



Your Duty to Investigate Workplace Complaints

The law requires you to investigate any hint of inappropriate behavior. Here's how.

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By law, employers must provide a workplace free of discrimination and harassment. Any complaint by an employee should trigger an investigation.

But it's not only when someone complains to you that you need to investigate. You're also required to investigate if any of the following warning signs comes to your attention:

- inappropriate comments or conduct
- general office knowledge of inappropriate behavior
- a request that inappropriate conduct cease.

You have the duty to investigate reported sexual harassment or discrimination even when the alleged victim doesn't ask for or consent to the investigation.¹

Steps to Initiate an Investigation

Every situation is different, and you may not need to perform all the same steps in every case. But here is an outline of steps to consider:

1. Request a Written Complaint. Asking the complainant to put the complaint in writing will accomplish three things:

- If complainants are willing to put their story in writing, it shows they are serious about it.
- The written account will serve as a guide to the facts to be investigated.
- Having a written account will be invaluable if the case goes to trial.

2. Determine the Purpose & Scope of the Investigation. Next, identify the goals of the investigation, decide how best to achieve those goals, and set a time frame in which to do it. Goals may include, for example: fairness, confidentiality, timeliness, accuracy, thoroughness, good documentation, compliance with the law, and compliance with organizational policies.

The law requires that you investigate promptly and thoroughly. You must also do everything possible to avoid retaliation against people who make complaints or serve as witnesses. If it is necessary to protect someone—for example, in a quid pro quo sexual harassment allegation—you may need to suspend the accused person pending the outcome of the investigation. The suspension could be with or without pay depending on the circumstances.

3. Choose an Investigator. The next step is to decide who will con-

duct the investigation. Choose the most appropriate investigator for each case, realizing that this person may be called later as a witness. Look for the following traits: believability, objectivity, sensitivity, calm manner, knowledge of organizational policies, skill in asking questions, and the potential to be a good witness. Here are some people to consider as investigators:

Human resource staff. Such people are usually knowledgeable about the organization and well-trained in asking questions.

Managers. Jurors often expect managers to be involved in workplace investigations.

Human resource staff & manager as joint investigators. This combination is often ideal. If managers are inexperienced interviewers, teaming up with human resource staff can fill the gap and create a productive partnership.

Member of internal audit, ethics, or security department.

Private investigator or other outside consultant.

Outside attorneys. In a sensitive investigation, your instinct may be to hire an attorney so that you'll be covered by attorney-client privilege. If litigation ensues, however,



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you'll be forced to waive the attorney-client privilege. Also, the attorney will be called as a witness, and you'll have to hire separate counsel to defend you. Thus, it isn't recommended that you hire an outside attorney to conduct the investigation.

In-house counsel. On the other hand, an in-house attorney is an excellent choice to conduct an investigation. An in-house attorney's work product is protected under the attorney-client privilege and the attorney work-product doctrine.² If the case goes to trial, you may want to waive the attorney-client privilege to show you acted in good faith in investigating the allegations. But if the case is settled before trial, your sensitive and confidential information will be protected from disclosure. If an attorney isn't involved in the investigation from the start, all information gathered by non-attorneys may be subject to disclosure to the other party before trial. Thus, you should consult with an attorney to explore these issues at the earliest stages of a sensitive investigation.

Steps to Conduct the Investigation

Here are steps for the investigator to take:

1. Review the Paperwork. Examine all relevant documents, including the personnel files of the parties involved. Be sure you understand the law, policy, or guideline that will be critical in resolving the issue. Here the advice of an attorney is extremely helpful.

2. Conduct Interviews. Hold the interviews in private, comfortable

surroundings, preferable away from the work environment. It's a good idea to have two interviewers, one of whom can later serve as a witness, if necessary. One should ask the questions while the other takes detailed notes. Take care that only one person at a time asks questions, to avoid accusations that they "ganged up" on the interviewee.

Interview the Complainant. When interviewing the person who made the complaint, begin by making the following points:

- The organization takes your complaint seriously.
- Everything you say during the interview will remain confidential unless someone has a "need to know."
- Please don't talk to anyone about the investigation. Failure to maintain confidentiality could compromise the investigation.
- Be assured that our organization doesn't permit any retaliation or reprisal for making a good-faith complaint. Should you feel any form of retaliation or continued mistreatment, let us know immediately.
- We will let you know as soon as we have completed the investigation and determined an appropriate course of action.
- Keep us informed of any further problems. Your continued cooperation will be necessary to reach a resolution.

Next, move into asking questions. Use a detailed outline of key questions prepared earlier. Begin with open-ended questions (who, what, where, when, why, and how), proceeding from the general to the specific.³ For example:

- What happened?

- Who was involved?
- When did the alleged incident occur? Where?
- Who witnessed the incident?
- With whom have you discussed the incident?
- Do you have any physical or written evidence?

Interview the Accused. Begin your interview with the accused person by making the following points:

- We are investigating a complaint of inappropriate conduct. We are committed to fairness and impartiality, and no conclusions have been reached. We want to give you a chance to tell your side of the story before we make any decisions.
- Retaliation against participants will not be tolerated.
- Information will be kept confidential except to those people who have a legitimate need to know.
- It's important for you to provide us with all facts and information that can help us get to the bottom of the issue.
- We will let you know as soon as the investigation is completed.

Next, ask open-ended questions to get the accused person's side of the story before moving on to the specific allegations. For example, ask initial questions to determine whether the accused had the opportunity to commit the alleged misconduct. These questions should address time, place, and presence of other people. If the answers reveal that the accused couldn't have committed the alleged act, then you don't need to disclose the specific allegations. This tactic can avoid later defamation claims.⁴

If the general questions indicate that the accused could have committed the alleged act, move into more specific questions, in a chronological

Nonprofit World • Volume 19, Number 3 May/June 2001
Published by the Society for Nonprofit Organizations
6314 Odana Road, Suite 1, Madison, WI 53719 • (608) 274-9777
www.danenet.org/snpo



**A written account will be invaluable
if the case goes to trial.**

fashion. Cover all events that occurred during the relevant time frame in chronological blocks of time. For each block of time, ask: what, when, where, who, how, and why. Don't leave the time block until all details necessary to recreate the scene have been established.

Ask for all evidence that corroborates the accused person's side of the story. At some point during the interview, you may have to disclose the identity of the complainant if the accused hasn't already figured it out.

If the accused refuses to answer questions, emphasize the fact that this is a chance for you to hear the accused person's version of events. Without hearing that version, you'll have to base your decision on other information gathered during the investigation, the inferences drawn from that evidence, and the accused person's unwillingness to cooperate. In some circumstances, refusal to participate is considered insubordination and grounds for disciplinary action, including termination.

Interview Witnesses. At the beginning of each interview with a witness, make the following disclosures:

- Explain what you are investigating. Tell witnesses what role they may play in the investigation.
- Explain that information obtained during the interview will be reported to those within and possibly outside the organization who have a "need to know."
- Emphasize the seriousness of the investigation, the importance of accurate information, and the witnesses' obligation to provide truthful, thorough information.
- Caution witnesses that discussing confidential information with

others could result in disciplinary action.

Ask witnesses to sign an acknowledgment that they understand these disclosures. It's important to have it on the record that you made these disclosures.

Next, ask the witnesses questions that could corroborate or refute the complainant's testimony. Be sure to distinguish fact from hearsay. Avoid "leading" questions which suggest the answer. Ask open-ended questions such as these:

- Did you see anything unusual going on between Sally and George?
- How did Joe behave toward Sally?

3. Document the Investigation. It is important to document the investigation, but keep in mind that this documentation will be discoverable if the case goes to trial. Therefore, avoid making any conclusions until the investigation is finished. Make sure your documentation accurately reflects the comments made by the accused, complainant, and witnesses. If you make a final report from drafts, throw away the drafts. Otherwise, the drafts could be used against you in court, and any changes you made could be viewed with suspicion.

4. Reach a Conclusion. Now it's time to make a conclusion and decide what, if any, corrective action is needed. The most important thing to keep in mind is to link specific facts to specific conclusions.

Review the corroborating evidence, and decide whether the evidence supports the alleged wrongdoing. In making your decision, weigh the credibility of the parties.

If you're unable to come to a conclusion, you may want to consult legal counsel. An attorney may be able to help you make a final decision.⁵

After making a decision, communicate with the complainant and the accused. Tell the accused person what disciplinary action, if any, you have decided is necessary. You needn't tell the complainant what corrective action you plan to take. Just tell the complainant that the situation has been resolved. ■

Footnotes

¹Laabs, Jennifer, "HR Puts Its Questions on the Line," *Personnel Journal*, February 1995.

²Howard, George, "How to Conduct an In-House Investigation," *The Employer's Group*, 1997.

³Flynn, Gillian, "Play Detective: How to Conduct an Internal Investigation," *Personnel Journal*, April 1995.

⁴Segal, Jonathan, "Proceed Carefully, Objectively to Investigate Sexual Harassment Claims," *HR Magazine*, October 1993.

⁵Connors, Richard, "Investigating and Responding to Employee Complaints," *Law at Work*, 1996.

Selected References

Conroy, Charles, "Sexual Harassment: Don't Let It Destroy Your Organization," *Nonprofit World*, Vol. 10, No. 2.

Mahoney, John, "Protect Yourself Against Employee Lawsuits," *Nonprofit World*, Vol. 15, No. 2.

Muehrcke, Jill, ed., *Law & Taxation, Leadership Series, Vol. I & II*.

Sills, Stephen & Scott H. Smith, "The Emperor's New Clothes, Or How to Protect Against Lawsuits and Other Chilling Surprises," *Nonprofit World*, Vol. 13, No. 6

Zhu, Judy and Brian Kleiner, "The Failure of Diversity Training," *Nonprofit World*, Vol. 18, No. 3.

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