

THURSDAY, MAY 9, 2024

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# The components of effective and defensible workplace investigations

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**H**arassment, discrimination, and retaliation are serious workplace threats that demand vigilant attention from employers under state and federal laws. This article explores some high-level yet essential components of effective workplace investigations. By understanding the legal duties, adopting comprehensive anti-harassment measures, and prioritizing thorough investigations, organizations can proactively prevent workplace misconduct and have a stronger defense to legal claims arising from such.

## Legal duty to prevent harassment

California's Fair Employment and Housing Act (FEHA) imposes a legal duty on employers to take all reasonable steps necessary to prevent discrimination, harassment, and retaliation in the workplace. Three key pillars guide compliance with this requirement:

1. Anti-harassment policy and training: It is essential for organizations to establish an anti-harassment policy and regularly train employees on this policy. Supervisors and non-supervisors alike must undergo anti-harassment training. Not only is this required under California law, but regular training helps foster a culture of awareness and respect.

2. Responding to and documenting complaints: Organizations must timely and thoroughly respond to



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- workplace complaints. *The precise scope of any investigation will vary depending on the facts and circumstances.* However, at a minimum, this should involve documenting the details of the complaint, interviewing the complainant and identified witnesses (and documenting such), and memorializing any determined corrective action.

3. Taking remedial action: When discrimination, harassment, or retaliation is confirmed, organizations must take prompt and appropriate remedial action to rectify the situation and prevent future occurrences.

## The components of an effective investigation

While the specific scope of an investigation may vary widely, below are a few of the key components and considerations for a workplace investigation.

### Intaking a complaint

Employment investigations require a meticulous approach, which begins with recognizing and intaking workplace complaints. It is therefore crucial to create an environment where employees feel comfortable reporting concerns

and can expect a respectful and non-retaliatory response.

All members of Human Resources and management have an obligation to address potential workplace misconduct if they receive a complaint or observe any improper conduct. Complaints may be reported formally (i.e., through verbal or written communication to HR or management or via a company hotline) or informally (i.e., through personal observations or rumors).

The responsibility to investigate arises *even if the people involved do*

not want any action. Thus, supervisors should not agree to keep Human Resources “out of it.” Instead, they should promptly notify Human Resources of potentially problematic situations, who in turn, must be prepared and equipped to investigate and address.

#### *Interviews and steps of an investigation*

As part of an investigation, an organization should generally: (1) conduct a thorough interview with the complaining party; (2) give the accused party a chance to share their perspective; (3) interview other relevant witnesses; (4) obtain relevant documents; and (5) otherwise investigate avenues that may be applicable to the allegations.

Interviewers should aim to establish a professional demeanor, explain the process clearly, and request full cooperation from witnesses. They should not promise confidentiality, as the extent of confidentiality is limited during an employer investigation.

Often, the key to a good interview is to listen. The interviewer should assure that witnesses, particularly the complainant, feel respect and gravity. The interviewer can employ a mix of both open-ended and tailored questions and should remain neutral to gather comprehensive and unbiased information. They should avoid accusa-

tory questions (which are likely to put a witness on the defensive), becoming angry or emotional, using specific legal phrases, or making predictions. They should not express their own opinions on a situation or reveal their specific sources to a witness.

When speaking to witnesses, interviewers can employ whichever order may be appropriate for the situation. They do not need to limit themselves to only one interview with each witness. Employers can require their employees to participate and may discipline individuals who refuse to do so.

Once an organization has completed their investigation, they must reach a reasonable and fair conclusion based on the facts, and should document the findings in a well-written report. If appropriate, investigators may also consider discussing with legal counsel before finalizing and determining their response.

#### *Credibility determinations*

Investigators often receive conflicting statements during interviews, requiring them to make credibility determinations. Interviewers should consider factors such as biases, evasiveness, or conflicting statements when making these determinations. Investigators may also notice other variables bearing on a witnesses’ credibility, including nervousness, past problems of a

similar nature, or general reputation. If investigators ultimately make a credibility determination, they should explicitly say so in the investigation report.

#### *Communicating the response*

Once an investigation concludes, the details that an employer may choose to share with the involved parties will vary widely on a case-by-case basis. Organizations should avoid providing confidential details of their investigation, while maintaining respect with all parties.

Regardless of the investigation outcome, employers should remind the complainant to notify them of any future workplace concerns. Employers should also emphasize their commitment to anti-retaliation policies. All parties involved should be reminded that their participation in investigations will not result in any form of retaliation. This ensures a safe reporting environment and builds trust in the investigative process.

#### *Record-keeping*

Maintaining a centralized and organized record-keeping system for investigations is also imperative. Leverage attorney-client privilege for sensitive communications, and ensure proper use to avoid breaching confidentiality.

All organizations must work to prevent harassment, discrimination,

and retaliation – and proactive and thorough workplace investigations is a key component of this. By implementing robust anti-harassment measures, and conducting investigations with diligence, organizations can create a workplace culture that prioritizes respect, fairness, and accountability.

Note that these are just a few of the high-level and key components of conducting effective workplace investigations. Organizations should consult with legal counsel for specific guidance or questions regarding a particular situation or investigation.

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