

GUIDANCE ON CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS

Q. *An employee recently complained that she feels she is being harassed by her supervisor, and we want to conduct a workplace investigation. Should we investigate her complaint ourselves? How do we put together an internal investigation?*

A. Deciding whether to conduct an internal workplace investigation or seek the services of an outside investigator can be difficult. Depending on the nature of the allegations and the employees involved, conducting the investigation internally may create a host of questions and concerns about neutrality or bias. On the other hand, retaining the services of an outside investigator (whether it's a law firm or an HR consultant) may escalate an already tense situation and cause resentment or suspicion among your employees. Although it's important to handle employee complaints consistently, deciding who will investigate them is often a fact-specific determination that should be analyzed on a case-by-case basis.

Conducting the Investigation

If your company decides to move forward internally, you'll have the benefit of quickly de-escalating the situation by promptly addressing and investigating the employee's concerns. Choose your internal investigative team carefully to ensure as much objectivity and neutrality as possible. Most internal investigators are HR professionals, managers, or business owners.

The team should never include the individual against whom the complaint was alleged. Employees must be able to speak candidly about their workplace conditions in a non-confrontational environment, and an employee shouldn't be forced to face her alleged harasser directly unless she agrees to do so before an arranged meeting. In a neutral workplace investigation, the investigative team acts in good faith and listens fairly to both sides. Investigators shouldn't be personally involved in the alleged incident(s) of harassment, should have a thorough understanding of company policies and EEO obligations, and should be able to remain impartial, objective, and fair during the investigation.

The Equal Employment Opportunity Commission (EEOC) has published general guidelines for conducting effective workplace investigations, available at <https://www.eeoc.gov/policy/docs/harassment.html>. It should be the goal of the investigators to gather all relevant facts and speak to all employees who may have knowledge of the allegations. The investigative team should aim to gather facts about when and where the incident(s) occurred, who was involved, whether there were any witnesses, the nature of the offensive conduct (e.g., discrimination, harassment, retaliation), and the effect of the alleged incident(s) on the complaining employee (e.g., anxiety, inability to perform work duties, hostile work environment).

Asking the complaining employee to provide a written statement is often helpful, and some employers have developed a complaint form for that purpose. The employee who was accused of misconduct should also have a fair opportunity to respond. Moreover, it's important to emphasize throughout the investigation that no employee who has made a complaint or is participating in the investigation will be retaliated against, either by management or by coworkers. Be clear that any employee who exhibits retaliatory behavior will be disciplined appropriately, up to and including termination.

Documenting the Investigation

It's highly advisable to document your investigation throughout the entire process. Keep a record of when the complaint was made, who was interviewed, when and where the interviews took place, who was present for the interviews, what was disclosed, what the ultimate findings were, and what action was taken and why. Having a careful record of the investigation will be extremely important if the EEOC or the North Dakota Department of Labor ever asks you to produce evidence that you conducted a fair and neutral workplace investigation.

However, be aware that investigative notes and documentation probably won't be privileged material in a future lawsuit, which means your notes may be used as evidence. Therefore, your documentation should focus on clear and concise fact-finding; should be accurate; should be written contemporaneously with, or soon after, each interview; should identify the note-taker and when the notes were taken; should be reviewed and signed by the interviewee; should not admit any liability or fault by the company; should be free from retaliatory language against any employee; and should be free from opinions and conclusions.

All investigative notes and findings should be kept in a confidential file separate from your personnel files. Only certain documents generated during the investigation should be placed in an employee's personnel files (e.g., recommended discipline, probation, termination, or training). It's a good idea to have your legal team review your documentation to ensure that it's properly drafted and eliminates or reduces your legal liability in future lawsuits.

Concluding the Investigation

Once all interviews have been conducted, the investigator should carefully review the notes and consider inconsistencies, credibility, specific evidence, any behavioral patterns, and the strength of witnesses' observations and statements. Ultimately, the investigator must determine whether a company policy was violated, whether the alleged conduct occurred, and what the company's response should be. Any action you take should be reasonable and responsive to the employee's complaint, and you must ensure consistency with company policy, past practices, EEO guidelines, and any legal requirements.

Although your response must address the specific situation that you investigated, it's important to ensure consistency in your responses to certain types of allegations. For example, if you offer antidiscrimination training and probation to the harasser after you substantiate claims of sexual harassment, you should consider whether you intend to implement the same action the next time you're faced with a sexual harassment complaint. Employees generally look for fairness in their workplace, and you can expect your workers to scrutinize the investigation process for objective implementation of company policies. Inconsistency in applying your policies or complying with EEO guidelines can lead to lawsuits.

Common corrective actions taken at the end of workplace investigations include oral or written discipline, probation, termination, changes to the supervisory relationship, and workplace training. If

you have any questions about the type of action you should take, reach out to your legal team for further guidance.

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