

## TOP TEN TIPS FOR CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS

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Internal investigations allow a company to monitor itself to ensure that its managers, supervisors, and employees comply with the law as well as internal policies and guidelines. The purpose of an investigation is to gather facts so that the investigator can make a credible determination about what happened and whether a violation occurred. In any sizable company there will inevitably be situations where someone believes his or her rights were disregarded or that company policies were not applied fairly. When this happens, your company should be prepared to conduct a comprehensive, objective, and professional investigation.

An internal investigation is distinguished from an external investigation that is conducted by a third-party and not at the direction of the company itself. An external investigation may be conducted by a regulatory agency such as the IRS or DOL. An internal investigation may be conducted by an employee of the company, such as an HR Manager, or by an external resource such as an attorney or HR consultant at the request and direction of the company.

Here are ten important tips for organizing, planning, and executing an effective internal investigation.

### **1. ESTABLISH A COMFORT LEVEL WITH THE EMPLOYEE WHO RAISES THE ISSUE.**

When an employee initiates a discussion with you regarding a workplace issue he or she is concerned about, it is critical that you respond properly. After ascertaining the general nature of the issue, make sure the employee feels comfortable that you can address it objectively. Establishing the employee's comfort level early on will help avoid problems when you reach the resolution point. Sometimes, if an employee does not agree with the outcome of an investigation, he or she may contend that the person conducting the investigation was biased; establishing a comfort level from the outset makes this less likely to occur.

Determining how quickly to initiate an internal investigation depends on the nature of the allegations and the other pending business priorities. However, sooner is generally easier to defend.

### **2. INTERVIEW THE CONCERNED EMPLOYEE.**

Use an initial interview with the concerned employee to help you determine whether the issue can be resolved informally or whether an internal investigation is necessary. The most important objective of this preliminary interview is to *get the facts*. Get the WHO, WHAT, WHERE, WHEN and WHY.

In addition, there are other important points to convey to the person who brought the problem to your attention:

1. Inform him/her that the company does not permit any retaliation or reprisal when a legitimate issue is raised.
2. Advise him/her that if an investigation is necessary, he or she will be notified and told who will be conducting the investigation.
3. Tell him/her that you will limit the disclosure of information to those people having a legitimate business need to know.
4. Instruct him/her to do the same. Inform the employee that he or she, as well as all individuals involved in an investigation, have a strict duty to keep information relating to the investigation confidential.
5. Tell him/her that the person conducting the investigation will be getting back to him or her from time to time and that his or her continued cooperation in the investigation will be necessary to reach a resolution.
6. Ask the employee for suggestions on how he or she thinks the matter could best be resolved. Does the employee have any suggestions or preferred resolutions?
7. Let the employee know *the company* will make any final determination regarding the best way to resolve the issue; however the employee's input is valuable and will be considered seriously.

### **3. ORGANIZE AND PLAN THE INVESTIGATION.**

Organizing your thoughts and planning the investigation before conducting witness interviews is one of the most important components of an effective internal investigation. Before conducting witness interviews, prepare yourself by doing the following:

1. Apprise yourself of any policies, guidelines, or practices that apply to the situation, such as personnel policy and procedures manuals, a code of ethics, finance manuals, security guidelines, benefits materials, or collective bargaining agreements.
2. Determine what relevant documents you can obtain that may help your investigation, such as the employee's personnel file, the employee's performance appraisals, expense reports, documents from internal interviews, and/or information from a prior investigation.
3. Determine who should conduct the investigation. In light of your expertise and experience, consider whether you are the right person to handle this particular investigation.
4. Consider whether you can be objective with regard to the parties involved and/or the issues raised. Ask yourself whether you have any bias that will prejudice the integrity of the investigation if you are the one who handles it.

#### **4. DETERMINE WHETHER ANY INTERIM ACTION IS NECESSARY.**

Evaluate whether the alleged foul play is serious enough for any interim actions to be taken. For example, consider whether steps are needed to protect the health and safety of other employees, company property, or the integrity of the company's policies or guidelines. The most common interim actions involve removing the accused from the workplace and placing him/her on administrative leave pending the outcome of the investigation. This is not done for disciplinary purposes, but rather to help facilitate the investigation, protect the investigation's integrity, and minimize possible complaints of retaliation.

#### **5. DECIDE WHOM TO INTERVIEW AND GATHER THE FACTS.**

An internal investigation may require interviews with a variety of people. Consider the possible interviewees and what is appropriate and necessary based on the situation. Possible interview subjects include the employee who raised the concern, the employee who is the subject of the complaint, witnesses to the conduct, other persons with relevant information, authors of relevant documents, people whom the accuser asks you to interview and people whom the accused asks you to interview. Remember, however, that less is more: limiting the number of people you interview will help you stay on track with the issue raised and ensure the effective use of time and resources. Accurate note taking during interviews is essential. Do your best to record important facts during the interview and complete your notes immediately afterwards while the information is still fresh.

#### **6. MAKE NECESSARY PREPARATIONS BEFORE MEETING WITH THE ACCUSED EMPLOYEE.**

Once you've gathered the facts, sift through them to determine what is relevant. Not all of the information you gather is relevant or necessary to come to a resolution, and only those facts relevant to the issue at hand should be considered. Before meeting with the accused, prepare an outline in which you list the facts that relate to each issue, leaving room underneath each fact to write in the interviewee's responses when those facts are discussed. It is difficult for anyone to respond to broad-based allegations of wrongdoing or abstract notions of policy or guideline violations, so prepare a detailed explanation of the issue that can be provided when you meet the accused employee. In addition, anticipate the accused employee's questions and be ready with answers.

#### **7. MEET WITH THE ACCUSED EMPLOYEE.**

Explain to the person who is the focus of the investigation that you need as much information from him or her as possible. Emphasize the importance of providing you with any facts or information that will help get to the bottom of the issue. If the employee refuses to cooperate, explain that you have an obligation to resolve the issue. Explain that if he or she refuses to provide relevant information, you will have to base your decision on other information gathered in the investigation and that his or her unwillingness to cooperate will be considered as a factor in your decision.

Always chose a comfortable, private environment for the interview. If the employee has been suspended, this may be a neutral off-site location. In the room, do not sit between the accused employee and the exit to the room, as this can seem threatening to the employee. If the employee requests to have a third-party present, discuss this with counsel as certain employees have rights to representation under limited circumstances.

Start off with broad questions such as: “What is he/she like to work with?” “Does it surprise you that she’s complained about you?” “What did happen?” Use open-ended questions at first. Then, move to narrow, pointed questions to follow-up. Listen carefully to the answers and be flexible in your questioning. Don’t start with tough questions – develop rapport first and ask them when the right atmosphere and chemistry have developed. Use timelines to help ensure you have the story and chronology straight. Doing so helps assess credibility and resolves conflicts. Finally, as in other interviews, do your best to accurately record information and complete your notes immediately after the interview.

#### **8. KEEP AN OPEN LINE OF COMMUNICATION WITH THE ACCUSED EMPLOYEE.**

Before concluding the interview with the accused employee, let the employee know that he or she is welcome to come back to you with additional information at any time, but preferably before the investigation is complete. Try to give the employee a general timeframe within which you expect to complete your investigation. This will encourage the employee to provide any additional information within a relatively short time period.

Remind the accused employee of his or her own confidentiality obligations – as well as other employees’ obligation to keep investigation confidential.

#### **9. DETERMINE THE FACTS AND MAKE A RECOMMENDATION.**

After analyzing the facts gathered during the investigation and reaching a conclusion about what happened, be prepared to make a recommendation to the appropriate manager regarding the actions that should be taken. In reaching a conclusion about what happened, you may be making a credibility assessment in cases where there are two separate versions of what happened. This is a critical aspect of an investigator’s function.

In formulating a recommendation, consider a variety of factors:

1. Were any of the company's policies, guidelines or practices violated?
2. Was the conduct also a violation of a governing law (e.g. Title VII of the Civil Rights Act, which, among other things, prohibits discrimination based on race)?
3. If so, would you consider the violation to constitute a serious offense?
4. What has the company done in the past with regard to similar violations?
5. Are you confident that you have gotten the accused employee’s side of the story?
6. How long has the employee who violated your policy been employed at the company?

7. Has the employee ever violated any other policies in the past?
8. What is the employee's performance history at the company?
9. Are there any other circumstances that could affect your recommendation, i.e., any "mitigating" circumstances?

**10. BE CONSCIOUS OF CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE.**

While gathering the facts and documentation during an investigation, keep in mind that such information may ultimately have to be disclosed to the public and could come into the hands of business competitors or opponents in future litigation. Accordingly, when deciding what to write and what to save in an investigation, consider the impact that would occur if the information were made public or introduced as evidence.

To ensure a thorough investigation while minimizing the risk of required disclosure and protecting the confidentiality of communications, you may be able to invoke attorney-client and/or work product privileges. A company can retain counsel to conduct the investigation for privilege purposes or a company can have an investigation conducted by a company employee under the direction of an internal attorney. However, in order for these privileges to apply, certain guidelines, which vary by State, must be followed. If these guidelines are not adhered to, the privileges may be lost and the material may be required to be disclosed. For instance, the attorney-client privilege protects only communication between attorney and clients, not the underlying facts. In other words, you cannot inoculate facts from disclosure simply by putting them in a memo to an attorney.