

Guide to Effective Investigations



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INTRODUCTION

The need to conduct an internal investigation arises in all organizations. Done properly, an investigation can help identify wrongdoing and correct the issue. Done poorly, the investigation can be detrimental in terms of bad publicity, loss of employee morale, and continuation of the problem. The primary purpose of any internal investigation is to improve the factual decision-making capability of management. This guide will help ensure that your investigation process is systematic and streamlined.

In this guide, we will cover some of the most critical aspects of investigations, including these topics:

1. Ensuring an objective and confidential investigation
2. Receiving the initial complaint
3. Conducting witness interviews
4. The need for accurate documentation and evidence
5. Making a Determination

ENSURING AN OBJECTIVE AND CONFIDENTIAL INVESTIGATION

The potential liability of a company and, in some jurisdictions, the personal liability of a participating management, depends on:

- The quality,
- Promptness, and
- Demonstrated fairness and objectivity of the investigation.

These are the elements an employer needs to take to demonstrate they took reasonable care to prevent and correct workplace harassment:

- Develop a written policy that defines prohibited conduct.
- Effectively communicate this policy to all employees.
- Train management and employees on sexual and other types of harassment and discrimination.
- Develop a confidential means of reporting harassment.
- Conduct a prompt, thorough and discreet investigation in response to complaints. This involves the following actions:
 - Initiate an investigation as soon as practicable—either the same day, or the following day after a complaint is lodged.
 - Remember that waiting to commence an investigation longer than necessary probably would not be considered prompt remedial action.
 - Consider that prompt investigation, even when wrongdoing is not found, reaffirms an employer’s anti-harassment policy, laying an even more solid framework for the affirmative defense.
- Where observed conduct constitutes sexual harassment, don’t wait for a complaint to be lodged.



- Don't allow your internal investigation to undermine reasonable avenues for complaints.
 - Thorough and careful investigations send a message to employees that the employer has an effective vehicle for sexual harassment complaints.
 - Avoid a policy that requires employees to file complaints with their immediate supervisors; instead provide several avenues for an employee to complain and allow the employee to bypass his or her supervisor, who might be the harasser.
- Follow through.
 - After the investigation has been completed and the final report has been submitted, the employer should advise the complaining party of the outcome of the investigation.
 - Appropriate discipline should be taken against the harasser if wrongdoing is confirmed.
 - Provide any necessary training, counseling, and support, and assure the complainant that cooperating employees have not been subject to reprisal for their role in the investigation.
 - Remember effective training in response to a singular incident will demonstrate to a jury the organization's commitment to preventing sexual harassment.

RECEIVING THE INITIAL COMPLAINT

Be sure your employees know exactly how to file a complaint—where they go, whom they talk to, what they report. This should be covered in your policy and any harassment training course. Hopefully the employees feel comfortable coming to their supervisor or HR with the information, which indicates a level of trust and credibility. If you receive anonymous complaints, those must be taken seriously as well and it is more difficult to address those if details are not provided.

Managers Role: Any person who receives the complaint should be well versed on the legal and practical issues of what to say and how to respond. This detail is covered in Session B of the Prevent Harassment training. As representatives of management, managers, supervisors, executives, should be trained to listen to the facts, and direct the employee to the appropriate person, usually an HR or employee relations person.

HR's Role: This person should have a higher level of skill and knowledge and be able to initiate an objective and confidential investigation.

In a conversation with the complaining employee, the person receiving the complaint should begin taking factually detailed notes. Once the complainant has finished articulating his or her concern(s), s/he should be asked to generate a document that reflects all issues raised. Explain that the document will serve to avoid confusion or misunderstandings and to clarify issues of concern to the complainant. Be careful not to commit to conducting an investigation at this initial meeting, as an informal resolution may still be possible.



If possible, obtain a written statement of the complaint from the complainant. If the complainant is not willing to write or sign a complaint, then the investigator should prepare a written summary of the complaint and make an effort to have the complainant confirm that the investigator's recitation of the complaint is accurate. Ask the complainant to provide the following information:

- Name of complainant including organizational details, title, department, location, phone number,
- Name of complainant's supervisor including organizational details
- Name of complainant's manager including organizational details
- Name(s) of alleged perpetrator(s), title, department, location, phone number, etc, if known
- Summary of all issues, concerns, or complaints
- Chronologically detailed account of the alleged issues with dates, times, places and first-hand witnesses to the events
- List of people the complainant suggests may have relevant information to the allegation and whether the information is first-hand or hearsay
- List of all documentation and physical evidence the complainant can provide or that should be acquired to support the allegations being made. For example:
 - Notes or log of events the complainant has made
 - Performance reviews
 - Corrective action documentation
 - Any other documentation the complainant deems appropriate

Once the complainant has finished composing the Initial Complaint, ask him/her to sign and date it. Note that you may need to collect this information on the phone if a complainant is unwilling or unable to fill out a form. If this is the case, take factually detailed notes of the initial meeting and generate the Initial Complaint on your own.

Once management has generated the document, ask the complainant to read the document. If the complainant requests changes to enhance the clarity of the documentation, add them. However, if the complainant wishes to delete information, note this, but do not remove the initial allegations. Requests for removal of information may indicate that the complainant provided misleading information initially or that someone in the work environment is applying inappropriate pressure. Ask the complainant to sign the revised document. If the complainant refuses, date and sign the report, noting the complainant's refusal to sign.

CONDUCTING WITNESS INTERVIEWS

Be prepared for your witness interviews and know how to respond to the questions.

- Be prepared for the "Why me?" question from your witness.
- Why are you interviewing this particular witness?
- What information or evidence do you hope to obtain?



- Decide beforehand whether you are going to disclose the entire reason for the interview or would that compromise your overall strategy?
- Decide if an introductory document or script will be used.
- Decide, as part of your strategic planning, if consequences for failure to cooperate will apply. If so, make sure you have a clearly written and communicated policy on this issue and that the corrective actions chosen are consistent with past actions concerning similar sets of facts with similarly situated employees.

Recognize that witnesses will have worries about what your agenda really is, and whether they may become the “target” of your investigation. This can be either an advantage or disadvantage; it can restrict the flow of information as witnesses attempt to protect themselves, or it can enhance the flow if they attempt to demonstrate teamwork and cooperation. In any case, be aware of the leverage that can be derived from uncertainty.

Be ready to take advantage of unscheduled interviews: In spite of all of the advantages of advanced preparation for a structured interview, do not overlook any spontaneous opportunities to obtain valuable information. Whenever appropriate, make yourself available in locations frequented by employees. When an aggrieved employee walks into your office to describe a problem, seize the moment. Postponing that visit may discourage certain disclosures and the source may be lost forever. If you are approached in an informal manner, be sure to conduct a follow-up interview with your co-investigator to formalize the information, also gathering any documentation and/or evidence using a forensic chain of custody.

It is important to convey to all interviewed that the company takes the allegations seriously. Be factual. It may only call into question the sincerity of your inquiry. Do not discuss your opinions and avoid making premature conclusions.

THE NEED FOR ACCURATE DOCUMENTATION AND EVIDENCE

DOCUMENTING WITNESS STATEMENTS

During the investigation, notes will be taken for many different reasons. The most typical being the interview notes for each person with whom the investigators have a dialogue. Interview notes should only contain factual information gathered as a result of the meeting with the witness.

OTHER DOCUMENTARY EVIDENCE

Often documents created as part of the normal course of business can be very useful to investigators and can lend strong support to post-investigation actions. Consider the following materials as you review and compile investigative documents:

- Personnel files
- Supervisor’s notes

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- Written company policies
- Posted information
- Employee handbooks
- Collective bargaining agreements
- E-mail messages

Be sure to examine these documents if they have any impact on the issues raised in your investigation. It is vitally important to be aware of documents that reflect poorly upon your organization as early as possible in the investigation process.

Assume that all documents are “discoverable” in litigation, unless the document is protected by the attorney-client privilege. That means be prepared to have the accused and his or her attorney scrutinize every piece of paper generated in your investigation.

Exercise care not to “waive” the attorney-client privilege by disclosing privileged and confidential materials to individuals outside the scope of the privilege. Give documents only to those persons who must see the documents in order to take personnel action.

DOCUMENT CONTROLS AND RECORDKEEPING

Documentation created or collected during the course of an investigation should be retained for a significant length of time, usually the length of employment plus seven years. Once an investigation is completed the documentation should be under the control of counsel to help protect the attorney-client work product privilege. The retention of investigatory files should be documented in the organization’s policy and procedure manual for conducting internal investigations. Should litigation occur, the documentation should be retained indefinitely.

MAKING A DETERMINATION

As you review your documentation, prior to making your final report, look over the files you’ve gathered. Determine if there are conflicting statements. Remove anything that is not relevant—that is, does not tend to prove or disprove the allegation being investigated.

Be sure to safeguard all documents collected by placing them in a confidential place where access is only allowed on a “need-to-know” basis—i.e., company lawyer, CEO, HR Director, Outside Investigator. If you’re investigating a discrimination complaint, you may need to gather current demographic information on a group or department: How have employees in the same protected class as the claimant fared in the group—pay, benefits, promotions—compared with other employees? How have other members of the protected class fared who report to the same manager or supervisor as the claimant?



Be sure to ask each witness if they have any documents that might be relevant to the matter, such as memos, diary entries, expense reports, etc.

As you go about gathering all types of evidence, you should be mentally composing your thorough, non-privileged Final Investigative Report to include:

- A description of the alleged wrongdoing;
- A description of the policies, procedures, and federal, state, and local laws applicable;
- A description of the physical, documentary, and testimonial evidence examined;
- A summary of the information elicited;
- Determinations as to credibility where there are conflicts in testimony; and
- Findings of fact based on the totality of credible evidence.

While identifying relevant facts, the investigator(s) should be identifying and analyzing which policies, procedures or laws have allegedly been violated. The task then becomes determining whether the facts support or refute the alleged violations of policy and/or law.

TAKING APPROPRIATE DISCIPLINARY ACTION BASED UPON YOUR FINAL REPORT

WHEN THE FACTS ALLEGED HAVE NOT OCCURRED

When it is determined that facts alleged have not occurred, it is best to take a neutral approach with both employees and to discuss why the conclusion was drawn. Emphasize that the investigation results are based on the evidence presented. Review the company's policies and procedures with each employee and discuss the issues of retaliation and reprisal. The complainant should be assured that, even though the investigation in this case turned out as it did, future complaints of misconduct will also be treated seriously and will be promptly and thoroughly investigated.

WHEN THE FACTS ALLEGED HAVE OCCURRED

When it is determined that facts alleged have occurred, the employer should take prompt corrective action. Whether the incident was minor or egregious, the alleged harasser must be disciplined. Discipline can range from warnings, preferably written warnings, to dismissal.

The complainant should be told that appropriate action has been taken against the harasser, and the importance of reporting future alleged incidents should be reinforced.

WHEN AN INTENTIONALLY FALSE COMPLAINT HAS BEEN MADE

If the employer determines the complaint was intentionally contrived to injure the alleged perpetrator, the employer must consider whether discipline should be taken against the complainant. Consult with legal counsel before disciplining the complainant.



WHEN YOUR INVESTIGATION IS INCONCLUSIVE

Sometimes the employer is unable to determine whether or not the facts alleged did occur. Where no clear determination of the facts can be made, the principal parties should be so advised. This should be done in a neutral manner. Both parties should be advised that misconduct, retaliation, and reprisal are unlawful and that the employer will protect the claimant, as well as others, from such conduct. Further, the claimant should be advised that future incidents of misconduct must continue to be reported and that the employer will treat each complaint seriously.

Both parties should be advised that all employees are required to observe and comply with all of the employer's policies and procedures. The employer may wish to review the policy with both employees to reinforce the seriousness of the matter. In addition, the employer may wish to explore the possibility of separating the parties by transfer so as to avoid future contact between them.

Finally, the employer may wish to use the incident as a springboard for re-communicating the organization's policies and procedures to the remainder of the work force. The amount of specific information broadcast should be enough so that the staff understands that an incident has occurred and has been investigated, but not enough to establish a basis for a defamation claim from one of the principal parties.

A copy of any corrective action documents should be placed in the personnel file of any employee disciplined as a result of the investigation. The full investigative record should be filed separately in a confidential secured file; this document is not considered to be a personnel record.

CLEARLY ARTICULATE THE BASIS FOR ANY CORRECTIVE ACTION(S)

Many employers fail to identify or articulate the reasons for discipline or termination. Instead, employers sometimes cite reasons for discipline they cannot prove or substantiate. At the same time, they overlook provable reasons that would justify termination. Remember your investigation goals—to obtain the facts, and determine whether misconduct has taken place. It is important to summarize your findings, and tie the disciplinary action directly to these findings. Providing an employee with vague reasons for his or her discipline or termination will only hurt an employer if the employment decision is ultimately challenged in court. The following will assist in an employer's defense in a wrongful termination claim:

- Whenever possible, identify the specific rule or policy the misconduct violated.
- Where more than one reason exists to justify termination, do not pick and choose which to inform the employee of; cite each of the multiple grounds that support the termination decision.
- Remember, if you decide not to give the employee a written copy of the reason for discipline or discharge, and instead orally communicate the basis, record it somewhere in the employee's personnel file. This information is discoverable during an administrative investigation or lawsuit. Employers must be prepared to defend the discharge on the basis told to the employee and the basis recorded if the two reasons differ at all.



The more difficult task involves determining what is appropriate discipline. *The severity of the discipline must be appropriate to the violations.* Several factors should be considered:

- The egregiousness (seriousness) of the conduct, including what occurred, length of time over which it occurred and the responses of the involved parties
- The more egregious the behavior the more likely that demotion, suspension and termination will be appropriate
- The hostility involved (e.g., was it an improper joke or a criminal assault?)
- The harm caused to the victim—if the victim suffered little harm, discipline may be less severe
- The harasser's employment record—similar prior behavior will support more severe discipline
- Whether the harasser was aware of the employer's relevant policy
- Discipline imposed on other similar cases
- Other employer policies, procedures, or union contracts relating to progressive discipline

Select a disciplinary action that fits the infraction. When possible, have someone else validate your conclusion. If the decision is going to be made in conjunction with others, meet with those individuals and jointly develop a recommendation.

If discipline does not include termination, the employer should monitor the situation to be certain that no further harassment occurs and the complainant is not subjected to reprisal or retaliation. If further harassment or retaliation occurs, additional disciplinary actions are warranted, up to and including termination.

Remember, terminations are a difficult and unpleasant task. Often, the employee has been employed at the company for several years. Personal feelings and ordinary human emotion must be taken into account. When possible, include appropriate management in the decision-making process. Consider using a Termination Checklist (see sample at end of this chapter). Avoid:

- Surprise—to the individual's manager
- Opening the floor to arguments in favor of or against termination
- Unnecessary publication of disparaging facts

Be sure your policy states in no uncertain terms that employees are required to cooperate in all workplace investigations deemed necessary by the employer. Failure to cooperate or sabotage of an investigation can be grounds for corrective action, up to and including discharge.

CONDUCTING APPROPRIATE FOLLOW-UP WITH COMPLAINANT

It is the employer's responsibility to ensure that retaliation does not occur. When the complainant and the accused are informed of the investigation's results, both should be advised of the organization's strong policy against retaliation. The complainant should also be told to report any conduct that he or she believes is retaliatory. (The complainant should also be told to report any continuation of the conduct



that caused the initial complaint to be made.) To further ensure that retaliation does not occur, the organization should follow-up with the complainant on a regular basis, giving the complainant ample opportunity to report any retaliatory conduct. Such meetings should be documented.

Be certain to communicate with the complainant and the accused (if any) at the conclusion of the investigation. Be ready with an explanation if the investigation concludes that there was no merit to the complaint or the result is inconclusive. In such a case, however, refrain from divulging details. You might say, for example, I interviewed five witnesses, or I was unable to locate a single witness, or I could not find any substantiation to the charge.

SUMMARY

Investigations, when done correctly, can keep an internal problem from becoming an external one, mitigate morale and productivity problems, prevent the problem from spiraling out of hands and avoid substantial financial losses.

However, a poorly conducted investigation can decimate morale, lower productivity, increase the likelihood of litigation and legal liability, and be very costly. Yet another potential problem is that an investigation may create divisiveness when employees are asked to comment about activities of supervisors and colleagues, or to disclose information that is harmful to a coworker.

Work with legal counsel to ensure that your investigatory process is solid and seek their assistance in every incidence that arises.