

CEP Magazine – August 2022 They did what? Conducting effective workplace investigations

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Workplace investigations can often be a business's and supervisor's worst nightmare. A formal workplace complaint from a government agency that needs investigation can cause many supervisors, compliance professionals, and human resources professionals to panic. No one wants to be in this position. Fortunately, there are a number of things that can be done before an investigation, during an investigation, and after an investigation to minimize the risk to the company even when you first discover the allegations of a discrimination charge from the Equal Employment Opportunity Commission (EEOC).

Before an investigation or incident occurs

Before an incident occurs, there are a number of things that can be done by a company to ensure that it is properly prepared to respond. Here are some items for employers to consider:

1. Make sure that your employee handbook contains all the workplace rules and is up to date.
2. Ensure that employee job descriptions are up to date and that they contain all the necessary duties of each employee. Many companies use catch-all language to capture duties that are only sometimes done by the employee.
3. Conduct training for managers and supervisors regularly on various employment policies (meal and rest breaks, disability and religious accommodation requests, complaint procedures, the basics of investigating complaints, bystander training) and techniques to respond to employee problems and manage employees.
4. Conduct bystander training for employees to help employees recognize the signs of sexual harassment.
5. Ensure employee records are up to date and employees are issued discipline notices when there is problematic behavior.

By ensuring that their policies and practices are up to date, companies can greatly reduce the likelihood of problematic behavior.

What to do when a complaint or problem is discovered

The first thing a company must do when it receives a complaint is to assess whether it needs to be investigated and what, if any, action must be immediately taken. Every allegation is different. Many problems require the company to take immediate action. For example, an allegation against the CEO of sexual harassment may require the company to suspend the CEO while the company conducts the investigation and prepares a statement to the media. Other incidents might be resolved without taking immediate action to remove an employee from the

situation. Here are some of the initial items that every investigator needs to consider the moment that a problem occurs:

1. Does the accused employee need to be suspended while the investigation is conducted?
2. Does the company need to make a public relations statement related to the investigation?
3. Should inside or outside counsel be used to investigate the problem?
4. Who witnessed the event? You may need to briefly meet with possible witnesses to set a time for a further interview, gather information about where the incident occurred (e.g., on Snapchat or in the breakroom around 11:30 a.m.), and ask whether any other witnesses were present.
5. You may need to review any statements that were taken immediately following the incident or decide to get a written statement following an incident.
6. There may be a report from a manager regarding the incident. If there is not a report, then you may wish to have the manager create one.
7. Consider whether you will need a special investigator. Does it involve computer hacking, or will you need a forensic accountant to determine the extent of the problem? Was a trade secret or confidential information stolen? Do you need to hire an attorney immediately to prepare to file or defend an eventual lawsuit?
8. Is there a need to report the incident to a government entity or the police? In the case of workplace accidents, there may be a duty to report the matter to the Occupational Safety and Health Administration. If child pornography is found on a company laptop, a theft occurred, or there was another violation of law, then you may need to file a police report.

All companies can benefit from having a basic investigation plan that contains relevant contact information and next steps to follow once an investigation is needed.

Reviewing documents and other evidence

Before interviewing witnesses, investigators must properly prepare themselves for the investigation. To this end, it is beneficial for investigators to review any relevant documents and evidence.

Companies have different procedures regarding collecting evidence, but there are a few items that all companies should examine:

- Any video or audio of the incident;
- Any social media posts regarding the incident;
- Emails or written documents concerning the incident, either from the party making the accusations or relaying their complaint to other people; and
- Any notes or reports taken immediately after an incident occurred.

Of course, investigators should avoid using computers, flash drives, and other devices that may need to be reviewed by a forensic investigator. You may need to turn these over to an expert before reviewing any relevant documents on them depending on the type of investigation.

Reviewing this evidence can be critical to developing the right questions to interview witnesses.

Interviewing the complainant

The first interview conducted should normally be with the complainant. It is where you will be able to best understand the exact allegations in the case and gather additional information. Here are the basic questions that should be asked in every interview. Of course, there will be additional questions based on the complaint and the allegations.

- Who performed the act involved in the complaint? For example, who made the sexually explicit comment?
- What happened? It is critical to go through and ask questions related to each allegation.
- When did the alleged conduct occur?
- Where did the alleged incident occur?
- What is the context that surrounded the incident? What was happening just before the incident?
- How did you react? For example, how did you react when the inappropriate comments were made? What happened after the comments were made?
- How did it affect you or your job? What happened to you as a result of the incident?
- Are there any persons that may have relevant information about the incident?
- Do you know whether anyone complained about the person previously?
- Are there any notes, physical evidence, or other documentation regarding the incident?
- How would you like to see this situation resolved?

Again, the person making the accusations or raising the complaint is the most important witness in an investigation. While the questions listed earlier are not the only questions that you should ask in an investigation, they are useful for beginning an outline of the questions to ask.

Interviewing the accused person

There are a couple of important points to remember when interviewing the employee that has been accused. First, they need to know some of the information surrounding the accusations against them. This does not mean that you need to share every detail regarding the accusations, but they need to know enough to give their version of the incident.

There are a number of basic questions that should be asked whenever interviewing an employee that is accused of a violation, including the following:

- What is your response to the allegations?
 - If the employee claims that the allegations are false, then you should ask why they are false.
 - Allow the employee to explain what is wrong about the allegations. Make sure to follow up and ask additional questions on important points related to the allegations in the investigation.
 - Are there any persons who have relevant information?
 - Are there any notes, physical evidence, or other documentation regarding the incident?
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- Do you know of any other relevant information?

Interviewing other witnesses

Other witnesses that need to be interviewed can be witnesses that directly observed the incident under investigation, witnesses that report similar complaints against the person that is accused of violating company policy, and individuals that the complainant spoke with regarding the incident.

Below are some basic questions to ask:

- What did you see or hear?
- When did this occur?
- What did the complainant tell you? When did they tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Assessing witnesses

Assessing witness credibility is one of the most critical factors to ensure that information is correct. The EEOC has a guide and recommends looking at the following factors:

Inherent plausibility: Is the testimony believable on its face? Does it make sense?

Demeanor: Did the person seem to be telling the truth or lying?

Motive to falsify: Did the person have a reason to lie?

Corroboration: Is there witness testimony...or physical evidence (such as written documentation) that corroborates the party's testimony?

Past record: Did the alleged harasser have a history of similar behavior in the past?^[1]

Analyzing witness testimony with these factors in mind can help make the determination much easier.

The investigation report

At the end of each investigation there should be a report that can be reviewed and used as evidence should a lawsuit follow the incident. The report should include the allegations; any witness statements; the steps taken in the investigation, including who was interviewed; outlines of the interviews and credibility findings; the parties that made the decision; the conclusions from the investigation; the actions that were taken; and other relevant information. The report should be prepared with the knowledge that it will help in a court case—rather than be the silver bullet that loses a case for the company.

Wrapping up the investigation

At the end of the investigation, companies must determine the appropriate action to take in the case. One of the most important questions to determine is what level of uncertainty you are willing to have in a resolution. A lot of

investigations will end with no clear person that was responsible for the actions. It may be impossible to tell whether a person committed a violation of company policy. For these reasons, it is always important to understand how to conclude an investigation whether the result is clear or not.

In a clear case, the decision will be easy. You will discipline or perform the appropriate action for the violation of company policy, document the action on a discipline form, write the various handbook policies or workplace rules that were violated, and follow up with the complainant as appropriate.

In cases where it is unclear if the conduct occurred, the decision becomes much more muddled, especially in cases involving sexual harassment. If allegations cannot be proven or shown to be more likely to have occurred than not, the company must make a tough decision. There is no requirement that allegations be proven beyond a reasonable doubt to terminate or discipline an employee. Depending on the circumstances, some companies will terminate an employee, provide a neutral or limited reference, or offer a severance. Others will take measures to ensure that the behavior does not happen again. The right answer will depend on the circumstances and evidence surrounding the complaint.

Conclusion

Conducting workplace investigations well can help mitigate workplace problems and reduce the likelihood and success of lawsuit. Companies that are prepared with a plan before an investigation begins, take immediate action once an investigation occurs, and carefully weigh all the information when concluding an investigation will be the most successful in reaching the best conclusions.

Takeaways

- Companies should have a plan in place that can be implemented when a problem requiring investigation occurs.
- Training for members of management and employees is essential to prevent and reduce the chances of incidents that need thorough investigations.
- Employers should develop a set list of questions to ask during each investigative interview.
- Investigators need to have specific guidelines for evaluating the reliability of witnesses.
- The investigation report should be created with the knowledge that it may be used in a lawsuit against the company.

¹ “Enforcement Guidance: Vicarious Employer Liability for Supervisor Harassment,” Equal Employment Opportunity Commission, accessed June 7, 2022, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

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