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# Workplace investigations

Grow | Protect | Operate | Finance

## Moderator



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# **Why and when to investigate**

Roxana Jangi

# When and why to investigate

- Why is it Important
  - So that decisions/outcomes can reasonably be relied upon in legal actions
  - Requirements under Occupational Health and Safety Legislation
  - Requirements under Human Rights Legislation
- When to Investigate
  - Employee misconduct is so serious that, if true, it may result in an employee being terminated for just cause
  - Possible violations of human rights legislation
  - Incidents of workplace violence, workplace harassment and sexual assault under Occupational Health and Safety
- Investigations may arise
  - When employer receives a complaint from an employee, a consumer, or another third party;
  - When an employer is concerned about an employee's behaviour; or
  - via whistle blower complaints





# **Key issues to consider when investigating**

Victoria Merritt

# 1. Are there any immediate risks?

## 1. Health & Safety

- Administrative suspension pending completion of investigation?
- Schedule separate shifts or reassign individuals temporarily?
- Enable remote work?

## 2. Reporting Requirements

- Insurer?
- RCMP or other enforcement agency?
- Board?
- Internal?



## 2. What is the legal framework?



- Review applicable policies
  - Bullying & Harassment/Respectful Workplace Policy
  - Code of Conduct
  - Contracts or agreements
  - Employee Handbook
- Review applicable legislation
  - Federal vs provincial
  - Human rights
  - Occupational health & safety
  - Employment standards

# 3. What is the scope of the investigation?

- Assess the complaint
  - Who is involved?
  - What are the allegations? Are they serious?
  - What does the complainant want?
- What evidence needs to be gathered?
  - Witnesses
  - Documents
  - Other evidence

# 4. How should the investigation be conducted?

Internal or external investigator?

## INTERNAL INVESTIGATOR

- Allegations are not serious
- In-house expertise available
- Effective use of resources\*
- Does not involve senior members
- No optics concerns

## EXTERNAL INVESTIGATOR

- Involves serious allegations
- Involves senior member or HR
- High risk (legal privilege)
- Optics may be an issue
- Particular expertise is needed

# 4. How should the investigation be conducted?

## Best practices

- Treat complaints seriously
- Have a plan
- Communicate carefully & consistently with the parties throughout the investigation
- Conduct investigations in a timely way



# 4. How should the investigation be conducted?

## Best practices

- Be fair and impartial – in both appearance & actuality!
- Respect confidentiality
- Document the investigation carefully
- Offer support to the parties

## 4. How should the investigation be conducted?



Key question: what would a decision-maker think if they scrutinized the investigation?

# 5. What action is needed after the investigation?

- Communicate the findings to key stakeholders
- Complaint substantiated?
  - Apology, counselling, training
  - Change in duties or reporting relationship
  - Discipline, up to and including termination of employment
- Consider action even if complaint NOT substantiated
- Remind parties: retaliation prohibited, report if any occurs

## 5. What action is needed after the investigation?

- If other recommendations are made, but not implemented, document why
- Broader learning opportunity:
  - Review (and update!) policies & procedures
  - Improve efficiency (templates? Training?)
  - Consider if investigation identified any broader issues within organization



# **Consequences of a flawed investigation**

David Konkin

# **Consequences of a flawed investigation**

## Topics

1. Privilege
2. Employees
3. Enforcement Authorities





# Privilege

When & why is it important?

- Not all investigations are sensitive enough to warrant the involvement of counsel
- Determined by the subject matter under investigation and the potential for company liability and subsequent scrutiny of the investigation
- Consider likely impacts from the investigation:
  - Litigation by employees
  - Damaging findings about the company
  - Enforcement agencies & regulators
  - Contractual counterparties





# Privilege

## Solicitor-client privilege

- Basis is protecting a lawyer's advice to their client
- Not just for legal advice:
  - “It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services.”
- Requires the involvement of counsel
- Jurisdictional differences



# Privilege

## Litigation privilege

- Permits private preparation for litigation, including investigations.
- Wider application.
- Dominant purpose.

### Considerations:

- Expires with the contemplated litigation.
- Starting point is critical: when litigation is contemplated.
- Regulatory requirements can oust litigation privilege.



# Employees

## Consequences

- Wrongful dismissal
- Privacy violations
- Employee morale
- Discourage internal whistleblowing





# Enforcement authorities

Expectations and consequences

Increased  
expectations

Custody of evidence  
and  
trampling the scene

Impact on leniency

# Workplace investigations

## How can Dentons help?

- External workplace investigations
- Investigative support and advise on internal investigations
- Workplace policy audits
- Workplace investigation training
- Respectful workplace training
- Compliance training



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