

Protecting the Whistleblower



Companies should fine-tune internal probes to make investigation more asset than liability

By R. Scott Oswald and Jason Zuckerman

In litigating whistleblower retaliation claims, we have found that poorly conducted internal investigations can be extraordinarily helpful to plaintiffs and harmful to employers. In particular, investigations that are intended to discredit the concerned employee or cover up wrongdoing to protect the accused will, at a minimum, deprive the employer of an affirmative defense and can also provide circumstantial evidence of retaliatory intent.

Employers, however, can take fairly simple measures to prevent an investigation from becoming more of a liability than an asset. Following are five tips for conducting an effective internal investigation.

- **Keep the Concerned Employee Apprised of the Investigation.** For any employees, disclosing wrongdoing is a daunting experience. Therefore, a concerned employee likely will be anxious about potential retaliation and focused on achieving a prompt a resolution to the problem or wrongdoing that the employee disclosed.

If the concerned employee believes that the company is not taking the employee's concerns seriously or is failing to take necessary corrective actions, the employee likely will pursue other avenues to remedy the problem, such as contacting the media or a regulatory agency. Accordingly, it is essential for the investigator to keep the concerned employee apprised of the status of the investigation. The investigator should periodically update the concerned employee regarding the investigator's findings and give the concerned employee a chance to respond and provide additional information, documents or corroborating witnesses.

At the conclusion of the investigation, the concerned employee should be informed of corrective actions, such as strengthened internal controls to prevent the type of accounting fraud that the concerned employee brought to light.

- **Focus on the Concerned Employee's Allegation Rather than the Employee's Motive.** The surest sign that an investigation is pretextual is when the investigation focuses on the concerned employee's motive for disclosing wrongdoing. As a matter of law, a whistleblower's motive is irrelevant. Accordingly, the investigation should focus on uncovering the veracity of the concerned employee's allegations, not on discrediting the source of the allegations.

- **Protect the Concerned Employee and Witnesses from Retaliation.** Not surprisingly, an employee accused of misconduct can be prone to resent the accuser and employees who assisted in an investigation. Accordingly, the employer should stay attuned to any retaliation resulting from an investigation, and should promptly respond to any retaliation.

If the concerned employee is harassed or subjected to pretextual discipline, co-workers would be chilled from disclosing wrongdoing. A chilled work environment is harmful to any organization because it will undermine management's ability to learn early on of future wrongdoing or misconduct. Moreover, a retaliatory investigation can result in liability for the employer.

For example, retaliating against a whistleblower by conducting a sham investigation and intentionally spreading false allegations of misconduct by the whistleblower gives rise to a claim of intentional infliction of emotional distress and other tort and employment actions.

Moreover, the Supreme Court recently clarified that a retaliation claim does not require proof of a tangible adverse job detriment, such as a termination or a demotion. Instead, the standard for retaliation is whether the conduct in question would dissuade an objective, reasonable person from making or supporting a charge of discrimination, or engaging in other forms of protected conduct.

Therefore, investigations must be conducted in a manner that will not discourage employees from reporting additional misconduct or wrongdoing.

- **Pay Heed to the Rights of the Accused.** Investigative findings based on uncorroborated allegations or dubious evidence can expose an employer to liability for a negligent investigation claim. Before taking any corrective actions based on the investigation's findings, such as terminating a manager accused of harassment, the investigative findings should be carefully scrutinized by at least one company official who was not involved in the investigation and has no stake in the outcome.

Factors to assess include whether the investigator failed to pursue leads, such as failing to interview a key witness; whether the investigator gave undue weight to hearsay; and whether the documentary evidence is consistent with the investigator's conclusions. Moreover, it is critical throughout an investigation to avoid defaming the accused.

- **Steer Clear of Unlawful Investigation Techniques and Preserve the Authenticity of Electronic Documents.** The Hewlett-Packard "pretexting" scandal, which resulted in a \$14.5 million settlement and other sanctions, is a stark reminder of the importance of complying with state and federal privacy laws.

Throughout the investigation, consider whether any particular technique might run afoul of state wiretapping laws, the Electronic Communications Privacy Act, the Fair Credit Reporting Act or the Health Insurance Portability and Accountability Act.

Investigators should also take steps to avoid inadvertent corruption of electronic documents. As most documents are now created and transmitted electronically, an investigation will likely entail the gathering and review of various types of electronic documents. Merely opening or reading an electronic file, such as an email or a spreadsheet, alters the metadata of the file.

The metadata itself could contain critical evidence that might resolve conflicting accounts, such as when a document was transmitted, received or opened. To ensure that evidence uncovered in an investigation will

retain its authenticity and be deemed reliable in potential litigation, create a “mirror image” or bit-by-bit copy of the source drive or database.

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