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打击盗版

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在中国开展内部调查

Conducting an internal investigation in China



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假设您美国的总部在中国设有一间重要的生产厂，而您怀疑其对中国官员有行贿行为。您为此组建了一支有经验的团队去调查该一状况以决定如何处理。这仅是开了个好头。基于我们在本刊上期提出的问题，我们将在本期中进一步阐述您在调查中需要注意的其他事宜。

避免“打草惊蛇”

在律师或调查小组的其他成员“突袭”这间中国的生产厂之前，您应该首先取得当地高管的配合——如果有中国可予信赖的高管的介入，对于事件真相的调查将至关重要。

当地高管能够有效地向雇员传达讯息，以确保其对调查予以全面合作，而无论过程如何地令人不快。当地高管也能够协助您理解当地业务实践和程序，可能存在的文件以及存放之处，政治和文化上存在的可能对调查产生阻碍的注意事项，以及如何更好地同雇员进行行之有效的沟通。特别是对一些发生在几年之前的受调查活动，要找到参与其中或有所听闻这些活动的前雇员，当地高管可能就成为您的唯一希望了。

但是，在一些特定的情况下，当地高管可能有义务向中国法律执行部门报告非法商业行为。因此，您一定要慎重决定可以披露的信息。

当然，如果当地高管存在参与或者默许该非法商业行为的嫌疑，则您可能要限制或可能排除（根据不同情况而定）当地高管对该调查的参与。在该情况下，总部将有需要遣派其总部的高管来协助中国的调查活动。

上述这些细节看似简单，但一旦被忽略，则会导致调查的失败甚至造成不必要的损失。调查小组往往会不必要地惊吓到雇员

或令其士气低落。大多数雇员对于内部调查完全不熟悉；他们可能会担心工作是否还能稳固，或者因为其他人的非法行为而受到责难；他们也有可能顾虑公司的健康氛围因而受到损抑。因此，对雇员盘问的语调和问题本身都应当是尽量保持尊敬的，并充分考虑到文化上敏感之处——您的调查团队一定要尽力不去疏远任何一名对于揭露关键不法事实有帮助的雇员。

周密的计划能降低对公司日常业务管理开展调查的干扰因素。例如，在厂区外设置一处知情者访谈地是谨慎而有必要的，因为其不仅能够减少对工厂日常营运的干扰，同时能够增强保密性和谈话的坦诚度。您或许还需要有一些关键人员能在下班之后协助电脑专家采集电子数据。另外，谨慎周密的规划还将帮助您的团队迅速完成调查，从而确保公司能早日步入日常业务发展的正常轨道。

在调查中安慰雇员

有时候，雇员在一项内部调查中会面对非常不愉快甚至艰难的问题，特别是如果他们或者他们的朋友对所调查的行为有所牵涉。律师通常忘记安慰那些接受艰难问题的雇员——请注意，在内部调查中的大部分雇员都是善意且勤奋的。律师必须作为公司的大使并且延续公司对他们合作的理解和欣赏。一个通情达理的人定会善意回报，并最终受益于或者致益于调查的开展。因此，请始终保持庄重和风度。

知晓当地劳动、税务以及法律

您需要通晓中国劳动、税务以及法律的专家。您在外国土地上只是一名访客，您可

不想和地方劳动法律有所冲突。这比第一次在中国大陆（或香港、澳门）解雇一名雇员的情况要复杂的多——这出于很多原因，包括劳动法和雇员士气方面的原因，通常最好是双方协商和平“分手”；您也希望谨慎对待告密者或者心有不满的雇员，因为他们可能造成其他的问题而改变您此次调查的方向或重心。同时，同在美国一样，调查可能产生税务和监管的问题。如果有缴税责任尚未履行，或者与地方监管部门之间尚存在其他合规问题，则公司可能需要立即甚至在调查结束之前采取行动纠正这些不合规行为。

披露，不披露？这是个问题

是否向中国或美国的政府机关主动披露调查结果可以成为一个相当复杂的决定。在决定是否予以披露时有不少因素需被纳入考虑当中，包括非法商业行为对公司财政上的影响、公司内控的有效性、投资者关系和公众关系以及市场完整性问题等等。您的团队包括专业审计师和数据保密专家，以及公司合适的监督委员会（如一个专门的诉讼委员会），应当都参与到这些重要的决策之中。披露，还是不披露，不是一项容易的决定，其对于公司将可能产生重大的影响和后果。因此，必须进行审慎和全面的考量。

从您的调查最初开始，一直贯穿整个过程，您都需要考虑这些问题：是否或如何准备这份调查报告，对知情者的访谈是否纪录在案以及如何将调查结果转报给公司；对于您对调查采取的方式可能产生的重大影响，您将如何回答。

请牢记上述种种事宜，因为它们能够帮助您成功完成调查，并且同时最大可能地缩小对公司正常运营的干扰。■



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Your home office in the US has an important manufacturing facility in China, where it is suspected that bribery of Chinese government officials may have occurred. You have assembled an experienced team to investigate the situation and determine what to do about it. This is a good start.

Building upon the issues addressed in this column last month, we consider here additional matters you and your team should keep in mind during your investigation.

Avoid storming into China

Before lawyers and other members of the investigative team “storm” the facility in China, you should coordinate efforts with local senior management. The involvement of trusted members in China can be critical in discovering what actually happened.

Local management can most effectively convey to employees the need to cooperate fully with the investigation, no matter how uncomfortable the process is. Local management can also assist in your understanding of local business practices and procedures, what documentation might exist and where, which political and cultural issues may pose challenges, and how best to communicate effectively and efficiently with employees.

Where the activities under investigation occurred years ago, your local managers may be your only hope of finding former employees who may have been involved in, or have information about, those activities.

Under certain circumstances, however, local management may have obligations to report misconduct to Chinese law enforcement authorities. You must therefore decide carefully what information to share.

And, of course, if local management is suspected of, or acquiesced in, the misconduct, you will want to limit — or possibly exclude (depending on the facts) — local management’s involvement in the investigation. In those circumstances, home office is likely to want to send someone from its management team to assist in China.

These issues may strike you as rudimentary, but investigations can fail or cause needless damage if basic issues are overlooked. It is far too common that investigative teams needlessly

frighten or demoralize employees. Most employees will be entirely unfamiliar with internal investigations; they will worry about job security, they will worry about being unfairly blamed for the misconduct of others, and they may worry that the general health of the company could be imperilled. The tone and nature of the questioning of company employees must be respectful and attuned to cultural sensitivities. Your team must make every effort not to alienate the very people who can help uncover crucial facts.

Careful planning can minimize the disruptive effects of the investigation on the company’s daily business operations. It may be prudent, for example, to conduct witness interviews offsite; not only will this limit disruption of the facility’s daily operations, it will also foster confidentiality and candour.

You may also need to have key personnel available after hours to assist computer forensic experts to gather electronic data. Careful planning will also help your team to complete the investigation quickly, allowing the company to get on once again with its daily business.

Dusting off those roughed up

Sometimes, employees face very uncomfortable and difficult questions during an internal investigation, particularly if they or their friends got a little too close to the fire. Lawyers often forget to “dust off” those who have been on the receiving end of difficult questioning. Mindful that most of those interviewed in an internal investigation are likely to be good and hardworking, the lawyer must be something of an ambassador of the company and extend the company’s understanding and appreciation for their cooperation. Reasonable people will reciprocate that good will, which will benefit the investigation and those involved in it. Always proceed with dignity and grace.

Labour and tax

You need experts on Chinese labour, tax, laws and regulations. You are a visitor in a foreign land and you do not want to fall foul of local labour laws. It can be trickier than it might at first appear to terminate an employee in mainland China (or Hong Kong or

Macau). For a host of reasons, including labour law and employee morale, it is sometimes best to negotiate a peaceful departure. You will also want to be careful with whistleblowers and disgruntled employees who may raise issues that could alter the direction and focus of your investigation. And, just as in the US, the investigation may raise tax and regulatory issues. If taxes are owed or there are compliance issues with local regulations, the company may need to take immediate corrective action with appropriate authorities even before the investigation is complete.

To disclose or not to disclose?

Whether voluntarily to disclose the results of an internal investigation with government authorities in China or in the US can be a complicated decision. There are a number of factors to ponder when considering whether to make certain disclosures, including, among other things, the misconduct’s effect on the company’s financial position, the effectiveness of the company’s internal controls, investor relations and public relations, and market integrity issues. Your team, including forensic auditors and data privacy experts, as well as the company’s appropriate oversight committee (such as a special litigation committee), should be involved in these important decisions. To disclose, or not, can have important consequences for the company. It must be considered carefully.

Consider from the very outset of your investigation, and throughout, whether and to what extent to prepare a report of the investigation, and whether witness interviews should be memorialized, and how the results of the investigation are to be communicated to the company. How you answer these questions may have a material impact on the manner in which you conduct the investigation itself.

Keeping these issues in mind can help your investigation to succeed, and, at the same time, minimize disruption to the company’s continuing operations. ■