

Navigating Workplace Investigations and Follow-Ups

Sarah Sawyer: Welcome to this week's OK at Work myself, Sarah Sawyer, my colleague Russell Berger both attorneys at Offit Kurman. And today we are talking about workplace investigations. We've talked about them in the past, a couple different contexts. Like why you might need to do an investigation, how you might complete one.

It might be an investigation into sexual harassment, retaliation, some type of misconduct. But we haven't really covered what happens when you do the investigation and then you find that something did go wrong. So perhaps an employee didn't quite do what they were supposed to. Maybe someone is retaliating, maybe someone did engage in conduct that is against company policy.

There's a lot of different things you can discover as part of an investigation. So where should employers be starting when they kind of get to the end of an investigation and go, oh crap. What now?

Russell Berger: Yeah. I think there's kind of two branches that you [00:01:00] have to solve for, right? The first is if something has been going on wrong, what are we doing to fix it? If it's two employees having conflict, are we separating them? Are we changing a reporting structure? Are we putting divides in place? Are we separating the employee? What are we doing to make sure that. The immediate issue that we started investigating is remediated and is there something we have to do for the person who's complaining?

Is there something we need to do to restore them, protect them, what have you? So that's one branch. The other branch is if you can determine that someone's done the wrong thing or someone's done the wrong thing, what is the discipline? How do you address that? And again, of course in this context we're gonna say it's very fact specific and it depends.

But Really, that's right as it depends on, how severe is the conduct? Is this something we wanna warn? Do we want to warn and train? Do we wanna give someone a final warning? Is this so bad that we need to terminate? Where does that fit in the history of this person?

Do they have other things in their personnel file? Is this habitual? It's maybe not that bad, but it's the fourth time, [00:02:00] like we can't take it anymore. So you're gonna have to make both sets of those decisions, if you reach the conclusion of an investigation, you realize, yeah, something isn't right here.

Sarah Sawyer: The meaning is you have to do something, right? It's not something that you can just say, okay, we investigated this and now, we don't wanna act. Because it can be uncomfortable to act in these situations to almost acknowledge that something has gone wrong and it's attempt to fix it.

But, inaction is really the worst case scenario when you have a finding like that. Both from a practical and a legal perspective, because obviously you need to address it now that it's been brought to your attention and now that you have made this finding, and also just from an operational perspective obviously someone's made a complaint or it comes to the company's attention somehow, meaning it's having an impact on whoever may be brought it to the attention or someone who's being impacted by whatever behavior or whatever's happening.

And so there is an operational component to it as well as a risk management and legal [00:03:00] protection side of it where obviously as an employer you want to manage risk, but you also wanna provide an environment where your employees are able to do their job without distraction of having, conflict or other issues, that's part of the reason these policies exist why the laws exists is to protect the employees. But also, you're trying to create an environment that everyone can do their job safely and, be focused on

productivity and having a good culture. So those are also gonna be some things that play into making the decisions that you're describing as far as, how to rehabilitate a team, how to adjust things with the complaining parties to ensure that you're moving forward in a way that mitigates risk, but also allows for smooth operations.

Russell Berger: Yeah. And I think, that kinda highlights the fact that, making sure things are resolved for the complaining party when some resolutions required and compelled by the investigation is steps you have to take to make it the highest [00:04:00] bucket of legal risk. That's where the legal risk that says, if you don't do the right things by this employee, that employee is gonna have a claim against you.

But I think you raised another good point, which is we also have to run the business successfully and effectively and you can mitigate the legal risk but not put yourself in a position to run the business effectively. 'cause you don't go far enough or you go too far, whatever the case may be.

So I think, need to do right and protect employee that complained when the facts warrant that. Also thinking about it from the business perspective of, okay, what's right for the organization, what puts us in the best position going forward is another consideration that, should go on to your list.

Sarah Sawyer: Yeah. Thanks Russell and we'll see you next time.

Russell Berger: Thanks Sarah.