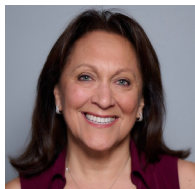


Workplace Investigations: Objectives Matter

A Practical Guidance® Article by A. Jonathan Trafimow, Carter Ledyard, and Natalie Loeb, Loeb Leadership



A. Jonathan Trafimow
Carter Ledyard



Natalie Loeb
Loeb Leadership

This article provides insight into whether (and how) to conduct a workplace investigation.

For additional information on conducting internal investigations, see [Workplace Investigations: Step-by-Step Guidance](#) and [Internal Workplace Investigations Checklist \(Step-by-Step Guidance\)](#).

For videos on best practices for conducting workplace investigations, see [Workplace Investigations Video](#) and [Remote Workplace Investigations Video](#).

Whether and how to conduct an internal workplace investigation will be driven not only by the initial allegations and facts giving rise to the apparent need for an investigation but also, in large part, by the company's objectives. Such objectives include legal compliance, enforcing company policies, furthering company values, valuing employees, and fostering employee and stakeholder engagement.

Imagine three (hypothetical) examples that may warrant an internal investigation of some type:

- Two senior executives separately come forward and accuse the CEO of sexual harassment.
- A supervisor with a history of interpersonal conflict complains that their direct report is not demonstrating sufficient empathy to the organization's constituents in the performance of their duties.

Some of a company's employees successfully pressed for a union election, and the company is concerned that the close vote reflects widespread low morale and dissatisfaction with the corporate culture.

Each example is briefly discussed below.

Sexual Harassment Allegations against a CEO

For the first example—involving allegations of inappropriate conduct by the CEO—the company would no doubt be concerned with legal compliance and be compelled to launch a serious and thorough workplace investigation. Multiple credible allegations of sexual harassment would not only implicate company policy but raise serious concerns about violations of applicable law. If the allegations are specific, serious, and credible, the company will likely be very concerned with the potential for legal liability. Maintaining confidentiality is also essential as rumor mills in organizations can destroy morale. The company would need to ensure that employees are working in a safe environment where sexual harassment is not tolerated.

Upon learning of the allegations, the company should, at a minimum, consult an attorney because of the significant potential litigation concerns. In consultation with counsel, the company may decide to have an attorney conduct the investigation or, alternatively, provide legal advice while

either a company employee or a third party conducts the investigation. If the attorney conducts the investigation, there is a risk that the attorney (and the attorney's law firm) might be disqualified from representing the company if litigation does follow. This risk is reduced if the attorney's role is confined to providing legal advice. Notwithstanding this risk, the company might decide to have a law firm conduct the investigation.

If the company decides to hire a third party, it should nonetheless consult with outside counsel on this decision. Depending on the particular facts and circumstances, there may be a viable argument that if the law firm retains the investigator to help it provide legal advice to the company in connection with the investigation, the investigator's work is privileged, at least in part (the underlying facts, of course, are not privileged).

Factors that a company might consider in whether to hire a third-party investigator include cost, the need for both the appearance and the fact of an investigator free from company influence, and the availability, if any, of qualified company employees to perform the investigation.

Supervisor's Poor Performance Review against Direct Report

For the second example—involving a supervisor's poor review of their direct report—legal liability appears to be less of a concern than the first example, and decision-makers at the organization may be relatively more concerned with the impact on organizational values and, perhaps, the impact of employees feeling valued. Given the supervisor's history of interpersonal conflict, the organization may be cognizant of the possibility of shared responsibility for the alleged performance issue. Here, the organization should lean on its established behavioral norms that shape its workplace culture.

Ultimately, the organization should determine which types of behaviors are considered acceptable in their culture and be sure that the supervisor and direct report are both demonstrating those behaviors on a consistent basis. In

this case, an internal or external executive coach can help the supervisor and direct report in changing behaviors, assuming there is a willingness to change on their parts. Talent flows to where it's valued and, if these behaviors are left unchanged, high performers may walk out the door.

As discussed, the organization may be somewhat less concerned about litigation risks, and more concerned with figuring out whether the supervisor's complaints are correct (a serious concern), whether the complaint is misguided or even motivated (consciously or otherwise) by a personal dislike of the employee, determining whether the manner in which its employees are trained to interact with service recipients needs to be addressed, and employee morale. Under these circumstances and with these concerns, the organization (with input from legal counsel) might decide that the investigator needs to bring different talents to the investigation than in the first example. The organization might reasonably conclude that the investigator does not need to be an attorney.

The third example, involving a unionization vote, does not involve allegations of workplace misconduct at all. Nonetheless, management's concern that employee receptivity to an organizing campaign demonstrates significant culture and morale challenges poses a different set of challenges for an investigator than an investigation centered around a specific allegation. In this case, the organization's leaders may want to consider a "workplace culture audit" to determine the following: Is there widespread dissatisfaction? If so, what are the causes? Are they economic (e.g., poor pay?), burnout (long hours, heavy demands?), cultural (employees feel unsupported?), legal (e.g., employees experience a toxic work environment), a combination, or none of the above? How can the company address these causes and create a better workplace for its employees? This type of survey, administered by outside professionals, will help the leaders identify concerns of their workforce, giving them specific data to craft a strategy to enhance morale and workplace culture.

Conducting a workplace investigation and prioritizing a healthy workplace culture do not have to be a zero-sum game. When investigations are conducted in a thoughtful manner with a desire to sustain a healthy workplace culture, outcomes can be even more successful.

A. Jonathan Trafimow, Partner, Carter Ledyard

Employment lawyer and litigator Jon Trafimow counsels clients on all aspects of employment-related issues, conducts workplace investigations and is an experienced trial lawyer. Jon is also an experienced mediator.

Jon's advice and counsel practice includes guiding clients who confront myriad workplace requests and complaints, ranging from allegations of violations of policy to harassment, discrimination and retaliation. He assists clients with disciplinary matters, addressing requests for leaves of absence for various reasons, managing reductions-in-force, drafting handbooks, severance agreements and other documents, and workplace training. The advice and counsel aspect of Jon's practice also includes workplace investigations.

Jon is an experienced litigator and trial lawyer. He has been counsel of record in numerous reported and unreported decisions. Jon is an experienced mediator, and brings those skills to benefit his clients seeking resolution of their disputes. The focus of his litigation is on claims of workplace discrimination, harassment and retaliation, but extends to claims of breach of contract and other employer-employee disputes.

Jon was previously a Fellow of the Coro Foundation Leadership New York Program. He frequently writes and lectures on employment law topics and has authored a book chapter (updated) entitled "Discrimination", published in the HR Guide to Employment Law: A Practical Compliance Reference (2009) and co-author of "The Sovereign Power of the State: A Proposed Theory of Accommodation," 12 Cardozo L.Rev.951.

Natalie Loeb, Founder, Co-CEO, & Leadership Coach, Loeb Leadership

Natalie Loeb is the founder and Co-CEO of Loeb Leadership, a preeminent leadership coaching and development company based in the United States with over 100 consultants across the U.S. and Europe. Natalie is an entrepreneur and a female business leader who has built a family owned and operated business from the ground up. She brings over 30 years of experience in talent development, coaching, and training, and is recognized as a thought leader and innovator within the legal profession and other industries.

Natalie worked as part of the Human Resources team at the headquarters of Skadden, Arps, Slate, Meagher & Flom LLP (Skadden Arps) in New York City, NY, where she designed and delivered leadership development programming and academies for firm members and found herself coaching senior managers and leaders one on one. Throughout her time in this role, Natalie observed organizations putting people with different backgrounds, perspectives, life experiences, and opinions together in highly demanding, stressful organizations, with the expectation that everything will run seamlessly – which is almost never the case.

Building upon her observations and experience, Natalie left Skadden Arps in 1997 and decided to put her efforts into creating [Loeb Leadership](#): a company that would raise up leaders who wanted to create meaningful, trusting relationships, increase their self-awareness, and find the strength, resilience, energy, and enthusiasm to create companies that are powerful, effective, and successful.

Natalie understands the need for people to be intentional in the way they lead and work, so that they can create workplace cultures that are inviting and inclusive and provide inspiration to do great work. She believes in the potential of everyone, and that given the right tools and guidance, anyone can achieve transformation—not just in their organizations, but in their communities, families, and personal lives, too.

Today, Natalie works with her expert team of coaches and consultants to partner with clients to address needs ranging from one-on-one leadership coaching, to custom development of company-wide management development programs, to the creation of DE&I initiatives and workplace culture transformation. Natalie often works with senior leadership members to assess current and aspiration workplace culture, increased self-awareness of leaders, new rules of engagement for how people collaborate, role definition and clarity, and streamlined work processes, among many other objectives.

Natalie received her Master of Science in Industrial/Organizational Psychology, and executive coach training at Baruch College in New York City, and is certified in over 15 leadership assessment tools. She is the author of numerous articles on leadership and is a sought-after lecturer at legal conferences and law firm forums, and a speaker at several distinguished Leadership Roundtables. She is a faculty member of the Practising Law Institute (PLI) and writes a monthly column in the PLI Chronicle titled *Coach's Counsel*, offering advice and guidance to the legal industry. Some of the recent virtual events she and her team have hosted include IQ vs EQ: What Lawyers Need to Know About Emotional Intelligence and Law Firm Workplace Culture – Be Smart, Build a Healthy Culture and Active Listening Skills for Lawyers.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.
