrants a referral to a prosecutor. The process is halted at this point, and the HR process will be entered into for the situation.

If the case continues, then a case supervisor should be assigned and the required professionals appointed to conduct the investigation according to the criteria now in place. Professionals may include accountants, computer forensics experts, and legal input. Ensure resources are available for this team to carry out the investigation.

Compliance in this step ensures that the investigative plan is thoughtful and sequential. If the situation involves fraud matters where material funds are at issue, compliance or the risk function should determine whether the organization has fidelity insurance available to cover losses attributable to the crime and misconduct. If so, make a timely notice of a possible claim.

**Step 5: Begin the investigation**

The investigation proper begins with a briefing on the matter. Guidelines are given on how to:

- Interview subject(s)
Create the paper trail (e.g., collect the evidence, create reports)

It is only after the evidence is checked to confirm validity that the confrontation of the wrongdoers should start.

**The interview**

Planning for the interview should be done in some detail. Consider the following steps:

- Interview process—location and persons to interview and by whom they will be interviewed
- Interviewing style of each interview
- Interview questions for each interview
- Interview conclusions—the process to be followed if a situation is present

Anyone subject to an investigation should be reminded that they are free to retain independent counsel if they so choose. A good investigator asks several questions where the answers are already known. These answers were predetermined as a result of the evidence gathered. This approach helps an investigator understand the motives and truthfulness of the person being interviewed. Investigators may also use the good cop/bad cop method to obtain information.

All important interviews should be conducted by two investigators and performed in a comfortable and nonconfrontational setting. Ensure one of the interviewers is of the same sex and race as the person being interviewed. If the case deals with allegations of religion, then the same concept should be undertaken.

If there is a recording process, ensure all the persons concerned consent to taping or recording the interview. Try to interview the key suspects at the same time so they can’t coordinate their responses. If prior to the interview the evidence indicates the requirement to terminate the employee contract, then set your termination plan in motion several days before the interview. This will require an immediate stop for the suspect’s access to the IT network and building access. The employee should also be issued a list of all equipment that should be returned, and coordination with company security staff must be
undertaken. A written report signed by all parties involved must be made for all interviews that cover all key points derived from the contact.

**Step 6: Create the paper trail**

All communications, evidence, and reports should be stamped, logged, sequentially numbered upon receipt, and properly maintained in the investigation case file.

**Key elements of a good report**

A good report may be done using an established template for a compliance report. This promotes consistency. The following aspects should be included in the report.

1. The report structure should include all names and contact details of the affected persons concerned and their job status. Employment hire dates are a suggested addition to the report, because this aids in the investigation where continual malpractice has been done by the employee.

2. It should have the details of the investigators and their contact details.

3. There should be a description of the allegation itself.

4. It should include the investigation scope.

5. Action numbers should be assigned to the different actions in the investigative process.

6. A credibility assessment of the various interviewees should be included as well as incident overviews and conclusions. The interview parties should be identified, and the address and time of the interview should be documented.

7. An “impact on business” section should be completed.

8. An exhibit list should be compiled for evidence.

9. Recommendations should be included with an organizational action plan.
Before submitting a written report, a verbal briefing on the findings and recommendations for final corrective action may be given to the interested parties. This will also permit taking additional investigative steps if needed. It may be that a report must first be issued to the regulatory authority for consideration and that no further report will be allowed for release due to the sensitivity of the material or situation.

The written investigation report should include a summary of the individual’s complaint, a chronology of events, the investigator’s findings/conclusions, and, as appropriate, recommended actions with specific responsibilities assigned to managers to ensure implementation.

**Tailoring the report**

If potential legal issues exist, the report should be provided to legal counsel for appropriate action. Under those circumstances, it will be the responsibility of legal counsel to report and advise management about the facts, circumstances, and alternative courses of action. The report should be adjusted to an abbreviated template for reporting to the board and other parties.

**Step 7: Utilizing documents for intelligence**

The documents created should be used as a learning tool for the compliance function. First, the holes identified should be fixed. Processes should be tuned. This may mean employee onboarding or controls are affected. Issue a final compliance report showing the steps that were taken, the facts found, and the conclusions reached. To avoid negative morale, it may be advisable to officially inform the business of the situation in a factual manner and explain that certain applications or controls are being changed. No names should be mentioned in this process.

**Communications in investigations**

Compliance should have a working knowledge of the psychology in communicating investigations. Being discreet is critical, so limit the sharing of information. Understand the phenomenon where when you tell people not to talk about things, they will absolutely talk about things; the old adage that “a lie will travel around the company faster than the truth will get its boots on” is
absolutely true. Rumors disrupt an organization’s employee morale and productivity.

**Ethics of the investigation**

To prevent individuals reporting externally, it is critical to have a credible investigative response to information received, regardless of the source. Properly trained internal investigators can reduce the exposure to lawsuits, litigation, and governmental adverse actions.

If someone requests the presence of an attorney, the interview should be conducted only with the presence of their legal counsel. Legal counsel should advise the employee of the seriousness of the matter and the organization’s policy or obligation to disclose the result of its investigation to the government. Procedural fairness processes should be followed when dealing with represented employees. Factors related to misconduct should be given with respect for the person and their innocence assumed until proven guilty.

**Confidentiality**

All information gathered during the investigation must be held in confidence, following a “need to know” standard. Every effort must be made to protect the privacy of those contacted during the investigation. Privacy and confidentiality exist when there is attorney-client privilege, and this should not be deliberately broken by compliance.

**Takeaways**

- Compliance investigations should follow a process that is predetermined yet flexible.
- Whistleblowers may not operate out of altruistic feelings, yet confidentiality is paramount.
- An investigation requires resources and evidence to be valid.
- Evidence must be suitable for the purpose it is collected for, and this should be agreed with legal counsel or forensics.
• The interview process needs careful pre- and post-preparation to be effective.