International Employment Lawyer

Workplace Investigations

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01. What legislation, guidance and/or policies govern a workplace investigation?

Australia

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Before commencing a workplace investigation, an employer must review the terms of any applicable employment contract, policy, procedure or industrial instrument. These documents will likely contain clauses that will dictate the investigation process.

There is also a significant body of common law that dictates how an investigation should be conducted and the procedural fairness that should be afforded to those involved. To ensure a workplace investigation is procedurally fair, employers must consider several factors, including:

- putting all allegations to the respondent in a manner which does not suggest a pre-determination of the outcome;
- conducting the investigation in a timely manner;
- providing the respondent with the opportunity to respond to the allegations;
- conducting a fair investigation process;
- making an unbiased (and not pre-determined) decision; and
- permitting the respondent and complainant to involve a support person or union representative.

Employers should also consider the additional steps they can take to conduct a best-practice investigation, including:

- being thorough and taking the time to plan the investigation;
- communicating clearly and fairly;
- considering whether the allegations are indicative of a wider workplace behaviour problem;
- maintaining confidentiality; and
- preventing victimisation.

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United States

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In the United States, any combination of legislation at the federal, state and local level, as well as judicial opinions and regulatory guidance interpreting those statutes, may impose obligations on relevant employers to undertake a timely internal investigation in response to complaints of workplace misconduct and to promptly implement remedial measures, where appropriate.

An employer's written policies often also set forth the company's expectations for how its employees, partners, vendors, consultants or other third parties will conduct themselves in carrying out the business of the company, and these policies may include protocols setting forth the parameters for an investigation in the event of potential non-compliance. Such investigatory roadmaps are often described in, for example, employee handbooks or a company's policy against discrimination and harassment.

Due to the patchwork nature of employment and related laws, it is not possible to cover every investigation scenario or related legislation in this guide. Employers should instead consult with experienced employment attorneys in their state to ensure compliance with the applicable legal and regulatory regimes.

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02. How is a workplace investigation usually commenced?

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A workplace investigation will generally be triggered by an employee making a complaint; however, issues may also be brought to the attention of an employer through an anonymous tip, by suppliers or contractors, from customers or because of observations and hearsay.

Complaints can be made directly to Human Resources (HR), anonymously, by email to a line manager or a third party. While complaints do not need to be written and can be informal, brief or verbal, complaints of this nature can make the process harder and more information may be required.

The receipt of a complaint does not necessarily mean that an employer needs to undertake an investigation immediately. A grievance policy ordinarily contains a multi-step approach to dealing with complaints, starting with internal resolution options such as informal discussions, conciliation and mediation. However, an investigation should be commenced where:

- the complaint alleges serious misconduct or unlawful conduct;
- the employer is required to conduct a workplace investigation as per an employment contract, policy, procedure or industrial instrument; or
- the complaint is complex and requires clarity on what has occurred to establish the facts.

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United States

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A workplace investigation is often, although not always, prompted by a complaint of workplace misconduct,

usually made directly by the employee who was harmed by the conduct, a third party who witnessed the conduct, or a manager or supervisor who was made aware of the issue and has reporting obligations as a result of his or her role in the organisation.

It is best practice – and often a legal requirement depending on the applicable state law – for companies to clearly outline a complaint process in their policies and to provide employees who experience, have knowledge of, or witness incidents they believe to violate the company's policies with one or more options for making a report. Although the specific complaint procedure may vary depending on the size of the organisation, the nature of the business and the type of complaint at issue, many companies provide for (or require) making a report through one of the following channels:

- a company-managed hotline or online equivalent;
- human resources;
- an affected employee's supervisor or manager; or
- a member of the legal or compliance department.

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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?

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It is an important consideration as to whether any of the employees involved in the investigation should be suspended, stood down or asked to undertake alternative duties for the period of the investigation. This decision will need to be made taking into consideration the nature of the complaint, any further damage to workplace relationships that could be caused by employees continuing to interact with each other, and potential work, health and safety issues.

It should not be automatic that the respondent is suspended as the employer will need to consider whether this is necessary in the circumstances. However, a period of suspension should be considered where:

- the allegations involve serious misconduct;
- there is a risk that the conduct will continue throughout the investigation;
- the respondent's presence could exacerbate the situation; or
- the respondent's presence could be disruptive to the investigation.

As an alternative to suspension, other options include working from home, performing amended duties or moving to a different workspace.

If an employee is suspended then they should ordinarily receive their full pay for this period. There are some exceptions to this, for example, if the employee is a casual employee or if a policy, employment contract or other industrial instrument allows the employee to be suspended without pay.

Generally, there is no minimum or maximum period a suspension should last, as this will depend on the length of the investigation.

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Yes. An employer may suspend the subject of an internal investigation with full pay pending the outcome of an investigation. However, this measure should be used sparingly, for example in cases where an employee has been accused of gross misconduct or where it is the only means of separating the alleged victim of harassment from the accused to prevent continued harassment. As an alternative means of separating the victim from the accused, an employer can consider interim measures such as a schedule change, transfer or leave of absence for the alleged victim with his or her consent (employers should take care not to take any action that could be perceived as retaliatory against the complainant – even if well-intentioned – including involuntarily transferring him or her or forcing a leave of absence).

Where an employer does determine that suspending the subject of an investigation is warranted while the company carries out its investigation, it should provide him or her with a written statement briefly outlining the reason for the suspension and the estimated date the employee will be advised of the investigation outcome and his or her final employment status.

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04. Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?

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Once the decision to undertake a workplace investigation has been made, it is important to decide who is the most appropriate person to conduct the investigation. For the investigation process to run smoothly a single lead investigator should be selected, although they may work with a larger team. The lead investigator and investigation team can be internally or externally appointed.

In deciding whether to appoint an external investigator an employer should consider:

- the nature of the allegations;
- the seniority of the respondent;
- whether a fair investigation can be conducted internally without any actual or perceived bias;
- whether there is a dedicated HR department with someone who has the required capability, skills and experience to conduct the investigation; and
- whether the employer wants the investigation to be covered by legal professional privilege.

If the employer decides to investigate the matter internally without appointing a third party, then the investigator does not need to have any specific qualifications. However, it is prudent to confirm that the investigator has the time and skills to conduct the investigation and that they can be objective.

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While every internal investigation should be carried out promptly, thoroughly and in a well-documented manner, employers should appoint one individual or team of individuals to oversee all complaints regardless of how they are received. Doing so helps to ensure that all allegations are documented, reviewed and assigned for investigation as consistently as practicable.

Once a complaint is received and recorded, the company should undertake an initial triage process to determine:

- the risk of the alleged misconduct from a reputational, operational and legal perspective;
- who is best suited to conduct an investigation based on the nature of the alleged misconduct and the perceived risk level (potential candidates may include members of human resources, legal or compliance departments, or outside counsel); and
- a plan for investigating the factual allegations raised in the complaint.

The appropriate investigator should be able to investigate objectively without bias (ie, the investigator cannot have a stake in the outcome, a personal relationship with the involved parties and the outcome of the investigation should not directly affect the investigator's position within the organisation); has skills that include prior investigative knowledge and a working knowledge of employment laws; has strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair; is detail-oriented; has the right temperament to conduct interviews; can be trusted to maintain confidentiality; is respected within the organisation; and can act as a credible witness.

At this triage stage, an employer may also wish to use the information collected from the complaint to proactively identify potential patterns or systemic issues at an individual, divisional or corporate level and react accordingly. For example, if a company receives a complaint against a supervisor for harassing conduct and that same individual has already been the subject of previous complaints, the company should consider whether it may be appropriate to engage outside counsel to carry out a new investigation to bring objectivity and lend credibility to the review – even if the prior complaints were not ultimately substantiated following thorough internal investigations. Similarly, the engagement of outside counsel is often appropriate where a complaint involves alleged misconduct on the part of a company's senior management or board members.

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05. Can the employee under investigation bring legal action to stop the investigation?

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The respondent has several rights including the right to have the complaint investigated in a fair, impartial and adequate manner, to hear the allegations in full and to not be victimised. However, there is no avenue for a respondent to bring legal action to stop a procedurally fair investigation.

In 2014, Australia introduced an anti-bullying jurisdiction which gave the Fair Work Commission (FWC) the powers to issue a Stop Bullying Order. There have been circumstances where it has been successfully argued that an investigation itself amounted to bullying and accordingly the respondent applied to the FWC for a Stop Bullying Order to suspend the investigation.

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In general, private sector employees have considerably fewer rights vis-à-vis a company-led internal investigation than their public sector counterparts. This is because many US states are “at will” employment states, which means that, absent an employment contract that provides otherwise, an employee can be terminated for any reason not prohibited by statute or public policy. Depending on the specific circumstances, however, an employee who is the subject of an internal investigation could bring or threaten legal action according to contract or tort principles to stop an investigation. An employee may also challenge an investigation because it was conducted in violation of certain federal, state or foreign laws, for example, the use of polygraph tests in violation of the Employee Polygraph Protection Act or foreign data privacy laws.

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06. Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?

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Co-workers can be interviewed as part of an investigation where they are witnesses to a complaint. If the employee refuses to attend the interview or is generally not cooperating with the investigation, the reasons for this will need to be considered carefully by the employer. Employers should consider whether there can be any amendments made to the interview process to accommodate the employee. However, an employer can make a reasonable and lawful direction to an employee to attend an interview. If an employee fails to comply with a lawful and reasonable direction, then it may constitute grounds for disciplinary action.

Witnesses who are employees are entitled to the legal protections that ordinarily attach to their employment, including not being bullied, discriminated against, or harassed and having their health and safety protected. Employers should also ensure that witnesses are not victimised as a result of participating in the investigation and that confidentiality is maintained.

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Yes. The investigator is empowered to decide which witnesses should be interviewed as a part of the fact-gathering process. In addition to interviewing the complainant, the investigation should include individual interviews with other involved parties, including the subject of the complaint, as well as individuals who may have observed the alleged conduct or may have other relevant knowledge, including supervisors or other employees. Many companies’ code of conduct, employee handbook or similar policy set forth the requirement for current employees to cooperate fully in any investigation by the company or its external advisors and also provide that failure to do so could result in disciplinary action, up to and including termination.

In the absence of contractual protections, employees may have no legal right to refuse to submit to an interview, even if their answers tend to incriminate them. That being said, when acting as a witness in an internal investigation, a current employee is usually afforded similar legal protections as the subject of an investigation, including the right to oppose unreasonable intrusions into his or her privacy and unreasonable workplace searches. For example, certain state laws prohibit an employer from questioning an employee regarding issues that serve no business purpose.

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07. What data protection or other regulations apply when gathering physical evidence?

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As part of an investigation, the investigator may want to collect evidence such as camera footage from CCTV, swipe card records, computer records, telephone records or recordings and GPS tracking. There are state-based workplace surveillance laws that operate in each jurisdiction in Australia. The laws recognise that employers are justified in monitoring workplaces for proper purposes, but this is balanced against employees' reasonable expectations of privacy.

The Privacy Act 1988 (Cth) (Privacy Act) also regulates how certain organisations handle personal information, sensitive personal information and employee records. The Privacy Act contains 13 privacy principles that regulate the collection and management of information. Employers should familiarise themselves with the privacy principles before conducting any investigation to ensure they are not in breach when gathering evidence.

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Documents and instruments that set out a company's policies (eg, employee handbooks, code of conduct or other written guidelines) often contain provisions regarding employee data and document collection, workplace searches, communication monitoring, privacy, and confidentiality. As discussed below, state and federal constitutional, statutory and common law – and in some cases foreign data privacy regimes – may provide additional protections to protect employees from an unwarranted or unreasonable invasion of privacy during an internal investigation.

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08. Can the employer search employees' possessions or files as part of an investigation?

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The starting position is that there is no general right for an employer to search an employee's possessions. However, an employer may be able to undertake a search in circumstances where:

- the employee consents to the search;
- there is a "right to search" contained in a contract, policy, procedure or industrial instrument; or
- the request to search constitutes a lawful and reasonable direction.

If an employee agrees to a search of their possessions, this consent should be confirmed in writing. If the employee does not consent then the employer can issue a direction to the employee. If the direction is lawful and reasonable, and the employee does not comply, then disciplinary action may be considered.

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As there is no unified data protection regime, privacy protections stem from a patchwork of federal and state privacy laws which impose limits on the extent to which an employer can collect information from its employees in connection with an internal investigation. Whether specific conduct violates an employee's rights is a very fact-specific inquiry requiring the application of relevant state laws and a regulatory regime.

In most circumstances, an employer is free to conduct searches of its workplace and computer systems in the course of investigating potential wrongdoing. Such searches are generally not protected by personal privacy laws because workspaces, computer systems and company-issued electronic devices are often considered company property. Many companies explicitly address this in written corporate policies and employment agreements. Employees who use their own electronic devices for work should be aware that work-related data stored on those devices is generally considered to belong to the employer (as a matter of best practice, employers should generally prohibit or at least advise employees against using personal devices for work and to maintain separate work devices, where possible).

These broad investigatory powers notwithstanding, the ability of an employer to conduct searches in furtherance of an internal investigation is not unlimited. For example, if an employer seeks to obtain or review work-related data from an employee's personal device, the employer must be careful to exclude any personal data. Certain states also prohibit an employer from requiring an employee to disclose passwords or other credentials to his or her personal email and social networking accounts, but permit an employer to require employees to share the content of personal online accounts as necessary during an interview while investigating employee misconduct.

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09. What additional considerations apply when the investigation involves whistleblowing?

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A complaint will be a whistleblowing complaint where a complainant has reasonable grounds to suspect that the information they are disclosing about the organisation concerns misconduct or an improper state of affairs or circumstances. The information can be about the organisation or an officer or employee of the organisation engaging in conduct that:

- breaches the Corporations Act 2001 (Cth);
- breaches other financial sector laws;
- breaches any other law punishable by 12 months' imprisonment; or
- represents a danger to the public or the financial system.

Since 2020, all public companies, large proprietary companies and trustees of registrable superannuation entities in Australia are required to have a whistleblower policy. Employers conducting an investigation will need to follow the processes outlined in their policy.

One of the key differences when conducting an investigation that involves whistleblowing is identity protection and the ability of the whistleblower to disclose anonymously and remain anonymous.

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Several federal, state, and local employment laws prohibit retaliation against employees who come forward with complaints or participate in corporate investigations. Employees who possess information regarding corporate misconduct may also be considered whistleblowers protected from retaliation under federal and state whistleblower laws, including but not limited to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Consumer Financial Protection Act of 2010.

An employee generally does not need to show that he or she was terminated or demoted to bring a retaliation claim; other actions on the part of the employer may qualify if they could be seen to discourage employees from raising complaints. To protect against a potential retaliation claim, employers should make clear at the outset of an investigation that retaliation will not be tolerated and require the complaining employee (and potentially his or her manager) to bring any instances of retaliation to the investigator's attention immediately.

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10. What confidentiality obligations apply during an investigation?

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Confidentiality protects the interests of the persons involved in the investigation as well as the integrity of the investigation. Before providing information as part of the investigation, employers should direct the complainant, respondent or witnesses to sign confidentiality agreements. This agreement should direct the person to refrain from discussing the investigation or matters that are the subject of the investigation with any person other than the investigator.

It is also best practice for participants in the investigation to be directed not to victimise (threaten or subject to any detriment) any persons who are witnesses to or are otherwise involved in the investigation.

After an investigation, employers should write to the complainant, respondent and any witnesses reminding them of their ongoing confidentiality obligations.

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Information arising from the initial complaint, interviews and records should be kept as confidential as practically possible while still permitting a thorough investigation. Although an employer must maintain confidentiality to the best of its ability, it is often not possible to keep confidential the identity of the complainant or all information gathered through the investigation process. An employer should therefore not promise absolute confidentiality to any party involved in an internal investigation, including the complainant. The investigator should instead explain at the outset to the complaining party and all individuals involved that information gathered will be maintained in confidence to the extent possible, but that some information may be revealed to the accused or potential witnesses on a need-to-know basis to conduct a thorough and effective investigation.

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11. What information must the employee under investigation be given about the allegations against them?

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To ensure procedural fairness, the allegations must be put to the respondent in writing in advance of the investigation interview. The allegations must be specific, but the respondent does not need to be provided with a copy of the original complaint. The respondent should also be informed that if the allegations are substantiated they may result in disciplinary action up to and including the termination of the employee's employment.

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The investigator must disclose to the employee under investigation the purpose of the investigation and, where the investigator is in-house or outside counsel, he or she should disclose that the company is the client.

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

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Employers will generally take steps to treat complaints sensitively and confidentially. However, because of the obligations employers have, confidentiality cannot be guaranteed as part of the investigation and the complainant, respondent and witnesses should be made aware of this.

Understandably, the complainant or witnesses may wish to remain anonymous. However, because the details of the allegations need to be put to the respondent so that they can provide an informed response or explanation, the source of the information will often need to be disclosed.

Employers can take steps to “ringfence” the investigation by asking employees to sign a confidentiality agreement. This will protect the interests of the participants of the investigation and uphold the integrity of the investigation.

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In general, except as provided above, depending on the seriousness of the complaint and investigation, the only persons who should be aware of it are the relevant individual in human resources or legal, and where different, the persons assigned to investigate. Although it may not be feasible to maintain absolute confidentiality in conducting an investigation depending on the nature of the allegations, investigators should exercise discretion at all times and, where possible, avoid identifying complainants, the subject of the investigation or witnesses by name where it is not necessary, and where doing so could be detrimental to the fact-finding process.

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?

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Non-disclosure agreements, also known as confidentiality agreements, can be used to maintain the confidentiality of the investigation. In this agreement, the employee will be directed to maintain confidentiality concerning the investigation and matters that are the subject of the investigation, and not speak to anyone outside the investigation team about the investigation without authorisation.

Confidentiality agreements are legal documents. Employees should be informed that a breach of the confidentiality agreement could result in disciplinary action being taken against them, up to and including termination of their employment.

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This is a fact-specific inquiry that depends on the specific circumstances and laws of the relevant state. In general, NDAs are frowned upon but can be used to an extent to keep certain facts and the substance of an investigation confidential. NDAs can never prevent employees from assisting in official agency investigations, however. NDAs also cannot lawfully prohibit employees from officially reporting illegal conduct by their employer.

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14. When does privilege attach to investigation materials?

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Investigation materials are not privileged and an employer may be required to disclose them in subsequent legal proceedings. If an employer is concerned about privilege attaching to an investigation, they should engage a legal practitioner to facilitate the investigation.

Employers who are concerned about privilege attaching to investigation materials should also consider the method of a lawyer's engagement. The lawyer should be expressly engaged to investigate, report and to assist the employer by providing legal advice. Additional benefits can be achieved if the legal practitioner engages an external investigator to investigate the complaint and prepare the investigation report. Privilege will attach to the investigation materials because they are prepared for the lawyer to allow the lawyer to provide legal advice to the employer.

It is important that employers do not expressly or inadvertently waive privilege. For example, by disclosing the investigation report or substantial contents of the investigation report. It is a balance between providing information to the respondent and complainant about the outcome of the investigation and disclosing too much information.

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For legal privilege to apply, a primary purpose of the investigation should be to provide legal advice to the company, including concerning non-lawyers working at the counsel's direction, and legal privilege likely will not apply to internal investigations performed as part of the ordinary course of business or where the investigation is required by a state or federal regulatory regime (eg, post-incident investigations of operations governed by OSHA's Process Safety Management Standards). It is, therefore, important to contemporaneously document the scope and purpose of the investigation and not risk waiving privilege by sharing privileged materials with unnecessary third parties.

Whereas attorney-client privilege includes only communications between an attorney and the client, work-product privilege is broader and includes materials prepared or collected by persons other than the attorney with an eye towards impending litigation. Examples of potential work products produced by attorneys in the context of an investigation include investigative work plans, interview outlines, memoranda summarising witness interviews and investigative reports.

As a practical matter, employees should be aware that communications with other employees or colleagues regarding the investigation are not privileged regardless of whether the colleague is also involved in the investigation or represented by the same counsel. Even if an employee believes he or she is sharing attorney communications with other employees who need to know the attorney's advice and who also have attorney-client privilege with the same counsel because he or she is involved or implicated in the investigation and also represented by company counsel, it is always prudent to refrain from sharing privileged information. If an attorney's communication is shared beyond those who need to know, attorney-client privilege may be destroyed.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?

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The respondent should be given the opportunity to have a support person present during the investigation meeting and any subsequent conversations that concern the termination of their employment. Failure to allow the respondent to have a support person may result in any subsequent termination of employment being found to be an unfair dismissal. This is because under the Fair Work Act 2009 (Cth), when the FWC is considering whether a dismissal is an unfair dismissal, they must consider any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

Employers should request that the respondent inform them 48 hours before any meeting of the identity of their support person. This will allow the employer to confirm the support person's suitability. A support person can be a legal representative or trade union representative, but the role of a support person is limited to assisting the employee and they are not there to act as an advocate or representative.

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Employees generally have no automatic right to counsel in connection with an internal investigation, unless contractually provided for under the terms of an employment agreement. Nonetheless, employees may choose to retain counsel, particularly if they face liability.

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16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?

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A trade union does not have any right to be informed of, or involved in, an investigation by an employer. However, an employee may request that their support person is a trade union member or trade union representative. This is appropriate and should be permitted.

Employers should review the terms of an employment contract, policy or industrial instrument as this may contain terms regarding trade union involvement. In particular, heavily-unionised workplaces may contain enterprise agreements which contain relevant clauses.

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Employers generally have no obligation to inform employees of their right to union representation or to ask if they would like a union representative present during the interview. Union employees may insist, however, that a union representative attend any investigatory interview that could lead to the employee's punishment, although the union representative may not interfere with the interview.

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17. What other support can employees involved in the investigation be given?

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Employers should be conscious that the investigation may have an impact on the complainant, respondent and witnesses. Employers will need to consider how to support their employees. The level of support provided will often depend on the size of the organisation and programmes already in place.

Many employers have an Employee Assistance Programme and employees should be reminded about this programme if further support or assistance is required. An employer's HR team may also be able to assist if an employee has concerns about the progress of an investigation.

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The employer's counsel should provide an *Upjohn* warning at the start of any interview, and delivery of the warning should be documented by a note-taker. An *Upjohn* warning is the notice an attorney (in-house or outside counsel) provides a company employee to inform the employee that the attorney represents only the company and not the employee individually.

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18. What if unrelated matters are revealed as a result of the investigation?

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During the investigation, unrelated matters can come to light, usually made by the complainant or a witness during the interview process. Unrelated matters may take the form of further complaints against the respondent (but on grounds that are outside the scope of the current investigation), or entirely different complaints.

An employer should first assess the nature of the new allegations. Entirely unrelated matters should be dealt with separately. However, if the matter relates to the respondent it may be appropriate to obtain consent from the respondent and complainant for the scope of the investigation to be widened. It is important to remember that all allegations must be put to the respondent and they must be given an opportunity to respond.

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Where new issues or claims arise during an ongoing workplace investigation, the investigator should discuss with in-house counsel whether the new issues or claims should be separately investigated and if so, by whom, or if instead those new issues or claims are sufficiently related to the current review that they can be investigated in parallel and incorporated into the ongoing fact-gathering process.

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19. What if the employee under investigation raises a grievance during the investigation?

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If a respondent raises a grievance during the investigation this should be dealt with under any employment contract, grievance policy or industrial instrument. This may involve investigating and responding accordingly. The content of the grievance should be carefully considered, but in many circumstances it is appropriate for the initial investigation to continue. Multiple investigations can be run simultaneously.

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Where an employee who is the subject of a workplace investigation raises his or her grievance during the investigation, the investigator should follow the same steps outlined above to triage new issues or claims. The investigator should also discuss with in-house counsel whether any particular steps should be taken to avoid the perception that any disciplinary measures taken against the employee (in the event the original claims are substantiated) were retaliatory.

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20. What if the employee under investigation goes off sick during the investigation?

Australia

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It is not uncommon for respondents to an investigation to take personal or carer's leave (sick leave) claiming that they are suffering from stress or anxiety. If this occurs, employers need to act appropriately, but this does not necessarily involve stopping the investigation process.

Employers should:

- assess the medical evidence to ascertain the respondent's condition and determine how long they are likely to be unwell;
- avoid exacerbating the condition;
- determine whether the employee is unfit to attend the investigation meeting;

- take into consideration the evidence of other witnesses;
- consider delaying the investigation for a short period; and
- consider conducting the interviews in other ways, for example, in writing.

While all efforts should be made to accommodate an employee who has taken personal or carer's leave during an investigation, if the respondent does not participate in the investigation, the investigation report may be prepared based on the available evidence.

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United States

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If an employee who is the subject of a workplace investigation becomes sick during the investigation, the investigator should complete as much of the process as possible in the employee's absence, for example by conducting interviews with the complainant and other witnesses and collecting and reviewing relevant documentation. Where the employee's absence is expected to be short-term, the employer can postpone completing the investigation until the employee returns to work and can be interviewed. Where a lengthy absence is expected, the investigator should take steps to ensure that the employee nevertheless has a fair chance to participate in the process, for example by providing the employee with flexibility in scheduling his or her interview or by offering other accommodations such as conducting the interview by video conference instead of requiring an in-person interview, or alternatively meeting in a neutral place instead of the office. It is important to maintain records of the steps taken to accommodate the employee to show that the process was reasonable and fair.

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21. How do you handle a parallel criminal and/or regulatory investigation?

Australia

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There are circumstances of misconduct in the workplace that can also constitute criminal conduct and be subject to a criminal or regulatory investigation. This can include physical or sexual assault, theft, fraud, illegal drug use or stalking.

An employer can proceed with an investigation to determine whether the respondent engaged in misconduct on the balance of probabilities. The employer can terminate an employee's employment before the outcome of any criminal investigation. However, the employer must keep in mind that procedural fairness must be afforded to the employee, particularly in circumstances where an employee is awaiting the outcome of a court proceeding.

Alternatively, an employer may decide to suspend the employee pending the outcome of the criminal investigation. If a criminal act has been committed, then the employer may decide to terminate the employee's employment.

Co-operation with the police and regulatory authorities is sensible and evidence can be compelled by the police or regulators by, for example, a subpoena, search warrant or an order for production.

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Employers have obligations to conduct a thorough and unbiased internal investigation and take prompt remedial action to prevent further workplace violations. As such, absent a criminal or regulatory investigation where the investigators ask the employer to pause an internal investigation, employers should be prepared to continue their internal investigation in parallel with the criminal or regulatory investigation while cooperating with police or regulatory investigators.

The police and the regulator can often compel the employer to share certain information gathered from its internal investigation. In some cases, the employer should analyse whether the non-disclosure of information evidencing criminal conduct within the company itself constitutes an independent crime or whether an applicable statute or regulation imposes an independent duty to disclose. Alternatively, the employer should consider whether, even absent an affirmative duty to disclose, disclosure of information gathered during an internal investigation may still benefit the employer.

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22. What must the employee under investigation be told about the outcome of an investigation?

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Managing the outcome of the investigation is an important part of the process. The respondent must be informed of the outcome of the investigation as soon as possible after the investigation is completed and the decision-maker has decided how to proceed.

The investigator must decide whether the claims have been substantiated on the balance of probabilities and the decision-maker must decide what disciplinary action, if any, will be taken. Any disciplinary action should be proportionate to the seriousness of the misconduct. Disciplinary action could include a warning, counselling, monitoring of behaviour or termination of employment.

Ideally, the outcome of the investigation should be communicated to the respondent and complainant in writing, setting out the allegations that have been substantiated, unsubstantiated or whether there is insufficient evidence to make a finding.

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In general, it is often helpful to provide the complainant and subject of the complaint with a short written

communication or verbal communication at the end of an investigation to advise that the investigation has concluded. Where the allegations are unsubstantiated, the communication should convey that no evidence of misconduct or unlawful conduct was found. Where the allegations are substantiated, the results and proposed communication should be reviewed with the legal function, together with potential disciplinary and remedial action, before it is communicated to the complainant and the subject of the complaint.

Where the misconduct alleged poses a high risk to the company from a reputational, operational or legal perspective, and especially where an investigation is conducted by outside counsel, outside counsel should determine, in consultation with the relevant individuals at the company, for example the general counsel, how and with whom to share investigation results and if and how to communicate the outcome to the complainant and the subject of the complaint. This is the case regardless of whether the allegations are found to be substantiated or unsubstantiated.

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23. Should the investigation report be shared in full, or just the findings?

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The investigator should prepare a written report setting out whether the allegations are substantiated, unsubstantiated or cannot be determined due to insufficient evidence. This report should be used for internal purposes only. Accordingly, the report should not be shared with the complainant, respondent or witnesses unless required by law, the employer's policies or another industrial instrument. It is particularly important not to share the investigation report should the employer wish to maintain privilege in respect of the report.

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Only the findings should be shared with the complainant and the subject of the complaint.

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24. What next steps are available to the employer?

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Employers must take steps to deal with the findings of the investigation and implement any

recommendations promptly. This may involve commencing disciplinary action.

The complainant and respondent need to be informed of the outcome of the investigation. All witnesses who participated in the investigation should also be thanked for their contribution and advised that the investigation has been completed. All participants in an investigation should be reminded of their ongoing obligations concerning confidentiality and victimisation.

If an employer decides that it may be appropriate to terminate a respondent's employment, the employee must be provided with the opportunity to respond and to "show cause" as to why their employment should not be terminated.

The investigation report along with any other materials produced during the investigation should be kept in a separate confidential file.

Employers should also consider whether action should be taken at an organisational level to prevent future misconduct. In particular, employers are required to take a proactive approach to addressing systemic workplace cultural issues in relation to sex discrimination, sexual harassment and victimisation.

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United States

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Where the misconduct alleged is substantiated in whole or in part by an internal investigation, the human resources function, potentially in consultation with in-house or outside counsel, should agree on disciplinary or remedial action to be implemented.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?

Australia

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The outcome of the investigation must be disclosed to the complainant and respondent. If there is a concurrent police or regulatory investigation, they may request a copy of the investigation report. Employers should generally cooperate with regulatory authorities, but should be careful about disclosing the investigation report as this may be privileged and privacy obligations must be considered. Employers should consider only disclosing the investigation findings and interview records if compelled to do so by regulators or police.

Interview reports, the investigation report and communications about the investigation should be kept in a separate file. The file should be marked confidential and access to the file should be restricted.

If proceedings are commenced, the investigation materials may be subject to disclosure unless legal professional privilege can be asserted, see above.

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Once fact-finding is complete, the investigator should discuss his or her notes with in-house or outside counsel and prepare a summary of the process, high-level findings, and a proposed resolution at the counsel's direction. This report should not include subjective commentary and should also avoid including excessive detail, and generally be treated confidentially during and after the investigation. If the report is requested by regulators or the police, the company should discuss with in-house counsel, and preferably also with outside counsel, how to respond to the request and whether any steps need to be taken to protect any applicable legal privilege.

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26. How long should the outcome of the investigation remain on the employee's record?

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There are legal requirements related to the time you must keep certain employee records in Australia, such as pay slips and time sheets. However, there are no laws concerning disciplinary records.

Employers can rely on previous misconduct to justify an employee's termination of employment where it can be shown it is part of a course of conduct. Accordingly, if complaints have been substantiated, and disciplinary action has been taken, these records should be maintained. However, if a significant period has elapsed since the misconduct, an employer should carefully consider whether it is appropriate to rely on this past behaviour to justify future disciplinary action for similar conduct.

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There is no requirement for the results of a workplace investigation to remain on an employee's record for any specific period. It is often helpful, however, for information relating to the outcome of such an investigation (regardless of whether the allegations are substantiated) to be accessible to the human resources or legal functions such that during the initial complaint intake process described above, any prior complaints and investigations relating to the same individual or group of individuals can be taken into account to identify any recurring issues or systemic violations.

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27. What legal exposure could the employer face for errors during the investigation?

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It is important for employers to conduct procedurally fair investigations that result in a fair outcome. Failure to do so may expose the employer to various claims by an employee. The most common type of claim following an investigation is an unfair dismissal claim. If a respondent's employment is terminated because of an investigation, they may be eligible to bring an unfair dismissal claim in the FWC alleging their dismissal was harsh, unjust or unreasonable.

An employee may also bring a bullying, discrimination or general protections claim. These claims may be made even where the investigation does not result in the employee's dismissal.

If an employer has departed from the procedures set out in their policies, or they have not followed the terms of an employee's employment contract or another applicable industrial instrument then an employee may bring a claim for breach of contract.

Australia has also recently introduced the "Respect@Work" legislation which places a positive obligation on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Accordingly, an employer who is not perceived to have taken a proactive and fair approach to these workplace issues faces significant legal exposure.

Failure to conduct an investigation properly (or a failure to conduct an investigation in circumstances where it is needed) can also cause significant reputational and financial risk.

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The subject of the investigation, the complainant, or a government agency investigating the same alleged misconduct could subject the employer to legal exposure. It is, therefore, helpful for a company to prepare a contemporaneous report of the investigation that summarises: the incident or issues investigated, including dates; the parties involved; key factual and credibility findings; employer policies or guidelines and their applicability to the investigation; specific conclusions; the party (or parties) responsible for making the final determination; issues that could not be resolved through the internal investigation; and employer actions taken.

The employer should also maintain a clear record of the steps taken to investigate the alleged misconduct and any findings, as well as all evidence gathered during the investigation, including documents collected and reviewed, any work done to identify systemic issues or patterns of behaviour, and notes from all interviews, which should be limited to the facts gathered, dated and should indicate the duration and location of the interview.

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