Post-Conference Special Session

CROSS-BORDER CONUNDRUMS IN WORKPLACE INVESTIGATIONS

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Employees now raise more allegations that employers must investigate – ranging from harassment to bullying to kickbacks to workplace safety. The collapse of barriers inhibiting employee reporting was overdue, and we believe that the ubiquity of genuine reports benefits companies desiring a productive, engaged workforce. With this in mind, companies are poised to welcome opportunities to investigate. At the same time, courts and reviewing authorities give internal investigations unprecedented scrutiny.¹

Preparing for and executing an investigation are as important as the investigation itself, if not more so. Here, we walk through various difficult situations that can multiply investigation cost and risk, allowing employers to spot issues at a local and global level. Part 1 helps employers triage, scope, and prepare for their investigations; in Part 2, we explore the aftermath, including recommending and implementing remedial measures.

PART 1: THE BEFORE

Companies are well served to set up investigations for success. A good investigation can improve workplace culture and minimize legal risk, but a flawed one can exacerbate toxic situations and create an array of legal liabilities. At the same time, the resources necessary to conduct a proper investigation can seem astronomical. Here we review a few parameters that can help an investigation from spiraling out of control.

**Intake**

The first steps the company takes in recognizing a complaint wield great influence over the integrity of the process itself. All investigations start with a “report” of improper conduct. This can come in the form of an employee’s complaint to HR or management, an employee’s report to HR or management of an issue impacting another employee, a “formal complaint” documented and reported, a call to an available employee “hotline,” notice to the organization through social media postings, and all manner of communications sent to management.

Employers should act swiftly and decisively, yet sensitively and without cutting corners. Threshold questions must be viewed through a lens that few if any decisions are risk-free.

Anyone fielding a complaint – which should include all leaders who are foreseeably in the position of receiving informal complaints – should understand how sensitive and difficult it is to raise a complaint and resist instincts to treat the complaining individual as a “litigant” rather than a “human.” When a complaint arises, the recipient must exercise careful judgment on the following, and be aware when he or she is out of their depth and should loop in other experts:

- In the initial response (which may be a placeholder email), making the individual feel that the company is listening and not dismissing them.
- Determining whether something actually warrants an investigation in the first place – is this really a performance/leadership concern that can be managed outside an investigation context? The word “investigation” can trigger alarm that can create anxiety – to what extent is that necessary and how can it be minimized?
- Assessing urgency – is there an immediate danger to the workplace and/or employees?
- What laws apply? Is there a cross-border component?
- Is there a heightened reputational risk?

¹ Lalonde v. Sena Solid Waste (Alberta Canada)
• Who else within the company will need to be looped in (e.g., the IT department, finance, tax, HR, legal, compliance) and who should the company be careful to exclude?
• Does the company have reporting obligations to the authorities?
• Is there something else under the surface? Particularly in certain countries, a report of one type of conduct may be indicative of a different issue. For example, a report that a manager is receiving “kickbacks” may indicate bullying or harassment.
• With a presumption toward treating complaints as genuine, does the complaint present any red flags? (This sensitive issue will be discussed under “Scoping.”)
• Is suspension appropriate – in many countries a decision to suspend without justification can create a litigation risk (e.g., Korea), but is the alternative worse?

It is important to determine the implications under the law where the conduct occurred, the law where the affected employees work, and the law of the country where the organization is publicly listed (if applicable) or where its majority owners are located. This step is not just to determine the potential laws violated if the complaint is validated, it is also to understand the legal and cultural landscape from which the organization’s decision makers and the individuals involved form their values. For example, most countries have laws related to sexual harassment, but while sexual harassment is well defined in the U.S. to mean unwelcome touching or conduct that is objectively and subjectively unreasonable, what is “reasonable” in the U.S. is not the same as what is reasonable elsewhere. Further, some countries have extensive procedural due process requirements even at the investigation stage (e.g., Ireland), and others have none at all.

The company may also need to take interim measures “pending investigation,” such as suspending a target, which can be complicated under various countries’ laws (and usually requires paid suspension). Because the targets of complaints are sometimes complainants themselves, this calculus can be tricky and the messaging even trickier. There is no truly discreet way to suspend someone, and if the target is ultimately vindicated, suspending the target will make it difficult for him/her to come back. There may even be alternatives such as working from home/taking the person out of the work environment but allowing him/her to continue working. For expats on assignment, repatriating the individual temporarily or permanent may be a good option in certain cases.

Investigators must also consider the matter of attorney-client privilege – if the company wants to conduct an investigation under the auspices of privilege, U.S. case law requires specific disclosures to interviewees, dubbed “Upjohn warnings.” These warnings can sound alarming, depending on how delivered – and can even come across as bizarre to non-U.S. witnesses, particularly given the lack of an analogue to U.S. privilege under some countries’ laws. Investigators should consider this in their delivery, as well as in their decision on whether to deem the investigation privileged in the first place. Often, it’s better to conduct a non-privileged investigation, where investigators understand from the beginning that their raw materials are likely to be disclosed in later litigation.

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3 EU Countries apply a very similar definition of harassment being “conduct related to [sex, age, race, disability, religion or sexual orientation] which has the purpose or effect of either (1) violating someone’s dignity or (2) creating an intimidating, hostile, degrading, humiliating or offensive environment.”
4 In the UK a suspension without “reasonable and proper cause” is a breach of the employer’s duty not to destroy trust and confidence [Crawford v. Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402].
In addition to all-employee-facing investigation policies, it can be helpful to implement some internal procedures for leaders that may receive complaints. To avoid problematic investigations occurring under the radar, these protocols can include when to loop in legal, and for global companies, when they must contact headquarters before taking action.

Finally, key is that employees may “report” in different ways, and while official mechanisms must exist, the company must be open to receiving and responding to complaints outside the official channels, and not per se holding against a complainant that they may not have been comfortable with the official channels. When complainants spiral into certain actions (e.g., emailing the top executives about complaints already investigated), there should be a plan for assessing this situation and redirecting it without overreaching to imply that it is ignoring the substance of the complaint just because of the method in which it was raised.

**Bias**

In any internal investigation, some presumption of bias exists – to varying degrees, it is impossible to identify a truly independent investigator within a company that pays his/her salary. Even in large companies with full-time employees devoted to investigations (a luxury many businesses lack), personal relationships and biases are difficult to police.

When selecting from internal resources, it is helpful to have consistent process for considering complaints and appointing the investigating staff. This does not mean that the same individuals should conduct every investigation – rather, a centralized group of decision makers should review the issues and select the investigator according to a consistent set of practices, in order to ensure consistency and fairness of process worldwide. Organizations that maintain a practice of self-appointed investigators on a country-by-country basis risk inconsistency, which undermines the validity of the rules and policies enforced. More importantly, when investigations are identified and conducted at the country-level, it often becomes the case that the individual investigating has a direct or “dotted line” reporting into the individual being investigated, or the subject of the investigation has sufficient authority and control so that the investigator does not feel a level of true independence. In addition to choosing someone who is fair, organizations should seek to appoint investigators who are prepared to “stick their neck out” and make findings of fact. A report that sits on the fence is of little use to anyone.

Depending on size, companies should have a formal or informal team responsible for receiving and managing investigations. This can be a compliance department or it can be an ethics committee or other informal role. It is essential for in-house lawyers to hold a leadership position for this group, in order to ensure that legal issues that expose the company to civil and criminal liability that are not readily identified on the face of a complaint will be identified immediately. Ideally, these lawyers will understand the key factors under the laws applicable in each affected jurisdiction, to assist the larger team by advising on what to look for and also on what procedural issues apply in any given context.

In addition to lawyers, HR, finance, compliance, and IT professionals are also appropriate participants in the investigation process, depending on the issue subject to review, the sensitivity and confidentiality of the matter, and how best to obtain complete and factual information. For example, HR may be best qualified to meet with an individual reporting having been sexually harassed or bullied, as an approachable individual who can obtain a complete understanding of the complaint, explain the process, and establish a rapport with the complainant to ensure continued cooperation. Finance professionals are most effective when conducting reviews of issues arising from sales transactions or services contracts. IT
professionals are key to determining whether trade secrets or confidential information has been misappropriated. Even when the subject matter of the investigation does not involve the expertise of each of these functional areas, it is helpful to have representatives from various parts of the organization work together as participants on a regular basis, since it helps to ensure that a variety of diverse and even opposing perspectives are considered when identifying issues to explore and grappling with some of the more complex challenges.

While the preferred approach is to conduct investigations internally as an expense savings measure, certain circumstances favor engaging an external investigator. An investigation that can be questioned as not truly an “independent” process from the outset will often invite unnecessary criticism from parties interested in supporting the complainant. It is more often the case that the position or status of the subject, the complainant, and the witnesses may influence the investigator’s ability to conduct thorough and meaningful interviews, or the ability to do so free from conscious or unconscious concern about whether the existence of the process could harm the investigator’s own career. Where bias is self-evident, an investigation’s target frequently raises a complaint that merits “investigation of the investigation,” implicating an overwhelming degree of bias of any internal “reconsideration.”

- Public scrutiny: When a complaint is lodged through social media or otherwise subject to public scrutiny, it is important to recognize that internal parties may be perceived as having a pre-existing conflict of interest that favors the individual or the organization.
- Professional relationship: Investigators with a professional relationship to the parties involved and individuals in the management chain of the parties involved should not participate. In addition, the institutional culture of an organization or department may make it difficult to identify issues that are more easily recognized by an outsider.
- Target’s position and role: Even without a close professional relationship between investigator and target, a powerful impetus exists to avoid taking action against high-level executives or successful revenue-generators.
- Subject-matter issues: Where the target of the investigation has expertise in the area in question (e.g., an HR executive accused of harassment or a CFO accused of financial fraud), an external investigation may help offset the power imbalance.
- Nature of allegations: Certain serious allegations (e.g., sexual assault) bear so many legal and reputational risks. Other types of allegations such as financial fraud may implicate specific regulatory concerns. An external investigator offers important protections given the high stakes involved.
- Pattern of complaints: If a company has received previous similar complaints against the target, or even other targets, an external investigation can help break the pattern, as many complainants finally feel heard.

In instances such as the following, external investigations can end up a cost-saving measure – and frequently, they can be scoped in a proportionate fashion, as discussed in the next section.

Finally, investigators must accept the reality of their own subconscious gender, racial, and cultural bias, and that it may influence their conclusions or recommendations. Investigators resistant or unaware of these background biases are susceptible to conclusions that may make the investigation itself a liability. Investigators must be self-aware in this regard, and must check these biases throughout when assessing credibility. Inexperienced investigators should be trained alongside an experienced investigator, with appropriate deference to the bias.
Scoping, Phasing

Whether internal or external, companies must set early expectations as to what a thorough, fair investigation means under the circumstances. No doubt, some investigations warrant a “no matter the cost” approach. But it’s worth noting that massive investigations can have a negative impact on employee morale and can cause additional harm to the victims – so it’s worth taking a close look before a full-scale launch. Local laws can be relevant on this point. In the UK, for example, the depth of investigation should be “reasonable in all the circumstances” which does not necessarily require investigating each line of defence/complaint advanced.6

This could mean a phased approach, in which a company does initial diligence. If it then determines that further investigation is unnecessary under the circumstances, it prepares a brief report explaining that decision. If unclear (particularly when dealing with a country outside their home jurisdiction), it can help to engage outside counsel at the very beginning to conduct that diligence, spot the issues, and make recommendations that might include a second phase of investigation. The company can then determine whether and how to conduct it (e.g., internally).

Assessing the circumstances is a calculation that requires great care, here are some examples where scoping can play a particularly important role.

- Non-employee claims. Where the complaint involves contractors or staffing agency employees, companies concerned about admitting co-employment may wish to extricate themselves completely from the investigation. This comes up often where companies have no presence in a given country and have utilized a staffing provider as an employer of record. In those cases, the company is likely to be deemed a coemployer no matter what, and coemployment is a dangerous risk driver.
- Diminished credibility.
  - Employees looking for a payoff
  - Negative reputation
  - Existing related complaints under investigation
  - Serial complainant/complainant who appears to be taking advantage of other channels
- Feasibility of corroboration. If allegations are easy to evaluate through data searches, etc., it may be possible.
- Obviousness. If the allegations/initial evidence is facially credible, the company may be comfortable proceeding to take action (e.g., terminating an employee) without subjecting the complainant and others to a protracted investigation.

Another important aspect of “scoping” is identifying evidence in a way that maneuvers around the rabbit holes. Regarding data, new data protection laws and evolving digital communication reduce the utility of relying on company email servers for a smoking gun. Pulling and reviewing an accused individual’s emails may not be worth the time or cost in a world where (1) using it may compromise the investigation’s integrity, as GDPR’s ripple effect has created anxiety surrounding all conceivable processes that use someone’s data in a way they might not like; or (2) savvy wrongdoers can communicate using a variety of mobile applications and are less likely to use a company-controlled email server to document their misconduct. Rather, email searching is becoming a more limited tool, which the company uses in a targeted fashion and only to the extent necessary and efficient to corroborate other evidence. Often witnesses will provide critical correspondence voluntarily, rendering secret searching unnecessary.

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6 Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94.
It is often sensible to create a “Terms of Reference” document setting out the purpose and remit of the investigation in clear and neutral terms so that everyone involved understands what is (and is not) going to be investigated. This is particularly so when using an external investigator. The Terms of Reference may cover:

- The purpose of the investigation. What are the allegations/issues that require investigation?
- Are there relevant internal policies that need to be applied and followed by the investigation such as disciplinary, grievance, bullying and harassment, or whistleblowing policies?
- What is the appropriate standard of proof? This is normally “on the balance of probabilities” but can vary by country and depend on the nature of the wrongdoing.
- Is the investigator’s role limited to making findings of fact, or should they also make recommendations?
- Is the investigation going to be covered by legal privilege? If so, that should be stated clearly in the Terms of Reference.
- Where should the written report be sent?

One of the benefits of a Terms of Reference document is to prevent an investigation “mushrooming” into something much bigger as issues are unearthed in the investigation. The investigator and the organization who commissioned him/her can then discuss whether to widen the scope of the investigation or alternatively whether a separate investigation is required.

It is also important to send relevant documents to the investigator at the outset so he/she can immediately assess the issues and areas on which to focus in the interviews – while avoiding a black hole. The first interview will normally be with the complainant(s) to get full detail of the allegations and minimize the risk of having to re-interview people in the event that additional allegations/detail arises later. On the other hand, data and documentary evidence is infinite, so strategic scoping is helpful here, as is scheduling in such a way as to have witness interviews guide the document review.

Individual witness interviews are the most important factor, but there is such a thing as interviewing too many people – in particular where unnecessary witnesses become aware of what should be a confidential investigation. In the global context, geographical distance, language barriers, cultural norms, and past practice will all factor in to determining how best to plan for them. As a general matter, in-person interviews are the most effective – not just for assessing the credibility of the witness, but also for calming down combative or traumatized witnesses, as well as conveying the sincerity of the organization when conducting an interview. Video chat can be tempting, but is a poor substitute for in-person communication, and any technological hiccups can even jeopardize the integrity of credibility findings. Sometimes, a phone-based investigation will suffice, particularly at initial phases and when interviewing bit players.

Experience tells us that witnesses who are concerned about retaliation will not offer helpful information, nor will they express this concern overtly. The best method to overcome this concern is to establish a rapport with the individuals who participate and to allow them as many assurances as possible. Such assurances come in the forms of (a) carefully explaining the meaning of “retaliation” and informing them that the company will ensure that they will not be subjected to punitive measures or targeted for participating, (b) allowing them to understand they are one of several witnesses who are participating, providing them the assurances that they will not be singled out, and (c) clarifying upfront that they themselves are not “under
investigation.” These often overlooked details help to build a relationship of trust between the witness and investigator that can contribute to a foundation of obtaining helpful information. In addition, it often helps to connect with fact witnesses more than once – first by phone to coordinate an in-person meeting and answer questions about the process, next in person for the formal interview, and subsequently to follow up on unresolved issues or after learning more details. Since most witnesses in an investigation rarely experience the process, it tends to be surprising and sometimes overwhelming, so often witnesses will remember key facts after their first in-person interviews.

When interviewing the individuals who are suspected of misconduct, many countries offer procedural protections that are designed to protect the individuals, but can frequently impose a chilling effect. For example, common law jurisdictions like the UK and Australia require employees to be presented with each and every potential allegation against them in advance, in writing. That principle normally only applies to subsequent disciplinary proceedings which may follow an investigation, but in certain circumstances can apply to the investigation meeting itself (for example the Irish case of Lyons v. Langford & Westmeath Education Board). This has the effect of making the process adversarial. When disciplinary action may result as a consequence of the interview, in some contexts these witnesses have the right to cross-examine others who provide information used by the company as the basis for such discipline. Similar procedures are imposed by civil-law jurisdictions, such as France, Israel, and the Philippines, all of which require advance written submissions to be provided to the alleged offenders to which they can respond. It is therefore important to distinguish between the fact-gathering phases of an investigation and the disciplinary stage and to be prepared to conduct more than one in-person meeting to ensure that appropriate procedures are followed.

Discretion and Sensitivity

In scoping the investigation and preparing for interviews, investigators should contemplate the question of how to be discreet and respectful to those involved. By default, investigators are scary – often investigators are best served to focus on de-escalating that anxiety to make the investigation productive, despite the proclivity we have for (what we believe to be, but what in the big picture is often not) erring on the side of caution.

We have all been conditioned, for example, to ensure that employees who come forward to report alleged legal violations and/or violations of the company’s policies cannot be promised confidentiality. This is because their identities may be required to be disclosed by civil law, such as the law in France prohibiting employees from being disciplined based on anonymous allegations, or by external proceedings, such as a Department of Justice investigation into alleged FCPA violations or an EEOC investigation into alleged discrimination.

Although the legal rationale warning against promises of confidentiality has to do with mandatory disclosures in certain countries to individuals who are accused of misconduct or requirements by law to comply with third-party investigations or litigation discovery, the initial genesis of this principle arose from a misconception by management and HR that still pervades after over 25 years. Specifically, when someone brings a complaint but states that he/she does not want the company to do anything about it, the listener often believes that he/she is respecting the complainant’s wishes by taking no action. But because the complainant’s stated wishes will never be a defense in the event of a claim relating to the company’s failure to respond to an issue, norms against confidentiality have developed – and in some cases they may go too far.
The best practice for addressing confidentiality, therefore, is to be transparent with a reluctant complainant or witness. Rather than making a blanket “we can’t promise confidentiality” statement, an effective method to communicate this message while building trust with a witness is to explain that the company will make every effort to maintain confidentiality for as long as possible, and will inform the witness if it becomes necessary to disclose his/her information. For a third party witness who is not a complainant, to the extent it is possible to provide assurances that his/her name will not be disclosed to other witnesses during the course of interviews, those assurances should be provided. It is a simple reality that there are many social factors weighing against coming forward to provide information harmful to a coworker or manager in an investigation, even when doing so is against the personal interest of the witnesses interviewed. Best practice is to acknowledge that these factors exist, discuss them to the extent witnesses express concerns about them, and adjust rigid protocols when doing so will help an investigator learn the truth.

This is not to say that the principles behind such protocols should be abandoned. Rather, considerations of confidentiality should be discussed openly with participants on the basis that they can understand the reasons that their identities might need to be disclosed and – more importantly – the timing of such disclosures.

PART 2: THE AFTER

Investigations are a means to an end – the goal is to ensure that the company is informed sufficiently when it takes actions that affect employees’ lives, often in a drastic sense. The lodestone, again, is “what, informed by the applicable laws, would best demonstrate to employees that the company wants them to report misconduct? Given that many laws actually deter complaint reporting for fear of their job life being upended, or being retraumatized, how can the company take action to encourage it within the legal framework?

Report

Most situations need a written report containing the key findings from an investigation, along with the procedures followed, scope of the analysis, and recommendations. The process for reporting the results and/or findings of an investigation can be just as challenging as the investigation itself. As a general matter, when tasked with explaining the basis of recommended remedial action, the investigation team is often asked to participate in meetings with C-suite decision makers, the Audit Committee of the Board of Directors, or the full Board. This should be anticipated as an eventuality from the inception of the investigation, and often presents an opportunity to level-set on the company’s ethical standards. Note however that in many common law countries the investigator should not make a recommendation of remedial action, but should instead present factual findings. That is because (1) the appropriate remedial action should not be considered until after a separate subsequent disciplinary process/hearing which will also cover any mitigating factors raised by the employee, and (2) it is a decision to be taken by an appropriate manager employed by the organization who will have knowledge of how the organization dealt with previous similar cases.

Important consideration in report writing:

- Making the fact findings – an investigator’s duty is to make credibility findings, which becomes difficult when evidence is scant. It is important to determine what actually happened, separate and apart from whether it constitutes a policy violation. In doing so, investigators frequently are left with witness credibility as a primary basis for fact finding
which means the report must explain their credibility findings. “He said/she said is not a standard of proof – it’s not even a thing.”

- Distinguishing fact findings from legal or policy findings/recommendations – it is tempting to come to a recommendation and back into the fact findings from there. It’s important that reporters reread their drafts with an eye toward this potential bias and avoid it. One important way to do this is to ensure that countervailing facts are addressed. Credibility assessments are particularly difficult, and should be well-grounded and described.

- Describing/logging the procedure – could the procedure itself have been biased? How were the witnesses and evidence selected? Drafters should think about the way the investigation is likely to be challenged and address this in the report itself. If the investigation was limited in scope in some specific way (see Part 1), make sure the report notes that and explains the reasoning, and also may incorporate a recommendation to conduct additional investigation where appropriate. On some level, no investigation is exhaustive, so a description of the process is essential to determine whether the investigator was reasonable in his/her conclusions.

- Privileged/interim drafts – interim report drafts may be discoverable and convey the impression the investigator is “cozying up” to the business and under its influence. The concept of privilege operates differently in different countries, making the idea of an interim draft very risky. The mode of communication before the draft report is complete (such as summary emails or phone calls) should be viewed through this lens, in the context of the full basket of risks including the likelihood of a lawsuit and where the lawsuit would take place. If outside the U.S., “discovery” is often much more limited. For example, even without a lawsuit, GDPR Subject Access Requests give EU-based employees power to see draft reports about them.

- Mindful of report’s internal reception – reports must be independent, but mindful of presenting findings and recommendations in a way that they are most likely to be well received by the business.

- Takeaways – often, decision makers will not read an entire report, and will rely on the executive summary or generate a separate “readout.” Drafters need to ensure that their summary captures the fact findings and signals recommendations, while remaining neutral and flagging any countervailing evidence/considerations. To the extent the internal stakeholders will generate their own “readouts,” draft the report to avoid mistakes in the later readout.

Recommendations can be the most controversial and challenging aspect of a report. Investigators tasked with recommendations must be informed of relevant laws and policies, and knowledgeable about the consequences of their recommended course on the business and the workplace. Confirmation bias is powerful – some internal investigators are even concerned about retaliation against them (the investigators) when making recommendations. In drafting a report, those receiving it will be expecting that attention be paid to their own preconceptions, and explanation in that context if such preconceptions are incorrect or out of line with the recommendations.

- Positive reputation of the alleged wrongdoer: Investigations into misconduct arising from an abuse of power often implicate a high-level leader who is well-respected among his/her peers and superiors. A successful performance history and positive professional reputation generally has no bearing on an individual’s likelihood to take advantage of lower-level employees. In fact, those who take advantage of their positive professional reputation to take advantage of subordinates often do so with the belief that their close professional friendships with those in even greater positions of power will protect them. In the investigation context, when it is discovered that an organizational leader has
engaged in repeated sexual misconduct or workplace bullying, the investigator must be prepared to address this reality in his/her recommendations and in messaging within the business.

- Negative reputation of the complainant: Likewise, complainants are often written off as noncredible underperformers raising an issue for self-serving reasons, and are often in danger of termination themselves. It is also tempting to hold against complainants that they have complained in a serial fashion and/or through inappropriate channels (think emailing the CEO). While these issues are relevant to note (and can be relevant to initial scope), investigators cannot discount the victim wholesale – and must work harder to convince those decision makers who have discounted the victim wholesale already.

With this in mind, in-house or external counsel reporting on an investigation should be prepared for internal blowback, particularly when the investigation relates to the treatment of others (e.g., bullying, sexual harassment), and that the decision makers will likely have their own relationships with the players. Recommendations may be shrugged off if deemed too lawyerly/risk-adverse, deemed “not credible” themselves. Will the recommendations be ignored? Are there multiple options that should be outlined (but will the business just accept the option with the least impact)? Are there latent risks associated with the recommendations? Will the recommendations deter others from reporting? Contemplating the contextualized risk drivers and likely business response helps minimize internal blowback and set the execution phase up for success.

**Holistic, Contextualized Solutions**

Investigators making recommendations must be pragmatic and practical to ensure that recommended steps address the full range of the underlying issues found, which often involve workplace dynamics that may repeat themselves (even with different players). “Fire the wrongdoer” – while an essential concept to understand and often necessary – is often a band-aid at best; it’s important for investigators to identify other drivers that led to an environment where the wrongful conduct took place and structure a post-investigation plan accordingly. This is true regardless of any staffing adjustments that may be warranted. The staffing decisions are often critical; even in those cases, however, the big picture impact on the workplace is the more important background to keep in mind throughout.

This is true regardless of the nature of the conduct alleged – a financial fraud investigation can reveal an abusive manager, for example – but if the findings deviate from the original complaint scope, be careful to expand the investigation as needed to make it fair. An investigation scoped for falsified expense reports may not have included witnesses critical to assess a bullying complaint. A conclusion to discipline or dismiss for an allegation different from the original complaint, or where parts of the original complaint were unsubstantiated, may be fundamentally unfair, or even discriminatory or otherwise illegal itself.

As such, the termination and discipline sections below encourage investigators to consider the broader picture and implications of those decisions. Additionally, employers should consider actions such as the following (whether or not any discipline or termination occurs), but with awareness to the potential downsides/messages sent:

- Policy updates – Policy updates may be advisable for any number of reasons. Investigations often reveal deficiencies in policies or just needs for refresh. But “bad facts” often make “bad law.” Policy updates made in a reactionary fashion may create disproportionate emphasis on a certain transgression, and any that are too specific to
the investigation may send scary signals, potentially making the complainant feel violated. Another thing to be careful of: “we will review our policies and procedures” is an oft-cited consolation prize when the company is skittish about taking more decisive action. It’s important not to default to this as a catch-all or to avoid making difficult decisions.

- Follow up audits – Often, investigations will reveal something problematic or potentially problematic, which expands beyond the allegations and individuals involved and may even be endemic of a massive cultural issue that could result in major widespread legal risk and/or reputational risk. This may be a matter of a simple “flag” for the company’s attention (e.g., “your Mexico office is out of compliance with wage/hour laws,”) or a stronger warning (“the company seems to have a widespread culture of heavy alcohol consumption and may be unaware of the implications, social pressures, and heightening of legal risks”; “your records management system makes you vulnerable to claims of vendor kickbacks, whether or not not accurate”).

- Training – Related to the above, training is a frequent and appropriate measure taken in response to an investigation, and is often considered “low impact” – but much like with policy adjustments, training should not be used as a “copout” to avoid difficult but necessary actions. Most companies have standard training protocols and new ones can come across as “box checking” that employees construe as such. But a true post-investigation training must identify a legitimate growth area for the organization, and be delivered in a manner and by a person that conveys authority and sincerity. In-person, particularly with subsidiaries abroad, is superior. Training is often a good opportunity to segue into a non-confrontational setting for conducting informal interviews in connection with background concerns. This can be quite effective in certain locations where “investigations” are particularly scary.

- Operational adjustments – Notwithstanding the caution against avoiding actions solely due to business impact (e.g., protecting a profitable harasser), recommendations are best when they take into account company operations and natural opportunities for making changes. Are raises about to come out such that changes in employment contracts could be naturally added? Is there a global conference coming up when training is an easy insert? Is there a Works Council meeting on which we could add an updated code of conduct to the agenda? Is the complainant requesting a position change or location transfer that would be easily implemented? Is the employee an expat who can be relocated/have his/her assignment terminated? Again, be aware of messages that this sends – an expat who keeps harassing people and then getting relocated sends a message that the company will bury its problems by shipping them elsewhere and subjecting a new group of employees to harm.

In considering all post-investigation measures, employers need to be aware of numerous perceptions that may affect the risk profile. Avoid narratives that the company’s actions are calculated based on profit and power. Avoid re-victimizing the complainant, mindful of his/her understandable anxiety in having advented a change.

**Termination**

Many investigations involve a finding of some policy violation, which may lead to an employment termination. Termination based on conduct found during investigation presents risks all around. Employers take risks by keeping a wrongdoer employed after they are on notice that certain misconduct has occurred. On the other hand, employees have a wide variety of rights under applicable laws in connection with termination and due process during investigations. In many
countries, a separate disciplinary process is required to consider what remedial action is appropriate during which the wrongdoer may have certain rights. These may include:

- A right to formally defend themselves in a disciplinary hearing at which they may be accompanied by a trade union representative or colleague.
- Adequate prior notice of the formal disciplinary hearing during which they can prepare and have access to evidence against them (including the investigation report and witness statements).
- Consultation with a union or Works Council prior to any dismissal decision.
- A right to raise any mitigating factors that may have influenced their behavior such as problems at home.
- A right to cross examine witnesses or otherwise challenge their evidence.
- A right to a separate appeal hearing before a different (and more senior) manager if unhappy with the outcome of the original disciplinary hearing.

In addition to the nature of the conduct itself as well as workplace well-being and safety, the decision on if and how to terminate is driven by:

- Applicable laws
- Cultural norms
- Employment contracts
- Protected status – (France)
- Company’s past tolerance of behavior or failure to train (e.g., firing for a negligent act in falling for a phishing scam)
- Message to organization (and those external to organization)
- Employee’s preference

Regarding employees’ preferences, many complainants state that they do not want the company to terminate the target of the investigation. Terminating the perpetrator may even re-victimize the complainant in some circumstances. But the complainant’s preference may not be genuine (e.g., complainant may be afraid to state that they want the company to fire the perpetrator for fear of retaliation or ostracism); and regardless, much like the above discussion regarding confidentiality, should not be determinative in light of the broader circumstances and impact to the workplace of keeping this individual in position.

The communication piece is also powerful. If the workforce knows that this individual has a reputation for/is the subject of an investigation based on certain conduct (which is often the case in high-profile individuals), the company’s decision not to terminate sends a message to other employees. This may deter others from reporting. It also may contribute to the perpetrator’s self-perception as “untouchable.”

In most countries outside the U.S., there is some form of unfair dismissal protection allowing a terminated employee to challenge the decision to dismiss – either on the basis that the decision was unfair, or because of defects in process. In some countries, such as Norway, a dismissed employee who brings a claim has a right to reinstatement pending the outcome of the litigation which can take many months – although an employer may seek a court order to disapply that principle.

The company must also consider the how of termination, with a view of local laws, cultural norms, and impact on the workplace. Should the individual be offered resignation with a severance package? The due process required in many countries may involve re-traumatizing
victims. In some instances, where the company knows it wants to terminate upfront (after assessing the relevant factors), negotiating a resignation pre-investigation may be worth considering.

**Discipline**

Companies imposing discipline short of termination face different, sometimes even more complex quandaries. Many countries have procedural due process requirements (similar to those outlined above under “Termination”) for any discipline whether termination or not (e.g., India), and employees can challenge the discipline without having to resign in protest first.

Many countries in Asia are “lifetime employment” countries, meaning terminations must be negotiated and paid for, short of egregious misconduct. That level of misconduct is often hard to prove, and legal standards may differ in application. This is why it’s important to incorporate global conduct standards into company policy – but even there, companies that have failed to implement policies properly under the law (e.g., Works Council consultations) will have trouble enforcing discipline under it. For example, in Japan, companies with more than 10 employees must file rules of employment with the local ministry. The rules must contain a comprehensive list of disciplinable offenses as well as the possible penalties to be imposed. If this information is not contained in the rules of employment or a contract and/or if the company is out of compliance with implementation, discipline won’t be enforceable.7 This usually becomes an issue when discipline is used as a basis for a later termination decision.

Laws like Japan’s can produce odd results, shackling employers such that they feel prohibited from the most effective forms of discipline, which are too timing- and context-specific to document comprehensively in a “rules of employment” document. When employers interpret those laws, then, they need to think about the big picture, reconciling the law with the risk of choosing an ineffective form of discipline. Employers may also devise a disciplinary plan they know may be challenged. But in the balance of risks, this may be the best decision if it is reasonable, proportional, and will reinforce the necessary consequences. In a later termination, employers must be aware that the discipline may be questioned and this may weigh in favor of negotiating the exit. Often, employers are well served to offer options along the lines of “you can resign, or you can accept this discipline.” The calculus may also be affected when multiple employees are subject to discipline and/or termination.

Some disciplinary options to consider depending on the circumstances – whether as an alternative to resignation, and/or in concert with one another:

- Employers may decide to withhold a raise or incentive bonus – In some cases, it can be appropriate to frame this not as discipline but as a failure to meet bonus plan eligibility conditions.
- Remedial training – If employers retain wrongdoers, it should take great care to ensure that the wrongdoers have accepted responsibility, understand the problematic nature of the conduct, and that the employer can be satisfied that the conduct will not repeat itself. “Check the box” online trainings fall short here; a one-on-one, in-person individualized training by an expert with basic knowledge of the facts is most effective. The trainer should coach on the conduct, the dynamics leading to the conduct, and likely future situations and avoiding retaliation (with emphasis on “what would deter future reports,”

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discussed further below). Trainers should report back to the company on the evaluation of the individual's participation, and can even make additional recommendations.

- Apology – Depending on the culture, location, level of the wrongdoer, and the victim’s preference (e.g., taking care not to pressure the victim to forgive/forget), an apology may be appropriate. Consider whether the apology should be public or private, the recipient, and the medium. The apology must be sincere and humble. In some cultures, there are specific protocols that are expected, which the company should take cues on from a local leader or expert counsel.

- Restricting participation in work-related events/travel – Wrongdoers who have engaged in misconduct in a social context, often with alcohol, may be fairly subject to restrictions such as “no company travel,” “no alcohol at work events,” or the like. Employers should be mindful of privacy rights in some jurisdictions when later disciplining on failing to comply with a directive such as “no alcohol.”

- Treatment programs – Offering unpaid leave for therapy or rehab may be appropriate in certain contexts, but generally should be combined with other measures mindful to avoid the popular narrative of giving powerful executives a “freebie,” valuing them above their victims, and pathologizing violent behavior to protect the bottom line. Often “rehab or resign” is an appropriate application.

Follow Up With Complainant

No matter what the outcome, the employer must take care to follow up with the complainant. Employees routinely report that they complained and never heard anything back later, which sends a poor message in addition to increasing legal risk. In some cases, investigations will end up with a result not totally in line with the complainant’s experiences. They may find the complainant’s allegations substantiated but not a policy violation; unsubstantiated but genuine; or in rare cases, malicious or fabricated. And the company may strongly desire to exit the complainant (for whatever reason) despite knowledge of the potential for retaliation. We will set aside the rare fabricated complaint for the moment.

Companies should aim to make the complaining employee feel heard during and after the investigation process. Many times, this is the employee’s primary objective. Over the course of the investigation, the investigator should take note of anything the complainant may have specified about his/her desired outcome, and then aim to find a way to validate the complainant’s feelings no matter what the ultimate recommendations.

Particularly in some countries, employees expect to receive a written response when the complaint is closed out, and can feel insulted when they do not. The complainant often asks for a copy of the report itself, and there are a number of reasons why circulating that report may not be advisable. Preparing a summary report of relevant conclusions, however, and explaining that there are employee privacy concerns preventing the disclosure of the full report, often satisfies these concerns.

Make clear with the employee when following up that the company is interested in any follow-up information the complainant wishes to provide, and that the company wants to know if he/she feels retaliated against (discussed further below).

What about where the complainant has or refers to a lawyer? Employees retaining attorneys during investigations is on the rise globally, but having a lawyer in one country does not mean the same thing as in another. In the U.S., ethical rules prohibit communicating directly with a represented party. This can pose challenges and gray areas when dealing with current
employees who are actively working and/or are asking questions relevant to the management of their employment relationship. Investigators should request a lawyer’s contact information (and document when the employee refuses to provide it, as often it may not be an officially-engaged attorney but a casual acquaintance without subject matter expertise).

A quick note regarding malicious complainants – as alluded to earlier, a truly malicious, fabricated complaint is quite rare, but in the event that a well-executed investigation finds such fabrication, the analysis above regarding discipline and termination is instructive. Further, as tempting as it is to surmise that you have a “bad egg,” a workplace in which one would fabricate a complaint likely suffers from broader cultural dynamics that need to be addressed.

**Preventing Retaliation**

We end with the subject of “retaliation,” as we cannot overstate its relevance in all decisions throughout an investigation’s life cycle (as well as in the workplace culture overall, outside of investigations). Companies recite, script like, their prohibition against retaliation and it’s often perceived as insincere.

As a concept, “retaliation” is difficult to define. Even the terminology is misleading – in the U.S. it often signals a legal standard and nested definitions like “adverse action” and “protected activity.” Outside of the U.S., that legal concept might go under different names such as “victimisation” and/or it might signify different protected conduct or actions constituting a legal violation. Some countries’ legal frameworks lack specific retaliation protections (and some even permit what U.S. lawyers would call retaliation as one of the few valid reasons for dismissal!). And some languages lack an adequate translation – the English word “retaliation” can imply physical confrontation in certain languages, and it may take a lot of explanation to convey that one need not threaten someone’s family or slash their tires (or even fire them) to violate the company’s anti-retaliation policy.

While mindful of the legal standards, employers in messaging their anti-retaliation values can explain that its primary goal is to avoid any actions that would deter employees from reporting in the future. Employees who make reports are often hypersensitive to changes in their work environment after reporting. The subjective perception-objective reality continuum is important in the sense that complainants who feel supported generally do not sue their employers. Investigators should be aware of heightened risks of retaliation (in the practical sense) in the following regard:

- Workplace gossip is inevitable, and often causes the most harm to complainants even where the business feels that the complainant is creating it. This has the potential to turn into a bullying situation.
- Confirmation bias against complainant, reinforcing a narrative that complainant is “difficult,” “high maintenance,” “oversensitive,” etc. which then leads others to perceive complainant’s actions unreasonably, and even unfairly judge his/her performance. Often gender-based (or other) stereotypes emerge as well, adding even more legal risk.
- Consider the relevant relationships – between complainant and respondent, certainly, but others as well. Does the respondent have control over complainant? This is not necessarily direct supervisor/subordinate. For example, is the respondent an IT professional that might put complainant’s requests at the bottom of the queue? Does the respondent have a friendship with complainant’s supervisor or coworkers? What about neutral witnesses – are there social relationships or supervisor/subordinate relationships that come into play?
• The respondent and others may try to avoid the complainant. “I’m scared the complainant will complain against me again/too so I want to avoid him/her.” To some extent this cannot be policed, but distribution of work is a legitimate concern that can lead to significant negative effects (fewer hours logged, fewer client opportunities, less likelihood of making numbers or bonus). This phenomenon occurs with serial complainants.

• Particularly as to those who have been accused of sexual misconduct, overreaction is common, which can lead to treating an entire group of individuals differently – e.g., refusing to mentor women for fear of being accused.

Respondents are often angry that complaints were raised against them, and when the finding is “genuine but unsubstantiated,” or “improper conduct falling short of terminable,” they have a chip on their shoulder. If the investigator is concerned that the respondent is in a position to and there is a risk that he/she will retaliate, this should weigh strongly in favor of removing the respondent from the environment. At a minimum, respondents with this demeanor should be heavily trained in avoiding retaliation.

Employers must also concern themselves with the possibility of retaliation against the investigator him/herself. Hopefully they will have considered this upfront and avoided this by selecting an external investigator. If not, consider including training of top executives on avoiding retaliation against investigators who provide unpleasant conclusions. If the decision makers at the employer don’t trust the investigator’s conclusions, it can choose to review the investigation externally, but it’s even more crucial to have an independent review in this case.

**Conclusion**

Employers faced with allegations to investigate: don’t forget the bookends. Promptness and fairness are often in tension – rushing upfront can poison the entire process and the findings. And poorly-executed post-investigation measures can make a difficult situation worse instead of improving it. Perspective on the “before” and “after” will help avoid the investigation itself becoming a black hole, which is not only costly but also risky.
Cross-Border Conundrums in Workplace Investigations

Presenters
Dr. Ulrike Conradi (Berlin), Cécile Martin (Paris), Stephen Shore (Toronto), and Stephani (Stevie) Williams (IKEA)

Moderator
Carson Burnham (Boston)

When to Investigate

- Reports or observation of conduct in violation of laws
- Reports or observation of conduct in violation of local, regional, or global policy
- Multiple reports
Manager X, a regional sales manager in Canada, contacts HR to “file a complaint.” He says his manager, Vice President Y, who is based in the U.S., has created a “hostile work environment” for him by micromanaging his direct reports, hijacking his team meeting, and insulting him in front of his team. When asked for examples of the conduct, Manager X says that Vice President Y, without checking with him first, told his team, “call me any time with questions,” attended his meeting unannounced and offered an impromptu Q&A, and said “we all need to work together to support Manager X in his transition to a new role.” Upon review of Manager X’s work history, you learn that he was newly-promoted to a people-manager role, that 3 members of his 8-person team recently resigned, and his team has struggled to meet new business quotas.

Who Investigates

- Privilege issues
- Actual or perceived independence/conflicts of interest
- Professional experience with the substantive issues
- Ability to gain trust/get information
- Cross-functional support
- When to involve external resources
Country Manager François, who leads a sales team in France, emails all employees worldwide on the last day of the fiscal year, congratulating the French team for “a spectacular left-brain” deal that closed that day. The next day, an anonymous hotline report comes in saying that François promised the customer a **100 percent discount** on a multi-million dollar purchase, and told the French sales team several weeks before that they would be paid as though no discount had been offered. Company policies requiring approvals for discounts are available online, in English, stating that “Finance” and “management” must approve discounts in advance. The customer is a well-known business, who qualifies as a “marquis client” for the company; failing to honor the discount promised by François could damage the Company’s reputation. Projected sales-incentive compensation for the transaction amounts to over $4M, which includes $1.3M to François.

**When the Law Does Not Prohibit Conduct, but Company Policy Does...**

- Have the policies been implemented in accordance with local law?
- Procedural requirements
  - Notice, consultation, language, employee agreement
  - Filed with Ministry of Labor
  - Incorporated into employment contract, règlements interieur
At a “ribbon cutting” dinner in Berlin to celebrate the successful acquisition of a new Germany-based team attended by the German team and U.S. executives, Marcus, the acquired company’s Managing Director, proudly stands up, proposing a toast, and announces that he landed a new large contract that day because he brought along Hanna, a recently-hired employee who is 22 years old and attractive. Marcus laughingly says that the new customer “will buy anything when Hanna is in the room.” Hanna laughs and the table shouts “cheers!” all around. Later in the evening, Anke, a member of the German team, pointedly asks the U.S. executives at the table, “can we be protected from sexual harassment now that we are part of an American company?” She also says, “Hanna should not have to expose herself for Marcus to win business.”

Reporting Investigation Results

- Written Reports
  - When/why necessary
  - Factual findings
  - Credibility assessments
  - Corroborating/contrary information
  - Objective, neutral, unbiased

- Standards of evidence to determine the facts
- When a legal analysis is required
Allegations:
China-based financial controller reports to U.S.-based CFO that the Managing Director of the Shanghai entity, with knowledge of the Singapore-based Executive Director of the company’s Asia-Pacific operations, has entered into supplier-arrangements with friends and relatives, and is taking kickbacks.

Investigation Findings:
1. Pricing agreements with certain suppliers are higher than others, without clear explanation;
2. Employees have been instructed to work exclusively with one reseller, who frequently hosts business dinners and karaoke events for managers;
3. Internal communications are conducted using WeChat on personal devices;
4. A variety of pornographic images were transferred to a company laptop when a senior manager plugged in his iPad to charge it;
5. The controller who raised the allegations is considered by her colleagues to be “a troublemaker” who “complains about everything”; and
6. The Singapore-based ED repeatedly asserts that the investigation is “disruptive,” “unnecessary,” a “witch hunt,” and that the Shanghai MD is a high-performer who is essential to the company’s overall success.

Allegations:
After the CEO of a global organization sends a company-wide email saying the company cares about and wants to put an end to sexual harassment, 3 employees from Brazil send a letter in response, stating they have been subjected to ongoing “moral harassment” from the Brazil Country Manager (CM).

Investigation Findings:
1. All but one employee describes having been publicly excoriated by the CM. Examples include being called “stupid and lazy,” having their work ripped up and thrown in the trash, being told “the only reason you’re here is that tight sweater,” doors slammed in their faces, being banished from meetings;
2. Employees provide emails from the CM to the Brazil team instructing them not to communicate with any manager in the U.S. without first getting the CM’s permission;
3. 12 claims for moral harassment are pending with the Labor Board from former employees;
4. The CM explained that he has high expectations of employees, the urgent business of the company requires only high performers, and U.S. management does not provide the budget needed to recruit high performers. The CM also said “this is how things are done here,” and “the American imperialists need to stop trying to colonize this office”; and
5. The CM’s U.S.-based manager protests that the CM is highly effective at external-facing critical business functions, and that the investigation is “encouraging problem employees.”
“Prompt and Effective Remedial Measures”

- Assess legal risk arising from the investigation results and available steps to mitigate exposure
- Review policies and internal rules
- Consider time limits and procedural requirements for disciplinary action
- Standard of proof for termination/disciplinary action – “serious/gross misconduct,” dismissal for misconduct, “cause”

**Allegation:** An international group of employees and managers at a global company-wide conference in Las Vegas decided to “go out” after a company-sponsored dinner. Three employees were arrested, others returned to the hotel intoxicated. Anonymous reports to the company hotline stated that employees had been “sexually harassed at the after-party.”

**Your Findings:**

1. A group of 25 managers and employees from all over the world went to the Palomino “Burlesque” Club, where USD 45,800.00 in alcohol/“other” expenses were purchased with a company card;
2. A manager from France used his corporate card to pay for the Palomino Club bill; the receipt was put through the company’s reimbursement system and immediately approved by his manager’s assistant;
3. A manager from Germany, upon return to the hotel, joined a group of employees in the lobby lounge, ordered a drink, and projectile-vomited on the group;
4. Two employees from the U.S. started a fight when the Palomino Club refused to continue serving them alcohol. A manager from Canada attempted to get them to get in a taxi, but before he could, all three were arrested for what was later described as “resisting arrest”;
5. U.S. HR and Finance employees also went to the Palomino Club with the group – the Finance employee had several drinks and returned to the hotel, the HR employee stayed behind to ensure that all employees could be located. Unable to do so, the HR employee said he called his own manager to ask for guidance;
6. A senior HR manager from the U.S., upon receiving a call at 3:00 am, answered saying “if I find out who this is, you’re fired tomorrow.” The person on the other end of the line hung up; and
7. All other interviewees said they had been invited by “a senior manager,” but did not remember who it was, and did not remember anything that happened that night. Each statement was nearly identical.
Retaliation & Interference with Investigation

- What does retaliation actually mean? ("victimisation," "revenge," more harassment)
- What are the consequences if retaliation or interference is reported during the investigation?
- Policy statements addressing retaliation, cooperation with investigations

After being notified that the company is sending a team to conduct employee interviews about the "company culture," the MD says "I fully understand" and "I encourage a review of any issues or concerns – it is important to our company culture that people feel empowered to raise issues."

During your interviews, you learn that the MD contacted several witnesses to say, "do you think they are going to ask about me?" and "this is because they want to find an excuse to cut costs and make the whole organization redundant."

A witness also contacts you to report that immediately after her interview, she was contacted by the MD and asked "what did they ask you about" and "did they ask about me." The witness had not disclosed to the MD that you would be interviewing her, and neither did you.
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