

EMPLOYER BEST PRACTICES

## Step-by-step guide to investigating workplace harassment claims

by David Kesler

*Allegations of harassment in the workplace abound. While harassment based on sex and race are the most common types of harassment complaints employers receive, allegations of harassment based on other protected classifications (e.g., disability and religion) also are on the rise. When responding to harassment complaints, you should conduct a prompt and thorough investigation. And because your response will be scrutinized if the employee later files a charge or lawsuit alleging unlawful harassment, you need to not only do an investigation but also make sure to do it correctly.*

*Bearing in mind that each situation you encounter will be different — and that no single “checklist” is a substitute for the comprehensive training you should provide all your employees who are engaged in the tricky work of conducting workplace investigations — here’s a list of steps you can use as a guide in getting to the bottom of workplace complaints.*

### Investigation checklist

- ✓ **Interview the complaining employee.** Interview notes should include the identity of the alleged harasser, details of what was said or done, the date of the occurrence(s), the date the complaining employee initially reported the allegations and to whom, the date of the interview, and the identity of possible witnesses.
- ✓ **Have the complaining employee sign and date a written statement.** If the statement isn’t in the employee’s handwriting, include an acknowledgment that she has read it in its entirety, she has had the opportunity to make corrections, and it is true and accurate to the best of her knowledge and belief.
- ✓ **Address confidentiality concerns.** Assure the complaining employee of confidentiality to the extent possible, but inform her that it’s subject to your obligation to interview witnesses and the accused harasser. Never promise total confidentiality or anonymity for the complaining employee.
- ✓ **Assure the complaining employee that retaliation won’t be tolerated.** Explain that company policy prohibits retaliation against employees for making complaints and that everyone participating in the investigation will be reminded of that policy. Encourage her to inform management or HR if she believes retaliation is occurring. (Also, at this point, be sure to document that you have addressed confidentiality and retaliation.)
- ✓ **Interview witnesses.** First, decide whom to interview and where the interviews will take place. When you meet with witnesses, explain the reason for the interviews. In conducting the interviews, follow the first two steps in our checklist. If the witness refuses to sign a statement, provide him with a summary of his testimony and invite him to make any necessary corrections. Instruct the witness to keep the matter confidential and not discuss it with anyone except as part of the investigation.
- ✓ **Address your antiretaliation policy with every witness.** Remind each witness (including the complaining employee and the accused harasser) about the company’s antiretaliation policy. You may wish to provide witnesses with a written copy of the policy. Let everyone know they are prohibited from retaliating against the complaining employee or other witnesses and that they’re also protected from retaliation based on their participation in your investigation. Tell them they should report retaliation if it occurs. Explain how and to whom such reports should be made.
- ✓ **Interview the accused harasser.** When you meet with the accused, explain the reason for your interview, including the nature of the complaint. Follow the first two steps in our checklist, and instruct him about confidentiality and the prohibition on retaliation. Let him know in no uncertain terms that retaliation will result in disciplinary action, regardless of the outcome of the harassment complaint. In some cases, it’s a good idea to meet with the accused harasser before meeting with other witnesses. If he admits to the alleged conduct, you may not need to talk to anyone else. In other cases, you may want to get all the facts from other witnesses before talking to the accused.
- ✓ **Identify additional witnesses.** Ask each witness (including the accused) if he knows who would have information about the situation. Interview those witnesses, following the steps outlined above. Remember, if you learn new facts during the course of an investigation, you should meet again with witnesses you’ve already interviewed to ask follow-up questions.
- ✓ **Determine whether immediate action is needed.** Sometimes, you shouldn’t wait until the end of your investigation to take action. Whether immediate action is a good idea depends on the circumstances of the claim. Is the complaining employee talking about a single past incident, or does she claim the harassment is ongoing? You also need to think about the seriousness of the claim. Is the offending behavior relatively mild, or has the complaining employee alleged she is being subjected to seriously abusive conduct? You may wish to separate the complaining employee and the accused

harasser, at least on an interim basis, if they work in the same area.

- ✓ **Review previous documentation.** Review your personnel files and supervisors' desk files on both employees to determine if the complaining employee has made previous similar complaints or if complaints have been lodged by other employees against the accused.
- ✓ **Make credibility determinations.** When stories differ, you will need to decide whose version of events is most credible. Credibility factors to consider include biases of either the accused or the complaining employee, history of similar conduct, whether witnesses corroborate one version more than the other, whether the complaining employee is facing disciplinary action, and whether the accused has disciplined the accuser recently. Also note eye contact, tone of voice, and the overall demeanor of each witness during interviews.
- ✓ **Decide what you think.** Review notes and statements, and make recommendations to management, if required. Be prepared to express your opinion on whether the alleged conduct occurred and the basis for your opinion. In some circumstances, however, you might not want to record your conclusion and recommendations. This is a good issue to discuss with legal counsel.
- ✓ **Report back to the complaining employee.** Assure the complaining employee that the company takes allegations of harassment very seriously and that you thoroughly investigated her complaint. If the accused harasser was disciplined in some way, inform the complaining employee that appropriate remedial measures were taken without specifying the disciplinary action meted out. If the accused remains employed with the company, advise the accuser that if the conduct recurs, she should immediately notify management or HR. Again, assure the complaining employee of your no-retaliation policy.

- ✓ **Retain your documentation.** Maintain your notes, statements, and investigation report for the period specified in your document retention policy. Be aware that your investigative file is a potential trial exhibit. Make sure your notes and the report are complete, factual, and accurate, are signed and dated, and include the three Ws: what, where, and when.

### ***Bottom line***

Conducting a prompt, thorough investigation will serve a number of valuable purposes. It will provide management with the information necessary to decide whether harassment occurred and, if so, what remedial measures are appropriate under the circumstances. In turn, prompt, effective enforcement of your antiharassment policy will act as a strong deterrent against future violations.

A thorough investigation will also reinforce your antiharassment policy by demonstrating the seriousness with which your company treats allegations of harassment. Knowing that their complaints will be taken seriously and investigated carefully will encourage other employees to report violations of your policy. Having employees who are willing to report violations they observe or experience is the most effective way to achieve the ultimate purpose of your antiharassment policy — eliminating harassment in the workplace.

Finally, a solid investigation file provides a strong defense if the complaining employee later files a lawsuit against the company. Signed statements may prevent the accuser, the accused, and any witnesses from later changing their stories, while the file as a whole may provide a good-faith defense that could decrease or eliminate any damages awarded.

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