

October 9, 2019

## Labor & Employment Law Special Briefing

### Highlights

- ✓ Comprehensive investigation checklist
- ✓ Choosing the right investigator
- ✓ Interviewing guidelines
- ✓ Dealing with privacy and confidentiality
- ✓ Framing and sharing the results

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By [Pamela Wolf, J.D.](#)

## Workplace investigations: How to get it right

In the current high-stakes social media environment, allegations of workplace discrimination or harassment can go viral in an instant. More than ever, given this very public risk of exposure and the momentum stirred by the #MeToo movement, companies must take all complaints of discrimination and harassment seriously and take appropriate steps in response. How do companies do that? It begins with an investigation into the allegations—one that is conducted with the end goal of promptly ending and remediating any misconduct.

To be effective, the investigation must be conducted through a process that takes into account many factors, including how the complainant and the accused will be handled during the pendency of the investigation, who will conduct it, how and where witnesses will be interviewed, who will be apprised of the progress of the investigation, confidentiality and attorney-client privilege issues, and who will be privy to the end results.

When corporate misconduct is alleged, other considerations come into play, such as reporting to the board of directors and self-reporting to government regulators to avoid the potential of greater penalties down the line.

To understand the best practices for employers faced with the need for a workplace investigation, *Employment Law Daily* reached out to a panel of experts: [Richard J. Cino](#), Office Managing Principal, Jackson Lewis P.C., Co-Leader of the Corporate Governance and Internal Investigations Practice Group; [Brooke Colaizzi](#), Member, Sherman & Howard L.L.C.; and [Eric B. Meyer](#), Partner, FisherBroyles LLP.

### Evaluate *all* potential complaints

“The most important step is to have a policy and adequate training to ensure that *any* comment or concern that could be interpreted as a ‘complaint’ is properly evaluated to determine what, if anything, needs to be investigated,” according to Brooke Colaizzi. “Any investigation must be started promptly and be conducted by someone who has training in conducting internal investigations.”

The focus at the pre-investigation stage is getting prepared to conduct the investigation, Eric Meyer explained. “This starts with *taking the complaint seriously* and, preferably, having the complainant document the complaint in writing,” he suggested. “The company should also take prophylactic steps to ensure that the complained-of behavior does not repeat itself.” These prophylactic steps may include separating the complainant from the alleged harasser and reminding people that there should be no retaliation.

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## Stages of the investigation

In fact, Meyer noted that there are really three stages of investigation:

1. Pre-investigation
2. Investigation
3. Post-investigation

### Pre-investigation stage

In addition to the initial “triaging of the issue” that along with Meyer and Colaizzi, Richard Cino references, the company should also consider contacting employment counsel (in-house or outside), especially where human resources is inexperienced with handling workplace investigations, Meyer said.

The final pre-investigation step is to pick an investigator, who could be someone in-house, company counsel, or an independent investigator, which is addressed in more detail below.

### Investigation stage

At the investigation stage, Meyer stressed that what is required are parameters (and possibly an engagement letter), preparation (e.g., reading the complaint, reviewing documents, scripting questions), and ultimately interviewing (and re-interviewing, as necessary).

Colaizzi also suggested that employers try to avoid a “cookie-cutter investigation process,” pausing to make sure that the investigation plan is appropriate for the specific concerns and circumstances. For example, “consider a third-party investigator, particularly if the complaint involves highly sensitive issues or high-level employees or executives, or if circumstances warrant a higher degree of accountability,” she recommended.

“The investigator should keep an open mind and never pre-judge,” Meyer cautioned. The investigator should take notes that are more focused on facts than on editorializing and legal conclusions, though it’s fine to include notes on credibility and demeanor. The investigator should also consider having each interviewee review and sign off on those notes, but without the investigator commentary.

### Post-investigation stage

The post-investigation stage “focuses on the investigative report (could be oral or written), taking action that is reasonably designed to end the complained-of behavior, and communicating the outcome to the complainant,” Meyer explained, adding that “the company should consider following up with the complainant from time to time, especially if the harassment complaint has merit.”

Colaizzi concurred: “Make sure that your policy or process contains a step at which someone circles back with the complainant.”

## Investigation checklist

Jackson Lewis attorney Richard Cino outlined the steps that employers should consider taking when investigating a complaint of discrimination or harassment, as well as the reasons they should be taken:

- I. Take immediate action.** It is essential that an organization assess the circumstances presented: “triage the issue.” What are the allegations and what do we need to do now to effectively and efficiently address the matter?
  - a. Preserve material information; preserve documents, emails, text messages, security footage, etc., and issue litigation holds, if appropriate.
  - b. Determine whether any immediate personnel actions are needed, including suspension pending investigation and separating the accused from the complainant.
  - c. Determine who within the organization, and potentially outside the organization, needs to know about the allegations and the actions being taken. Consider any immediate reporting obligations (i.e., to the Board of Directors, law enforcement, other government agencies).

**II. Determine appropriate investigator.** Think about the type of claim, level of risk, and need for advice from outside counsel. Choosing the correct investigator will help advance the goals of the investigation and address the conduct.

**III. Develop an investigation plan.** The plan will bring focus to your investigation.

- a. Review relevant company policies, Code of Conduct, handbook, collective bargaining agreement, etc., to determine if there are substantive and/or procedural requirements regarding investigations and reporting.
- b. Draft the investigation plan (documents to be collected and reviewed, research needs, witnesses to be interviewed, order of witness interviews, and who will conduct these efforts).
- c. Revisit the plan *often* as the investigation unfolds.
- d. Determine what kind of report will be provided at the end (verbal or written) and whether interim reports at key junctures are needed.

**IV. Conduct witness interviews.**

- a. Draft outlines and identify documents for each witness interview.
- b. Identify interview location (onsite or offsite) and type (in-person vs. phone/video conference interview).
- c. Determine people who will be present at the interview (Notetaker? Coworker or support person allowed?).
- d. Inform the witnesses who the investigator is, whom the investigator represents, and the role of the interview in the process. If appropriate, provide an *Upjohn* warning at outset of interview [that the attorney represents the employer, not the employee; that the company, not the employee, is the holder of the attorney-client privilege; and that the company

may, as it sees fit, waive the privilege and disclose the employee's statements, including incriminating ones, to the government]. There may be other communications necessary at the outset of the interview.

e. Emphasize non-retaliation protections.

**V. Make findings.** These are factual conclusions as to whether the allegations are or are not substantiated, or are inconclusive, and why.

**VI. The report.** Create and deliver the verbal or written report to appropriate stakeholders and decision-makers within the organization.

**VII. Corrective and disciplinary actions.** The organization determines corrective and disciplinary action. Even if the investigation was inconclusive, consider training, monitoring, and preventative measures.

**VIII. Reporting obligations.** Determine reporting obligations both inside and, if applicable, outside the organization.

- a. Whether self-reporting to governmental entities, law enforcement, or other authorities is appropriate.
- b. Whether to report internally (e.g., Board of Directors, executives).

**IX. Other post-investigation actions.**

- a. Follow up with and advise the complainant of the conclusion of the investigation. Reiterate that if in the future there are any concerns regarding retaliation, the complainant should immediately raise those to company representatives.
- b. Confirm that corrective action is complete.
- c. Review policies and implement preventive measures, if applicable.

## About the investigator

Before the investigation begins, the employer must choose an individual to investigate the complaint and make relevant determinations. That person should be a trained HR investigator, Richard Cino suggested.

## Special training

Do investigators need special training to conduct good investigations? Cino, Colaizzi, and Meyer all agree that they do.

"Investigators need a thorough understanding of employment law and a good grasp of the

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proper process for an investigation,” according to Colaizzi. “I strongly advise that an investigator shadow someone with the necessary expertise before personally conducting any investigations.”

As to what training, skills, and abilities, investigators should have, Meyer listed these:

- Interviewing skills;
- Ability to remain even-keeled;
- Flexibility (knowing when to deviate from an interview script);
- Good writing skills;
- Experience with other investigations.

Cino added that investigators need specific training on:

- The investigative process, including understanding the difference between fact-finding and ultimate recommendations;
- Building rapport with witnesses;
- Making credibility determinations;
- Writing investigative reports; and
- Attorney-client privilege or work product issues.

## Outside party investigations

There are times when it is wise for an employer to engage an outside party to handle the investigation.

### *High-profile, high-risk cases*

The circumstances under which it may be best to have an outside party handle the investigation vary. “High-profile, high-risk cases (top executives, allegations of criminal conduct/corporate fraud, allegations of sexual harassment/assault) often call for an outside, experienced investigator,” Cino said. “Also when there is no person internally who is outside the chain-of-command of the complainant or the accused,” he added.

### *Appearance of bias*

The choice of investigator should also take into account the appearance of bias. “An outside investigator may mitigate concerns of bias or the appearance of bias,” Cino explained. “The investigation is an effort to address an allegation of improper or even unlawful conduct. Organizations want the investigation process to be beyond reproach.”

### *Inexperience and other concerns*

Meyer suggested that an outside investigation may be wise when the company is inexperienced with conducting investigations, or when there are concerns about privilege and the ability of outside counsel to continue to represent the company in subsequent litigation. He also echoed Cino’s concerns about potentially high-profile matters, such as the Dallas Mavericks investigation.

Meyer is referring to an investigation by two law firms that substantiated numerous instances of sexual harassment and other improper workplace conduct within the Dallas Mavericks basketball team over the course of nearly 20 years. The investigation followed a February 2018 *Sports Illustrated* article detailing such allegations, which was widely publicized.

*“An outside investigator may mitigate concerns of bias or the appearance of bias.”*

— Jackson Lewis attorney Richard Cino

## Who may be disqualified?

When choosing an investigator, the employer should keep in mind what would disqualify particular individuals or otherwise make them a poor choice.

Any person who may be a potential witness should not be the investigator, according to Cino. Likewise, any HR investigator who may have a bias for or against the complainant or the accused, such as a friend of either party, should also be ruled out.

“Generally, good guidance is to consider how the selection of the investigator will look to those involved and in the event of future proceedings,” Cino explained. “Is the individual free of bias or influence?”

## Objectivity, neutrality, flexibility

The three attorneys also weighed in on the most important things that investigators should keep in mind when conducting an investigation.

Cino said that investigators should keep unconscious bias in check. They should also remain neutral and not reach a conclusion until all the evidence is gathered.

“Keep an open-mind and don’t pre-judge,” Meyer added.

Colaizzi echoed these suggestions, also pointing to “fairness, open-mindedness, adherence to process and procedures, but with an eye towards adjustments that may need to be made due to special circumstances.”

## Goals of the investigation

What should be the specific goals of a workplace investigation into discrimination or harassment allegations? As author Stephen R. Covey stressed, “Begin with the end in mind.” To make sure employers and investigators keep their “eyes on the ball,” here are some more specific recommendations.

### Ending the misconduct

“The company should ensure that it is taking steps that are reasonably designed to *end* the complained-of behavior,” Meyer stressed.

Cino echoed these sentiments, saying that the goals of the investigation should be to “*stop* any alleged wrongful conduct in a swift and effective manner, by obtaining a full, objective understanding of the facts” and to “take prompt corrective action.”

“While not desirable, a poorly handled investigation that nevertheless stops the conduct is better than an investigation that is better conducted, but the resulting action of the employer was not effective to remediate the conduct,” according to Cino.

### The big picture

Looking at it more broadly, Colaizzi said: “In the big picture, the most important goals are (1) meeting the organization’s legal obligation to investigate and correct illegal conduct or conduct that violates company policy; and (2) establishing trust and confidence in the workforce.”

## Documentation

An employer needs to have a formal policy and process for documenting investigations, according to Colaizzi. “Develop a process that would allow, months or years down the road, someone who was not involved with the investigation to track what happened,” she suggested.

### Fact-based

When documenting the workplace investigation, “precautions should be taken to ensure confidentiality and, if applicable, privilege and work product,” Cino advised. “Keep documentation fact-based, use neutral language, and date your notes,” he added.

### Thorough

An investigator should proceed as though everything he or she does and produces will be discoverable in potential litigation. Colaizzi also reiterated that the investigator should create documentation that would allow someone not involved to track and understand what happened.

“Pay attention to attorney-client privilege if an attorney is involved and consider how to document both the process and the conclusions to preserve privilege but also anticipate the possibility that you will have to waive privilege with respect to some or all of the investigation,” Colaizzi suggested.

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## Every investigation sets a precedent

Sherman & Howard attorney Brooke Colaizzi suggested that any investigation into alleged workplace harassment or discrimination should endeavor to:

1. Accurately and completely identify and understand the employee’s concerns and any underlying cultural factors contributing to the discontent;
2. Conduct a thorough investigation appropriate to the scope of the allegations that allows for a well-reasoned determination as to credibility and remedial action, if needed; and
3. Establish solid precedent for future investigations, both in terms of process and consistent treatment of similar misconduct.

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## Credibility determinations

Credibility determinations should be addressed in advance. “An organization should consider ahead of time if it will proceed with some sort of presumption in making credibility determinations and addressing he said/she said cases,” according to Colaizzi. She continued:

- “Will the organization assume the complainant is correct unless the investigation finds otherwise?”
- Will the organization assume that it can and should always make a credibility determination?
- What is the wisdom of a conclusion that ‘the investigation could neither corroborate nor dispel’ the allegations?”

In assessing the credibility of the allegations and in reaching a conclusion, “strive to have credibility determinations based on facts/documents/evidence, rather than witness demeanor and other cues that require interpretation,” Cino suggested.

## Unconscious bias

Unconscious bias can play a “hidden” role. Colaizzi said that organizations should consider the potential sources of unconscious bias in making determinations in an investigation. Cino agreed, warning that investigators should keep their own bias in check, not jump to conclusions, and “have the information learned shape the investigation and findings.”

## Interviewing guidelines

How should the interviews of the accuser, the accused, and any witnesses be conducted? For starters, consider collecting all relevant documents in advance, so that they can be used in the interviews, according to Colaizzi.

## Complainant interviews

The Sherman and Howard attorney said that if possible, always start with the complainant. “I prefer to allow the complainant to tell ‘his or her story’ without interruption or prompting questions, as a means of understanding the individual’s perspective,” she explained. “Start off the interview with an appropriate *Upjohn* warning

so that the complainant understands who you are and what your role is in the process.”

Colaizzi recommended that the interview focus on gathering as much information as possible. “Push to get answers—but avoid seeming argumentative with respect to the merits of the complaint,” she suggested. “Always leave open the possibility (with the complainant, too) of follow-up interviews to address information obtained during subsequent interviews.”

Ask the complainant who you should talk to, Colaizzi continued, adding that you should not feel limited to this list. “Instruct the complainant to immediately get back to you if he or she experiences retaliation, or if he or she thinks of any additional information you need to know,” she added.

## Upjohn warning

The *Upjohn* warning that Colaizzi referred to is a disclaimer issued by the company’s attorney to an individual employee who is being interviewed in an internal investigation. It takes its name from *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

The warning states that the attorney represents the company, not the employee; that the company, not the employee, is the holder of the attorney-client privilege; and that the company may, as it sees fit, waive the privilege and disclose the employee’s statements—including incriminating ones—to the government (which it may do in the hope of obtaining cooperation credit).

A properly administered warning helps the attorney to avoid conflicts and the employee to avoid unwitting forfeiture of any Fifth Amendment rights.

## Interviewing the accused

Colaizzi recommended that where possible, interview the accused last, although with large investigations that may not be feasible. “I usually approach the interview by describing the allegations that initiated the investigation and allowing the accused to respond without interruption,” she explained. “Again, the goal is to gather information and push for answers rather than anything that could be perceived as argumentative.”

Colaizzi also instructs the accused not to approach the complainant or any witnesses about the matter but allow the investigators to complete the investigation. “I advise both as to the prohibition on retaliation and the reporting process if the accused believes he or she is subjected to retaliation, from whatever source,” she said.

## Witness interviews

“The *Upjohn* warning is the first and one of the most important steps in the witness interviewing process,” Colaizzi stressed. “I also make sure the witness understands whether or not he or she was mentioned by name in the complaint; it is a balance between not revealing too much and providing the witness with enough comfort to encourage him or her to continue with the interview,” she said.

Colaizzi noted that she tends to ask more pointed questions of witnesses than of the complainant or the accused. “I also ask witnesses if they can think of anyone else I should talk to,” she added. “I repeat the retaliation warnings and ask the witness to keep the content of our discussion confidential.”

## Be open-minded

As a final insight about interviewing, Colaizzi said: “Be open-minded—this is a general process, and circumstances may warrant deviations.”

“Some thought should be given at the outset as to how the interviews should be conducted and whether any circumstances are known at that time that warrant adjustment,” Colaizzi also suggested.

## Stating the conclusion

When the investigation is completed, how should the investigator frame or articulate the conclusion? “Some investigators use phrases like ‘more likely than not’ when assessing the credibility and the veracity of claims,” according to Colaizzi. “The precise language is less important than a manner of documentation that can distinguish between degrees of certainty and proof. A conclusion should strive to neither overstate nor understate the conclusions.”

## Interview checklist for third-party investigator

Fisher-Broyles attorney Eric Meyer offered this interview checklist, given from his perspective as a third-party neutral investigator:

- Introduce yourself, provide your business card, and explain your role as an independent investigator.
- Explain to the interviewee that it appears s/he has important information and you are speaking with him/her to find out what happened.
- Ask the interviewee to answer questions truthfully.
- Explain that you may prepare an affidavit based on the responses, which you’ll ask the interviewee to review and sign.
- Confirm that the interviewee is not recording the interview.
- Encourage the interviewee to keep the interview confidential and not discuss it with others (and that the company will do its best to maintain confidentiality but cannot guarantee it).
- Confirm that the interviewee understands the instructions.
- Ask if the interviewee has any questions.
- Inquire about the “who/what/when/where/why/witness/supporting” documents.
- Ask follow-up questions.
- Have a script, but don’t be wedded to it.
- For the complainant, ask about the effect the bad behavior has had on her/him and what s/he would like the company to do to discipline the accused.
- Remind the interviewee about no retaliation and to advise the investigator, HR, or a supervisor if s/he encounters any.
- Thank the interviewee for his/her time.

## Fact-based conclusions

“Keep the conclusion fact-based if possible,” Cino said. “State the complainant’s allegations and the facts related to those allegations that lead to a conclusion of whether the allegation is corroborated, not corroborated, or inconclusive.”

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## Avoid legal conclusions

“Many times, the *factual* investigator should not draw *legal* conclusions,” Cino suggested.

Meyer agreed that an internal investigator should avoid legal conclusions. “Rather, s/he should focus on whether the complained-of behavior occurred,” he explained, also noting that “before investigating, the company should have already decided what will (and will not) be part of the final report.”

## Identify next steps

While agreeing that “first and foremost, to the extent possible, the conclusion should articulate a finding as to the specific concerns or complaints that were raised,” Colaizzi suggested that the conclusion “should also identify the specific next-steps in ensuring appropriate remedial action is taken.”

## Best practices and pitfalls

Jackson Lewis attorney Richard Cino offered general best practices for employers, as well as the pitfalls that they should avoid when it comes to investigating complaints of discrimination and harassment.

### *What are the best practices?*

Investigations should:

- Be well-planned;
- Be efficient and prompt;
- Be impartial and conducted by disinterested persons; and
- Bring closure if possible.

### *What are the most significant pitfalls to avoid?*

- Putting in place barricades to reporting or investigating (e.g., strict chain-of-command reporting);
- Not providing several avenues for reporting; and
- Refusing to investigate until a complaint is put in writing.

## Avoiding pitfalls

Colaizzi further explained some potential pitfalls that employers should avoid. “Delay, particularly in reaching out to the complainant for an interview, can taint the investigation from the beginning by creating distrust within employee ranks,” she observed. “Also, an organization investigating a complaint must be willing to take the necessary remedial actions when the investigation is over. Failure to do so does almost more harm than not investigating at all.”

## Updating the complainant

Updating the complainant is an important part of any investigation. But to what extent should the employer or the investigator inform the accuser of the progress of the investigation?

“Err on the side of keeping the complainant updated,” Meyer suggested. “Too often, I mediate or defend claims of discrimination in which the complainant claims that the company did not investigate his/her complaint of discrimination. However, the company did investigate but failed to communicate enough (at all?) with the complainant.”

## Avoiding the wrong perception

The complainant certainly should be notified at the end of the investigation, according to Colaizzi. But even “during the investigation, it is important to ‘update’ the complainant in terms of something being done, without any significant detail, as frequently as necessary to avoid the perception that the investigation was dropped or never started in the first place,” she advised.

## Communicating the process

Cino suggested that the investigator should advise the complainant that the investigator may need to discuss the incidents the complainant has described with potential witnesses and with the accused. The employer’s updates, if appropriate, should be brief and process-related, for example: “We are in the middle of interviews. After interviews are concluded, we will make



a determination and let you know when the process is completed.”

The Jackson Lewis attorney also pointed out that there often will be a need to follow up with the complainant in order to continue the factual investigation and that the complainant should be made aware that this may occur.

## Privacy and confidentiality

What do employers need to know about privacy and confidentiality issues when an employee has raised an internal complaint of discrimination or harassment?

### What to tell the complainant

Let's start with the complainant—should the accuser be told to keep the matter confidential? “Generally, confidentiality should not be guaranteed or mandated,” according to Cino.

Colaizzi echoed that advice. “Confidentiality cannot be promised by an investigator,” she said. “I use ‘discretion’ rather than confidentiality. Employers must reserve the right to use and disclose information collected during an investigation as needed to effectively and thoroughly investigate the complaint.”

“On the other hand, Colaizzi continued, “I still advise asking interviewees to maintain the confidentiality of the interview.”

### The NLRB's take

Meyer addressed the question from the perspective of federal labor law. “The ‘Obama’ National Labor Relations Board limited an employer’s ability to require confidentiality as part of a workplace investigation,” he explained. “I would anticipate the current Board will backpedal. At the very least, employees should be encouraged to keep the investigation confidential.”

### What to tell the accused

Turning to the accused, should the employer tell them that they are being investigated, and if so, how much information should be shared? “Generally, the company should identify the complainant and give the accused the opportunity to respond to the allegations,” according to Meyer.

“The employer may advise the accused of the allegations (on an as-needed basis) or the fact that allegations of improper conduct have been asserted and the company is investigating the issues presented,” Cino suggested. The accused should also be advised that “no conclusions have been made and a thorough investigation will be conducted,” he added.

Colaizzi said that she always shares the allegations with the accused, although the precise manner in which she does so may vary depending on the circumstances. “I also believe you have to disclose the complainant,” she explained. “The goal is to get the most accurate information possible, and not disclosing the allegations and the persons from whom they are coming compromises that.”

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*“The goal is to get the most accurate information possible, and not disclosing [to the accused] the allegations and the persons from whom they are coming compromises that.”*

— Sherman & Howard attorney Brooke Colaizzi

## When supervisors are accused

There are additional considerations when a complainant accuses a manager or a supervisor of discriminatory or harassing behavior. What should employers keep in mind in these circumstances?

### Heightened risk

“These complaints naturally heighten the risk to the organization because of the per se liability for managerial misconduct,” Colaizzi pointed out. She said the choice of investigator is very important here: “You need someone who has enough authority and presence to ask tough questions of managers or executives.” But on the other hand,

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“a significant piece of maintaining the integrity of your investigation processes is to treat all complaints equally in terms of seriousness and diligence in conducting an appropriate investigation,” Colaizzi added.

## Additional steps

Meyer said that when a supervisor or manager is alleged to have engaged in the misconduct, employers should stress that there will be *no retaliation*. “Consider a suspension without pay pending investigation (with back pay if the investigation does not substantiate the complaint),” he also suggested.

Cino added that interim measures, if appropriate and necessary, may be important, such as assigning a temporary supervisor for the complainant and suspending the accused supervisor pending investigation. Generally, the investigator should not report to the accused manager or supervisor, he added. The employer also must prevent retaliation or the possibility of retaliation.

## After the investigation

After the investigation is completed, the employer should again check in with the complainant to ensure there are no retaliation concerns. “If the supervisor/manager remains employed, consider if it’s appropriate for that individual to supervise or manage the complainant and any needed additional oversight of performance reviews of the complainant going forward (again, to mitigate retaliation concerns),” Cino suggested.

## When top executives are accused

What, if anything, should employers do differently when the misconduct is allegedly committed by a top executive? “Ensure that outside counsel is involved and communicate the complaint to the Board of Directors,” Meyer emphasized.

## Third-party investigation

Colaizzi instructed that a third-party investigator is almost always necessary in these circumstances. “Very rarely will an organization

have an investigator with significant authority and experience to investigate an executive,” she explained. “Also, take some time up-front to identify who within the organization will ‘run point’ on the investigation and be responsible for ensuring that any necessary remedial measures are taken.”

## Enhanced handling and external communications

When the accused is a top executive, “the basics are the same, but it likely calls for enhanced handling, communication among a key decision-making group regarding the investigation process and efforts, and prompt action,” Cino suggested.

Cino also recommended that employers should consider engaging an attorney to conduct the investigation and address privilege issues at the outset. In addition, employers should review the executive’s employment agreement to determine any additional contractual obligations and or consequences.

Cino added that employers should work on a public relations/communications plan that must be nimble.

## When the incident is made public

Sometimes, despite an employer’s best efforts to avoid it, a discrimination or harassment accusation and surrounding details are made public. What should employers do—from a legal perspective—for “damage control?”

## Consider a PR firm

Meyer said that in these circumstances, the employer should consider hiring a public relations firm to control the damage. “A PR firm is generally more adept than a law firm at handling this,” he suggested.

Colaizzi agreed, saying that companies “should consider retaining a PR firm early on and have the PR firm work with their attorneys (to protect the work as much as possible).” The PR firm, she explained, can provide suggestions on responding to public reports, and the attorney involvement “can temper the message to avoid any negative impact on the investigation or its aftermath.”

## Internal communications

Similarly, Colaizzi suggested that the company may need to consider whether some sort of internal communication is necessary. “The external or internal statement may say nothing more than that the company takes the situation seriously, disagrees with the public reports, and that the company is doing everything necessary to resolve the matter,” she said.

## Avoid substantive public comments

Speaking as a litigator, Colaizzi said that she is “very adverse to any substantive public comments from a company during or about an investigation, because those public statements can be evidence.” She explained that it is usually

best to avoid the temptation to “correct” facts set forth in publicity or social media.

## A word about retaliation

While the experts already have shared some of their insights related to retaliation, the topic is worth revisiting. What do employers need to know about retaliation in the context of internal complaints of discrimination or harassment? Cino stressed these points:

- Monitor non-retaliation during and following an investigation.
- Recognize the need to open a new investigation of any alleged retaliation; retaliation is a potentially separate issue.
- Remind the accused of the company’s anti-retaliation policy.

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## Sexual harassment

As the #MeToo movement continues to bring both heightened awareness about sexual harassment and greater pressure on organizations to deal with allegations effectively, investigations of this type of misconduct may need to take special factors into consideration.

### Careful messaging

“In this day and age, these concerns raise issues of messaging,” according to Sherman & Howard attorney Brooke Colaizzi. “Sexual harassment complaints generally are no different than other discrimination or harassment claims, with the possible exception that sexual harassment concerns may warrant more frequent separation of complainant and respondent. However, sexual harassment concerns can create more disruption in the workplace and a heightened possibility of public disclosure because of the social and political environment,” she explained.

### Separating accuser and accused

Jackson Lewis lawyer Richard Cino stressed separation of the accuser and the accused. “The

organization may need to consider separating the complainant and the accused during the investigation or suspending the accused so as to minimize claims that he/she had the ability to continue to sexually harass other employees, engage in retaliation, or attempt to influence the investigation,” he noted.

### Look out for conflicts

FisherBroyles attorney Eric Meyer flagged the potential for conflicts of interest in these situations. “Ensure that the investigator does not have any actual or potential conflicts,” he said. “This could be a personal relationship. Or, maybe, the investigator was a witness to the complained-of behavior or would have trouble remaining objective.”

Meyer also warned: “When using an outside investigator—especially outside counsel—recognize that this person could become a witness and the report may not remain privileged.”

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## Most significant risk

Colaizzi called retaliation “the most significant risk attached to any investigation, particularly given the reality that the complainant, accused, and witnesses likely will not be confidential in identity or in their conduct after being interviewed.”

“I advise that the investigator always remind interviewees about the company’s policy against retaliation and who to contact if someone believes they are experiencing or observing retaliation arising from the investigation,” Colaizzi said.

*“Among other things, the company should take prophylactic steps to ensure that the complained-of behavior does not repeat itself during the pendency of the investigation”*

— Fisher-Broyles attorney Eric Meyer

## Don’t lose an important defense

Meyer pointed to an important potential defense. “Don’t retaliate, and remind others of the same,” he urged. “When a supervisor takes a tangible employment action against the victim, the company loses its *Faragher-Ellerth* defense to a hostile work environment claim.”

## Sharing the conclusion

Once the investigation has been completed, the employer must decide whether and how to share the conclusion and results. There is also the question of how much detail should be shared.

## It’s up to the employer

Generally, the investigation process is that of the company, Cino observed. “There is no obligation to inform the complainant of the investigation’s findings,” he said. “Many times, employers opt

to advise the complainant that the investigation has concluded, of any necessary actions taken, to thank the complainant for coming forward, and to advise that any future concerns be brought to the company’s attention.”

## “Need to know”

Meyer suggested that the information should be shared on a “need-to-know” basis, for example with senior executives, HR, the victim, alleged harasser, and counsel, and with more detail for those individuals who are *not the subject* of the investigation.

Colaizzi agreed that the general conclusion should be presented to the complainant and to any “need to know” individuals within the organization.

## How much to share

How *much* information must be shared depends greatly on the structure of the organization and the circumstances of the complaint, according to Colaizzi. “For example, a public company with public reporting obligations will be in a much different position than a private company,” she explained. “Those directing an investigation should consider ahead of time what audiences may need to receive information and how best to provide that information while preserving privilege.”

## Remedial steps

Should the employer share any remedial steps taken? “Whether or not the specific remedial steps should be shared with the complainant depends greatly on what those steps are,” Colaizzi said. “For example, specific discipline against the accused I treat as a confidential personnel matter that should not be shared. Widespread training or policy reminders is the type of remedy that can be disclosed more easily.”

## Third-party reports

Are there any additional or different steps that an employer should take when a discrimination or harassment “incident” is reported by a vendor, a customer, or other internal party who may have witnessed or heard about it?

## The steps are similar

The employer should take similar steps to the ones it would take for an internal complaint, according to Cino. “Follow-up with the vendor, customer, etc., to let them know the matter was taken seriously, was investigated, and was resolved,” he added.

Colaizzi agreed. “The steps are the same—an investigation is likely necessary and should proceed promptly,” she said.

## Prophylactic measures

“Among other things, the company should take prophylactic steps to ensure that the complained-of behavior does not repeat itself during the pendency of the investigation,” Meyers suggested. “Otherwise, the investigative steps are similar to those outlined above.”

## Agency charges

When an employer first learns of a discrimination or harassment complaint through notice of a charge delivered by a state, local, or federal agency, the employer may need to consider different or additional factors when conducting an investigation.

## Internal investigation

Under these circumstances, should the employer initiate an investigation of its own? “Yes absolutely,” said Colaizzi. “An internal investigation gives an employer thorough insight into the complaint and any underlying causes, and best allows the employer to defend itself in the formal proceedings.”

“Yes, at the very least the company must investigate or otherwise conduct due diligence to defend itself,” according to Meyer. “In this situation, outside counsel may lead these efforts.”

Cino agreed, elaborating that typically, the company would retain outside counsel to defend the complaint or action.

## Separate compliance investigation?

“There may be instances given the nature of the allegations where an employer may choose to investigate the matter from a compliance perspective, separate and apart from defending the proceeding,” Cino noted.

“For example, if an employee claims to have been retaliated against under Sarbanes-Oxley, the employer will defend the action. If there are factual allegations in the complaint that must be looked into from a compliance perspective, a separate investigation may be undertaken.”

## When the accused still works there

Should the employer handle the situation differently if the employee still works for the company than if the employee has already left the company? “Many times, the ‘plaintiff’ still works for the company,” Cino observed.

## Business as usual

When that is the case, “the threatened or actual litigation should not be discussed with the employee, particularly if he/she is represented by counsel,” Cino advised. “As best as possible, it should be ‘business as usual’ for the employer and employee.”

## Retaliatory scrutiny

“There is always the threat of retaliatory scrutiny,” Cino continued. “This does not mean that an employer is not entitled to take appropriate action against an employee who is underperforming or not acting in an appropriate manner. Rather, it means there must be legitimate business reasons to support any action,” Cino advised.

## Employment status

Colaizzi agreed that the complainant’s status as currently employed with the company can make a

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difference. However, if a former employee makes a complaint, the employer should still conduct an internal investigation so that it can best defend itself, Colaizzi suggested. “Whether or not someone is a former employee matters more with respect to decisions such as whether or not to interview that person.”

## Responding to the agency

Generally, how should the employer gather information necessary to respond to inquiries by the agency handling the complaint? “Under the direction of an attorney, first and foremost,” according to Colaizzi.

Cino further recommended that the employer interview supervisors, coworkers, and other witnesses, and work with its information technology group to gather relevant emails and documents.

## Corporate misconduct reports

What steps should an employer take when a whistleblower makes an *internal* complaint about corporate misconduct? “Any reaction to a report of misconduct should be focused on an initial

determination from a compliance perspective,” Cino said. “The company needs to get its arms around whether there is a compliance issue, first and foremost.”

## Safety concerns

When a whistleblower reports safety concerns or unsafe working conditions, the employer should respond promptly and take interim remedial action, according to Cino. “Depending on the type of issue involved and its impact on the public, a crisis management team that is agile and empowered should be at the ready and utilized,” he said.

## Improper financial reporting

When the conduct reported involves improper financial reporting or accounting, the potential need for the employer to report the incident is of significant importance, Cino said. “Additionally, the employer may need to utilize internal and external resources (e.g. forensic accountants, forensic computer experts) to assist in the investigation.”

## Discriminatory job screening

According to Colaizzi, a report of intentional discriminatory job screening is just another form of a discrimination or retaliation complaint that should be investigated accordingly.

Cino suggested that in this situation, a public relations/communication plan will likely be warranted to communicate remedial action.

## Threats against union activity

When it comes to reports of threats against employees suspected of union organizing activity, Cino noted the possibility that an unfair labor practice claim could result. “Supervisors who threaten employees who attempt to exercise their rights under the National Labor Relations Act could trigger an unfair labor practice claim,” he explained. Employers need to treat this like any other investigation and stop any improper conduct, he stressed.

## About whistleblower complaints

Jackson Lewis attorney Richard Cino said, “With any whistleblower complaint, the focus should always be to address the allegations in as effective a manner as possible, determine whether issues exist, and whether they can be corrected.”

Cino also identified the most significant pitfalls that employers should keep in mind when investigating internal whistleblower complaints:

- Remembering that a whistleblower does not necessarily have to be *correct* about a reported issue to be protected from retaliation under any of a myriad of statutes.
- Failing to utilize needed resources (attorneys, accountants, IT, etc.) to provide specialized knowledge to assist in the investigation.
- Failing to notify the appropriate outside agencies (self-reporting).
- Failing to monitor for retaliation/the appearance of retaliation.

## Prepare for scrutiny

Cino offered a few final words on workplace investigations: “Investigations play an important role in a compliant organization. It comes as no surprise that individuals may disagree

regarding a particular circumstance or set of facts or perceived facts. Investigations help to resolve those issues and hopefully move everyone forward. It is important to have the investigation process be one that can withstand scrutiny.”

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### About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for Employment Law Daily. As a practicing attorney for 12 years, Wolf’s experience included litigation of employment and civil rights matters.

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