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### Six Best Practices for Workplace Investigations

It has never been more important to conduct quality workplace investigations. Workers are demanding more of their employers, and demanding answers as well. Often, however, employers begin workplace investigations without proper tools and without a thoughtful plan. Below, we provide six best practices to help companies conduct excellent workplace investigations.

#### **Conduct Timely Investigations**

Workplace issues and complaints should be promptly investigated. This best practice comes as no surprise, but nonetheless, employers frequently find themselves investigating conduct that occurred months or even years prior.

Employers are not necessarily the primary cause of delay. Indeed, delay can come from employees who defer reporting issues to the company. Employees delay reporting for a variety of reasons: They consider themselves bystanders who are not involved in the issue; they believe the issue to be minor or inconsequential (until it grows into a larger issue); they believe the company will not promptly respond to their complaint; or they fear their manager will learn about the report.

These issues can be mitigated with a few adjustments. First, employers should provide multiple avenues for employees to report (and feel comfortable reporting) their concerns to the company. Second, the company's policies should inform employees they may raise complaints—big or small—to someone other than their direct manager. While addressing small complaints may seem like an administrative hassle, companies are finding success in addressing small issues before the concerns spiral out of control. Third, the company may consider establishing reporting platforms, which make reporting simple and reduce the fear of retaliation.

Another way to increase investigation timeliness is to ensure efficient case management, such as using a case management platform to streamline the recordkeeping and investigation process. Doing so reduces the administrative burden and refocuses this time on conducting the actual investigation.

#### **Create an Investigation Plan**

Workplace investigations should always be flexible, but flexibility does not negate the need for an initial investigation plan. The investigation plan should include the nature of the complaint, the scope of the investigation (more about that below), whether the investigation will be privileged, the participants (including the investigator and expected witnesses), the order of witness interviews, the material facts to be collected, the relevant documents to collect and review, the location of the interviews, and whether the interviews will be recorded. A thoughtful plan at the outset will help the company capture the relevant facts and avoid circular investigation.

#### **Determine the Scope and Goals of the Investigation**

The goals and scope are distinct components of a quality investigation. The goals of an investigation are to ensure that: (1) each employee interviewed, particularly the complaining employee, feels heard; (2) the company enforces its policies and procedures fairly and effectively; and (3) a resolution is reached and communicated.

These goals provide a sense of due process and fairness to all parties.

Scope is distinct from goals. Investigation scope refers to the specific question that will be answered. Employers routinely choose an investigation scope that is too broad or unfocused. One way to narrowly frame the scope of an investigation is to ask questions at the outset, such as: "Did the employee do [factual allegation] and if so, did this conduct violate company policy \_\_\_"? The scope of the investigation should not answer a legal question, such as "Did the employee create a hostile work environment?" or "Did the employee engage in discrimination"? Each of these components—goal and scope—should be considered by the investigator at each step of the process.

### Gather and Preserve Relevant Documents

Before conducting interviews, investigators must gather relevant documentation and begin assembling an investigation file. The investigator will likely need to obtain additional documentation as the investigation proceeds, and the investigation file should be kept up to date as new documents become relevant throughout the investigation. One important tip is to save copies of the relevant policies to the investigation file. Doing so adds completeness and clarity to the investigation file when reviewed later, particularly when, as often happens, the prior policy versions are difficult to track down.

### Use Vivid and Plain Language

Investigative notes and reports should describe the investigator's impressions and observations, not just the words communicated by the witness. For example:

- Did the witness seem distracted?
- Did the witness raise their voice?
- Did the witness avoid answering the question asked?
- Did the investigator observe any notable body language (e.g., eye-rolling) on the part of the witness?

Because the investigator's observations are often key to their ultimate determination, these considerations should be included in the notes and report.

A few other tips:

- An investigator should not be shy about including specifics in their notes and report. Too often, an investigator's report states something generic like: "The witness reported hearing an offensive comment." But what did the witness hear? An investigator should report exactly what the witness observed and heard—except for truly out-of-bounds language, which can be referred to in other ways.
- Investigator reports and notes should be easy to read and should avoid using generic identifiers like: "Complainant reported that her direct manager assigned the highest-profile projects to other employees." It is much better to include names in the report to avoid vagueness and to create a vivid picture of the situation. The best reports are written in plain language.
- Finally, investigation notes should also list details such as the date, time, location, attendees, and whether the investigation was conducted virtually or in person. Investigators do not always include these details.

### Report Out and Finalize the Investigation File

A written report is not always necessary or advisable. When a company decides to use a written report, the report should reach an ultimate conclusion as to the facts and policies of the company but should not opine on issues of law or use legal terms. The report should be preserved and accessible and should clearly note whether the

company intends to assert attorney-client privilege and/or work product protection over the document. Finally, the company should store the investigation file separately from the employee's personnel file, as many state laws allow employees the opportunity to inspect and request copies of their personnel files. However, any associated discipline should be routed to the disciplined person's personnel file.

One overlooked step is reporting the outcome of the investigation to the complaining party and the accused. This can be done in a variety of ways, even informally. When the results are not reported, employees may be inclined to go outside the company's processes to seek other solutions, such as finding a new job, talking to a lawyer, or attempting to fix the issue themselves. These outcomes, while not completely avoidable, are likely reduced if the company provides a sense of due process and fairness, which includes relaying the results of the investigation to the parties.

Lastly, the investigator should review the file to ensure relevant communications, notes, and documents are preserved in a central repository. Busy investigators, whose attention has likely turned to the next investigation, should take extra care to complete this last step in the process.

Those who have further questions about conducting internal investigations should reach out to trusted counsel.

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