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Smart Investigations are Smart Business

by Julie Davis

A customer complains about product failure. You suspect internal fraud is occurring. One employee files a discrimination complaint; another is posting unusual performance results. You receive a government subpoena. All of these situations have one thing in common: the need for an investigation.

And the investigation needs to be smart. We live in a world in which every TV hour has some show involving private detectives, psychics, savants of every stripe and mysterious government agencies conducting high-tech and savvy investigations. The pressure to keep up with best practices and pop culture means that your customers and stakeholders have extremely high expectations that you will conduct high-quality investigations, learn the truth, take appropriate action and be transparent about the process.

You can meet these expectations and serve many other business interests as well. Good investigations are good business because they:

- are required for compliance with

Confidentiality

Investigation

Judgment

Expertise

federal or state law in certain situations;

- allow the best response to complaints, government inquiries, media reports and employee misconduct;
- are required by your organization's code of conduct or other policies;
- create deterrence and good culture

by reinforcing that your organization values facts and truth;

- reinforce that rules apply to everyone and that retaliation for whistleblowing will not occur;

- reinforce the credibility of senior leaders who sponsor investigations;

- protect the business and its stakeholders by identifying and correcting the problem or establishing that no wrongdoing occurred; and
- allow the organization to best defend possible litigation.

Conducting the Investigation

Because most smaller businesses do not have trained internal investigators, it is important to identify early the need for expert assistance in designing and conducting important investigations. Using an expert investigator can help you achieve an efficient, time-sensitive investigation that is accurate, perceptive, sensitive to your issues, and delivers cogent conclusions on which you can rely. An expert investigator can also provide:

- experience in interviewing and judging witness credibility;
- experience in locating critical data;
- sound judgment about facts and events;
- a spokesperson who can field questions about the investigation;
- lack of bias or organizational tunnel vision, providing more credible

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The Status of Employer Intentional Tort Claims in Ohio

By Frank A. Ray

Effective 2005, the General Assembly enacted "employer intentional tort" as Section 2745.01 of the *Ohio Revised Code*. In 2010, the Supreme Court of Ohio upheld constitutionality of the legislation. Since Section 2745.01 was passed, Ohio's judges have consistently responded with coolness toward applying this tort statute to workplace injuries.

Section 2745.01 says that the employer is not liable for committing an "intentional tort" unless the plaintiff proves the employer intended to injure another or believed the injury was "substantially certain to occur." According to the statute's definition of "substantially certain to occur," this means the employer is responsible for a workplace injury under the intentional tort statute only if the employer acted "with deliberate intent to cause

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conclusions for internal or external acceptance;

- witness testimony, if needed; and
- you and others with the freedom to continue running your business.

Early in the process, in addition to selecting an investigator, you will need to make some big decisions about how the investigation will be conducted. Consider the following questions:

- Who is responsible for overseeing the investigator?
- Who must be sequestered from the investigation process, either because they are implicated or because they could bias the result?
- If the investigator is a lawyer, should the investigation be privileged and confidential, or should the results be delivered to the public, government or media as part of your crisis management strategy?
- What is the initial scope, timing and cost of the investigation?
- Will special investigative techniques (such as surveillance, forensic computer analysis) be used?
- Who will receive the investigation conclusions and in what order (to allow for a review and potential testing of the initial conclusions to ensure best results)?

Good planning and investment in smart investigations will yield positive short- and long-term results.

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an employee to suffer an injury, a disease, a condition, or death.”

For the last eight years, Ohio trial and appellate courts have repeatedly issued and upheld summary judgment (quick disposal of a case without a trial) for employers whose injured employees have filed lawsuits under Section 2745.01. With few deviations by judges, that trend continues.

There are two exceptions to this tendency to dispose of such cases, however. According to the statute, an employer can be found liable for an intentional tort for 1) deliberately removing an equipment safety guard or for 2) deliberately misrepresenting dangers related to workplace toxic or hazardous substances. The law presumes that either action constitutes “intent to injure another.” When employees have based employer intentional tort claims on these exceptions, a modest number of cases have survived summary judgment.

In 2012, the Supreme Court of Ohio reinforced trial and appellate court trends by instructing that an employer is not liable for an employer intentional tort claim without a “deliberate intent to injure,” and that the injured employee’s only remedy is within the workers’ compensation system.

Further, in recent revisions to Ohio Jury Instructions (OJI), the Ohio Judicial Conference has applied tort

reform legislation to statutory employer intentional torts. In these standardized jury instructions, “joint and several liability” has been altered for all tort claims in Ohio, including employer intentional torts. When any third party joins in the tortious conduct of the employer, the employer can deflect financial responsibility to the third party if the employee proves liability and damages. When any third party acts as a joint wrongdoer that caused the employee’s damages, the percentage of fault by any third party proportionately reduces the employee’s award against the employer and imposes financial responsibility on the third party for the assigned percentage.

Tort reform legislation and the newest version of OJI dictate that an employee’s “contributory fault” applies only to statutory employer intentional tort claims that occur on premises owned, occupied or controlled by the employer. When an employee is found to have contributed, through negligence, to his or her own injury by more than 50 percent, then that employee cannot recover any damages. If the employee’s contributory negligence that caused his or her injuries is less than 50 percent of the cause of injury, the employee’s award is proportionately reduced.

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Ohio’s Minimum Wage Increase Is Effective January 1, 2014

By Patricia F. Weisberg

Ohio’s minimum wage correlates with the inflation rate for the 12 months prior to September.

Effective Jan. 1, 2014, Ohio’s minimum wage increases \$0.10 from \$7.85 per hour to \$7.95 per hour for regular hourly employees. The

minimum wage for tipped employees increases \$0.05 from \$3.93 per hour to \$3.98 per hour.

Ohio’s minimum wage law does not apply to employees at smaller companies whose annual gross receipts are \$292,000 or less per year after January 1, 2014, or to 14- and

15-year-old employees. The state minimum wage for these employees is \$7.25 per hour because the state wage is tied to the federal minimum wage (currently \$7.25 per hour).

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