

Internal Investigations: Evaluating Allegations

Steps to Consider As You Work Through the Investigative Process

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Complaints and allegations will arrive via many channels with varying amounts of detail. Regardless of the source, the complaints and allegations should be evaluated before making any decisions about how to proceed with the information. This is one of the most important parts of the investigative process.

The person responsible for the evaluation must make the evaluation immediately because failing to act promptly may aggravate matters. The best practice is to promptly evaluate all complaints/allegations and document both the process and the findings. The importance of this initial evaluation process cannot be overstated, and it is not always easy to determine whether or not an allegation is serious and/or warrants a full investigation.¹

Although not every allegation or complaint warrants investigation, all of them require evaluation and written documentation explaining the decision. Based on the outcome of the evaluation, the predicated authority will decide whether to investigate, what to investigate, and how to investigate. The wrong decision at this stage will affect every subsequent decision and action.

It is becoming increasingly common to refer to this evaluation process as “triaging” the complaint, which is a process in which things are ranked in terms of importance or priority. What it comes down to is quickly making an accurate assessment of information to decide how much and what type of resources are needed. Triage may require some initial action steps before a proper assessment can be made.

ROLES AND RESPONSIBILITIES

First, there must be a person with the authority to evaluate and decide what further action should be taken on a complaint, including an investigation. Investigators often refer to this person as the predicated authority. Making investigative decisions on an *ad hoc* basis is not a sound practice and, in fact, could create all kinds of problems and potential liability.

It is highly advisable to establish this authority in a policy document approved at the highest level before the first investigation is undertaken. Often this person is the compliance officer (CO), human resource manager (HRM), or legal counsel, depending upon the nature of the complaint. The predicated authority evaluates complaints, allegations, or other information received to determine whether the allegation would be actionable should the information prove true. Part of this evaluation is determining any potential liability issues related to the allegations or the manner by which the investigation would be conducted.

TAKE STOCK OF WHAT IS KNOWN

In making this assessment, the predicated authority begins by taking stock of what is known from the information on hand, including the source of the information — the complainant, the media, or other sources or indicators. He or she also will determine which of the assertions are established facts and which are in dispute. Organizations receive allegations from numerous sources. An investigation may be triggered by a local newspaper article, in response to legal action, requests from government agencies, information from former employees or another entity in the same line of business. However, the vast majority of complaints or allegations will come from within the organization — from employees, management or the board of directors, or from HRM or the CO as a result of hotline tips or ongoing auditing and monitoring.

It is important to scrutinize the source of information for reliability. This involves

trying to understand motivation of the complainant or the information source. If the complaint comes into the hotline, the recipient of the information, during the intake of the complaint, should try to ascertain why the complainant is making the allegation at this time. If the complainant's identity is known, the investigator will conduct a subsequent interview during which he or she also will watch for motivational signals. The complainant's motivation may be good, or it may be questionable. It is not unheard of for individuals to try to use the complaint process to get even with a boss or co-worker. This could lead to exaggerating and distorting facts.

DETERMINE THE RULE VIOLATED

Determine whether the allegation or suspected activity would constitute a violation of the organization's policy and/or code of conduct, industry standards (*e.g.*, safety), or federal or state law or ruler and, if so, which one and what impact this will have on the employees and the organization. Among the most important decisions during the evaluation is whether the information warrants immediate disclosure to a duly authorized regulatory or law enforcement agency for investigation.

There are few headaches greater than initiating an internal investigation of something that really is in the jurisdiction of an enforcement agency and then “muddying the water” and “polluting” the evidence. The worst case scenario is creating an obstruction of justice violation by involving the organization in a strictly law enforcement issue. This is not as unusual as one might think. There are many organizations that have become the subject of a separate law enforcement investigation for taking actions to “cover up” a violation of law or interfering with an existing legal investigation.

Another useful step in evaluating the initial complaint or allegation is to physically visit the site of an alleged event, act, or incident to gain a fuller understanding of what the investigation might involve.

For example, understanding the particular work environment, proximity of employees to one another, and access to property or records may help the investigator understand the impact on the complainant.

It is clear that one decision may be that the allegation or complaint does not require investigation or further action. In most cases this may be the reasonable conclusion; however, it is worth noting that this decision on an allegation or complaint has its downside. First and foremost it may create a legal liability. Failing to act upon allegations of serious misconduct or hazardous behavior in the workplace could result in a serious problem should some injury occur that was preventable.

There have been a number of cases where employees have been reported in the belief they were under the influence of narcotic drugs or alcohol with failure or delays in investigating the merits of the allegations only to find out later that those employees had subsequently harmed other employees or patients. This is not a good story for the lawsuits that followed. Similarly, there have been cases of individuals being reported for carrying weapons that were not acted upon promptly that also led to great regrets and problems.

Of equal gravity is the failure to act promptly on a situation involving protected classes, such as in the case of alleged unlawful (sexual) harassment. The failure to investigate those types of allegations opens the entire entity to exposure for serious monetary and other liability. Delays sometimes really turn into decisions. If you delay making a decision long enough, it is a decision not to investigate with all the surrounding risks, as well as other serious problems. If during this lag period the complainant becomes the subject of retaliation, the organization incurs new liability that requires investigation.

The bottom line is to evaluate all allegations thoroughly and act promptly on the decision as to how to proceed. In any case where delays are unavoidable, it will pay to

keep in contact with complainants so they know they have not been forgotten or that you have not dropped the ball. Similarly, if you decide that the merit of the complaint does not warrant investigation, it might be advisable to explain the reasons to the complainant. Sometimes it is merely a matter of insufficient information to take logical steps to verify the concern. If so, explain it, and perhaps you will get more information to allow a different decision.

WHAT TO INVESTIGATE?

It is important to remember that internal inquiries can confirm or refute information provided by a complainant. Not all allegations are factually accurate; not all allegations are borne out by investigation; not all allegations are true. The general rule is that an internal inquiry of some type is warranted for any credible information of potential wrongdoing; however, not all complaints will warrant a full and formal investigation. Setting the appropriate level of investigative response is very important. No one wants to get involved in a major “wild goose chase.”

For example, the predicated authority may make the decision to undertake a limited scope internal inquiry to further evaluate the information or establish whether there are grounds for administrative action should the allegations be borne out by a full investigation. Many times, the decision is made that there is insufficient information and evidence on the face of the complaint to warrant a full scope internal investigation. The best practice is to address all allegations and record the decision in a written report, even those that do not involve a formal inquiry or investigation.

The decisions regarding the conduct of investigations are not a science. It always comes down to a series of judgment calls. Most complaints and allegations can be resolved with limited amount of investigation or internal inquiry in a matter of hours or a few days. Many times the facts stand on their own merits and are not subject to dis-

pute; the only problem is figuring out what they mean. The compliance investigation may be limited to filling in a few gaps in the facts to make the decision.

In some cases, the complainant alleges a wrong that may be serious to him or her but is relatively trivial for the organization. However, even a minor issue may be a problem if it is part of a pattern or is symptomatic of something more serious. The best practice is to look for patterns emerging from what appear to be trivial issues. Often many minor allegations and complaints may be symptoms of a pattern relating to the same source of problems. It may be a manager that seems to draw complaints for repeating the same bad behavior over a period of time. It could be a pattern that is linked to poor written guidance that causes problems. In some cases a pattern of small problems may be more serious than one big isolated event. In some cases, a pattern may result in a class action suit.

Even seemingly minor workplace complaints need to be evaluated. One of the most common errors by internal investigators is failing to respond to misconduct allegations in the workplace.

One of the biggest problems with compliance officers and other designated internal investigators is that they underestimate or ignore lesser issues, such as violations of policies and procedures and the organization's code. If one purpose of an organizational compliance program is to enlist all employees to help ensure compliance with applicable laws and regulations, then the organization must show concern for employee issues as well, not just issues that may have a major impact on the organization. Acting promptly on concerns and complaints by employees sends a message that the compliance officer and organization are serious about enforcing the code and compliance policies.

There is no discretion about investigating violations of federal and state laws, such as fraud against the government and unlawful harassment, among others. If, af-

ter investigation, the conclusion is that the complaint was without merit, the organization needs to carefully and fully document the investigative process and the decision and ensure that the document is able to meet a challenge by government agencies.

KEY CONSIDERATIONS IN EVALUATING ALLEGATIONS AND COMPLAINTS

Carefully examine and evaluate all allegations and complaints for substance and credibility, as well as the information and sources needed to confirm the validity or lack thereof. It is critical to act promptly in deciding what action, including investigation, is appropriate. Delays in this process can only increase the likelihood of a bad outcome. Whenever allegations are being evaluated, ask several questions about what is being provided, such as the following:

1. Who would be the appropriate party to resolve this issue (*e.g.*, compliance officer, HRM, legal counsel, privacy officer, chief financial officer, supervisory management, et cetera)?
2. If the information is borne out by investigation, would it be actionable?
3. Is there sufficient information to provide logical leads to prove or disprove the allegation?
4. Is there sufficient information in the complaint to institute an internal investigation?
5. Should legal counsel be involved and, if so, at what point?

DELIBERATELY FALSE COMPLAINTS

Before leaving the topic of evaluating the allegations, it may be worth considering that the allegation on its face may be patently false. This happens more often than one might think. Sometimes the cover or anonymity may encourage someone to try to use the complaint process to “get even” with his or her boss or co-worker. The compliance officer or other responsible parties need to be aware of this possibility. Ironically, the complainant may become the subject of the investigation, but the inves-

tigating officer needs to be sure that he or she has convincing evidence that the information is false and malicious and the person made a deliberate false complaint. The operative word here is “deliberate.”

Endnotes:

1. Information for this article was drawn in large measure from Conducting Internal Investigations in Health Care Organizations by Richard P. Kusserow ISBN: 978-1-936230-06-8, Published 2011 by Atlantic Information Systems. /aishealth.com/marketplace/books-directories-and-data.

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