Today’s eLunch Presenters

Michael Roche
Partner
Chicago
MRoche@winston.com

Cardelle Spangler
Partner
Chicago
CSpangler@winston.com
Overview of Employment Investigations

• What can trigger an investigation?
• Why conduct an investigation?
• Timing of the investigation
• Who should conduct the investigation?
Overview of Investigations: What Can Trigger an Investigation?

- Company learns of potential
  - Violation of law
  - Violation of company policy
  - Serious unethical conduct
  - An event creating risk for company:
    - Civil liability risk
    - Criminal liability risk
    - Reputational risk
    - Cultural risk
Overview of Investigations: Why Conduct an Investigation?

- Gather facts to determine if alleged wrongdoing occurred
- Enable company to make an informed decision about how to resolve alleged wrongdoing
- Develop record to show company responded to alleged wrongdoing
• Limit Liability
  – Defense to most harassment claims
    • Co-worker harassment
      – Employer’s prompt investigation and remedial action prevents the plaintiff from establishing its burden of proof
    • Supervisor harassment – *Faragher-Ellerth* affirmative defense
      – Employer exercised “reasonable care” to prevent and correct any sexually harassing behavior
      – Employee unreasonably failed to take advantage of preventative or corrective opportunities
  – Remove alleged wrongdoer from employment decisions
Overview of Investigations: Why Conduct an Investigation? (cont’d)

• Limit Damages
  – Punitive damages – investigation may show good faith and rebut inference of malice/recklessness
  – Shorten the statute of limitations (e.g., FLSA)

• Mitigate risk of litigation or negative publicity
  – If complainant brings issue to company, company should investigate and resolve issue before complainant resorts to courts or media

• Avoid acting on inaccurate information
Pre-investigation Issues: Timing

• For certain defenses, employer’s investigation must be “prompt”
  – *Swenson v. Potter* (9th Cir. 2001): response was prompt and appropriate where employer initiated investigation three days after it learned of sexual harassment incident
  – *Bennett v. N.Y.C. Dept. of Corrections* (S.D.N.Y. 1989) (investigation initiated four weeks after an employee’s harassment complaint was not sufficiently “prompt”)

• If possible, company should start preparing for investigation within a day or two of learning about alleged wrongdoing
Pre-investigation Issues: Is the Investigation Major or Minor?

• Key judgment call and balancing act
  – Crucial that proper steps are taken for major investigations
  – But cannot waste corporate or legal department assets on every single minor issue that is raised

• Relevant considerations
  – Title, role, and responsibility of the person(s) alleged to have engaged in wrongdoing
  – Potential dollar value of harm to company or public
  – Nature of wrongdoing in relation to company’s business
  – Contact of person(s) alleged to have engaged in wrongdoing with customers, government, or others outside the corporation
  – Likelihood of adverse publicity
Pre-investigation Issues: Who Should Conduct the Investigation?

• Businesspeople, inside or outside counsel?
• Depends on nature of investigation
• Businesspeople should be involved in only minor misconduct investigations. Senior executives should almost never conduct investigations
  – Why?
    • Any non-lawyer investigator is likely to become a fact witness and subject to deposition or trial questioning
    • Lawyers will be better able to determine legal significance of certain facts, how they fit into legal claims and defenses and into overall investigation
    • Businesspeople will generally not be viewed as independent
• In-house counsel
  – Better understanding of the general facts, corporate organization, and corporate structure
  – Better availability of in-house counsel
  – Lower costs
  – BUT: “political” concerns: perceptions of lack of independence by authorities
  – CAUTION: legal advisory role should be separated from business advisory role and attorney-client privilege should be protected
• Outside counsel
  – Often, more investigative experience
  – Greater perceived independence
  – Sometimes, more familiarity with specific applicable statutes and in dealing with agencies/regulators
  – Clearer protection of attorney-client privilege and work product
  – Can often bring more investigative resources to bear
  – “Political” reasons
    • Outside counsel useful when senior employees may be questioned, implicated, or disciplined
    • Avoid in-house counsel becoming known as the company’s “bad guys”
• Best and most typical format
  – In-house counsel and outside counsel work together
  – In-house counsel bring to bear their greater knowledge of corporate structure and people to help identify issues, witnesses, and key documents, and coordinate interviews and course of investigation
  – Outside counsel “directs” investigation – for privilege and work product purposes – and bring to bear their independence, experience, and resources
Chronology of Employment Investigations

• Before conducting interviews
  – Define issues and identify and review relevant laws, policies, and contracts
  – Identify potential witnesses
  – Identify who will have access to investigation information
    • Limit access to those with “need to know”
  – Determine whether the investigation will be privileged
  – Consider whether to place accused wrongdoer on administrative leave pending investigation’s outcome (be aware of appearance of retaliation)

• Conducting interviews – order of interviews
  – Complainant
  – Accused wrongdoer
  – Witnesses with knowledge of disputed incidents
  – If necessary, follow up interviews with complainant and accused
Chronology of Employment Investigations (cont’d)

• Post-investigation
  – Produce investigative report summarizing steps taken in investigation and analyzing relevant evidence and issues
  – Select and execute any remedial action
  – Follow up meetings with complainant and accused regarding results of investigation
  – Determine whether to maintain privilege or use investigation as a defense
Common Issues Across Investigations

• Preliminary issues to cover with a witness
  – Warnings
  – Confidentiality
  – Certain NLRB issues
  – Interview best practices
  – Attorney-client privilege
  – Litigation holds
  – Requests for presence of lawyer during interview
  – Involvement of law enforcement
Common Issues Across Investigations: Pre-interview Warnings

• **Upjohn** warning
  – Lawyer represents the company, not the employee
  – Interview is to gather facts to give legal advice to company
  – Employee’s communications during interview are covered by attorney-client privilege
  – Corporation holds privilege and it alone will decide whether to waive privilege
  – Keep the interview confidential

• **Miranda-style** warning?
  – Making false statements during the interview or producing falsified documents could result in criminal prosecution

• Anti-retaliation instruction
  – Company will not retaliate against employee for participating in investigation
Common Issues Across Investigations: Confidentiality

• Standard practice: instruct witnesses to maintain confidentiality of interview and investigation
  – May be necessary to maintain the attorney-client privilege
  – Helps prevent future witnesses from learning about investigation and preparing responses before they are interviewed
  – Limits number of employees with knowledge of investigation and minimizes likelihood of leaks

• Banner Health Sys. d/b/a Banner Estrella Med. Ctr., 358 N.L.R.B. No. 93 (July 30, 2012)
  – Must provide a “legitimate business justification” for confidentiality instruction (e.g., destruction of evidence, protection of witnesses, fabrication of testimony, potential for a cover-up)
Common Issues Across Investigations: Certain NLRB Issues

- **NLRB v. J. Weingarten Inc.,** 420 U.S. 251, 262 (1975)
  - Union employees have right to have a representative present during an “investigatory interview in which the risk of discipline reasonably inheres”
    - But employer has no obligation to notify employee of rights

- **Johnnie’s Poultry Co.,** 146 NLRB 770 (1964)
  - When investigating to prepare for an NLRB proceeding, must give certain instructions at the start of an interview
    - Describe purpose of the interview
    - State that participation is voluntary
    - Assure employee there will be no retaliation
Common Issues Across Investigations: Interview Best Practices

- Include a third person in interviews who can take notes and serve as a witness should disputes over the interview arise
- Tell witnesses to contact interviewer if they think of anything else relevant to the investigation
- Consider whether to have witness sign a written statement
  - What to avoid
    - Expressing opinions during the interview
    - Making credibility assessments in notes while witness is in the room
    - Secretly recording the interview in a state with a two-party eavesdropping statute
      - E.g., Illinois Eavesdropping Act, 720 ILCS 5/14-1 et seq.
Common Issues Across Investigations: Attorney-client Privilege

- Elements of privilege: confidential communication between client and attorney for purpose of obtaining legal advice
  - In-house counsel’s communications are privileged, but not when they concern general business advice
    - For this reason, communications are not privileged simply because a lawyer is copied on an email or attends a meeting
- Company holds privilege
  - Company may waive privilege by asserting an investigation as a defense to a legal claim (e.g., sexual harassment)
- Label investigation communications “attorney-client privileged” – worthwhile even if not determinative
Common Issues Across Investigations: When to Implement a Litigation Hold

• Potential litigation hold triggers
  – Employee dies or is seriously injured – *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007) (duty to preserve arose when college officials became aware of alleged sexual assault by professor)
Common Issues Across Investigations: What If a Witness Requests a Lawyer?

• Employees have no general right to have attorney present during investigatory interview
• If the employee refuses to participate in interview without an attorney, company must consider how important employee’s testimony is to investigation
  – Company can generally punish employee for refusing to participate in investigation, BUT first consider implications . . .
Common Issues Across Investigations: When to Involve Law Enforcement

• When the company discovers criminal misconduct
• When the investigation reveals theft of substantial trade secrets or other valuable company information
  – Involving law enforcement may supplement company’s investigation resources and may deter potential competitors from doing business with wrongdoer
• When wrongdoing uncovered by investigation is a reoccurring problem for company and involving law enforcement may deter future wrongdoing
Types of Employment Investigations

- Whistleblower/retribution claims
- Theft of trade secrets
- Sexual harassment
- Wage and hour violations
- Retaliation
- Accounting fraud
- Time and expense fraud
- Workers’ compensation fraud
Types of Employment Investigations: Whistleblower/retaliation Claims

• Overview of legal landscape
  – A variety of federal and state laws protect employees that make good-faith complaints of legal violations
    • Examples: Title VII, ADA, ADEA, ERISA, FLSA, FMLA, OSHA, SOX, and many state laws
  – Many laws protect employee complaints made internally to company or externally to regulators and law enforcement
  – Elements of a whistleblower/retaliation claim
    • Complainant engaged in activity protected by the statute
    • Complainant suffered an adverse action
    • Causal connection between protected activity and adverse action
Types of Employment Investigations: Whistleblower/retaliation Claims (cont’d)

• Basics of investigating whistleblower complaint
  – Ensure no adverse actions are taken against complainant until the investigation is complete
  – Identify which whistleblower laws are involved and analyze standards for protected activity and causation
  – Identify all instances of complainant’s alleged protected activity
  – Investigate thoroughly each alleged instance of wrongdoing and retaliation identified by complaint
  – Key determination: Was there really a ‘causal link’ between ‘protected activity’ and ‘adverse action’?

• One goal of the investigation: insulate alleged wrongdoer from the decision-maker
• Issues unique to Sarbanes-Oxley
  – Maintain complainant’s confidentiality
    • Breaching confidentiality by itself may be considered an adverse action, *Menendez v. Halliburton, Inc.*, ARB Case. No. 12-026 (Mar. 15, 2013)
  – Notify audit committee and follow its procedure if complaint involves allegations of accounting or auditing violations
Types of Employment Investigations: Theft of Trade Secrets

• Often connected to non-compete cases. Urgent need to investigate and preserve evidence.
• Company should immediately image potential offender’s computer hard drive and identify if and when employee inappropriately transferred files
• Preservation of information for offensive purposes (instead of our usual defensive purposes)
• Consider engaging third-party expert early (e.g., digital forensics firm)
Types of Employment Investigations: Theft of Trade Secrets (cont’d)

• Particular items to analyze on offender’s computer
  – Deleted files
  – Internet history
  – Documents emailed to personal email address
  – Documents uploaded to cloud
  – Documents downloaded to external devices (e.g., thumb drives, external hard drives); print history
  – Phone records/text records
  – Key card records/sign-out sheets
  – Hardcopy papers and files
    • So often forgotten, now “best” way to steal information
Types of Employment Investigations: Sexual Harassment

• Basic procedure for investigating sexual harassment
  – Key is to promptly perform an investigation and implement any remedial action
  – Ask victim how he or she would like the situation resolved
  – Conduct and document this investigation with an eye on how it may be used as a defense in litigation
Types of Employment Investigations: Wage and Hour Violations

• Potential investigation subjects
  – Misclassification of employees as exempt or independent contractors
  – Failure to pay non-exempt employees for all hours worked

• Basics of misclassification investigations
  – Identify employees’ actual job duties
    • Compare job descriptions with actual job duties – actual duties determine classification status
    • Identify whether employees are disciplined for failing to perform certain duties – it’s hard to argue duties are required if employees can decline to perform them without repercussions

• Investigations over failure to pay for all hours worked
  – Compile timekeeping records and understand how timekeeping systems work
Types of Employment Investigations: Accounting Fraud

- Allegations of wrongdoing may implicate complicated accounting rules and principles
- Consider involving expert early in investigation to educate the investigator and provide direction on how to gather relevant facts and assess technical issues
- Internal expert v. external expert
  - Is the internal candidate sufficiently independent?
• Consulting expert v. testifying expert
  – Consulting expert may be retained in confidence and his or her advice and work product are not discoverable
  – Testifying expert’s opinions, methodology, and credentials must be disclosed in litigation
    • Communications are not protected by attorney-client privilege when communications relate to
      – Compensation for expert’s “study or testimony”
      – Facts or data the lawyer provided and expert evaluated in forming his her opinions
      – Assumptions lawyer provided the expert and were relied on to reach a conclusion
Types of Employment Investigations: Time and Expense Fraud

• Gather all documents relating to disputed time billed or expenses incurred and gather documents showing employee received the company’s policies related to billing time and incurring expenses
• Interview alleged violator
• Obtain all facts related to the disputed items and verify employee’s representations (e.g., review time entries, time connected to network, etc.)
• Decide whether there was a violation of company policy and take remedial action
Types of Employment Investigations: Workers Compensation Fraud

• Consider involving third parties
  – Company’s workers’ compensation insurer
  – Third-party investigative firm to conduct surveillance of employee
  – State workers’ compensation agency (e.g., Illinois Workers’ Compensation Fraud Unit with the Illinois Department of Insurance)

• Surveillance – if company conducts it to investigate potential fraud
  – Ensure surveillance does not occur when employee may have reasonable expectation of privacy (e.g., restrooms, private home)
  – Avoid using deception when conducting surveillance
Electronic Information in Investigations

• Can review and monitor everything employees view on company’s electronic equipment
  – But company’s policies must notify employees that they have no right to privacy when using company’s electronic equipment

• Company cannot log in to employee’s password-protected email or other personal account without authorization to access electronically stored information, Title II of the Electronic Communications Privacy Act (“Stored Communications Act”) (criminal liability)
  – But information downloaded to a device (e.g., laptop, cell phone) is not in electronic storage
Electronic Information in Investigations (cont’d)

• Many states (e.g., California, Michigan, Illinois) prohibit employer from requesting to access employee’s social media account
• Some states (e.g., Maryland) include an exception for certain investigations, such as those involving allegations that an employee downloaded employer’s proprietary or financial information
• Can image an employee’s workplace computer without employee’s knowledge
  – If the employer finds communications between an employee and his or her attorney, most states allow the employer to review those emails provided the employer’s policy removes any expectation of privacy in workplace communications
Fair Credit Reporting Act Overview

• FCRA contains detailed consent/disclosure obligations when an employer obtains a “consumer report” from a “consumer reporting agency” for “employment purposes”
  – A “consumer report” includes information about a consumer’s character” or “general reputation”
  – A “consumer reporting agency” is an entity that regularly provides “consumer reports” to third parties for a fee
  – “Employment purposes” includes evaluation for employment, promotion, reassignment, or retention

• FCRA applies when a company obtains a third party background check on job applicants
  – Employer can obtain consent from an applicant that covers current and future background checks
When the FCRA Does Not Apply

• FCRA does not apply when an employer conducts its own in-house background checks
• FCRA largely does not apply to investigations involving employee misconduct
• FCRA generally does not apply when outside law firm is engaged to conduct investigation
International Investigations

• Significance of data protection laws
• European legal framework
• Employee monitoring
• Access/disclosure rules
• Restrictions on reviewing employee emails
International Investigations: Significance of Data Protection Laws

• United States protects particular categories of information (e.g., medical information, credit information), while many other countries protect all “personal” information about individuals and employees
• Many data protection laws apply to use of protected data outside of the subject country
• Canadian and European laws create private rights of action for data privacy violations
• Each European state also has its own data protection agency to enforce data privacy laws
International Investigations: European Legal Framework

• In 1995, EU passed Directive protecting personal data
  – Protects all types of distinguishing personal information (e.g., person’s name, photo, employee identification number, or email address)

• The Directive prohibits businesses operating in Europe from transmitting protected data outside of the subject country to avoid compliance
  – The Directive includes approved methods for transporting data to a country with less strict privacy protections than the EU
  – Because these methods are onerous, companies may prefer to avoid transferring data from an EU state to the U.S.
International Investigations: Employee Monitoring

• Seven EU principles employers must adhere to when engaging in employee monitoring
  – Necessity
  – Finality
  – Transparency
  – Legitimacy
  – Proportionality
  – Accuracy
  – Security
Questions?
Thank You.

Michael Roche  
Partner  
Chicago  
MRoche@winston.com

Cardelle Spangler  
Partner  
Chicago  
CSpangler@winston.com