

Investigating Complaints of Discrimination and Harassment

Editor's Note: This checklist outlines the steps that should be undertaken when investigating a complaint of workplace harassment or discrimination. This checklist also provides guidance for ensuring attorneys effectively question witnesses and evaluate findings.

This checklist was contributed by Kara Ariail and Kevin D'Olivo of Holland & Knight.

Foundations for the Investigation

Developing effective note-taking and interviewing techniques is crucial to conducting a thorough investigation into discrimination or harassment complaints, as well as other types of employee complaints.

Effective Note Taking:

- Take detailed notes that record, as closely as possible, the exact information provided by each witness interviewed.
- Interview notes should include the witness's name, and the date, time, and location of the interview.
- Interview notes should include questions asked of the witness and responses provided by the witness.
- Decide in advance if interview notes will include your interpretations, beliefs, and assumptions about the information recorded (helpful for asserting privilege), or will remain intentionally objective (helpful if you are intending to waive privilege to support an *Ellerth/Faragher* defense).
- Review and finalize the interview notes immediately upon completion of each interview.

Effective Interview Techniques:

- Decide in advance the issues to be explored with each witness.
- Decide in advance what policies and other written documents may be relevant to share with a witness and have copies available to review with the witness if appropriate.
- Interview witnesses individually; consider timing and location of interview to maximize witness comfort and cooperation.
- When you begin the interview with a witness, make appropriate disclosures:
 - o your relationship to the employer and your role in the investigation (*Upjohn* warning);
 - o what is being investigated and why the witness has been identified as someone with relevant information;
 - o the employer's view that the investigation and underlying complaint are very serious matters;

- o the witness's obligation to provide thorough and truthful information;
 - o how the information received may be used and, specifically, that the information provided will be shared with those who have a need to know;
 - o the need for the witness to maintain the confidentiality of the interview; and
 - o that no retaliation will occur against any individuals who participate in the investigation, regardless of the information provided.
- Advise witnesses that if they believe they are subjected to any adverse action (i.e., discipline, loss of pay, etc.) because of their participation, they should notify HR immediately.
 - Start with open-ended questions; move to more narrow, focused, and even leading questions to obtain the specific information required for the investigation.
 - Ask one question at a time; no compound questions.
 - Ask questions that encourage the witness to relate events chronologically.
 - Save uncomfortable or embarrassing questions until the end; beginning with tough questions usually causes the witness to become defensive.
 - Don't conclude the interview without asking tough questions, even if the witness is becoming uncomfortable.
 - If the interview becomes confrontational or emotional, take a break.
 - Remain neutral in your demeanor, don't give the impression that you disbelieve a witness.
 - Listen carefully to all the information provided by the witness, even if it doesn't seem to respond directly to a question.
 - Avoid making statements to the witness, or sharing your opinions or conclusions with the witness.

Conducting the Investigation

Upon receiving notice of an employee's complaint of discrimination or harassment, you should take prompt action that includes meeting with the complaining employee, determining the scope of your investigation, and interviewing third-party witnesses and the alleged wrongdoer.

Interviewing the Complaining Employee:

- Assess if the complaining employee is inclined to recount the entire basis for the complaint (in which case you should listen and then revisit specifics), or needs to be led through the complaint with specific questions to elicit the facts.
- Confirm you have the names of all people whom the employee thinks may corroborate his or her allegations.

- Obtain, or ask the employee to identify, any relevant documents. If applicable, identify any relevant company policies.
- Don't promise confidentiality. Tell the employee the information he or she provides will be shared with those who have a need to know, including the alleged wrongdoer and witnesses identified by the complaining employee.
- Let complaining employee know the next steps and general time frame for completing the investigation (if known). Let employee know that inappropriate conduct will be stopped and appropriate corrective action will be taken.
- Prior to ending the initial conversation, confirm that the employee has provided a thorough and truthful accounting of the circumstances relating to his or her complaint, and fully answered your questions.
- Remind employee once more that there will be no retaliation against the employee for raising a complaint.

Determine the Scope Investigation Necessary to Resolve the Employee's Complaint:

- Is immediate interim action (temporary leave, transfer, etc.) required to protect the complaining employee? If so, discuss with employer.
- Does the complaint's subject matter lend itself to being addressed immediately without need for further investigation involving other employees?
- If the subject matter is such that it can't be resolved immediately and further investigation is necessary, identify potential witnesses and individuals who need to be interviewed regarding their knowledge of, or participating in, the allegations of inappropriate conduct.
- When identifying potential witnesses, consider the importance of both a thorough and controlled investigation. Consider whether each individual you intend to interview is actually likely to have relevant information.
- Identify documents to be reviewed.
- Determine the order of witness interviews.
- Establish a realistic schedule and timeline for completing your investigation promptly. As the investigation proceeds, continually evaluate what facts you need to reach a determination regarding the allegations. If clarification is necessary, go back to the complaining employee or appropriate witness.

Interviewing Witnesses:

- After the initial meeting with the complaining party and before interviewing other witnesses, prepare a detailed outline of key questions. Key questions should cover all incidents or matters a witness should be questioned about and all relevant details.
- What knowledge does the witness have? Distinguish between what the witness saw, heard, did, and felt.

- What is the source of the individual's knowledge? Distinguish the individual's personal knowledge from second-hand information or hearsay.
- Regarding knowledge of specific events, explore the relevant time frame in chronological blocks of time. Don't leave a chronological block until all the details necessary to recreate the scene have been established. Necessary details include:
 - what happened, when, and where;
 - who was present and who may have relevant information even if not present; and
 - what was said or done, by whom and in what order.

If the witness identifies an example of inappropriate conduct:

- Determine if it was an isolated event or part of a pattern. If there has been a pattern, question the witness about each prior incident.
- Determine what impact, if any, the witness believes the inappropriate conduct had on the alleged victim, on the witness, on others and the general work environment.
- Ask the witness to identify individuals the witness has spoken to about the conduct or overheard discussing the conduct.
- Ask the witness if he or she has any notes, recordings, or other evidence.
- Don't tell the interviewee what other witnesses have said unless it's necessary to obtain necessary facts or evaluate witness credibility.
- Complete the interview by confirming with the witness, and in your investigation notes, that you have a complete and accurate understanding of the facts.
- Advise the witness that if he or she has forgotten and later recalls any information or documents, the witness should call you immediately when the additional information comes to mind.

Additional Considerations When Interviewing the Alleged Wrongdoer:

- Disclose the allegations in full detail so that the alleged wrongdoer has a full opportunity to refute and disprove each statement and/or alleged incident.
- Ask the alleged wrongdoer if the alleged victim ever indicated any displeasure with anything the alleged wrongdoer has said or done.
- Ask the alleged wrongdoer's opinion as to why the accuser would make the claim.
- If the alleged wrongdoer denies wrongdoing and claims that the complainant is lying, explore possible reasons. Does the alleged wrongdoer have any facts that show the alleged victim or anyone else may have a motive to fabricate the allegations against the alleged wrongdoer?

□ Ask the alleged wrongdoer to identify all persons he/she believes should be interviewed as part of the investigation and what relevant information each is likely to have.

Completing Your Investigation

□ Evaluate your interview notes. Evaluate any evidence obtained during your investigation, including applicable policies and any relevant documents.

□ Assess witness credibility and make necessary credibility determinations:

- compare different witnesses' chronological versions of events;
- compare if witness testimony is consistent with evidence in relevant documents; and
- evaluate potential motives.

Verify anything that can be verified; ensure you have obtained any material corroborating statements.

□ Draw conclusions based on all evidence and credibility assessments.

□ Determine in advance of preparing the report if the employer wants written recommendations regarding corrective action or other remedies that may be indicated by the results of the investigation.

□ Prepare investigative report:

□ include a list of all witnesses interviewed, documents reviewed, a summary of the complaint, the alleged wrongdoer's response, and a summary of all witness statements.

□ The report should reach conclusions regarding the facts, address the resolution of any credibility issues, and identify the evidence that substantiates the conclusions.

□ Advise employer on post-investigation actions:

- advise on recommended corrective action, as applicable;
- address potential limitations of attorney-client privilege, as applicable; and
- address distribution of report and findings, including sharing with those who have a need to know.

□ Advise employer on follow up with complaining party when the investigation has been completed and appropriate action has been taken.

□ Remind employer to prevent and respond to any allegations of retaliation.

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