INVESTIGATION PITFALLS & HOW TO AVOID THEM

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The Power of Experience®

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PRIVACY & CONFIDENTIALITY

“You spelled ‘confidential’ wrong.”
Privacy & Confidentiality

• Attorney-client privilege
• Joint defense agreements
• Confidentiality agreements
• Employee interviews confidentiality
• News media & public relations
• Federal grand jury investigations/Fed. Rule Crim. Proc. 6(e)
“The most effective way to maintain confidentiality & mitigate adverse consequences of the disclosure of confidential information is to plan your internal investigation from the very beginning with the end in mind.”

- Latour “LT” Lafferty, Esq., CHC, CCEP
REPRESENTED WORKERS
Investigative Interviews

- Types of interviews in an investigation
  - Informational interviews
    - Learn about processes and procedures
    - Build up knowledge to understand what happened and the impact
  - Witness interviews
    - Those with information regarding the event
      - They may or may not ultimately be implicated
  - Subject interviews
    - Those against whom the allegations have been made
Unionized v. Non Unionized Employees

- **Informational interviews**
  - No different in treatment of unionized v. non-unionized employees

- **Witness interviews**
  - May be different treatment

- **Subject interviews**
  - If the interview in any way can lead to discipline or termination, union members can request that a shop steward or union officer be present
  - Today, non-union members do not have that right.
Witness Interviews

• Treatment of unionized v. union
  unionized employees may be different
  – Could the discussion lead to discipline
    or termination?
    • If no, rights of unionized and non unionized
      employees is the same
    • If yes, the rights are different
Weingarten Rights

• In 1975 the US Supreme Court gave unionized employees the right to assistance from union representation during investigative interviews.
• This right is commonly known as Weingarten Rights
• Currently, this right does not attach to non-union workers.
• The NLRB has flip-flopped on this over the years
When do Weingarten Rights Apply?

• Weingarten rights apply when there in an investigatory interview and
  – Management questions an employee to obtain information,
  **AND**
  – The employee has a *reasonable belief* that discipline or other adverse consequence may result from what he/she says
How is the Rule Applied?

• When an investigatory interview, where the employee has a reasonable belief that may result in their discipline:
  – The employee must make a clear request for Union representation before or during the interview. The employee can’t be punished for making this request.
What the Supervisor/Interviewer Can Do?

• After the employee makes the request for a union representative to be present, management has three options:
  1. It can stop questioning until the representative arrives
  2. It can call off the interview or,
  3. It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative.
Role of Union Representative

The representative not required to merely be 'silent witness'. He or she has the right to:

- be informed by the supervisor of the subject matter of the interview
- take the employee aside for a private conference before questioning begins
- speak during the interview
- request that the supervisor clarify a question so that what is being asked is understood
- give employee advice on how to answer a question
- provide additional information to the supervisor at the end of the questioning.

The representative does not have the right to tell the employee not to answer nor, obviously, to give false answers. An employee can be disciplined for refusing to answer questions.
What the Union Representative Can’t Do?

• The Rep cannot negotiate over the subject of the meeting.
• And does not have the right to tell workers not to answer a question or to give untrue answers.
• Refusal to answer questions can be a reason for discipline.
When is There no Right to the Presence of a Union Representative?

• The meeting is merely for the purpose of conveying work instructions, training, or communicating needed corrections in the employee's work techniques.
• The employee is assured by the employer prior to the interview that no discipline or employment consequences can result from the interview.
• The employer has reached a final decision to impose certain discipline on the employee prior to the interview, and the purpose of the interview is to inform the employee of the discipline or to impose it.
• Any conversation or discussion about the previously determined discipline which is initiated by the employee and without employer encouragement or instigation after the employee is informed of the action.
• Even in the above four (4) circumstances, the employee can still ask for representation. Most employers will permit a representative to attend even when not required to.
Impact on the Investigation

• In addition to Weingarten Rights, review your collective bargaining agreement.
• Check to see if there are any other investigative procedural requirements.
• Make sure you follow any applicable requirements.
• You don’t want to negatively impact your investigation because you did not follow a procedural requirement.
• Otherwise, procedure as usual and conduct the investigation with your normal standard of professionalism!
PRIVILEGE
(“The thing you want most.”)
Context – The Heart of the Matter

• The investigative record:
  – Tangible:
    • Witness statements & interview reports
    • Documents & exhibits
  – Intangible:
    • Mental impressions – who & what we think is important
Context – The Pursuers

- The Royal Fleet – Law enforcement agencies
- Cpt. Jack Sparrow – P’s lawyers; S/H lawyers; Litigants
- Davey Jones’ Crew - Protectors
Work Product Privilege

- Fed. Rule of Civil Procedure(b)(3)
- Fact v. Opinion
- Elements
- Overcoming the privilege
- Mental impressions
Attorney-Client Privilege

• Fed. Rule of Evid. 501/Common law

• Rule of Professional conduct

• Elements

• Employee Interviews/Upjohn warnings
Self-Evaluative Privilege


• Elements

• Not generally accepted
Overcoming Privileges

• Waiver

• Crime/Fraud exception

• Federal prosecution policy

• S/H litigation – Garner Rule “good cause”
INTERNATIONAL ISSUES
Investigations

• Goal is generally the same –
  – Uncover/find/identify the truth

• Processes generally the same –
  – Gather information from
    • Documents
    • People
    • Observations

• Does location matter?
Where to Begin???

- What country?
- What company policies and procedures exist for conducting investigations in that particular country?
- Have investigations been conducted in that country before, by you or any others in your company?
- If so, did you use external or internal investigators?
Analyzing the Allegation

- What is the issue that was alleged?
- If the allegation is proved to be substantiated,
  - Does it violate
    - The law
    - An internal policy or procedure
    - An ethical standard or company value
  - If not, does a policy, procedure or control need to be changed?
    - Is training needed?
Investigative Plan

• Documents
  – Where are they located
    • What country
    • What part of the country
    • Are there laws about using documents for investigative purposes
    • What kind of documents can/cannot be used

• Applicable Policies and Procedures
  – Are company policies and procedures applicable consistently throughout the company?
  – How are those policies and procedures communicated to employees?
Investigative Plan Continued

• Are employees obligated to comply with those policies and procedures
• Are there labor unions
  – Are there other worker rights groups
    • Governmental
    • Industry
• People
  – Governmental protections – i.e. privacy
  – Are there prohibitions or restrictions about interviewing employees?
Investigative Plan Continued

• Do employees in this particular country have any obligation to speak to the company?
  • With or without representation

• Report Writing
  – What can be included in a report
  – Who has to receive a copy of the report
  – Who cannot receive a copy of the report

• Post investigation notices to employees
  – Who has to be notified
  – Who needs to be notified
  – How do they need to be notified
Conducting the Investigation

• After completing research, draft a plan that complies with the legal and cultural requirements.
• Begin your investigation
  – Collect documents
  – Interview people
  – Conduct surveillance
• Modify the plan as appropriate throughout the investigation
• Stay within the bounds of applicable laws
International Considerations

• Different considerations in different countries
• Review audits and other investigations that have been conducted in that country
• Consult internal/external lawyers to identify any unique guidelines that need to be followed
• Identify employee privacy and other rights in that country
• What are the obligations for notifying the government?
Who Conducts the Investigation and Why?

• Internal resources
  – Knowledgeable
  – Capable

• External resources
  – Investigative firms
  – Law firms

These may have particular expertise in this jurisdiction or with this subject matter

• Some combination
Avoid Problems

• Once you identify legal and/or cultural restrictions, follow them
• Better to be cautious then to jeopardize the entire investigation
• Get help every time you even think that you are beginning to see a red flag or if you have any questions
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