



Tools to Conducting an Effective Internal Investigation

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Overview

- When is the duty to investigate triggered
- Steps to an effective workplace investigation
- Concluding a workplace investigation
- Pitfalls to Avoid

When is the Duty to Investigate Triggered?

The duty to investigate can be triggered by a variety of circumstances. Some of the more common instances involve:

- A complaint of discrimination, harassment or retaliation (i.e. EEO)
- A complaint about safety violation(s)
- Whistleblower complaint
- Complaint about wages

Specific EEO Considerations

Complaints that stem from protected categories or protected activities should be given careful and immediate attention. Protected categories and actions include:

- Race
- Color
- National origin/ancestry
- Religion
- Sex/gender
- Sexual orientation
- Pregnancy
- Age
- Marital status
- Disability/Medical Condition
- Veteran Status
- Requesting a reasonable accommodation
- Requesting a protected leave of absence, i.e. FMLA, pregnancy, disability

All Reasonable Steps

Federal law, and several state laws, establish employers have a legal obligation to take “all reasonable steps” to prevent discrimination, harassment and other unlawful practices. Employers must also take steps to correct inappropriate workplace behavior.

Investigations are one of the key “reasonable steps” employers can take to identify and address inappropriate conduct in the workplace.

When is an employer on notice?

There are numerous ways an employer can be put on notice which may trigger the duty to conduct a workplace investigation:

- Written complaint
- Verbal complaint
- Anonymous complaint
- Employer hotline
- Exit interview
- Formal process, i.e. agency complaint, lawsuit
- Other

A word about the word “Complaint”

The word complaint can mean different things to different people. In the context of investigations, employers should interpret this word broadly. An employee claiming something is “unfair” may be considered a complaint. Words and phrases such as, “treated differently” or “that person makes me uncomfortable” may be sufficient to trigger the duty to investigate. When in doubt, ask more questions to determine if the duty to investigate is triggered.

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Sara works in the office as an estimator. Rich is a journeyman in the shop. Sara and Rich, along with several other co-workers socialize outside of work. Sara and Rich can sometimes engage in flirtatious conduct but nothing beyond that has happened. Recently Sara elected to have a boob job. When she returned to work, her co-workers noticed the change in her appearance. Rich was discussing Sara's new appearance with Joe and Chris while the Shop Foreman, Pete, was standing near by. Rich jokingly told Joe and Chris that he paid for Sara's surgery and she is going to repay him with sexual favors. Everyone had a good laugh. The next day, Joe told Sara about Rich's joke. Sara did not appreciate Rich's joke and goes into the office and told Marjorie, who works in accounting, about Rich's comment, that she is upset and doesn't want to work with Rich anymore.

Has the duty to investigate been triggered?

Steps to a Workplace Investigation

- Pick the investigator
- Identify the focus of the investigation
- Identify witnesses
- Identify relevant documents
- Conduct Interviews
- Analyze information gathered
- Reach conclusion

But remember – there is no one size fits all. Investigators need to be nimbal and realize these steps may need to be adjusted depending on a specific set if circumstances.

Choosing the Right Investigator

The investigator will lead the entire investigation process. Thus, it goes without saying, picking the right investigator is a key step in the process. The right investigator is someone who is:

- Impartial
- Objective
- Has experience/training
- Understands the importance of confidentiality
- Understands the focus and purpose of the investigation

Sometimes it is necessary to bring in a third-party investigator from outside the workplace. This is particularly the case when the complaint involves human resources or those who typically conduct workplace investigations or when the complaint is already at the formal process (i.e. lawsuit or agency charge).

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Who should conduct the investigation into Sara's concerns?

- Marjorie
- Pete
- Someone else in the organization
- A third party investigator

Focus and Purpose of the Investigation

Many investigators do not understand the purpose of a workplace investigation. An effective workplace investigation will answer two key questions:

- Did the conduct occur?
- Did the conduct violate a workplace policy?

The purpose of the workplace investigation **is not to determine if the alleged conduct is unlawful.**

Start with a plan

A good workplace investigation begins with a plan that identifies the focus of the investigation. It also takes into consideration several logistical factors.

- Will the investigation be conducted in person or virtual
- Witness list
- Document list
- Timeline for the investigation
- Is there any immediate action that should be taken pending the outcome of the investigation (i.e. suspension pending result of investigation, reassignment, leave of absence, etc.)
- Who needs to know the results of the investigation
- Will there be a written report

Start with the Documents Before Conducting Witness Interviews

One pitfall investigators often fall into is to jump immediately into witness interviews without stopping to determine if there are any relevant documents they should review before speaking with witnesses. This is a big misstep as often times documents can provide key insight into potential lines of questioning or other potential witnesses. Investigators should also be sure to review relevant employer policies, such as EEO or safety policies.

It is usually at this point when the Investigation File should be started.



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What are some of the documents the investigator should review in connection with the investigation?

Investigation File

- List of actions taken, i.e. phone/email log, when interviews scheduled, documents reviewed
- Relevant documents, i.e. complaint, written statement and policies
- Witness interview notes
- Written report, if desired.

Pre-Interview Planning

- Consider witness order, generally start with the complainant, witnesses and then the respondent.
- Sketch out lines of questioning for each witness, including relevant documents where needed
- Determine where the interview will be conducted to ensure confidentiality and discretion so the witness feels comfortable in sharing information



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Who should the investigator interview as part of the investigation?

Effective Interviewing Techniques

The goal of any investigatory interview is to try to obtain as much relevant information as possible. To do this, you set the stage and have a plan. Ensure you are conduct the interview in a location that makes the witness comfortable and discrete. Use your draft lines of questioning as a guide, but don't be tied to it. As the interview evolves, be ready to shift lines of questioning around and explore new areas. Other key tools to enlist include:

- Ease into the interview, explain the process
- Asking open ended questions. Avoid yes or no questions and instead ask questions that elicit a more detailed response, i.e. tell me what happened? What did X say/do next?
- Remember the 5 Ws – Who, What, When, Where and Why.
- Focus on the facts – Steer clear of rumors or opinions and redirect witnesses back to what they observed or heard first hand.
- Take notes but don't lose eye contact.
- Review your notes and lines of questioning before ending an interview. Circle back to areas of questioning if needed.

Other Interview Tips

- When meeting with witnesses be sure to remind them about:
 - The “need to know”
 - Prohibition against retaliation
- When meeting with the complainant:
 - Be sure to cover all of the allegations raised in the complaint
 - Inquire as to the desired outcome from the investigative process
- When meeting with the respondent:
 - Review each allegation in such a way that allows the respondent the ability to fully respond
 - Remind the respondent regarding no retaliation against anyone involved in the investigation

What about confidentiality?

An investigator cannot promise complete confidentiality. The investigator can represent that they will conduct the investigation discretely and only speak with those who need to know but cannot promise the investigation will be kept confidential.



Things to Avoid During Interviews

- Sharing your opinions
- Discount what the witness has shared with you or their observations/perceptions
- Promise any specific action – the investigation is not completed

The Uncooperative Witness

Most people are not excited about being interviewed in connection with a workplace investigation. Some will take the position, they will not cooperate as not to get involved. Tools investigators can use in these instances include

- Take some time at the beginning of the process to try to build a rapport with the witness.
- Help the witness understand the employer's expectations with respect to the investigation process and any policies regarding participation in internal investigations
- If the witness still refuses to participate, document that in your file

Employee Representatives

Union employees have the right to have a representative present during an interview that the employee reasonably believes could lead to discipline. Employee representatives are allowed to give advice and active assistance to an employee during an investigatory interview. They are not, however, allowed to interfere with the interview.

Not all workplace investigations will trigger employee representative rights. If the employee is being questioned about another employee's conduct, i.e. the employee is a witness in a complaint but not the respondent, that witness employee is not entitled to representation if they are being questioned about what they observed.

Should You Ask for Witness Statements?

This is a difficult question and will vary depending on who you ask. Before asking for witness statements, the investigator should consider if they believe the witness will be able to effectively prepare a witness statement. Some investigators will prepare statements for witnesses. This can sometimes lead to the statements being challenged as not being truly witness statements. Other investigators will read their notes to the witness at the conclusion of the interview, ask the witness if the notes accurately capture the information provided during the interview and, assuming they are accurate, ask the witness to sign the investigator's notes, verifying they have reviewed the notes and that they are accurate. Other times, the investigator may determine to simply rely upon their interview notes. The investigator will need to determine what approach is best under each situation.

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The investigator has been working through the documents and conducting interviews to reach a conclusion. When the investigator finishes Sara's interview, she asks if this is going to be kept confidential. What should the investigator tell Sara in response?

During his interview, Chris is uncooperative and tells the investigator he does not want to get involved and that he likes both Sara and Rich. What should the investigator tell Chris to encourage him to be forthcoming and participate in the process?

Before Reaching a Conclusion

Once the interviews are completed and the relevant documents have been obtained and reviewed, determine:

- If there are any additional documents you need to obtain and review,
- If there are any additional witnesses you need to meet with or follow up questions you need to circle back with to witnesses you already interviewed

Forming The Conclusion

Once the investigation is complete, the investigator needs to review the file to form a conclusion. The investigator should:

- Review the information gathered and draw reasoned and logical factual conclusions as to what occurred
- Give consideration to contradictory information provided by witnesses and documents and take into account credibility assessments
- Determine if the information gathered is enough to establish in good faith that the alleged conduct occurred, did not occur, or if the investigation did not yield sufficient information to form a conclusion
- If the investigator determines the alleged conduct occurred, evaluate if the conduct violates an employer policy(ies)

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The investigator completes the investigation and determines Rich did make the alleged comments. The investigator also finds that Rich's conduct violates the company's policy prohibiting harassment in the workplace. Shortly after the investigator reaches this conclusion, Sara sends an email inquiring about the status of the investigation.

What should the investigator do in response, if anything?

Is a Written Report Desired

Not all investigations will need a written report. Written reports are often time consuming and care should be given in drafting them to ensure they are complete, impartial and objective. Before taking on such an undertaking, the investigator should meet with the decision makers involved with the investigation to determine if a written report is necessary or if a verbal report of findings will suffice. If a written report is desired, the investigator should take care in preparing the report. The investigator must understand the report will likely become a key exhibit and important process should any formal legal process ensue.

Components of a Written Investigation Report

- The report should include:
- A summary of the allegations that spawned the investigation
- The remedy the complainant requested, if any
- A Summary of the relevant documents
- A summary of the witness interviews
- Chronology of events if helpful
- Findings of fact
- Statement of determination regarding policy violations
- Exhibits

Common Pitfalls

- Failing to investigate the “off the record” complaint. There is no such thing as “off the record.”
- Failing to maintain objectivity
- Failing to review all relevant documents or interview all relevant witnesses
- Failing to focus on the facts in investigation file
- Failing to bring in a third-party investigator when needed
- Failing to monitor for retaliation



Thank you

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