

Is there a way to ensure sensitive investigation records remain confidential?

Q. One of our employees has just filed an internal complaint claiming that she has been sexually harassed. We are concerned that if we discipline the alleged harasser based on our findings and note this incident in his personnel file, he may demand to inspect our investigation records. May we avoid this by maintaining a separate investigation file?

A. Under California Labor Code 1198.5, an employee is entitled to inspect personnel files which “are used or have been used to determine that employee’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.” Employers are not, however, required to provide records relating to the investigation of a criminal offense.

Employers seek to maintain the confidentiality of their harassment investigations for various reasons. For instance, an employer may wish to protect from retaliation the individuals who provided information.

Given that harassment generally does not constitute a criminal offense, if the investigation file is included in the employee’s personnel file, he or she will likely be entitled to inspect the documentation. Excluding all references to the investigation from the personnel file would not be proper, since the disciplinary action imposed will ostensibly be based on the investigation.

The best course of action for employers may be to maintain a separate investigation file. The employer should draft a report on the findings and actions taken against the employee—which may be included in the personnel file. This should satisfy the legal requirements, given that the disciplinary action will be based on the investigation’s findings (not the statements of any particular individual).