Keeping the Independence in Internal Investigations
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The hallmark of a reliable investigation is the independent analysis of the facts relevant to an employee’s complaint. An objective, frank analysis increases the reliability of the investigator’s conclusions and also assures that the process itself is trustworthy, accessible, and fair; these factors all contribute to an effective investigation. The United States Supreme Court, federal and state courts, and the EEOC have provided guidance regarding what constitutes an effective investigation. Similarly, guidelines and codes of ethics published by professional organizations serve as guidance to professionals conducting workplace investigations. This article contains some practical advice for in-house or internal professionals conducting workplace investigations who may be faced with unique challenges to their independence.

Internal personnel, including human resources professionals, may be presented with challenges different from those faced by an outside investigator that could potentially impede their independence, or perceived independence, when conducting an investigation on behalf of their employer. This may be simply the consequence of the investigator’s inherent role and responsibilities within an organization. For example, the internal professional may have relationships with employees who might be witnesses in the investigation (including complainants and alleged harassers); the investigator may be involved in performance management, which might prompt or be the source of the complaint; the investigator may be subjected to pressures to provide status reports during the course of the investigation; and the investigator may feel certain pressures because of a perceived value to the organization of the parties involved in the complaint. Careful planning at the outset of an investigation, managing expectations, educating the organization on the components of an effective investigation, implementing internal protocols, and simply being mindful of these challenges may eliminate or significantly reduce the threat, or perceived threat, to an internal investigator’s independence.

Choosing an investigator
The EEOC Guidance provides, “The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts.” In addition, the AWI Guidelines identify key factors to use to determine the appropriate person to conduct an impartial investigation. These factors include someone who is, and is perceived to be, impartial. For example, factors to be considered include whether the investigator is a party to the situation (e.g., in another capacity the investigator may have assisted with a reorganization of the affected department), and whether the in-house investigator has preconceived knowledge or a vested interest in the outcome of the investigation.

In addition to investigations, the internal human resource professionals may serve dual or multifunctional roles and responsibilities, such as performance management, within an organization. An actual or perceived conflict may arise when the internal professional involved in the performance management is charged with the task of investigating a harassment complaint made by an employee who was placed on a performance improvement plan (PIP), and the underlying allegation is that the PIP was in retaliation for protected conduct, discriminatory, or otherwise unlawful. The performance assessment of the employee will likely be challenged, and therefore the investigator in this situation could be a witness to the underlying factual issue: the propriety of the performance evaluation. Alternatively, the investigator may have, or may be perceived to have, alliances with the manager or complainant. In this situation, it would be optimal for the internal professional involved in the underlying issues to recuse himself or herself from the investigation. Similarly, if the professional closely supports a particular work group in the organization, he or she must consider whether relationships with potential parties or witnesses might impede judgment.

An employer and investigator would be wise to consider in the planning stage of the investigation whether any potential conflicts would impair independence.

1 See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc., v. Ellerth, 524 U.S. 742 (1998). In these two seminal cases, the U.S. Supreme Court discussed the value of an effective anti-harassment policy in combating sexual harassment in the workplace, and recognized that employers that implement and enforce effective anti-harassment policies may be afforded an affirmative defense to a claim of hostile work environment. Following these two decisions, the EEOC published guidance describing steps an employer might take to establish reasonable care in addressing workplace harassment. U.S. Equal Emp’t Opportunity Comm’n, No. 915.002, Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999), http://www.eeoc.gov/policy/docs/harassment.pdf.


3 The SHRM Code of Ethics and Professional Standards in Human Resources Management states, “As human resources professionals, we must protect the interests of our stakeholders as well as our professional integrity and should not engage in activities that create actual, apparent, or potential conflicts of interest.”

4 AWI Guiding Principles, Principle 2 (a).

5 Chersky, Ethical Issues for Internal Professionals Who Conduct Workplace Investigations, AWI J., April/July 2014, at 5. See also EEOC Guidance, “The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts.” The SHRM states that when selecting the investigator, the appropriate investigator should “have no stake in the outcome.” SHRM, Investigations: How to Conduct Investigations (Apr. 22, 2013).
Handling internal pressures to complete the investigation quickly

After choosing the appropriate investigator and defining the scope of the investigation with the employer, the investigator will commence the investigation. EEOC Guidance and other professional guidelines, such as the AWI Guiding Principles, provide that an investigative process, to be effective, must be thorough. A thorough review of relevant facts often includes several witness interviews, including the complainant and the alleged harasser, and a review of relevant documents, all of which take time. Along with the pressure to get the investigations concluded, investigators are always balancing the needs for the investigation to be “prompt” with the need for it to be “thorough.” This may be particularly difficult for internal professionals who tend to handle a large volume of complaints.

An internal investigator might be susceptible to internal pressures to complete the investigation because of deadlines pertinent to the department under investigation, such as rollout of a new service or product. The investigator may be directly contacted by the parties’ supervisors with questions and pressures to complete the investigation, stated concerns about the potential impact on the productivity of the parties due to the investigation, or suggestions regarding the veracity of certain witnesses. The pressure may be more significant if the alleged harasser is a higher-level employee and the supervisor is higher-ranked than the investigator. These pressures could include a request to hurry to a conclusion or questioning the investigator during the course of the investigation about what the witnesses are saying. These pressures can interfere with a good-faith and thorough process and can threaten the investigator’s independence.

Setting expectations up front could eliminate or reduce pressures faced by an internal investigator in these circumstances. An organization, along with the investigator, should discern at the outset of the investigation any potential challenges presented by timing of the investigation. A “work-around” plan should be constructed. Additionally, “need-to-know” communications, such as the level and frequency of status updates as the investigation proceeds, as well as who receives them, should be determined at the outset. These discussions and planning might include what management should and should not say or do relative to the involved parties during the investigation.

An investigator is often challenged with addressing these pressures on his or her own. The investigator should enlist the support of his or her supervisor. Moreover, adopting protocols that address these concerns, such as limiting direct contact with an investigator, or at least a plan for support when an investigator is faced with this challenge, could alleviate these pressures. Understanding the investigator’s tension to get the investigation concluded while at the same time having the obligation to be thorough, organizations could adopt systems that provide investigators with backup support. Protocols could be communicated to management during training and/or in written policies and regulations. An organization might be well served to educate managers and supervisors about the importance of a thorough and independent investigation and about their obligations and responsibilities with regard to the policy. Training managers of their responsibilities not just to report complaints, but to refrain from activity that could inadvertently impede the investigation, would be helpful in eliminating pressure on an investigator that could ultimately hinder his or her independence.

Avoiding reputation and character “evidence” in making credibility assessments

When conducting an investigation, an internal professional may have personal knowledge of an employee’s “reputation” or hear about it from fellow colleagues. For example, if a complainant is challenging a performance evaluation as discriminatory based on having rebuked her manager’s sexual overtures, the investigator should not allow the credibility of the complaint to be impacted based on the accused’s reputation of “being a family man.” Alternatively, the investigator may have heard the opposite, that the accused is separated from his spouse or unhappily married. Again, the investigator should not rely on this information to make credibility conclusions. The EEOC Guidance specifically states, “Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances.” An internal investigator may have more of this type of information available to him or her and must be deliberate in developing the facts and avoiding a tendency to confirm biases that he or she may harbor because of knowledge of information not relevant to the facts being investigated. The investigator must avoid making premature factual conclusions that are not fully independent and reliable.

Tendencies to take management at its word or to use reputation and character in an analysis can be avoided by fully developing the facts by eliciting relevant information such as. What exactly occurred? Are there other persons with relevant knowledge? Are
there notes or documents supporting the witnesses’ testimony? If so, get it; if not, ask why it does not exist. The EEOC Guidance sets forth areas of questioning and possible questions to ask. Follow these and other guidelines, which are intended to help the investigator elicit relevant facts. Challenge the facts. Seek objective means to determine credibility: plausibility (i.e., look at the timeline), independent corroboration from other witnesses, corroborating documents, and motive to falsify. Seek objective underlying data pertaining to both sides.

**Showing compassion without emotional involvement during the investigation**

An internal professional might know the complainant, accused, and/or witnesses personally. The strain of an investigation and/or the underlying issues may be evident on the parties, who may cry or exhibit other signs of anxiety, stress, and concern. It may be challenging for the internal investigator to refrain from allowing this to impact his or her reasoning or be conflicted because of his or her role’s dual responsibility to “support” the employee. Behavioral research has shown that empathy, although a good thing, can erode ethics. In making an effort to see the things the way people close to us do, we may take on their interests as our own. This may make one more willing to overlook transgressions. Internal investigators should audit their own loyalties within the organization.

These facts can present a practical dilemma for the investigator: learning to manage the “human” side of an investigation while maintaining neutrality. It is critical for an investigator to remember that as an advocate of a fair, independent investigative process, he or she is fulfilling a responsibility to support the employees. As a practical point, there are ways to show the “human” side as an investigator. There may be a tendency to nod or agree with a witness as a showing of support and compassion; however, this could be mistaken by the witness as the investigator “taking sides.” The better response, as a way to show the witness that he or she has been heard and understood, is to say simply, “I understand.” Another effective way to convey understanding is to repeat back to the witness what he or she just said. The investigator should avoid emotional attachment to any witness. If this becomes a risk because of the investigator’s individual perceptions or personal knowledge outside of the investigation, the investigator should recuse himself or herself or have someone else read the report to act as a sounding board.

It cannot be stressed enough that focusing on the facts and developing them in the analysis is an investigator’s best tool for reaching conclusions objectively.

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**Steering clear of other influences in report writing**

After concluding witness interviews, document review, and analysis of the facts, the investigator might be charged with drafting a report that contains his or her conclusions. If the investigator is required to have the legal department or risk management department review the report before it is finalized, this too can present the internal professional with unique challenges if the investigator is concerned that the reviewer is looking for a particular result or finding. This pressure may simply be due to an inherent reticence to deliver bad news, or the knowledge that a conclusion will be unexpected. The investigator should not allow these influences to impact his or her final conclusions. The culture of an organization, from the top to the bottom, will largely impact the investigator in this situation. An organization that values a respectful and safe work environment, and fosters that value through education, policies, and a fair internal grievance process, will cultivate an atmosphere that sees a frank and honest assessment of facts as a positive opportunity for growth.

**Conclusion**

In conclusion, the internal investigator may be presented with unique pressures that could challenge his or her independence. However, there are practical and proactive measures that an organization or an investigator can take to eliminate or reduce these threats. At the outset, the investigator should screen for actual or perceived conflicts of interest. Expectations should be stated upfront with regard to communication during the course of the investigation. Also, the organization might educate upper management about these expectations and the importance of them to the integrity of the investigation, in addition to stressing the significance of eradicating discrimination and harassment in the workplace. An investigator must avoid advocating for any party to the investigation by building trust and advocating for a fair process. All of these goals are best accomplished by conducting a rigorous investigation focused on facts. Finally, the analysis and conclusions should be based on independent facts and free of other influences. An investigator, in conducting a thorough, frank, and rigorous investigation, and by supporting conclusions succinctly, will present the decision maker with a reliable assessment of a claim. An organization that supports an independent process is in the best position to bring about positive change.

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* Adam Waltz, _The Limits of Empathy_, Harv. Bus. Rev., Jan.–Feb. 2016, at 6. Recognizing that empathy is the current rage being touted as a critical leadership skill, Professor Waltz discusses recent research, which suggests that this focus on empathy may be too intense. He states that although empathy is essential to leading and managing others (without it there would be disastrous decisions), failing to recognize its limits can impair individual and organizational performance.