

Conducting workplace investigations



An employee complains that her co-worker's inappropriate comments and behavior make her uncomfortable. You receive an anonymous letter from an employee accusing a colleague of misconduct. A job applicant possesses all the right qualifications; however, a gap in his employment history raises a red flag. What do you do next in all these instances? Investigate. Investigate. Investigate.

Conducting prompt, thorough internal investigations followed by appropriate corrective action may be the best way to insulate your company from potential liability when faced with employee wrongdoing. That's why it is important that you know the basics for conducting all types of investigations, from the mundane to the unique.

Getting the investigations picture

Before donning an investigator's cap, you must understand the why's and when's behind an investigation. Ginger McRae, senior consultant with Employment Practices Solutions (Decatur, GA), stresses that employers need to recognize that the purpose of an investigation is to respond to facts, not assumptions or speculations.

In addition to the intrinsic purpose of separating fact from fiction, internal investigations provide employers with a bevy of benefits. Specifically, investigations can:

- uncover hidden problems;
- serve as a decision-making tool;
- be used as a legal defense against harassment claims, for example, in court; and
- decrease the likelihood of high employee turnover rates and low employee morale.

Now that you know why an investigation should be conducted, you need to know when to initiate one. McRae points to three instances that should always set off investigations bells and buzzers.

1. When anyone in a position of authority (no matter the degree of that authority) receives information that suggests a law or company policy has been violated. Such information commonly points to evidence of alleged harassment, discrimination, theft, violence, substance abuse, or conflict of interest.
2. When off-site or after-hours work-related conduct has the potential to, or does already, affect an employee's on-the-job performance or violate a law or company policy. For example, a fact-finding initiative should be launched if upon returning from a seminar a supervisor begins to exclude a fellow seminar attendee from departmental meetings. Or an employee complains that a co-worker is stalking him/her.
3. When an anonymous complaint is received. Just because you don't know who filed the complaint, doesn't mean it lacks merit.

To make the most of a workplace investigation, you need to understand not only the why and when, but also the

who, what, where, and how.

Who? You, a designated staff member in a position of authority, or an outside investigator.

What? Investigate a complaint or alleged violation of a law or company policy.

When? An alleged behavior is having an adverse impact on an employee and/or the workplace.

Where? Behind closed doors. It's crucial to maintain a degree of confidentiality when investigating. That's not to say you shouldn't take a closer look at where an alleged safety infraction occurred, for example.

Why? To gather factual information so that you can reach an objective resolution.

How? The following information is designed to answer that very question. It will provide you with tips on employing basic investigation techniques.

The ABCs of internal investigations

You receive a complaint, so you investigate. You don't receive a complaint, so you don't investigate. Use that logic and chances are good you'll end up embroiled in a legal battle. A complaint does not have to be formally reported to warrant an investigation. Complaints can come to your attention via:

- rumors;
- informally shared information; and
- confidential information.

Also, pay special attention to the following types of complaints, which are likely to sneak under your investigation radar.

1. Complaints made after an employee has been fired or has resigned. These complaints usually surface during an exit interview or termination meeting.
2. Complaints that are made verbally, rather than in writing.
3. Complaints that don't use legal buzzwords, like "discrimination," "retaliation," or "harassment."

Regardless of how a complaint is brought to your attention, what you do next is crucial, cautions McRae. She encourages employers to: take immediate action; preserve all evidence; separate the involved parties, if possible and necessary; and stop any misconduct.

How you respond to a complaint can mean the difference between a situation successfully resolved and a drawn-out legal battle. That's because court after court have ruled that a fair and prompt investigation is the best way to insulate your company.

Internal investigation checklist

Use the following tips to aid you in ensuring that every internal investigation you conduct withstands legal scrutiny.

After receiving the complaint:

- Review applicable company policies, so you know exactly what procedures will need to be followed. For

example, whom do you need to notify of complaints? Do you need authorization before investigating? Does a member of upper management need to be present during investigatory interviews?

- Determine how extensive the investigation needs to be by judging the nature of the complaint. For example, minor complaints may only necessitate a discussion with the employee and his/her supervisor. More serious complaints, such as those of harassment, will require a full-scale investigation, complete with interviews of the complainant, the alleged harasser, and any witnesses. Incidents involving major theft or serious acts of violence may even require police intervention.
- Review any pertinent documentation, such as employee personnel files, performance appraisals, disciplinary warnings, and any prior investigation files relating to the employees involved.
- Develop an investigatory interview question list. Although you should try to be consistent and ask everyone involved the same types of questions, feel free to ask follow-up questions triggered by employees' answers.

During the investigation:

- Decide if any interim actions need to be taken. For example, if an employee claims his/her supervisor is sexually harassing him/her, temporarily transferring one or both of them may be an option. Other examples: temporary leaves of absence, changes in work shifts, suspending (with pay) employees accused of serious workplace misconduct.
- Question the individuals involved. Use open-ended, rather than "yes-no," questions in order to get as much information as possible. Take notes so you can compare answers later, and don't be afraid to re-question employees if information is unclear.
- Maintain as much confidentiality as possible. Don't use names unless necessary, and keep all investigative information on a business-need-to-know basis.
- Thank employees for their assistance, and emphasize that they will not be retaliated against for their participation.

Questioning potential witnesses

If ever called on the legal carpet, you must be able to prove to a judge and jury that you made a good-faith effort to end the questionable behavior. So when it comes time to sit down with witnesses to the shoddy behavior, it's imperative you know the questions to ask in order to net the information you want.

Using a tape recorder is not recommended because many witnesses are inhibited by tape recorders and are less likely to speak freely. Taking notes is appropriate. If there are two investigators, one should take the lead in asking the questions while the other captures as many of the details verbatim as possible. The questioner should also take notes.

When interviewing potential witnesses, explain that notes will be taken. Tell all employees they will be allowed to read the notes. State that the notes try to capture the gist of the conversation, not every word. It's a good idea to quote certain important statements exactly. Take time to do this. Remember, your silence is acceptable. Sometimes silence will bring forward more information than the next quickly asked question. Allow the employee to change the notes to ensure they correctly represent what the employee said. Ask the employee to initial each page and sign the last page. This step is time-consuming, but it ensures that the notes will not be challenged if the case should go to court.

Some employees may ask for a copy of the notes. Explain that company policy is not to provide notes to ensure confidentiality. This is not a trial. It is simply a company investigation. The notes should be written in ink and signed by the employee.

Write the questions in advance based on the details the accuser has provided. Never "wing" these questions. Important pieces of information may be overlooked if you do not prepare the questions in advance. If some new

detail surfaces, you may surely add to your original questions or alter them to incorporate it. Sometimes a witness will skip ahead and answer one of your questions out of sequence. Simply skip that question when you come to it or perhaps ask it again to clarify. "You stated earlier that...Is that what you saw or heard?"

Start with a statement like this: "I am conducting an investigation based on a charge by an employee. Your cooperation is very important and will be confidential."

Begin with general questions.

- What is the general workplace atmosphere like in the employee's group?
- What style of communication is used by the employee? His/her supervisor? Other employees?
- What is the supervisor's managerial style?
- How is important information provided to employees?
- Are there any problems in the work group?

Continue with more specific questions.

- Have co-workers complained about inappropriate behavior in the work group?
- Has the employee personally noticed or been offended by inappropriate behavior? Describe any inappropriate or offensive behavior that has been witnessed.
- Have offensive jokes or comments been made about people in the group?
- Who made these remarks? What exactly was said?

If answers do not corroborate what the charging employee has claimed, it is time to be more exact. "On Friday, March 15th, at about 4:30 p.m., did you notice anything in your work area that may have been disturbing to you or another employee? Did you hear a conversation involving (name the employee)? Did you see anyone talking to this employee? Did you observe any particular interaction between this employee and a co-worker?"

At the end of each interview, remember to thank employees for their cooperation. Remind them that there will be no retaliation. Invite them to call you if they think of anything else that would assist in the investigation. Stress the issue of confidentiality and the avoidance of the appearance of collusion.

Post-investigation actions

You've gathered evidence, talked to witnesses, interviewed the accuser and the accused, and documented your efforts. Now it's time to reach a conclusion.

Doing so might not be so easy if your investigation reveals that you have a he said/she said situation on your hands. If that's the case, you need to assess the credibility of both parties involved. Consider:

- the plausibility of what each is telling you;
- the demeanor of each; and
- whether either has any motivation to lie.

You cannot shy away from making a determination of fact, says McRae, even in he said/she said situations. As long as you make a good-faith decision, you shouldn't find yourself in legal trouble, even if it is later uncovered that your ultimate determination was incorrect.

Resolution options

Once you've reached your investigatory conclusion, you'll want to report back to the involved parties.

- If the investigation is inconclusive, or the complaint is found to be without merit, let the complainant know

that he/she can come to you with any additional information he/she may have in the future.

- If you discover that an employee has made a false accusation, take appropriate disciplinary action. False accusations of a serious nature — such as theft — may be grounds for termination, while less serious incidents may call for a written warning, suspension, or probation.
- If you find the complaint has merit, take immediate corrective action. Remember, though, that you do not have to inform the complainant of what the corrective action is. Some, like termination, transfer, or suspension, will be obvious. Written warnings, probation, etc., aren't.
- Reiterate the fact that retaliation will not be tolerated, and that employees should come to you with any further complaints, whether or not they're related to the original complaint. And if the complaint was about harassment, discrimination, etc., check in with the complainant from time to time to ensure the situation has been resolved.

Investigation follow-up

A few days after you've reported your conclusion to the involved parties, meet with the accuser. Re-interview him/her to ensure the situation has been remedied and he/she has not suffered any form of retaliation. Document this interview as you would one conducted during an investigation.

Also, McRae encourages employers to keep the following items on file (though not in the employee's personnel file).

- The original complaint.
- All investigatory notes.
- Records of evidence examined.
- Witness statements.
- Written summary of findings and ultimate resolution.