

BUSINESS FOCUS: The role of an outside investigator

By Kathleen Davidson, Pastori | Krans, PLLC



One of the smartest things a business can do when faced with an employee complaint is to conduct a prompt impartial investigation of the matter, often by hiring an outside employment lawyer, like myself, to serve as an investigator. An investigation lets a complaining employee feel heard and it shows all involved employees that the business takes the allegation seriously.

What will a skilled investigator do?

When I am hired, I first want to know what was alleged and how it was alleged. Next, I will review the relevant business policies and procedures at issue. I will also want to review the personnel files of both the complaining employee and the employee alleged to have committed a policy violation.

Then, I will identify what witnesses I should speak with and in what order. Once I have identified the witnesses and key documents, I begin interviews. I start every interview with the same disclaimers:

- Just because I am there does not mean that anyone did anything wrong. It means they have an employer that takes employee complaints seriously, and that my job is to figure out what, if anything, occurred.
- I tell the witness that they are free to take breaks whenever.

• I welcome them to contact me after the interview if they think of something else that they wish they had mentioned.

• I invite the witness to keep the specific questions that I ask them confidential, but I'm careful not to prohibit them from talking about the matter, as such an instruction could violate the National Labor Relations act.

• I inform witnesses that I will try to keep information as confidential as possible, but I cannot guarantee confidentiality since if they tell me something key to the matter, and they are the only witness with that piece of information, I may need to name them in my report. If however, five employees report the same things, my report can just state that "five employees told me" and I do not have to list who they are.

My goal at the end of the investigation is to be able to say, by a preponderance of the evidence (51%), whether it is more likely than not that a policy violation occurred or if it is more likely than not that it did not occur. My report will list the allegations, the employees interviewed, a general summary of the facts that I concluded and my overall conclusion.

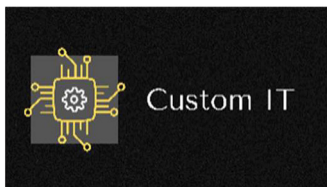
Sometimes employers will also request that I provide recommendations on what I think should occur post-investigation, particularly if I found a policy was violated. A business should only welcome recommendations if they intend to follow through with them, otherwise, it can open them up to future liability if the same employee reoffends.

A prompt and thorough employment investigation is not just the morally right thing to do to protect your employees, it provides the employer a possible defense to future claims of similar conduct by the same employee. It's one thing for a business to say they didn't fire their employee because they did not believe the allegations against them. It's another thing for a business to be able to say that they did not fire an employee

because they hired an impartial outside investigator who found that it was more likely than not that a policy was not violated and that discipline was therefore not warranted. Impartial outside investigations are wise investments for the savvy employer.

Kathleen Davidson is an employment lawyer at Pastori | Krans, PLLC. She conducts employment investigations and advises both businesses and individuals on employment law. She also practices family law and business litigation. She attended St. Anselm College and the University of Maine School of Law. Kathleen was the Manchester Bar Association President from May 2020 through May 2023 and is the past Chair of the Board of Amoskeag Health. She has been awarded Best Lawyers® since 2020 and Super Lawyers® since 2018. She also serves on the Committee for Cooperation with the Courts and is a member of the New Hampshire Association for Justice.

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