The Do's and Don'ts of Internal Investigations: The Strategic Approach to Compliance with Federal and State Laws in the Employment Relationship

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Introduction

Every organization must prepare for the inevitable need to conduct an investigation in the workplace. The need predictably arises when there is suspected corporate wrongdoing by a management official or by an employee. An investigation becomes a best practice especially when allegations of harassment or discrimination occur.

Employment Laws Necessitate Investigation

Both federal and state Laws provide protections for harassment and discrimination of protected groups.

Federal Protections

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 et seq., as amended by the Civil Rights Act of 1991.

This statute prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin, and prohibits discharge or retaliation for exercising rights guaranteed by Title VII.

National Labor Relations Act

The National Labor Relations Act ("NLRA") regulates labor relations affecting interstate and foreign commerce and embodies the national labor policy of the United States. The Act also protects employees' freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The Act confers the following rights:

- employees have a legally enforceable right to organize.
- requires employers to bargain with employees collectively through employee-elected representatives;
- employees have the right to engage in concerted activities for collective bargaining purposes or other mutual aid or protection;
- Amendments to the NLRA established other rights and set out more prohibitions;
- employers and labor organizations cannot enter into hot cargo agreements;
- picketing used to force an employer to recognize or bargain with a labor organization is an unfair labor practice.

The NLRA is enforced by the National Labor Relations Board (NLRB or "The Board"). The Board is responsible for considering, and correcting unfair labor practices. Employer unfair labor practices include:

- Interference with, restraint on, or coercion in employee organizing efforts;
- Dominating or obstructing a labor organization;
- Discrimination based on union membership or organizing efforts;
- Discrimination for filing charges or giving testimony; or
- Refusing to bargain with the union

Employee unfair labor practices include:
- Discrimination by the union against its members or failure to fairly represent its members
- Hiring halls;
- Refusal to bargain;
- Strikes, picketing, secondary boycotts for certain purposes;
- Excessive or discriminatory initiation fees.

Equal Pay Act, ("EPA") 29 U.S.C. §206(d)(1)

This statute prohibits an employer from paying a female employee a lower wage than her male counterpart for equal work or jobs performed, in work that requires equal skill, effort and responsibility.

Age Discrimination in Employment Act of 1967, ("ADEA") 29 U.S.C. § §621 et seq.

This statute prohibits employers with 15 or more employees from age-based discrimination against persons aged 40 and over and prohibits discharge for exercising rights guaranteed by the ADEA.

Rehabilitation Act of 1973, 29 U.S.C. §§793 and 794

Section 793 imposes affirmative action obligations on covered federal contractors regarding handicapped applicants and employees; Section 794 prohibits discrimination in employment by recipients of federal financial assistance on the basis of handicap and requires reasonable accommodation of otherwise qualified handicapped individuals.

Uniformed Services Employment and Reemployment Rights Act, ("USERRA"), 38 U.S.C. §§4301-4307

This statute provides certain reinstatement rights and other protections for employees returning from military duty.

Civil Rights Act of 1966, 42 U.S.C. §1981

This statute prohibits discrimination based on race and ethnicity and extends protection to harassment on the job, discriminatory firing, and other post-hiring conduct by employers.

Americans with Disabilities Act, ("ADA") 42 U.S.C. .§1210, et seq.

This statute prohibits discrimination in employment against qualified individuals with disabilities. It also imposes an obligation on employers to reasonably accommodate disabled individuals if a reasonable accommodation will enable the individual to perform the essential functions of his/her job.

Family and Medical Leave Act

The Family and Medical Leave Act of 1993, 29 U.S.C. §2612 et seq. ("FMLA") is a federal law which requires employers with 50 or more employees to provide 12 weeks of job-protected unpaid leave to their employees for the following reasons:

- the birth or the adoption of a child;
- the serious health condition of a child;
- the serious health condition of a spouse or parent; or
- the employee's own serious health condition.

The protections of the FMLA apply only to "eligible" employees. Eligible employees are those who have worked for an employer for at least 12 months and have worked at least 1,250 hours during the 12-month period immediately preceding the scheduled leave. If an employee is deemed eligible, the FMLA requires employers to hold open the employee's position or to place the employee in an equivalent position upon his/her return from FMLA leave.

Not every employer, however, is required to provide FMLA leave to their employees. Only employers who have 50 or more employees within a 75 mile radius are covered by the FMLA.

42 U.S.C. §1981

This statute prohibits discrimination on the basis of race in the making and enforcing of contracts. Despite its language, its provisions apply to all employees, regardless of whether an employment contract exists, and prohibits not only race discrimination but racial harassment as well.

42 U.S.C. §1983

This statute provides a cause of action for the deprivation of rights guaranteed by the United States Constitution and other federal laws. It applies only to those individuals or entities acting under the "color of" state law.

Louisiana State Law Protections

La. R.S. 23:301-54, 23:368: Prohibits employers, labor organizations and employment agencies from written or oral inquiries or use of application forms that request information about applicants' disabilities. Also prohibits advertising relating to employment that indicates any preference, limitation, specification or discrimination based on race, creed, color, religion, sex, age, national origin, or protected genetic information.

La. R.S. 23:301 et. seq. Louisiana Employment Discrimination Law - Includes employers of 15 or more for disability, race, color, religion, sex and national origin; 20 or more for age and sickle cell trait; 25 or more for pregnancy, childbirth and related medical conditions.

La. R.S. 23:368 - Prohibits discrimination based on genetic information.

La. R.S. 23:961-962 - Dictates freedom for political activity in the workplace. Employers with over 20 employees may not use employment consequence to influence employee voting.

La. R.S. 23:966 - It is unlawful to discriminate against smokers or non-smokers. Nor can an employer require a person to abstain from smoking other than at work.

La. R.S. 46:2251 et. seq. - The Civil Rights for Handicapped Persons.

La. R.S. 964 - No employer may discharge or discriminate against an employee who has testified or furnished information with regard to the information of Louisiana labor laws.

La. R.S. 23:354 - Discrimination against those with sickle cell trait is unlawful.

La. R.S. 23:633 – Compensation. This statute mandates payment twice monthly in certain occupations.

La. R.S. 23:14 - Record Keeping Requirements. Requires employers to supply information to the Department of Labor and requires all employers to keep records for employees for one year.

La. R.S. 23:213, 23:486 - Meal and Rest Periods. Minors must get rest periods of at least 30 minutes after working 5 hours. Rest periods are required only for workers in compressed air chambers.

La. R.S. 29:401 et. seq., 42:394 - Louisiana version of USERRA

La. R.S. 23:965 - Jury Service. Jury duty is a political activity. Employer must reinstate employee in the same position with the same wages and benefits. Public employers must pay employee for the time spent in jury service up to 1 day.

La. R.S. 23:731 - Employees and applicants with garnishments are prohibited unless the employee has 3 or more garnishments for unrelated debts in a two year period.

La. R.S. 30:3027 - Whistleblowers

La. R.S. 23:823, 23:981, 23:983 - Right to Work. The Right to Work laws governing labor relations in Louisiana.

La. R.S. 23:631 - Payments Due on Termination. All wages are due on the earlier of the next regular pay day or two weeks.

La. R.S. 23:341 - Pregnancy, Childbirth and Related Medical Conditions - Applies to all employers with over 25 employees.

La. R.S. 40:1299.124 - Bone Marrow Donors are protected and allowed up to 40 hours paid leave, unless agreed otherwise.

La. R.S. 37:2950, 44.9 - Use of Arrest and Conviction Records in Hiring Decisions not permitted unless convicted of a felony which relates to employment sought.

La. R.S. 23:1016 - Worker's exposed to potentially toxic substances have the right to access relevant records.

In addition, there are state law claims for quasi - tort issues such as intentional infliction of emotional distress, invasion of privacy, defamation, assault or battery and other types of injures. These actions may be brought in addition to the federal and state law discrimation and harassment claims.

Ethical Considerations in Internal Investigations

Aside from the host of legal ramifications when conducting internal investigations, employers and their attorneys must all be aware of ethical considerations. An employee under investigation who seeks advice from the company's attorney must be informed that the attorney represents the company. Joint representation of an employee and a company can give rise to numerous problems and should generally be avoided. A company may wish to take steps to arrange for separate counsel where an obvious conflict exists. When an employee under investigation chooses to hire a private attorney, an adversarial relationship is not inevitable. Confidential communications flowing from the employee to

the company's attorney (or from the company to the employee's attorney) may still be protected under the joint defense privilege, also called the "common interest rule."

An internal investigation may uncover individual or corporate conduct that is criminal, or which condones sexual harassment or race discrimination. The ethical issue facing the attorney-investigator is when and how he or she must report such wrongdoing. Public companies are required to report certain types of wrongful conduct. For example, criminal conduct by an employee must be disclosed to the SEC. The release of hazardous substances by a company must be reported to the EPA.

Companies have consistently disclosed to the SEC widespread sexual harassment and gender and race discrimination that have led to full-scale EEOC investigations. In contrast, allegations of widespread discrimination that are being investigated internally do not necessarily pose the same disclosure issues for a company. Until an inquiry reveals the type of problems that could lead to liability, no materially important event has occurred and no reporting is required.

Attorney-client privilege. An employer may in some situations be able to use attorney-client privilege to protect investigative confidentiality. This is a consideration when an employer, in anticipation of potential litigation, conducts an investigation at the direction of an attorney and wishes to preserve its related communications with the attorney from disclosure during a later lawsuit. In such cases, it is critical that all documents containing privileged information be appropriately labeled with such warnings as, "*attorney-client communication, privileged and confidential.*" The attorney-client privilege is not absolute, and employers desiring to invoke it for a particular investigation are well advised to consult with counsel to identify items that can be legitimately protected.

Confidentiality

Confidentiality is a major concern for everyone involved in an internal investigation and seems of particular concern where employees have made allegations against others—as with harassment reports. It is not unusual for employees to make harassment complaints to human resources, then insist that their concerns be kept anonymous or even illogically request that their complaints not be investigated. It is also not unusual for the most well-intentioned witnesses to qualify or even withhold needed information during an investigation, because they fear negative consequences if others learn of their disclosures. This reluctance to be identified or involved in accusations of wrongdoing is directly related to fear of retaliation—which is, of course, strictly prohibited by anti-discrimination law when making discrimination complaints or participating in investigations.

Confidentiality may be given to the most possible extent but no guarantees can be given. The EEOC has stated that harassment investigations should be conducted as confidentially as possible. However, enforcement authorities recognize that no employer can promise absolute confidentiality in a harassment investigation. It may be necessary to

share certain information with others in order to advance the investigation, resolve the complaint, or reinforce harassment prevention efforts. To protect the privacy and rights of stakeholders, limit legal exposure and minimize adverse workplace effects, investigators must be constantly vigilant to assure that relevant information is shared only on a need-to-know basis and that witnesses and any others receiving sensitive information are asked to maintain confidentiality.

In some cases, employers go so far as to advise witnesses that inappropriate discussion of confidential information could potentially result in disciplinary action or personal legal liability. This admonition may not always be realistic, especially when an investigator is seeking to establish rapport and trust with a reluctant interviewee. However, there have been instances where employees who discussed confidential personal information about co-workers have faced such charges as defamation, retaliation or invasion of privacy.

Despite the challenge of maintaining optimal confidentiality, an investigator has many ways to preserve an individual's privacy while still asking about critical information. For example, in some instances, it is possible to discuss specific allegations without mentioning names. In other situations, it may be possible to conduct an interview without advising the interviewee that an investigation of misconduct is underway. Circumstances will vary, and the investigator must exercise judgment in each case to determine how little information can be divulged in order to obtain needed facts.

Legal Standards Often Relevant to Investigations

The term "unlawful harassment" first evolved in the context of sexual harassment. EEOC guidelines define sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

Much of this definition applies most specifically to "*quid pro quo*" sexual harassment, referencing situations where a victim is, against his or her wishes, expected to provide sexual favors in order to receive favorable workplace treatment or face unfavorable workplace treatment if he or she refuses. The most prevalent unlawful workplace harassment complaint is described in the last bullet point of the definition. This is "*hostile*

work environment" harassment, which as currently applied by the EEOC, can be based, not only upon sex, but also on race, national origin, religion, color, age or disability.

One critical point with all types of unlawful harassment is that the conduct is unwelcome. Unwelcomeness is a factor that can potentially apply in seemingly ambiguous circumstances such as when sexual activity appears on its face to be consensual, when there is no deliberate intent to antagonize, or when the complaining person is affected by, but not the target of, the offensive behavior.

Protected individuals and groups. Everyone, with the possible exception of an organization's highest-level official(s), is protected from illegal harassment in workplaces subject to applicable anti-discrimination laws. Certainly, no one at any level in a workplace is exempt from the responsibility to refrain from unlawful harassment. The EEOC expects covered employers to protect their employees, not only from each other, but also from harassment by customers and workplace visitors—and similarly to appropriately address harassment committed by employees against such non-employees. Men can illegally harass other men, and women can unlawfully harass other women. An employee does not even have to be the intended target of harassment to show that the conduct subjected him or her to an unlawful hostile working environment.

Liability for harassment by supervisors and managers. The U.S. Supreme Court has established a "*vicarious liability*" standard, which essentially holds that employers are accountable for all harassment committed by their supervisors. (*Faragher v. City of Boca Raton*, 524 U.S. 775 [1998] and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 [1998].) With respect to harassment liability, a supervisor is an individual who has the authority to make or recommend tangible employment decisions affecting the complaining employee or the authority to direct the employee's daily work activities – *or*-- who is reasonably believed by the employee to possess such authority. In some instances, supervisors and managers who have committed especially egregious harassment may even be held personally liable—along with their employers—for their unlawful actions. The vicarious liability standard acknowledges that employees bear responsibility for letting their employers know about supervisory harassment—but makes clear that this is only true if the employer has provided its employees with adequate access to effective, credible internal assistance.

If a supervisor commits unlawful harassment—whether or not higher levels of management knew about the situation—the employer is always liable when the harassment has resulted in a "*tangible employment action*" such as, for example, demotion, promotion, an undesirable assignment or discharge.

Where supervisors participate in or condone a pervasive hostile environment but there is no tangible employment action, the employer may be able to minimize its liability. To do this, the employer must be able to prove that it exercised reasonable care to prevent and promptly correct any harassment, but that the employee nonetheless unreasonably failed to complain to management or to otherwise avoid harm. If the employer cannot offer this

proof, it will remain liable whether or not it knew about the hostile environment harassment.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, the Supreme Court stated:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

This holding as well as that from *Faragher v. City of Boca Raton*, 524 U.S. 775 was discussed in *Casiano v. AT&T Corp.*, 213 F.3d 278 (Fifth Circuit Court of Appeals) which stated:

At the first stop on the *Ellerth/Faragher* road map, courts are required to determine whether the complaining employee has or has not suffered a "tangible employment action." If he has, his suit is classified as a "quid pro quo" case; if he has not, his suit is classified as a "hostile environment" case. That determination provides a fork in the road on the *Ellerth/Faragher* map: In a "quid pro quo" case, the road branches toward a second stop at which the court must determine whether the tangible employment action suffered by the employee resulted from his acceptance or rejection of his supervisor's alleged sexual harassment. If the employee cannot show such a nexus, then his employer is not vicariously liable under Title VII for sexual harassment by a supervisor; but if the employee can demonstrate such a nexus, the employer is vicariously liable per se and is not entitled to assert the one and only affirmative defense permitted in such cases since *Ellerth* and *Faragher*. In other words, proof that a tangible employment action did result from the employee's acceptance or rejection of sexual harassment by his supervisor makes the employer vicariously liable, *ipso facto;* no affirmative defense will be heard.

On the other hand, if the first-stop question is answered in the negative, *i.e.,* the employee did not suffer a tangible employment action-the situation perceived to exist as a matter of

law by the district court in this case-the suit is a "hostile environment" case, and the other branch at the fork in the *Ellerth/Faragher* road must be followed. On this branch, a different inquiry ensues at the second stop: If proved, would the actions ascribed to the supervisor by the employee constitute severe or pervasive sexual harassment? If they do not, Title VII imposes no vicarious liability on the employer; but if they do, the employer is vicariously liable- *unless* the employer can prove both prongs of the *Ellerth/Faragher* affirmative defense, to wit: Absent a tangible employment action, (1) the employer exercised reasonable care to prevent and correct promptly any such sexual harassment, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. As noted, this is the employer's only affirmative defense in a supervisor sexual harassment case post *Ellerth/Faragher,* and it is available only in a hostile environment (*no* tangible employment action) situation; never in a quid pro quo (tangible employment action) case.

Co-worker and non-employee harassment. When peers or even supervisors with no authority or perceived authority over the complaining employee commit harassment, the liability rules are somewhat different. In these cases, the courts will hold an employer liable if it knew or should have known of the misconduct but did nothing to stop or correct it. In other words, if an employee complains about this kind of harassment in an external charge, an employer may be able to limit its liability by showing that it had absolutely no way of knowing that the harassment was occurring. Similarly, the employer may be able to limit its liability here if it can show that it was aware of the harassment and had taken immediate, appropriate corrective action upon learning about the problem. Notably, an employer may be expected to know about harassment incidents even if the employee did not internally complain. For example, if other employees in a workgroup know that problematic conduct is occurring, a court might decide that the workgroup supervisor—and therefore the employer—should have known about the situation.

These standards are also applied by EEOC guidelines to harassment by non-employees such as customers, vendors or workplace visitors. However, the employer's control over misconduct by these individuals would be considered in determining liability.

When unpleasant interactions become legal violations. Determining when unwelcome behavior constitutes unlawful harassment normally becomes an issue when no tangible employment action has occurred but the employee nonetheless believes him or herself to be unlawfully victimized by a hostile working environment. It is well settled that federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action"

Since "offensiveness" is a subjective term with various meanings for various individuals, who decides whether conduct is sufficiently offensive to constitute unlawful harassment? Courts typically assess whether a reasonable person would consider the behavior offensive, while also considering the complaining employee's subjective perceptions and any adverse effects on the employee. In making these assessments, the courts will consider the nature, frequency and severity of the conduct. For example, an occasional

objectionable comment would not be considered as severe as physically threatening or obviously humiliating behaviors.

Investigations are The Primary Tool when Behaviors give Rise to Complaints or Suspect Behavior.

While well-formed policies and properly trained management and employees are the best defense to prohibited behaviors, when such issues do arise, an investigation is the next best tool for an employer to take as a defense to a claim. The path of the investigation should be given extensive, careful and timely planning so it may be effective. Several factors should be analyzed when determining the path of an investigation.

Factors to consider in an Effective Investigation

Investigator Selection

Employers are well advised to be extremely selective in determining who will conduct harassment investigations, since the capabilities and credibility of an investigator can significantly influence investigative effectiveness as well as employer liability. Because there is no time to waste at the time of a complaint, it is a good idea to give some thought to investigator characteristics before—not just after—a complaint is made.

In addition to being highly sensitive and fraught with legal implications, harassment investigations are often complex. An untrained or inexperienced investigator can easily become overwhelmed or make mistakes that can adversely impact investigative outcomes and employee confidence in management. This situation holds true for harassment complaints and other types of workplace investigations. A skilled investigator is far more likely to handle sensitive issues correctly, efficiently identify needed data, weed out extraneous information, and focus on relevant facts. Employers can help themselves by assuring that there are individuals available who are trained and skilled in conducting investigations. Training sufficiency applies not only to human resource staff but also to any managers or other individuals who may be called upon to assist with investigations.

Many factors affecting an investigator's capability relate less to competence than to management's attitude toward and willingness or ability to facilitate the investigator's work. These factors raise such questions as whether the investigator has unrealistic or competing time demands, adequate management and organizational support or sufficient available resources for use in meeting investigative goals. Management credibility is a primary consideration here, especially if there is a general workplace perception that management is biased or if persons who may affect or be impacted by complaint outcomes are allowed to influence investigations. Issues like these can seriously hinder even the most skilled investigator and make it impossible for him or her to obtain valid information. Often they result in a perception that the employer did not place a sufficiently high priority on the investigation—or worse, that the employer was motivated by discriminatory intent.

To be used as a valid defense, an investigation must be a full fact-finding mission, not an exercise in evidence gathering to validate a foregone conclusion. The investigators selected must be impartial and must be perceived by those affected to be not only competent, but more importantly, to be objective and fair. If an interviewee doubts the neutrality of the investigation, that individual will often be guarded with the investigator. It will be difficult to determine the accuracy of information he or she collects. Any questions about an investigator's perceived neutrality on the part of either the complaining party or the alleged harasser should be promptly addressed.

One helpful means of assessing this issue is for the investigator to ask both the complaining party and the alleged harasser at the beginning of fact-finding discussions whether they have any questions about his or her objectivity in the present investigation. If either party raises a concern, consideration should be given to finding an alternative investigator for a particular phase or perhaps even for the entire investigative process.

To assure needed skills or objectivity or when internal resources are limited, it is sometimes desirable to engage an external investigator for a given complaint. Under current interpretations of the federal Fair Credit Reporting Act, misconduct investigations by non-employees must be treated the same as other third-party background investigations. Resulting reports are subject to the same rules for disclosure and access by investigated employees, as are documents like external credit, criminal records or reference checks.

The Investigatory Question

How does an investigator determine what facts are relevant? With respect to the description of an incident, an investigator must establish the investigatory question. The investigatory question is one that represents why the investigation must be conducted.

Specific Investigation Tools

An investigation should be a planned process to arrive at a conclusion. Facts must be collected in a systematic fashion. The investigation should seek information to determine what, if anything occurred. Secondly, the investigation will seek to determine why the event occurred.

The Collection of Evidence

Relevant Facts

To an investigator, evidence is any fact that has the potential to help describe and explain what occurred. In essence these are the relevant facts in a case.

The word potential is critical in defining what constitutes a relevant fact. Suppose there are three people at the location of an event. Interviews of all three might cause the investigator to conclude that two of them were paying so little attention to what was occurring that they were unaware of the event under investigation. Nonetheless, their testimony constitutes relevant information, or evidence, if only because the investigator could not have known in advance of the interview whose testimony might generate useful information.

Policy Considerations

An important consideration for the investigator upon beginning an investigation—and throughout the fact-finding process—is an examination of policy issues. The first step here is to confirm that there is an existing well-drafted anti-harassment policy in place. The second step is to determine how effectively the policy has been implemented to date. These factors can have significant implications for the outcome of an individual investigation, including potential indications that the current complaint might have been prevented had the policy been more effectively designed or implemented. On the other hand, an examination of past policy effectiveness may confirm that the employer has made reasonable prior efforts to prevent and correct incidents giving rise to harassment complaints. The investigator cannot ignore either eventuality since each could have an impact on conclusions and resolution measures for the current complaint and preventive actions that may be needed for the future.

A well-drafted policy document typically:

- Clearly states the policy's purpose and emphasizes prevention.
- Employs language, tone, style and specific provisions that are clear and realistic for the employer's individual workplace.
- Includes a form for employees to sign and return acknowledging policy receipt.
- Addresses all forms of unlawful harassment and clarifies the differences between sexual harassment and other kinds of harassment.
- Includes a sampling of clearly described examples of prohibited behaviors.
- Adequately emphasizes protections from retaliation for making complaints or participating in investigations.
- Describes multiple accessible, responsive complaint processes.
- States that impartial investigations will be conducted for all harassment complaints and addresses how confidentiality commitments and communication will be handled during investigations.

- Is consistent with all related policies and procedures available to employees.

Effective policy implementation typically includes:

- The policy has been broadly communicated and marketed throughout the workplace.

- Managers and others accountable for policy implementation understand the policy and their responsibilities—and have been adequately trained to administer it.

- Managers and supervisors believe that the policy will be enforced, and they routinely support and reinforce its provisions as demonstrated by their behaviors—on and off the job.

- Non-supervisory employees throughout the workplace understand the policy and believe that it will be fairly administered.

- The employer has a record of accomplishment showing that policy commitments have been consistently met and that any past harassment, discrimination or retaliation reports have been correctly handled.

Interviewing the Complainant

During the complaint meeting, it is important to ask for as much detail as possible about the allegations so that they are clearly understood and can be adequately addressed. It is essential to obtain from the complainant a list of any witnesses and other individuals who might be able to shed light on the issues. Often, additional complainant interviews are necessary to obtain clarification or additional elaboration on specific points. It is advisable to obtain a written summary of the issues and discussion which is agree to and signed off by the complainant. The complainant may assert that it is impossible for him or her to continue working in the same environment as the accused. In this situation, the employer must consider several issues, including the potential legal and ethical risk of refusing to remove an employee from a possibly harmful situation. Depending on circumstances, the employer may decide to temporarily separate the parties pending the outcome of the investigation—perhaps by reassignment, at-home work, or by placing one or both on leave of absence. Decisions must also be made as to whether a selected temporary resolution will be viewed as punitive, especially by the complainant. Other considerations are the seriousness of the allegations, how the rights of the accused will be affected, and whether to pay for time away on leave.

Occasionally a complainant will be reluctant to participate in an interview after making the initial complaint or may be out of the workplace on temporary leave pending investigation outcome. This can be problematic if the investigator did not personally hear the initial complaint and needs to obtain a fuller understanding of the allegations. In such situations, the investigator must determine the advisability of making contact or pressing

the complainant for additional information. One useful approach is to mail the employee an invitation to be interviewed in a setting aimed at reducing any discomfort he or she may be experiencing. Even if a complainant declines to be interviewed, an investigation must go forward. In such situations, the employer's safest and most effective route is to conduct the best investigation possible on the basis of available information.

Interviewing the Accused

In almost every case, the investigator will need to interview the alleged harasser to present the allegations and give him or her opportunity to respond. Depending on circumstances, this interview may be logically conducted immediately following the initial interview with the complainant. In some situations, however, it may be best to wait to interview the accused until after other individuals have been interviewed.

A critical action during interviews with the complainant and the accused is to clearly outline all issues under investigation. Oblique questions may disguise the intent or context of the original allegations and make it difficult for the person to candidly respond. An investigator will likely spend as much time interviewing the accused individual as was spent with the complainant.

Usually, persons accused of wrongdoing will initially react with defensiveness and hostility -- whether or not they are guilty. An investigator can best respond by demonstrating respect for the alleged wrongdoer's rights and concerns and by emphasizing that an investigation is a neutral fact-finding process conducted as confidentially as possible for the purpose of identifying possible problems. It is important to explain clearly and calmly that confidentiality is expected and that retaliation will not be tolerated.

An accused employee may believe that he or she cannot continue to work with the person who made the complaint. As with complainants who feel similarly, the employer must determine how the parties can be separated without causing more problems. Often a decision is made -- whether or not initiated by the accused, and especially when very serious misconduct has been alleged -- to remove the alleged harasser from the workplace altogether until investigative results are known. To preserve all employees' rights and avoid legal exposure, the employer should be careful not to imply a premature assumption of guilt.

Interviewing Witnesses and Others

In addition to asking for witnesses from the parties and other interviewees, the investigator is well advised to conduct an independent search for potential witnesses who might possess relevant information. An examination of organizational records and other available data may reveal similarly situated workers, former employees, customers, family members, or others who could aid the investigation. This is especially important with harassment complaints because harassment is often a repeated behavior—not limited

to just one targeted victim. There is a high likelihood that others, not identified by current interviewees, could share experiences that might confirm or refute the allegations.

There would seem to be a potentially unending number of witnesses who might need to be interviewed. However, in most workplace investigations, the witness list is manageable, especially in a relatively straightforward complaint involving one complainant alleging misconduct by one other individual over a relatively brief period. According to some investigators, in such situations, an interviewer might expect to meet with five to eight witnesses in interviews typically lasting from 30 to 45 minutes each.

Four Forms of Evidence

All of the relevant facts can be categorized in one of the following forms of evidence: testimonial, documentary, physical or demonstrative evidence.

Testimonial Evidence

Testimony is what someone communicates about his or her memory of observations he or she made. In every case a witness must have used one or more senses--seeing, hearing, touching, smelling, and tasting--to have observed some part of an event. Communication is ordinarily oral, although sign language or body language or acting out an event can all represent testimony.

The transformation of the observation to communication, however, is mediated by the nature of someone's memory. Assuming that most memories are not neurologically impaired, some people remember an event better than others because, for example, they were paying greater attention. Others might feel emotional about the event and as time progresses their memories might evolve into something more consistent with their emotions than was the original observation.

Documentary Evidence

Documentary evidence represents the manner in which testimony is preserved. It cannot exist independent of someone having made observations. The most common example of documentary evidence created during the course of an investigation is a witness statement.

Most organizations have myriad sources of documentary information, all the product of individual sensory activity. For example, attendance records are what employees would communicate about their memory of their presence or absence at work if they could remember every detail for a relevant period of time. Since it is clear that would be an inefficient way to document so many pieces of data, an organization ordinarily asks staff to record that data as it occurs.

Physical Evidence

Physical evidence is made up of things and the spatial relationship between and among things. Water is a thing and therefore physical evidence. The floor is a thing. Where the water is on the floor represents their spatial relationship and is physical evidence.

But, to be physical evidence, any thing must truly be the thing itself. It wouldn't be good enough to offer a knife as physical evidence if it could not be established as the knife in question. It would never be good enough to offer a knife which is "just like" the knife involved in an incident.

Criminal justice entities created what we now term the chain of custody, a method of collecting and documenting physical evidence that helps establish objects as authentically the things themselves.

Demonstrative Evidence

Demonstrative evidence is the way in which physical evidence is preserved. It cannot exist independent of physical evidence. The two most common examples of demonstrative evidence are photographs and diagrams. A photograph preserves color and shape of objects adequately quite well. A diagram more adequately illustrates spatial relationships.

A powerful source of demonstrative evidence that has become much more prevalent in recent years is the surveillance camera.

Objectivity

A properly conducted investigation is characterized by objectivity. An investigator must not feel emotions that would commit him or her to any particular conclusion. In fact, the best investigators do not care about the conclusion, only that it be the product of properly collected evidence.

Emotional attachments to any conclusion distract an investigator from the investigative process. The investigator will be drawn to evidence that would tend to support his or her desired outcome. The natural consequence of a less objective process is that the investigator might tilt the record -- perhaps unwittingly -- by including more evidence favoring his or her feelings.

In essence, there is a direct relationship between objectivity and thoroughness: Generally the fewer objectives the investigator's performance, the less thorough.

Investigatory Rules

The values of speed, thoroughness and objectivity, as previously discussed are important to an effective investigation. The following are helpful rules when conducting an investigation:

- The investigator should have no interest in the outcome of the case.
- The investigator should first interview the person who reported the incident.
- If there is a scene that has been secured, the investigator should then visit that scene as quickly as possible
- The investigator should create whatever demonstrative evidence the conditions at the scene suggests would be useful to share with others who will evaluate the evidence and make decisions about the validity of the investigatory findings. This may include photographs and/or make diagrams of scenes to preserve relevant information.
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- The investigator should conduct interviews of and take written statements of any witnesses
- Incident interviews should avoid leading the witness. Instead, the investigator should ask open-ended questions -- questions beginning with who, what, where, why, when and how.
- The investigator should the review documentary evidence.
- The investigator may engage in background interviews of an employee's supervisor or co-workers
- Near the conclusion of the investigation the investigator should conduct whatever follow-up interviews might be necessary and take written statements based on those interviews.

Follow-up interviews -- a second (or third, etc.) interview with a particular witness will occur in one of three situations. First, the investigator may have forgotten to ask a question that should have been asked during the first interview. Or, the investigator may have discovered additional information that would require asking additional questions not relevant at the time of the previous interview. Or, the investigator may ask questions that would help him or her reconcile conflicting evidence.

The investigator should write a final report, including details of his or her investigatory activities.

A final report is not a brief an investigator uses to prove his or her findings. It is a document that communicates to others the important elements of the case. Those elements include a description of the methods the investigator used to find and collect evidence as well as a summary of the evidence the investigator collected.

Although not strictly an investigatory activity, most HR professionals will also include a section in a final report offering what he or she concludes is the answer to the investigatory question. Remember that this report, along with the investigator's file may become evidence should the matter proceed to litigation.

Employee Request to Terminate Investigation

Another difficult issue arises when an employee files a complaint, then requests -- perhaps even begs -- that nothing be done. When notified of a potential problem, employers generally have a duty to investigate and take corrective action, if appropriate.

However, there also are risks in investigating a complaint against an employee's wishes. For example:

- If employees' wishes are not honored, they may not seek HR's help in the future. A trusting relationship often is the best inhibitor to litigation.
- If decision makers know of an employee's complaint, subsequent decisions will be tainted by this knowledge and employers could be exposed to retaliation charges. However, decision makers can't retaliate in response to a claim if they never knew it existed.

In short, there are risks both to taking action and to avoiding action. Employers must balance these risks by practicing risk selection, rather than risk avoidance. When deciding whether or not to investigate, an employer should consider several factors, including:

- The severity of the alleged wrong.
- The pervasiveness of the alleged wrong.
- Whether individuals other than the complainant may have been affected by the alleged wrong.
- Whether there have been other complaints against the alleged wrongdoer.
- The relative positions in the organization of the complainant and the accused.

If the alleged conduct is neither severe nor pervasive, and if no other factors point to a need to investigate -- for example, if there were no prior complaints about the alleged harasser -- it may be reasonable (although not risk-free) for HR to honor the employee's wishes and refrain from investigating further.

Under these circumstances, HR should:

- Document in a memo -- either to the complainant or to the file -- the limited nature of the complaint and other factors that led HR to honor the employee's wishes.
- Encourage employees to notify HR immediately if they change their minds or have any subsequent problems, emphasizing that the company will neither engage in nor tolerate retaliation of any kind.

- Follow-up with the complainant periodically to make sure there are no additional problems. Each time, document what the complainant states.

Cultural Differences in Workplace Investigations

Employers should keep their employees' cultural differences in mind when planning interviews or investigations. The term "cultural differences" in its broadest sense includes differences based not only on the familiar protected categories mentioned in laws enforced by the EEOC, but also differences based upon income, regional origins, dress code and grooming standards, music preferences, and political affiliation. Even within some ethnic or racial groups, there are perceived differences between the members based upon how long an individual has been in this country, skin tone, language ability, and religion. Interviewing techniques that seem effective with longtime residents in the United States may not be effective at all with people who come from abroad and who are not used to American cultural norms. In order to minimize any cultural limitation, an employer should:

- Approach each interviewee with an open mind - do not form an opinion before meeting and talking with the individual, but rather let the interview shape your opinion.
- Put yourself in the interviewee's place - imagine yourself as an employee being faced with your own questions.
- Prepare yourself before interviewing each employee on your witness or party list. If you need more information about general cultural attributes of people from certain countries or religions, research the issue (using sources such as the public library or the Internet), reviewing at least two or three different sources for each different cultural type involved.
- Try to find out as much as you can about a particular culture's stance toward things such as the amount of physical space between people who are talking with each other, the amount of eye contact that is appropriate, the significance of voice inflections when asking questions, and the significance, if any, of head movements and other body language during a conversation.
- Be sensitive to the role that gender can play in cultural dynamics. For instance, in some cultures, it may be inappropriate for a male interviewer to be alone in a room with a woman who is being interviewed. A general practice of always having an opposite-gender witness present would come in handy for such times. Another example might be that male employees from certain cultures might react very adversely, or may "clam up" altogether, if forced to answer pointed questions from a female interviewer. Whether it's right or wrong to have such an attitude in our country is beside the point if the goal of getting full and accurate information is not being achieved.

- Remember that one can be easily deceived by generalities and stereotypes. Just as there are significant differences between the longtime citizens of your own neighborhood, town, county, and state, and between the members of your church, there are equally significant differences between the people of other countries and religions. Refer back to point 1 above.

Regardless of cultural differences, there are some constants:

- Every person appreciates being treated with respect.
- Even those who come from cultures noted for self-sacrifice and community thinking have a sense of self-value and appreciate being treated as individuals.
- Every person appreciates feeling as if their opinion matters to you.
- Everyone appreciates an opportunity to explain themselves, so be sure to allow enough time to let people "get things off their chests."
- Every person from every culture understands the basic concept of fairness: that people should be treated consistently according to known rules or standards, based upon things that were within their power to control.
- Every employee comes to an interview with a certain amount of trepidation and uncertainty and will appreciate whatever you can do to reassure them that they will at least be treated fairly.

Remember, while it is important to know your employees and to have basic familiarity with their backgrounds and cultures, you will mislead only yourself if you believe that you have them all figured out based upon cultural generalities. Keeping an open mind and treating people fairly based upon what they do or don't do are the keys to bridging whatever cultural gaps exist.

Investigating Documents and Physical Evidence

An investigation should also include a review of documents and other background materials, including the employer's anti-harassment policy. Records often reveal critical information that witnesses might not know about or recall. For example, personnel and prior investigative files might indicate whether similar alleged acts or complaints have occurred in the past. This would shed light on policy implementation effectiveness, and possibly reinforce or refute a party's position and affect decision-making regarding the severity of discipline. Time records might indicate whether a party was in the area where a relevant event was alleged to have occurred. Organization charts can highlight relevant staffing practices, workplace relationships, and the names of potential witnesses. Other document sources include formal and informal communications such as e-mail, memos, time cards and even daily planners.

Physical evidence can also be useful. Items directly named in the allegations, such as pictures or graffiti, would be very important for the investigator's examination. Clothing, tools and other items—in or out of the workplace—might shed light on whether the

allegations are true. The placement of a door, the condition of equipment or other facility particulars might indicate whether an alleged incident occurred as described.

There is virtually an unlimited supply of documentation and physical evidence a resourceful investigator might access to help expedite the fact-finding process, enhance the quality of findings, and timely complete a thorough investigation. Practicality and common sense must balance such a search, which should not become a hunt for information extending beyond realistic boundaries.

Credibility Findings

When the investigator's findings of fact hinge on the credibility of witnesses, the investigator should document the reasons you used to come to your conclusions. If the issue ever comes to trial years later, having this written justification will be invaluable.

Consider the following factors (among others) when determining credibility:

Consistency. Consistency is critical. However, employers must apply consistency consistently. Minor inconsistencies in one person's story cannot be magnified while another person's inconsistencies are disregarded.

Body language. Body language may be relevant. But employers should consider cultural factors that may affect body language, such as eye contact.

Timing. For example, the fact that a complaint closely follows discipline could suggest that the complaint is retaliatory.

Corroboration. Corroboration is helpful, but not necessary. Some wrongs occur behind closed doors and you cannot take the position that uncorroborated complaints are necessarily without basis.

On the other hand, if an employee claims colleagues can corroborate her allegations (or defense) and those individuals fail to do so, the absence of corroboration may be telling.

Other complaints. The existence of complaints by prior employees tends to corroborate a recent complaint. On the other hand, the fact that a group of employees allegedly experienced similar behavior does not necessarily mean the complaints have merit. Sadly, employees sometimes conspire to set up an unpopular supervisor or peer.

Analyzing Results

Assuring completeness. At some point, an investigator must decide that fact finding is as complete as is reasonably possible. If the investigator has maintained a continuously updated action plan, this is the time to double-check it to assure that no tasks are left undone. In doing so, the investigators might assess their efforts by answering the following basic questions:

• Was adequate, clear, specific information about accusations provided to the alleged wrongdoer and did he or she have an adequate opportunity to fully respond?

• Did the investigation consistently maintain a focus on the complaint allegations as opposed to emphasizing irrelevant or less important factors?

• Was there reasonable follow-up on all potential witnesses, document sources and physical evidence noted in the course of the interviewing process and any independent document review?

• Was an adequate attempt made to collect information with balanced attention to the claims of each party?

• Can any decisions to exclude noted information be reasonably and comfortably explained?

The legal consequences for failing to reasonably explore and fairly consider all available relevant data during a harassment investigation can be severe. For example, one court found that an employer did not conduct a thorough investigation because it focused on an individual's performance issues rather than an investigation of underlying harassment claims. (*Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 [8th Cir. 2000].) Another court found it questionable that an employer interviewed the accused and no other witnesses when conducting its investigation into a harassment complaint. (*Endres v. Techneglas, Inc.*, 139 F. Supp.2d 624, 632 [M.D. Pa. 2001].)

This information suggests that when an investigator begins to analyze findings and discovers that important data is missing, it is wise to reopen the investigation. The undesirable alternative is to act on incomplete findings, thus creating a questionable record that will remain indefinitely as compliance vulnerability for the employer.

Reaching a Conclusion

There is little instruction from the courts as to how to draw conclusions from workplace investigation evidence. This may well be a judgment call. Some guidance may be inferred from indications that judicial authorities generally appear to consider democratic decision-making processes more objective and impartial than arbitrary rulings by single authority figures. For this reason, it is suggested that credibility might be enhanced and legal exposure potentially reduced when more than one individual participates in the interpretation of investigative findings. This might be accomplished through a discussion between appropriate management and human resources. These individuals can review findings submitted by the investigator, then develop conclusions and recommendations to be subjected to a layered review process -- assuring that multiple individuals contribute input before a final resolution decision is made.

Decision Making

When making decisions, focus on whether the behavior in question was inappropriate or unprofessional -- don't label behavior as illegal. There are at least three reasons for this counsel:

- Your goal is to get wrongdoers to accept the results of the investigation and make any behavioral changes necessary. Those labeled with the stigma of "harasser" are more likely to reject investigative findings.
- Many objectively offensive behaviors are not illegal (because they are not sufficiently severe or pervasive). Employers that focus only on illegal behaviors may unwittingly tie their hands when it comes to discipline, because punished employees may argue in court that their actions were not illegal, and therefore, did not warrant discipline.
- Finally, don't admit legal liability. That way, in litigation, if the complainant is not satisfied with the corrective action, your organization can argue that the conduct did not rise to the level of harassment—and even if it did, the employer took appropriate remedial action.

With this background, there are generally four possible conclusions an employer can reach for each allegation an employee makes. They are, with an example for each:

The conduct occurred and was inappropriate. For example, she said "You look sexy in that shirt!" and this was inappropriate.

The conduct occurred but was not inappropriate. For example, she told him, on one occasion, that his new suit was sharp and this comment was not inappropriate.

The conduct did not occur. For example, he alleges that she told him—in front of his peers—that he looked sexy. However, his peers claim she did not make this comment.

It is not clear whether the conduct occurred. For example, he alleges she told him he looked sexy—which she denies. There were no witnesses and both parties seem credible; we can't determine whether the comment occurred.

Closure

Once an employer conducts an investigation and analyzes the results, appropriate action must be taken. The courts very simply require employers to take action that will likely deter future harassment from occurring. Depending on findings, immediate resolution actions may take several forms. Some suggestions for actions of major importance are discussed in this section.

Communicating investigative outcome to the parties. Both the complainant and the accused will anxiously await the investigator's findings, and both have a right to appropriate closure. It is usually best to maintain confidentiality regarding specific corrective actions and fact-finding details. Normally, it is appropriate to advise the complainant that allegations were either substantiated or not substantiated and (if applicable) that appropriate action has been taken. It is critical to remind the complainant that he or she will be protected from retaliation and to ask him or her to immediately report any future retaliation problems. If the allegations were not substantiated, a similar meeting might be held with the accused in which he or she is advised of the basic finding, warned against retaliation, and reminded that harassment is strictly prohibited.

Communication with employees found in violation is addressed in the discussion of disciplinary action below. If the employer offers an Employee Assistance Program (EAP), it is often useful to remind both parties that this benefit is available if they feel a need for additional specialized help.

Beware of retaliation. Employers should constantly bear in mind the necessity to avoid retaliation against employees for exercising their legal right to make a discrimination complaint. To avoid liability, the employer should carefully scrutinize any follow-up decisions resulting from the complaint and assure that there are no inadvertent adverse effects on the complainant.

Retaliation or perceived retaliation frequently arises as an issue when the employer must separate the complainant and the accused because they can no longer work together. Separation is usually wise since it is difficult for employees to maintain a constructive relationship after one has accused the other of misconduct. However, it is important to assure that the complainant perceives the selected separation action as positive. For example if the complainant is to be moved, the action should not involve transfer to a less desirable job, location or shift, while the accused remains in place because he or she is considered more valuable to the organization.

If an employee complains of retaliation after making a complaint or participating in an investigation, that claim must also be investigated and treated as seriously as the original harassment concern. These complaints are difficult to assess and resolve because they can arise from erroneous perceptions or unrelated negative experiences. Primary considerations for the investigator here usually relate to time proximity and connections between circumstances that cannot be legitimately explained.

Disciplinary Action for Violations

According to the EEOC, disciplinary/corrective action for harassment violations should be proportionate to the severity of the offense. For many employers, corrective action is incremental, beginning with an oral (albeit documented) counseling for a first-time minor violation. If infractions recur, the employer will normally issue formal, increasingly stern written warnings, then possibly place the employee on probation or suspension, or take more serious action such as demotion or discharge. Depending on the severity of the conduct and the personnel involved, employers may bypass initial steps and take serious action immediately.

Consistency with past practice. In determining appropriate disciplinary action, it is important for employers to consider prior actions taken for similar misconduct and similarly situated employees. Inconsistent corrective action is often used as evidence that an employee was singled out and held more accountable than co-workers of a different race, sex or other designated class.

The employer should also assess whether past practice has been effective and legally compliant. For example, a harassment investigation may reveal that similar violations in the past were not addressed with sufficiently serious corrective action—or not addressed at all. When this happens, the employer must determine how to establish a new, appropriate precedent and properly address the current violation while minimizing legal and employee relations exposure associated with any apparent inconsistencies.

Organizational level distinctions. Another consideration is the organizational level of the employee to be disciplined. For instance, if a senior manager is involved in inappropriate conduct, an employer will likely need to take more severe action than if a non-manager commits such behavior. Organizational level is one compliance criterion for assessing whether employees are similarly situated. Therefore, in this example, compliance requires that the manager be treated in a manner consistent with treatment accorded other managers at his or her level.

Avoid mixed messages. If disciplinary action will occur in close proximity to a planned pay increase, bonus or promotion for the offender, it is advisable to delay or, in some circumstances, even cancel such actions. Otherwise, a harmful, conflicting message is sent to the offender—and often to the general workplace—that the employee is being rewarded despite his or her misconduct.

Discharge. When discharge is the selected action, it is advisable to double-check related investigative results to assure once again that the decision is reasonable and well founded on complete, accurate information. Considerations during this final assessment would also focus on confirming that there are no questions about motivation or objectivity and that the investigation was consistent with accepted guidelines for preventing and responding to discrimination and harassment issues.

Communicating the action to the offender. As a rule, the action should be communicated in a face-to-face meeting rather than by e-mail, telephone or mail—unless there is no other viable option. Consideration should be given to timing and the appropriate person(s) to deliver the message. Obviously, the employee must be advised of the specific inappropriate behaviors he or she is charged with committing. It is usually best to use the term "misconduct" as opposed to "unlawful harassment" in describing the offenses. There should be a clear explanation of how the behavior violated policy and negatively affected the organization. A strong statement should be made reinforcing harassment and retaliation prohibitions and a clear explanation given about the consequences of further violations. Depending on circumstances, it may be useful to advise an offender that he or she will be required to attend specialized training classes or, as noted above, to refer him or her to the employer's EAP. The disciplinary meeting should be well documented. Any written reprimands should be signed and dated. The employee should also be asked to sign the document acknowledging receipt. If he or she declines to sign, that should simply be noted without attempts to force the issue.

Depending on circumstances, "Weingarten Rights," as discussed above, may apply in meetings with violators to discuss investigative findings. If such rights apply, the employer can either grant such a request or refuse and advise the employee that the investigative outcome and any resulting action will be communicated in writing unless he or she chooses to attend without the co-worker.

Follow-Up

Follow-up with offenders. An employee's conduct following corrective action should be monitored and some periodic review conducted. This may be informal or it may be a series of meetings to discuss the employee's progress. If an agreement had been made to help an offending employee meet expectations, the employer cannot afford to forget that agreement. Failure to act as stated can create legal exposure if further infractions occur.

Follow-up with complainants. Periodic checkups with the complainant are always necessary to assure that he or she is not experiencing problems with retaliation or adjustment to any job changes that may have occurred as a result of the investigation. Although a complainant has been asked to report any problems following the investigation, he or she may be reluctant to do so.

Despite confidentiality requests, employees tend to gossip and speculate about investigations and spread rumors, which may or may not be founded on fact. If the accused is popular, co-workers may shun the complainant or otherwise display resentment toward him or her. Even when a complainant is transferred to a new job, adjustment can be difficult if new co-workers are reluctant to interact freely with him or her for fear of inadvertently generating a complaint against themselves.

Situations like these can hinder harassment prevention efforts and discourage other employees from making legitimate complaints. They might also be construed as retaliation and can escalate into serious employee relations and productivity issues.

Therefore, it is critical that an employer not rely on the complainant for follow-up reports but proactively initiate conversations with him or her, probe for any problems and take immediate appropriate action if any are uncovered.

Records maintenance. Investigative records are extremely sensitive documents. Generally, these records should be maintained indefinitely in a secure central location with access restricted to individuals on a need-to-know basis. Any follow-up activities should also be documented and added to the file. If the record is not correctly maintained it can potentially be used as evidence of an employer's noncompliance. On the other hand, a well-maintained record of a properly conducted investigation is invaluable as an employer defense in case of related future litigation.

To maintain confidentiality and avoid legal exposure, references to an employee's complaint or participation in an investigation should be excluded from his or her personnel file -- and from the personnel files of all other employees. No records pertaining to the investigation should be placed in any employee's individual personnel jacket, except neutral documents recording related employment transactions specific to that individual, such as disciplinary write-ups, pay adjustments or job changes.

If an employer has promised to purge a corrective action write-up from a harassment offender's personnel file at some future time, for ethical and legal reasons that commitment must be met -- unless there is an appropriate reason to do otherwise. However, the employer will need the record if there are further infractions or relevant investigations or litigation at any time in the future. There should be a clear understanding on the part of the employee that even purged write-ups related to this type of offense will be retained indefinitely -- and used as necessary for corrective action decisions if violations recur.

Supervisory notes can be subpoenaed in employment litigation and can create liability issues for an employer if they contain inappropriate information about individual employees. Any supervisors or managers involved in a complaint or investigation should be asked to submit any relevant notes for maintenance in the central investigative record. They should also be reminded not to retain references to the complaint or the investigation in individual records they may keep on their subordinates.

Workplace healing and other preventive measures. Like all performance management activities, corrective action is more than an isolated event. To be effective and bring about positive results, it must include follow-up to return normalcy to the workplace. This is especially important after an investigation since even the most sensitively handled investigations can generate disruption and workplace polarization. When an individual is disciplined, his or her co-workers and other employees are usually affected in some way. It is in the employer's best interest to be alert to these issues and appropriately address them. This might be simply accomplished through informal climate sensing activities such as casual conversations with employees or occasional visits to affected work sites.

Often it is necessary after harassment incidents to reinforce anti-harassment policies through more comprehensive activities such as training sessions for all employees or re-dissemination of the policy.

The Report of the Investigation

The best investigation in the world may be rendered useless unless memorialized in a written report. A written report is often the most effective way to organize the investigator's conclusions and allow for a determination of appropriate remedial action. A thorough, non-privileged report should contain: (1) a description of the alleged wrongdoing; (2) a description of the documents, manuals and witnesses examined; (3) a summary of the information elicited; (4) determinations as to credibility where there are "fact" conflicts; and (5) findings of fact based on the credible evidence. This report should be shared with in-house or outside counsel who, based on the investigative findings, should render an opinion as to the potential legal liability and suggest actions to minimize any damage that may occur.

Conclusion

Internal Investigations are an essential tool in an employer's handling of workplace issues. They are fraught with legal, practical and strategic issues; however, careful planning must occur to ensure thoroughness, success and the proper outcome.

Sample Investigation Checklist

A. Who, what, when, where, how and why: Conduct a thorough interview of the accuser or initial witness. Request and/or demand confidentiality. After reviewing notes, always ask if there is anything else.

B. Put out the fire first. No decision has to be made "now." Stabilize the workplace. The more severe the potential discipline/longer tenure, the more care in ensuring fairness.

C. Case by case decision to suspend employee during investigation. Warn about contact with other employees & consequences.

D. Assess what additional help you need. Consult with Employee Relations in all allegations of discrimination, harassment and/or violence. Council will determine privilege issues.

E. Define whom you need to speak with and what questions you will ask. Determine when written statements are needed. Collect relevant documents.

F. Interview the accused or potentially involved person(s) with a view toward finding out what happened. Ask for information that clears and defends the accused. Provide detailed allegations to the accused to allow complete and fair answers. Ask for witnesses to current and past events. After reviewing notes, always ask if there is anything else.

G. Assess when the accuser/witness should be asked to put their claim(s) in writing. Work with Employee Relations/Legal to decide whether sworn or signed statements are needed.

H. Do not be unduly swayed by your knowledge of those involved. Sometimes we need to determine whether we are going to protect the identity of the accuser. Remember – you don't care how this turns out – no picking sides.

I. Re-interview (or additional interviews) based on new information and issues. Present new allegations to the accused.

J. Keep good notes of interviews, responses, dates/times, efforts, results, actions and refusals. Assume all documents will be seen by a jury. Avoid gratuitous conclusions and speculations. Only write what you were told and what you saw.

K. Decide whether a report is necessary and assess privilege issues again. Careful with conclusions/recommendations – get issues into A/C privilege <u>before</u> a report is prepared.

L. Assess credibility and resolve factual disputes. Or, determine you don't need to and can act on another reasonable basis. Keep secondary performance issues separate from this investigation.

M. Make decisions on the action(s) to take with due consideration of past history. Don't debate with the disciplined/discharged employee (the investigation was complete and is over). Close the investigation with those who need to know.

N. Follow up as needed on the effectiveness of the corrective action. Be alert to retaliation claims and follow up on them.

O. Determine what information to provide the Manager throughout the process or if the next level of management needs to be contacted.

P. If you find there is "no probable cause" due to one employee's word versus another. You may consider advising the accused that if the issue is raised again we will assume the first incident was true and we will discipline accordingly.

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