

Speaker 1: Welcome to the performance review, Greenberg Traurig, California labor and employment law podcast, where we discuss and review important trends and topics for California employers with hosts Ryan Bykerk and Phillip person.

Speaker 2: Well, welcome back to the podcast and thank you for joining us today. We are going to be discussing workplace investigations and to help us with that. Phillip and I are joined by guest Mike Mason, who is the global head of workplace [00:00:30] relations at PayPal. Mike is an employment lawyer, and he's a human resources executive with broad experience and expertise, including experience with managing internal workplace investigations. So Mike, welcome to the podcast. Why don't you tell us a little bit about your practice and your experience in particular with this topic? Okay.

Speaker 3: Thanks Ryan. It's a pleasure to be with you guys and to be a guest on your podcast. I've never done a podcast before, so I appreciate the opportunity. Hope we, hopefully we can make it a good one. I'm an employment [00:01:00] lawyer. I spent some time at Greenberg Traurig, as you guys know now I'm at PayPal. I've spent some time in-house and I've spent some time in an HR role. And, and what I do currently is, is sort of at the intersection of HR and employment, I'm in the legal department at PayPal, but one of the hats I wear is overseeing our internal workplace investigations globally. So I have a team of six people around the world who are doing as their primary [00:01:30] daily work, internal investigations.

Speaker 4: It certainly sounds like we have the right person for the topic. So let's dive right into it. Mike, can you tell us how does a workplace investigation arise?

Speaker 3: Sure. So we, we, we keep an eye on a variety of different sort of intake avenues, most commonly it's some type of an employee complaint, and those can come in an informal conversation with the manager, or they can come through some more formal portal, [00:02:00] like an ethics hotline or some type of, uh, an anonymous tip line, uh, or, you know, more formally if there's some type of a way in a written policy for employees to submit complaints. So that's most common. Sometimes they'll just be an observation by an employee or a manager like, Hey, I think there's some misconduct happening here that I want to flag. And so that's one way that you can, as a company, sort of be put on notice that you may need to conduct an investigation. And then more obviously if you get a demand letter from a [00:02:30] lawyer or an EOC charge, you know, there's something there that needs to be looked into at that point.

Speaker 2: Yeah. So, I mean, it sounds like a lot of these things obviously come up when it's just, you know, it's it maybe a judgment call, right? It's like, ah, this, this looks like something we're gonna need to look into. Are there some instances in which an investigation is not just a good idea, it's actually legally required?

Speaker 3: Sure. So a lot of the discrimination laws title seven and state law equivalents do [00:03:00] impose an obligation on an employer, uh, or, or an op or conducting an investigation may be a requirement in order to raise a defense to some type of an allegation of discrimination. Um, OSHA and DDOT have some specific requirements and regulations that do require a workplace investigation when there's some type of a, of an

event or an injury. So there are some specific affirmative legal requirements in that regard.

Speaker 4: [00:03:30] And certainly there are different types of investigations. There's formal ones, informal ones, ones with external investigators, internal investigations. Mike, what type of investigations should an employer conduct? Does it depend on certain factors,

Speaker 3: Something that comes up because depending on the nature of the conduct at issue often it's an employee who says, I feel like I'm being treated unfairly by my manager or my [00:04:00] manager's harassing me and people often misused words like harassment and discrimination and what you quickly uncover is the managers just trying to performance manage the employee. In which case I would say that's more of an informal investigation. You talk to the manager, you make sure that what they're doing is appropriate and not based on some improper motive or discriminatory intent. And then there's not much to be done [00:04:30] after that. However, if there's a more serious allegation or there's reason to believe that there is some form of potential improper conduct or improper motive, then I would say you do a more formal investigation. And what I mean by a formal investigation is you're going to keep careful written documentation of what you did and why and what the result of the investigation

Speaker 2: Is. So, Mike, you mentioned that you've got like a team of six folks who are helping to do some [00:05:00] of these investigations. Are there others you sometimes bring in to help with that? Should it always be counseled? Could it be somebody else who are sort of the cast of characters that might be involved in an investigation and how might an employer go about picking who should take the lead?

Speaker 3: Yeah, good question. And, uh, there's good reason to bring in either inside counsel or outside counsel bringing in an outside investigator is often wise and appropriate, especially if there's some possibility [00:05:30] of a perception of a conflict. If you're using an internal investigator who may have an actual or perceived conflict, then bringing in an outsider can often resolve that concern, human resources, commonly, especially in companies where you don't have a legal department or you just don't have enough staff to be able to do it. Oftentimes the human resources team is conducting investigations. In which case I always advise they should be following best practices and protocols [00:06:00] and trying to conduct high quality and consistent investigations. Sometimes law enforcement is involved in some unfortunate situations or you're partnering with law enforcement in order to conduct the investigation. And then there's other internal departments that frequently will assist like it like payroll security, there's some type of a security function. Those are all, uh, internal stakeholders that, that you're often partnering with.

Speaker 2: Uh, [00:06:30] Mike, you had, you had mentioned, uh, outside investigators. Can, can you elaborate on that a little bit because are there like third-party services that you, you might go to or who, who might qualify as an outside investigator that you might look to

Speaker 3: We're using outside counsel, outside lawyers, that those are the third parties. There are non lawyer investigators and sort of private investigators who have similar skillsets, but

if we're going to the outside, we're almost always using an outside law firm sometimes because we need [00:07:00] regulatory expertise sometimes because there's some white collar component sometimes just because we need an outside lawyer with a good skill set in conducting internal investigations.

Speaker 2: Got it makes sense,

Speaker 4: Mike, sometimes when we're litigating a matter, we're often pulling our hair out, trying to figure out how the employer conducted this investigation. Do you have any tips? How should an employer conduct the workplace investigate

Speaker 3: That could take [00:07:30] an hour in itself? Um, I, we only have 30 minutes. Yeah, I know. Um, so let me, uh, let me kind of start at a, at a high level and, and I'm glad you mentioned litigation because often when, when I'm thinking about how do we do the best investigation possible, I will look at it through the lens of what would a plaintiff's lawyer pick on if they were two years from now looking [00:08:00] at this investigation and how the company handled a complaint and what can we do to put ourselves in the best position to defend our investigation. And so some tips in that space, one is do a really good report. And what a good report looks like is you have a very precise scope in terms of what the allegations are. You're investigating. You're very careful with the language in terms of framing, what you're looking at.

Speaker 3: [00:08:30] So for example, if someone says I'm being harassed by another coworker or I'm being sexually harassed, the scope of your investigation is not whether or not someone is being sexually harassed. The scope of your investigation is whether or not specific conduct occurred. And so you're not making a judgment call about whether or not it's sexual harassment, a legal judgment. That's not appropriate to be opining on in your written report. [00:09:00] It's whether or not the actual underlying conduct occurred. That's the, that's the real important part of the investigation and your resulting documentation, objective facts, no inappropriate characterizations of facts. Like those are things that go into a good investigative report and then findings and conclusions that are reasonable and that you can draw from the facts as contained in the investigation [00:09:30] report. So those are all things that sort of go into how you conduct the investigation and then how you ultimately document your findings in the final report,

Speaker 4: You brought up a good point because sometimes we'll review investigation notes or, um, the investigation report, and there will be the ultimate conclusion. And at times it may not be correct. And that's something we'll have to deal with on the back end when we're litigating this.

Speaker 3: [00:10:00] Yeah. And, and the other thing I like to do, and again, this puts you in a good position when you, if, if you're defending litigation down the road, in addition to the report, have a document that explains why you scoped the investigation the way you did. Uh, so, you know, if, if someone raises 10 different complaints and you're only going to investigate, six of them, we'll have an explanation for why you selected [00:10:30] those six and left four out. Um, if the, if a witness says here's 10 people, I

think you should talk to who can corroborate my version of the events and you talk to five out of the 10, have an explanation for why you didn't talk to those other five. You know, like they may have been employees who left the company, or they may have been people who you tried to contact, but who weren't willing to cooperate, you know, and if two years [00:11:00] go by and you're in litigation, you won't remember why you did what you did. But as an investigator, you are susceptible to criticism, you know, like, Hey, this witness said, there's 10 people who can corroborate my story. And you only talked to five, isn't that right? And so sort of thinking ahead to how that may play out and putting yourself in the best sort of defensive position, having a document that explains those decisions can be really useful down

Speaker 2: The road. It really [00:11:30] is, uh, an endeavor in which the Monday morning quarterbacking is pretty much going to happen. So you really, I suppose you do, you really do have to think that far ahead. So when it, when it comes to, so, so you've done the investigation, maybe you've made your plan, you've executed it, you've documented it, the way that you're talking about you basically have come to sort of the conclusion on the objective facts, who, who are you reporting those findings to? I mean, as the, or the person charged with the investigation oversight, who, who gets to know about that? I mean, how, how do you go about that [00:12:00] in a, on a normal investigation? Does the board get it, does management get it? Who gets the results of the investigation?

Speaker 3: I think the first question is of the people who participated in the investigation, who gets a report and what's the substance of it. And so I think almost always the first question is with respect to the person who raised the concern, what are we going to go back and tell them, you always have to go back and say, we've concluded [00:12:30] our investigation. What more do you tell them? Often it's, we've concluded our investigation and appropriate steps have been taken. And then the question is if they press for more information, how much more are you willing to give them, or is it appropriate to give them other people who you talk to as part of your investigation might be the people who are accused of misconduct and for them too, it's important to go back and do some type of a closeout communication and think carefully [00:13:00] about the substance of what that is.

Speaker 3: Sometimes if your investigation concluded that there was some type of inappropriate behavior, then you also need to be working on how are you going to remediate with the people who were engaged in the inappropriate conduct, other internal stakeholders, HR often, uh, you know, from, from, from my perspective, since I'm in the legal department, HR is a very close partner. So we were always very close with HR management of the people who are the subject. [00:13:30] And sometimes the people you know, management chain of the person who raised the concern. So thinking, you know, who are the appropriate people and management, depending on the seriousness of the allegation. And you know, what level of interest there is among senior leadership or the board that's often appropriate. If you're investigating the CEO or alleged misconduct at the executive level, then often the board is going to have an interest. And so you'll probably be asked at some point to do either a verbal [00:14:00] or written report. And so, you know, be prepared for that. And then there may be some agencies where the report is actually turned over in some written form or where the agencies will

expect the company to conduct an investigation and then produce some type of written summary of the results of their own internal investigation.

Speaker 2: We've kind of touched on this in a couple of different places in your responses, but how do you go about thinking about privilege generally [00:14:30] when you're, when you're looking at a, at an incident, what should be privileged? What shouldn't, how do you go about making that determination at the front end?

Speaker 3: The safest practice or the most conservative practice is to treat everything as privileged from the outset that gives you the greatest chance of being able later to assert the privilege or work product protections. One important component to think about is the Upjohn warning, at least in the United States, uh, [00:15:00] when you're interviewing a witness, making a sort of short disclaimer to them about your role as an attorney for the company and not for them, that can be important in sort of preserving the appropriate legalities of your overall investigation. Thinking about sort of the documentation that you gather along the way as part of your investigation. You know, if it's existing documentation [00:15:30] by incorporating it into your investigative file, that may not give you a privilege argument, but the whole compilation of your report, if you're trying to preserve the privilege is important. And then we also, and I think a lot of internal investigators who are conducting an investigation will conduct an investigation thinking that, yeah, we're going to try to preserve the privilege, but anticipating that the privilege may be waived at some point. And what [00:16:00] that translates to is you've gotta be real, careful and precise in what you put into your report, understanding that this may be an important document down the road should litigation arise, that the company may very well want to waive the privilege in order to turn over, to support its defense. Some of

Speaker 4: Our listeners may be thinking, where do I conduct this investigation? Do I conduct investigation in a private room with a spotlight beaming down on the, uh, witness, [00:16:30] or do we do it in a comfortable place with a couch and offer the witness tea? So, Mike, can you tell us where we conduct these investigations?

Speaker 3: It was a more interesting question a year ago before everyone did everything from their home office or their living room. Um, I don't like investigations that make the witness uncomfortable. So, um, uh, you [00:17:00] know, a windowless conference room in an office building, um, uh, often can be an intimidating place. And so I I'm, I try to be creative in terms of like, what's the right location. Sometimes, you know, a coffee shop off the premises might be better, especially if you're talking to somebody about really sensitive allegations, they may be more comfortable, offsite somewhere doing this. And so finding a place [00:17:30] where the other person is comfortable, I think is important, the, uh, video conferencing capabilities and technology, and just how quickly things have advanced in the year 2020, I think have proven you're able to conduct an effective investigation via video conference. You can get the right of information and draw the right inferences from a video chat. And so I think that this year has really proven that if you must, you don't necessarily [00:18:00] have to be face to face to conduct an effective actual investigation.

Speaker 2: So when you've decided that there's an issue that needs to be investigated for you, Mike, what's your timetable? I mean, is this something that I suspect, I know the answer, but is this something that you have enough lead time? You can wait a little bit or, or is it important to get these things, uh, uncovered right away?

Speaker 3: I, yeah, I'd say do it as quickly as you reasonably can. One, because some of the laws require [00:18:30] you to investigate quickly and to take effective remedial action. As soon as you're alerted to some type of an issue, the more difficult issues are when some of your witnesses are unavailable or uncooperative, what do you do? How long do you let that slow down your investigation? If somebody is out on leave, for example, do you bother them while they're on leave? Or do you wait? They're supposed to be back in three weeks. Should you wait the three weeks? Then you wait three weeks and then they're still not [00:19:00] back. And they're going to be up for another six weeks and then, well, do you bother them then? So those are some of the trickier questions about how long do you let witness availability slow you down before you either conclude your investigation without them, or you get a little bit more creative in terms of how you're going to reach that witnessing and gather the information you need. This is another area where you're susceptible to criticism down the road. When a plaintiff's lawyer is playing Monday morning quarterback [00:19:30] and trying to criticize your investigation. If it takes a long time, that's an area where you're sort of susceptible. So that's another reason to try to do it as quickly as reasonably possible.

Speaker 2: Yeah. Okay. That makes sense.

Speaker 4: Mike, do you have a list of things to avoid when conducting an investigation? That could be

Speaker 3: A long list, but let me try to think of a few highlights. One I mentioned is be objective. Don't prejudge a situation. [00:20:00] You need to be asking the right questions with an open mind of each witness and go into each interview with completely blank slate, not expecting to confirm what you suspect is where things are going to land, but being open-minded and objective both in the way that you ask the questions and in the way that you report the information, avoid conflicts. That's another one don't be overly friendly with the people who you're interviewing. [00:20:30] You should not be social media friends with the people who are the people raising concerns or the subjects of a investigation avoiding actual or perceived conflicts for people who are in positions like mine or NHR, where they do internal investigations. So you're an inside investigator rather than an outside investigator. Be careful about being stuck in kind of an awkward situation. If you're asked to investigate somebody who's in your management [00:21:00] chain, for example, that may cause you to not be able to conduct a thorough objective investigation. And so consider carefully whether there's other people you could bring in to help that that'd be a good situation where you probably want to bring in someone from the outside to help conduct an investigation.

Speaker 2: We could talk about all the different ways you could get into trouble doing investigations. One of the things I had meant to ask you earlier, Mike was about the rights that interviewees might have. So when you [00:21:30] knock on somebody's door



and you say, I need to talk to you about this. Do they have a right to counsel? Do they have, do they have the right to have somebody come and sit in or have a union rep or something like that, but what rights do interviewees have in the interview process? Yeah,

Speaker 3: That's important to know going into an investigation, if you're in a union setting than understanding the collective bargaining agreement and the process that you're under, or whether you may be covered by a discipline or a grievance [00:22:00] component of the CBA that will spell out some of these things specifically whether or not someone can bring another party with them and who it can be, who from management should attend or not. So the CBAs can be very prescriptive in terms of what an, a disciplinary related investigation entails. If you're not under a CVA and not in a union setting, and more generally an employee says, can I bring [00:22:30] my lawyer? In most cases, you don't necessarily have to agree, but in my experience, as long as the lawyer behaves, sometimes it's better to agree and get the information that you want, um, rather than let that impede your investigation.

Speaker 3: So I'm usually open to allowing someone to bring their counsel with them. And I expect the lawyer in that type of a situation, if it's just a fact gathering interview, not to interfere [00:23:00] with my questions or with the investigative process, in which case I come away with what I wanted. And I'm usually not concerned about the lawyer being there and listening to the types of questions that I'm asking people will want to bring friends or advocates there's jurisdictions in the world, where there may be some rights to those that you need to be aware of. If you're in the us often, this is just governed by your own company policy or practice. And so just being consistent in terms of what [00:23:30] you allow, I think is, is the way to approach those.

Speaker 2: Okay. No, perfect. That's, that's so helpful. And, and really, I mean, like we've said, we could, we could spend hours here picking your brain. Unfortunately, there are limits to how long we can keep you and how long we can keep our listeners. So really thank you so much for this Mike. It's been absolutely fantastic. And I think we may have warned you, but one of the things that we like to do at the close of every performance review podcast is to end with a wild employment story. And we've had some great ones so far. So [00:24:00] pressure's on, what's one of the Wilder or crazier employment stories that you've come across in your practice, whether it's yours or just one you've heard about, uh,

Speaker 3: I've got one it's investigations related. Um, it was long in my past, so it has nothing to do with any, any of my prior employers full disclaimer. But I was as a relatively junior lawyer, brought in to conduct an investigation of a CEO of a small company by the board. [00:24:30] And the board said, our CEO just resigned. We think there's something strange happening, but we don't know what, and we'd like to understand what's going on. And so with that very low level of information, I'll kind of fast forward to the end, which is that the CEO had been engaged in an affair with the secretary of the company. There had been some inappropriate use of funds. There had been [00:25:00] all sorts of plans, laid the in violation of contractual obligations. It turned into a mess. And the

reason I mentioned it is because there were a number of learnings by me in that experience.

Speaker 3: And one is don't underestimate what you're investigating. There's still misconduct out there that happens. Adults make bad decisions, and it often leads to complications in the workplace. And when you're brought in to [00:25:30] do an investigation, it's common for you to find out the full scope of all of those bad decisions and, and the impact of them. And so I'll keep it short, but it took an army of people to really help navigate that, including sort of a PR crisis consultant, other outside support in order to kind of manage through the situation and bringing in other lawyers to help. So when conducting an investigation, be [00:26:00] prepared to find out things that, that, that may surprise you, uh, and that, and that, um, are the result of, of like what I said, like adults, just making bad decisions.

Speaker 2: I think that's the, I think that's gotta be the quote of the episode, right there. Adults make bad decisions.

Speaker 4: Adults make bad decisions. I feel like that's something you should tell your kids, just a warning them that when they grow up, they might make bad decisions too. That's right. [00:26:30] But honestly, Mike, thanks for joining us on the performance review and thanks for our listeners tuning in for those who have questions, any other crazy employment story, they want to tell about adults making bad decisions. Feel free to email us@performancereviewatgtlaw.com. Otherwise we'll catch you next time.

Speaker 1: Thank you for joining us on this episode of the performance review, California employers face many challenges, and we want to help let us [00:27:00] know which labor and employment topics are important to your company. So we can give them a performance review. You can email us at performancereview@gtlaw.com. If you like, what you hear, feel free to share. And please subscribe on Spotify, apple podcasts, Stitcher, or@gtlaw.com. This podcast is eligible for California self study. CLE credit certificates of attendance will not be issued. California attorneys are responsible for self-reporting the amount of time they listened for all other jurisdictions. Please contact your state's MCOE board or committee [00:27:30] for guidance on their rules and regulations as it relates to the self study credit. This content is for informational purposes only and does not contain legal or other advice and or opinions for more information, please visit B I T dot L Y slash GT law disclosures.

Speaker 5: [inaudible].