

October 24, 2019

Conducting Effective Workplace Investigations

When might an employer need to investigate?

Theft of company property

Rumor of drug dealing in parking lot

Complaint about supervisor bullying

Complaint of sexual harassment

Complaint of unfair denial of promotion

Complaint of wrongful discharge

Receipt of discrimination claim filed with MHRC

Customer complaint about poor customer service or patient abuse

Complaint that employee threatened another employee

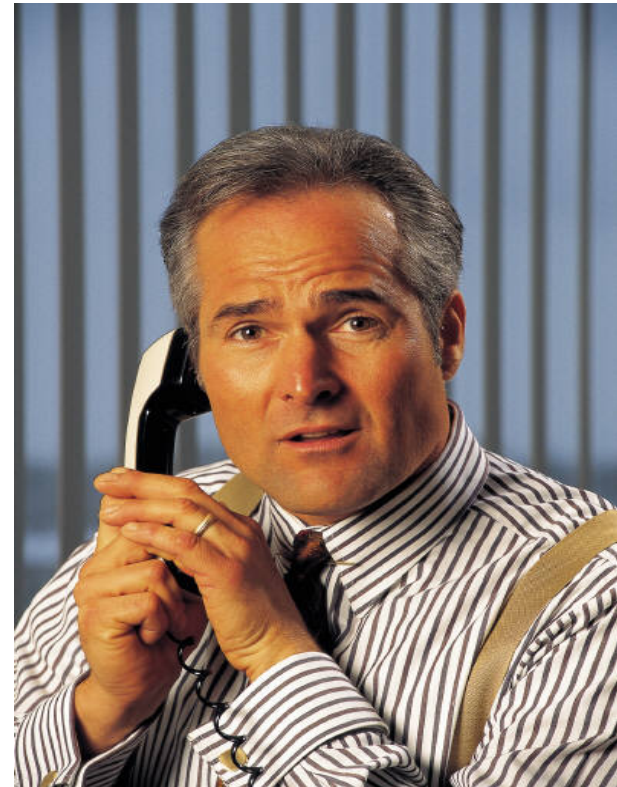
Complaint of safety violations

Complaint employees being forced to work off the clock

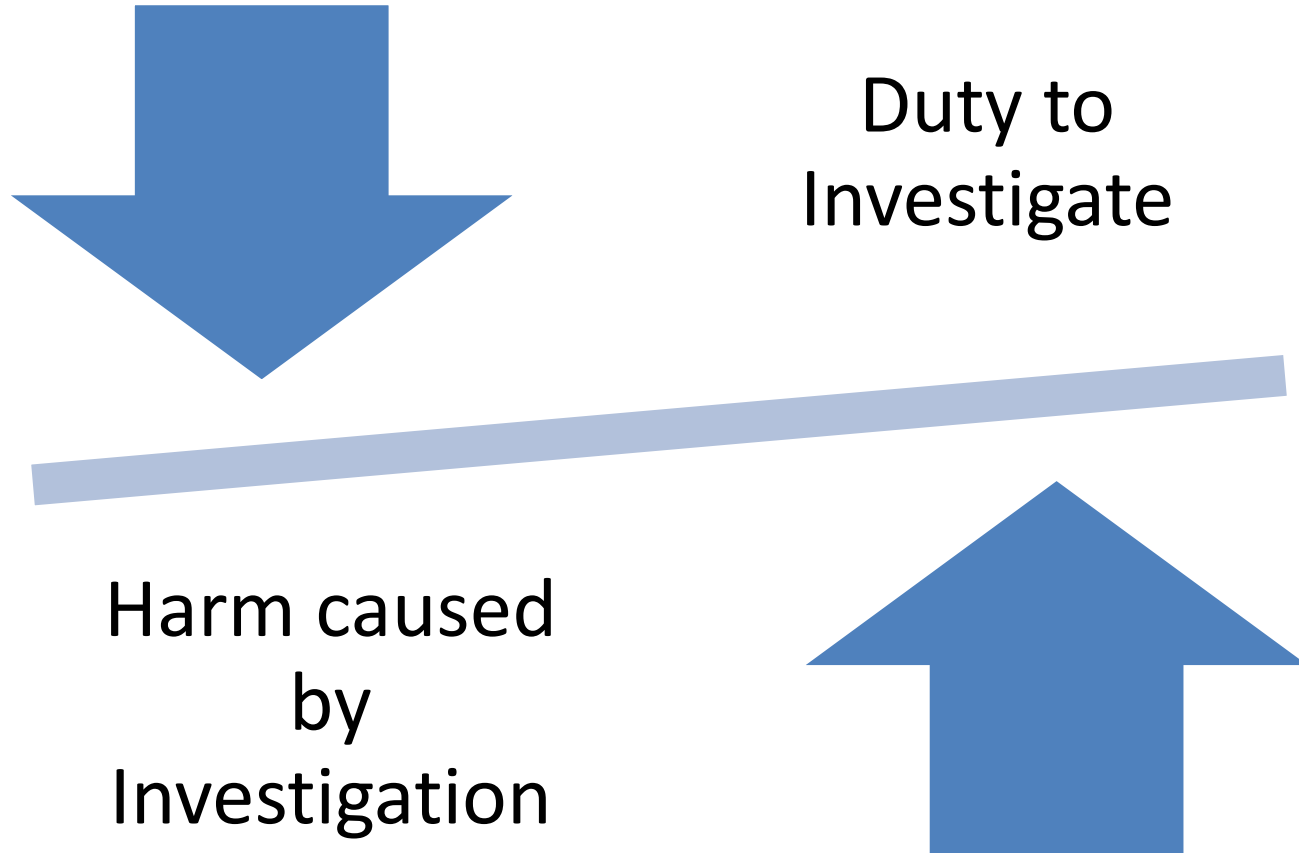
Workplace accident with suspicion of drug or alcohol use

Should employers investigate every workplace complaint?

What if allegation is from anonymous source saying that CEO is having affair with an unnamed person?



Should employers investigate every complaint?



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Preliminary Considerations

Purpose(s) of Investigation

Determinative Defensive



- To figure out whether disciplinary action is required in response to employee misconduct
- To correct an injustice or mistake by management
- To make the work environment safer or less hostile or offensive to minority group
- To correct legal compliance problems before they become liabilities



- To create an affirmative defense to a potential hostile work environment claim
- To pin down witness statements while memories are fresh and to prevent future exaggeration
- To be able to communicate the facts in order to obtain legal advice
- To figure out facts in order to devise a defense strategy in anticipated litigation

Selecting the Investigator(s)

1. Impartial, objective, fair
2. Respected
3. Skilled, experienced, knowledgeable
4. Good listening skills, empathetic
5. Available
6. Clear writer
7. Effective witness
8. Single investigator vs. investigatory team
9. Primary investigator and note-taker
10. Legally permitted to investigate

Who can lawfully conduct a workplace investigation?

32 MRS §8104. License requirement; exceptions

1. **License.** A person may not act as a professional investigator without first obtaining from the chief a license to be a professional investigator or investigative assistant.

2. **Exceptions.** This section does not apply to the following:
 - C. [**Recruiters**] A person employed to inquire into the fitness of an applicant for employment with that person's employer;

 - F. [**Attorneys**] An attorney admitted to practice law in the State acting in a professional capacity;

 - K. [**Current Employees**] A person employed exclusively and regularly by an employer in connection with the affairs of the employer only, and there exists a bona fide employer-employee relationship in which the employee is reimbursed on an hourly basis;

Should the investigation be conducted under the cloak of attorney-client privilege?



Legal counsel should be involved at outset if:

Charge or lawsuit has been filed or threatened

There is a significant likelihood of litigation against the company

Corporate compliance question (OSHA/FLSA/SOX) is at issue

Serious unlawful (criminal or civil) behavior has been alleged

Unusual investigative techniques contemplated, e.g., surveillance, lie detector

Misconduct alleged against senior member of management

Accused is a member of a collective bargaining unit

Charge to the Investigator

Draft a written charge outlining the scope of the investigation, the question(s) to be answered and the standard of proof.



Example: Does the evidence establish that it is more likely than not that Janet's allegations against Mike regarding sexual advances and comments are true? If so, did Janet welcome or encourage the advances or comments?

Standard of proof: "more likely than not"

Charge to the Investigator

Investigator
(particularly outside)
should be charged
with determining
facts, not legal
conclusions or
consequences.

Company official
should determine if
facts establish
violation of policy,
and appropriate
remedial action



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Conducting the Investigation

The Mechanics

Preparatory Steps

1. Draft the investigator's charge
2. Obtain relevant company policies/CBA/personnel file material
3. Gather and secure available documentary and physical evidence
4. Determine whether **interim protective measures** need to be in place during the investigation
 1. Should complainant be allowed to stay out of the workplace?
 2. Should respondent be placed on administrative leave?
 3. Should there be a no contact directive?
5. Determine if electronic evidence needs to be secured and if forensic computer expertise will be needed

Always start with complainant?

Many times, yes.

Other times, you may want background information from managers or other witnesses first.



Why might someone hesitate to report harassment?

Embarrassment

Fear of
Retaliation

Fear of
Intimidating
Process

Peer Pressure

Won't be
believed

Might be
mistaken

Everyone will
know

Don't want to
get anyone in
trouble

Want to handle
it myself

Hope it will go
away

Ignorant of
rights

Sense of guilt

Not Really
Offended

Complainant interview

- Be sensitive to reasons why complainant may be a reluctant witness
- Stress protection against retaliation
- Obtain exhaustive list of allegations
- Ask for copy of journal, notes, emails, texts, voicemails, etc. that support claims
- Ask the complainant to put complaint in writing; or to sign summary you prepare
- Ask whether there are others you should interview
- Determine whether protective measures needed
- Ask what outcome complainant would prefer
- Make sure you explain company can't guarantee to honor preferences

Preliminary Scripted Remarks

Explain your role and that you have been retained by the company

Necessary to say what you are investigating?



Explain the expectation and limitations of confidentiality

NLRB/EEOC says that silencing witnesses may violate rights



Explain the consequences of refusing to cooperate

Is discipline a possibility?



Explain the right to be free from and consequence for engaging in retaliation

Retaliation can be unlawful

Style of Questioning?

Hint: Don't be that guy



Tips for Questioning Witnesses

- Use open ended, not leading questions
 - Who? What? When? where? What happened next? What did you do in response? How did you feel? Can you tell me more?
- Have prepared questions but be flexible to deviate or follow up on new information
- Interview witnesses one-by-one in private
- Consider using multiple investigators where a group is charged with misconduct and questioning should happen simultaneously
- Remain neutral; don't take sides
- Consider whether to record interview or have note-taker

Use of Recordings in Investigations

Pros

- Reinforces seriousness and transparency of investigation
- Investigator can focus on interviewing, not notetaking
- Promotes some to tell the truth?
- Verbatim recording can be used in case witness disputes what he said.
- Can be used to disprove claims of investigator misconduct.
- Accuracy of record enhanced
- Transcript can be created from audio record
- Saves investigator time converting notes to readable prose.
- Witness may also be recording interview.
- Recording can be used as a training tool for investigators

Cons

- Witnesses may “clam up”
- Technology (or user thereof) can fail
- Recording can be used to support claims of inadequate or biased questioning by investigator
- Investigator cannot omit irrelevant but damaging portions of witness statements from official record
- Recording may be inconsistent with company culture
- Company opens itself to challenges to investigator making credibility determinations
- Investigator cannot review notes in real time to ask follow up questions.
- Witnesses may insist upon recording and leak recording to others.

Practical Tips in Using Recorder

Always notify all witnesses that they will be recorded, and get their consent on the record or in writing.

Consider doing preliminary investigation off the record first and then record witness statement in more organized and succinct fashion.

Be consistent—record all witnesses (who give consent), including those interviews done by phone or some other media.

Take some notes during investigation so you can follow up, and in case of technology glitches.

Decide whether you are going to make recording available to accused prior to or after investigation.



Trauma-Informed Victim Interviewing

- Especially important for alleged victims of physical, sexual or emotional abuse.
- Be prepared for the needs of a traumatized person, including physical comfort and the need to feel safe
- Ask questions strategically and transparently—open ended and at the victim's pace.
- Let them know at the outset what you are going to be asking and that the questions that will be asked will be difficult.

Right to Support Person or Representation at Interview?



Investigation No-no's



- No polygraph tests
- No surveillance or GPS tracking, unless by licensed private investigator
- No unauthorized intrusion into social media
- No unauthorized background checks
- No false imprisonment
- No threats or false statements by investigator
- No disclosure of information to anyone other than decision-makers or legal counsel

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Conducting the Investigation

Reaching a Conclusion

Credibility Determinations Are Hard



The fact that the evidence is in conflict is not a valid reason to dodge a credibility finding—that’s the investigator’s job.

Credibility Determinations

Inherent plausibility

Demeanor

Motive (or lack of motive) to falsify

Corroboration

Reputation for truthfulness

Remember Investigator's Charge

Is investigator being asked just to find facts or to make recommendations on corrective or remedial action, or both?



Beware of drawing legal conclusions

Your report can be used as an admission against the employer.

Avoid statements like: "Sam created a hostile work environment" or "the company's overtime policy violates the FLSA."



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Documentation

The most important part!

Model Format for Report

- Use format to help you focus, but do not be a slave to it. Every investigation is different and every report is different.
- Individual witness statements may be helpful or necessary; if so, attach as exhibits.
- Include as exhibits key documents or evidence, e.g., text messages, Facebook posts, emails.
- Assume that report may be read by a wide audience and that attorney-client privilege may be waived or invalidated by the court.
- Think about whether witness attribution is necessary or advisable.
- Avoid inclusion of unrelated facts or allegations; use separate report if important to memorialize.

Template for Investigation Report

1. Name(s) of Complainant(s)
2. Name(s) of Respondent(s)
3. Division/Facility/Department
4. Date of First Report
5. Date(s) of Incident(s)
6. Date(s) Investigation Conducted
7. List of Witnesses Interviewed
8. Summary of Complaint(s)
9. Summary of Reply(s)
10. Summary of Key Witness Statements*
11. Finding of Facts
12. Conclusion(s)
13. Remedial Action Recommended**
14. Name(s) of Investigator(s)
15. Date of Investigation Report

* With or without attribution

** Only if part of investigator's charge



Understand your audiences



Tips for an Effective Report

- Tell the story as if the reader knows little to nothing about the actors or situation.
- Use clear, grammatically correct sentences; avoid being too cryptic.
- Factual findings should be factual, not generalizations, not loaded or judgmental.
- Remember that the little details are sometimes essential to the findings.
- Ask yourself: will the reader appreciate that the investigation was thorough, careful, objective, and fair and the conclusions well reasoned and justified?

Document the Remedial Action

- Investigation report should be kept in files separate from personnel files.
- Interim measures taken should be separately documented and kept with investigation report.
- Remedial action and the rationale for action taken should be documented and put in disciplined employee's personnel file.
- Unless Complainant is disciplined for making knowingly false accusations, no part of investigation notes or remedial action should go into Complainant's file.

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