



JEFF BYRD | SACRAMENTO BUSINESS JOURNAL

Workplace investigations

Employee misconduct policies save companies money and time

MICHAEL SHAW | STAFF WRITER

Janitorial services firm ABM Industries Inc. paid \$5.8 million last year to settle claims filed by the Equal Employment Opportunity Commission on behalf of 21 female employees in central California. The nationwide company, which EEOC said ignored sexual harassment complaints for years, also was ordered to institute a litany of safeguards, from establishing a toll-free number for complaints to ensuring third-party monitors will review investigations of future allegations.

While most business owners aren't likely to face allegations of negligence to the degree ABM was accused — the complaints ranged from male workers repeatedly exposing themselves to rape of one female worker — the case demonstrates the need for strong policies regarding employee misconduct, according to employment lawyers.

In a recent online seminar, two attorneys who serve as counsel to the California Chamber of Commerce noted the importance of policies that establish clear rules for workplace investigations. The potential consequences of failing to do so are clear from the settlement in the ABM case, said Erika Frank, the chamber's vice president and general counsel.

"That's a lot to pay for failing to investigate," she said of the \$5.8 million settlement. "All of that could be avoided if the

company took the complaints seriously and terminated employees."

Every business — even those with only a few employees — should have policies addressing all types of employee misconduct, from theft or embezzlement to threats of violence in the workplace.

"Knowing when and how to conduct workplace investigations is a critical skill for both large and small businesses," Frank said.

Sometimes allegations come directly to company officials, and other times they come from an outside agency, such as EEOC. In the case of the latter, companies should immediately contact counsel to represent them, Frank said.

Having a clear set of rules, however, can be important if the case eventually goes before a judge or jury, as even situations where a thorough investigation has been completed

can wind up in the court system.

"The courts have stated it's the employer's duty to conduct a prompt, appropriate investigation," Frank said. "It stops the misconduct and clears innocent people ... It can prevent the loss of valuable information and could limit liability or damage."

So when is a formal investigation appropriate?

Susan Kemp, senior employment law counsel for the California Chamber, said companies can choose to treat every incident with a formal investigation, but that could be time-consuming. More likely, issues such as inappropriate water cooler talk, the displaying of racy calendars or office gossip, won't need anything other than an informal inquiry.

But if there are serious allegations, such as a quid-pro-quo allegation of sexual harassment, a formal investigation with interviews is warranted. The chamber recommends training human resources employees or others in investigation, or hiring a third party to perform them. The third party should be an attorney or a licensed private investigator, or the results could be challenged in court. If the investigator is an attorney, however, he or she should not be the one who typically represents the company because a lawyer or firm involved in investigating a complaint could be barred from subsequently representing the company in a lawsuit.

Investigators should ask open-ended, non-leading questions initially to solicit information, narrowing down questions as needed. Any criminal activity uncovered should be turned over to law enforcement agencies.

The standard for proper investigations has been established by the courts, Kemp said. It requires that investigators talk to the accuser, accused and relevant witnesses; advise the accused of the misconduct allegation; and allow ample opportunity to defend against, correct or contradict

BIZ SAVVY

Checklist for starting your own business

Take this test to see if you're ready for entrepreneurship

I have never met anyone who left his or her job — whether fired or voluntarily — who then started his or her own business and regretted it.

What these people always regret is not having done it sooner. This includes people who eventually failed and had to go back to work for someone else.

Afraid to try something new? Most of us are. But our regrets will invariably be for what we didn't do rather than for what we did.

So are you ready to be an entrepreneur? Do you have the right stuff? Before you take the plunge and start your own business, take this test:

SWIM WITH THE SHARKS

HARVEY MACKAY

• **Do you need a new idea?** It isn't the quality of the ideas you have that will determine whether you are successful, it's the qualities you bring to those ideas.

New ideas are wonderful if you can come up with them. But your best chance of success is working hard, using established values and ideas if necessary.

• **Who are your customers?** "Everyone" is the wrong answer. If your concept is going to succeed, you have to identify a realistic target audience, big enough to be profitable yet small

MACKAY | PAGE 15

JUST THE FACTS

Engaging customers

Sixty-nine percent of small business owners use a form of social media to help run their businesses, according to a recent Webs social media survey of more than 1,100 small business owners nationwide. Here's how they're using the interactive tools:



Webs Inc. is a website development resource for entrepreneurs.

SBJ GRAPHIC

INVESTIGATION | Hiring an outside party to review serious allegations can be beneficial

FROM PAGE 14

statements of others.

And the witnesses and parties involved in an allegation of misconduct should not be promised confidentiality, as the matter could be revealed in court. At the same time, only those parties necessary to the investigation should have access to the information or files.

Employees who refuse to participate in

an investigation can be disciplined according to that company's policy. And employees who sign a statement are entitled to a copy of that statement, the lawyers said.

Often it makes sense to separate the responsibilities for investigating allegations and disciplining employees. That way, the investigator is less likely to be accused of bias if he or she has no input into the decision. Only after an investigation is complete should a permanent decision be

made about whether company rules were violated.

The lawyers noted that California law prohibits taking action that could be considered retaliatory to a whistle-blower. That includes changing work hours or locations to avoid contact with an employee accused of misconduct, which could be perceived as retaliation if the change inconveniences the worker.

Ultimately, the investigation should

determine whether it's reasonable to conclude that a violation of company policy took place. The courts have established that businesses don't have to prove the conduct occurred.

"The question is not whether the person did it, but did the employer act in good faith," Kemp said. "Did the decision follow an appropriate investigation."

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MACKAY | Create a business plan, seek advice, eliminate fear of failure to achieve success

FROM PAGE 14

enough for you to service it thoroughly.

• **Why should anyone want to buy your product or service?** Find an unmet, unanswered need by identifying a market segment that isn't being served or is being served inadequately.

For example, take the post office, which served everybody but unprofitably. Then FedEx and UPS jumped in and redefined the industry. They are profitable, while the post office is bleeding red ink.

• **Who is your competition?** If there is a market for your product or service, someone is supplying that market.

He or she may be using another product. Or using a nearly identical product that you can beat on quality, performance or service.

Either way, competition is a mixed blessing. It doesn't really matter how many others are doing something similar. All you have to do is find a way to do it better.

• **What advantages does your organization have over the competition?** Management? People? Product? Service? Financial strength? Reputation? Recognition? Marketing? One is not enough. Sometimes all are not enough. But you can usually beat better-financed competition with superior customer advantages.

• **Do you have a business plan?** If you haven't gotten around to that, make one before you do anything else.

The business plan serves several very useful purposes. It forces you to think your way through the startup process and your long-range goals. It's also a document you'll need if you plan on getting outside financing from anyone except your relatives.

If it isn't persuasive and effective to an independent outside businessperson, that might tell you something about your real chances for success.

Your plan should include a situation analysis, objectives, target audiences,

mission statement, objective, strategy and tactics, execution, budget, measurement and a time and action calendar.

• **What do your banker and lawyer say?** Bankers see and evaluate business plans all day long. That's their business. They might even have seen one like yours.

And while you're at it, ask if they would lend you money to finance your business.

Attorneys can help you avoid pitfalls. They are there to protect you.

• **What does your mentor say?** Find a "tiger," preferably someone who's been around the block.

Retired professionals are a marvelous resource for this kind of advice.

I can't urge you enough to check out SCORE. It has access to people with every imaginable kind of business experience.

These people also have the time, patience, skill, wisdom and understanding to help and sometimes, just to listen. They

are invaluable at helping you expand your network of contacts.

• **Have you done an honest self-survey?** Do you really want to do this or are you just trying to escape your own problems?

Be brutally honest and make sure the problem is not you. If you're going to be an entrepreneur, you have to believe in yourself more than you believe in anything else in the world.

• **What will you do if you fail?** Don't be discouraged if you do fail. Few entrepreneurs make it the first time they try. Failure teaches you not to fear failure because if you can survive it to fight again, you haven't failed. You have only heightened your appreciation of success.

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Structures 2011

at the new Sacramento International Airport Terminal

September 20, 7:30-9:30am

The Sacramento Business Journal's annual "Structures" event will be held this year at the region's most interesting new building: the new terminal at Sacramento International Airport.

Come hear what our panel of experts has to say about transportation challenges and opportunities in the region.

HARDY ACREE , Director of Airports Sacramento County Airport System	ROELOF VAN ARK , CEO California High-Speed Rail Authority (invited)
BECKY JOHNSON , Director of Public Affairs Siemens Industry, Mobility Division	MICHAEL WILEY , General Manager & CEO Sacramento Regional Transit District
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