

How to Survive the Corporate Internal Investigation

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Quick quiz for the business executive: What is the appropriate reaction to Fox News' termination of Roger "Big Un" Ailes for allegedly fostering a locker room atmosphere?

(1) This is an example of political correctness run amok. What's so wrong with a locker room?

(2) This was a long time coming. When will Brian Kilmeade, Sean Hannity and Bill O'Reilly get the axe?

(3) This could never happen to me, since I'm a stickler for following all the company rules (and would never be guilty of sex harassment).

(4) There but for the grace of God go I.

Correct answer: (4).

Because of the widespread use of the internal investigation at most companies, coupled with the growing use of the internal investigation as a multipurpose solution to many corporate conundrums and challenges, most executives will likely have this unpleasant experience, even if the last time they "sexually harassed" a female was in the second grade.

Over the years, there have been many rumors that Roger Ailes was not, shall we say, the most enlightened boss when it came to treatment of women. Alleged examples: (1) referred to his anchors as "girls"; (2) indicated that two of his well-known anchors "wouldn't get noticed in a bar"; (3) in job interviews, was fixated on women's legs; and (4) allegedly criticized ex-Dallas judge Catherine Crier when she wore a pantsuit, indicating that he "didn't spend x-number of dollars for a glass desk for nothing." Along with other more salacious allegations.

Problem was, Ailes' conduct had been kept under wraps for years, with no one coming forward with any substantial complaints. Recently, however, an unrelated Machiavellian plot had been developing: apparently Rupert Murdoch's sons had been looking for an excuse to get rid of Ailes for a multitude of reasons. Problem was, he had been extraordinarily successful at his job. The solution: internal investigation prompted by Gretchen Carlson's sexual harassment allegations. In short order, Ailes was fired.

A. 'Show Trial'

However, there were clues that the Ailes' investigation was a "show trial." Even if reliable sources had not leaked the fact that a corporate power struggle was the underlying motivation

TEXAS LAWYER

for the termination, there were other clues that indicated that Ailes' boorish behavior was not the entire reason for his ouster.

A law firm conducting an internal investigation as complex and significant as this one is usually given time to turn over every rock before a termination decision is ultimately made. But here, the internal investigation commenced roughly on July 6, and Ailes' termination was announced around July 21. Compared to typical "internal investigation time," this would constitute warp speed.

When the internal investigation focuses on a key member of management, that individual is usually given the benefit of the doubt before a termination decision is made. This is especially true when the individual in question (such as Ailes) is essentially credited with the entire organization's dramatic success, basically from its inception.

Here, however, Ailes' extensive contribution was ostensibly given the same consideration as the proverbial "hill of beans," which is to be expected if the termination is a forgone conclusion as opposed to a management decision that has to be carefully weighed and evaluated.

In retrospect, it was undisputed that Ailes' conduct had been problematic and kept below the surface for many years. When the internal investigation began to gain traction, the brothers suddenly had all the leverage and evidence that they had been hoping for.

All of which points to the extraordinary power of the internal investigation to sidetrack an executive's career in the blink of an eye.

B. Blame it on the Feds

Internal investigations have gained popularity in some instances because of unintended consequences, such as the fact that companies have encouraged employees to report on each other with hotlines and codes of conduct, as well as the fact that many whistleblower protection statutes encourage and protect internal reporting. There is also the belief that internal investigations constitute best practices when it comes to risk avoidance. However, the biggest culprits here are the feds, with the most recent factor being the Yates memo, which encourages companies to utilize their internal investigations as a method to identify and turn over employees to federal authorities for possible prosecution.

The aggressiveness of the federal authorities here has significantly changed the dynamic as far as most companies' willingness to allow employees to have their own counsel in internal investigations.

Other factors that have fueled the explosive growth of internal investigations include big legal fees:

The legal press frequently warns that there is an existential crisis facing the practice of law: the squeeze, by client companies, on outside law firms.

When it comes bolstering a law firm's bottom line, an internal investigation practice can be, in the words of one of our greatest thinkers, "huge."

One of the reasons is because the nature of an internal investigation is open-ended. These assignments are a welcome respite from the confining restraints and headaches of task-based litigation billing. Further, considerations of privilege assume a much greater significance in these types of assignments. Consequently, this type of assignment generally insulates a law firm's

TEXAS LAWYER

invoice from the types of multi-departmental/bean counter/prying eyes that account for so much friction in the relationships between companies and their outside counsel.

Not surprisingly, these internal investigations generate humongous fees, such as the "in-excess-of" \$2.5 million (and counting) the NFL is paying an outside law firm (Paul Weiss) for their investigation of the air pressure in Tom Brady's footballs. Paul Weiss is, coincidentally, handling the Ailes internal investigation.

Thus, conducting internal investigations are very profitable and law firms are bolstering their "bench" here, in many cases, by hiring ex-government prosecutors to head up entire practice groups.

This process is usually accompanied by an intense marketing campaign, designed to demonstrate their value to companies.

C. In-house Talent

Nature abhors a vacuum, right? Similarly, corporate law departments generally abhor any legal fees they can't figure out a way to control. Thus, the impetus for the emergence of the "inside" compliance team.

This group is generally supervised by the general counsel's office, possibly headed by a chief compliance officer, with assistance from such "control" disciplines as human resources, internal audit, risk management, corporate security, etc. (all of which are usually jockeying for an opportunity to demonstrate their value in the emerging internal investigation "space"). Like on TV when they assemble a joint task force of FBI, DEA, plus state and local police. Only without the sidearms, but with the same level of turf jealousy.

The care and feeding (e.g. salaries and benefits) of this type of corporate SWAT team isn't cheap. Why should you (the executive) care? Because when a company commits to this type of team—along with the capital expenditure associated with it—it is human nature to expect tangible results. Which usually manifests itself in an executive termination every now and then.

D. Problems for Executive Witness

Because there are no guidelines that spell out procedures or standards of proof, companies basically have broad discretion in finding culpable conduct.

Coupled with that is the tendency to expand the types of executive misconduct that is prohibited in many company Codes of Conduct. As an example, many Codes of Conduct have "conduct that reflects poorly on the company" as a stated violation, which can cover a whole range of unspecified practices.

The absence of any due process protections, coupled with broad categories that are now recognized, have left companies with almost unbridled discretion to conduct internal investigations and make desired findings without being subjected to any external controls.

Even though most internal investigation details are kept confidential, there are emerging anecdotal examples of corporate terminations, ostensibly based on Code of Conduct or other managerial violations, which are in reality motivated by a different rationale, such as Ailes' termination and an earlier Boeing executive termination.

E. When Harry Met the Internal Investigation

Ailes' termination would not be the first time that ulterior motives were conceded as the real reason for what was in essence a "show-trial," followed by an executive termination. In 2003, despite many objections, Boeing rehired Harry Stonecipher, handing him the position of CEO. Before he retired from Boeing, he had held the formal positions of President, COO, and Vice Chairman. Informally, he held the title of "irascible curmudgeon."

Problem was, like Roger Ailes, Harry was "old school," in his case to openly carry on an affair with a current Boeing employee. He didn't last long.

Those in the Boeing workforce that expressed the most outrage over this relationship were not militant feminists who might have been offended by this display of throwback conduct, nor were there concerns from the legal department or HR regarding potential legal exposure. Curiously, behind the scenes intel indicated that Harry's demise was the work of ambitious rivals for his position who saw his throwback conduct as a convenient way to reunite Harry with his Barcalounger at home. After a show trial (i.e. internal investigation) he was.

F. Levelling the Paying Field

Given the significant imbalance of power here (illustrated by the vast resources and manpower available to companies doing internal investigations), is there anything the individual witness can do to level the playing field? To some degree, yes.

For those fond of corporate buzzwords, the operative mindset here should be: "be enterprising," "take charge of the process"; "be proactive" and "don't panic; be analytical." Translation: as they still say in some parts of Texas, hire a "law-yuh."

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