

## Compliance Today – December 2020

# Investigating violations of your organizational code of conduct

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Most organizations have a code of conduct, but have you thought about your code in relation to conducting investigations of issues that may have been reported via your hotline? The principles established in your code could be particularly significant when investigating an allegation related to human resources (HR). Although compliance professionals have a tendency to immediately turn to regulations (which is a good place to start), often your own internal organizational documents provide a lot of useful guidance as well.

As an example, if you had a complaint of bullying by an employee against another employee, how would you investigate this, and why would a compliance professional conduct the investigation rather than someone from within HR? It certainly seems a complaint of bullying would be a personnel issue. But what if the complaint came from an HR staff member about another HR staff member? In this situation, a compliance professional could provide a fair and impartial review. To determine the scope of the investigation, you will need to ascertain the precise nature of the complaint in order to identify exactly what you are investigating and who should conduct the investigation.

With an accusation as critical as bullying, you would want to move quickly to investigate the complaint and help resolve the matter. Having a preestablished game plan can assist in expediting the investigation and avoiding delays, thus demonstrating that your organization takes the matter seriously and that employees are protected at work.

This article will focus on the interview process of conducting compliance investigations. The article is not intended to cover every step involved in directing an investigation and will not review actions necessary should an investigation need to be conducted under attorney-client privilege.

### Documenting your investigation

Creating a documentation record or timeline tracker would be beneficial to provide evidence of important events, such as what and when investigational activities occurred. A timeline tracker could include information and activities such as:

- The date the complaint was received and complaint details;
  - The method used for submitting the complaint (e.g., the company's hotline, an internal email box, a designated phone number for employees);
  - The names of individuals selected for an interview, in what order the interviews will occur, the scheduled dates of the interviews, and the name of the investigator(s); and
  - The date the final report was issued and the names of anyone receiving a copy of the final investigation report.
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## Interview questions

Once you have identified the “who” and “when” for interviews, it is highly advisable to write down the questions you wish to ask during the initial interview. Formulating your questions in advance of the interview will ensure that any information paramount to the investigation is not missed when you are attempting to discover as much as possible about events or circumstances relevant to the complaint.

For our example of bullying, we would want to locate and review any laws, regulations, or other guidance that could be pertinent to an investigation (e.g., Americans with Disabilities Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act, your organization’s policies, and your organization’s code of conduct). Collectively, these materials can provide a basis of knowledge and reference for formulating your interview questions.

Interview questions to be asked of the complainant should be carefully developed in order to elicit the relevant facts of the complaint. Advise the person being interviewed that confidentiality will be maintained to the extent possible under the circumstances. While the actual interview questions asked may depend upon the specific complaint, there are some basic questions to initially ask the complainant:

- Can you provide the date, time, and location of the incident(s)?
- Did this occur in the workplace? Did this occur during working hours?
- Exactly what occurred?
- Were there any witnesses to these incidents?
- How long has the behavior you describe been occurring, and is it still happening?
- Have you ever reported this incident before? If so, to whom and when? Was there a response?
- How has this affected you and your job performance?
- Do you have any documentation (e.g., emails, texts, notes) you can share to demonstrate the complaint?
- Are there other individuals who have direct knowledge of the behavior and should be interviewed?
- How would you like to see the situation resolved?

Interview questions to be asked of the accused employee should be designed to elicit a response to the allegations. It is also important that you inform the accused employee that any retaliation against the complaining employee could result in disciplinary action regardless of the outcome of the investigation. Below are some sample opening questions to ask the accused employee:

- What is your response to the allegations?
  - If denied, ask whether the complaining employee would have any reason to be untruthful.
  - If the allegation is confirmed, proceed with asking what, when, where, and how it occurred.
- Do you have any documentation (e.g., emails, texts, notes) you can share to invalidate the complaint?
- Are there other individuals who have direct knowledge that could disprove the allegation and who should be interviewed?

- How would you like to see the situation resolved?

## Bullying and harassment

For the purposes of this article, our compliance investigation interview process example is one of bullying, so it would be imperative that you have a good understanding of the definitions for “bullying” and “harassment.” Of note is that even some harmful bullying behaviors are not technically unlawful, and bullying means different things to different people.

- Bullying can be defined as “unwelcome behavior that occurs over a period of time and is meant to harm someone who feels powerless to respond.”<sup>[1]</sup>
- Another definition defines workplace bullying as “‘situations where an employee repeatedly and over a prolonged time period is exposed to harassing behavior from one or more colleagues (including subordinates and leaders) and where the targeted person is unable to defend [themselves] against this systematic mistreatment.’”<sup>[2]</sup>
- A website managed by the U.S. Department of Health & Human Services ([stopbullying.gov](https://stopbullying.gov)) states that verbal bullying is “saying or writing mean things,” which can include teasing or threatening to cause harm.<sup>[3]</sup> This same website states that social bullying “involves hurting someone’s reputation or relationships,” which can include leaving someone out on purpose or embarrassing someone in public.

So how is bullying different from harassment? Harassment is defined as “unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”<sup>[4]</sup>

## The interview location

Something to consider when preparing for the interviews is the choice of venue. You may want to consider alternative methods for meeting with interviewees. Conducting the interviews using online video communication tools rather than in-person meetings could prove beneficial for several reasons:

1. Online audio and video conferencing eliminates the need to search for a meeting room for the interviews. (And if your organization is anything like mine, meeting rooms are hard to come by!)
2. An online interview may relieve employees’ concerns about someone seeing them meeting with compliance and questioning them about why the meeting occurred.
3. Employees may feel a little more at ease during an interview taking place in their own environment.

## The interviews

As the investigator, you will need to be conscious of keeping an open mind when conducting the interviews. Your role is to collect the facts, not to prejudge. A good way to begin each interview would be with a statement regarding the confidentiality of the conversation and assuring the individual you want them to feel comfortable being open and honest with all their responses to questions.

Healthcare organizations are required to have a nonretaliation policy. Therefore, it may be beneficial to remind

the interviewees that this policy exists and protects those who report in good faith. Point out some of the key elements of your organization's nonretaliation policy, especially advising that retaliation includes counseling, discharge, demotion, harassment, or any other manner of discrimination or threatening to discriminate against the individual in the terms and conditions of their employment.

And do not forget about your organization's all-important code of conduct. Chances are the code contains clear guidance on the organization's prohibition against behaviors that constitute bullying and harassment. Make certain the interviewee is aware of the precepts established in your code.

Be sure you either provide the interviewees with a copy of your nonretaliation policy and your code of conduct or that you provide clear instructions regarding exactly where in your organization's document archival system those items can be located.

If you can help the interviewees feel more relaxed and calm about speaking with you, a lot of the details you learn may come from simply listening to the person tell their story.

## Conclusion

Based on the investigation findings, you will need to determine whether there was evidence of misconduct and document the reasons for whatever conclusion is reached. So, what if your investigation proves the complainant's claim did not result in a violation of federal or state law? Well, this would indeed be good news! But this is where your organization's internal documents may play a significant role, because even without a substantiated violation of law, a violation of your code of conduct may have in fact occurred. My organization's code of conduct states that "everyone should be treated with respect, including our patients and their families and your coworkers." The investigation into a complaint of *bullying* may uncover behavior that truly exhibited a lack of respectfulness toward others. Disrespectful behavior can be demonstrated by inappropriate language, lack of trust, poor communication, and an overall fear by staff of retaliation.

I am certain we all hope that no employee in our organization feels they are being bullied, but realistically, it is likely there will be incidents of this nature. Planning ahead, well before you actually receive a complaint, will help you feel better prepared to carry out a bullying investigation or, for that matter, managing the investigation of any type of issue or concern that has been reported.

## Takeaways

- Your organizational policies should provide helpful guidance, so do not forget to review them.
- Even if no federal or state laws were violated, a violation of your organization's code of conduct may have occurred.
- Everyone wishes to be heard, especially when it seems that no one has been listening before.
- Preparation could make the investigation process much easier for you and for those individuals you may need to interview.
- Take good notes during the interview(s); to ensure legibility, quickly archive the notes in typewritten form after the interview while you can still remember the details.

<sup>1</sup> Lisa Nagele-Piazza, "Going Beyond Compliance to End Workplace Harassment," Society for Human Resource Management, July 30, 2020, <https://bit.ly/3oclUR0>.

2 Arash Emamzadeh, “Workplace Bullying: Causes, Effects, and Prevention,” *Psychology Today*, September 27, 2018, <https://bit.ly/36tpvDM>.

3 “What Is Bullying,” stopbullying.gov, last reviewed July 21, 2020, <https://bit.ly/2HSSlDl>.

4 “Harassment,” U.S. Equal Employment Opportunity Commission, last accessed October 2, 2020, <https://bit.ly/3jw8dd2>.

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