

Who Should Conduct An Investigation Of Employee Misconduct And The Role Of Confidentiality

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In our last post, we discussed the reasons for conducting an investigation of employee misconduct. This post addresses who should conduct the investigation and concerns related to confidentiality surrounding investigations of employee misconduct.

Who Should Conduct The Investigation?

The first step related to investigating a complaint of harassment is to determine who should undertake the investigation. The person selected to conduct the investigation should be credible, empathetic yet firm, in a neutral position, familiar with company policies and procedures, and an effective communicator (meaning both a good listener and able to articulate company policy).

Other factors to be considered in light of the type of harassment claim at issue include the gender and ethnicity of the complaining party. Should there be a single investigator or a team to ensure neutrality and proper documentation? Further, if the parties involved do not speak English as their first language, it is advisable to have a bi-lingual investigator as employees are much more likely to open up to a native speaker.

The key is to remember that, should the matter ultimately result in a lawsuit, the investigator is going to, in large part, be the face of the company at trial in front of a jury. You must choose this person wisely!

Depending on when the harassment claim comes to light or if the alleged harasser is a high ranking executive, it may be best to hire an investigator outside of the company in order to retain credibility. It is important to note that, if you hire an outside lawyer to conduct the investigation, you must be very careful to attempt to retain the attorney/client privilege. Indeed, Texas courts have not been uniform in their treatment of whether investigations conducted by outside counsel retain the attorney/client privilege as it relates to fact finding, *e.g.*, interviewing witnesses and gathering of relevant materials.

Therefore, if you hire outside counsel to conduct the investigation of a claim and the matter later ends up in litigation, it is advisable to retain separate litigation counsel in case the issue of attorney/client privilege comes up during the course of discovery. At the onset of an employee investigation by outside counsel, it is crucial that both parties define the scope and intent of the investigation so that all available steps are taken to maintain attorney/client privilege.

To Be Confidential, Or, Not To Be Confidential?

When initially undertaking an internal investigation of alleged employee misconduct, it is relatively common practice for employers to request all employees involved to maintain confidentiality and not discuss the matter with other co-workers. However, in 2012 in the *Banner Health* decision, the National Labor Relations Board (the "NLRB") held that a **blanket**

company policy prohibiting employees from discussing an ongoing internal investigation was unlawful. 58
N.L.R.B. No. 93 (July 30, 2012).

Instead, the NLRB held that, in order to prohibit discussions among co-workers of an ongoing investigation, "an employer must show that it has a ***legitimate business justification***" that outweighs employees' Section 7 rights under the National Labor Relations Act to self-organize and engage in other concerted activities for purposes of collective bargaining and other mutual aid or protection. The NLRB found that a blanket/uniform policy requiring that all employees maintain confidentiality during the course of an internal investigation served to chill employees' rights to collectively bargain and discuss their respective treatment by their applicable employer.

Under the *Banner Health* decision, the burden is on the employer to first determine whether, in any given investigation, witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated or there is a need to prevent a cover up. The employer may only instruct employees to maintain confidentiality if it can meet this rather vague and amorphous standard. Further, the employer must specifically inform employees what pieces of information involved in the investigation are to be considered confidential. This is clearly a difficult standard for employers to meet, much less gauge, during the rapid flow of information surrounding an investigation of alleged employee misconduct.

Based on the *Banner Health* decision, ***it is imperative that employers review their handbooks*** and other policies and procedures to verify that such policies and procedures do not contain a blanket policy that all internal investigation communications should be treated as confidential as a matter of course. The NLRB has specifically stated that such a provision is unlawful and will subject the employer to penalty.

If you have concerns regarding whether your handbook meets the requirements stated in the *Banner Health* decision, it is recommended that you contact counsel to review the applicable policies and procedures.