

EMPLOYER INVESTIGATIONS

The new ‘Uber’ trend: anonymous complaints

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In HR practices in days of yore, anonymous complaints were regarded as inherently suspect and unreliable. Fast-forward to 2017, however, and anonymous complaints alleging discrimination and harassment have become relatively common and are recognized as potentially reliable indicators of workplace problems, including harassment, discrimination, and retaliation.

Anonymous complaint sends Uber into skid

In the most recent and remarkable example, an anonymous post by an Uber insider (“Amy Vertino”) described an extraordinarily toxic corporate culture—one in which chaos, favoritism, and competition dictated over common sense. The post described a workplace in which male staff members were openly and persistently hostile toward female employees and participated in rampant gender-specific verbal abuse and sexually specific narratives in online group chats. The “Vertino” post followed similar accusations by former Uber site reliability engineer Susan J. Fowler.

Two massive investigations ensued. First, the law firm of Perkins Coie LLP assessed a total of 215 complaints (e.g., discrimination, harassment, unprofessional conduct, and retaliation), some of which came from an anonymous tip line. This investigation resulted in the termination of 20 employees, along with other remedial actions, with 57 cases still open.

The second investigation, prompted by Fowler’s allegations, was headed up by former Attorney General Eric Holder, now a Covington & Burling partner. The scope of the investigation included an evaluation of Uber’s workplace environment and the company’s policies and

practices as they relate to discrimination, harassment, and retaliation. It resulted in 47 recommendations suggesting changes in senior leadership, enhanced board oversight, internal controls, training, improved HR and complaint processes, diversity and inclusion enhancements, changes in employee policies and practices, recommendations for addressing employee retention, and a review of pay practices.

The Uber board of directors accepted and published Holder’s comprehensive findings (see <https://newsroom.uber.com/covington-recommendations/>). Shortly thereafter, the company’s CEO took a leave of absence. Next, a board member resigned after making a sexist remark at a companywide meeting to fellow board member and columnist Arianna Huffington (“joking” that if there are more women on the board of directors, it is “much more likely there’ll be more talking” on the board).

Investigation vs. environmental assessment

Anonymous complaints often present investigative challenges. Unlike the Uber experience—where improper conduct was so rampant that it was impossible to ignore—many anonymous complaints aren’t readily traceable either to specific victims, specific perpetrators, or even specific misconduct. In that event, real challenges for HR professionals and investigators arise. In the absence of an identifiable witness, how can the allegations be verified? If a specific perpetrator isn’t identified, how can the investigation proceed?

And in an organization of any significant size, how can a sound investigation occur without casting an investigative net that ensnares a large portion of the employer’s employees? Casting the net too broadly can result in reduced efficiency, distraction, speculation, poor morale, and a corporate sense of unease. Frontal efforts to ferret out the complainant, who insisted on anonymity to avoid retaliation, can lead to trouble. But not casting the net at all isn’t an option—the law requires employers to take reasonable steps to identify and rectify harassment, discrimination, and retaliation.

The California Department of Fair Employment and Housing’s (DFEH) recently published Workplace Harassment Guide (May 2, 2017) emphasizes that the anonymity of a complaint isn’t a legitimate reason to ignore it. But when—as is often the case—the anonymous complaint provides only general information, the employer may need to do an environmental assessment or survey to determine where issues may be. An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual.

An environmental assessment involves a softer approach than an investigation, although the ultimate objective may be similar. An employer in a typical environmental assessment will inform members of a work

group that it is interested in conducting a confidential assessment of work practices and the work environment. The “consultant” (who is often a qualified investigator) will ask general questions relating to the culture of the workplace and will allow witnesses more control over the flow of the dialogue while tactfully seeking out specifics that could lead to identification of the alleged perpetrator as well as the nature of the alleged misconduct.

How broad should an environmental assessment be? It’s situational, and the options are many. The DFEH indicates that an environmental assessment “might mean interviewing all the employees in a work group about how they interact, [or] if they have experienced or witnessed any behavior that has made them uncomfortable.” Sometimes that works. For example, if allegations of wrongdoing have arisen during a time of organizational changes within a department, an environmental assessment could involve interviews of all members of the department under the rubric of obtaining employees’ viewpoints on the efficacy of the changes and on any other environmental concerns. Casting a wide net increases the prospect that information revealing serious problems will emerge and can then be addressed with the employer’s duty to identify and remedy workplace problems. That said, a workplace assessment that is broader than necessary can disrupt a workplace, so great care needs to be exercised in defining the scope of the inquiry.

Other avenues for employees to communicate workplace misconduct or complaints include written surveys, telephone hotlines, and websites designed for reporting anonymous complaints. Telephone hotlines may provide less anonymity, but they often allow employers to make initial determinations of credibility and urgency. Third-party websites such as EthicsPoint provide a confidential and secure vehicle to submit and record workplace issues and often improve the specificity of the complaint. These avenues shouldn’t replace existing policies or discourage employers from traditional formal complaint procedures.

Bottom line

While anonymous complaints can present challenges, you have the same duty to address anonymous complaints as you do when the complainant, the alleged perpetrator, and the specific allegations are identified. Doing so, however, often involves a dose of creativity and a nontraditional investigative approach.

Workplace assessments can provide an excellent opportunity for you to identify systemic organizational problems that otherwise may go unnoticed or unchallenged. However, it’s imperative that you maintain control over the scope and confidentiality of the environmental assessment to lessen any unintended negative effects and disruptions to the workplace.

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