

Workplace Investigations

A training guide on better understanding what workplace investigations are, how to appropriately handle workplace investigations, and tips on ensuring a safe work environment.

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An Introduction to Workplace Investigations

General Concepts, Definitions, and Why Investigations are Important

General Concepts

- A workplace investigation is conducted when there is credible information that there may have been wrongdoing, wrongful behavior, misconduct, or ethical failures/slip-ups/violations within the workplace.
- A workplace investigation may also be necessary in circumstances that do not necessarily provide specific allegations against an employee or employer, but some allegation was made, or some wrongdoing may have occurred, and the appropriate next step would be to investigate in order to exclude the possibility that wrongdoing occurred within the business or company.

Who may be parties to a workplace investigation?

- A workplace investigation is an internal investigation, meaning it involves those within the workplace, and the allegation or complaint that gives rise to an investigation is brought against or involves anyone in the workplace, including employees, co-workers, supervisors, and employers.
- The person bringing the complaint is oftentimes an employee or worker, and is oftentimes called the accuser, complainant, or victim.

Why Should Employers Take Providing and Conducting Workplace Investigations Seriously?

- Investigations can help the employer identify and resolve internal problems before they become widespread.
- How businesses and companies investigate potential misconduct can affect the employer's reputation.
- Promptly responding to a complaint through an investigation will:
 1. Provide the best information and evidence regarding the matter.
 2. Show the employer to be ethical and credible.



"To address this mistake we must use root-cause analysis. I'll begin by saying it's not my fault."

There are Consequences in Failing To Provide Investigations

- Investigations not conducted properly, or lack of providing investigations entirely, may have serious consequences for all parties.
- Potential issues that may arise include harm to the complaining party, lawsuits, and ethical or legal misconduct/violations.



"Possible trouble sir. There's a crew here from 60 minutes and they're coming this way."

The Purpose and Goal of Workplace Investigations

Workplace Investigations should be meaningful and effective

- The purpose of a workplace investigation is more than merely gathering facts about an incident or creating a record of the incident to indicate the employer was aware of the situation.
- An effective investigation process protects the interests of the business and its employees by:
 1. Preventing and detecting misconduct and violations.
 2. Ensuring the workplace and its activities comply with applicable laws, policies, and regulations.
 3. Identifying areas of improvement for the business and the workplace.



"OK, OK, I'LL AUTHORIZE A FACT-FINDING MISSION!
JUST DON'T BOTHER ME WITH THE RESULTS!"

An investigation is...

- Fact-finding. It is based on facts—not assumptions, personal opinions, or conclusions.
- Investigations are for the purpose of determining (fully and credibly):
 - What happened with respect to a particular incident;
 - Whether the alleged conduct did or did not take place;
 - What the circumstances surrounding the incident were;
 - Who was involved; and
 - Whether a violation of law or business policy occurred.
- Investigations should be thorough, unbiased, analytical, and based **solely** on facts gathered.

Workplace Investigations: Steps and Procedure

The following slides will provide general steps and guidance the employer should take as soon as the employer receives a verbal or written complaint. Some changes may be necessary, as appropriate, to fit a specific situation or an employer's specific type of business and needs.

Confidentiality

- An employer is required to maintain the integrity of the business and the investigation by protecting the confidentiality of the employee, including the employee's complaint or claim.
- A complaint or claim may be verbal or written.
- Confidentiality begins once a report or complaint is received.
- Every aspect of an investigation must be kept confidential, including the subject matter, details, and materials and facts gathered regarding the complaint and investigation.
- Even information on whether there will be an investigation should be kept confidential.



"Full disclosure...
we're not disclosing anything."

Confidentiality must be maintained (to the extent possible)

- An employer must balance confidentiality with the employer's duty to conduct an effective, prompt, and accurate investigation.
- Therefore, it may not be possible to keep all information relating to the complaint, to interviews, and to records completely and entirely confidential.
- However, confidentiality must be maintained *to the extent possible*, and the employer should explain to all parties involved that
 1. Confidentiality remains in place to the extent that would also allow for a thorough and accurate investigation.
 2. Some information may be revealed, as necessary on a "need to know basis," to parties involved (such as the accused, witnesses, or potential witnesses).
- An employer should NOT promise *absolute* confidentiality to any party.

Risks of Not Maintaining Confidentiality



"WE TAKE CONFIDENTIALITY VERY SERIOUSLY
IN THIS COMPANY."

- A failure to maintain confidentiality may have consequences.
- Some of these consequences include:
 - Damage to a party's reputation if outsiders learn of the allegations.
 - Undermining the success of the investigation.
 - Risk that a party or witness/potential witness may try to cover-up the misconduct.
 - Employer liability, outside negative attention or publicity, and/or harm to an employer's reputation.
 - Jeopardization of an employer's ability to defend a potential lawsuit or litigation involving the matter.
 - Retaliation.

Protecting the Accuser (Complainant)

- Immediate measures or precautions should be taken, if and as necessary, for the accuser or complainant to feel safe while dealing with the complaint and throughout the investigation.
- Precautionary needs will vary on a case-by-case basis, depending on the specific situation and how severe or minimal it is.
- Example: an employee bringing a harassment or retaliation complaint may need a schedule change, leave of absence, or to work from home.
- A change may especially be necessary in situations where the complainant and the accused work in the same environment, in close proximity, or cross paths during work hours.
- The employer and complainant should communicate to reach a reasonable and appropriate solution.
- Employers may choose to seek legal advice before making decisions if unsure on an appropriate course of conduct at any point in the process.

Qualities the Chosen Investigator Should Posses

- Choosing the right investigator is a substantial component of having a successful investigation.
- The individual who takes on this role must possess certain qualities, including but not limited to:
 - The ability to be objective and unbiased.
 - Have no shared interest or involvement in the outcome, or a personal relationship with the parties.
 - Working knowledge of employment laws.
 - Skills, experience, and knowledge in conducting investigations (competent, experienced, and well-trained).
 - Understand different aspects vital to investigations, including confidentiality and privilege requirements, how to interview parties and witnesses, proper management of documents and records, and understanding necessary procedural steps.
 - Detail-oriented; impartial; strong interpersonal skills allowing the investigator to build rapport with the parties and be perceived as neutral and fair.
 - Full knowledge of the employer's business and its functioning, management, history, risks, etc.

Selecting the Investigator: Internal vs. External Investigators

Courts approve of both internal and external investigators (*Dominic v. DeVilbiss Power Co.*). Each has its own advantages and disadvantages. Three main types are discussed below.

1. Human Resources

- Pros: specialized job training and prior experience in conducting workplace investigations; employees feel comfortable with HR; knowledge of the business and employment laws.
- Cons: employees may perceive HR staff as not being neutral in the investigation because of their relationship to the employer; risk of having a close personal relationship with a party to the investigation; a party's lack of trustworthiness to the HR staff because of any of these reasons.

2. Outside, Nonlawyer, Third-party Investigators

- These persons are often used when the employer does not have an internal person that possesses qualifications necessary to conduct investigations or when the person who regularly would take on investigations is a party to the matter.
- Pros: the ability to be objective and be perceived as objective (which an internal investigator may lack).
- Cons: may need to acquire knowledge and get familiar with the employer's business, history, employees, etc.

4. Legal counsel investigators (in-house or outside)

- Pros: outside counsel can be objective, while in-house has knowledge of company culture and the employees.
- Cons: can be perceived as intimidating by a party, which may hinder the party's ability to be open and provide information.

Overview of the Investigation Process

Step 1: Should you investigate?

- Before jumping in and conducting an investigation, make sure an investigation is necessary.
- Sometimes, if a problem is minor or all employees come to an agreed understanding of a problem, it may be not be necessary to make a full investigation.
- However, unless explicitly clear or not risky, conducting an investigation is still best.
 1. Sometimes it is not possible to tell how severe or substantial a problem is unless it is properly investigated—the situation may be more serious than it seems.
 2. A failure to investigate may lead to legal or ethical trouble, lawsuits, and harm to the reputation of the employer and business.
 3. Workplace problems relating to the situation may continue to exist.



"I had a pizza with extra sauce in the breakroom, but someone ate it. We're not leaving this room until I find out who it was!"

Step 2: Take prompt action

- An investigation should be initiated promptly after receiving a complaint, or when the employer knew or should have known of a problem.
- How "prompt" the investigation should be will vary on a case-by-case basis
 - For example, harassment complaints require immediate commencement of an investigation, and depending on the specific situation at hand, action may need to be taken even before the investigation can begin in order to prevent substantial or further harm.
 - Some considerations include the type of harm or complaint, the complexity of the situation, and who or how many people are involved.

Step 3: Choose the right investigator and plan the investigation



Sherlock Holmes, summoning all his detective skills, concludes that there is too much sugar in his tea.

- All factors should be taken into consideration when choosing the investigator.
- A situation may require an employer to choose a different investigator than the one who would normally investigate.
- The investigator must:
 - Take time to understand the situation, employee complaint, reports, written materials, exhibits, and other necessary components required for a successful investigation.
 - Gather materials involved or relating to the complaint, understand what information is known and what information needs to be provided, what questions need to be asked, who needs to be interviewed, and any additional documents needed for a successful investigation process.

Steps 4 and 5: Conduct the interviews and evaluate the evidence

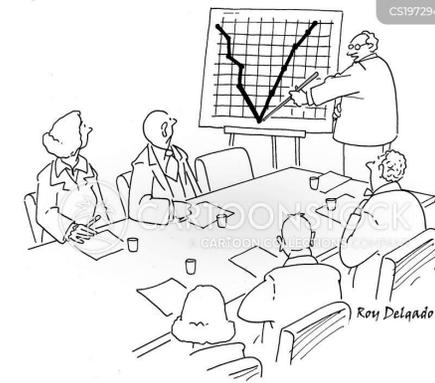
- The investigator's goal should be to gather information, find facts, and acquire knowledge.
- The investigation should be thorough and complete—the investigator must have sufficient knowledge and facts, which are not only based on the accused and the complainant's interviews.
 - This would result in an uncorroborated, inconclusive, and/or unsupported finding.
- It is vital to the accuracy of the investigation findings that the investigator acts as a neutral fact-finder, for the purpose of fact-finding, and without allowing emotion or other outside variables to hinder the investigator's fact-finding ability.

Step 6: Use the investigation to evaluate the situation, close the investigation, and make a formal recommendation

- Once the interviews have been conducted and evidence collected, credibility issues are resolved, and all procedures are executed properly, the investigator has all facts available. The investigator should then use these components to evaluate the information and provide a formal recommendation.
- Once the investigator has made a final decision, the employer must notify the complainant and the accused of the outcome.
- It is important that the complainant knows that the employer took the complaint seriously, has taken steps for action, and agrees that the employee has been properly heard on the matter—even if he or she does not agree with the outcome.
- The employer should follow up and communicate with the complainant at some point in the future to make sure there are no issues.

Step 7: Provide a written summary or report of findings

- An employer may want to consider preparing a final investigative report.
- The benefits of preparing a final investigation report are: 1) documents and files are kept organized for the benefit of the business; and 2) all required materials are at hand, in preparation for any potential lawsuit or if it needed for court purposes.
- Keep all records, including notes and evidence such as documentation of employee's behavior and incidents, and a clear record of the investigation process and findings, including all interviews.
- Investigators should make sure their interview notes are as factual as possible, contain as much relevant information as possible, are dated, and indicate the duration and time of the interviews.



"Here, we started to be investigated..."

Step 7: Continued

- The final report should include a summary containing the following information:
 - The incident or issue that was investigated;
 - The parties involved;
 - Key factual and credibility findings, providing as many specific sources as possible;
 - Employer policies or guidelines and how those policies and guidelines are applicable to the investigation;
 - Specific conclusions;
 - Party or parties responsible for making the final determination;
 - Identification and explanation of issues that could not be resolved and why the issue(s) were unresolvable; and
 - The action or steps the employer took based on the investigation findings.
- The goal of the final report is to ensure that if a court were to review it, the court would be able to conclude through the documentation that the employer took the situation seriously, responded immediately and appropriately, and had a good-faith basis for any actions taken as a result of the investigation.

Step 8: Take remedial action

- The employer must use the outcome of the investigation findings to take remedial action.
- The goal of remedial action and the type of action taken will depend on the specific situation presented and the investigation findings.
- Sometimes, the findings will indicate that no wrongful conduct has occurred. Other times, findings of wrongful conduct will require the employer to remedy the situation.
- For example, for harassment and discrimination complaints in which an employer has determined that the harassment or discrimination has occurred, the employer must take corrective action that is designed to both cease the harassment and minimize the risk of reoccurrence [*Intlekofer v. Turnage*, 973 F.2d 773, 778-779 (9th Cir. 1992)].
- Oftentimes, appropriate corrective action means disciplining the accused, which may include official written or oral instruction, training, or discharge.
- However, in some instances even when the accused was found to have engaged in wrongdoing, a verbal warning will suffice.

Final Tips

Final tips for employers



- Employers should make sure to provide a healthy work environment which allows those in the workplace to feel safe and comfortable enough to raise concerns and complaints.
- Workplace investigations are an important aspect of an ethical, functioning, and organized business.
- Employers would benefit from developing a guide or policy that outlines specific protocols or measures that are taken when an employee raises a complaint relating to the workplace or its people.
 - A guide or policy would make it easier for an employer to follow a complaint process from start to finish using an organized method, therefore creating a uniform and consistent manner of handling conflict or wrongful conduct in the workplace.



THANK YOU!