MANAGING HUMAN RESOURCES IN CHALLENGING TIMES

Investigating Allegations of Employee Misconduct

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I. Introduction.

A. Background.

B. Since starting my private practice, I have conducted a number of very sensitive and even explosive internal investigations of allegations of employee misconduct.

C. What does this have to do with the tough economic times that counties face, along with the attendant morale problems?

1. Employee misconduct does not go away in such a climate, and neither does the need to carefully and effectively investigate allegations of such misconduct.

2. In tough economic times, counties can even less afford botched decisions that must be defended at great cost – and that, if not successfully defended, can result in reinstatement with back pay or an award for damages.

3. And think about the impact on morale of not addressing serious employee misconduct in a way that eliminates such employees from the workplace.

a. When staffing is reduced, those left are working harder for no more money – and even for less money.

b. There is less tolerance than ever among hard-working employees for those who are destructive in the workplace.

(1) If you don't address obvious misconduct, this has a devastating impact on the morale of good employees.

(2) The misbehaving employees will fight harder to keep the jobs they have – meaning it is more important than ever than your investigation be rock solid so that you can defend the action you take.

D. In such a short time, this is hardly all-encompassing training. But I hope to leave you with some factors to consider in deciding how to handle the need for investigations.

II. What can trigger the need for an internal investigation?

A. A variety of scenarios can arise:

1. A formal complaint by an employee of misconduct by another employee, often a claim of discrimination such as sexual or racial harassment, or allegations of acts or threats of workplace violence, or simply an employee who has had it with a misbehaving colleague – particularly in a time when everyone is carrying extra duties.

a. Formal complaints are very dangerous to ignore.

b. Once you are notified in this way, it often triggers a legal duty to investigate and determine the facts, and to take appropriate, remedial action in light of your conclusions.

(1) This is particularly true if the allegation is of a violation of law, such as employment discrimination (including unlawful harassment based on sex or other factors), violations of federal laws in wage and hour, safety, or the like, or whistleblower allegations.

c. If you fail to act on such a complaint, you may find yourself liable to the complaining employee in a legal action – and perhaps a federal or state agency with enforcement authority.

d. The key here is to seek legal advice immediately and do *not* let such complaints fall to the bottom of the pile.

2. An issue may be raised by someone in management or another county official, perhaps outside your office.

a. Again, this will often trigger a duty to investigate and determine the facts.

b. From both the legal and political standpoints, it is not a comfortable or easily defensible position to explain why a county did nothing to investigate or respond to a clear allegation of a violation or misconduct.

3. More difficult – you learn of the problem in a less formal way, such as the grapevine or rumors. What must you or should you do then?

a. It is a common myth that someone must file a formal or written complaint in order to trigger a county's obligation to investigate or take action.

b. But particularly if the allegation involves some claimed violation of federal or state laws (including employment discrimination and other employment-related laws), there is no requirement of a formal complaint, let alone a written one.

(1) It is enough that the employer (meaning *anyone* in management) knew or should have known of the issue.

(2) Two key take-away points here:

(a) Whenever your lowest-level, front-line supervisor learns of something, "the county knows" – because that knowledge is imputed to the county's highest

management, in other words, the Board of County Commissioners.

i) So make sure that when your supervisors or managers learn something from employees, however they learn it, they report it immediately to senior county management so that an appropriate investigation can be undertaken.

(b) Sergeant Schultz or ostrich-style management offers no legal insulation and may be very damaging to the county.

III. Who should conduct the investigation?

A. There is no one-size-fits-all answer to this question. But there are two basic choices.

B. The county can conduct the investigation internally. Some factors to consider:

1. Who might be suitable within your county?

a. Do you have anyone who has been trained in conducting investigations of claimed employee misconduct?

b. Unless it is a criminal issue, using law-enforcement investigators from the Sheriff's Office is usually not a good idea. Administrative investigations are *not* the same or even all that similar to criminal investigations.

c. Do not pick a person who will later need to serve as the hearing officer at the pre-disciplinary hearing. That generally would exclude your county administrator or other, senior administrator within the Commissioners' Office.

d. Pick someone who will make a good witness later – because the chances are good that he or she will be one.

2. Be aware that investigatory records are likely to be public records, and that may be a reason to assign the investigation to an attorney where the county can claim attorney-client privilege and attorney work product to shield notes and any report.

C. External investigator – when does it make sense?

1. An experienced outside investigator may offer a county more expertise – and more credibility as a later witness.

a. This may be particularly true in mid-sized to smaller counties who may simply not have that skill-set on staff.

2. If the county uses a lawyer, authorized under Ohio Rev. Code § 305.14 or 309.09, that may allow the report and other documents gathered by the attorney-investigator to be shielded by attorney-client privilege.

a. One possible problem: using the county's regular, outside counsel to conduct the investigation may disqualify the entire law firm from representing the county if later litigation arises involving the subject matter of the investigation.

3. An outside investigator without ties to any of the key persons involved may be able to negotiate the conflicts and complexities of a case more effectively than an "insider."

a. This is particularly true if the person being investigated is high-ranking and perceived as powerful.

4. What are the downsides?

a. The obvious one is higher cost – you will have to pay the fee to the investigator in what is likely a time-consuming process.

b. So you have to weigh whatever benefits there may be in terms of a possible better outcome against those costs.

IV. Special issues in conducting internal investigations.

A. What notices do you need to issue to witnesses before an interview?

1. Are you required to tell the witness being interviewed what this is about beforehand?

a. No! Unless your collective bargaining agreement provides otherwise.

b. This is just as true if the person is the potential target of discipline – with the same caveat as above.

2. But under Ohio Rev. Code § 9.84, as interpreted by the Ohio Supreme Court, we must give the target of potential discipline a *Piper* notice before the interview explaining that the employee has the right to have counsel present.

a. The attorney's role and rights in that interview are exceedingly limited.

(1) The employee may consult with the attorney – as long as a question is not pending.

(2) The attorney cannot "object" to questions or direct the employee to refuse to answer, unless the answer to the question would

potentially incriminate the employee, *i.e.*, implicate the employee in a possible violation of criminal law – *not* that the answer might get the employee in trouble or even fired.

B. What if the employee is in a bargaining unit represented by a union?

1. If the employee has a reasonable belief that he or she may be subject to disciplinary action as a result of the interview, he or she may assert the right to have a union representative present during the interview. This is referred to as the employee's *Weingarten* rights.

a. The employee must assert this right – you are not required to advise the employee of this right (unless your collective bargaining agreement so specifies).

b. The employee is only entitled to *a* union representative, not the preferred representative, and not to a lawyer.

c. The representative's role is limited to the role for attorneys under a *Piper* notice as stated above – the representative cannot disrupt or stop the interview.

2. If the employee is clearly a bystander witness who is not the subject of potential discipline, there is no *Weingarten* right to union representation.

a. You may choose to allow it anyway.

b. Beware of the "uh, oh" moment.

C. Does the employee have any "right to remain silent"?

1. Explain circumstances in which a *Miranda* warning is required.

2. Accordingly, if the investigation in which the issue is an administrative, disciplinary violation only, with no criminal law implications, there is *no* right to remain silent.

a. The employee *must* answer your questions, even if the answer will get the employee fired, and refusal to answer can itself be a dischargeable offense (with proper warnings).

b. The fact that the employee followed the advice of an attorney or union representative not to answer a question will not be a defense.

3. But if the underlying incident being investigated involves a possible violation of criminal law, and the employee or his or her representative asserts a right not to answer a question based on the Fifth Amendment right not to incriminate oneself, a public employer cannot order the employee to answer the question

without issuing a *Garrity* warning.

a. After a *Garrity* warning is issued, you can then order the employee to answer the question, and fire him or her for insubordination if the employee refuses to do so.

b. But you must also guarantee that none of the information gathered in response to the question is in any way used in any subsequent criminal investigation or prosecution.

c. Weigh this decision *carefully*, and in consultation with your Prosecuting Attorney.

(1) You may unintentionally botch a criminal investigation, or at least seriously complicate it.

(2) Can you make the case without interviewing the target of the investigation? If so, do it!

(3) Can you take other steps to protect the information gathered before the post-*Garrity* interview?

D. A final note on employee misconduct that may also involve criminal misconduct.

1. Ohio Rev. Code § 124.34 provides that conviction for a felony, even one having nothing to do with the employee's job duties, is automatic grounds for removal.

2. But do *not* wait for the criminal justice process to run its course before acting on work-related misconduct.

a. These are completely different processes, with different standards of proof, different goals and outcomes, and different procedural rights.

b. The criminal justice system is often quite slow, leaving everyone involved in limbo.

c. A plea-bargained outcome may weaken the employer's basis for action.

3. Make your case based on a careful, administrative investigation and take appropriate action. Let the criminal case then determine criminal liability as a separate matter. A person may be "acquitted" of criminal charges while the employer still has just cause for a discharge.