

Labour & Employment 2020

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Contributing editors**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens,
K Lesli Ligorner and Mark Zelek****Morgan Lewis**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.



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Conducting global investigations amid uncertainty: a practical guide

Louise Skinner, Keir Baker, Rebecca Kelly and K Lesli Ligorner

Morgan Lewis

Employers operating across multiple jurisdictions have faced rapidly growing litigation and reputational risk in recent years. Misbehaviour in financial markets, the tightening of antitrust rules and cultural movements such as #MeToo have resulted in a sharp increase in employment investigations and litigation. Employers can suffer significant costs and reputational damage as a result of poorly managed investigations and the negative press that may ensue. Such impacts can be limited by having an effective system for receiving and investigating whistle-blowing and employment-related complaints, with appropriately qualified and trained personnel of sufficient seniority assigned to each stage of the process. A coordinated and consistent global approach is even more important in times of significant disruption and uncertainty, where international travel is limited and many of the key roles are carried out remotely.

For global organisations, investigations are exponentially more complex because local laws and processes must be understood and followed in each relevant jurisdiction. Differing rules in respect of legal privilege can further complicate matters and inhibit an employer's ability to take a seamless global approach. Legal practitioners and HR professionals can play a critical role in ensuring focus is placed on key issues when designing or refining an investigation protocol or when conducting an investigation. It is crucial to construct a process that will help ensure that each investigation is conducted in a lawful, consistent and effective manner that minimises legal and regulatory risk as far as possible.

Complaint reporting

It is essential that employers foster a culture that encourages reporting. From a practical basis, issues that are aired internally and at an earlier stage are generally easier to resolve than issues that are allowed to fester and make it into the public sphere.

To facilitate the development of a reporting culture, all employers should have an incident management programme that includes a reporting process, a non-retaliation policy and a 'speak up' policy, each of which should encourage employees to report or escalate any misconduct that they encounter. The various stages comprising this programme should be clearly documented and easily accessible to employees at all levels across the business. Employers should also continuously review their reporting procedures, having regard to technological innovations or the changes in the workplace or the make-up of their workforce.

Employers should be cognisant of the fact that relevant issues can occur not only inside the workplace but also outside it, whether that be at work-organised social events or on social media. In addition, the rise of remote working has opened the door for an additional 'halfway house' in which issues can arise during the course of employment but outside of the traditional conception of the workplace (such as on video calls).

As a result, there is no exhaustive list of sources from which an allegation requiring investigation will be reported, and employers should be quick to welcome and treat seriously all credible reports, no matter their source. A variety of triggers, from both internal and external sources, may bring a potential issue to an employer's attention, including:

- internal triggers, such as:
 - reports via managers or supervisors;
 - reports via HR;
 - reports via ethics and whistle-blowing reporting lines;
 - interviews (including performance or exit interviews);
 - electronic data; and
 - internal audits; and
- external triggers, such as:
 - regulators;
 - police;
 - third-party complaints;
 - ombudsmen; and
 - the media.

To ensure employees are comfortable with raising misconduct and other issues that may be of a sensitive nature, it is critical to train managers and supervisors on how to react and receive reports, and the importance to workplace culture of speaking up. In particular, employers must emphasise that managers and supervisors should escalate reports to the relevant HR point of contact (even where they consider the reports to be trivial) and not carry out investigations on their own. Consistency in approach and careful record-keeping is also critical in minimising risk and ensuring fairness of approach.

Risk assessment and planning

Upon receipt of a report, the first step for employers is to review the contents of the allegations to develop an initial response plan. Consideration should be given to the following key areas:

- **Seriousness:** is there a regulatory or criminal aspect? Are high-level employees involved? What is the potential impact on victims, if any? How widespread is the alleged misconduct? Will the investigation have to be conducted on a strictly confidential or need-to-know basis?
- **Complexity:** analyse the number and types of issues. Are there multiple areas of law and different jurisdictions involved? Consider the rights of the accused. Is there a right to suspend, and is it appropriate to do so in the circumstances?
- **Urgency:** is the safety of the complainant or a witness a concern? Should the employer call the police? Is there a medical issue? Are there safeguards for possible victims?

- **Credibility:** is the source known, or is this an anonymous complaint? Can the facts be easily verified? Is there scope for liaising with the complainant for more information? Might the complainant want certain safeguards or assurances before he or she is willing to particularise his or her complaint? What difficulties will be encountered in investigating an anonymous complaint, and how can these be addressed?
- **Privilege:** should the investigation be subject to legal privilege? If so, what are the steps necessary for preserving privilege? Might there be any advantages to waiving privilege (such as to ensure good relations with relevant regulators), either at this stage or as the investigation progresses? Is a limited waiver possible under the law of the relevant jurisdictions?

The answers to the foregoing questions will determine how the employer should plan its investigation, including its scope, its likely duration and the identities of those individuals composing the investigation team (including whether to instruct external counsel). In the first instance, regard should be to any relevant policies or a staff handbook that may set out certain processes or timelines that the employer has indicated it will follow. Consideration should also be given to differences in law and approach across relevant jurisdictions. Before work is started, the rules in each applicable territory must be examined to ensure risks are not inadvertently created.

Investigation protocol

For each issue, employers should establish an investigation team whose primary role is to establish the relevant facts by discovering, collecting and preserving the relevant evidence. Broadly, evidence will come in one of two forms: (1) oral evidence provided by the concerned parties and witnesses and (2) documentary evidence.

How potential evidential material is preserved and collected is likely to be critically important if it becomes necessary to engage with regulators or courts, given that the credibility of an investigation can be damaged by a failure to secure all potentially relevant material at the outset, and an ineffective document preservation and collection process may be viewed as obstructive or uncooperative, counter to obligations to the regulator or court. All decisions taken (and the reasons for such decisions) should be recorded.

As regards each form of evidence, employers carrying out global investigations should have regard to the provisions of foreign law that might influence the investigation process; specifically, employers should ensure they are aware of the rules concerning legal privilege and the rights of, and the obligations owed by and towards, employees.

Such provisions of foreign law can have a significant influence on the conduct of the investigation. For example, in France, where an employer terminates the employment of an employee for misconduct discovered during an investigation, and that employee sues to contest the dismissal, the evidence collected during the investigation will only be admissible in court if the employer has possessed the evidence for over two months, the evidence was not obtained in violation of French data privacy laws, and the employer respected all legally required procedural rules in the investigation and termination process.

Meanwhile, in the United Kingdom and many other European jurisdictions, data protection laws afford employees the right to demand – subject to privilege and other defined exceptions – access to any documentation held by the employer that contains their personal data, including documentation that may have been gathered or produced during the course of a confidential investigation.

As such, when planning the investigation process, employers should ensure that they:

- appoint an appropriate investigation team: depending on the relevant issues, investigation teams may comprise representatives

from a number of different functions, including the HR, compliance, legal and security functions, or from external counsel or other third parties;

- address technical and logistical issues: if needed, experts are available to help the investigation team navigate through foreign-language documents, traverse unfamiliar legal and cultural issues and processes, liaise with distant witnesses or gather evidence from difficult sources.
- identify and preserve evidence: this includes:
 - considering data privacy issues;
 - finding the location of key electronic data and preserving it, engaging technical or IT experts where necessary;
 - identifying key witnesses;
 - involving legal counsel to trigger privilege;
 - deciding if a litigation hold is necessary;
 - determining whether third-party interviews are necessary;
 - obtaining outside evidence; and
 - identifying key stakeholders for oversight, such as the general counsel, the audit committee, a special committee, the chief compliance officer or high-level HR executives; and
- consider potential initial disclosures: employers should decide whether it would be beneficial (or indeed, necessary) to disclose the existence of the investigation or early findings to employee representatives, a data controller, a regulator, the audit committee or senior management.

Critical steps

Each investigation is unique, with the facts and circumstances of the relevant issues (and the relevant jurisdictions in which such issues are alleged to have occurred) dictating the specific procedures that should be followed.

The following steps should be considered:

- **Conduct data and document review:** depending on the facts, employers may wish to review personnel records, supervisor files, emails, texts, project files, expense reports and voicemails. This process should be subject to local legal review. To streamline the process, key words or phrases (known as search terms) should be identified that can be used to narrow the scope of the review.
- **Develop an initial fact pattern:** this involves determining who was involved, and beginning to tell the story of who, what, where, when and how. Any necessary regulator, data privacy, trade union or works council notifications should be considered as the full picture begins to develop. Any conflicting accounts or gaps in the chronology that can be addressed in interviews with witnesses should be identified.
- **Conduct interviews:** investigators should be prepared and ensure that any relevant documents that have been identified (such as emails) are available for the interviewee to review and respond to. Good interviewing techniques should be developed and used. Investigators should know which evidence to look at and have a plan to encourage cooperation and to address non-cooperation. Whether it is appropriate for the interviewee to be accompanied should be considered, taking into account the applicable law in each jurisdiction and whether translators will be necessary for effective communication. Each interviewee should be made aware that retaliation will not be tolerated. The importance of the investigation, any restrictions and the need for confidentiality should be addressed. If the interviewer is an attorney, there should be consideration of whether to give an Upjohn warning, which is meant to advise an interviewee who is a company employee that the interviewer represents the company and not the individual. Clear and comprehensive notes of each interview (being mindful of the applicable privilege rules) should be taken and any indications that an

interviewee possesses relevant documents should be followed up. It is important to note that confidentiality has its own restrictions and parameters depending on the jurisdiction and the interviewees.

- Understand fact patterns: have the allegations been confirmed? Have other possible problems or facts been discovered? Whom might also need to be spoken to? What additional evidence needs to be collected and reviewed?
- Create a written report of factual findings: this involves developing the fact pattern and reporting only factual findings. Legal conclusions should not be drawn nor should recommendations be included in the written report, and these should not be documented in the case management system. These facts should be reported to management or other decision-makers but any privilege issues that cover the report should be borne in mind.
- Reporting obligations: this involves considering whether any facts give rise to any reporting obligations, such as to any auditors or government authority, or taking any disciplinary action as necessary.

Remediation and next steps

After the investigation has concluded and the investigator has made factual findings, management or other decision-makers should assess the findings to determine and take appropriate action. No investigation is worth doing if appropriate corrective action is not taken afterwards. The action could involve verbal or written warnings, suspension, demotion, termination, reassignment or no action. Often, it is important to have the proposed corrective action reviewed by local legal counsel before it is implemented.

If a problem has been identified that has slipped through the cracks of the employer's operations, or any part of its systems has failed to work as intended, it is essential to assess the relevant procedures and processes and ensure recommendations are made for improvement.

It is also imperative to ensure compliance with any regulatory obligations that may exist in any relevant jurisdictions, which may include notifying and regularly updating the regulator on findings and conclusions in the investigation. By involving relevant personnel or external advisors at the outset who can consider and advise on these issues, the risk of regulatory breach will be minimised.

Additional follow-up

Last, but importantly, there should be a follow up with the complainant. For example, where the employment of the alleged harasser has not been terminated in a harassment case, it is important to contact the victim to provide context as far as possible, and ensure the harassment is not continuing. The same procedure should be followed in discrimination or victimisation cases.

Throughout the investigation process, it is important (to the extent possible and appropriate) to maintain contact with the complainant to ensure that retaliation is not occurring and (subject to confidentiality considerations) update him or her on the progress of the investigation. Such contact will also assist with affirming to the complainant and other relevant employees that the employer is taking the complaint seriously. In some situations, such as where there is a clear imbalance of power between the complainant and the accused, it may be appropriate to monitor for retaliation proactively. In each case, feedback from potential victims of retaliation should be sought, and any efforts to manage the risk of a retaliation lawsuit should be monitored.

At the end of the process, the appropriate parties should be informed that the investigation has been concluded, and it should be confirmed that appropriate measures, if any, are being taken to stop the inappropriate behaviour. If possible, description of the exact disciplinary action taken should be avoided.

Potential risk areas

Although each global investigation is unique, there are some common mistakes. Examples include the following:

- Making mistakes early on: errors in the first 72 hours can put the entire investigation at risk. Evidence can be lost (or in certain cases, hidden or destroyed) while quick judgements, premature action or ambiguous documentation can send the investigation down the wrong track. Failures to understand and act in accordance with privilege rules in the relevant jurisdictions can also have significant consequences.
- Missing the forest for the trees: employers should not get side-tracked or overlook issues that may be important or that may need to be revisited or separately investigated. They should focus on the precise issues raised by the complaint and liaise with the complainant (where necessary and appropriate) for further particulars of events giving rise to the complaint.
- Failing to communicate: failing to maintain contact with the complainant can lead to assumptions that the employer is doing nothing to address the complaint, and it can undermine trust and faith in the investigation process (and any corrective action taken further down the line). Employers should provide updates that demonstrate they are actively investigating the situation, without sharing specific details or breaching confidentiality or legal privilege.
- Trampling on evidence: inexperienced investigators or others in the organisation can inadvertently destroy, corrupt or inadequately secure critical evidence, or even create new problematic evidence, such as emails or notes commenting on the investigation.
- Accepting information at face value: investigators may have to assess credibility where evidence or accounts conflict. It is important that preconceptions or subconscious biases do not influence the conduct of the investigation team.
- Failing to understand cultural differences: a failure to understand the culture of a relevant jurisdiction, workforce or workplace may prevent an investigation team from discerning what employees are trying to communicate, meaning that relevant information is not secured from witnesses.
- Allowing retaliation: retaliation against complainants or witnesses opens employers up to additional legal risk and erodes the culture of compliance needed to encourage internal reporting.
- Failing to honour employees' rights: employers should be alert to the need to protect the rights, privacy and reputations of investigation subjects and others, and then balance this need with the need to conduct an effective investigation.
- Drawing legal conclusions: the investigation report should never contain legal conclusions. Remediation decisions should be based on the factual findings.
- Waiving privilege: inadvertent and poor document management during the investigation may result in a waiver of privilege on sensitive documents.

Global Issues

The legal systems of different jurisdictions may impose different requirements that can have a marked impact on the procedure or substance of the investigation process. There should be regard to each jurisdiction's rules, customs and standards pertaining to:

- data privacy;
- anonymous hotlines;
- whistle-blower protection;
- evidence collection;
- the conduct of interviews;
- policies and work rules;
- disciplinary rules;

- proportionality standards;
- external ombudsmen;
- employee representatives;
- available corrective actions;
- culture and language; and
- attorney-client or legal privilege.

Creating and implementing an effective and compliant investigation process in a global environment can seem daunting. It is important to take it one step at a time, while being alert to categories of differences, and rigorously manage the moving parts and processes.

Conclusion

The accepted thinking as to best practice for conducting effective global investigations has largely remained consistent in recent times. However, in a global crisis that poses new questions and challenges across all areas of employers’ operations, there are additional considerations to which employers should have regard to ensure that effective investigations can still be carried out in an era of uncertainty:

- Remote witness interviews: with limitations on travel and restrictions on in-person interactions, interviews with relevant witnesses will increasingly need to be conducted electronically. As well as posing logistical challenges, the inevitable restrictions on viewing a person’s ‘soft’ behaviours (such as eye conduct and body language) may inhibit the interviewers’ – particularly external interviewers who may not be known to the witnesses – ability to develop a rapport or trust with the interviewee, and will also make assessing a witness’ credibility more difficult. Introducing and discussing documents with remote witnesses also takes more planning and may present logistical issues in respect of showing documents, particularly if the interviewer does not wish to share a physical or electronic copy of a particular document with the witness.
- Collecting and preserving evidence: closures of offices and the rise in remote working can raise additional challenges for the evidence-collection process. Office closures will restrict access to hard-copy documents possessed by relevant witnesses, while confidentiality concerns could be triggered by individuals having to rely on their home IT equipment and Wi-Fi.
- Economic uncertainty: regard should be had to the impact of economic uncertainty on the attitudes of relevant individuals towards an investigation. Where there are increased fears in respect of job security, and increases in stress levels or frustration more generally, stronger emotions on the part of the complainant and the accused may be accompanied by witnesses being more circumspect with providing their accounts (particularly where the accounts might give rise to retaliation or be self-incriminating).

The above considerations highlight the importance of preparing a focused and detailed plan for any investigation, and ensuring that it is delivered by a well-briefed and appropriately trained investigation team that takes all opportunities to be engaged, and transparency when communicating with all relevant stakeholders.

Each investigation is unique, and employers will always respond to and engage with unexpected issues as and when they emerge. However, proactive planning that has regard to the issues and action points set out here will help employers effectively respond to complaints and thereby mitigate the rapidly growing litigation and reputational risks, no matter the prevailing global circumstances.

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