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5 Considerations for Nonprofits in International Internal Investigations

Compliance and Ethics

Employment and Labor

Nonprofit Organizations

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Internal investigations involving activities outside the US require nonprofit leaders at the highest levels to respect the legal differences involved in inquiries and the cultural sensitives that may fundamentally change the approach of an investigation. In-house counsel are critical leaders in preparing and leading investigations outside the United States. Whether conducted with internal resources or outside counsel, the planning and implementation has heightened importance in protecting or exposing a nonprofit in litigation or other repercussions.

Investigations in a non-US environment have more facets. Employment claims may have different elements, such as anti-discrimination protections for specific groups or requirements for using employee committees for investigations. Claims about fraud or bribery could involve internal controls and mandatory reporting. Mishandling could shake the very stability of the nonprofit's local registration status.

As described in a prior article, key elements in any investigation are clarifying attorney-client privilege and attorney work product; investigating claims in a timely manner; and protecting against retaliation against those cooperating in the investigation. In the international context, in-house counsel can take precautions and prepare the nonprofit board and leadership for an international internal investigation.

1. Establish a relationship with local counsel

Preparation will smooth the path of any internal investigation. Whether you use in-house resources or local counsel in an investigation, in-house counsel should have a trusted local counsel to advise. Here are some considerations:

- A local counsel should have experience with employment, bribery, and fraud investigations, especially involving a US nonprofit organization working in-country.
- The local counsel should have strong working knowledge of English if the local language is not one that in-house counsel speaks. “Lost in translation” becomes a critical failure during the pressure of an investigation. (Sometimes using US outside counsel with language skills to manage the local counsel becomes important.)
- Select a local counsel that is directly managed by in-house counsel and not local staff. Local cultures, even for attorneys, often places loyalty in established relationships above the faraway client or its US staff. Retaining confidentiality about the investigation is very difficult when local counsel is accustomed to working directly with the local country director.
- Assure that local counsel understands any related entity relationship and advises on the necessity to have joint representations prior to a matter arising. In-house counsel will need to brief a local board on the necessity and value of an arrangement and continue to control the relationship with outside legal counsel.

Local counsel should have expertise in multiple law fields in order to adequately prepare for internal investigations. SOMKID THONGDEE / *Shutterstock.com*

In-house counsel will also have to adjust their position and understand they probably will not enjoy privilege during an in-country investigation. The local counsel should clarify in advance how in-house counsel can best protect their communications with the leadership and board. Government investigators, particularly, have unfettered access to documents and communications. This type of sensitivity to restraint and confidentiality should also be emphasized to the nonprofit leadership and board when an investigation ensues.

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In addition, local outside counsel should explain the differing risks to a nonprofit between private actions and government investigations. Investigations practices may vary depending on the type of complaint, internal resources (such as internal audits), and the risk of exposure.

2. Assure policies, training, and investigation process aligns with local law

In-house and local counsel should review local laws. PeopleImages.com - Yuri A / *Shutterstock.com*

A nonprofit may dedicate a great deal of resources to establish a code of conduct and whistleblower policies that are intended to protect the organization globally. In that context, in-house counsel can work with local outside counsel to determine if local laws may include specific parameters that restrict the ability to conduct internal investigations in a routine manner. For instance, a routine internal audits review may require express permission to review emails and this type of permission should be established before a compliance and investigation arise.

Employment laws usually have protections, such as prohibited discrimination among tribal group members or women of childbearing age, that may not be obvious to in-house counsel who are not in country. Some countries expressly require local employee committees to conduct investigations, so use of US-based counsel may not be feasible.

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For all these variables, local outside counsel can guide in-house counsel on how to adjust policies and trainings appropriately for country employees. This evaluation process will help structure a standard investigation process, based on the complaint type, that limits exposure and expedites an investigation.

3. Assess insurance

Many insurance policies are drafted for US-based claims, so it is important to have a broker with extensive experience with corporations working globally with multiple related entities. In-house counsel can be invaluable in helping the nonprofit and broker run through scenarios for an international investigation where an internal complaint is expected to instigate a litigation claim. For instance, employment practices liability insurance may not cover non-US claims and other options can be considered. Insurance companies sometimes pre-qualify local counsel to expedite coverage if a claim arises.

4. Culture

The common fail point in an internal investigation that is executed in a country is limited awareness of cultural norms. Those norms may be specific to the country, a region, or the operation. Ideally, in-house counsel will have some working knowledge of the power centers within the local operations, the tribal, caste, or race relationships, the gender treatment, and other dynamics that will be material to approaching an investigation.

In many countries, there can be multiple languages, perceptions of attorneys, or suspicion of remote interviews being recorded. Even terminology can have a significant impact. For instance, the word “investigation” can commonly have criminal implications to staff being asked to answer questions. Preparation can help in-house counsel navigate those cultural sensitivities. Resources can include in-house counsel at other nonprofits working in the region, outside counsel in United States and locally that have experience in the country, and cultivating a relationship with internal auditors or others who have worked in the region.

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5. Leadership and board guidance

The small circle of leaders involved in an internal investigation should understand the variables in an international context. In some cases where privilege and confidentiality are particularly important, involvement by outside counsel may become more important, such as bribery claims. Before investigations arise, present the process used by in-house counsel and internal auditors to the nonprofit's leadership and board. And explain the value of external resources to protect the nonprofit, playing out risks and protections, before an internal investigation emerges.

Communicate the necessary procedures and any precautions to the board before any internal investigations arise. Rawpixel.com / *Shutterstock.com*

During an investigation, a renewed commitment from leadership to protect all the staff from retaliation can be particularly important. While protecting whistleblowers is policy, retaliation may be more subtle if the investigation is being conducted at arm's length. The message and practice from the top should be taking seriously every complaint or concern from those employees (or contractors or grantees) being asked to support the internal investigation in country. In-house counsel can reinforce the importance of remaining protective of the process and the people.

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6. Preparation is critical

An in-house counsel — and its internal auditor partners — can be overwhelmed by an international investigation that is high stakes for the nonprofit. Preparation, perhaps beginning with the largest country operations or the most mission critical, can mean resources are ready to serve the organizations when a complaint is received.

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