

**Workplace Investigations:
*Understanding the Process and the Complex Dynamics***

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Leaders of organizations find it difficult to decide whether or not to initiate an internal investigation for a host of reasons, ranging from concern over employee relations, a discomfort in investigating other employees, to a belief that the leader must take action if something is learned. It is important to recognize that these “psychological influencers” and others can adversely affect the decision making process. In addition to psychological influencers, there is a misperception of the investigative process and a lack of appreciation for the human dynamics. We will discuss some of these psychological influencers and describe the investigative process, which will illustrate the complex dynamics of undertaking an internal inquiry within the workplace. This document will allow organizational leaders to fully appreciate such an important undertaking.

First, no one enjoys hearing negative claims about their organization or its members. People feel a sense of profound disappointment of being a part of an organization where there are allegations of dysfunction, incompetence, disloyalty, disrespect of others or criminality. When we do learn of such claims of behavior, the allegations become an attack on the organization and its leaders. Because of these feelings, leaders need to be abundantly cautious by executing the appropriate strategy and not an emotional response.

Leaders tend to undergo a discernment process after the disclosure of an allegation. For the most part, leaders will intellectually attempt to assess the claim, categorize the data and then base a response on their vocational and/or personal reference. For example, the leader, who has legal experience, will want to undertake an investigation to learn the facts because this leader has an appreciation that there are consequences if no action is taken to investigate the claim. Or to the contrary, the leader, who has been the subject of criticism in the past, may view the undertaking of an investigation as the unearthing of undesirable information about the organization (or leadership) and as a result, elects to avoid criticism by not pursuing an investigation. With that said, in some cases, leaders may not have the luxury to decline an investigation because of the nature of the allegation, legal requirements or its own organizational governances.

Leaders need to know that there is a structured process for conducting an internal investigation, defined by best and past practices. However, each investigation may vary depending on the allegation, parties involved, organizational culture, any recognized collective bargaining agreement, legal requirements and the support (or lack thereof) by the organization's leadership.

We utilize a "seven phase" investigative process, which is designed to determine whether or not an employee has breached any organizational policy and/or law and to mitigate such further occurrences. These phases and their subcomponents are described as follows:

1. Preparation and planning
 - a. Identifying of the scope and nature of the claim
 - b. Assessing talent to be the impartial fact-finder
 - c. Developing a well-conceived strategy
 - d. Establishing a methodology for the investigation and rules of conduct (including managing information)
 - e. Vetting any legal issues

2. Information gathering
 - a. Preparing a witness list and questions to be asked of each witness
 - b. Determining the order of witnesses to be interviewed
 - c. Securing any documents and other relevant materials for the interview
 - d. Knowing the organization's policy and/or law relating to the allegation
 - e. Identifying a good venue for the interview

- f. Deciding who should be present during the interview of witnesses
 - g. Planning for any special requirements (e.g., language translator, *Weingarten Rule* for interviewing members of a collective bargaining unit, recording of the interview)
 - h. Anticipating how to manage a hostile witness
 - i. Handling of evidence (for maintaining the chain of custody)
 - j. Scheduling sufficient time for each interview
 - k. Making sure that all witnesses identified (and relevant to the investigation) have been interviewed
3. Verification and analysis
- a. Corroborating witness statements
 - b. Identifying any contradictions in witness statements
 - c. Weighing the witness' creditability
 - d. Determining if any organization's policy and/or law has been breached
4. Discipline and/or corrective action
- a. If action is necessary, reviewing employee's past work record and performance appraisals
 - b. Comparing past practices of discipline for similar acts of misconduct
 - c. Determining if disciplinary sanctions for any protected class employee would expose the organization to a claim of *disparate treatment* or *disparate impact*
5. Risk assessment
- a. Determining if any employee, third party and/or organization's assets are at risk in terms of retaliatory action, including harm or damage
 - b. If there is a potential risk, undertaking preventative measures to mitigate that risk
6. Documentation
- a. Summarizing witness statements
 - b. Offering findings (facts only not legal conclusions)
 - c. Presenting any recommendations based on the findings
7. Prevention and education
- a. Identifying potential liability claims against the organization
 - b. Reporting any trends or potential future similar claims
 - c. Developing measures to mitigate like claims or risk for the future

As noted above, our investigative process is multi-dimensional and requires leaders to understand the complexities when interviewing employees and performing the various tasks of an investigation. Leaders must recognize these complexities as well as their own psychological influencers so that they do not override their decision making process in connection with whether or not to initiate an investigation or adversely affect the quality of the investigation. Moreover, when initiating an investigative inquiry, it is imperative for leaders to be thoughtful in their strategy, including retaining the professional talent, to carry out the necessary tasks and ensure impartiality of a workplace investigation.

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