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Employment Law

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Best Practices for Conducting Employee Misconduct Investigations

Since the rise of the #MeToo movement, many employers have seen an increase in employees bringing internal complaints claiming harassment by co-workers or management. In order to avoid potential liability or increased exposure, employers must ensure that they conduct prompt and effective investigations designed to ensure that any harassment in the workplace is eliminated. While employers may complain that having to step aside from regular duties to respond to an internal complaint is a drain on time and resources, it is crucial that employment attorneys urge clients to take these complaints seriously and to fully investigate the allegations.

Who should conduct the investigation?

Ideally, employers should have one individual responsible for conducting investigations to ensure consistency. Since employers have the freedom to choose who conducts an investigation, the best person is a management level employee who would make an excellent expert witness should the case progress to litigation. If a television news crew came to the workplace for a live interview, the person that the company would feel the most comfortable putting in front of the camera as a spokesperson is the perfect choice. The law firm that represents the company in litigation is not a good choice because the attorney who investigates the complaint will likely become a witness and would then have a conflict of interest.

Initial steps before interviewing witnesses

The first step in the investigation is to request that the complaining employee put the complaint in writing. Some employment attorneys recommend against this approach since you will already be interviewing the person, but there are many advantages to getting the complaint in writing. First, the investigator will know from the beginning the full scope of the employee's complaints and concerns the employee wants resolved. This will help the investigator determine the scope of the investigation, what areas to cover, who should be interviewed, and what needs to be done ahead of time. Second, if the employee embellishes the claim in subsequent litigation by coming up with more allegations of misconduct that were not in the initial complaint, the company's attorney can use the writing for impeachment. Third, if employees enhance their claims in a deposition as compared to the interview and litigation counsel attempts to impeach them on the inconsistency, employees may complain that the investigator rushed them during the interview, they were not allowed to tell their full side of the story, or they were nervous or felt pressure during the interview and left out key details. But if the complaint was reduced to writing, presumably the employee could write out the complaint on his or her own time, with reference to any documentation supporting the claim, and would arguably include all complaints of misconduct.

As part of the initial steps of the investigation, the investigator should also request copies of all emails, texts, voice mail messages, videos, pictures, greeting cards, memos, notes, diaries, etc. from the complaining employee as well as the accused. Depending on the circumstances, it may be advisable to have IT personnel run a search of emails sent and received by both the accuser and the accused. Review the company's nondiscrimination and harassment policy, any applicable union contracts or grievance procedures, work rules, personnel files, or disciplinary records.

Conducting effective interviews

Once the investigator has assembled the initial documentary evidence, begin by interviewing the complaining employee, move on to witnesses, and then the accused. Prior to this interview, draft a list of topics to cover, but not specific questions. With a list of questions rather than topics, the investigator is less likely to listen closely to the answers and is more likely to be reading from the script. It is also a good idea to tape record interviews of both the complaining employee and the accused harasser. While some attorneys feel otherwise, anyone who has deposed both parties to a key conversation knows that the likelihood of agreement on what was said during the meeting is close to zero. In order to tape record the interview, the investigator must have the consent of all people in the room and their consent should be noted at the start of the tape recording.

While the investigator should also take notes of each interview, the investigator is not there to be a court reporter and provide a verbatim transcript. On the other hand, only writing down comments that would be helpful to the employer opens the investigator up to a claim of bias. Notes should be a general summary of what was said to help with later recall. The notes should focus on facts and factual observations and avoid adjectives and conclusions. The original notes must be retained in their original format, even if the investigator later types or rewrites the notes to be more legible.

The investigator should strive to make the interview as conversational as possible by asking open-ended who, what, why, when, where, and how questions. Aim to get a complete picture from all witnesses. The investigator should ask each witness if he or she has disclosed "everything" or whether there are other concerns with the accused or someone else. It may be helpful to use documents to refresh witnesses' recollection. Ensure that each topic or accusation has been fully explored. Save confrontational questions for the end, so that the witness does not clam up and stop talking. The investigator may wish to explore whether the relationship was consensual at any point in time and how, when, and why the relationship ended. Ask the accused for any reasons or motives that he or she may know for the claim of misconduct to be made. Advise the complaining employee that a follow-up interview may be necessary to address any accusations or statements made by the accused harasser or witnesses.

Complaining employees and witnesses should all be made aware of the employer's policy against retaliation, given a copy of the policy, as well as a memo reminding them of the non-retaliation policy and urging them to contact the investigator if they believe that anyone in the company is retaliating against them. The alleged offender should also be told of the policy and instructed to avoid contact with the complaining employee. This directive should also be put in writing.

While many employers and employees want confidentiality in the investigation, the National Labor Relations Board decided in *Banner Health System*, 362 NLRB No. 137 (June 26, 2015), that asking employees during investigatory interviews to not discuss the investigation with others is a violation of Section 7 of the National Labor Relations Act. In light of this decision, private employers should not request confidentiality during employee interviews.

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Wrapping up the investigation

Once the investigator has reviewed all relevant documents and conducted interviews, the investigator must determine whether there has been a violation of the employer's internal policies. The investigator should not look at whether there has been a violation of federal, state, or local employment laws. Many investigators conclude that the allegations are unsubstantiated because of conflicting evidence, especially when there are no definitive witnesses to the alleged misconduct. The better practice is for the investigator to assess the credibility of each witness in light of their testimony, the documentary evidence, and history of any such misconduct or allegations against the accused.

Ultimately, the investigator should make a recommendation or decision on whether there has been a policy violation and, if so, what discipline would be sufficient to prevent further incidents. While court decisions emphasize that employers have the discretion to decide on the appropriate response when there has been a violation, the investigator should take into account prior discipline or accusations of misconduct and how the employer has disciplined other employees who violated the same work rules to ensure consistency. *See Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629, 637 (7th Cir. 2009) "In assessing the corrective action, our focus is not whether the perpetrators were punished by the employer, but whether the employer took reasonable steps to prevent future harm."

Although it may be ideal for the investigator to prepare a written report detailing the entire investigation and recommendations, many investigators find such projects daunting. Since the promptness of the investigation and resolution is a factor in the employer's potential liability in a lawsuit, the investigator should not create a report if it will delay the conclusion of the investigation by more than a few days. *See Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005) (recognizing "prompt investigation of the alleged misconduct as a hallmark of reasonable corrective action"). A better option is for the investigator to present an oral report to management with recommendations, ideally in the presence of legal counsel to protect the privilege.

The final step is for the investigator or other member of management to separately meet with the accused and accuser and convey the employer's decision and why it was reached. During this meeting, the parties should be again reminded of the employer's policy against retaliation. If discipline results from the investigation, the disciplinary forms should be completed and a copy of the discipline, not the investigation, should go in the accused employee's personnel file. Lastly, the employer should follow up periodically with the complaining employee to ask how things are going and if there are any additional concerns. This conversation should be reduced to writing by memo or email. By following these steps, employers should send a message to all employees that complaints will be taken seriously and will be handled fairly and impartially.

About the Author

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