By Don Phin, Esq.

Investigating, Managing, and Preventing Wrongful Employee Conduct

"It is quite a three-pipe problem"

– Sherlock Holmes in Sir Arthur Conan Doyle's "Red Headed League"

Introduction

Trying to run a business in today's turbulent economy is hard enough without having to deal with unscrupulous, disloyal, unethical, and otherwise disastrous employees! Bad employees can be very expensive. For example, published estimates of employee theft range from between $40 to $120 billion annually. The damage caused by drug users at work is estimated to exceed $120 billion annually, and three out of five people who do drugs have a job!

Then there are the grief and costs associated with sexual harassment, discrimination, and other irresponsible behavior for which the employer is liable. Bad employees not only steal property, but they also injure customers and other employees, file frivolous lawsuits, generate legitimate lawsuits, create bad press, contribute to employee turnover, and ultimately, can cause business failure.

Disastrous employees are not just limited to the rank and file. Quite the contrary. There are plenty of "million-dollar" executives, and it is not because of how much money they make, it is because of the damage they cause. There are studies indicating that the cost of corporate crime in America exceeds manyfold the cost of what might be considered our common crimes. For example, the banking industry loses four to five times as much money to embezzlement every year as it does to robbery.

While I will not venture into it during this report, the best way to avoid these employees is to have a workplace culture that builds powerful employment relationships, which includes having a robust hiring process. Many bad employees should not have been hired in the first place.

Because we have become so litigious, how you investigate, manage, and prevent wrongful employee conduct becomes a significant risk management issue for your company. It is not just your liability you have to be concerned about, but the effect the circumstances can have on the culture of your company. For example, it is well documented that employment litigation generates mistrust, lowered morale, and non-productivity, on top of exorbitant legal fees and costs. You not only have to gather facts, but you also have to ask questions such as "Am I doing everything necessary to maintain the level of trust within this company?" and "Am I respecting my employee's rights to privacy in this process?" and "Who's going to sue us next?"

In this report, I will discuss what you should investigate, who should do the investigation, what a proper investigation consists of, how to take appropriate corrective action, and what needs to be done to prevent wrongful conduct from occurring in the first place. Truth is, there is no "perfect" investigation formula. Each matter is viewed case-by-case. What I hope to do on these pages is to lay parameters for you to follow based on agency regulations, court opinions, and my personal experience.

We'll start with a few cases you should know about…

The Cotran Case

Years ago, two important cases were decided that impact this area. In 1993, Rollins Hudig Hall International, Inc. (Rollins), received a report to its Human Resources office that Ralph Cotran, its Sr. Vice President (Contran), was sexually harassing two women employees. After being approached, both women said, "They had been harassed by Cotran". Both women prepared written statements indicating that he had exposed himself, masturbated in their presence, and made

repeated obscene telephone calls to them at home. After a discussion amongst executives with the "need to know", Cotran was confronted with the two statements and informed that an investigation would pursue. Pending completion of the investigation, Rollins suspended Cotran. Over the next two weeks, the company's manager for EEO compliance conducted interviews with 21 people including 5 that Cotran had asked her to interview. The investigation concluded that the women who accused Cotran of harassment appeared credible although the investigation failed to turn up anyone else who accused him of harassing them. The investigation confirmed that Cotran telephoned both women at home. The investigation concluded it was more likely than not that harassment had occurred. After reviewing the investigative report, complete with attached affidavits, Rollins' president fired Cotran.

Upset with his termination, Cotran sued. He claimed his termination violated the company's obligation only to terminate him for "good cause" and it had slandered his reputation. In his defense, Cotran claimed he had consensual relationships with both employees and that their statements were nothing more than vindictive conduct. At trial, many of those witnesses interviewed during the investigation were asked to testify.

The jury returned a "special verdict". Asked whether Cotran "engaged in any of the behavior on which [Rollins] based its decision to terminate his employment" it answered "no". The jury then awarded Cotran $1,780,000! Rollins immediately appealed the case. Before the appellate court, the issue was 1) does the jury get to decide whether the alleged conduct that led to the decision to terminate happened in fact? or, 2) is it better to ask whether the employer had reasonable grounds for believing the alleged conduct occurred and otherwise acted fairly? The Court noted that many courts in California and across the country are divided on this question. After an extensive analysis of the arguments on both sides, the court stated that the proper inquiry is not "did the employee, in fact, commit the act leading to the dismissal but rather was the factual basis on which the employer concluded a dischargeable act had occurred reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual."

In ruling as it did, the Court said it preferred to focus on the employer's response to the alleged misconduct rather than the ultimate truth of the employee's misconduct. The Court ordered a re-trial, removing Cotran's $1,780,000 verdict.

The point I am trying to make is this: how thoroughly you investigate a claim will be one of the most important liability questions asked. Even if you are in a jurisdiction that has a different standard, regardless of your good faith efforts, the latter is all that you can do. The cite for the Cotran v. Rollins case is 17 Cal.4th 93 (1998).

Investigate Promptly and Thoroughly

In the case of Faragher v. City of Boca Raton (1998) 524 U.S. 775, the importance of conducting a prompt and thorough investigation was re-emphasized by the U.S. Supreme Court. It held that employers may defend and limit their damages against employee claims of sexual harassment when they have a policy, investigate complaints thoroughly and promptly, take appropriate action, and the employee fails to avail themselves of those protections.

Failing to take the approach suggested by the Cotran and Faragher decisions also made headlines in 1998 when the Miller Brewing

Company was hit with a $26.6 million dollar verdict for failing to thoroughly investigate an allegation of sexual harassment. As in Cotran, the employee accused of sexual harassment brought the suit! As it turns out, Miller had terminated the employee for discussing an episode of Seinfeld that his co-employee found offensive. When she complained, Miller allegedly made a "knee-jerk" termination without thoroughly investigating the claim. The termination was viewed as draconian and slanderous under the circumstances, resulting in the enormous verdict. While an appeal was also filed, and most likely a settlement was reached, you can see that the company in Miller had a much greater exposure than in Cotran because of how they responded to the claim.

Companies that fire, discipline, or reprimand employees accused of wrongful conduct — including sexual harassment, discrimination, or theft — can usually minimize the exposure to a lawsuit, and additional losses, if they conduct a prompt and thorough investigation that evidences a "good faith" belief in any actions taken. The EEOC has issued sexual harassment investigation guidelines which can be found at https://www.eeoc.gov/policy-guidance-documents-related-sexual-harassment.

What Should You Investigate?

This question is not as simple as it may first sound. There are circumstances where the law requires you to conduct a prompt and thorough investigation, such as when an employee complains to anyone in management about conduct that violates a statute or regulation. Complaints about sexual harassment, discrimination, or violation of the American Disabilities Act, are classic examples. Other investigations are essentially at the employer's discretion. These include investigations related to drug and alcohol use, theft and misconduct, business fraud, customer complaints, etc. Sometimes an investigation must occur because you received a complaint from an agency or attorney. In that event, you must investigate to help defend against the possible fine or claim. Another reason to investigate is to maintain the ethics and integrity of your company and system.

There has been many a circumstance where an employer was glad they investigated a matter under the belief that "where there is smoke, there may be fire". A proactive employer will pay attention to smoke signals and rumors. "What to investigate?" is a risk management issue directly related to your tolerance for, and desire to eliminate, the risks facing your company. Many companies will investigate as part of their system for checks and balances. For example, they will use "spotters" or surveillance cameras to prevent shoplifting or misappropriation of funds. An investigation may also occur due to a customer, client, vendor, or another third-party complaint.

One of the greatest mistakes I have seen over the years is a company's tendency to *ignore, bury or deny* conduct that should be promptly and thoroughly investigated. This is a human nature tendency. None of us want to deal with bad news. We will either ignore a matter hoping it will go away (I'll just pretend Johnny didn't do that), bury the matter hoping that it won't resurface (I can't believe he did that, but I won't tell on him), or deny its existence altogether (Johnny would never do something like that). We hesitate even in the face of objective evidence. That is one reason it is so important to have a process in place for investigating claims including training managers and HR on the importance of doing so.

Who Should Investigate?

You have four basic choices. Either you go it alone, or you hire an attorney, human resource consultant, or private investigator.

Investigating an issue on your own has the advantage of being less expensive and perhaps more expedient but perhaps the disadvantage of not being "independent" and void of professional experience and advice. If you got it alone, consider having an "investigation team" (at least 2 people), so there is a diversity of viewpoints and a sense of neutrality. Be careful to make sure any investigator isn't compromised by personal relationships, past experiences, or their possible role as a witness to the underlying facts. If the company has in-house counsel, there is good reason to believe that with proper support and tools they can conduct an excellent investigation.

Professional investigators and lawyers are trained at viewing matters on an objective basis. Unlike company employees, they do not have a direct stake in the outcome of any action, which may filter or affect their ability to obtain or analyze relevant information. The primary benefit of using outside help is their expertise in ferreting out information that might otherwise remain buried by an in-house investigation.

If you hire a private investigator, make sure they are properly licensed. If not, both you and the investigator may violate state statutes and regulations. Their professional accreditation offers credibility if they have to testify in any possible hearing. The limitation is an investigation by a non-attorney will not be protected by an attorney-client privilege, unless they have been retained by your attorney.

Should your regular employment law attorney investigate? You must weigh the risk vs. benefits of having your lawyer investigate because if they do, they may be prevented from representing you in any lawsuit. But odds are, if they conduct a qualified investigation then no further action will be taken by the employee. Even if the employee takes further action, odds are the claim will never go to trial.

Sometimes your attorney is best used "behind the scenes" helping to direct an investigation conducted by company personnel or an outsider. This way the attorney-client and work product privileges are maintained. Understand that despite the attorney-client and work product privileges, anytime the company intends to rely on the strength of its investigation, it waives its right to those privileges.

Conducting the Investigation

When investigating claims, there is no substitute for thinking in terms of who, what, when, where, why, and how. In a sense, you must set the stage.

- Who – anyone the accuser or the accused suggests being interviewed. Also, anyone with the ability to see, hear, or know of the alleged conduct. Don't skimp on the investigation. Remember, in Cotran, *21 employees were interviewed before reaching a "good faith" decision. Some of the most dangerous witnesses I've encountered over the years were those not interviewed* at the time an allegation was made. Draw out a game plan as to whom you intend to interview, beginning with the accuser(s) and saving the accused for the end. Never hesitate to go back to a witness to get additional input considering newly discovered facts.
- What – You want to ask if the witness is aware of any *facts, documents, witnesses,*

which may or may not corroborate the allegations. Documents to be considered include any personnel policies and procedures, personnel files, previous investigations or complaint notes, memos, e-mails, and other communications.

- When – Immediately after you map out your investigation game plan. The EEOC requires that any investigation of a complaint of discrimination or harassment be done "promptly and thoroughly". Immediacy is also an issue when an employee is suspected of theft, fraud, or other similar violations.
- Why – The primary reason for asking why question is to get to people's motivations. An employee may engage in theft because they feel they are being underpaid. An employee may make a claim of sexual harassment because they do not like the aggressive style of a new manager. Asking the why questions may lead to system failures or the existence of mitigating factors.
- Where – Where the witness wants to be interviewed, so long as it affords privacy and comfort. Note that having the investigation take place in an executive office or conference room may be threatening to the witness and limit their testimony. Ask, "Where would you like to talk about this?"
- How – As David Bohm once said, "The truth does not emerge from opinions, it emerges through a dialogue". The primary role of someone investigating a claim is not to represent the employer or to make decisions; it is to gather facts, documents, and witnesses. Attached is an Investigator's Tools checklist to help with the investigation process. While checklists are valuable and a good head start, there is no substitute for active listening. Many times an important response to an important question will go unnoticed, given the desire to ask the next question.

Using dialogue in the investigation process means you create a "safe place" for communicating. It means you don't start the investigation with the belief system you are there to protect your company or that you already know who's right and who's wrong. It means you ask open-ended questions you clarify until you are left with specific details.

Allow any accused employee to review the evidence against them and give their side of the facts. Juries will look upon an investigation as being unfair where the accused employee is not allowed to defend him or herself. Distinguish between first-hand knowledge, hearsay, and mere gossip. Explore any accusations and the credibility of witnesses.

Don't accuse or coerce during an investigation. The purpose of an investigation is to gather facts, documents, and witnesses, and nothing more. Companies can be sued for disseminating rather than gathering information. Do not threaten disciplinary action, civil, or criminal legal action during the investigation process. Coerced testimony lacks credibility and only leads to a larger set of problems.

Note: Federal Law limits the use of recording equipment to tape confidential conversations, but allows for recording confidential conversations when only one party has given prior consent (18 U. S. C., Section 2511). California and most other states are more restrictive and only allow a recording when both parties consent. Bottom line- if you are going to record a witness, do so with full consent on the recording and in writing.

Anyone conducting an interview must be careful about making accusatory statements. For example, one company spent over $50,000 defending a claim brought by a black bank teller accused of petty theft when the interrogator stated, "all you people have these problems." In that case, which the employer eventually won, the employee accused the company of false imprisonment, intentional infliction of emotional distress, and racial discrimination. It is imperative to make sure that during an investigation you do not comment on any statements made by the employee, or offer any gratuitous statements unrelated to the investigation. As Sgt. Joe Friday said…"just the facts".

Union Employees Have the Right to Have Co-Worker Present at an Investigatory Meeting

Twenty-five years ago, the United States Supreme Court, in the case of NLRB v. Jay Weingarten, 420 U.S. 251 (1975) afforded union members the right to have a co-worker present (generally a union shop steward) at an investigatory interview, which the employee reasonably believes might result in disciplinary action.

Rule 7 of the National Labor Relations Act requires an employer to allow a co-employee present when enforcing "the right to act in concert for mutual aid and protection". This right is applied where the employee reasonably believed the interview might cause disciplinary action. Extending this right to the non-union setting has been a hotly contested issue before the NLRB over the past 25 years.

What the Weingarten decision means for you:

1. Nothing, if you are dealing with non-union employees.
2. You do not have to notify the employee of their Weingarten right.
3. If an employee requests a co-worker to be present, you must accommodate that request, or cancel the interview, or see if they will consent in writing to the interview without representation.
4. The right of representation would apply in an investigatory setting related to sexual harassment and discrimination claims, substance abuse, theft, unethical conduct, violations of policies and procedures, insubordination, etc.
5. Remember, this case applies to "investigations" only.
6. The right does not allow the employee to bring in an outside attorney or union official.
7. This right does not extend to management-level employees.

Get It In Writing

Memorialize statements made by the accused, accuser, and witnesses you interview by drafting a declaration to be signed under the penalty of perjury. If they refuse to sign it you may have to question their credibility. Often employees, who are essential witnesses to an event, will change their stories later, especially if they no longer work for the company.

One of the most dangerous witnesses is a former employee with an ax to grind. That is one reason it is so important to be thorough when you investigate and place statements in writing.

Maintain any notes or documents related to the investigation separate from the employee's

personnel file and limit access to the material. Mark it "Confidential."

Employee Suspension

If the alleged offense is significant, consider suspending the employee with or without pay while you complete your investigation. This allows for a "cooling-off period" and a thorough investigation before making any termination decisions. It can remove barriers to the investigation because there is no need to act in haste, and it will minimize your exposure to wrongful termination litigation. If the employee is found to be innocent of wrongdoing, provide them with pay for any paydays missed. Bottom line: even though you need to do a "prompt and thorough investigation", make sure you get all the facts before taking action.

A Note About Detention

The Courts have ruled that reasonable attempts to investigate employee theft, including employee interrogation, are a normal part of the employment relationship, and cannot result in a lawsuit being filed outside of the Workers' Compensation system. However, the courts have also stated that employer conduct rising to the level of "involuntary detainment" is "always outside the scope of the compensation bargain" and can support a common law action by the employee against his or her employer for false imprisonment, intentional infliction of emotional distress, and other causes of action.

An employer has the right to "reasonably detain an employee suspected of theft" but may not engage in "unreasonable confinement". You must be careful not to force the detainment, either expressly or by implication. Restraint can be shown by words, gestures, or acts that cause a person reasonable apprehension he or she will not be permitted to leave the investigation. For example, you should not say, "You're not leaving this office until I get some answers." Only use forced detention where you have probable cause to believe the employee is in wrongful possession of company property. This is known as the "shopkeeper's privilege." However, if you detain them to obtain a confession or restitution, your company will not be protected by the shopkeeper's privilege.

A Note About Using Polygraphs

In his fascinating book "The Truth Machine," author James L. Halperin builds a story around a device that can detect honesty with 100% accuracy. "The Truth Machine" had a profound impact on the legal system and its very existence had a chilling effect on wrongful conduct. It is interesting to note that because the "truth machines" we use today, notably the polygraph, cannot detect honesty with 100% accuracy, their use is severely restricted by law.

Despite substantial restrictions, the Federal Employee Polygraph Protection Act allows the use of polygraphs under limited circumstances. Polygraphs can be used only with employees in highly sensitive positions such as military and police force personnel, security guards, and those with direct access to controlled substances. They may be used as part of an ongoing investigation for economic loss, but that employee must have had access to the stolen information or materials. And last, most statutes require you to provide the employee with a statement to sign indicating that taking the polygraph examination is a voluntary exercise and they may stop it at any time. Because of all its restrictions, I strongly discourage the use of polygraphs except under unique circumstances, and with professional assistance.

Interestingly, I spoke at the AWI conference about a technology that is much more accurate than a polygraph. Converus claims it has 86-88% accuracy with 30-minute screening tests. While it is far more accurate than 99% of humans at a credibility assessment, its use is currently limited by the Polygraph Protection Act. As a result, most of their work is with law enforcement and out of the country employers.

Concerns About Employee's Privacy

The investigation of any activity implicates the boundaries of the employer's rights vs. that of the employee. Employee claims in this area are generally brought about under a theory of invasion of privacy or defamation of character. Most of the privacy issues have involved drug testing and surveillance cases. The defamation cases arise when communications are made beyond a group that has the "need-to-know" including co-workers, customers, clients, and prospective employers.

Unless you are dealing with employees in a safety-sensitive position such as law enforcement or truck drivers, you should not engage in random drug testing. Drug testing should take place only after an accident has occurred or upon "reasonable suspicion" of current use. When it comes to employee surveillance the best way to avoid privacy claims is to give notice in advance of the surveillance as well as the business reason for doing so. This not only protects you from breach of privacy claims but also from wrongful conduct occurring in the first place.

Under the common law of most states, an employer has a "qualified privilege" to communicate a matter of business concerns to legitimate parties without fear of getting sued. They lose that privilege if any of their communications are made for malicious reasons. That is why I suggest at the beginning of an investigation you determine exactly who needs to be involved in the "control group" and limit communications to them. You may also want to further insulate your communications by involving an attorney.

The Report of Findings

A report of findings should be an unbiased interpretation of the facts, documents, and witnesses an investigation has gathered. Its job is to give management the information necessary to make appropriate decisions. Should you intend to rely on the investigation as a defense in any subsequent lawsuit, you can expect to see your report analyzed, second-guessed, and cross-examined during the process. Make sure the report is accurate and written in a manner that is easy to understand by a layperson. This is not about one lawyer writing to another lawyer.

Present the report in a chronological fashion. Your interpretation of any facts, or the credibility of any witnesses, should be supported by objective documentation, including attached affidavits and documents.

When drafting the report, you may want to eliminate the use of any specific witness names to help protect against the possibility of retaliation (which will be discussed in a moment). I also suggest you shred and dispose of any drafts of your report but keep all of your notes supporting it. The report is a summary document and should be no longer than a few pages in length.

To prevent claims such as those in the Rollins and Miller cases, provide the accused with a copy of the report. Given them an opportunity to once again respond to any facts or allegations in the

report before moving on to any form of corrective action.

Take Corrective Action

As Cicero once said, "let the punishment meet the crime". Now that there's a report – what should you do? First, if you are the investigator, you should not be the person making human resource decisions. Second, any decision made should be reviewed by a human resources executive, attorney, or someone else in upper-level management. Before engaging in any form of discipline, it is imperative you look to any existing company policies and procedures or past practices, which would dictate the appropriate form of discipline. Regardless of any policies or procedures, I am not aware of any court preventing the discharge of an employee who is found guilty of theft, harassment, discrimination, or similar wrongful conduct.

Numerous cases indicate that a company must engage in discipline even after the conduct has stopped. Failing to do so may in and of itself constitute a legal violation. Depending upon the circumstances, a strong verbal warning may be appropriate. The point is to make sure that whatever action you take it is designed to punish the wrongful conduct and deter it from happening again. Other options include written warnings, transfer, demotion, suspension without pay, reassignment, etc. Make sure it is the wrongdoer who is punished and not the victim.

There is an additional aspect to this entire investigation process that relates to maintaining trust within an organization. By walking its talk, management will obtain the loyalty of its employees. However, if management states it will not tolerate harassment and other forms of wrongful conduct, but then lets upper-level executives off the hook, you not only increase your exposure to a lawsuit but also destroy the quality of your employment relationships.

While any disciplinary-type action you engage in is ultimately your decision, always ask the victim or wrongdoer what he or she would suggest discipline under the circumstances. Ask him or her, "If you were in our (the employer's) shoes, what would you do to make sure that this conduct never occurs again?" (Assuming that it does not amount to grounds for immediate discharge). Look into any mitigating factors such as a mental disability (possibly protected by the Americans with Disabilities Act). Discover if the accused has a specific complaint regarding the proposed discipline. Before terminating or disciplining the employee, consider offering them a hearing or appeal of the proposed discipline to a party not associated with the disciplinary process.

Make Any Victims Whole

EEOC regulations require an employer to make any victim of harassment or discrimination "whole". While not specifically defined, this can include reimbursement of any sick pay or vacation used by the employee to escape the wrongful conduct of a co-worker, out-of-pocket expenses related to psychiatric or therapy visits, and removal of any unwarranted performance evaluations created by the accused.

If the wrongful conduct involves a customer, then you should do everything possible to make the customer whole. Ask the customer what they would like you to do. In one classic scenario, a company installed the wrong fence around a house. Twice they tried to satisfy the customer by replacing the fence. After spending thousands of dollars, they gave up trying to figure out what would satisfy the customer and simply asked, "what would like us to do?" The customer replied,

"I would have been happy had you just painted the original fence." The point is, don't assume that you know what is best for a victim- ask them.

Last, is the issue of voluntary disclosure. Sometimes the victim of wrongful conduct is the IRS, a group of investors, or other entities that may implicate white-collar criminal enforcement. While I won't get into it in this report, one of the best strategies for minimizing damage caused by such conduct is to engage in voluntary disclosure of the conduct before it is unearthed by a third party.

Strategies for Preventing Wrongful Employee Conduct

As stated at the outset, having a powerful hiring process is an essential weapon in your arsenal for preventing wrongful conduct. In addition, these strategies should be considered:

- Create a clear line of authority between employees and departments. For example, accounting and operations should be kept separated where possible.
- Checks and balances to any system are essential – especially in accounting. Consider having your books audited on at least a quarterly basis. There are horror stories galore about accounting departments that have swindled hundreds of thousands and even millions of dollars from their employers. Make sure somebody is watching the gatekeepers in your organization.
- Make sure your company, and all of its valuables, are kept under lock and key. Do not take unnecessary risks by conducting "social experiments". All of us would like to trust our employees, but that does not mean we should do so blindly. Protect your valuables – don't conduct social experiments with them. When it comes to employee theft it is the opportunity to steal, more so than the financial need, which is the primary cause of it.
- Educate the employees as to the impact poor conduct can have on company stability, brand damage, promotions, etc.
- Look out for bizarre employee behavior. It could be everything from driving a fancy new car they have no reason to afford, to working late every night on their own.
- Consider purchasing a commercial crime insurance policy to protect against the crimes of theft, forgery, and embezzlement. Also, consider "3-D Bonding" of your employees.
- Consider an anonymous tips program or hotline that fellow employees can use to heighten management's awareness of potential wrongful conduct. I sit on the Advisory Board of my favorite reporting program Employee Confidential. Let me know if you want to learn how they can help your company.

Fixing the System

Wrongful employee conduct is often the result of system failure. When a company fails to do reference and background checks, or otherwise hire properly, it exposes itself to discrimination, harassment, fraud, and other wrongful employee conduct. A company must ask if the process it has for educating employees regarding appropriate conduct is effective and if the ability to report violations has been clearly communicated.

Correct any flaw in your management system that allowed the employee to engage in the

wrongdoing. Perhaps you did not send a message from the top that inappropriate conduct will not be tolerated. Perhaps you did not conduct a thorough reference check when hiring the employee. Perhaps you allowed tempting access to valuable inventory. Perhaps you did not have your employees sign a trade secret/confidentiality agreement.

Be careful about what you say to employees and customers about an employee who has been transferred, demoted, or fired for wrongful conduct. It is best to simply let co-employees and customers know the employee has been replaced by someone else, who will strive to be a valuable employee and resource for customers. If rumors abound regarding the termination of an employee, try to nip them in the bud and explain to whoever is creating the rumor that it is neither necessary nor beneficial to the company. If a prospective employer calls about an employee and wishes to know why they are no longer working at your company, it is my recommendation to provide only their last position and dates of employment. If the employer wishes a more extensive reference, only consider doing so after you obtain a release for the reference from the former employee and the prospective employer.

Conclusion

As stated at the outset, running a business is hard enough without having employees causing unnecessary problems. The late Rev. Norman Vincent Peale would emphasize that you "get what you focus on." That is one reason it is so important to focus on a clear set of expectations for your workforce. Let them know the rules and then enforce them. One way to keep people away from temptation is to have a strong set of checks and balances in place.

Finally, fight the human nature tendency to want to ignore, bury, or deny wrongful conduct. From a legal, business, and ethical standpoint, promptly and thoroughly investigate any matters, which are a risk for your business. If you find that something did go wrong, discipline the wrongdoer appropriately, and if necessary, refer the matter to the police. Attempt to make any victim of the wrongdoing whole and fix your system so it doesn't happen again.

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About Don Phin, Esq.

Don Phin is a California employment law attorney. He has consulted with hundreds of companies to help improve their employment practices. He has presented over 600 times to CEOs, HR, and other executives on what works in employee relations. Don's latest book is *The 40| |40 Solution: Mastering the Emotional Energy of Leadership and Sales*.

Don built HRThatWorks, used by 3,500 companies and sold to ThinkHR in 2014. In addition to consulting and speaking, Don does executive coaching and workplace investigations.

Originally a kid from the Bronx (you may still hear the accent), today Don lives in sunny Coronado, California.

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