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## Tips for Conducting an Effective Internal Investigation

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## **Tips for Conducting an Effective Internal Investigation**

### **I. Determining Who Should Investigate**

Companies typically have three options when it comes to choosing an investigator: 1) an internal professional, usually someone in Human Resources or Audit, 2) a lawyer, including both in-house and outside counsel, and 3) an independent, external investigator. Consider the following for each:

#### INTERNAL PROFESSIONAL

The benefits to using an internal professional are immediate availability, familiarity with company personnel and processes, and cost (none!). However, keep in mind that it might put the professional in an awkward position if he or she is asked to investigate a higher-level employee, like an executive, or someone in his or her own department. It might even give rise to claims of bias. In addition, if litigation is likely, you should consider whether the individual will make a good witness.

#### LAWYER

Using a lawyer to conduct an investigation may be problematic if you intend to rely on the same lawyer to provide legal advice to management on the same issue. The potential for allegations of bias, the threat to the attorney-client privilege, and the possibility of the lawyer being called as a witness and therefore conflicted out of representing the company in litigation are factors to consider.

#### EXTERNAL INVESTIGATOR

An external investigator is a good choice if your investigation is complex, likely to lead to litigation, or involves high level employees. Because such investigators are neutral fact-finders, they are less susceptible to claims of bias. In addition, most external investigators are well trained and comfortable testifying, if necessary.

### **II. Start with Data Collection**

Before you begin interviewing witnesses, it is well worth your time to do a little forensic research. Investigations don't usually yield a smoking gun, but if there is one, you will find it here. Places to look include:

1. Emails and texts messages on corporate devices or systems
2. Social media
3. Company voicemail
4. Computer log-in records (can establish time and place of witness)
5. Badge records (ditto)

6. Security camera footage
7. GPS on company vehicles

A word of caution, however: be mindful of privacy laws. Most states require notice to employees if an employer intends to electronically monitor their activity, even on corporate devices and systems. In addition, hidden cameras should never be placed in a location where an employee has an expectation of privacy (such as a bathroom, locker room, or private office). Finally, the Stored Communications Act and similar laws generally prevent employers from hacking into personal email or social media accounts or requiring employees to turn over private passwords as a condition of employment.

### III. Witness Interviews

Before beginning, consider the order in which the witnesses should be interviewed. Usually, it is a good idea to start with the complainant, then the fact witnesses, leaving the respondent for the end. That gives the respondent the opportunity to address all allegations and supporting facts against him or her.

Draft an outline of questions for each witness. This will serve as a roadmap for the interview and will help keep things on track. However, do not be afraid to follow a line of questioning that veers from the outline – interviews often go in unexpected directions, and it is important to follow all relevant testimony that arises. Do not be afraid to ask the tough questions, even those that may be embarrassing or otherwise uncomfortable.

After sitting down with the witness, introduce yourself and go over the ground rules for the interview, including reminders regarding the importance of keeping your discussion confidential and assurances of non-retaliation. Be sure to start with broad, open-ended questions, and let your witness do most of the talking. Make note of any specific issues you want to delve into later in the interview. If you have a smoking gun, it is usually a good idea to wait to discuss it with your witness near the end of the interview. Remember, however, that your role as a neutral investigator is simply to record the facts, not cross-examine the witness, so do not become argumentative with the witness, even if you suspect he or she is lying.

### IV. Spotting Deception

How do you know if someone is lying during an investigation? The short answer: you don't, not with certainty anyway. However, witnesses will often provide some obvious clues when they are uncomfortable with your line of questioning. And when this is the case, there is a good chance you might not be getting the whole story. If your witness does any of the following, it's a signal that you probably need to dig a little deeper:

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