

1. WHETHER TO CONDUCT AN INVESTIGATION

Guiding Principle: An impartial workplace investigation should occur when an employer has determined that one is necessary.

Key factors to consider:

- Are there key facts in conflict?
- Even if key facts are not in conflict (e.g., the accused has admitted the alleged conduct), does the employer need to determine the number of alleged victims or the extent of harm?
- Is a policy violation or a violation of law alleged?
- Is there a legal obligation to investigate?
- Where discrimination is alleged, is the complainant in a protected category? If not, would the conduct nevertheless violate the employer's rules, ethics or expectations?
- Do the allegations call for an "organizational assessment" instead of an "investigation" (e.g., friction within a work group)?
- Will the investigator be able to maintain the impartiality of the investigation?

2. DETERMINING WHO SHOULD CONDUCT AN INVESTIGATION

Guiding Principle: The investigator should be impartial and objective, and have the necessary skills and adequate time to conduct the investigation.

Key factors to consider:

- Whenever possible, the investigator should be someone the participants view as impartial, though this may not be possible in every case.
- Employers may choose to use an in-house (internal) investigator. In such cases, the internal hierarchy of the organization should be considered to avoid the perception of biased or compromised objectivity.
- Employers who choose to retain an outside investigator should consider any licensure requirements which may apply to outside investigators. An outside attorney investigator conducting an impartial investigation should appreciate the distinction between the role of impartial investigator and that of advocate.
- Employers should guard against exerting undue influence on the investigation. This does not preclude them from preserving evidence, providing necessary notifications to employees, and providing input to the investigator concerning the investigation's scope.
- The investigator should consider whether specialized expertise is required, and, if so, consider whether the investigator possesses the requisite expertise, whether the investigator should partner with another with the req-

uisite expertise, or whether the investigator should decline the investigation.

3. DEFINING INVESTIGATION SCOPE

Guiding Principle: The employer and the investigator should develop a mutual understanding concerning the scope of the investigation. In this context, the "scope" of the investigation refers to the issues to be investigated.

Key factors to consider:

- To promote clarity, the investigator may wish to obtain appropriate documentation of the scope of the investigation.
- Where the employer has decided not to investigate a major issue substantially related to issues within the scope of the investigation, after the investigator has made a reasonable effort to resolve any difference of opinion, the investigator may wish to consider whether to go forward with the investigation and may wish to document that decision.
- During the course of the investigation the investigator may become aware of issues that are beyond the initial scope of the investigation. If this occurs, the investigator should generally provide appropriate notice to the employer, which may include documentation, so that the employer may decide the appropriate course of action.
- If requested to do so by the employer and if the investigator agrees, the investigator may include the additional issues with the original investigation, or may conduct a separate investigation.
- If during the investigation the employer decides to change the scope of the investigation for reasons other than the discovery of additional issues, or to limit interviews or otherwise restrict the investigation, the investigator may wish to document these changes and/or restrictions. Determining the scope of the investigation differs from determining the process to be followed in conducting the investigation.

4. INVESTIGATION PLANNING

Guiding Principle: The investigator should engage in planning for an effective investigation.

Key factors to consider:

- The investigator should consider what documents, if any, are needed and who will be able to provide them. Documents may include e-mails and e-files, text messages, personnel and sensitive files, timelines, policies, procedures and handbooks, and any relevant prior investigation materials and written statements.
- The form that the report should take (i.e., oral v. written;

recommendations; legal conclusions) is generally decided upon by the employer.

- Verbal and/or written advisements that the investigator and/or the employer will be providing to witnesses should be considered.
- Determinations to be made often include who will be interviewed, in what order, and for what purpose, subject to change due to witness availability and information obtained.
- Planning also may include deciding who should schedule interviews, work out logistics, and set up interviews, and identifying the resources needed and who will provide them.
- Adjustments to the investigative plan may need to be made for new developments and newly-discovered witnesses and evidence.
- It may be helpful to develop general lines of inquiry to be used in interviewing witnesses.

5. COMMUNICATING WITH REPRESENTATIVES OF THE EMPLOYER

Guiding Principle: A determination should be made as to who the investigator will be communicating with about what matters, taking into consideration issues of privilege.

Key factors to consider:

- In addition to witnesses, communications with the employer (or on behalf of the employer) generally fall into two main categories: (1) communications concerning the scope of the investigation, the advisories to be given and the type of report to be produced, and (2) communications concerning scheduling and logistics.
- Whenever feasible, an employer representative should not be a witness or participant in the matters being investigated. Investigators should avoid communicating with anyone who is or may be directly involved in the matters being investigated and anyone who is or may be interviewed on substantive matters.
- An employer representative is generally the most appropriate person to handle logistics and scheduling and to provide initial advisories with respect to current employees such as the need to cooperate in the investigation, to maintain appropriate confidentiality, and to tell the truth during the interview.
- An employer representative is also generally the most appropriate person to make the initial contact with witnesses who are third parties and/or former employees.
- An investigator should understand the employer's policies with respect to allowing others, such as attorneys, union representatives, friends and family members, to be present during an interview.

- An investigator should clarify union involvement, if any.
- An investigator should avoid communicating conclusions before the investigation is complete.

6. CONFIDENTIALITY AND PRIVACY²

Guiding Principle: The investigator should take steps to safeguard the confidentiality of the investigation without guaranteeing anonymity or complete confidentiality.

Key factors to consider:

- The investigator or employer may wish to provide the parties and witnesses with a written explanation of the need for confidentiality.
- The investigator should maintain his/her investigation file in a manner that will protect the confidentiality of the information contained therein.
- The investigator should not reveal the details of the investigation, or the contents of the investigation file, to anyone other than the employer except in compliance with employer directives, legal process, and the law. However, the investigator may share information with participants on a "need to know" basis and is not precluded from revealing information necessary, in the investigator's judgment and consistent with any employer directives, to conduct or attempt to conduct, an effective interview and/or to apprise an individual whose conduct, or lack thereof, is at issue, of the facts sufficient to allow the individual the opportunity to respond.

7. EVIDENCE GATHERING AND RETENTION

Guiding Principle: The investigator should gather relevant evidence.

Key factors to consider:

- In determining the evidence to gather, the investigator may consider:
 - The nature of the allegations;
 - The probative value of the evidence, weighed against the costs of gathering the evidence, in terms of money, time and potential disruption to the workplace;
 - Whether outside expertise is needed.
 - If the investigator requests evidence from the employer that the employer declines to produce, a note to this effect (that evidence was requested but not produced) may be made in the final report, depending on the investigator's judgment concerning its significance.

² Currently there are significant developments regarding instructions to witnesses regarding "confidentiality" by both the National Labor Relations Board and the EEOC. Therefore, care and research in this area should be considered.

