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?**

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- 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

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o Was there a request the complaint be reduced to writing ___ ___
  ▪ If not, why not:
    ______________________________________________________
    ______________________________________________________
    ______________________________________________________

o Has the request to reduce the complaint to writing been complied with ___ ___

• Is the complaint from a governmental agency ___ ___
  o Local ___ ___
  o State ___ ___
  o Federal ___ ___
  o Foreign ___ ___
  o 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 ___ ___
  o Related or similar to past or ongoing litigation (either brought by or against the organization) ___ ___
  o Involves individuals or departments that have been the subject of similar complaints ___ ___
  o Related or similar to past or ongoing governmental investigation ___ ___
  o 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  
  o Theft or destruction of proprietary and confidential information  
  o Exposure to class/collective action  
  o Health and safety concerns  
  o Environmental concerns  
  o 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  
  o The training materials have been obtained and reviewed  

• The complaint raises potential violations of company policy  
  o Policies involved:  
    _______________________________________________________________  
    _______________________________________________________________  
    _______________________________________________________________  

• The complaint exposes the organization to publicity that could potentially damage its good will and reputation  
  o Internal public communication personnel should be contacted to discuss a potential public relations strategy  
  o 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:
  o Will the investigation be covert
  o Will advance notice of the interview be provided
  o Where will the interview be conducted
  o Will there be any safety concerns during or immediately after any interview
  o Will signed statements be secured from any witnesses
    o Which ones and why:
      __________________________________________
      __________________________________________
      __________________________________________
  o Determine under what circumstances, if any, the interview will be terminated
    - Request for representation
    - Refusal to cooperate
    - Other:
      __________________________________________
      __________________________________________
  
- Determine the sequencing of the interviews
  o Is a whistleblower involved
  o Is an employee’s employment status about to change
  o Will a witness’ cooperation decrease if the investigation becomes known
  o Other issues
    __________________________________________
    __________________________________________
    __________________________________________
  
- Determine who will be present for each interview
  o Interviewer and note taker
  o Interviewer and witness
  o Internal counsel
  o Witness representatives
    - Do policies or contracts permit/require
    - Do legal requirements permit/require
• Will any personnel be suspending pending the completion of the investigation ___ ___
  o With or without pay ___ ___
  o Requested to prepare a written statement in anticipation of the interview ___ ___
  o Requested to prepare a written statement at the conclusion of the interview ___ ___
  o Policies and applicable contracts have been reviewed ___ ___
  o Comparables have been reviewed and evaluated ___ ___
  o 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 ___ ___
  o The initial complaint and any supplements ___ ___
  o Applicable law and regulations ___ ___
  o Applicable policies ___ ___
  o Personnel files as appropriate ___ ___
  o Managerial files as appropriate ___ ___
  o Prior similar complaints and investigation materials ___ ___
  o Prior witness statements ___ ___
  o Prior comparables and similarly situated personnel ___ ___
  o Other

• Conclude the interview with the appropriate statement and instructions ___ ___
  o Confidentiality of the investigation ___ ___
  o 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
  o Identifying relevant documents to be retrieved and provided
    ▪ Timeline for providing the additional documentation agreed upon
  o The interviewer’s contact information in the event of refreshed recollection or questions
  o Remind the witness of applicable company policies
  o Guidance if contacted by third parties concerning the investigation
  o Any follow up information that may be needed
    ▪ Timeline for providing the additional information agreed upon
  o The potential need to have a follow up interview
  o Other:
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________
    __________________________________________________________

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

• Will the employee be represented during the course of the interview
  o Review of protocols and internal policies to determine
  o Is the employee represented by a union
  o Legal requirements reviewed

• Anticipate questions that will be posed by the witness and prepare the responses
• Revise the investigation plan as dictated by events
  o Additional documents and data to be obtained
  o Additional witnesses to be interviewed
  o Identify follow up that may be necessary
  o Have new issues been raised
  o Other:
  ______________________________________________________
  ______________________________________________________
  ______________________________________________________

E. Concluding the investigation

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