

Rebecca Torrey: Conducting an effective workplace investigation

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With a dramatic rise in employee complaints due to the #metoo movement, conducting an effective workplace investigation is a common concern. Human resources personnel are the first point of contact for most complaints, as well as the ones overseeing or conducting the investigations. With greater possibility of legal liability, along with the consequences of adverse publicity on social media, no employer can stand by unprepared.



Conducting an effective investigation begins with ensuring a fair procedure for everyone involved and carefully documenting the facts discerned through the process. After receiving a complaint and determining an investigation is needed, the first step is to meet with the individual(s) who made the complaint, preferably in person. It is a good practice to request that they provide a description in writing of what occurred and who was present, including dates and times — although the employer has an obligation to investigate all known complaints whether written or not. The investigator may then interview others who were present to obtain what firsthand knowledge they have. The investigator should plan questions in advance and take detailed notes, including the dates of what occurred, names of witnesses and the location of any documents or emails corroborating the information provided. Using open-ended questions will help elicit information while not causing employees to feel cross-examined or attacked.

Next, the investigator speaks with the person accused of misconduct to gather information from their perspective, providing a fair opportunity for them to tell their side of the story. It is most effective to relate the allegations against the accused during the meeting rather than beforehand. The accused should be told clearly the allegations against them and, if the person refuses to cooperate, others' statements may weigh more heavily against them.

Employees participating in the investigation often request that their identity not be revealed. An employer or investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation in order to conduct it and take appropriate remedial action. Witnesses can be identified by other participants based the questions asked, making it practically impossible to keep confidential who shared what.

However, managers should be instructed not to disclose what they know about the incident besides among those with a need to know. Participants should be cautioned not to retaliate against anyone involved in the investigation and to report retaliation if it occurs.

One key planning decision is whether to use an internal or external investigator. Either way, the investigator should know how to conduct an investigation, including understanding applicable laws and personnel policies and how to effectively question witnesses, document interviews and analyze the results. The investigator should have the communication skills needed to interact comfortably with people and summarize the results in a written report.

External investigators should be used whenever the process would be tainted by an accusation of bias or if it is likely the situation will end up in litigation. An external investigator would be key, for example, for complaints involving executives situated above the investigator in the organizational hierarchy or when the internal investigator is perceived to be close to the accused. External investigators are optimal where there are multiple complaints about one person, when a group is accused of creating a hostile work environment, or for a repeat practice left unaddressed. Using an outside investigator under direction of legal counsel offers greater confidentiality, which can be consequential in the event of litigation. Retaining an outside investigator every time could be cost prohibitive, especially in jurisdictions where the law requires that external investigators be a licensed private investigator or attorney.

Employers have the same duty to investigate anonymous complaints as those from a known source. It may take some thought, however, to determine where to begin an investigation with limited facts and no known complainant to interview. Depending on the situation, the investigator might interview the team working with the accused, or indirectly enable employees to come forward by re-circulating the policy against harassment and complaint procedure. In certain circumstances, a workplace climate survey may offer a place to begin.

There is no hard-and-fast rule how long an investigation should take. It must be commenced and concluded promptly in light of what is feasible. A general rule of thumb for a single complaint and several witnesses is up to two or three weeks. Those involving numerous complaints and witnesses with limited availability may take over a month to complete. Speed should not take precedence over being thorough and fair to all parties involved. If there is fear of retaliation or a threat of harm, for example in cases of predatory conduct or sexual assault, the accused may be placed on administrative leave or a remote work situation pending the investigation after consulting legal counsel as to whether leave is paid or unpaid.

Following the fact-finding process, the investigator will assess potentially inconsistent accounts and make reasonable factual conclusions based on all available evidence. The investigator should provide the conclusions to management, who may assess the results with legal counsel. It would be prudent to safeguard the documentation in a confidential location apart from the personnel file of the person who made the complaint and to document all remedial action in the personnel file of the accused.

It is the employer's duty to take prompt remedial action designed to stop inappropriate behavior from ever recurring and to prevent retaliation. That can range from a finding the evidence was inconclusive to a termination decision. In he-said-she-said situations where it

is impossible to determine what likely happened, the accused should be instructed on the policy against harassment and retaliation and carefully overseen going forward. It is critical to communicate to the victim as a sign of respect that the investigation has concluded and to emphasize the complaint was taken seriously. It is unnecessary to share exactly what took place so long as they understand the investigation resulted in appropriate remedial action. The investigation is not over until that happens.

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Rebecca Torrey, Partner, Employment and Labor Department Chair at Elkins Kalt Weintraub Reuben Gartside LLP and member of IR Global – a multi-disciplinary professional services network that provides advice to companies and individuals in over 155+ jurisdictions.

Rebecca provides practical guidance in personnel matters to help employers keep on top of constantly developing employment laws on the state, federal and local levels. She has over 25 years of experience helping employers reduce the risk of employment litigation so they can focus on growing their business. She offers thoughtful, individualized advice to manage situations early on before they become costly, public legal disputes.

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