

How to Conduct Effective Workplace Investigations Into Harassment and Discrimination Complaints

Editor's Note: This checklist describes basic protocols that should be followed in any discrimination/harassment investigation to ensure that the investigation will be prompt, thorough, and effective. What constitutes an effective investigation will vary based on the seriousness and scope of the complaint and the alleged wrongdoer's level of responsibility.

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Purpose of an Effective Investigation

Workplace investigations are increasingly common. Whether the reason for the investigation is an allegation of sexual harassment, corporate fraud, or some other misdeed, the need for an effective investigation cannot be overstated. If properly done, an investigation protects the company's interests in both the short and long terms. More immediately, investigations uncover misconduct, ensure corporate compliance with applicable law, protect the corporate image, and often provide a legal defense in the event of litigation. In the long run, they convey to employees and the public that the employer is committed to handling and resolving complaints professionally and maintaining a workplace free of discrimination and harassment.

1. Investigate Any Credible Report of Misconduct

- Once a company receives a *credible* report of wrongdoing, it must conduct an investigation.
- A credible report can be a personal complaint, a tip on a hotline, the observations of a manager/supervisor, or an outsider's report of an issue to the company.

2. Once a Report is Received, Begin the Planning Process as Quickly as Possible

- The investigative process must be thoughtful and well-planned from start to finish. Planning reduces the risk of error, ensures compliance with best practices, and helps withstand post-investigation challenge to the thoroughness and effectiveness of the investigation.
- Pre-investigation planning includes consideration of the following elements:
 - the actual purpose and objective of the investigation
 - the relevant employer policies and relevant law
 - who should investigate
 - who are the witnesses and what is the order/timeline of interviews
 - what topics should be discussed during the interviews
 - whether these decisions are documented

3. Choose the Appropriate Investigator

□ The investigator should be competent and professional, and be familiar with applicable legal standards. Objectivity is also important given the need to uncover the truth in a fair and impartial manner.

□ Potential candidates and their merits:

○ Human resources managers

- A good choice for relatively straightforward complaints of harassment and discrimination.

- Typically have strong interpersonal skills, have experience with investigations, and are generally familiar with applicable employment laws.

- Familiar with company culture and the individuals involved.

○ Outside investigators

- No connection to the individuals involved, which may help with the appearance of objectivity.

- Employees also may feel freer to discuss potentially embarrassing topics with individuals unknown to them.

○ Attorneys, both inside and outside counsel

- Trained to interview witnesses, collect evidence and assess credibility, and they are familiar with applicable law.

- A significant advantage is the potential availability of the attorney-client privilege and work product doctrine which can, in certain circumstances, help maintain the confidentiality of the investigation.

PRACTICE POINTERS

Companies may choose attorney investigators because they want to keep the investigation and conclusions privileged and confidential. Although the details of the attorney-client privilege and work product doctrine are beyond the scope of this checklist, it is important to mention that neither the attorney-client privilege nor the work product doctrine will always shield the discovery of information. In order to assert the privilege, care must be taken to ensure the presence of the following: there must be an attorney and a client; the relationship must be established *for the purpose of providing legal advice*; there must be communication between them; and that communication must be made with the intent to keep the communication confidential.

The work product doctrine protects mental impressions, conclusions, opinions, and legal theories of an attorney, but they must be created *in anticipation of litigation*. Even in the presence of these privileges and protections, courts often hold that employers waive any privilege that may attach to investigation-related documents when the company raises the adequacy of the investigation and/or corrective action as a defense in litigation.

4. Define the Scope of the Investigation

□ The scope should be limited to discovering those facts that prove or disprove the issues underlying the investigative goals.

□ The investigator should avoid a “scorched earth” approach. As with any investigation, however, as facts are uncovered, the process should be adjusted to account for the true nature of the underlying problem and the need to develop a complete factual record.

5. Identify Witnesses to Be Interviewed

□ At the outset, the investigator should identify every person with possible knowledge of relevant facts and then decide whom to interview.

□ This list typically includes the complaining party, the subject of the complaint, any person believed to be a direct witness, and the supervisors of the complainant and subject.

□ The investigator must balance the need to get complete information with the desire to keep the matter as contained as possible.

6. Consider the Order in Which to Conduct Interviews

□ Generally, witnesses are interviewed in the order from the least to most likely to have engaged in any wrongdoing.

□ Typically, the first witness is the complaining party. Since the interviewer knows the least about the facts at this point, the complainant may need to be interviewed again at a later point.

□ The next set of interviews are the neutral third-party witnesses, with the questions focusing on what these individuals saw and heard, and the basis of their knowledge.

□ The subject of the complaint is typically interviewed last, after the interviewer has a better understanding of the underlying incident(s). It is critical to afford the subject of the complaint the opportunity to present his/her response to each matter raised by the complainant.

7. Select a Location

□ Any place that ensures a full and frank discussion will be appropriate, provided it allows for privacy, confidentiality, and witness comfort.

□ In-person interviews are far better than any telephone interviews, which should be avoided if possible.

8. Be Prepared With Questions

□ The interviewer should come prepared with standard instructions and a list of topics/questions. Always begin with instructions.

□ The investigator should explain the reason for the investigation, both what is being investigated and why the witness is being questioned. The investigator should also describe his/her role.

□ With regard to the topic/question list, these are guidelines only, since the interviewer may need to follow up on or clarify answers to questions.

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When the interviewer is an attorney, the interview **must** begin with *Upjohn* warnings. Also known as a corporate Miranda warning, this is a notice the attorney (in-house or outside counsel) must give to a company employee. This notice must inform the employee that the attorney represents only the company and not the employee individually. Providing an employee with an *Upjohn* warning should make it clear that: 1) the attorney/client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company; and 2) the company may choose to waive the privilege and disclose the employee's statement to a government agency or any other individual or entity.

9. Ask Good Questions, Listen Attentively, and Observe Demeanor

- Never stick to a script.

- Plan general questions or topics, listen closely to answers, and retain flexibility to follow up for more detailed answers or on any new information provided.

- Follow this interviewing protocol:
 - Follow a chronological or other systematic order when questioning witnesses. This way, the questions are clear and the witness can easily understand them. Random questions can be confusing.

 - Be reasonable in expectations. Rarely will an employee confess to wrongdoing in an initial interview.

 - Begin with open-ended questions (the “who, what, where, why, and how”) and then narrow the focus. Always keep questions clear and direct.

 - Ask tough questions, even if they are embarrassing, but save them until the end, if possible.

 - Return to key issues several times in different ways. This refreshes recollection and allows the observation of demeanor.

 - Allow silence. Witnesses often speak more to fill the void.

 - Always determine the basis for the witness's knowledge. Is the information based on personal knowledge or experience, or learned from some outside source?
 - Is the witness's statement contradicted by a document or by another witness? If so, be sure to follow up and ask for more information at the appropriate time.

 - Observe body language. This helps with a credibility assessment.

 - Always ask if there are others with relevant information or who should be interviewed.

 - At the conclusion of an interview, always ask whether there is anything else the witness wants to add and whether there are any other documents to review.

 - Conclude the meeting with instructions regarding confidentiality and non-retaliation and thanks for time and cooperation.

10. Collect and Review Relevant Documents

- Documents are a critical part of an investigation since they often provide evidence of contemporaneous communications or behaviors and can be used to refresh recollection or suggest other avenues of investigation.
- Handle them cautiously, whether in electronic or paper form. Don't write on or alter original documents.
- Take steps to preserve original documents and, if tampering is suspected, collect the same documents from several sources. An investigator should note the source of each document collected.

11. Reach a Conclusion

- The purpose of the investigation is to make detailed and supportable factual findings. This allows the company to implement appropriate remedial action and make any needed changes to business operations.
- The investigator should reach a conclusion as to what happened, when it happened, who was involved/responsible, and what standards applied.
- Once completed, the investigative file should be maintained in a secure area.

12. Report the Results

- As interviews are completed, interview memos should be prepared, and at the conclusion of the investigation, a final report should be submitted.
- Consideration must be given to the form of this report. There are several options, including an oral report, a written report, or some combination, and which option you choose depends on multiple factors.

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While the report should include a summary of facts gathered and any conclusions or recommendations, it may also memorialize damaging information. In this case, one option to consider is the preparation of solely an oral report, although this will sometimes appear to be an effort at hiding the truth. The final report could be a combination of an extensive oral report with a limited written report, or a detailed written report.

- The format of the report should be discussed and considered before the conclusion of the investigation.
- The final report should be limited to the scope of the investigation and should include:
 - a description of when the initial complaint was made and in what form;
 - the dates of the investigation, from beginning to end;
 - identification of individuals interviewed, including date of the interview, summary of information provided, and any credibility assessments;
 - identification of documents reviewed;
 - a summary of facts gathered;

- a statement of whether the complaint was substantiated, and any specific conclusions reached;
- a discussion about whether the conduct implicated company policies or guidelines; and
- a description of the company's response to the report.

□ The employer also should consider whether the report will include recommendations. In more far-ranging investigations, the company may want recommendations regarding the drafting/revision of policies, suggestions to change the culture, and recommendations as to the handling of complaints or appropriate disciplinary actions. In smaller investigations, however, such recommendations may not be appropriate as they are outside the scope of the investigation. These items should be considered before the report is prepared.

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