



How to Conduct a Sound Workplace Investigation

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Workplace investigations play a key role in detecting and rooting out employee misconduct, bullying, discrimination, harassment, and similar issues. They are also relevant in employment-related legal actions, for example in an arbitration proceeding to show that misconduct occurred or in a discrimination lawsuit to prove that an employer's response to a complaint was appropriate. This month's article explores key considerations related to conducting proper investigations.

Investigations must be timely, fair, objective, and thorough. The following eight considerations will help meet these criteria.

1. Know when to conduct an investigation.

An investigation should begin when there is reason to believe that inappropriate conduct is occurring. Legally, an employer is on notice and required to act when it “knew or should have known” of unlawful conduct. This requires acting upon formal, informal, or anonymous complaints or reports, supervisory observations, workplace rumors, or any other means of notice. Investigations are required even if the person making the report or complaint asks that nothing be done. Employers cannot require a written complaint but should request one.

2. Begin the investigation as soon as possible.

A prompt investigation meets the law's requirement to move in an expeditious fashion in cases of unlawful harassment, and it assists in the preservation of evidence. Many employees are fearful about making a complaint or participating in an investigation, so moving quickly helps to obtain needed information before they change their minds about cooperating.

3. Take interim measures where circumstances warrant.

Interim measures may be required while an investigation is pending to protect the parties. This can include actions like placing the accused on a paid administrative leave, physically separating the parties, or making schedule changes.

4. Select the right investigator.

The person selected to conduct the investigation must be trained and experienced,¹ possess core soft skills, such as the ability to demonstrate empathy and establish rapport, employ active listening skills, and be intentional about managing biases. Selecting the right investigator is important because the quality of the investigation impacts the success of any related legal claims, and the investigator often becomes a key witness in those proceedings.

In many instances the organization should hire an outside investigator. It can be difficult for in-house staff to be impartial and objective, especially if the investigator knows the parties involved, and has already formulated beliefs or biases about them.

Many employment attorneys are trained workplace investigators, and when an investigation is done by an attorney or under the direction of an attorney, it may be attorney/client privileged and work-product protected. While the privilege may later have to be waived, for example, to demonstrate that the investigation was prompt and thorough, or that no unlawful harassment occurred, the protection it affords is worthy of consideration at the outset.

5. Plan the investigation.

No one should ever “wing” an investigation. Careful planning is the key to ensuring the investigation is thorough and done right. A written investigative plan should outline:

- the scope of the investigation,
- who to interview and in what order,
- subjects to be addressed and questions to be asked,
- relevant documents and other potential sources of evidence,
- logistical arrangements, and

- decisions on issues such as whether to use a second interviewer, witness admonitions, recording interviews, and allowing representatives.

6. Interview all relevant parties using proper techniques.

The key to effective interviews is to build rapport with the interviewees and make them feel as comfortable as possible to secure receipt of complete and quality information. Interrogation techniques are inappropriate in workplace investigations.

Interviews should begin with simple open-ended questions about witnesses' backgrounds to help put them at ease. Questions around substantive issues should start broadly using the standard who, what, where, when, and how, and then become progressively narrower to gather all relevant details and check for consistencies and contradictions. Asking questions in different ways, and making inquiries like, "how do you know that," and "what do you mean by that" are valuable to obtain details and to discern fact from witnesses' opinions.

Every interview should end with questions that will ensure witnesses have shared all they know. These include, "Is there anything else I should know?"; Is there anything else you thought I would ask but didn't?"; "If you were in my shoes

is there anything else you would ask?"; "Is there anyone else you think I should talk to, or documents that I should see?"

Throughout the process, interviewers must set aside biases and preconceived notions, keep an open mind, and avoid assumptions and jumping to conclusions. Conclusions must wait until all evidence has been gathered and facts evaluated. Moreover, interviews are not the time to share opinions, and words and tone of voice should be carefully monitored to avoid giving an impression that the interviewer agrees with anything a witness says.

7. Gather other potentially relevant evidence.

In some investigations evidence will be limited to witness statements. However, in other situations, other forms of evidence may need to be gathered and evaluated to make a final determination. Relevant information may include:

- personnel, payroll, disciplinary, attendance, and computer or other electronic records,
- emails, texts, and other correspondence,
- citizen or vendor complaints,
- sales receipts and credit card charges,
- or even video footage or audio recordings.

Any reliable information that could prove or disprove a pertinent fact should be considered.

8. Make a decision!

In many investigations, there will be conflicting stories or versions of what happened. Making credibility determinations in the face of these conflicts is the core of what the investigator is called to do. A conclusion needs to be made as to whether, based upon a preponderance of the evidence, it is more likely or not that the allegations are true. Rarely is it impossible to reach a conclusion.² This is where a trained investigator who understands and is skilled at making credibility decisions proves valuable.

Conclusion

Investigations help detect problems in a timely manner and determine what happened so that appropriate remedial measures can be taken. They must be treated with the seriousness they are due, and there are many factors involved in making sure they are done correctly. When legal considerations are implicated, employers should consult their municipal or employment law attorney before undertaking one.

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1. EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (06-18-1999). ("Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.")

2. See for example EEOC Policy Guidance on Current Issues of Sexual Harassment (03-19-1990) ("In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's

account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.); see also EEOC Enforcement Guidance, *supra* note 1, sections on "Credibility Determinations" and "Reaching a Determination."

Stay tuned for announcements on the League's
122nd Annual Conference.

We are busy planning a great event!

