



**Workplace Investigations: Checklist for Management Attorneys**  
**ABA ERR Contracts and Executive Compensation Subcommittee**

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**I. Pre-Complaint**

- ☐ Ensure critical policies are in place
  - Sexual and other forms of harassment
  - EEO/anti-discrimination
  - Code of Conduct/Ethics
  - IT Acceptable Use
  - Ensure that confidentiality policies/provisions are not overbroad (should not prohibit protected conduct, including whistleblowing and protected activity)
- ☐ Ensure that HR personnel and managers are properly trained on how to address internal complaints from employees and third parties (customers, vendors etc.)
  - Counsel (in-house and/or outside) should be involved early on in formulating approach
  - Managers need to know how to respond to complainant who insists that she or he does not want her/his concerns investigated

**II. After Complaint is Lodged**

- ☐ Identify issues to be investigated
- ☐ Determine who should be advised of the complaint and need to investigate

- ☐ Consider the implications of union involvement
  - If alleged wrongdoer is union member, consider *Weingarten* rights
- ☐ Determine whether investigation should be attorney-client privileged
  - Most discrimination/harassment investigations will not be privileged, in light of potential defenses available to employers that promptly investigate complaints and implement appropriate remedial measures (if necessary)
  - If investigation is intended to be privileged, an attorney will conduct the investigation. The attorney should implement steps to ensure that the privilege is maintained, including:
    - Involving a senior manager to ensure that all communications about the matter are with counsel.
    - Arrangement for management to instruct lower level employees who are to be interviewed to understand the purpose of the interview.
    - Give *Upjohn* warnings to employees who are interviewed.
- ☐ Determine who should investigate
  - If intended to be privileged, in-house or outside counsel
  - If not privileged, investigator can be Human Resources representative or outside investigator, typically engaged in with assistance of counsel
    - Generally, outside employment counsel should not conduct the investigation
- ☐ Determine timetable for investigation – as promptly as possible
- ☐ Consider interim measures
  - Place accused employee on leave
  - If supervisory relationship exists, consider temporary reassignment, but be careful about taking steps that will be perceived as retaliatory
- ☐ Identify and preserve documents and electronic evidence
  - Emails
  - Notes

- “Personal” data, including emails from personal accounts, text messages, social media posts
- Gather relevant information that investigator likely will want to review initially
  - Complaint documentation and supporting materials
  - Personnel records of complainant and accused
  - Previous investigation files (if any)
  - Consider obtaining (or at least demanding preservation of) personal text messages and personal emails

### **III. Managing the Investigation**

- ☐ Preserve privilege as to communications with client
  - In light of *Koss v. Palmer Water Dept.*, No. 02-560-13 (D. Mass. 2013) and similar decisions, management attorneys should take steps to ensure that communications are privileged to the extent possible
  - Assume that counsel’s written communications with the investigator will be discoverable
- ☐ Set parameters for the investigation but let the investigator do his or her job – do not micromanage
  - Speak with the investigator about preliminary conclusions before a written report is generated
  - Review the report before it is finalized
  - Consider whether report is sufficiently comprehensive
    - Were all relevant witnesses interviewed?
    - Were all relevant records reviewed?
    - Ensure that investigator addresses any gaps or omissions in the investigation before report is finalized

#### **IV. Special Issues Involving Alleged Executive Misconduct**

- ☐ Determine whether investigation should be managed at Board of Directors level, rather than by CEO/HR
  - Will special committee be appointed?
  - Ensure that Board members involved in investigation oversight are sufficiently neutral and unbiased
- ☐ Consider indemnification/representation issues
  - Executive may be entitled to indemnification and defense under employment agreement and/or corporate bylaws
  - Document indemnification arrangement (typically advance of counsel fees pending results of investigation)
- ☐ Determine whether executive's counsel will be permitted to participate in investigative interview and, if so, the parameters of such participation
  - Is counsel's role limited to observation?
  - Determine whether company counsel (in-house or external?) will participate (observe) as well
- ☐ If executive misconduct is alleged, there may be a greater desire/need to preserve privilege
- ☐ Consider interim measures (suspension, reassignment) in light of executive's employment agreement, as Good Reason severance provision could be triggered

#### **V. Conclusion of the Investigation**

- ☐ Communicate with client about investigator's conclusions, possible discipline and next steps, all with an eye on preservation of privilege
- ☐ Manage the client's communications with the complainant and the accused
  - If possible, HR/management should speak with complaining party before any disciplinary action is taken
  - Provide complaining party with a written summary of results of investigation and any actions taken as a result
- ☐ Assist client with documentation of discipline

- ☐ Ensure that management periodically follows up with the complainant to ensure no retaliatory or further harassing/discriminatory behavior has occurred
- ☐ For executives accused of wrongdoing, carefully analyze employment agreement's severance provision, which may be triggered by discipline or termination
- ☐ For executives at public companies affected by discipline or termination, consider whether to disclose on SEC Form 8-K
  - Item 5.02: must disclose that named executive officer resigns, retires or is terminated from that position
  - Materials changes in position may trigger disclosure requirement
  - Disclosure required within four business days of after occurrence of the event