Workplace Investigations: 5 Basic But Important Tips

There has been no shortage of high-profile workplace investigations and discussions surrounding the outcome of those investigations in the news over the past year. But what happens when you're no longer reading about the investigation in the news and you're suddenly at the center of one in your workplace?

Whether you're an employer who is considering whether investigating is really necessary or an employee who has asked for or been named in an investigation, read on for five basic but important tips:

- **Employers may be required to conduct an investigation**

An employer may be required to conduct an investigation based on its own internal policy or as a matter of law.

Many organizations introduce policies dealing with general complaints or more specific issues like harassment or discrimination. It may seem hard to believe but it's easy, especially in mid-size organizations that are typically marked by harmony, for an employer to introduce a policy and be less than familiar with its content. Whether you're an employer faced with a complaint, the person making a complaint or the person who is named in the complaint your first step should be to consult the applicable workplace policies. In your review ensure you understand how investigations are triggered and any information that the policy provides with respect to the procedure, mandate and potential outcomes of the investigation. It's also a good step to consult workplace policies, if they exist, which define the conduct that is being complained of.

A workplace may also be required to investigate as a matter of law. The Occupational Health and Safety Act, for example, requires that employers conduct an investigation into complaints of workplace harassment, where appropriate. While Ontario's Human Rights Code doesn't compel an employer to conduct an investigation into a complaint of discrimination, whether one was conducted will be a primary question for Ontario's Human Rights Tribunal.

- **Investigators may be internal or external to the workplace**

Unless a workplace policy mandates that investigations be conducted either by an

internal or external investigator, employers typically have a choice between having someone in-house conduct the investigation or hiring a third party.

While third-party investigators can be very expensive, good investigators can also bring a great deal of expertise to a complex situation. If an employer is selecting an internal investigator, they want to be certain that the internal investigator has a thorough understanding of the investigation process. Obtaining legal advice, in which a lawyer can help guide the internal employee in conducting an investigation may assist an employer in achieving a sounder outcome.

- **Investigators are neutral decision-makers**

Whether they are internal or external to the organization, it's important that the employer, complainant, respondent and all witnesses understand that the investigator is not their advocate. The investigator is a neutral party who is expected to collect relevant facts, and assess those facts against the applicable workplace policy or law to determine if the conduct alleged has occurred and to render a decision. If any party needs advice, advocacy or assistance through the process they have to look elsewhere.

- **Complainants and Respondents may be owed representation**

Depending on the parameters of your workplace policy, parties to the investigation maybe owed a representative. This is particularly common in unionized workplaces and unionized employees are often promised the representation of their union throughout the investigation process.

However, it is increasingly common for non-unionized employees to be offered the opportunity to have a support person present even if this is not promised by a workplace policy. Ultimately, a support person can be very valuable to parties to an investigation, especially if the subject matter of the investigation is particularly sensitive. It is incredibly important that the support person understands that they are there to support the party and cannot provide answers or intervene on their behalf. While many complainants and respondents chose to hire a lawyer to help advise them through the complex investigation journey, a support person can also be a trusted family member or friend.

- **Workplace investigations can and do go wrong**

Ultimately, the most well-intentioned investigations can and do go wrong. Investigation shortcomings can range from things like extreme delay to a lack of impartial decision-making and everything in between. Investigations can be extremely complex and whether you're an employer, complainant, respondent or witness, we'd encourage you to reach out with your questions.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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