



# An Employer's Guide to Conducting Internal Investigations

Source: Corporate Compliance & Regulatory Newsletter. Brooke Iley and Mark Blondman



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Disgruntled employees raise issues every day, and every day employers respond by conducting some type of internal investigation. To warrant an immediate and thorough internal investigation, employee complaints need not be in writing or "formally" made. The key ingredient in any investigation is preparation.

Be mindful that a complaint is not always the event that triggers a company's duty to investigate. The duty arises when an employer observes acts or statements that suggest prohibited activity. Prudent employers often investigate even without a clear legal mandate. An employee complaint can be about virtually any aspect of the employment relationship, but the most frequently raised concerns deal with harassment, discrimination, ethical violations and retaliation. Whatever the complaint, recent legal decisions have made certain that employers have an unequivocal duty to investigate promptly and thoroughly as soon as the employer is put on notice of possible wrongdoing. See *Hardage v. CBS Broad, Inc*, 427 F.3d 11 (2005).

In addition to general employment statutes, the Sarbanes-Oxley Act provides a broader level of protection for employees who file internal complaints. While relevant to publicly traded companies, these complaints apply to private companies pursuant to various federal and state "whistleblower" regulations. See *Bechtel v. Competitive Tech. Inc.*, 2005-SOX-00033 (5/29/05). Further, filing a SOX complaint does not preempt other causes of action so an individual with a whistleblower issue is likely to file a claim under other employment laws. Whatever the complaint, the investigation should focus on rendering a proper business decision.

## How to Prepare for an Investigation

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When a complaint is received, the employer should set goals for the investigation. Goals should include gathering the facts, determining the merits of the complaint, complying with legal obligations, maintaining confidentiality to the greatest extent possible, preserving the reputations of individuals and company, taking proper remedial action, avoiding liability, and preventing future claims. The goals of a particular investigation must be accomplished with integrity, fairness, impartiality and respect.

Once it is clear that an investigation is warranted, give careful thought to who should conduct the investigation. The same individual is not going to be right for every company investigation. In fact, multiple investigators could be useful in highly complex cases, or where timing is a critical factor. Give consideration to the positions and authority of the complainant and accused; any perception of bias a proposed investigator might evoke among witnesses; and potential impacts on business operations. Generally, a good investigator must actively listen, be able to process and rapidly respond to new information, possess critical thinking skills, and have a solid knowledge of company policies and practices. Other technical qualifications will depend on the type or complaint at issue. For example, an accounting background might be necessary for charges of financial mismanagement.

After an investigator is assigned and goals set, the first order of business is to conduct a thorough document review. The employer must preserve all electronic data; everyone participating in the investigation should be instructed not to delete any electronic communications and the IT department should preserve all archived and taped materials. Relevant physical evidence usually includes the complaint, witness statements, personnel files written policies and computer records. This will assist in developing relevant background information and placing the complaint in the proper context as related to the business.

Reviewing personnel history of the potential interviewees will help clarify relationships and potential biases. These documents provide a foundation to build an investigation, but the investigator should continually seek additional documents throughout the course of the investigation.

At this stage, the investigator is prepared to identify key witnesses. The investigator should generally interview the complainant first, accused next, key witnesses and then other possibly related witnesses. Once the order has been established, the investigator should prepare a chronology of events and an outline for each witness. Outline topics may include:

- Review of applicable company policies, including how they are communicated to employees, whether followed, etc.;
- Summary of the complaint, including how the employer received notice, as well as a chronology of important events;
- The names and identities of all relevant witnesses with notes on relevant background and relationships to complainant and accused;
- Relevant employment information of the complainant, the accused and the key witnesses;
- Specific information for each identified incident (who, what, when, where, why);
- Identity of other possible witnesses, new leads and new documents;
- A conflict check procedure to resolve conflicting witness accounts without identifying the witness; and
- Potentially related claims and relevant information.

To summarize, an investigator should always consider the following before investigating an employment complaint:

- Identify the goals of the investigation;
- Identify legal and factual issues to be resolved before reaching a decision;
- Identify the time frame to conduct the investigation;
- Identify and review all relevant physical evidence and communicate a clear directive to preserve all electronic data;
- Identify potential witnesses and the order in which they should be interviewed; and
- Identify general interview topics.

## How to Conduct Interviews

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The investigator should begin every interview with a brief introduction that includes the reason for the interview, and appropriate disclosures. Normally, the investigator will have a witness present to take notes and corroborate evidence. This person's role should be described at the outset to put the witness at ease. He or she must be honest about the purpose of the interview without breaching confidentiality. For instance, opening remarks could be that the company is investigating certain complaints about unfair treatment of minorities.

A savvy investigator must maintain an air of confidentiality without making a direct promise. If a lawsuit is filed, the promise of confidentiality will be broken if a court compels disclosure. However, an investigator must stress to the witness that the information provided will only be shared with management or others on a limited need to know basis. Generally, the interviewer doesn't need to tell the interviewee what other witnesses had to say -- except when interviewing the accused. The investigator should never discuss opinions or conclusions with anyone while the investigation is pending.

An investigator should always remain neutral and never appear to take sides. With that said, he or she must remain focused, keep the interview on track and moving forward in order to get as much information as possible. If the witness becomes emotional, take a break. Focus on the prepared interview outline when the interview goes off track. Remember, the investigator must instill trust while controlling the room.

As noted, the complainant is usually the first to be interviewed. In incidents of harassment, discrimination and possible retaliation, the employer has a duty to protect the safety of the complainant. In all workplace complaints, the employer must focus on its legal obligations and assure compliance with corporate policies. To this end, a clear message should be conveyed to the complainant that a thorough investigation will occur and the appropriate action taken. The employer also has a duty to protect the complainant from any form of retaliation.

The accused is likely to be one of the next people interviewed. It is natural for a person who has been accused of misconduct to behave in a defensive manner. The investigator must assure due process to the accused. The investigator should be careful not to convey the impression that they are out to get the accused or have predetermined the accused's guilt. At the same time, the investigator should make it clear that the company takes the complaint seriously and intends to conduct a thorough, impartial investigation. The accused should also be reminded that the company has a legal obligation to investigate. Put concerns about defamation into perspective.

An investigator should assure the accused that the company is conducting its investigation in a manner that will prevent damage to reputations by handling the investigation as confidentially as possible, and gathering the facts before making any decisions. This is the perfect time to reiterate any corporate rules, zero tolerance mandates, and to advise that if found to have committed the offense at issue, the accused is subject to discipline up to and including immediate termination.

Listen carefully and follow up on all matters that arise -- even unexpected ones. An investigator should avoid being hyper-focused on a list of questions to the extent that it prevents the witnesses from revealing other points that turn out to be relevant. Relevant issues can be explored with the aid of open-ended, non-leading questions. For example, an investigator may ask the accused to describe their working relationship with the complainant or to describe the office environment. An investigator may want to start in a nonconfrontational way by asking the accused about background information. After extracting as much information as possible from a witness on a given point through the use of open-ended questions, the investigator should ask more pointed questions while making sure to ask the accused about each specific allegation made by the complainant.

After meeting with the complainant and the accused, the investigator is often faced with a "he said/she said" situation. The truth often lies somewhere in between, and other witnesses are integral sources of information to balance the facts. Interviewing other witnesses is similar to interviewing the complainant and accused. Consider carefully what the purpose of the meeting with each witness is and tailor the meeting for that purpose, limiting the information revealed about the situation to the greatest extent possible. The investigator should make sure to review the preliminary investigation outline that was drafted and pull relevant topics for each key witness. The investigator should encourage the witness to contact him/her after the interview if they think of anything else that might be relevant to the case. Remind the witness of the importance of confidentiality.

## Investigative Recommendations

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After all the evidence has been gathered and interviews concluded, the investigator must evaluate and make a determination as to the merits of the complaint. The investigator should look into the details of the statements provided and determine whether witness statements were consistent. The investigator should also consider whether the witness had any reason to be less than truthful. Generally speaking, the investigator will formulate conclusions based on the totality of the investigation. Any written statements should be carefully drafted to include concise statements of facts and conclusions.

Even in situations where the employer moves quickly to investigate, it could be liable if it fails to take appropriate remedial action. The investigator must move quickly to report his/her findings to corporate decision makers so that prompt action can be taken. This includes protecting a complainant from any form of retaliation, disciplining the accused, providing employee training, and revising and reissuing general company procedures, as needed.

Once a decision has been reached, it should be communicated to the complainant so they understand and are prepared for the action to be taken. The appropriate remedial action depends largely on the circumstances, and several factors should be considered: the seriousness and frequency of the conduct; the harasser's overall employment record; the victim's overall record and employment history; the discipline imposed for other similar prior cases of harassment and for violation of other similar company policies; and whether other company policies may relate to the situation for example, a policy of progressive discipline.

Once a decision is reached, the employer should provide the investigation results only to those people who need to know. If the employer has a duty to prevent the complaint of conduct, such as harassment, the employer may disclose the general information to its workforce. While the specific discipline should not be disclosed, the employer should advise the employees that it is taking steps to prevent recurrence of the offending behavior. Disclosure of the investigation results provides an excellent opportunity to reinforce the employer's anti-harassment, anti-discrimination, business ethics and other employment policies.