

Articles

## 10 Tips for Conducting Effective Workplace Harassment Investigations

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The wave of workplace harassment allegations dominating headlines in recent weeks has been a wake-up call to employers to review their anti-harassment policies. However, the best-drafted policies are meaningless unless companies have an investigation protocol in place that mandates a prompt and thorough investigation of any complaints of sexual misconduct in the workplace. While a thorough investigation can help to alleviate office tension and may shield the company in the event of a lawsuit, an inadequate investigation can hurt worker morale and expose the employer to litigation.

Below are some tips for conducting effective workplace investigations:

### 1. PROMPTLY REPORT THE COMPLAINT TO HR

Supervisors (or other employees) should not take it upon themselves to investigate complaints of workplace harassment. Rather, they should immediately contact HR, or those individuals charged with enforcing the company's anti-harassment policy, to report such complaints. Supervisors should report the complaint even if made anonymously, if the supervisor does not think the complained of conduct amounts to harassment, or if the supervisor believes the complainant will report it to HR on his/her own. Complaints of harassment should be reported **even if** the complainant asks that it not be reported.

### 2. IDENTIFY THE BEST PERSON TO CONDUCT THE INVESTIGATION

Companies should carefully consider who will be responsible for conducting the investigation. Employers should evaluate whether the person charged with conducting the investigation can remain impartial, objective, and fair throughout the investigation. Companies should also consider whether the investigation should be conducted by internal resources, or if they should engage a third party to investigate. The answer likely depends on the severity of the complaint, the identity of the accused, the adequacy of internal resources, and the risk of legal liability. In some cases, the company can protect documentation related to the investigation as attorney "work product" if inside or outside counsel is involved in the investigation.

### 3. PROMPTLY INITIATE (AND CONCLUDE) THE INVESTIGATION

The investigator should immediately initiate the investigation and share the timeline for the investigation with the complainant and the accused. If there are unavoidable delays, the reason for the delay should be documented and, where appropriate, should be communicated to the complainant and the accused.

### 4. TAKE IMMEDIATE AND NECESSARY REMEDIAL MEASURES

At the start of the investigation, the investigator should consider whether any temporary measures need to be taken. For example, if appropriate, the complainant may be reassigned or the accused may be placed on leave. When taking such measures, however, employers should avoid taking any actions that may appear to be retaliatory. Thus, it may be inappropriate to reassign the complainant, rather than the accused supervisor, or place the complainant on leave, even if paid. See also Tip # 7 below.

### 5. INTERVIEW ALL POTENTIAL WITNESSES

Investigators should interview every witness connected with the alleged misconduct, typically beginning with the complainant, even if the complainant provided a written statement. The investigator should ask each witness to identify any other individuals who may have witnessed the alleged incident and if there is anyone else with whom the investigator should speak. All identified witnesses should be interviewed, including former employees when possible. To the extent feasible, ask each witness not to discuss the substance of the interview with other potential witnesses.

### 6. DOCUMENT THE INVESTIGATION

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The investigator should document the entire investigation process – not only the who, what, where, when and how of the investigation, but also any remedial or corrective actions that were taken and the reasons for such actions. This step is critical because the employer may be required to demonstrate when and how it investigated the employee's complaint. Even though some documentation may be protected from disclosure in a legal proceeding, the best practice is for the investigator to presume the documentation will be reviewed during an EEOC or other agency investigation or trial. Thus, the investigator should avoid documenting speculations, particularly those that suggest the company may be liable.

### **7. TAKE STEPS TO AVOID RETALIATION**

Do not retaliate against the complainant and take steps to avoid any appearances of retaliation. Investigators should inform all individuals involved in the investigation that the company will not tolerate any form of unlawful harassment or retaliation against the complainant or anyone participating in the investigation and document that the warning was given. The investigator should also encourage the complainant to report any suspected retaliatory behavior and should designate someone to follow up with the complainant periodically in the months following the investigation to ensure compliance.

### **8. TAKE PROMPT, REMEDIAL ACTION**

After all interviews have been conducted (and any credibility issues have been resolved), the employer should promptly determine whether any discrimination, harassment, and/or retaliation has occurred. If the complained of conduct occurred, the employer should take reasonable and appropriate disciplinary action against the accused, including termination if warranted. It is important that any action taken against the accused be done only after a thorough investigation is completed.

### **9. KEEP THE CONCERNED PARTIES INFORMED**

After a determination has been made, the employer should meet separately with the complainant and the accused to explain the investigation process, the results and any disciplinary action that may be taken. If the results of the investigation are inconclusive, this should be also be communicated. The complainant should also be encouraged to report any further instances of harassment or retaliation. Likewise, the investigator should remind the accused of the company's EEO and anti-harassment policies and that he/she must not retaliate against the complainant or anyone who cooperated in the investigation.

### **10. BE CONSISTENT**

All complaints, even those that may seem trivial, should be thoroughly investigated. Employers should treat all employees accused of similar wrongful conduct in the same fashion, regardless of the status of the parties involved. One of the most common mistakes a company can make is to protect a high-level executive, top producer or favored employee who has been accused of harassment, while taking severe disciplinary action against other employees accused of similar misconduct.

An employer's prompt and effective response to complaints of harassment or retaliation may limit its liability should the employee take subsequent legal action. Thus, it is imperative that employers implement not only robust EEO and anti-harassment policies, but also effective mechanisms to investigate and resolve workplace complaints consistent with those policies.

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