

Effective Internal Investigations

Do you know how to respond when your organization receives an employee complaint of harassment, hostile work environment, or discrimination? This article will provide you with practical advice on what to do when you receive a complaint, how to conduct the investigation with step-by-step advice, and what to do following the investigation. With investigations, rarely do the “facts” turn out as presented, so be prepared for surprises. Use your HR instincts and skills to your advantage in asking questions and probing for details so that you can make the best recommendation or decision. Investigations are rarely win-win situations. One of your goals is to diminish fallout and manage risk.

Initial Response

You Receive a Complaint – Now What?

The most important thing to do when an employee comes to you with a complaint of harassment or discrimination is to take it seriously. Clear your busy schedule and address the issue. You have a legal obligation to do so. Listen to the complainant tell his or her story. Be prepared for emotion.

Ask questions: who, what, when, how often, when did this start? Ask if there are witnesses. You must analyze this preliminary information, assess the magnitude of the problem, and make several key decisions. Consider the following:

- **How serious is the complaint?** What is the risk to be managed? Does it involve one employee or an entire department? Is the behavior limited to work or does it spill outside work? Are there safety issues? The answers to these questions are critical in determining your next steps.
- **What actions do you need to take now?** Is the situation contained or gaining steam? Would suspending a party help defuse the matter? Does a transfer of the complainant or time off with pay help short term?
- **Are you equipped to deal with this issue?** Do you have the time, the skill, the ability to conduct a thorough investigation? Do the parties trust you? Will they be candid with you? Or is greater objectivity needed?
- **What are the pros and cons of an internal investigation versus a third-party investigation?** Engaging a third-party to conduct the investigation may be particularly helpful when the situation is complicated or a high-level employee is involved.
- **What are the risks to your organization?** If the complaint is egregious, your organization has a history of similar complaints (indicating a widespread problem), or you have public relations concerns, you may want to engage legal counsel to assist you.
- **What is your organization’s history with complaints?** If this is the first, senior management may react differently than you expect. In general, what are the senior management expectations for this level of employee relations matters?
- **Don’t forget about your Employee Assistance Program**—this may be an excellent resource for the complainant.

Prevention Tips – The best way to avoid having to do an investigation is prevention.

- **Policy:** Have comprehensive policies on unlawful harassment and nondiscrimination. Make sure that each spells out what will not be tolerated, the responsibility to come forth with knowledge, and the internal person to hear concerns.
- **Training:** Annually conduct supervisory and employee training.
- **Consequences:** Make employees aware of the consequences for behavior of this type through policy implementation, training, communication, etc.
- **Respectful environment:** Do you have a culture of respect and tolerance? If not, your odds of a complaint are high.

Having a bit of knowledge on protocol before an occurrence is good HR strategy. Talk with the person to whom you report to discuss the expectations in these types of situations. How soon does he or she want to know about a

situation? Is it expected that you have a witness in every conversation? At what point should legal assistance be sought? Knowing the process will assist you in making decisions.

Conducting the Investigation

The investigation of a complaint of discrimination or other wrongdoing is essential to determining the seriousness of the complaint, the credibility of the parties, and the appropriate action to be taken. The investigation must be responsive and thorough. Has your organization designated a “chief investigator?” By default this is often HR. Designating a chief investigator ahead of time helps the organization be prepared for issues that may arise during the investigation. What if the complainant or accused won’t talk to HR—or only wants to talk with someone of the same sex? What if a party asks to electronically record the meeting or have a co-worker or other witness present? The investigator should be trained and knowledgeable about harassment and discrimination law, be respected, be perceived as objective, and have discretion and the ability to keep things confidential.

Step 1: Prepare an introductory statement. An important first step is to prepare an introductory statement that you will convey to each person interviewed. This is important to set the right tone, be clear on expectations, describe your role, and explain why the meeting is occurring. Your statement should include:

- Clarification of your role as investigator.
- The format for time together.
- The purpose of meeting.
- A statement that there will be no retaliation for coming forward or participating in the investigation.
- The request for complete honesty.
- A statement that you cannot promise that any specific corrective action will take place—especially when talking with the complainant. The complainant does not have a right to know the specifics of any discipline that may be issued. However, once the matter is resolved you may share a general statement such as if the accused was disciplined.
- Provide copies of the appropriate policies where relevant.

Step 2: Choose a location for the meetings. Conduct your interviews in a space that offers privacy from both walk-by traffic and from being overheard. Make the setting comfortable with water and tissue available. Have a phone with you for safety reasons.

Step 3: Take detailed notes. As with any HR matter, good documentation is key. It is critical that you take detailed notes—using a laptop is effective. Type as you ask questions and listen. These notes substantiate reasons for decisions made and provide key background should an involved party file a third party claim.

Step 4: Interview the complainant. Ask the complainant to tell you what happened. Let the person talk for a bit before asking questions. Make sure you have a good understanding of the frequency and severity of incidents, how the complainant responded, whether the complainant asked the accused to stop the behavior, who else knows or was involved. Ask why the complainant is coming forward now—was there a triggering event? Ask why the complainant thinks this occurred. Try to build a timeline and understand who was involved. Ask where the incidents occurred and what happened. Ask the complainant if he or she has any personal documentation of the events, such as a journal. Ask if the complainant was contacted by the accused by email, voicemail, or via social media.

Step 5: Support the complainant. The organization’s support and assistance in moving forward may prevent the complainant from taking the matter further and filing a claim with the EEOC, for example. The nature of the complaint will direct your actions. For example, it may be necessary to transfer one of the employees if the complainant and the accused work together.

Step 6: Interview the accused. This interview may be more challenging to conduct. Do not assume the accused knows why he or she is meeting with you. It is important to explain the reason for the meeting during your introductory statement. Stay objective—you have only heard one side so far. Emphasize that retaliation of any kind will not be tolerated. Ask the accused to tell his or her story. Start general then refer to specifics from the complainant’s interview and ask the accused to respond to the specifics. If the accused denies everything, ask if there are aspects that are true. If the accused admits to acting improperly, ask for an explanation. What was his or her intent? If you learn that the accused did, in fact, violate a policy, instruct him or her that this behavior must stop immediately and document this directive in your notes.

Step 7: Interview witnesses. The list of witnesses may grow as you conduct your interviews. Be sure to interview their supervisors. When interviewing witnesses, you must be more cautious about the details you provide to them for

confidentiality reasons. Start with a general statement, such as, “There has been an incident involving several employees and it was recommended that I speak with you.” Get more specific, as necessary. Emphasize that you are interested only in direct knowledge and facts, not impression or opinion. You will need to explore new leads as you uncover facts and may need to re-interview parties based on new facts.

When you think you have a full picture of the incidents that led to the complaint and have had an opportunity to assess the credibility of the individuals involved, it is time to move on to the next step—deciding how to resolve the matter.

Wrapping Up and Moving Forward

An effective investigation of the complaint is the key to reducing your legal risk and maintaining a corporate culture of integrity and civility. Now that you have concluded your investigation, it is time to wrap up the matter by deciding on the appropriate disciplinary steps to take and examining your findings to determine whether there are ways you can prevent future complaints.

Documentation

An investigation generates a large amount of documentation. Many of these documents are highly sensitive. Investigation notes should not be filed in personnel files. This information is fact-finding and not decision-oriented—it contains a number of employee names and may be needed in the future should the complaint expand into a legal matter. The established HR best practice is to store employee relations-related investigative notes separate from personnel files. The notes and all materials related to the investigation should be kept in a confidential file.

Taking Action

After the investigation is completed the appropriate action should be determined. You may be charged with making the decision yourself or your organization may require you to report the results of your investigation to a member of senior management and make a recommendation on the appropriate action. The decision will depend on the findings of your investigation, the nature of the accused’s behavior, your company policies, and past practice.

Once the decision is made you will need to meet with the accused and inform him or her of your conclusions and the action that will be taken, if any. You also must inform the complainant that the investigation has been concluded and provide a general update as to the action taken. This communication will help the individual feel a sense of resolution and employer support. Keep in mind that the complainant does not have the right to full disclosure of information. You must protect the privacy and confidentiality of all parties. Conduct a candid discussion about the complainant’s ability to move forward, especially if the accused remains employed by the organization.

Monitor

Do any misunderstandings need to be resolved so that the parties can focus on their work? Check in with the parties from time to time to ensure no retaliation is taking place. Make sure the complainant has been instructed to let you know if problems recur.

Policy and Culture Review

After the matter is concluded, reflect on what the organization can do to prevent another occurrence of discrimination or harassment. Do policies need to be tightened? Has the culture become uncivil? Are standards of conduct clear and supported by management? Are managers well trained on expectations and their enforcement?

Reduce the chance of a future claim by focusing on these areas:

- Recruitment. Do interviewers know what not to ask?
- Onboarding. This is the ideal time to set the tone of your organization. Be clear and specific on what behaviors you will not tolerate. Have new employees sign and acknowledge that they understand your policies and their consequences.
- Culture of Respect and Tolerance. Do you require employees to act considerately? Or does the organization allow inappropriate e-mail attachments and other communications? Is uncivil behavior permitted? Has it become easier to look the other way?
- Coaching and Discipline. Are managers timely and effective when dealing with behavior or performance issues? Is there consistency in consequences and application of policy?
- Performance Management. Is the feedback specific, job-related, and frequent?

- Training. Are managers and employees trained annually on unlawful harassment, appropriate standards of conduct, and other employment policies?
- Management Actions. Are they swift, clear, and in proportion to the event? Do managers know what is expected of them when they receive a complaint of harassment or discrimination?
- Exit Interviews. This is the perfect opportunity to ask employees whether they ever thought they were harassed or discriminated against or are aware of this type of occurrence in the workplace.

Keep in mind: An investigation of a complaint of inappropriate behavior can be turned to the organization's advantage if the incident is used as an opportunity to improve practices to prevent future occurrences.