



Checklist for Conducting Investigations

Organizations are under increasing scrutiny to ensure its operations, personnel and agents comply with internal policies and a myriad of legal requirements. Companies, whether private or publicly held, are being investigated by federal, state, local and foreign authorities to a greater degree than ever before. Attorneys who represent current and former employees typically threaten to pursue claims that raise ethical issues, class and collective action allegations, systemic discrimination claims, and the potential of adverse publicity concerning the organization's practices. There is also a growth industry for lawyers to assert claims on behalf of shareholders for any number of "oppression" claims. In addition to these concerns organizations are subjected to heightened threats and risks to proprietary and confidential information.

To protect itself, the organization is well served to respond strategically, deliberately and thoughtfully when confronted with claims or threats to its proprietary and confidential information. Before decisions are made on how best to contain or mitigate the potential damage all relevant facts must be understood and evaluated. Only then will the company be able to respond in a strategic manner to protect its long and short term interests.

Conducting a strategic, thoughtful and thorough investigation, protected by the attorney client privilege, will serve the organization in any number of ways:

- Determining those relevant facts so that appropriate, fully informed actions can be taken by management or the board
- Taking the steps necessary to terminate any inappropriate conduct
- Formulating appropriate internal best practices and policies to deter and detect similar conduct in the future
- Establishing and documenting the organization's prompt good faith response to a complaint or incident
- Insulating management and the organization's board from allegations of complicity or claims of failing to respond timely
- Coordinating the investigation with any independent investigations being conducted by third parties
- Determining additional training opportunities that may be appropriate
- Promoting a healthy culture of transparency and compliance within the organization

This checklist has three major purposes: (1) to assist decision makers in determining whether an investigation is necessary (sections A and B) and, if so, (2) what resources to leverage in conducting the investigation (external, internal, etc.) (section C). The third purpose is to provide the investigator with a potential checklist of issues to consider and address during the course of the investigation and potential post-investigation activities (sections D and E). Like any checklist, this tool is merely illustrative and any investigation must be tailored to the particular facts and circumstances involved and supplemented with



the common sense, experience and best practices that inform the seasoned investigator’s decisions. It is not intended to be a “straight jacket” but suggestive of matters that are worthy of consideration.

A. What is the source of the complaint?	Yes	No
• Anonymous company hot-line or other written anonymous complaint	___	___
○ Is there a protocol for establishing a communication stream with the anonymous individual	___	___
○ If so, has the protocol been implemented	___	___
• Written complaint from internal personnel	___	___
• Written complaint from a third party (supplier, customer, etc.)	___	___
• Is the complaint a candidate for resolution through an early ADR event or contractual dispute resolution mechanisms	___	___
• If the complaint is from an that is a signatory to the CPR or similar pledge	___	___
○ Is your organization a signatory	___	___
• Written complaint from an attorney representing an employee or other agent of the organization and, if so:	___	___
○ Is there a threat to “go public” that needs to be addressed or contained	___	___
○ Is there an agreed time in which a response will be provided	___	___
▪ If so, does the organization have the resources necessary to conduct the investigation in a thorough and timely manner	___	___
○ Are there mandatory alternative dispute resolution mechanisms that should be raised at this time with the attorney	___	___
○ Has the attorney attempted to insulate the employee from interviews by agents of the employer	___	___
○ Will early mediation or other ADR techniques be an option for consideration	___	___
▪ If so, has a strategy been developed to implement an ADR plan	___	___
○ Should the first contact with the attorney be by phone or written	___	___
○ Has the organization had prior dealings with the attorney	___	___
▪ If so what have been the nature and quality of the contacts	___	___
○ Has the general reputation of the attorney been determined	___	___
• Verbal complaint		



- Was there a request the complaint be reduced to writing _____
 - If not, why not: _____

 - Has the request to reduce the complaint to writing been complied with _____
- Is the complaint from a governmental agency _____
 - Local _____
 - State _____
 - Federal _____
 - Foreign _____
 - Have there been other similar complaints from the agency involved _____
 - If so, identify all such complaints: _____

- Other _____

B. Does the nature of the complaint require an investigation?

- Required by internal protocols or written policies (even if anonymous or verbal) _____
- Required by applicable law or regulations _____
- Required to forestall potential litigation or in anticipation of litigation _____
- Related or similar issues that have been received in the past _____
 - Related or similar to past or ongoing litigation (either brought by or against the organization) _____
 - Involves individuals or departments that have been the subject of similar complaints _____
 - Related or similar to past or ongoing governmental investigation _____
 - Related or similar to past complaints whether written or unwritten _____
 - The same or related materials have been obtained and reviewed _____
- The complaint raises the potential of criminal wrongdoing _____



- The complaint raises the potential of jeopardizing important stakeholder relationships (i.e., suppliers, customers, shareholders, employees) _____

- The complaint raises the potential of significant loss being sustained _____
 - Theft or destruction of proprietary and confidential information _____
 - Exposure to class/collective action _____
 - Health and safety concerns _____
 - Environmental concerns _____
 - Other _____

- The complaint raises potential systemic issues _____

- An investigation has been requested by management or the board _____

- The complaint was raised during or in connection with a training program _____
 - The training materials have been obtained and reviewed _____

- The complaint raises potential violations of company policy _____
 - Policies involved: _____

- The complaint exposes the organization to publicity that could potentially damage its good will and reputation _____
 - Internal public communication personnel should be contacted to discuss a potential public relations strategy _____
 - External resources (crisis management, etc.) will be consulted _____

- Does the complaint, regardless of its source, have a significant potential to implicate the conduct of key employees, management, or important business interests and policies _____

- Does the complaint raise issues involving potential self-reporting obligations, cooperation with governmental investigations or safe harbor potential _____



- Applicable law and regulations have been reviewed (local, state, federal and foreign) _____
- If there is a pending governmental investigation is the coordination of investigatory activities advisable or requested by the governmental agency _____

C. If an investigation is required who should conduct the investigation:

- Prepare a preliminary investigation plan (i.e., a project management plan) that:
 - Sets forth the preliminary objectives(s) of the investigation _____
 - Sets forth the preliminary issues that require an investigation _____
 - Sets forth a preliminary evaluation of the witnesses who will need to cooperate in the investigation and identify those individual(s) whose conduct is a potential focus of the investigation _____
 - Sets forth the documents and data that will require review _____
 - Internal policies do not place any restrictions on company data and systems that can be accessed _____
 - Applicable law has been evaluated to determine any restriction on data that can be accessed _____
 - Sets forth the protocols to maintain confidentiality and preserve the attorney-client privilege _____
 - Evaluates the potential of a “cat’s paw” theory _____
 - Minimizes the potential of a retaliation claim _____
 - Determines the need to implement a document hold and the extent of the hold _____
 - Document hold policies and protocols have been reviewed _____
 - Evaluates existing policies and contracts to evaluate the extent of cooperation with the investigation that is required by personnel _____
 - Identifies the personnel and entities that should be kept advised of the progress of the investigation and the results _____
 - Evaluates whether there is a need to coordinate with any other pending investigation (internal or external) _____
 - Determines if any insurer(s) needs to be placed on notice and, if so, when _____
 - Establish a time line for the investigation _____
 - Assigns preliminary responsibility for the performance of investigative tasks to specific personnel and the time line for completing the assigned tasks _____

- Determine if the investigation will be conducted by internal personnel:
 - Qualified internal personnel who are available and will be viewed as objective, above reproach and immune from influence (no issues of



- internal pressure, loyalty, etc.) _____
- Trained to provide all Upjohn warnings _____
- Trained and experienced in conducting investigations and interviews _____
- Knowledgeable of applicable law _____
- Trained in maintaining confidentiality of information and data gathered _____
- Use of internal personnel will not give rise to the “appearance” of partiality _____
- Personnel involved in the investigation will not be evaluating the activities of their own departments _____
- Utilization of internal personnel in conducting the investigation is not prohibited/discouraged by applicable law _____
- Internal personnel who conduct the investigation will be satisfactory witnesses _____

- Determine if external independent counsel desirable:
 - Is it important to enhance the attorney client and work product privileges _____
 - Is it important to enhance the appearance of objectivity _____
 - Is the legal department implicated in the complaint _____
 - To protect current outside counsel from testifying and potential disqualification _____
 - Current outside counsel has a prior relationship with the potential target of the investigation _____
 - To ensure all Upjohn protocols are followed _____
 - To coordinate any joint defense agreement(s) _____
 - To maintain confidentiality of the investigation _____
 - To coordinate with current outside counsel _____
 - Requested by the Board or C-Suite personnel _____
 - To assist in developing potentially difficult change management or address other sensitive internal issues _____
 - There is a likelihood the investigator will be required to testify as to the quality and nature of the investigation _____
 - Other: _____

- Determine other resources that may be required to supplement or coordinate with the investigation:
 - Internal IT personnel _____
 - External IT resources _____



- Internal audit department _____
- External auditor _____
- Computer forensics _____
- Accounting forensics _____
- Independent investigators _____
- Psychiatrist/psychologist _____
- Statistical analysis _____
- Security personnel _____
- Other: _____

- Image and collect key documents and data before initiating the investigation _____
 - Is there a concern that personnel may attempt to destroy or tamper with documents or other data if the investigation becomes known _____
 - Is there a need to preliminarily determine if there has been any attempt to tamper with, edit, delete, download, etc. any documents. _____
 - Will any company property need to be assessed (computers, lockers, etc.) before the interviews are conducted. _____
 - Do company policies permit the access of documents on IT systems _____
 - Applicable laws have been reviewed _____
 - Does access to company information, documentation or systems need to be restricted pending the completion of the investigation _____

- Is a search of the organization's premises required _____
 - Local laws have been reviewed _____
 - Applicable policies and contracts have been reviewed _____
 - Identify the locations that may require a search:

- Is surveillance required (video, use of investigators, etc.) _____
 - Local laws have been reviewed _____
 - Applicable policies have been reviewed _____
 - Contracts (i.e., collective bargaining agreements, etc.) have been reviewed _____

- Will a Joint Defense Agreement will be appropriate or desirable _____



D. Conducting the required interviews

- Prepare a strategy for each interview and identify the scope of information to be obtained:
 - Will the investigation be covert ___ ___
 - Will advance notice of the interview be provided ___ ___
 - Where will the interview be conducted ___ ___
 - Will there be any safety concerns during or immediately after any interview ___ ___
 - Will signed statements be secured from any witnesses ___ ___
 - Which ones and why:
 - _____
 - _____
 - _____
 - _____
 - Determine under what circumstances, if any, the interview will be terminated ___ ___
 - Request for representation ___ ___
 - Refusal to cooperate ___ ___
 - Other:
 - _____
 - _____
 - _____

- Determine the sequencing of the interviews
 - Is a whistleblower involved ___ ___
 - Is an employee’s employment status about to change ___ ___
 - Will a witness’ cooperation decrease if the investigation becomes known ___ ___
 - Other issues ___ ___
 - _____
 - _____
 - _____

- Determine who will be present for each interview
 - Interviewer and note taker ___ ___
 - Interviewer and witness ___ ___
 - Internal counsel ___ ___
 - Witness representatives ___ ___
 - Do policies or contracts permit/require ___ ___
 - Do legal requirements permit/require ___ ___



- Other:

- Will any personnel be suspending pending the completion of the investigation
 - With or without pay
 - Requested to prepare a written statement in anticipation of the interview
 - Requested to prepare a written statement at the conclusion of the interview
 - Policies and applicable contracts have been reviewed
 - Comparables have been reviewed and evaluated
 - The potential for retaliation claims has been assessed

- Determine if policies or applicable contracts require cooperation with the investigation and under what circumstances

- Review all relevant data and documents prior to the interview
 - The initial complaint and any supplements
 - Applicable law and regulations
 - Applicable policies
 - Personnel files as appropriate
 - Managerial files as appropriate
 - Prior similar complaints and investigation materials
 - Prior witness statements
 - Prior comparables and similarly situated personnel
 - Other

- Conclude the interview with the appropriate statement and instructions
 - Confidentiality of the investigation
 - May only discuss with the witness' attorney
 - However may not interfere with governmental investigation if any pending or about to be commenced



- Advise representation may be requested if questioned by governmental agencies _____
 - Identifying relevant documents to be retrieved and provided _____
 - Timeline for providing the additional documentation agreed upon _____
 - The interviewer's contact information in the event of refreshed recollection or questions _____
 - Remind the witness of applicable company policies _____
 - Guidance if contacted by third parties concerning the investigation _____
 - Any follow up information that may be needed _____
 - Timeline for providing the additional information agreed upon _____
 - The potential need to have a follow up interview _____
 - Other: _____

- Compilation of interview notes in a timely manner that:
 - Documents all relevant information obtained _____
 - Delineates facts obtained from mental impressions _____
 - Enhances the work product privilege (mental impressions, etc.) _____
 - Document the Upjohn warning given during the interview _____
 - Sets forth the time , place and who was present during the interview _____
 - Sets forth the concluding instructions provided _____
 - Identifies additional investigation required as a result of the interview _____
 - Other: _____

- Will the employee be represented during the course of the interview _____
 - Review of protocols and internal policies to determine _____
 - Is the employee represented by a union _____
 - Legal requirements reviewed _____
- Anticipate questions that will be posed by the witness and prepare the responses _____



- Revise the investigation plan as dictated by events ___ ___
 - Additional documents and data to be obtained ___ ___
 - Additional witnesses to be interviewed ___ ___
 - Identify follow up that may be necessary ___ ___
 - Have new issues been raised ___ ___
 - Other: ___ ___

E. Concluding the investigation

- Determine who needs to be apprised of the results of the investigation (either in whole or in part) ___ ___
 - The complainant ___ ___
 - Will the complainant be asked if satisfied with the investigation and any remedial actions taken ___ ___
 - The complainant's representative ___ ___
 - Supervisory personnel ___ ___
 - The Board ___ ___
 - C-Suite personnel ___ ___
 - Governmental agencies ___ ___
 - Have there been any prior agreements that need to be dealt with ___ ___
 - Public relations/crisis management personnel ___ ___
 - Other: ___ ___

- Determine how and to what extent the above will be apprised of the investigation results ___ ___
- Determine the nature and content of the final investigatory report and whether it will remain confidential and subject to the attorney client privilege ___ ___
- Determine if any safe harbor protections are available ___ ___
 - Determine how any safe harbor provisions will be best utilized ___ ___



- Determine what remedial actions (i.e., discipline, re-assignment, termination, etc.) will be taken ___ ___
 - Review comparable instances ___ ___
 - Will the remedial action give rise to potential claims of retaliation ___ ___
 - Potential “cat’s paw” implications ___ ___
 - Will the remedial action be satisfactory to the complainant ___ ___
 - Does the remedial action meet the requirements of applicable law ___ ___
 - Ongoing counseling and education ___ ___
 - Other: ___ ___

- Determine what protocols or policies need to be modified or implemented ___ ___

- Determine if there are other change management actions that require consideration ___ ___

- Determine the nature and content of the final investigatory report and whether it will remain confidential and subject to the attorney client privilege ___ ___
 - Will the report contain recommendations of any nature ___ ___
 - Will the report consist of a written and verbal summary ___ ___

- Determine if any releases or settlement agreements will be obtained ___ ___
 - The terms have been determined ___ ___
 - Early ADR efforts will be attempted as appropriate ___ ___

- Will any claims be asserted by the organization as a result of the investigation ___ ___
 - Determine how and when such claims will be asserted ___ ___
 - Will preliminary injunctive relief will be sought ___ ___
 - Will there be coordination with any federal agencies (i.e., U.S. Attorney’s office, etc.) in connection with the assertion of any claims ___ ___
 - Will early ADR efforts will be attempted ___ ___

- Do any financial statement corrections need to be made or other disclosures mandated ___ ___

- Conduct an after action assessment of the project management plan, the completeness of the checklist, and the performance of the



investigation team members

___ ___

- Implement continuous improvement activities on the investigation protocol

___ ___

- Other closing activities:

Suggestions on improving this check list are welcomed and encouraged. Please send your comments to richard@hurfordresolution.com