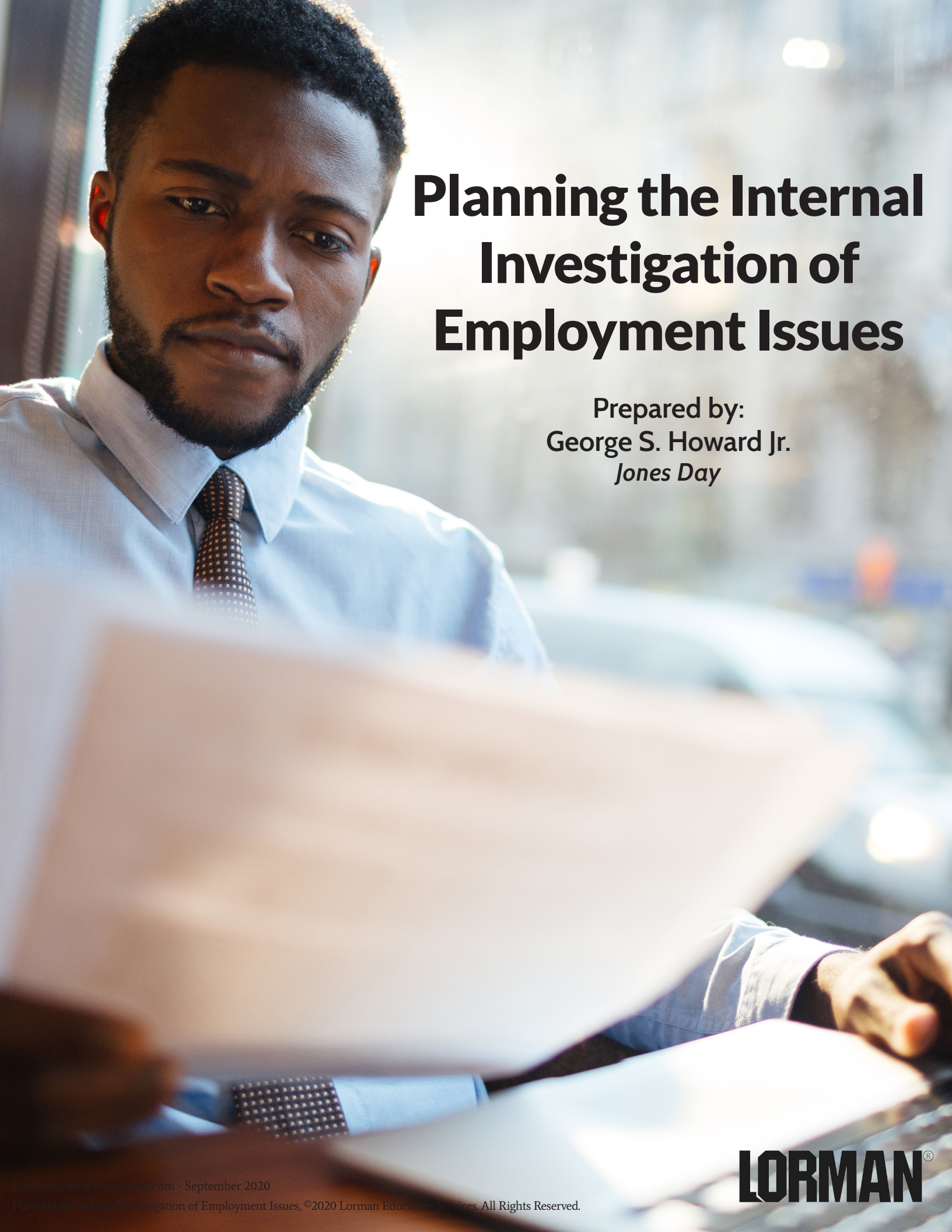

Planning the Internal Investigation of Employment Issues

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Planning the Investigation

1. Determine the purpose of the investigation

Internal investigations can serve numerous purposes. Internal investigations, effectively completed, can gather facts necessary to make business and legal decisions, e.g., whether the employer is in compliance with relevant laws or whether discipline or discharge of the accused or others is appropriate. On the other hand, the main objective served by an investigation conducted is in response to the receipt of an administrative charge or a lawsuit will likely be to assist in defense of the claim.

2. Selecting an investigator

Selecting an investigator is probably the most important decision in the investigative process. There is a wide range of potential investigators, including line management, human resources or the in-house legal department. Outside consultants, regular outside legal counsel, and special outside legal counsel should also be considered. There are a number of significant factors to evaluate when choosing an appropriate investigator, including: the investigator's skill, his or her credibility, and whether the company may want to keep the investigative findings and recommendations confidential through a claim of attorney-client privilege and/or attorney work-product.

NOTE: A provision of the California Business and Professions Code provides that only licensed private investigators or attorneys may conduct most types of investigations. However, this statute includes an exception where a company uses one of

its own employees to investigate misconduct. Prior to selecting a non-attorney, third-party investigator, a California employer should consult legal counsel to determine the best way to proceed. Other states may have similar restrictions on the identity of investigators.

An investigator must have the skills necessary to carry out an investigation. It is critical that the investigator be sensitive towards the complainant. Regardless of the nature of the investigation, the investigator must be able to maintain confidentiality, have good interviewing skills, understand available investigative resources, have good analytic and communication skills, and if needed, and be an effective witness at trial. The investigator must also possess sufficient knowledge of applicable laws, company policies and procedures, and technical aspects of the company's business so that he or she can fully understand the nature of the complaint.

An investigator must also be viewed as credible by the company personnel involved in the investigation. An investigator is credible if he or she is viewed as not only skilled, but unbiased. If the investigator is not credible, company decision makers may be reluctant to implement changes based upon the results of the investigation. More important, a complaining employee needs to feel that his or her complaint has been addressed seriously and fairly. The employee who feels there has been a cover-up may be more likely to pursue litigation about the mishandled investigation than about the underlying complaint.

While an investigator employed by the company may be viewed favorably because he or she more fully understands the company, an outside investigator will usually be regarded as more impartial. The impartiality of the investigator will be even more important if the results of the investigation will be disclosed to a governmental agency, to the public, or in trial.

It may be desirable to retain outside counsel to work closely with corporate counsel and/or management to conduct an investigation, because: (1) this approach will reduce the cost of the investigation; (2) corporate counsel will likely be more familiar with the company, its operations and personnel, and be better able to prepare and set up interviews for outside counsel; and (3) working together may ensure obtaining more reliable answers during the investigative process.

3. Preserving the confidentiality of the investigation

Before an investigation has been initiated, consideration should be given to preserving the confidentiality of the investigative material. In many circumstances, if the investigation is directed by an attorney and appropriate measures followed, the substance of the investigation can be kept confidential and not become evidence that will later be disclosed to the other side. Therefore, an employer may want to have its attorney direct the investigation to establish an attorney-client or attorney work product privilege to protect documents from later disclosure.

However, the employer will often want to rely on the investigation as a defense in the litigation. For example, in a sexual harassment case, if the alleged victim takes legal action,

the investigation will often serve as evidence that the employer properly investigated the allegations, considered the facts, and took appropriate action to prevent a recurrence upon learning of the alleged misconduct. Conversely, if the terminated or disciplined harasser takes legal action, the investigation will often establish good cause or a legitimate nondiscriminatory reason for the employer's decision.

When the workplace investigation is used as a defense in later litigation, some or all of the investigation will be discoverable, despite claims of the attorney-client privilege. *See Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110 (1997); *Harding v. Dana Transport*, 914 F. Supp. 1084 (D. N.J. 1996) (employer required to disclose investigator's notes and allow investigator to be deposed where it used investigation as defense to claim of sexual harassment). However, in many cases, where an attorney is involved in the investigation, it will be sufficient to disclose the non-privileged records of the investigation, without also disclosing the privileged items, if the non-privileged materials disclosed provide an adequate basis for a fair adjudication of the case.

Wellpoint did not make a blanket holding that the attorney-client privilege and work product doctrine are waived in every case where an employer put the adequacy of its pre-litigation investigation at issue … Where a defendant has produced its files and disclosed the substance of its internal investigation conducted by non-lawyer employees, and only seeks to protect specific discreet communications which those employees have

with their attorneys, the disclosure of such privileged communications is simply not essential to a thorough examination of the adequacy of the investigation or a fair adjudication of the action.

Kaiser Foundation Hospital v. Superior Court, 66 Cal.App.4th 1217, 1226-1227 (1998).

Thus, from the outset, employers should be aware that the investigator, as well as non-lawyer employees involved in the investigation, may later be deposed, and non-privileged investigation notes and reports may be discoverable.

Where an investigation is conducted by a non-attorney and the employer discloses the non-attorney's report, the employer may still successfully claim the attorney-client privilege as to communications between its attorneys and company personnel involved in the investigation or decision making. So long as the attorney provides only legal advice and does not conduct the factual investigation, the attorney's advice remains privileged. The investigator’s report, however, is not privileged and can be used as a defense in the lawsuit. *Kaiser Foundation Hospitals v. Superior Court*, *supra*.

Therefore, before the investigation begins, management, together with legal counsel, should: (a) evaluate how the employer intends to use the investigation report; and (b) identify how the attorney-client privilege may be preserved.

4. Warnings or directions to witnesses re: confidentiality

Human resource professionals will uniformly agree that maintaining confidentiality of witness statements, especially during the course of the investigation, is essential to obtaining an accurate assessment of the facts and an evaluation of the allegation. However, until very recently, the National Labor Relations Board ("NLRB") held that an employer might "prohibit employee discussion of an investigation only when [the employer's] need for confidentiality with respect to the specific investigation outweighs the employee's Section 7 rights [under the National Labor Relations Act]." *The Boeing Company,* 362 NLRB No. 195 (2015). However, in December 2019, the NLRB reversed its previous decision. The NLRB held that rules requiring employees to "maintain confidentiality" during an investigation of "illegal or unethical behavior" are legal so long as the rule does not directly mention union organizing or other "concerted" activity and is limited to an ongoing or "open" investigation. *Apogee Retail, LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

Under the *Apogee Retail* decision, an employer may lawfully instruct employees who have been interviewed or will be interviewed during an investigation of potential misconduct that they may not discuss with other employees statements made in their interviews with the investigator and may not discuss the investigation itself. However, to be valid under the *Apogee Retail* decision, the employer's instruction to persons involved in the investigation must (1) not refer specifically to discussions with union representatives or otherwise refer to "concerted activity;" and (2) be limited to an ongoing, "open" investigation. After the

conclusion of the investigation, an employer would have to provide specific justification to maintain the ban on communications between employees regarding the investigation. Further, there should be no prohibition on employees who are *not* involved in the investigation to discuss the matter among themselves.

Because of the NLRB's recent about-face on this issue, we recommend that employers monitor further developments on this topic. However, for now, employers may maintain a "confidentiality policy" for persons involved in the investigation, consistent with the above.

It may seem obvious to most human resource professionals that, in virtually all investigations, employees/witnesses should not be "comparing notes" or cross-pollinating their testimony . We also recommend that, prior to advising employees/witnesses not communicate with one another about the investigation, the employer document concerns of one or more of the following:

- concern that the testimony of one employee may affect that of some other employee;
- concern that retaliation or intimidation could occur if an employee's testimony is made known to others;
- concern that documents or electronic materials might be altered or destroyed if the testimony of an employee is made known to others;
- because of particular facts involved in the investigation, an employee's health or sensitive personal information

could be improperly disclosed (this consideration should be limited to bona fide health or extremely sensitive personal information, other than salary or wage information);

- other facts or circumstances relevant to the particular investigation that could justify a recommendation that employees not discuss the investigation or their knowledge of the facts with other employees.

Any written policy on this subject should specifically authorize employees to discuss the investigation with their union representatives, if any. Ideally, such written policies should be reviewed by competent labor counsel. The policy might also state that employees should report to the investigator or to a senior human resource officer any circumstance that might indicate that the integrity of the investigation is being compromised, or that witness intimidation or retaliation is occurring.

5. Identify and review internal documents

Another critical aspect of an investigation is the identification and review of internal documents. The identification, control, and review of documents is essential and must be done in a timely fashion. Efforts must be initiated *immediately* to retain and preserve all relevant forms of documentation, including both hard-copy files and electronically stored information. If a claim has been threatened, either through a "demand letter", an administrative charge or a lawsuit, "litigation hold" notices must be sent promptly to all appropriate personnel. There must be a mechanism to ensure that the identified documents include a

comprehensive collection of relevant documents and that there is some integrity and control once the documents are gathered. In most investigations, the “hard drives” of the computers of persons involved should be imaged by a competent information technology professional.

6. Prepare an outline of the investigation

An outline of the investigation should be prepared, summarizing the purpose of the investigation and outlining a plan for the process, including the identification of applicable documents and witnesses. The investigator must keep an open mind and not tailor the outline to a predetermined result or anticipate where the investigation will lead. There must be room in the outline for the investigator to follow up on the discovery of information which the company did not originally anticipate.