

Managing Outside Investigators – Best Practices for Employers

Article By:

Teresa Burke Wright

When workplace misconduct, whistleblowing or harassment is at issue, employers commonly turn to outside investigators to help ensure an unbiased investigation that will withstand challenge in future litigation. Engaging an investigator who is an attorney helps ensure that the investigation file and report will be protected by attorney client privilege. Employers may later decide to waive that privilege and produce the report, which can give rise to mandatory disclosure of the investigator's entire file and, potentially, testimony by the investigator. These tips help protect the privilege that applies to the investigation and help ensure the integrity of the investigation.

1. Watch What You Tell the Investigator.

At the start of an investigation, it is tempting to provide the investigator with a download of all relevant details – for example, that the employer finds the claimant not to be credible, or the employer's opinion on the likely outcome of the investigation. Instead, provide the investigator with just the basic information to enable them to conduct the investigation – let the witnesses provide the details, and allow the investigator to draw their own conclusions about credibility and outcome.

2. The Employer Decides the Scope.

Issues often arise that are beyond the scope of the investigation as initially envisioned. For example, a witness may have their own complaint, or allegations of unrelated misconduct may arise. When this occurs, the investigator should return to the employer to determine whether the investigator's mandate should be expanded to include these issues. The employer determines its instructions to the investigator.

3. Let the Investigator Decide What to Do.

The investigator should decide what witnesses to interview and documents to review. If the employer is part of these decisions, the integrity of the investigation could be challenged on the basis that the employer played too large a role in shaping the investigation. Instead, provide the investigator with the complaint, and possibly very key documents, such as clearly applicable policies, a write-up given to the claimant if directly relevant, or an annual review that is being challenged. If the complaint is not in writing, it should be reduced to writing by someone representing the employer, with the claimant confirming it is accurate.

4. Don't Ask the Investigator for Legal Advice.

When an attorney conducts the investigation, the investigator should not also provide legal advice to the employer; another attorney should be engaged for this purpose. Questions to direct to separate counsel may include, for example, the scope of the investigation (see #2 above); how to handle a reluctant witness; managing performance issues of the claimant, accused or witnesses while the investigation is pending; or the possibility of intermediate measures such as separating the claimant from the accused or putting one or

both on administrative leave. Obtaining legal advice from the investigator creates the risk that that advice will be discoverable as part of the investigator's file.

5. **Handling Draft Reports.**

Ideally, at the end of the investigation the investigator should provide their factual findings and conclusions by way of an oral report to the employer, before the employer decides whether to obtain a written report. When a written report will be prepared, the best practice is for the employer not to review drafts of that report, since those drafts may ultimately be discoverable. If a draft is reviewed, the employer should correct factual misstatements but should not influence factual findings or conclusions.

6. **Separate Recommendations from Findings of Fact.**

If the investigator is asked to make recommendations, they should be listed in a separate document from findings of fact and conclusions reached by the investigator.

Recommendations may include, for example, that the accused should attend training, that policies should be changed, or that an employee should receive a written warning or performance improvement plan. Keeping recommendations separate from the rest of the report helps protect those recommendations from disclosure later on.