
JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

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Workplace Investigations: Proactive Assessments Mitigate the Risk of Costly Litigation in a Newly Remote Environment

Stefani C Schwartz*

***Abstract:** “Bullying, discrimination, sexual harassment and other forms of workplace misconduct can create a crisis for any company—and trying to ignore or cover it up will make a bad situation worse.” That’s the warning from a December 2021 article for Forbes, which goes on to say that in addition the damage to an employer’s reputation, a study by workplace misconduct reporting service Vault Platform found that workplace misconduct cost U.S. businesses more than \$20 billion in 2021. In this article, the author discusses how proactively conducting workplace investigations can reduce an employer’s risk of winding up in court and paying the considerable tangible and intangible costs of misconduct, a risk further complicated by an increasingly home-based workforce.*

During the past two years, the COVID-19 pandemic has introduced new factors in the ever-shifting area of employer liability: large-scale layoffs and furloughs, the introduction and/or expansion of possibilities for remote work, the drive for a safe return to the physical workplace, and the dual needs for vaccination and accommodation of religious objectors to vaccines to name a few. These issues predate the current public health crisis but have been pushed to the forefront of employer concerns as a result of the virus. Yet this new arena provides opportunities for cultural, scientific, and legal progress. Many employers may benefit from the familiarity their employees now have with remote work, and the development of successful mRNA vaccines has wide-ranging implications. The changing legal landscape, however, introduces

uncertainty for employers concerned about the risks associated with any particular action.

Consider, for instance, the decisions many employers have had to make about transitioning to a remote work environment, later transitioning back to in-person operations, and possibly having to revert to remote work as the COVID-19 situation changes. Those decisions are loaded with legal questions beyond the expected skillset of a business owner: Are you liable if one of your employees catches COVID-19 at your workplace? How do you deal with employees who do not want to be vaccinated? How are employees with different family situations, commuting concerns, and medical histories going to respond to your decision?

COVID-19 might also cause someone to believe that more standard workplace issues have not occurred in the recent past, as remote work limits the interaction between coworkers. This belief would be unfounded. Remote work provides the same opportunities for harassment, discrimination, and intimidation as the traditional workplace. The fact that employees might not physically interact does not mitigate the chance of misconduct but only serves to decrease the chance of a manager noticing misconduct. Virtual interactions are not observed or monitored by supervisors in the same manner that in-person interactions might be, making remote work more susceptible to workplace misconduct.

COVID-19, then, has both aggravated certain workplace issues and made it more difficult for managers to ensure they are aware of any issues whatsoever. Employers need both advisors, especially for the former, and fact finders, especially for the latter. There is a process that provides both of these functions in the form of a single individual, and it is the topic of this discussion: workplace investigations.

A workplace investigation is a fact-finding endeavor carried out by third-party legal professionals. An attorney with experience in labor and employment law conducts interviews with employees, supervisors, and managers to make factual determinations about the state of the workplace. Investigators aim to identify the employees' primary concerns and expectations for their work environment. This information is then provided to the manager along with a set

of recommendations, providing a foundation for the manager to develop plans and policies.

Workplace investigations are most common in the context of pre-litigation employment disputes. The prevalence of such disputes has risen sharply since the beginning of the pandemic due to the same issues discussed above: remote work, vaccination, and so on. For example, consider the hypothetical case of a female employee who makes it known that she considers the inconsistent application of the company's remote work policy to be discriminatory on the basis of gender. Litigation over this issue is certainly undesirable, even if the plaintiff is ultimately unsuccessful. Successful litigation can cost an employer large amounts of time and money, and engagement in a lawsuit concerning a hot-button issue such as gender discrimination may negatively affect a business's reputation.

One of the most effective ways to preempt litigation is to implement a workplace investigation. In addition to making factual determinations, investigators also make recommendations to employers about policies, practices, and personnel. Recommended improvements in workplace operations are often sufficient to resolve the inciting dispute and may also address other issues that have gone unnoticed by the employer.

For instance, imagine that an investigator has been called in to assess the employee's claim of gender discrimination in the application of the remote work policy. During the course of the investigator's interviews, she also finds that a group of other employees are uncomfortable with inappropriate remarks made by their supervisor. This issue is identified and discussed in the investigator's report and subsequently addressed by the employer. In this scenario, a problem the employer was previously unaware of is resolved easily, without sparking litigation, simply because the employer made the choice to bring in an investigator. Instead of dealing with two lawsuits, either of which might be disastrous for the employer on its own, the employer can address both situations with one practical solution.

Of course, workplace investigations do not eliminate the risk of legal action being taken against an employer. Assuming that litigation does occur, however, there are at least two reasons why the workplace investigation remains an effective tool.

First, an investigation can be used as a defense in any subsequent litigation. Moreover, the implementation of an investigation demonstrates that the employer is ready and willing to take good faith, proactive measures to respond to employment disputes. This demonstration is useful both in a court of law and in the court of public opinion, which looks favorably upon an employer's recognition that a problem should be addressed in addition to the legal action being taken.

Second, workplace investigations can assure an employer that an issue in one area of the company is not present in other areas. As another example, a legal complaint might arise concerning the implementation of the vaccination policy in a company's marketing department; perhaps the director of marketing has allegedly made negative comments about religious accommodations for vaccines, comments that do not align with the company's policy. An employee files a legal complaint against the company because of the employee's perception that the company treats her religious group unfairly. The head of the company, wishing to determine whether other supervisors have made comments misrepresenting company policy, should initiate a workplace investigation to eliminate the risk of more lawsuits arising.

Working With an Outside Investigator

If investigations are important, why can't an employer conduct an investigation herself? There are a number of reasons why an external investigator is far better suited to this critical task than an inside party.

First, employees are more likely to honestly communicate their concerns to an individual who does not have direct influence over their employment status. As valuable as clear and honest communication is in the workplace, such communication must always be evaluated through the lens of the employer–employee relationship. That lens can blur important details in complex employment disputes, making the synthesis of an overall picture nearly impossible.

Second, the experience of a legal professional ensures that the right questions will be asked, and the responses understood and communicated clearly to an employer. Employment and labor

attorneys have the expertise in questioning and listening in order to obtain the most essential information from employees about these issues. Similarly, a professional knows what words or phrases to look out for because she knows which kinds of issues are most likely to result in negative outcomes for an employer.

Third, an external investigator is not biased in the same ways that an internal individual may be. In the previous points, the investigator's familiarity with the complexities of employment and labor issues was emphasized; here, it is precisely the investigator's *lack* of familiarity with the specific workplace being investigated that is a notable strength. An external investigator has little-to-no preconceived notions about what she might discover in the course of her work and absolutely no predetermined opinions about the value of any employee's contributions. This lack of familiarity with the particulars of the environment allows the investigator to best identify and communicate the concerns and ideas of the employees without intermingling those concerns and ideas with her own.

Initiating and Managing an Investigation

Workplace investigations begin with a meeting between the investigator and the manager or management team initiating the process. This meeting serves three roles: defining the scope of the investigation, communicating any known issues or recent complaints, and compiling a preliminary list of individuals to be interviewed.

The bulk of the investigation work consists of interview-style meetings between the investigator and various employees. These meetings can be virtual, but it is best for them to be conducted in person; as honest and clear communication about potentially sensitive topics is easier to achieve face-to-face. Employees are asked about their work histories and job description to provide context for their claims, and then provide their views on the strengths of their company, as well as potential improvements it could make. If there is an ongoing dispute or contested policy, employees are asked to give their perspectives on those as well. One might assume that investigators avoid discussing the interpersonal "drama" common to all workplaces, but this assumption would be incorrect.

Discussions of disputes, disagreements, or clashes of personality can reveal patterns of mismanagement, illuminate the negative influence a particular supervisor has on a group of employees, or lead to discussions of related topics the employee might otherwise have omitted. This reflects an important principle of conducting these interviews: they must be organic conversations, in which the employee feels at liberty to stray off topic or expand on an answer to a question.

Employees are often asked to summarize their views on the company and their role within it. This can take many forms: “I’m content here, but I think there are issues with management,” “I am planning on leaving as soon as I can,” “I know that there are others who have complaints, but I think those concerns are overblown.” This serves two roles: providing context for the employee’s more detailed comments and providing a foundation for the investigator to summarize her findings in a subsequent report.

The Investigator’s Report

Provided by the investigator to the employer after the conclusion of the investigation, the investigator’s report consists primarily of two components: a summary of findings and a list of recommendations.

The summary of findings must include all of the vital information gathered in the interviews while distilling this information to a consumable quantity. The skilled investigator, then, is not only well versed in the law and able to tactfully discuss sensitive topics with strangers, but she is also an adept writer. It is also in the report where conflicting facts or narratives are reconciled, or at least presented in their conflicting state. Perhaps one employee considers a particular policy to be immeasurably beneficial while another believes it to be an obstacle to the completion of her work. Neither of these views can be ignored altogether, and the investigator must present these conflicts in a way that is constructive to the employer.

The list of recommendations describes precisely those adjustments to policy and practice the investigator advises the employer to make based on the factual background. As is evident from the numerous examples discussed, these recommendations could be

related to formal policies, to standard practices, or to individuals and personnel management. Recommendations need not align exactly with the assessments of the employees; a skilled investigator interprets those assessments and makes recommendations as she sees fit, perhaps disagreeing outright with a number of employees.

Conclusion

Workplace investigations are not a particularly new tool for mitigation of risk in employment liability. They have, however, become more critical given the rise in employment disputes complicated by the COVID-19 pandemic. Investigations are a straightforward, efficient, and effective way to combat the risk of employment litigation because they reflect the best aspects of the employer–employee relationship: understanding, respect, communication, and shared goals. It is often challenging to cultivate these ideals in environments where relationships have deteriorated or broken down—often, a professional is needed to diagnose the issues and recommend remedies. There are no easy solutions to workplace issues in the wake of the pandemic, but there are solutions, and workplace investigations are one of the best tools for identifying those solutions.

Note

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