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MCLE Article: The Four "W"s of Workplace Investigations: When, Who, What to Expect and What is Adequate

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By Shivani Sutaria

In the recent years, there have been several highly-publicized lawsuits brought by employees of law firms, alleging discrimination and harassment. While the news stories have focused on lawsuits against the large law firms, smaller law firms have faced similar legal claims. It is important for the smaller law firms to be prepared to address employee complaints, and determine whether an investigation is warranted, and if so, how to select an investigator, what to expect when an investigation is conducted, and what constitutes an adequate investigation.

WHEN TO CONDUCT AN INVESTIGATION

Complaints of alleged workplace misconduct come to the attention of employers in a variety of ways. Typically, it is through an employee's direct reporting to a supervisor or a human resources representative (if there is a one). Employers can also learn about potential misconduct through observation of interactions between employees, notice by third-parties or even anonymous reviews.

Once on notice regarding potential discrimination or harassment, California employers have a legal duty to investigate. California's Fair Employment & Housing Act ("FEHA") requires employers to "take all reasonable steps to prevent discrimination and harassment from occurring" in the workplace.[1] Failure to do so can be the basis for independent liability in a lawsuit.[2] The courts have deemed that one such "reasonable" and "necessary" step employers must take to prevent discrimination and harassment is prompt investigation of complaints.[3] The 2017 "California Department of Fair Employment and Housing Workplace Harassment Prevention Guide for California Employers" ("DFEH Guide"),[4] which is based on the California Fair Employment and Housing Council 2016 regulations on "Harassment and Discrimination Prevention and Correction,"[5] specifically also states that "prompt, thorough and fair investigations of complaints" is a required step in preventing and correcting discrimination and harassment.[6]

Absent a legal duty, formal workplace investigations are advisable if the law or company policy are implicated, key facts are in dispute, and/or the extent of harm and number of people needs to be determined.[7] This can include, but is not limited to, workplace situations related to violence, theft, bullying, confidentiality breaches, and consumption of alcohol or other illicit substances at work.

WHO TO SELECT AS THE INVESTIGATOR

Once the small firm determines a workplace investigation is legally required or simply a good idea, firm management must then confront the question of, "Who should conduct the investigation?" The answer to the question of who should investigate is found in relevant statutes, case law and EEO agency guidelines.

Legally Authorized Workplace Investigators

California law, specifically California's Private Investigator Act ("PIA")[8], dictates who can perform investigations related to issues that arise in the workplace: "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person."[9] This statute allows for licensed private investigators to conduct investigations. It also provides exceptions, thus allowing two other categories of professionals to perform workplace investigations.

First, workplace investigations can be conducted internally by "a person employed exclusively and regularly by any employer ... in connection with the affairs of such employer only and where there exists an employer-employee relationship."[10] Thus, investigations *may* be conducted by internal human resources representatives, executives, company counsel, in-house investigators and, in the case of small law firms, the firm's managing partners or office manager. This means that third-party consultants, such as human resources consultants, without a private investigator or attorney license are not authorized under California law to conduct investigations. Any person who unlawfully investigates and the person who "knowingly engages" an unlicensed person faces a fine of $5,000 and imprisonment of up to one year in jail.[11]

11 This relationship was attacked a few years ago in the case of *City of Petaluma v. Superior Court.*[12] In *City of Petaluma,* the court extended the attorney-client privilege to workplace investigations performed by an external attorney investigator, holding that the attorney investigator was performing legal services when conducting a workplace investigation for an employer. In this case, it was argued that since the attorney investigator was a "fact finder" who did not render legal advice as to what action to take as a result of the findings of the investigation, the attorney investigator was not performing legal services to which the privileges would apply. The court disagreed, ruling that an attorney-client relationship can exist absent the rendering of legal advice.[13] The court further stated that the work of the attorney investigator to "use [her] legal expertise to identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened"[14] is the performance of a legal service and thus the application of the attorney-client privilege and the work product doctrine applied to her entire investigative efforts.

Criteria in Selecting the Investigator

In deciding whether the investigation should be conducted internally or externally as well as who that investigator should be, there are three questions to ask: 1) whether the investigator can be neutral and impartial, 2) whether the investigator can conduct the investigation promptly and thoroughly and 3) whether the investigator possesses the relevant skills.

Is the Investigator Neutral and Impartial?

Investigator neutrality and impartiality is of paramount importance.[15] Ideally, the investigator is someone who has no personal or other connection to the parties or employer and can objectively consider all the evidence being gathered. As such, workplace investigations should ***not*** be conducted by someone who is a potential witness, possesses actual or perceived biased for or against the complainant or subject, or is in the position to be influenced by those involved or by the outcome.

Internal investigators who may not be neutral and impartial would include a human resources manager investigating an accommodation complaint revolving around his own decision not to accommodate a disabled associate attorney, or a supervising attorney investigating a harassment claim against a paralegal with whom the supervising attorney has a personal friendship, or the managing partner investigating the firm's founding partner to whom she reports regarding a pay equity concern. Recently, in *Viana v. FedEx Corporate Services*[16], an unpublished Ninth Circuit case, the court overturned summary judgment for the employer partially due to the employee presenting evidence that the investigator - her supervisor - was biased against her due to her age, gender, and national origin; Viana's supervisor, who investigated the alleged misconduct

and made the decision to terminate her, had called her a "bitch" and other sexist terms.[17]

When utilizing an external investigator, the small law firm must also ensure there is neutrality and impartiality. There is an obvious conflict of interest when an employer's defense counsel – who is retained to be a zealous advocate for the employer – is also tasked with investigating a complaint for the client. It is highly unlikely that defense counsel can simultaneously satisfy the role of advocate and impartial investigator. Furthermore, if the issue being investigated leads to litigation, then the adequacy of the investigation will be challenged on this basis. Thus, defense counsel may be placed in the position of having to testify as a witness in a matter in which she is defending.

Ultimately, having a neutral and impartial investigator promotes a more effective investigation process; witnesses will be more likely to be forthcoming with information, perceive the process as fair, and accept the findings and/or recommendations.

Can the Investigator Conduct the Investigation Promptly and Thoroughly?

While there is no legally prescribed timeline for starting, conducting and concluding an investigation, the goal is for the process to be begin "promptly, as soon as is feasible" and "once begun, it should proceed and conclude quickly."[18] However, the amount of time an investigation takes from beginning to end will always differ based on a variety of factors, such as the seriousness of the allegation, scope of the issues, and the availability of the witnesses and other evidence.

While promptness is important, thoroughness is of equal if not more significance. The entire investigation process has many steps, from agreeing on the scope with the client, developing an investigation plan, interviewing witnesses with varying availability, obtaining relevant documents that can exist in various hard and electronic forms, and drafting the investigation report. Also, investigations are an evolving process, in that information received can lead to the need to interview a newly identified witness or view recently discovered video surveillance.

Does the Investigator Possess the Requisite Skill?

Effective investigators should have knowledge regarding standard investigatory practices as well as possess the applicable skills needed to conduct investigations.[19] For example, strong oral and written communications skills are critical as investigators need to interview witnesses and draft investigation reports. Interpersonal skills are also critical; establishing rapport with witnesses can result in productive interviews where more information is obtained. Furthermore, a must-have skill is the ability to synthesize and analyze facts for the purpose of making factual findings, which is the investigator's primary charge.

There are several professional organizations such as the Association of Workplace Investigators ("AWI") and the Society for Human Resource Management ("SHRM") as well as law firms and that provide training programs for workplace investigators. For example, AWI offers an accredited certificate program that consists of four days of training and one day of testing. Those who achieve passing scores on the tests receive a certificate and the ability to use the certificate designation of Association of Workplace Investigators Certificate Holder ("AWI-CH").

In sum, smaller employers, in particular, struggle to identify internal employees who are simultaneously neutral and impartial, prompt and thorough, and skilled in investigations. This can be for a variety of reasons, ranging from not having an uninvolved human resources representative, to not having a managing partner with the time to dedicate to the investigation, to not having a senior partner who is qualified to conduct a workplace investigation. As a result, smaller firms have a greater need to rely on external investigators to conduct their workplace investigations.

WHAT TO EXPECT IN AN INVESTIGATION

At the outset of an investigation, the employer communicates to the investigator the scope, or in other words, the issues to be investigated. The employer should not, however, be part of the next step which is investigation planning; this entails the investigator deciding who should be interviewed, the chronology of the interviews, and what documentary evidence should be reviewed.

In conducting the investigation, the investigator's task is to gather relevant factual information. The primary way investigators do this is through interviewing the complainant, subject and witnesses. Investigators should document their interviews, either through taking handwritten or typed notes, drafting statements for witnesses to sign, obtaining witness statements, and/or audio recordings. Investigators also gather factual information through reviewing relevant documents. Based on the situation, investigators may need to view surveillance, inspect physical space and/or involve experts such as forensic accountants.

Most investigations, especially those involving "he said/she said" situations, require the investigator to assess the credibility of those interviewed. Factors related to credibility include corroboration through witness testimony or physical evidence, inherent plausibility, motive to falsify, bias, past record, ability to recollect, habit, and inconsistent/consistent statements.[20]

Investigators must then synthesize and analyze the gathered facts and assesses the interviewees' credibility for the purpose of making factual findings. In making findings, investigators' standard of proof is "preponderance of the evidence" or "more likely than not", which has been described as "fifty percent plus a feather."[21] It is recommended that investigators do not make legal conclusions, as their responsibility is to make factual determinations. It is also recommended that investigators do not make conclusions about whether company policy was violated nor provide advice regarding corrective action or other employer action.[22] One of the reasons for this is because the employer - not the investigator - possesses knowledge about its company policies and how they have consistently been applied in the past.

Investigators can present their factual findings to clients in either verbal or written reports, which can vary in detail and length based on the complexities and employers' preference. If an employer is going to rely on the investigation to take corrective action, the Fair Credit Reporting Act ("FCRA") requires the employer to provide a summary of the investigation findings to the employee against whom the action will be taken.[23]

What is an Adequate Investigation

Cotran v. Rollins Hudig Hall International, Inc. is a landmark decision in which the California Supreme Court established the tenets of a reasonable, good faith investigation.[24] In this sexual harassment case, the employer took an adverse employment action based on the findings of an investigation, which entailed interviewing the complainants, the accused and twenty-one other witnesses, obtaining sworn statements from the complainants, and assessing the parties' credibility. However, the findings ultimately proved to be inaccurate. The court ruled that the proper question for a jury in assessing an employer's adverse action following an investigation is whether it was the result of "fair and honest reasons regulated by good faith on the part of the employer which are not trivial, arbitrary, capricious, unrelated to business needs or goals, or pretextual."[25] The court further defined the term "good cause" as a "reasoned conclusion … supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."[26]

Subsequent cases have further addressed what an "adequate investigation" entails. In *Silva v. Lucky Stores, Inc.*[27], the appellate court noted numerous aspects of the investigation that made it a "good faith" and "reasonable" investigation. The court stated that Lucky had a written investigation policy in place and utilized an uninvolved human resources representative who had been trained by in-house counsel on how to conduct an investigation. The investigator promptly interviewed the complainant, subject and numerous witnesses, recorded the information obtained from the interviews and/or obtained a written statement, asked "relevant, open-ended, nonleading questions", maintained confidentiality by conducting a number of interviews off the company premises or by telephone, and assessed credibility.[28]

There are also several post-*Cotran* cases where the court deemed the investigation to be inadequate. In *Nazir v. United Airlines, Inc.*,[29] the court found many shortcomings in the investigation including the failure to interview potential witnesses and follow its own written investigation procedures.[30] Moreover, the court also noted that when the investigation is conducted by someone who "inferentially had an axe to grind, assisted by someone who 'served' him'", it is evidence of pretext.[31] In *Mendoza v. Western Medical Center Santa Ana*[32], the court determined the investigation was perfunctory; in this sexual harassment case, the court

stated that the investigator was not properly trained, had no investigation plan, interviewed the complainant and subject together, interviewed no witnesses and failed to assess credibility. The court found that this flawed investigation was evidence to support the employee's wrongful discharge claim. *Nazir* and *Mendoza* demonstrate that conducting an investigation is not enough to satisfy an employer's legal burden, but that the investigation must contain the adequacy hallmarks articulated in *Cotran* and its progeny.

CONCLUSION

It is important for small law firms to maintain the appropriate policies, including a workplace investigation policy, and take measured steps to assess a workplace concern and determine whether an investigation, either internal or external, is warranted. The courts have made it clear that the investigation will be scrutinized if there is litigation, and that a failure to follow guidance on what constitutes an adequate investigation can result in employer liability.

ENDNOTES

1 CAL. GOV'T CODE §§ 12940(j)(1) & (k).

2 CAL. GOV'T CODE § 12940 (k).

3 Northrop Grumman Corp. v. WCAB, 103 Cal. App. 4th 1021, 1031 (2002).

4 Housing Workplace Harassment Prevention Guide for California Employers ("DFEH Guide"). The DFEH Guide can be found at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide-1.pdf.

5 CAL. CODE REGS. tit. 2, §§ 11023-11024.

6 DFEH Guide, *supra* note 4, at 1.

7 Association of Workplace Investigators ("AWI") *Guiding Principles for Conducting Workplace Investigations*, AOWI (2012) https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/Publications/Guiding_Principles_.pdf ("Guiding Principles"), "workplace investigation should occur when indicated by law or policy as determined by the employer.").

8 CAL. BUS. & PROF. CODE §§ 7523 *et seq.*

9 CAL. BUS. & PROF. CODE § 7521.

10 CAL. BUS. & PROF. CODE § 7522(a).

11 CAL. BUS. & PROF. CODE § 7523(b).

12 City of Petaluma v. Super. Ct, 248 Cal. App. 4th 1023 (2016).

13 *Id.* at 1033-2034.

14 *Id.* at 1035.

15 DFEH Guide, *supra* note 4, at 4.

16 Viana v. FedEx Corporate Services, No. 16-56346 (9th Cir. March 22, 2018).

17 *Id.* at 3.

18 DFEH Guide, *supra* note 4, at 3.

19 DFEH Guide, *supra* note 4, at 4-5.

20 DFEH Guide, *supra* note 4, at 5-6; EEOC's "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" ("EEOC Guidance"). The EEOC Guidance can be found at https://www.eeoc.gov/policy/docs/harassment.html.

21 DFEH Guide, *supra* note 4, at 6; AWI Guiding Principles states "In many workplace investigations, the appropriate standard of evidence will be 'the preponderance of the evidence' standard; namely, whether after weighing all the evidence, it is more likely than not that the alleged incident occurred."

22 DFEH Guide, *supra* note 4, at 7.

23 15 U.S.C. § 1681b(y)(1)(B)(1); 15 U.S.C. § 1681b(y)(2).

24 Cotran v. Rollins Hudig Hall International, Inc., 17 Cal. 4th 93 (1998).

25 *Id.* at 108.

26 *Id.* at 108.

27 Silva v. Lucky Stores, Inc. 65 Cal. App. 4th 256 (1998).

28 *Id.* at 265-277.

29 Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243 (2009).

30 *Id.* at 280.

31 *Id.* at 277.

32 Mendoza v. Western Medical Center Santa Ana. 222 Cal. App. 4th 1334, 1337, 1345 (2014).