

A quick guide for conducting workplace investigations

An effective, fair investigation after workplace misconduct or incidents can go a long way towards reducing liability for employers

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BACKGROUND

DESPITE LEGISLATION mandating that investigations must be undertaken, there are no hard-and-fast rules on how to conduct a proper workplace investigation. As a result, many employers continue to conduct investigations that may not withstand legal scrutiny. Here you can find some key legal principles and best practices for conducting effective workplace investigations.

Workplace investigations are becoming increasingly prominent in today's workplaces. In part, this is due to fairly recent legislative changes that require employers to conduct workplace investigations in certain circumstances. Employers have also recognized the benefits of conducting investigations prior to administering discipline, to identify issues with workplace morale, and to highlight areas for improvement within their workplace culture. Additionally, in certain circumstances, properly conducted workplace investigations can be effective tools to mitigate the risks associated with litigation or arbitration.

It's all about fairness

Employers have a legal obligation to fairly and impartially conduct workplace investigations, although determining what is fair will vary with the circumstances. A key component of conducting a fair workplace investigation involves using an investigator who is neutral, unbiased, and who will be even-handed with the parties and witnesses.

Investigations must also be conducted in a timely manner. This affords fairness to both the parties by avoiding undue delay because the sooner an

investigation is completed, the sooner the employer can act. Proceeding expeditiously also helps produce a better-quality investigation, as memories and recollections rarely improve over time.

Employers should also be cognizant of whether it may be prudent to remove an employee from the workplace during the investigation process. Tensions and emotions often run high as the process unfolds, and in order to ensure fairness for all parties, it may be appropriate for the complainant or respondent to be placed on a paid leave or offered modified duties while the investigation is underway.

Understanding the purpose

It is essential to understand the purpose for which the investigation is being conducted. It could be in response to a legal obligation, because the employer received a complaint regarding an alleged breach of company policy, to determine if there are grounds to levy discipline, or to assist in identifying and resolving larger issues with the workplace culture. Ultimately, there are a myriad of reasons why an employer may need to investigate and understanding its purpose will often dictate the type of investigation that is appropriate in the circumstances.

Identifying the investigator

Depending on the purpose of the investigation, it may be advisable for the employer to conduct the investigation internally. However, while internal investigators may be suitable for routine and straightforward investigations, they may lack an ability to be impartial or deal with complex factual and legal issues. Although they can be more costly, retaining external investigators allows employers to select someone with the necessary skills and experience to properly conduct the investigation. Because they are not regularly employed in the workplace, external investigators are also less likely to present issues with impartiality.

An additional consideration the employer will want to keep in mind is whether it would like, or need, the investigation to be privileged. In some circumstances — though there is no guarantee of ensuring privilege — that can be accomplished by retaining an external investigator.

Defining the scope

Regardless of whether an internal or external investigator is conducting the investigation, the employer should establish specific scope around the investigation — such as its mandate, the timeline, whether the investigator has only been retained to perform fact-

finding alone, or if the investigator should be tasked with providing recommendations.

It is not uncommon for issues to arise throughout an investigation. To the extent possible, the employer should indicate whether the investigator should address any additional complaints or cross-complaints beyond those initially identified, or if conducting a separate investigation is preferable. When defining the scope of the investigation, both the employer and investigator must have a clear understanding of the investigator's role. When using external counsel, this role should be spelled out in the retainer agreement.

Maintaining confidentiality

At the outset of every interview whether with the parties or witnesses, the best practice is to outline the investigative process and emphasize that all parties and witnesses are expected to maintain confidentiality over their participation in the investigation. Maintaining confidentiality is crucial to conducting an effective workplace investigation, as it helps preclude having the process undermined by gossip and collusion. Further, the limits of such confidentiality should also be communicated to all persons involved. It is also prudent to re-

iterate the confidentiality obligation at the conclusion of each interview.

Interviewing witnesses and assessing credibility

After reviewing any applicable workplace policies and complaint documents, the first interview to be conducted is typically with the complainant. This is the investigator's opportunity to get a complete picture of the issues by hearing the who, what, when, where, and why. The complainant should also be encouraged to provide any relevant documents to the investigator at this time. Additionally, the investigator will want to elicit any relevant contextual information, including the identity of any witnesses that should be interviewed.

After meeting with the complainant, the best practice is to distill the allegations into a complaint document and to provide it to the respondent in advance of their interview. The hallmark of procedural fairness in this context is for the respondent to know the allegations against him or her, and to have the opportunity to respond. Accordingly, it is imperative that the respondent have all allegations put to her for comment. The respondent

is typically interviewed after the complainant and after they have had a reasonable opportunity to formulate a response.

The investigator will then want to meet with all witnesses with relevant information. After meeting with the witnesses, the investigator should consider if a follow-up with either party is necessary to fill in any gaps or to gather a more complete understanding of the facts.

Bear in mind that preparation is key and, where possible, the investigator should apprise themselves of all relevant facts and information to prepare questions in advance of conducting an interview.

Although it may not be practicable to always conduct interviews face-to-face, the investigator's findings will always involve an assessment of credibility. By conducting interviews in person, investigators are better suited to assess credibility by observing the parties, determining the appropriate questions, and testing competing or alternate narratives. A proper assessment of credibility is the foundation to an effective investigation.

Building the paper trail

A competent investigator keeps

a well-documented paper trail of each step of the investigation. This includes establishing an investigation plan, taking detailed notes of all interviews, providing the witnesses the opportunity to review their notes to ensure accuracy, and having them sign off to confirm the same.

The investigator will want to preserve all documentary evidence obtained during the investigation to be reviewed while drafting the report and to support the ultimate findings and process, should either be challenged.

Preparing the report

In most cases, investigators are tasked with preparing a written report of their findings. The report sets out whether each allegation has been proven on the balance of probabilities, or, put another way, whether it is more likely than not that each allegation is true. In making this determination, the written investigation report should outline: the summary of the complaint or allegations; the investigative authority and process; an assessment of credibility; relevant contextual information; legal and policy framework; a summary of

the evidence and findings; and the investigator's conclusions or recommendations, where part of the investigation's scope.

Deciding who gets what

Given the importance of maintaining confidentiality, and in some cases privilege, typically only the persons tasked with making a final decision on discipline flowing from an investigation, if any, should be provided with the investigation report. It is generally sufficient if the complainant and respondent are provided with a summary of the report; however, the employer should also keep any legal obligations regarding mandatory disclosure in mind — such as with workplace harassment — and consider if any other individuals should be informed of the results.

An effective workplace investigation can limit an employer's exposure to liabilities, damages and reputational harm. Although the above highlights some best practices that employers should keep in mind when conducting workplace investigations, it is always best to seek independent legal advice with respect to every specific situation.