

The first revision of the Guiding Principles is based on numerous suggestions submitted by AWI members. Again the Committee prepared drafts, and the final version was approved by the Board. Although the title of the Guiding Principles was simplified in the first revision, the Guiding Principles remain focused on impartial workplace investigations.

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer's policies, standards, ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned conclusions based on the information gathered.

AWI believes that the publication and revision of these Guiding Principles will enhance the quality of workplace investigations.

1. DECISION TO CONDUCT AN INVESTIGATION

Guiding Principle: A workplace investigation should occur when indicated by law or policy as determined by the employer.

Key factors to consider:

- a. If key facts are in conflict, an investigation often is appropriate.
- b. Even if key facts are not in conflict (e.g., the respondent has admitted the alleged conduct), the employer may need to determine the number of persons affected or the extent of harm.
- c. Whether or not a violation is one of policy or of law may influence the decision.
- d. Whether the complaint is based on the complainant being in a protected category is a consideration. If not, an employer may consider whether the conduct alleged nevertheless violates the employer's rules, policies, practices, or expectations.
- e. Allegations may call for an "organizational assessment" instead of an "investigation" (e.g., friction within a work group).

2. CHOICE OF INVESTIGATOR

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

Key factors to consider:

- a. Whenever possible, the investigator should be someone who is in fact, and who is perceived by the participants to be, impartial, though this may not be possible in every case.
- b. Employers may choose to use an in-house (internal) investigator. In such a case, the internal hierarchy of the organization should be considered in order to avoid the fact or

perception of bias or compromised objectivity.

- c. Employers who choose to retain outside investigators should consider any licensure requirements which may apply to outside investigators.
- d. An outside attorney investigator conducting an impartial investigation should appreciate the distinction between the role of impartial investigator and that of advocate.
- e. Employers should guard against exerting undue influence on investigations. This does not preclude them, for example, without limitation, from preserving evidence, providing necessary notifications to employees, and providing input to investigators concerning the investigations' scope.
- f. 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 requisite expertise, or whether the investigator should decline the investigation.

3. SCOPE OF INVESTIGATION

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:

- a. Determining the scope of the investigation differs from determining the process to be followed in conducting the investigation.
- b. 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 generally should provide appropriate notice to the employer, which may include documentation, so that the employer can determine the appropriate course of action.
- c. 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.
- d. During the investigation, if the employer decides to change the scope of the investigation for reasons other than the discovery of additional issues, to limit interviews, or otherwise to restrict the investigation, the investigator may wish to document these changes or restrictions.

4. INVESTIGATION PLANNING

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

Key factors to consider:

- a. The investigator should consider what documents, if any, are needed and how to obtain them. Documents may include e-mails and e-files, text messages, personnel and sensitive files, timelines, policies, procedures, handbooks, and relevant prior investigation materials.
- b. The form that the report should take (i.e., oral v. written; recommendations; legal conclusions) generally is decided upon by the employer.
- c. The advisements to be communicated to witnesses and the manner in which they will be given should be determined in advance.
- d. Initial determinations to be made often include who will be interviewed, in what order, and for what purpose, subject to changes due to witness availability and additional information obtained.
- e. Planning may include deciding who should schedule interviews, work out logistics, set up interviews, identify the resources needed, and provide the needed resources.
- f. Adjustments to the investigative plan may need to be made as a result of new developments or newly-discovered witnesses or evidence.
- g. General lines of inquiry are typically developed to be used in interviewing witnesses.

5. COMMUNICATING WITH EMPLOYER REPRESENTATIVES AND WITNESSES

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

Key factors to consider:

- a. In addition to witnesses, communications with the employer (or on behalf of the employer) generally fall into three main categories: (1) communications concerning the scope of the investigation, the advisements to be given, and the type of report to be produced; (2) communications concerning the process for obtaining evidence, scheduling, and logistics; and, (3) background information.
- b. If feasible, investigators should avoid communicating outside the interview process with anyone who is or may be directly involved in the matters being investigated, or with anyone who is or may be interviewed on substantive matters.
- c. If feasible, an employer representative should not be a witness or participant in the matter being investigated.
- d. An employer representative generally is the most appropriate person to handle logistics and scheduling and to determine the content of initial advisements to be given to current employees. These include, for example, the need to cooperate in the investigation, to maintain appropriate confidentiality, and

to tell the truth during the interview.

- e. An employer representative generally will decide whether third parties may be present during interviews if requested by a witness. This includes representatives if an employee is covered by a collective bargaining agreement. However, an investigator who is an attorney must be cognizant of rules of professional responsibility, including rules concerning contact with a represented party.
- f. An investigator should avoid communicating conclusions before the investigation is complete.

6. CONFIDENTIALITY AND PRIVACY³

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

Key factors to consider:

- a. The investigator should maintain the investigation file in a manner that will protect the confidentiality of the information contained therein, consistent with the employer's instructions and legal requirements.
- b. The investigator should consider the extent to which the investigator reveals information in order to conduct an effective interview.

7. EVIDENCE GATHERING AND RETENTION

Guiding Principle: The investigator should gather relevant evidence.

Key factors to consider:

- a. In determining the evidence to gather, the investigator may consider, without limitation:
 - i. The nature of the allegations;
 - ii. Laws and policies, for example, the employer's electronic media policies;
 - iii. The probative value of the evidence, weighed against the costs of gathering the evidence, in terms of available financial resources, time, and potential disruption to the workplace; and,
 - iv. Whether outside expertise is needed.
- b. If the investigator requests evidence from the employer that the employer declines to produce, the investigator may wish to document this.

³ There have been significant legal developments regarding proper confidentiality instructions to witnesses. These developments should be considered.

8. WITNESS INTERVIEWS

Guiding Principle: There are many effective ways to handle witness interviews. The investigator should create an environment that maximizes the chances of obtaining reliable information and should document (either through note-taking, recording, or some other method) the witness' testimony in a reliable and consistent fashion.

Key factors to consider:

- a. Whenever feasible, the parties and witnesses should be interviewed in person.
- b. The interview presents a unique opportunity to assess witness credibility. The investigator should put himself or herself in a position to determine the credibility of witnesses relative to one another.
- c. An environment that is safe, private, and reasonably comfortable is conducive to a productive interview.
- d. Generally, the investigator's role, the purpose of the investigation, and advisements concerning confidentiality, retaliation, and the like, are provided at the outset of the interview.
- e. Generally, open-ended questions, giving the witness an opportunity to expand on the requested information, are more likely to elicit information than closed-ended questions.
- f. Questions that allow the witness to respond fully are the goal.
- g. The complainant should generally be asked to provide the specifics of the incidents described and to identify any relevant witnesses and documentation.
- h. The complainant and respondent should be provided with an opportunity to present their positions and to correct or challenge relevant statements contrary to their positions; specific admissions and denials should be sought.
- i. Witnesses should be permitted to take breaks and leave the room.

9. DOCUMENTING THE INVESTIGATION

Guiding Principle: The investigator should document the steps taken during the investigation and the investigator's decision-making process, so that there will be a reliable record of the evidence the investigator relied upon in reaching findings.

Key factors to consider:

- a. There are many different ways to effectively document. Whichever method the investigator uses, the investigator should take steps to ensure the reliability of the documentation.
- b. The investigator should consider documenting: (1) occasions on which significant obstacles were encountered; and, (2) the process used to collect the information considered.

10. INVESTIGATION FINDINGS

Guiding Principle: An investigator's findings should be consistent with the scope of the investigation as defined by the employer.

Key factors to consider:

- a. In many cases, the employer determines that the scope of the investigation be restricted to determinations of fact and/or policy violations. Legal conclusions and recommended personnel actions should be communicated only if they are requested, that is, if they are within the scope of the investigation.
- b. The investigator should strive in good faith to make reasoned findings.
- c. The investigator should clearly understand the applicable standard to be used in evaluating the evidence and should weigh the evidence in accordance with the applicable standard. In many workplace investigations, the appropriate standard of evidence will be "the preponderance of the evidence" standard; namely, whether after weighing all the evidence, it is more likely than not that the alleged incident occurred.

11. REPORTS

Guiding Principle: A written report should be prepared if requested by the employer.

A written report may contain the following:

- a. A statement of the scope and the issues;
- b. An explanation of the investigation process;
- c. A discussion of the evidence relied upon by the investigator;
- d. An identification of the employer policies involved, if any;
- e. An identification of any evidentiary standard used; and,
- f. A statement of the investigator's findings and conclusions.



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GUIDING PRINCIPLES FOR CONDUCTING WORKPLACE INVESTIGATIONS¹

INTRODUCTION

With great pride, the Association of Workplace Investigators ("AWI") originally published its then-entitled "Guiding Principles for Investigators Conducting Impartial Workplace Investigations" ("the Guiding Principles") on the third anniversary of the founding meeting² of its Board of Directors ("Board").

AWI's Guiding Principles Committee ("the Committee"), which was established at AWI's founding Board meeting, developed the Guiding Principles in collaboration with AWI membership. Specifically, in March, 2010, the Committee conducted three full-day roundtables to gather the information which provided the foundation for the Guiding Principles. Of AWI's 100 Charter Members, 85 participated.

Over the next two and one-half years, the Committee synthesized the information gathered and prepared drafts of the Guiding Principles. The Guiding Principles were reviewed by the Committee, the Board, and ultimately the entire AWI membership, which currently numbers approximately 400.

¹ © 2012-2013 Association of Workplace Investigators, Inc. All rights reserved. Originally published September 25, 2012. First revision July 29, 2013. The principles and key factors contained herein are of a generalized nature and are intended for both in-house and third party investigators conducting impartial workplace investigations. Because every investigation presents different circumstances, it may be necessary or desirable in any given investigation for an investigator to deviate from the identified principles or key factors. Accordingly, any such deviation or decision not to adhere to the identified principles or key factors does not necessarily render an investigation inadequate.

² The founding meeting of the Board of Directors of the California Association of Workplace Investigators, Inc. (CAOWI) was on September 25, 2009. On October 31, 2011 CAOWI changed its name to Association of Workplace Investigators, Inc. (AWI) and expanded its purpose beyond California.