



Moderating Influence Needed To Survive Corporate Investigations

By Allen Smith

High anxiety often accompanies corporate investigations of alleged violations of the Sarbanes-Oxley Act (SOX), according to David Geneson, a Sheppard Mullin attorney. By acting as a "moderating influence," HR professionals can help the company survive, he told *SHRM Online*.

"You don't want to destroy the company merely by the investigative process. That risk is very obvious, very clear. You can create all sorts of negativity in the company just by conducting an inquiry," Geneson said.

"People wonder what's going on. And it isn't the kind of thing that you broadcast the details about to the troops. You basically try to keep it very low profile for all the obvious reasons in terms of successfully getting information," he remarked.

The HR manager's responsibilities are "among other things, trying to make sure that the rumor mill isn't grinding full time spewing out all sorts of disinformation."

'Awkward Posture'

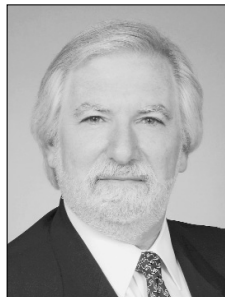
It's a delicate balance, Geneson acknowledged.

"You have the HR person in that awkward posture of, on the one hand, trying to maintain equilibrium among the troops and on the other hand recognizing that the investigation may be critical to the company against an external assault" or to excise an unethical practice.

At the same time, HR has to be wary of obstructing the investigation, he cautioned, recalling an HR official who "started misapprehending his responsibilities to the point where he interfered with the investigative process."

Of course, corporate investigations may lead to personnel actions. Geneson recalled one corporate investigation where an HR manager "was intimately involved" in a formal review committee to deal with certain senior members of management.

"HR helped that process to move forward so that if in fact extreme action was taken against these individuals, there could never be a claim that they did not receive adequate due process in the evaluation of the allegations against them," he recalled.



David Geneson



Bob Rose

A corporate investigation can lead to a spike in voluntary departures as well, at which point not only the health of the organization becomes endangered, but the investigation itself. "That whole process becomes undermined when people start to leave, which is why the HR professional has to do everything in his or her power to maintain that level equilibrium," Geneson said.

If staff members start to flee, exit interviews can become "more important than ever," noted Robert Rose, also an attorney at Sheppard Mullin. They can help uncover information that the employees may have been "sitting on or didn't feel that they had the freedom to reveal until it's their last day or last hour on the job."

Learn About the Process

HR professionals owe it to the company and employees to familiarize themselves with the corporate investigation process, including such widely misunderstood legal terminology as "attorney-client privilege," Geneson emphasized.

The privilege is a key concept and often misunderstood by employees at all levels within an investigated company. Geneson recalled that in a recent government investigation, it came to light that certain senior company employees assumed that their discussions with the company's attorney would be protected by the attorney-client privilege, "even though those attorneys were not their attorneys. They totally misapprehended the relationship, and it ended up being litigated on that particular point before the government could go forward with its case."

Rose added that the attorney-client privilege "could become one of the highest cards to play" in a corporate investigation. From his perspective, the preservation of "all privileges"-including the work-product privilege-is essential to a good corporate investigation.

"It's about the only protection you have from other parties litigating other issues," Rose said. Otherwise, the corporate investigation "provides a road map to outsiders should they choose to litigate against the company" over unearthed issues.

For Rose, "the hallmark of a good corporate investigation above and beyond rooting out the concerns that have been raised is to maintain a good solid cloak of privilege that the company can, if it chooses, waive at some point, or it can maintain throughout."