

Workplace Investigations – One Size Does Not Fit All

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Over the last few years, employers have faced new and expanded obligations under state and federal employment laws relating to prohibition of discrimination, harassment, and retaliation in the workplace. These changes stem from agency regulations and opinions, such as the Equal Employment Opportunity Commission's (EEOC) [shift on workplace guidance for sexual harassment](#), newly enacted state laws, including the [expansion of protected classes](#), and changes to judicial review of employment claims (e.g., [case law relaxing the harm standard for discrimination](#)).

Responding properly to reports of unlawful discrimination, harassment, and retaliation includes conducting appropriate workplace investigations. The purpose of the investigation is to collect the facts related to the allegations based on interviews of the claimant, the alleged wrongdoer, and other potential witnesses, and review of reasonably available records and other evidence, so that company management can review the factual findings and make well-informed decisions about how best to promptly and effectively stop the violation of company policy, if any.

Employers should keep the following tips in mind for workplace investigations:

- **There is no one-size-fits-all response.** Complaints vary in severity, risk, and level of concern. Similarly, employment investigations vary in light of the underlying complaint. Some investigations may necessitate a more expansive investigation, with formal witness interviews or the involvement of outside counsel, but others may not. Employers should use their reasonable judgment in their response to employee complaints, considering the applicable circumstances, and they should avoid a one-size-fits-all investigative response. As a general rule, all investigations should include interviewing the complainant and the alleged wrongdoer and accurate documentation of what steps were taken, when, and what was learned.
- **Formal complaint not required to begin an investigation.** Employers do not need to wait for a formal complaint before beginning their investigation. Employers can, and often should, begin a workplace investigation following a verbal or informal complaint by an employee (such as a comment to human resources or a supervisor relating to a potential violation of a law or company policy).
- **Investigations don't always have to be performed by an internal investigator.** Though companies may use an in-house internal investigator to conduct an investigation (such as qualified human resources personnel), certain circumstances may be better suited for an impartial external investigator, such as severe allegations, an increased risk of litigation, when appropriate corrective action may involve employment termination of one or more employees, or in the absence of an experienced and uninvolved internal investigator

- **Witness interviews don't have to be in-person.** Interviews can take many forms, of varying degree of formality. Interviews can be conducted in person or remotely. Remote video interviews are effective where in-person interviews are not reasonably practicable, such as when they may lead to delays in completing the investigation or the witness' anticipated role is less critical and does not justify the added expense. Seeing a witness' face allows the employer to better assess credibility and read facial gestures or other movements, and is generally preferable to a phone call discussion. Relatedly, employers should consider oral witness statements as opposed to written witness statements for similar reasons. The investigator should accurately document each interview, including the date of the interview, who was present, and what the witness reported.
- **Inform witnesses of evidence preservation obligations.** Depending on the severity of the allegations and the risk of litigation, employers should consider sending out evidence preservation letters to witnesses (or potential witnesses), so those individuals are on notice to not delete any potentially helpful documents and communications. In lieu of an evidence preservation letter, employers can also consider orally informing witnesses of their evidence preservation obligations. Preserving key documents and communications can greatly assist in workplace investigations and can also be helpful in the unfortunate event that litigation ensues.
- **Concluding investigation.** Regardless of how the investigation shakes out, employers should emphasize that retaliation is prohibited against the complainant(s) or any employees who participate in an investigation. Employers should also consider informing the parties who are the subject of the investigation (*i.e.*, the complainant and alleged harasser) of the outcome of the investigation, such as whether a company policy was violated. This does not mean that employers must inform the complainant about the specific corrective actions taken by the employer, but whether the allegations were substantiated or unsubstantiated, and that proper corrective action will be taken if substantiated. Regardless of the outcome of the investigation, employers should also consider periodic and documented follow-up with the complainant to determine whether any further concerns exist.
- **Employee training is key.** Regardless of how an employer elects to move forward with a workplace investigation, they should be sure to have reporting procedures in place and train their workforce on relevant policies regarding harassment, discrimination, and other potentially unlawful employment activity. Proactive employers are typically in a better position to conduct effective workplace investigations.

In keeping these practical tips in mind, employers will be well-positioned to respond to employee complaints in a timely and dutiful manner.

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