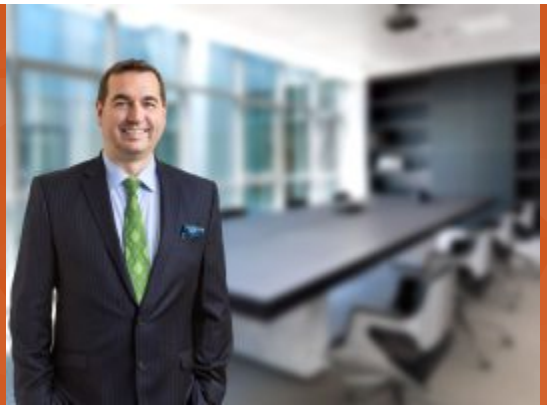
Top Seven Tips for Handling Internal Investigations

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Businesses of all types occasionally run into situations where they need to undertake an internal investigation. Sometimes the need for an investigation is prompted by an inquiry from a governmental agency such as the Department of Justice, the Securities and Exchange Commission, a state attorney general's office, or another regulatory agency. Sometimes the internal investigation is needed because an employee complained about the treatment he or she received from a supervisor or fellow employee. And sometimes it might be the result of an employee reporting what he or she believes to be broader misconduct on the part of the company or its employees – a whistleblower. If you are an officer, a director, or in-house counsel at the company, you are likely to be one of the first people to have to respond to the event triggering the need for an internal investigation. Because of the variety of topics that an internal investigation could cover, there are few rules that apply 100% of the time. But the following are a set of guidelines that should be generally applicable to anyone faced with having to do an internal investigation.

DO consult, and retain if necessary, counsel.

Having experienced outside counsel conduct an internal investigation is almost always a superior choice to having someone within the company perform it. Experienced counsel will be able to identify the legal pitfalls that might come from any findings as the investigation progresses and help the company respond appropriately. Experienced counsel will also be better versed in how to conduct any document review, employee interviews, and analysis of the facts counsel gathers. Not all investigations can be completed only with the assistance of counsel. If financial issues are at play, for example, forensic accounting or auditing experts might be necessary. If the nature of the investigation requires subject matter experts, it is better for outside counsel to formally retain the expert. By having counsel retain the subject matter expert, you will be better positioned to have the company assert the attorney-client privilege over any work done by the experts at counsel's request.

DO identify the issues to be investigated.

Although this seems to be self-explanatory, it is important to identify what exactly needs to be investigated. In cases where there is misconduct alleged by a whistleblower or outside agency, the alleged misconduct might have ramifications on more than one part of the business. Think about how the alleged misconduct might impact the company's customers, clients, business partners, SEC disclosures, financials, and other stakeholders. Thinking through those potential effects will help you tailor the scope of your investigation properly.

DO preserve all potentially relevant documents.

Any experienced outside counsel should be well-versed in determining the best way to preserve any relevant documents. The most common documents that you will need to

secure immediately are emails and other electronic documents stored on a server or locally on the hard drives of potentially relevant witnesses. Most businesses that have an in-house IT staff, or who use a reputable external vendor for IT services, should be able to preserve all relevant materials on a server (without the involvement of individual employees whose email is being preserved) so that the files cannot be deleted, either purposefully or inadvertently. To the extent there are documents that employees maintain in paper format or locally on their hard drives, you should seek to collect those documents as well. To avoid the risk of an employee deleting any relevant documents, it is best practice not to give the employees a personal heads-up that their documents are being collected except to the extent necessary. This avoids the potential, albeit hopefully rare, scenario where an employee deletes relevant documents out of fear of embarrassment or accusations of wrongdoing. In many companies a request to collect documents from someone's local hard drive can feel like an awkward conversation, so you should be comfortable relying on counsel to have those conversations with employees when necessary. Once the documents are collected, counsel conducting the investigation will review the relevant ones and use those for employee interviews and in reaching ultimate conclusions.

DO maintain confidentiality as much as possible where needed.

The most important aspect of maintaining confidentiality is to ensure that the content or even existence of the investigation is not known outside the company and its counsel. This is particularly so in the context of a publicly traded company. If there are allegations of wrongdoing that prompted the investigation, disclosure could adversely affect a company's stock price. Even if the results of the investigation show no wrongdoing whatsoever, the existence of the allegations runs the risk of tainting the stock price. Internally, confidentiality is important as well, but for different reasons. To effectively conduct an internal investigation, the investigator is going to need to balance (a) the need for finding out information from the employees through individual interviews with (b) the need to ensure that employees are not improperly talking to one another about the interviews and the investigation and with (c) the need to gain the trust and cooperation of employees and any other relevant witnesses. Again, experienced counsel will be able to guide you through the process of which employees, officers and directors should know what information and at what time they should know it.

DO keep open a line of communication to any regulatory authority or other body scrutinizing the investigation.

If a regulatory agency prompted the internal investigation, it will sometimes be willing to offer guidance about what issues it views as most important. You do not want to finish an investigation only to learn that it inadvertently did not address an important question. The same remains true even if the investigation is being overseen internally by the Board of Directors or a subcommittee of the Board of Directors. If, for example, the Board of Directors is working with the company's auditors to determine whether a particular issue being investigated needs to be disclosed, getting regular feedback from the Board or its subcommittee will help ensure that the investigation is seeking the information requested and is done credibly.

DO document the steps you take in the investigation and the results you find.

At the end of the investigation, counsel conducting the investigation should put together a report with conclusions from the investigation. This report will typically include a summary of the information relied upon (categories and numbers of documents collected, interviews conducted, experts consulted, etc.) and conclusions with a reasoned explanation for those conclusions.

DO take remedial action if needed.

Not every investigation is going to result in the need for remedial action. But if there is a situation where you have identified either purposeful wrongdoing or even innocent mistakes, remedial action might be warranted. There is no one-size-fits-all type of remedy because the conduct that you have identified as needing corrective action can vary. Remedial action can come in a variety of forms. Establishing new training programs for employees might be sufficient to correct conduct that is inadvertent, negligent, or simply one or more innocent mistakes. More egregious misconduct might warrant a harsher sanction, up to and including termination. Any adverse, individualized employment action, such as termination, demotion, or individualized training should be carefully vetted with employment counsel to ensure that the company does not subject itself to claims (meritorious or not) of retaliation against a whistleblower.

These seven principles are the foundation for an effective internal investigation. If you are confronted with the need to conduct an investigation, especially if you have not done so previously, it is important to reach out to counsel promptly to assist with the nuances of any investigation. The Morse Litigation Team regularly advises on such matters, guiding clients through the process and to the most favorable outcome. For more information, please contact Scott Magee.