



INTERNAL INVESTIGATION CHECKLIST

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Internal Investigation Checklist

Preface

Employers are required by law to take prompt action to investigate complaints of harassment.¹ This obligation arises upon immediate receipt of the complaint, and poses a duty upon the employer to ensure the complainant was provided with a thorough investigation of each and every allegation. We have provided a checklist for employers to follow when investigating complaints and to help safeguard themselves from lawsuits and charges that arise from these complaints of harassment.

I. Notice of Potential Harassment or Other Misconduct

Once an employer is put on **notice** that potential harassment has occurred, there arises a duty to take prompt, effective remedial action to stop the harassing conduct. Notice can be provided in a number of ways, including:

- Internal complaints (written or oral).
- Notice of lawsuits.
- Informal reports.
- Hotline calls to corporate compliance.
- EEOC complaints.
- Observations.
- Anonymous letters and/or messages.
- Union grievances.
- Exit interviews.

¹ This checklist addresses investigations into claims of workplace harassment. Many of the suggestions in this document are applicable to internal investigations into other types of workplace misconduct.

In some circumstances the complainant or accused might be someone not directly working for the organization, such as an employee of a third-party vendor or a visitor. Nonetheless, an investigation is still required. For ease of presentation in this checklist, it is assumed that the complainant and accused are employees. Also, the same analysis would apply if the complainant or accused was a volunteer.

DON'T:

- Don't ignore complaints from disgruntled or departing employees.
- Don't wait for an informal complaint to turn into a lawsuit.
- Don't ignore an "off the record" complaint – there is no such thing. Never agree not to investigate an allegation of harassment or other misconduct.

DO:

- Follow up on each and every complaint, regardless of the merit of the allegations.
- Investigate all complaints, whether the complainants request an investigation or not.
- If your organization has insurance coverage for employment-related claims, timely report a claim to all applicable insurance companies and/or your insurance broker. Your insurance policy might cover the costs of the internal investigation, including the expense of retaining a lawyer to conduct the investigation.

II. Establishing Policies for Preventing Harassment and Conducting Investigations

Employers should try to adhere to established policies and procedures for resolving complaints. To the extent possible, investigations of alleged harassment or other misconduct should be conducted with a well organized and consistent approach. The focus of the investigation is on whether the conduct in question violated the employer's internal policies prohibiting harassment or misconduct in the workplace.

Prior to receipt of complaints of harassment, employers should:

- Establish effective anti-harassment, anti-discrimination, and anti-retaliation policies.²
- Have in place a simple method of reporting complaints of harassment easily accessible to all employees.
- Provide the employee alternatives with respect to whom to report the harassment to.

² It is advisable for employers to have additional, more general set of policies relating to appropriate workplace conduct, a procedure for employees to report workplace misconduct, and the consequences for violating those policies.

- Ensure that the foregoing policies and complaint procedures are disseminated to all employees, at the time of hire, in employee handbooks, on wall postings, and through periodic training sessions.³
- Identify and train employees to educate other employees on policies and complaint procedures.
- Identify and train individuals who will investigate complaints of harassment.
- Train supervisors to recognize and respond to incidents of harassment and to report the incidents to the human resource department and/or the executive director.
- Ensure that procedures for investigation of complaints are consistent.
- Establish a workplace culture of ethical compliance, including an environment that is welcoming of employees, volunteers, and others coming forward with complaints and concerns.

DON'T:

- Don't select an investigator who is perceived as biased.
- Don't select an investigator who has a friendship or reporting relationship with the complainant or the accused.

DO:

- Select an investigator who is knowledgeable and responsive to issues and complaints of harassment.
- Try to identify at least two investigators within the organization to handle complaints of harassment.
- Try to select investigators who are members of at least one of the protected categories.
- If necessary, hire an outside investigator.

III. Commencing the Investigation

It is imperative that employers respond quickly and effectively to complaints of harassment. Within 24 hours of receipt of a complaint, employers should acknowledge

³ Because nonprofits are permitted to have volunteers, they should have a parallel set of policies and distribution and training practices with respect to their volunteers inasmuch as volunteers can engage in or be the victims of inappropriate harassment or other misconduct.

the complaint and begin planning an investigation. The investigator should contact the complainant, and ensure that the complaint will be kept as confidential as possible and that an immediate investigation will be conducted.

Prior to investigating the complaint, the investigator should perform the following tasks:

A. Obtain Background Information on the Complainant and the Accused

- Review the complainant's personnel file, job description, and performance reviews.
- Review the accused's personnel file, job description, and performance reviews.
- Look for documentation that the complainant and the accused received (1) copies of the employer's anti-harassment, anti-discrimination, and anti-retaliation policies and complaint procedures and (2) periodic training about these policies and procedures. Documentation would include signed receipts for employee handbooks, training session attendance sheets, and minutes of staff meetings where these topics were discussed.
- Identify any previous charges, complaints, or grievances filed by or against the complainant or the accused.

B. Analyze the Complaint

- Identify the issues arising from the complaint.
- Analyze the applicable employer policies, guidelines, and practices to determine whether or not a violation might have occurred.
- Determine the focus and goal of the investigation.
- Identify all potential witnesses, if available from the complaint.

C. Prepare for the Investigation

- Identify at least two, unbiased investigators to conduct the investigation. Possible investigators include human resource personnel, private investigators, outside consultants, and/or legal counsel.
- Prepare an investigative work plan and an outline of questions for the complainant, the accused, and potential witnesses. When preparing the questions, think about ways to phrase them in order to minimize or

eliminate the need to disclose, either explicitly or implicitly, the source of the facts underlying your questions. This will help to minimize the risk of retaliation.

- Decide the preliminary order of interviews.
- Notify Board members, managers, and employees of the allegations on a strictly “need to know” basis. Consider having a Board member involved in the investigation.
- Identify documents to be reviewed with each individual, and determine the relevancy of each document. If documents appear to be missing from a file, make a note to discuss with the identified individual.

Possible documents to review include:

- Written complaint.
 - Policies, procedures, and instructions.
 - Prior relevant investigation files.
 - Prior relevant complaints.
 - Personnel files of the individuals involved.
 - Collective bargaining agreements.
 - Other relevant business records.
- Consider separating the complainant and the accused pending the results of the investigation, or honoring the complainant’s request for transfer – document the fact that the complainant requested the transfer. The complainant should not be subjected to an adverse employment action as this could give rise to a claim of retaliation.
 - Consult in-house or outside legal counsel who is aware of the substantive law regarding the allegations, if possible.
 - Reach out to the complainant, the accused, and all relevant witnesses to schedule interviews.
 - While conducting the investigation, keep in mind that people other than the accused might need to be disciplined. Disciplinary policies should apply to:

- Wrongful conduct – violators.
- Ignoring and not reporting violations – condoners.
- Failure to detect by supervisors – sleepers.
- Refusal to cooperate with an investigation – uncooperatives.
- Retaliation – retaliators.

D. Do's and Don'ts

DON'T

- Don't delay the start of the investigation. This is probably the most important rule to conducting investigations of harassment in the workplace. Delaying an investigation will subject the employer to the risks that the investigation will be deemed insufficient and the employer will lose the right to assert the defense that it embarked on a prompt and thorough investigation upon receipt of the complaint. In addition, promptness sends a strong signal to employees that the organization takes complaints seriously.
- Don't be a slave to your interview outline or investigative work plan.
- Don't search the accused's locker, desk, or personal items prior to consulting the employer's legal counsel as such action potentially could lead to a claim of invasion of privacy.
- Don't make any conclusions regarding the merits of the allegations prior to speaking to all parties involved in the investigation and reviewing the available relevant documents.

DO:

- Inform all parties of: (1) the importance of maintaining confidentiality during the investigative process and (2) the employer's zero-tolerance policies for harassment and retaliation against anyone who in good faith complains about harassment or participates in an internal investigation.
 - Note that employees have a right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. An employer is allowed to restrict those discussions only when the employer has a legitimate and substantial business justification that outweighs employees' rights. It is the employer's responsibility to first determine during each investigation whether witnesses need protection, evidence is in danger of being destroyed, testimony is in

danger of being fabricated, and there is a need to prevent a cover up. Only if the employer determines that such a corruption of its investigation would likely occur without confidentiality is the employer then free to prohibit its employees from discussing these matters among themselves.

- It is also the employer's responsibility to justify a prohibition on employees discussing a particular ongoing investigation. An employer must proceed on a case-by-case basis. An employer cannot simply impose confidentiality requirements in all cases or in all cases of a particular type. An employer's determination that confidentiality is necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.
- If the accused or an employee-witness refuses to cooperate with the investigation, then advise the employee that s/he is obligated to cooperate with the investigation and his/her failure might result in disciplinary action up to and including discharge. You want to state this in a firm, professional matter-of-fact manner and not in an aggressive, threatening way.
- Understand that:
 - The complainant, the accused, or an employee-witness might request to tape record the interview. Note that photography and audio or video recording in the workplace are protected if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. There might be certain circumstances where an employer can refuse to allow photography, such as protecting trade secrets or the photographing of vulnerable persons (such as children and victims of sexual abuse). Because investigatory interviews are normally done in private offices, conference rooms, or offsite, generally there is no need for such protections. An employer should consider recording interviews if it knows that employees are recording them, in order to have unedited versions of the interviews.

With the proliferation of smartphone technology, there is a good chance the complainant, the accused, or an employee-witness might be recording the interview. So you should ask interviewees if they are recording the interview. Even if they say "no," they might still be doing so. As a result, it is as important as ever that the interviewers act professionally and without bias throughout the interview, including during breaks.

- During investigations, employees at times request that their lawyer or another witness be present during the interview. This presents complicated issues. On the one hand, refusing such a request might make the investigation appear unfair and it might cause the witness/complainant not to cooperate in the investigation. On the other hand, allowing a lawyer to attend might make the interview more difficult as the lawyer will likely be looking for mistakes or omissions in the interview process or might try to interfere with the interview (e.g., by coaching the witness). When such a request is made contact the employer's legal counsel for advice. Significantly, lawyers that are present during an investigation can be considered witnesses if the case is eventually litigated by the complainant.
- In a unionized setting, an employee who is asked to participate in an investigatory interview that might lead to discipline of the employee has the right to request a union representative be present. The union representative is not entitled to interfere with the meeting.

Currently, this applies only in unionized settings. However, the NLRB has gone back and forth as to whether it should also apply in nonunionized settings. Because the NLRB's position might change in the future, employers should consult with their legal counsel when this issue arises in a nonunionized setting.

- Allow flexibility in your interview schedule and investigative work plan as you gain more understanding of the facts during the investigation.
- Approach the investigation from an unbiased perspective.
- Determine conflict of interests with the investigators.

IV. The Interviews

Arrange to meet with the complainant, the accused, and anyone else who might have first-hand knowledge of the incidents surrounding the complaints of harassment. Attend each interview with an open mind and a clean pad of paper, and document the date and name of individuals present at the meeting. Be sure to take detailed and accurate notes of the statements provided.

It is preferable that two investigators be present at each interview. Consider having one investigator taking the lead on asking the questions while the other investigator takes detailed notes. Near the end of the interview, take a break so that the two investigators can privately discuss whether any issues or questions have been missed.

A. Interviewing the Complainant

1. Preliminary Issues to Discuss with the Complainant

- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then request the complainant not to speak to others about the investigation. Advise the complainant that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a proper investigation.
- Inform the complainant that the employer does not tolerate retaliation for complaints of harassment or for participating in an internal investigation. Request that the complainant immediately report any complaints of retaliation to you.
- Provide the complainant with an overview of the employer anti-harassment, anti-discrimination, and disciplinary action policies. Assure the complainant of the employer's commitment to the policies.
- Inform the complainant that a full and thorough investigation will be conducted.
- Obtain background employment information from the complainant. Inquire as to how the complainant came to work for the employer. Ask the complainant to provide an overview of his/her position and job responsibilities.

2. Investigating the Allegations

- Obtain information relating to the complainant's relationship with the accused. When did the complainant first meet the accused? What, if any, is the nature of their relationship (reporting, social, etc.)? Did they ever have a personal and/or dating relationship outside of the office?
- Discuss the “**5 W's**” – **Who**, **What**, **Where**, **When**, and **Why** of each allegation in the complaint. **Get specifics.**

Sample questions to ask about each alleged incident of misconduct include:

- Who was involved in the complained of misconduct?

- Where did the alleged misconduct take place? Was it in the workplace or offsite? Were there any witnesses? If yes, who?
 - What transpired between the accused and the complainant that formed the basis of this complaint?
 - When did the complained of incidents take place? Get specifics – date, times, etc.
 - Why does the complainant think the accused would have caused the alleged incident?
 - How often did the incidents occur?
 - How did the complainant react?
 - What was the complainant's response when the incident occurred?
 - What was the complainant's response after incident?
 - Had the complainant been offended in the workplace by anything before the incident?
 - Did the complainant tell anyone about the incident? Who? When? Where?
- If there is a span of time between the alleged harassing conduct, ask the complainant what prompted him/her to report the incident now instead of at the time of the incident.
 - Ask the complainant if there are any other witnesses or people with knowledge of the incidents, and the extent of their knowledge.
 - Ask the complainant whether s/he is aware of anyone else who has been harassed by the accused or anyone else and how s/he acquired this information.
 - Ask if the complainant previously complained of the harassing conduct to anyone else, including coworkers, friends, and family. If yes, request the identity of these individuals and when the complainant reported the conduct. Ask if any action was taken after the incident was initially reported.
 - Periodically summarize what the complainant has told you to ensure accuracy and to demonstrate to the complainant that you are carefully listening.

- Ask if the complainant believes his/her job performance has suffered or if s/he has experienced any psychological injury as a result of the harassment. If the complainant claims the conduct has negatively impacted his/her performance or mental state, ask for specific examples. Ask if the complainant has sought treatment.
- Ask for any documentary evidence that the complainant believes supports his/her allegations of harassment, including any relevant e-mail, notes, photographs, voice mails, and audio or video recordings.
- If the complaint involves graffiti or other visual forms of harassment, locate and photograph the offending material, remove and preserve it if possible, or permanently cover it up if it cannot be removed. The employer should document the “visual form of harassment” as thoroughly as possible making sure the pictures taken accurately reflect the size, wording, depictions, etc. In no event should the offending material be left in place.
- Specifically ask “what prompted you to report this” and “is there anything else the accused has done that you have not spoken about?”
- Ask the complainant what specific relief and/or solutions s/he is looking for. However, don’t make promises to provide the requested relief.
- Ask the complainant if there are any other incidents of harassment or discrimination, or any other relevant information, that s/he hasn’t told you about.
- At the conclusion of the interview, inform the complainant that the investigation is to continue. State that the investigator(s) might have to meet with the complainant again after other interviews. Inform the complainant to contact you immediately regarding any concerns (including retaliation) or follow-up issues s/he might have and any additional facts or events that s/he might have failed to have mention during the meeting with you.
- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are difficult to read or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the complainant is trying to tell you. Rather, write down specifically what s/he is saying. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views regarding the claim or a particular allegation.
- Don't stick to a basic format of questions – listen to the complainant's story and ask specific follow-up questions.
- Don't use leading questions when interviewing the complainant.
- Don't defend the accused or the complainant. Find a balance between providing comfort and trust for the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.

DO:

- Ask questions that allow the complainant to tell his/her own story.
- Be polite (but firm when necessary), as the complainant will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do point out inconsistencies, if relevant.

B. Interviewing the Accused

1. Preliminary Issues to Discuss with the Accused

- Introduce yourself, and explain that the purpose of the interview is in regards to allegations of harassment. Explain the allegations in very general terms, without being too vague to allow the accused to tell his/her story. Avoid being too specific at the outset, as this might allow the accused to tailor his/her responses during the interview.

- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then direct the accused not to speak to others about the investigation. Advise the accused that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a proper investigation.
- Inform the accused that the employer does not tolerate retaliation for complaints of harassment or for participating in an internal investigation. Request that the accused immediately report any complaints of retaliation to you.
- Provide the accused with an overview of the employer anti-harassment, anti-discrimination, and disciplinary action policies. Remind the accused of the employer's commitment to the policies.
- Inform the accused that a full and thorough investigation will be conducted.
- Obtain background employment information from the accused. Inquire as to how the accused came to work for the employer. Ask the accused to provide an overview of his/her position and job responsibilities.
- Initially, explain to the accused why s/he is being interviewed, without revealing the name of the complainant. Assure the accused that the employer has not reached any conclusions regarding whether the alleged misconduct occurred. See if the accused offers the name of the complainant without you having to provide the complainant's identity.
- If the accused does not identify the complainant, do **not** provide the accused the name of the complainant if you have sufficient additional facts that make it unnecessary to disclose the complainant's identity (e.g., three people came forth with similar allegations of misconduct or the alleged misconduct occur in a group meeting setting).

2. Investigating the Allegations

- Obtain information relating to the accused's relationship with the complainant. When did the accused first meet the complainant? What, if any, is the nature of their relationship (reporting, social, etc.)? Did they ever have a personal and/or dating relationship outside of the office?

- As necessary, explain the specifics of each allegation made against the accused. Review one allegation at a time – that is, don't lay out all of the allegations at same time.
- Discuss the **5 W's** of each allegation against the accused. At a minimum, require the accused to confirm or deny each allegation; however, still try to elicit more information if possible with respect to each allegation.

Sample questions to ask about each alleged incident of misconduct include:

- Who was involved in the incident that transpired between the accused and the complainant?
- What transpired between the accused and the complainant that would give rise to complaints of harassment?
- Why does the accused think the complainant filed these complaints of harassment?
- Where did the alleged misconduct take place?
- When did the complained of behavior occur?
- Does the accused know of any other complaint of harassment or discrimination the complainant has lodged with the employer or any other employer?
- Has the accused ever been accused of harassment or discrimination before, in this workplace or elsewhere?
- Has the complainant ever told the accused that s/he does not like certain behavior and asked him/her to stop?
- Has the complainant initiated any jokes, gestures, or behaviors that could be considered to be harassing or discriminatory?
- If the accused denies allegations, ask why s/he believes the complainant has raised these allegations. Discuss what potential motives might exist to cause the complainant to report these complaints.
- If the complainant confirms the truth of the allegations, but claims they were not unwelcome, ask why the complainant believes the conduct was welcomed.

- Ask for any documentary evidence that the accused believes supports his/her position, including any relevant e-mail, notes, photographs, voice mails, and audio or video recordings.
- Ask the accused if there are any other witnesses or people who might have relevant information, and the extent of their knowledge.
- Periodically summarize what the accused has told you to ensure accuracy and to demonstrate to the accused that you are carefully listening.
- At the conclusion of the interview:
 - Remind the accused of the employer's policies against harassment and retaliation. Provide the accused with a copy of the policies and consider having the accused execute an acknowledgement of receipt for the policies. Inform the accused of possible disciplinary actions that could be taken in the event the allegations made against the accused are substantiated and/or the accused retaliates against the complainant for filing the complaint or any of the witnesses for participating in the investigation.
 - Inform the accused that the investigation is to continue. State that the investigator(s) might have to meet with the accused again after other interviews. Inform the accused to contact you immediately regarding any concerns (including retaliation) and follow-up issues s/he might have and any additional facts or events that s/he might have failed to have mention during the meeting with you.
- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are difficult to read or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the accused is trying to tell you. Rather, write down specifically what s/he is saying. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views regarding the claim or a particular allegation.
- Don't stick to a basic format of questions – listen to the accused's story and ask specific follow-up questions.

- Don't use leading questions when interviewing the accused.
- Don't defend the accused or the complainant. Find a balance between assuming the good faith of the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.

DO:

- Ask questions that allow the accused to tell his/her own story.
- Be polite (but firm when necessary), as the accused will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do point out inconsistencies, if relevant.

C. Interviewing the Witnesses

1. Preliminary Issues to Discuss with the Witness

- Introduce yourself, and explain that the purpose of the interview is in regards to allegations of harassment. Explain the allegations in very general terms, without being too vague to allow the witness to respond to your questions and fill in, confirm, and/or deny the details of what happened. Avoid being too specific at the outset, as this might allow the witness to tailor his/her responses during the interview. Normally there is less need to discuss all the allegations with each witness.
- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then direct the witness not to speak to others about the investigation. Advise the witness that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a proper investigation.
- Inform the witness that the employer does not tolerate retaliation for complaints of harassment or for participating in an internal investigation.

Request that the witness immediately report any complaints of retaliation to you.

- Provide the witness with an overview of the employer anti-harassment, anti-discrimination, and disciplinary action policies. Remind the witness of the employer's commitment to the policies.
- Obtain the witness' background employment information. Ask the witness to discuss his/her position and job responsibilities.
- Obtain the witness' relationship with the accused and/or the complainant. If the witness is not an employee, obtain the witness' relationship to the employer.

2. Investigating the Allegations

- Provide a broad overview of allegations of misconduct. This will allow the witness to discuss his/her own version of events surrounding the complaints of harassment. To the extent possible, do **not** identify the names of the complainant and/or the accused if you have sufficient additional facts that make it unnecessary to disclose their identities (e.g., three people came forth with similar allegations of misconduct or the alleged misconduct occur in a group meeting setting).
- Inform the witness that no conclusions regarding the merit of the complaint have been made.
- Ask questions designed to elicit information while providing minimal information.

Sample questions to ask include:

- What is the witness' relationship with the complainant and the accused?
- Did s/he witness any inappropriate behavior on the part of the complainant or the accused? If yes, find out details.
- Did the accused engage in the complained of conduct? If yes, find out details. If no, then ask why the witness thinks the complainant made the complaint.
- Review the lists of sample questions set forth above for the complainant and the accused to see if you should ask any of those questions to the witness.

- If the witness is unable to corroborate events, ask why the complainant, the accused, or another witness might have suggested the witness be interviewed. Generally there is no need to disclose the name of the person who made the suggestion.
- Ask for any documentary evidence that the witness might have related to the allegations, including any relevant e-mail, notes, photographs, voice mails, and audio or video recordings.
- Ask of the witness if there are any other witnesses or people who might have relevant information, and the extent of their knowledge.
- Periodically summarize what the witness has told you to ensure accuracy and to demonstrate to the witness that you are carefully listening.
- Ask if the witness is willing to sign statement if necessary. Prepare written statements for signature from impartial witnesses only with the advance advice from the employer's legal counsel.
- Inform the witness to contact you immediately regarding any concerns (including retaliation) and follow-up issues s/he might have and any additional facts or events that s/he might have failed to have mention during the meeting with you.
- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are difficult to read or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Uncooperative Witnesses

- Attempt to establish rapport and explain the investigative process in some detail (without disclosing the names of the other witnesses).
- Communicate the employer's policy regarding participation in internal investigations. If the witness is an employee and refuses to cooperate with the investigation, then advise the witness that s/he is obligated to cooperate with the investigation and his/her failure might result in disciplinary action up to and including discharge. You want to state this in a firm, professional matter-of-fact manner and not in an aggressive, threatening way.
- Document the witness' refusal to cooperate.

4. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the witness is trying to tell you. Rather, write down specifically what s/he is saying. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views regarding the claim or a particular allegation. Don't slant the investigation in favor of the complainant or the accused.
- Don't stick to a basic format of questions – listen to the witness' version of the facts and ask specific follow-up questions.
- Don't use leading questions when interviewing the witness unless the witness is being uncooperative.
- Don't defend the accused or the complainant. Find a balance between assuming the good faith of the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.
- Don't threaten or intimidate a reluctant witness to provide information. Simply remind the employee-witness of his/her duty to assist in the investigation and, if it still seems the witness is refusing to cooperate, simply note that in your investigation notes.
- Don't over-investigate.

DO:

- Establish a position of neutrality.
- Ask questions that allow the witness to tell his/her version of the facts.
- Be polite (but firm when necessary), as the witness will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do point out inconsistencies, if relevant.

D. Re-Interview the Parties or the Witnesses if Necessary

- Attempt to verify information obtained in other interviews or documents.
- Be direct; do confront with material contradictory information.
- Try to keep the source of contradictory information confidential.

V. Summarizing the Results of the Investigation

The final step in an investigation is to analyze the information gathered to date, take steps to resolve the complaint, and closeout the investigation.

A. Analyzing the Investigation

- Summarize the information obtained from the accused, the complainant, and the witnesses.
- Draft a detailed statement of the facts, including a chronology of the events as described by each individual participating in the investigation.
- Determine the existence of any evidence supporting/undermining facts. For example, consider any documents, emails, photos, or audio/visual recordings.
- Consider behavioral factors and body language (e.g., eye contact, nervousness, and appearance) of the complainant, the accused, and the witnesses when assessing the truthfulness of their stories. Be sure to factor in how such individuals act in the workplace under normal circumstances (e.g., because of cultural or personal reasons, such as shyness or a disability, an individual might not make regular eye contact in day-to-day interactions).
- Establish and identify other indicia of the credibility of the complainant, the accused, and the witnesses, such as their reputations for honesty, any reasons that might have to lie, and the overall believability of their stories.
- Identify any factual inconsistencies in and among the accounts of the events provided by the complainant, the accused, and the witnesses. While people perceive events differently, the truth normally makes sense.
- Distinguish between welcome and unwelcome conduct. For example, the complainant might have tolerated or begrudgingly participated in inappropriate workplace banter for a period of time in order to fit in or not be criticized.

- Consult with the employer's legal counsel prior to reaching conclusions as to the merit of harassment complaints.

B. Making a Determination Regarding the Merits of the Complaint

- Determine which version of the facts is most credible.
- Determine whether evidence is sufficient to establish that the alleged misconduct occurred and whether the employer's policies were violated.
- In evaluating the conduct, consider the following:
 - Frequency and pattern of coworker and supervisory conduct – is the conduct repetitive and pervasive or random and isolated?
 - Were incidents occurring "on the job" or in "social settings"? Were the "social settings" in any way related to work?
 - Did the conduct consist of comments, suggestions, and/or innuendo or did it extend to indecent or unwanted propositions, touching, and/or direct observations of a sexual nature?
 - Was there supervisory tolerance of, contribution to, or direct participation in inappropriate conduct or a hostile work environment?
 - Was crude, vulgar, or other highly-offensive language used? Was it annoying or severe?
 - Did the conduct consist of isolated jokes and/or teasing or persistent pressure for dates and/or display of sexually-explicit material?
 - As to disputed issues, what evidence have you obtained that supports or undermines the statements made by the complainant, the accused, and any witnesses?
 - How much is direct evidence? How much is circumstantial or hearsay?
 - Was the conduct truly "welcomed" or was it acquiesced to and tolerated by the complainant because s/he could not risk losing his/her job?
 - What are the reputations of the complainant, the accused, the witnesses, and other participants for truthfulness and/or credibility?
 - Did the misconduct extend to the entire department/working unit or was it limited to a few actors?

- Are there undisputed facts between the claimant's and the accused's versions of what occurred?
- Did the conduct of the accused constitute inappropriate conduct even if it did not constitute harassment?

C. Deciding Corrective and/or Disciplinary Action

- Consult applicable policies to determine the appropriate disciplinary action with respect to findings of harassment.
- Give consideration to the nature, duration, and seriousness of the offensive conduct when determining the nature and extent of corrective or disciplinary action. For example, a supervisor's demands for sexual favors in order to keep job would be viewed as more serious than a nonsupervisory coworker's requests for a date with no threat involved.
- Consider the accused's position when making the disciplinary determination because a more severe penalty might be appropriate for a supervisor than a nonsupervisory coworker.
- Factor in prior misconduct by the accused.
- Consider disciplinary action taken in previous cases involving other employees. Try to be consistent with discipline given for similar misconduct by similar employees, especially where imposing different discipline might be seen as having a disparate impact on persons in a protected class (i.e., accused employees who are members of a protected class receive harsher discipline for similar misconduct). However, if the prior discipline is determined in retrospect to have been inadequate or if a new manager has higher expectations for the workforce than the prior disciplining manager had, then stronger discipline might be appropriate. Document the reasons for imposing harsher or lesser discipline.
- Take remedial action if necessary. Examples include, but are not limited to:
 - Re-issue anti-harassment, anti-discrimination, and anti-retaliation policies and complaint procedures to the accused and possibly to the entire work group or to the entire workforce at all locations. Consider new or refresher training for the accused and possibly for the entire work group or for the entire workforce at all locations. Also evaluate if similar misconduct might be occurring in other parts of the organization.

- Discuss the incident with the accused and others who might have participated in the misconduct or failed to act sooner to stop it.
- Ensure that the offensiveness of the misconduct is clearly understood by the accused and other wrongdoers.
- Call for its cessation.
- Point out the potential consequences if corrective action is not taken or the misconduct is repeated in the future.
- Request an apology.
- Decide on the punishment to be imposed on the accused:
 - Issue a written reprimand to the accused.
 - Change the job assignment of the accused.
 - Transfer the accused.
 - Place the accused on probation.
 - Suspend the accused without pay.⁴
 - Make the accused bonus ineligible.

⁴ If the accused is an “exempt” employee for wage-hour purposes, the employer must make sure that any suspension without pay is implemented in a manner that does not violate the federal Department of Labor’s rule relating to docking the pay of exempt employees. In particular, 29 C.F.R. 541.602(b) provides that:

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of **safety rules of major significance**. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more **full** days imposed in good faith for infractions of workplace conduct rules. **Such suspensions must be imposed pursuant to a written policy applicable to all employees.** Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence. [Bolding added.]

- Lower the performance rating of the accused.
- Demote the accused.
- Dismiss the accused.
- Decide if discipline needs to be imposed on:
 - Supervisors who ignored the misconduct or who should have detected the misconduct had they been diligent.
 - Employees, including supervisors, who refused to cooperate with the investigation or engaged in retaliatory conduct.
- In those instances where the investigative results do not support a finding that the accused engaged in conduct violative of the employer's policies, no remedial action might be necessary. However, if the investigation reveals that some employees (or volunteers) in the workforce are not cognizant of the employer's policies, consider providing additional training, which can range from a redistribution of the applicable policies (accompanied by a memo from senior management) to formal classroom-style training sessions.⁵
- Document any disciplinary action taken against the accused, and, if possible, have the accused sign the notice of corrective action taken against him/her. Document any other corrective actions taken (e.g., harassment prevention training sessions conducted).

D. Prepare the Investigative Report

- Include the following in the Investigative Report:
 - Summary of the allegations.
 - Remedy requested.
 - Summary of relevant policies, procedures, rules, or instructions.
 - Summary of the interviews with the complainant, the accused, and the witnesses.

⁵ Employers are obligated to conduct periodic harassment prevention training and should not wait to conduct such training until after misconduct is reported. In addition, updated periodic training permits employers to educate employees (and volunteers) about evolving expectations, such as not discriminating against individuals based on their gender identity or expression, sexual orientation, or marital status.

- Description of relevant documents.
- Chronology of events.
- Statement of findings of fact (allegation-by-allegation).
- Statement of conclusions drawn from the allegations (if requested).
- Discussion of recommendations for the actions to be taken (if requested).
- Don't summarize or conclude any violation of state or federal law has occurred. You are not a lawyer.
- Note: Depending upon the circumstances, a written investigative report is not always required.

E. Prepare the Investigative File

- Include the following in the investigative file:
 - Complaint.
 - Log of investigator's actions, including dates.
 - Statements and/or interview notes from the complainant, the accused, and the witnesses.
 - Documents related to the complaint and other relevant physical evidence.
 - Investigative Report.
 - Documents regarding follow-up meetings with the complainant and the accused and the corrective actions taken (e.g., training provided as part of corrective action).
- **Be sure the investigative file is accurate and complete, and does not contain extraneous materials – the file is subject to discovery in a subsequent legal proceeding.**

F. Discussing the Results of the Investigation

- Report the results of the investigation to the complainant and the accused. You are not obligated to provide extensive details or give anyone copies of the investigation file.
- Remind the complainant that the employer will not tolerate retaliation and s/he should immediately report any retaliation to you or some other designated person (e.g., the Chair of the Board's Personnel Committee).
- Consider providing a statement for the complainant to sign stating s/he has been informed of the results of the investigation and is in agreement with any disciplinary action/corrective action taken as a result of the investigation.
- Consider providing a statement for the accused to sign stating s/he has been informed of the results of the investigation, is in agreement with any disciplinary action/corrective action taken as a result of the investigation, and promise not to engage in the same or similar misconduct in the future.⁶
- If any of the conduct has been a repeating pattern, consider revising the employer's policies and training to emphasize the unacceptable nature of the conduct in attempt to minimize the reoccurrence of the behavior in the future.
- Submit the Investigative Report to the appropriate individuals, but not if they were accused of wrongdoing: your manager, the Director of Human Resources, the Executive Director, the Chair of the Board's Personnel Committee, or in-house legal counsel. Limit distribution to only those managers with a need to know.

G. After the Investigation Is Completed

- Periodically follow up with complainant to ensure that complained of conduct has not resumed and there has been no retaliation.
- Document the results of any follow-up conversation with participants.

⁶ Some employees will refuse to sign corrective action forms, especially if the forms require the employees to acknowledge the wrongdoing occurred and promise not to engage in such misconduct in the future. If an employer wants to minimize the risk that an employee will push back, the form could merely require that the employee acknowledge receipt of the correction action form. However, it is preferable that an employee acknowledge the wrongdoing occurred and promise not to engage in such misconduct in the future.

If an employee refuses to a sign corrective action form, then the employer should document that fact on the form and consider whether such refusal is grounds for further discipline.

- Ensure that no retaliation has taken place as a result of a person having, in good faith, complained about harassment or participated in the internal investigation. Carefully review subsequent employment actions (e.g., performance reviews, promotions and demotions, and compensation decisions) for signs of retaliation.

H. Do's and Don'ts

DON'T:

- Don't make blanket, conclusory statements that any illegal conduct occurred; e.g., don't write "Allegations of illegal harassment substantiated." Rather, if applicable, state that the accused engaged in inappropriate conduct that warrants disciplinary action.
- Don't destroy any of the documentation after completion of the investigation and maintain it in a file separate and apart from employee personnel files. Notes that were illegible or contained shorthand and therefore were rewritten or typed to improve legibility and clarity can be shredded.
- Don't automatically reassign the complainant to a new position, department, or location because such action could be seen as punitive or retaliatory. If the complainant requests a transfer, then try to get the complainant to make a written request that indicates that the request is being made voluntarily.
- After investigation is completed, don't discuss any information obtained during the investigation with others, except on a strictly "need to know" basis.

DO:

- Do make sure that notes provide an accurate account of the parties' interpretation of the events.
- Do make sure the record of disciplinary action taken against the accused or other wrongdoer is placed in his/her personnel file.

VI. Recap: 10 Most Costly Mistakes

1. Ignoring the complaint.
2. Delaying the start of the investigation.
3. Selecting an investigator who is viewed as biased to either the complainant or the accused.
4. Guaranteeing "absolute and complete" confidentiality.

5. Failing to interview and listen to the complainant, the accused, and other relevant witnesses.
6. Failing to maintain the confidentiality of the complaint and the investigatory process.
7. Threatening, coercing, or intimidating the witnesses.
8. Failing to complete the investigation promptly.
9. Failing to protect the complainant and the witnesses from retaliation, and failing to follow-up with the complainant after the investigation is completed.
10. Failing to take appropriate disciplinary or other corrective action.

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