

RISK COMMUNIQUÉ

Conducting Internal Investigations

It is extremely important for any entity to prepare to promptly conduct a thorough and equitable investigation of alleged workplace wrongdoing such as harassment, discrimination, retaliation, theft, and threats of violence. Additionally, an entity must take appropriate remedial action to stop workplace wrongs and prevent future occurrences.

This Risk Communiqué offers risk management guidelines to assist your entity in appropriately responding to employee allegations of workplace wrongdoing.

Tips for Conducting Investigations

Tip #1 - Establish an Internal Investigation Team

Designate an Internal Investigation Team to promptly and effectively investigate allegations of personnel conflict or wrongdoing. In the interest of fairness, the Investigation Team should reflect the diversity of the workforce.

Which members of your entity should serve on the Investigation Team? Consider the following selection criteria:

- Job responsibilities include managing personnel issues;
- Trusted and respected employees;
- Ability to maintain confidentiality;
- Interviewing skills;
- Detail oriented / well organized;
- Documenting skills;
- Keep matters confidential;
- Unbiased, reasonable decision makers; and
- Available for follow up.

Tip #2 - Train the Investigation Team

It is recommended that a labor and employment attorney or human resources professional periodically train your entity's Investigation Team to prepare for the variety of potential allegations of workplace wrongdoing. Training on case scenarios is a productive "trial run" for investigators, designed to help avoid mistakes with an actual complaint. Proactive training familiarizes Team members with established investigation guidelines and strengthens employee confidence in the entity's fair internal processes.

Tip #3 – Know What Constitutes an Effective Investigation

Sound investigations include many factors, including but not limited to:

- Fair to all involved;
- Conflict of interest check to identify and remove any Investigation Team members named in a complaint or too closely associated with those involved;
- Initiate the investigation promptly upon receipt of a complaint;

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- Review of relevant entity policies and procedures;
- Non-retaliation measures (when appropriate, consider separating the accuser and the accused during the investigation to minimize potential for continuing harm or retaliation);
- Protecting confidentiality to the greatest extent possible while allowing for a comprehensive investigation;
- Instructing that the complaint and investigation should be kept confidential;
- Outlining investigation steps for all interested parties;
- Informing interested parties that false and / or malicious allegations or participation in the investigation will lead to discipline;
- Reaffirming the entity's multiple avenues of complaint in the event of further wrongdoing or retaliation;
- Interviewer(s) taking detailed notes, careful not to interpret what is said;
- Allowing all interested parties to give their detailed accounting, and perspectives of the facts;
- Interviewer(s) develop an investigation summary – an objective report of the facts established during the investigation;
- Reviewing interview notes with persons questioned to ensure accurate documentation;
- Communicating an estimated timeframe for completion of the investigation; and
- Timely completion of the thorough investigation, indicating the entity took the complaint seriously.

Tip #4 - Incorporate Standardized Investigation Forms

Utilizing consistent forms and / or questions for investigations demonstrates fairness for all involved in an allegation. A goal is to prevent various supervisors from using their own methods of questioning and documentation. Standardized forms and questions help guide the investigators when meeting with the person making the complaint (accuser), the accused, and any witnesses. Strive for consistency from one investigation to the next, yet allow for customization depending upon who is being interviewed and the nature of the allegation. Remember that it is wise to assume all documentation surrounding the investigation may be discoverable, and ultimately produced to opposing legal counsel, a judge or jury.

Tip #5 - Third-Party Investigations

Circumstances may arise where any internal investigation may be perceived as biased for the entity's benefit. Employees may be more comfortable speaking candidly to an objective person from outside the entity. Examples of when an outside third-party investigation may be appropriate include:

- A high-ranking member of the entity is accused of wrongdoing;
- Multiple complainants;
- An employee from a small entity perceives there is "nowhere to turn"; and
- Other real or perceived internal conflicts of interest exist.

A human resources consultant, private investigator, or legal counsel may serve as a third-party investigator. Select an investigator based on the professional's level of education and experience in relation to the nature of the complaint. Lastly, become familiar with the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which requires an employer using an outside third-party investigator to provide the affected individual with a summary of the investigation report after taking adverse employment action.

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Tip #6 – Consider Involving Outside Legal Counsel

Seek immediate input from your legal counsel regarding the response to a personnel complaint. There are valid reasons for and against utilizing your regular legal counsel as the third-party investigator, including the attempt to keep all or part of the documentation surrounding the investigation confidential for subsequent litigation. For this, protected documentation should be labeled “attorney work product” and / or “privileged attorney-client communication”. One possible disadvantage of using your entity’s regular attorney for conducting the investigation may be that the attorney may be asked to serve as a witness in subsequent litigation, and therefore unable to represent the entity in litigation.

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