

WORKPLACE INVESTIGATION ESSENTIALS

Presented by:



WHAT WE'LL COVER TODAY:

- When to conduct investigation
- How to conduct an investigation
- Importance of confidentiality
- What to put in your report/findings
- Maintaining your investigation file
- Avoiding retaliation

DO YOU NEED TO INVESTIGATE?

As an employer, we have a broad responsibility to investigate workplace issues, such as...

- Harassment/Sexual Harassment
- Discrimination
- Workplace Violence
- Performance
- Inappropriate Behavior



WHEN DO YOU NEED TO INVESTIGATE?

Conduct an investigation if:

- Employee/Vendor/Customer brings complaint to Management or Human Resources
- Manager reports a complaint made to him/her by an employee/vendor/customer
- Anonymous complaint is brought and has enough detail that it can be investigated

POLICIES THAT MAY REQUIRE INVESTIGATIONS

- Discrimination or Harassment
- Violence in the Workplace
- Personal Use of the Telephone, Computer, or Other Company Equipment
- Theft
- Cash Handling
- Insubordination
- Other Conflict in the Workplace



OFF-DUTY CONDUCT: TO INVESTIGATE OR NOT TO INVESTIGATE

- Off-duty conduct is generally off-limits
- Privacy Laws
- Difficult to investigate; may not yield complete or accurate information.
- If an employer chooses to implement reporting requirements, the policy should also explain the rationale behind the reporting requirement.

INVESTIGATION STEPS

1. Receive the Initial Complaint
 - Written if possible; make sure you understand the nature of the complaint
2. Provide Protection if Necessary
3. Select the Investigator/Investigation Team
4. Make a Plan

INVESTIGATION STEPS

5. Develop Interview Questions
6. Conduct Interviews
7. Determine the Facts of the Matter
8. Follow Up

GET COMPLAINT IN WRITING

- An accurate and consistent description of the alleged events will help in conducting the investigation
- If employee does not want to put complaint in writing, have person taking oral complaint write it down, have the complainant review it, and sign, acknowledging it is accurate
- Include the names of all parties involved



THE LEGAL RISK OF NOT INVESTIGATING

Even if company chooses not investigate and takes the direction of an informal response, to minimize legal risk do the following:

- Document reason in memo to complainant
- Follow-up with complainant
- Observe workplace behaviors



INTERMEDIATE MEASURES

If complaint is harassment, discrimination, or violence, make sure that the conduct does not continue.

- Schedule Changes
- Suspension or Administrative Leave
- Cannot appear to be retaliation

WHO SHOULD INVESTIGATE?

- Investigators should be credible, respected, and neutral
- Advantage of using an investigation team
- One male and one female employee to investigate, especially in matters of sexual harassment
- Internal vs. External Investigators
 - ✓ Look at who the allegation is against
 - ✓ Type of claim brought
 - ✓ Severity or pervasiveness
 - ✓ Organization personnel available to conduct the investigation

AN INVESTIGATION MUST HAVE:

- Speed
- Thoroughness
- Objectivity



INTERVIEW FORMAT

- Introductions
- Explain purpose of investigation
- Describe investigation process
- Emphasize importance of confidentiality
- Discuss zero tolerance for retaliation
- Clarification of relationship of parties involved



CONDUCTING INTERVIEWS

- Interview complainant
- Interview any individuals named in complaint as witnesses
- Interview the alleged offender
- Interview any witnesses named by alleged offender
- At the end of each interview, assess the credibility of the person interviewed

INTERVIEWING THE COMPLAINANT

- Reassure the complainant that no negative action will be taken
- Confidentiality -- limited to those who need to know
- Do not use leading questions
- Get specific details: direct & observable knowledge, not hearsay
- Obtain signed written statement/questionnaire

QUESTIONS TO ASK REGARDING EACH ALLEGATION:



- Who?
- What?
- When?
- Where?
- Your response?
- Witnesses/documents?

FOLLOW-UP QUESTIONS:



- Is there anything else you think I/we should know?
- Is there anyone else you think we need to talk to?
- Supporting documentation?
- What would you like to see happen as a result of this investigation?

INTERVIEW OF WITNESSES

- Disclose only “need to know” information
- Focus on specific facts, first-hand knowledge
- Separate speculation and innuendo from specifics of what happened
- Draw distinction between:
 - Don’t recall whether it occurred
 - Recall that it did not occur

INTERVIEW FORMAT FOR WITNESSES

- Explain purpose of investigation – no conclusions
- Confidentiality maintained to the extent possible
- Discuss confidentiality and retaliation
- Is it first-hand knowledge?
- Ask questions to get facts
- Find out who else you should talk to
- Obtained written signed statement/questionnaire

CREDIBILITY OF WITNESSES

- Is the testimony believable on its face? Does it make sense?
- Did the person seem to be telling the truth or lying?
- Is there witness testimony?
- Is there physical evidence that corroborates the party's testimony?
- Did the alleged offender have a history of similar behavior in the past?

INTERVIEW OF ACCUSED



- Should you disclose identity of complainant?
 - General rule – yes
 - Exceptions may include
 - Public event
 - Safety concern
- Provide accused a detailed account of the complaint
- Allow accused to fully provide his/her own account of the incident

INTERVIEW FORMAT FOR ACCUSED

- Explain purpose of the investigation –
 - “No conclusions have been reached at this point.”
- Confidentiality maintained to those who need to know
- Give information about the allegations
- Obtain written statement/questionnaire
- Observe non-verbal cues
- Probe further upon denial
- Are there witnesses?
- Discuss confidentiality and retaliation

REVIEW EACH ALLEGATION, 1 BY 1

- General questions, more specific as necessary
- Distinguish between
 - Don't recall whether it occurred
 - Recall that it did not occur
- If denied, ask accused why the complainant would say that it did
 - May uncover some other issue going on
- Ask accused for Witnesses, Documents, Other relevant information

NON-EMPLOYEE OFFENDER

- If the alleged offender is not an employee:
 - ✓ Contact his/her employer
 - ✓ Let them know of the claim
 - ✓ Request that they conduct an investigation
 - ✓ Follow-up to ensure that appropriate action has been taken



INVESTIGATION TIME LIMITS

- The investigation should be completed and appropriate action taken within days of a complaint
- SHRM states average time to initiate an investigation is 2.1 days, with 6.7 days to complete



STATEMENT OF INTERVIEW

- Have two people conduct interview
 - 1st person asks questions
 - 2nd person takes notes
- Type up statement of interview based on questions and answers
- Have person interviewed review, make any corrections, and sign statement
- All statements go into your separate investigation file
- If recording, all parties must consent

BACKGROUND INFORMATION

- Review personnel files of the complainant, alleged offender, and any witnesses
- Look at any past history of complaints filed against accused, or by the complainant
- How was any past incident dealt with



REACH A DETERMINATION

- Investigator must determine whether the allegations are true or false
- If sufficient evidence is found, disciplinary action will depend on seriousness of incident and “track record” of offender
- Make sure you follow the company’s policies
- Review findings with Human Resources or legal counsel

DECISION MAKING

- Nature of conclusion
 - Avoid legal labels
 - Focus on appropriateness or inappropriateness
- Basis for conclusion
 - Include credibility findings, where applicable
- Motive/Intent of Accused (if inappropriate behavior)



DECISION MAKING

- Possible conclusions as to each allegation:
 - Occurred and inappropriate
 - Occurred but not inappropriate
 - Did not occur
 - Unclear whether behavior occurred
 - Not to decide is to decide

FINAL REPORT



- Prepare a report based on findings from interviews and any other documentation
- Keep report brief and concise
- Write report in objective, neutral style
- Any conversations with legal counsel should not be included in report
 - That is privileged attorney-client information
- Have Human Resources/legal review draft report before finalized

Remember: Report could become
“Exhibit A” in court some day

CORRECTIVE ACTION

Legal standard:

- Punish/Discipline for wrongdoing
- Deter recurrence

Best practice:

- Allow for redemption (if termination isn't warranted)

NON-SUBSTANTIATED ALLEGATIONS

If investigator finds no evidence to substantiate the allegations

- Let complainant know the conclusion; if issue is harassment advise him/her to report any future incidents of harassment or retaliatory actions
- Let accused know the conclusion and remind him/her of importance not to retaliate against person bringing claim



COMMUNICATING RESULTS

Two Objectives

- Getting workplace back to normal
- Stemming potential litigation

Be aware of...

- Disclosure versus Confidentiality
- Need to revise policies
- Need for training and/or refresher
- Is the current complaint process working?



INFORMING THE COMPLAINANT

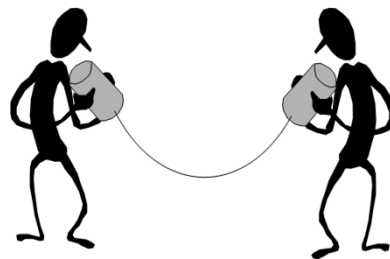
- ✓ Inform complainant of the results of the investigation and your corrective action plan
- ✓ Let employee know you will be monitoring the situation
- ✓ Remind employee to let you know if he/she experiences any retaliation

INFORMING THE ACCUSED

- Inform accused of the results of the investigation
- Inform of any corrective action plan, discipline, etc.
- Do NOT debate results of investigation
- Caution against retaliation

INFORMING OTHERS

- The less said the better
- May need to communicate *some* information regarding results of investigation
- Avoid speculation
- Bring closure





- Meet periodically with employee who brought complaint to make sure he/she has not experienced any further issues (i.e., harassment) or been retaliated against
 - For example: meet at 2 weeks, 6 weeks, 3 months after investigation
- Document your conversation with the employee, including any issues, concerns, outcomes, and put in investigation file

RETALIATION: WHY DO WE CARE?

- Protection is widely available in many laws
- Easy to prove/hard to defend
- High risk claims
- Hard to prevent retaliatory reaction
- Easy for juries to understand
- Employee may lose the initial claim but still win a retaliation claim

RETALIATION



- Prevent and correct retaliation against
 - Complainant
 - Witnesses

How?

- Observe
- Follow up
- Train Supervisors
- Alert them to the situation

INVESTIGATION FILE



- All information that makes up formal investigation goes into investigation file
- NOT part of employee's personnel file
- Include the following
 - Notes
 - Written complaint
 - Witness statements
 - Documents from witnesses
 - E-mails
 - Policies
 - Tape recordings, computer files, timecards, calendars, etc.
 - Report

10 MOST COMMON MISTAKES...

WHEN CONDUCTING INVESTIGATIONS

1. Failure to get input from the person complaint is against/alleged harasser
2. Failure to get input from the complaining employee
3. Shortcutting the investigation; not interviewing ALL witnesses
4. Dragging out the investigation
5. Terminate now, investigate later



10 MOST COMMON MISTAKES...

WHEN CONDUCTING INVESTIGATIONS

6. Failure to close the loop
7. No "second set of eyes"
8. Inadequate or flawed documentation
9. Failure to protect privacy
10. Requiring "face-to-face" confrontation

mistake



QUESTIONS?



THANK YOU!



Sandra Villegas

www.associatedemployers.org

406-248-6178