

# Strategies for Investigating Misconduct Against Superstars, C-Suite Employees in Retail Industry

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In the retail industry, when superstars, C-suite employees, and other high-achieving individuals are accused of misconduct, the company has a significant management challenge to address the situation in an unemotional, business-like manner, as well as to consider the optics and ethics of the situation. This article offers strategies on how to investigate and address allegations of misconduct by and against superstars and C-suite employees in the retail industry.

## Considerations Before Launching an Investigation

Effective investigations are disciplined and intentional. A deliberate approach before an investigation begins is the basis for a successful, effective investigative process. Questions to consider include:

- Who is the client? Is it a member of management, the board of directors, or committee of the board (such as the audit committee), or an ad hoc group?
- What is the scope of the investigation? Will the investigator simply be providing a factual report, or will the investigator also be expected to provide recommendations or legal advice about the results of the investigation?
- What is the deliverable of the investigation? Will there be an oral report, written report, or executive summary?
- Who are the likely audiences for the investigation results? Will the results of the investigation be kept confidential, or is there a need to share the results of the investigation with either an internal or external audience?
- Who is the appropriate individual(s) to conduct the investigation? Does the organization need to use outside resources, or can the matter be handled effectively internally by HR or in-house counsel? (Hiring an external investigator is preferred to avoid bias.)
- Is any interim action necessary pending the completion of the investigation?

## Consider Stakeholders

An organization must take disciplined and thoughtful actions when presented with a complaint against a superstar or C-suite employee to ensure that stakeholders (such as employees and shareholders) consider them effective. The following should be taken into account to ensure concerns raised against superstars and C-suite employees are handled appropriately:

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- What is the company's policy and practice for addressing the concerns, and is the company deviating from this policy and practice? Are there legitimate reasons for any deviation so it does not give the appearance of favoritism toward one individual over another?
- What is the company's communication strategy for the investigation? How will it affect issues such as privilege and confidentiality?
- Will the individual(s) conducting the investigation be viewed by third parties as independent and impartial?
- How will the investigation affect other significant matters within the company such as pending litigation or transactions?

### An Investigation Is Not Always Privileged

Communications with in-house counsel are not always protected by attorney-client privilege when conducting an investigation. To be considered privileged, it must be proven the communication was made primarily for the purpose of giving or obtaining legal advice, rather than for general business reasons.

Courts have wrestled with discerning the primary purpose of a communication because there is no bright-line test distinguishing business and legal advice. To determine if attorney-client privilege will apply to a communication that mixes legal and business advice, courts developed the "subject-matter" test (*see Upjohn Co. v. United States*, 449 U.S. 383, 394 [1981]) and the "control group" test (*see City of Philadelphia v. Westinghouse Electr. Corp.*, 210 F. Supp. 483, 485 [E.D. Pa. 1962]).

For the attorney-client privilege to apply to a communication with in-house counsel under the subject-matter test, these factors must be satisfied:

1. The communication to in-house counsel must be made for legal advice;
2. The employee making the communication must have done so at the direction of a superior;
3. The superior must have made the request so the corporation could secure legal advice;
4. The subject of the communication must be within the scope of the employee's corporate duties; and
5. The communication must not be disseminated beyond persons who need to know of its contents.

The more restrictive control group test is used by only a few states. Under the control group test, an employee's statement is not considered to be privileged unless (1) the employee is in a position to control or even to take a substantial part in a decision about any action the corporation may take upon the advice of the attorney or (2) the employee is an authorized member of a body or group

that has that authority.

## Effective Documentation

Proper documentation is key to a thorough investigation. To ensure that proper documentation is being maintained during an investigation:

- The documentation should be clear about what was investigated and the factual findings regarding the issues raised.
- Factual recitations in any report should summarize objective facts and avoid prejudging, editorializing, or providing legal conclusions.
- Consideration should be given to whether the facts gathered are based on firsthand knowledge or hearsay and whether there is any documentary evidence of the alleged wrongdoing.
- Any conclusions or recommendations should be adequately supported by the objective facts in the report. If the evidence is inconclusive, the employer should document the reasons for its determination and monitor the situation.

If an attorney conducted an investigation, any written report should ensure that potentially privileged matters (*i.e.*, legal conclusions and advice) can easily be segregated from non-privileged factual information.

## Reporting and Disclosure Concerns

Investigations cannot be viewed in a vacuum. A retail organization should develop a robust compliance program to determine whether the issue investigated is a one-off occurrence or part of a larger issue that must be addressed on a systemic basis. The organization should consider the following after completing the investigation:

- Is it necessary to self-report the issue to law enforcement?
- Is the issue that was the subject of the investigation part of a larger issue that may need to be disclosed in the organization's filings?
- Does the organization have effective mechanisms in place for tracking and evaluating the types of complaints that it receives and investigates, and if so, do any changes need to be made to these procedures to improve their effectiveness?
- Does the organization need to adopt new policies or procedures to address the issue investigated? Is additional training for the workforce warranted?

Proper strategies for investigations are key to protecting retailers. Please contact a Jackson Lewis attorney if you have any questions about the above or about complaint investigations.

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