

How to Conduct Effective Workplace Investigations

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HOW TO CONDUCT EFFECTIVE WORKPLACE INVESTIGATIONS

By Christina Hynes Mesco

You receive an email message detailing crude and suggestive instant messages an employee received from her co-worker. A manager passed over for (yet another) promotion calls you to report that he believes that it may be due to his race. While out to lunch with your friend, and a department supervisor, she mentions that one of her employees might be using the corporate credit card in violation of company policy. The receptionist knocks on your office door to say the office manager “talked down” to her; this was not the first time and it makes her feel like she’s stupid.

What do you do in these situations? Do they each warrant an investigation?

Knowing how, and whether, to conduct a workplace investigation into alleged employee misconduct is key to ensuring your workplace is free from discrimination, harassment, and inequality. This knowledge can help ensure that your organization is governed by the rule of law rather than a managers’ whims, which will help defend your organization against any unfounded legal claims. Awareness of best practices also allows your company to establish better

policies and procedures, which can improve supervisors' decision-making and foster a healthy work environment.

When Do You Need to Conduct a Workplace Investigation?

The word "investigation" can conjure images of a small, windowless room, dimly lit by a single bulb, with a nervous witness subjected to a barrage of questions. Maybe there is some fist-pounding on a table for effect. In reality, an intra-corporate investigation should be conducted in good faith, with transparency, and in alignment with a company's policies and procedures. Investigations have several purposes, including responding to an immediate complaint, protecting employees from mistreatment, and avoiding legal liability.

Whether a human resources (HR) representative or a business owner, your best response to receiving a complaint from an employee is almost always to conduct an internal investigation as soon as you can. This will help determine whether and how your organization should respond to the alleged misconduct.

Allegations that involve criminal conduct should be immediately reported to the proper authorities. More commonly raised legal claims, such as complaints of discrimination, harassment, and retaliation, should be promptly investigated by an employer. After gathering documents and witness statements, an investigator can provide her best understanding of what occurred to the organization, which can then determine whether responsive action is warranted, such as discipline against the

alleged offender, changes in internal policy, or accommodation of an employee need.

It is clear that such situations warrant intervention by managers or HR. But what about complaints that do not fit neatly into these legal categories? Not all complaints will necessarily require the time and effort of an investigation. Some employees may complain over matters that, taken at face value, appear petty, such as the receptionist's complaint mentioned above. A simple conversation, coaching, or reiterations of internal policy may allay their concerns.

But be cautious in dismissing complaints out of hand. If left unchecked, an office rife with seemingly trivial grievances can quickly degrade into a hostile environment, which might create legal liability for an employer. Always consult with legal counsel in making a determination of whether to conduct an investigation, but a baseline rule of thumb is that if the business can be sued for the activity someone is complaining of, it should investigate the complaint.

Consider what message you send to your employees by conducting an investigation. Favoritism or lack of transparency will signal disregard for the truth, or even employees' well-being. Conversely, fair investigations communicate to your employees that their concerns will be handled with empathy, that they are valued by the organization, and that you are committed to a workplace free from discrimination, harassment, and retaliation.

Who Will Conduct the Investigation?

Selecting an impartial investigator is critical to ensuring your investigation is perceived as credible and the results are accepted by the parties involved.

Imagine this scenario: Kim and Huang are both Directors in IT reporting to Alex. Meena is an Associate VP in HR and is Kim's close friend. They frequently eat lunch together, collaborate on work projects, and see each other outside of work. Kim reports to another HR manager that she feels that Alex has made comments to her that are disparaging toward women. She also states that she is concerned that Alex gives bigger bonuses and raises to her male peer, Huang. Meena conducts an internal investigation into Kim's complaints and, after reviewing the results, the Executive Team places Alex on a final written warning and removes his managerial responsibility over direct reports. Shortly thereafter, Alex's attorney sends the company a letter stating that its investigation was a sham conducted by Kim's buddy, presumably in retaliation for Alex's refusal to accept Kim's dinner invitation a few months prior.

The investigator's neutrality is the foundation upon which the entire investigation and its results depend. Despite conducting the most meticulous and comprehensive inquiry possible, its results will not be accepted by the parties involved or subsequent legal decision-makers if the investigator's impartiality is questionable. Meena may be an impeccable investigator, but her close relationship to Kim raises suspicions of bias, whether true or not. An investigator must be perceived as evaluating all evidence fairly and disinterestedly.

Determining whether to engage an outside party to conduct the investigation will likely be determined by the subject matter of the complaint alleged. The ideal standard for serious complaints is to engage a neutral, accredited, third party (typically a law firm) to conduct the investigation. Employers can use this **helpful search tool** from the Association of Workplace Investigators (of which our firm is a member) to locate qualified investigators.

If the organization's budget does not allow for an outside investigator, the investigator should hold a management-level position, have a background in conducting such investigations (usually HR personnel), and have no relationship with the parties or witnesses, to preserve objectivity regarding the complaint. Identifying a neutral internal investigator will likely be easier for larger organizations; smaller organizations may find that true objectivity is nearly impossible and an outside investigator is imperative. Be guided by the principle that if the process is flawed, the results of the investigation will not be trusted. Choosing the right investigator is worth the time, effort, and cost required.

How Should the Investigation Proceed?

Sometimes an internal complaint will center on one discrete event. More often, complaints will center on acts that took place over a period of time—several weeks or even years.

Complainants may even relay a laundry list of issues rather than one or two concerns. Accordingly, thought and care must be given to determining the scope and breadth of the

investigation: What are the issues that must be investigated and during what time period? What internal policies or relevant laws govern the alleged behaviors? Who are the witnesses that must be interviewed? What documents should be reviewed in connection with the investigation, including emails, text messages, handwritten notes? Where will the interviews be conducted? If in person, will they be at the company's offices or off-site? Or will the interviews be conducted via phone or Zoom? The answers to these questions will be different for every investigation and should be determined in collaboration with management, HR, and to a limited extent, the complainant.

At all times the need for an exhaustive, expedient review yielding reliable results must be balanced against limited corporate resources and the disruption to the workforce caused by an investigation. Ideally, in-person witness interviews conducted off-site will allow maximum privacy, limiting office disruption and encouraging witness participation. Meeting face-to-face can also serve to allow the investigator and witness to establish a rapport more easily. The investigator can more accurately gauge the witness' credibility by observing non-verbal cues that might be lost in a phone call or over Zoom. Although in-person interviews are ideal, investigations are conducted with great frequency via Zoom and telephone. This is especially true now that we are in the midst of a world-wide pandemic: some investigations must proceed remotely out of necessity. It has been our experience that conducting

investigations via Zoom and telephone can be just as successful as those conducted in-person.

Another important consideration in conducting internal investigations is confidentiality. The company should caution all involved in the investigation—the complainant, witnesses, and anyone else with relevant knowledge—that the organization expects confidentiality. Explain that witnesses should not discuss questions they were asked, information they shared with the investigators, or the subject matter of the investigation. This is to ensure the impartiality of the investigation so that, for example, witnesses do not try to “match” versions of events or retaliate against employees for their participation in the investigation. Employees that fail to respect confidentiality should be disciplined in accordance with the company’s policies.

Investigations conducted by a company’s counsel may be subject to the attorney-client privilege (meaning the parties cannot be compelled to share information subject to the privilege in court). You should consult with counsel regarding whether and how attorney-client privilege may apply to your investigation. Notwithstanding the company’s request for confidentiality, witnesses should be cautioned that their statements may not be subject to complete confidentiality, nor can they be promised anonymity.

How Will the Results of the Investigation Be Communicated?

Most often, the results of an investigation are reported in writing, though it may be determined that the results should be shared orally instead. Whether written or not, findings should include:

- A summary of the complaint(s) received;
- A statement describing the scope of the investigation, including identification of any relevant employer policies (and/or laws if applicable);
- Identification of witnesses interviewed and documentary and other evidence reviewed;
- A summary of relevant witness testimony;
- A summary of relevant evidence gathered from documents and other sources; and
- The investigator's impressions, findings, and conclusions.

With this information as a basis, your organization can then determine the next steps in addressing the complaint received. The results may require disciplinary action of employees, an overhaul of internal policies, or even further investigation. Take great care to ensure that those involved in the investigation are protected from retaliation. Also be cognizant that sometimes actions taken to address a complaint can themselves be perceived as retaliation (e.g., transferring the complainant as a method of addressing his complaint). Guidance from legal counsel regarding next steps is usually advisable.

Regardless of the investigation's outcome, an important final step is communicating the results of the investigation to the

complainant, to express that employee concerns are valued by the organization. Thank the person for bringing the matter to the attention of the organization and, without sharing details, assure the complainant that a thorough investigation was conducted, that the results were carefully reviewed, and an appropriate course of action was carried out.



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