Workplace Investigation Checklist

Events that may trigger an investigation

Generally, workplace investigations must occur when the employer “knows or should have known” about alleged misconduct. While you aren’t required to read minds, there are situations that should put you on notice of the possible need for a workplace investigation.

1. The easiest one — an employee files a formal complaint or grievance.
2. You receive a demand letter from the employee’s attorney.
3. An employee files a complaint with the U.S. Equal Employment Opportunity Commission or equivalent state or local agency.
4. An employee tells a supervisor about a situation that makes him or her “uncomfortable” but says he or she doesn’t want to make trouble and therefore doesn’t want to file a formal complaint.
5. An employee fills out workers’ compensation paperwork and lists something like “stress due to workplace harassment.”
6. An employee’s morale, behavior, or performance mysteriously declines. Take note that in a situation like this you don’t want to pry so aggressively that you intrude on the employee’s personal life or force the employee to feel further victimized. Instead, start by asking general questions about the workplace environment to determine whether workplace events have any role in the decline.
7. A call to the employer’s hotline.
8. Anonymous voicemail, e-mail, or written messages. The fact that the message is anonymous isn’t an excuse to skip an investigation. It may mean, however, that you’re limited in your ability to gather information since some anonymous messages don’t contain all relevant facts.
9. An employee is arrested for conduct occurring in the workplace, which if true also would be a violation of your company policies. Note that you can’t take action against the employee by firing him the moment you hear about the arrest. He might be innocent. Also, you need to determine for yourself whether the conduct occurred in the workplace and whether there was a violation of your company policies.

Receiving a complaint to investigate

Here are some types of complaints and issues to keep in mind:

1. Formal complaints.
2. Informal complaints.
3. Employee hotline tips or complaints.
4. Requests to keep a complaint confidential.
5. Remember, investigate what you “know or should have known.”
6. Before starting or anytime during the investigation if the need arises, consult with appropriate HR personnel on whether investigative leave for either party is appropriate while conducting the investigation.

Inform the accused person’s supervisor of the complaint

Here are issues to keep in mind:

1. Instruct the supervisor not to take any action against the complaining party or the accused stemming from the allegations being investigated.
2. Tell the supervisor to coordinate any action, including possibly placing either party on leave, with the investigator and appropriate HR personnel.

Who should investigate?

An investigator (internal or external) must be:
1. Fair, impartial, unbiased, trusted, independent.
3. A good communicator (verbally and in writing) with strong interviewing skills.
4. Able to communicate with all levels of employees.
5. Able to testify competently and hold up in the witness chair.

How to choose the right investigator

Your decision should be based on the following:
1. The type of conduct alleged.
2. The alleged perpetrator’s position in the organization.
3. The investigator’s knowledge of the subject matter and ability to assess risk.

Preparing to investigate

Gather documents, which may include the following:
1. Time and labor records.
2. Work schedules.
3. Work logs.
4. Diaries.
5. Incident or other reports.
6. Charts or notes maintained as part of the job.
7. Employee communications (e-mails, voicemail messages, text messages, and phone logs).
8. Managers’ department files.
9. Supervisors’ “private” supervisory or shadow files.
11. Personnel files.

Remember, limit the scope of the investigation to policy violations. This isn’t the time to conduct a background check on the accused or to conduct a character assessment.

What to avoid

Here’s a list to consider when contemplating or conducting an internal investigation:
1. Failure to conduct any investigation.
2. Using a biased investigator.
3. Investigating in a biased manner.
4. Promising complete confidentiality.
5. Disclosing information beyond those who “need to know.”
6. Prejudging before or during an investigation.
7. Conducting an inadequate investigation.
8. Not warning about protection from retaliation.
9. Telling witnesses not to talk to the complaining employee.
10. Failing to provide a written report if an outside investigator is used and adverse action imposed.
Conducting an investigation – the interviews

Here are issues and questions to consider before holding interviews:

1. Location.
2. Privacy.
3. Comfort for complaining party.
4. Witnesses — go to them or bring them to you? Think strategically.
5. How to use open-ended questions.
6. Whether you should be yourself when asking questions, or if you should be “the person you need to be.”
7. Ask for names of witnesses.
8. Ask for documents and suggestions of other helpful documents.
9. Is there a duty to participate?
10. Consider Weingarten rights. Definition: A bargaining-unit employee shall be given the opportunity to be represented at an investigatory meeting if (a) the employee reasonably believes that the result of the meeting will result in disciplinary action and (b) such representation is requested.
11. Assess the witnesses’ personality and credibility.
12. Scheduling.
13. How to discuss confidentiality.
14. How to discuss retaliation.
15. Ask “Is there anything else?” at least twice, preferably three times, and be certain to reflect the question and answer in your notes.

Investigation touchstones

Here are some things to remember:

1. Introductory remarks define the investigation.
2. Your purpose — impartial, unbiased, objective.
3. Scope — keep the interview on track.
4. Request candor.
5. Request confidentiality from witness during investigative period and beyond.
6. Inform interviewees that your organization takes all such complaints seriously and that the organization has an obligation to investigate the allegations.
7. The information provided by the interviewee will be kept as confidential as possible and disclosed only on a need-to-know basis. To maintain the confidentiality of the information gathered during the investigation, the witness is to refrain from discussing the complaint or the investigation with any other employees while the investigation is under way.
8. The company has a firm policy prohibiting retaliation against any participant in the investigation or against any person believed to have participated. Any perceived retaliation must be reported immediately. Provide instructions for doing so, including the name of the person to whom a complaint of retaliation should be made.
9. Each employee is expected to cooperate fully in the investigation.

Note taking

1. Accurate.
2. Consider having an assistant if you can’t take notes and ask questions.
3. Decide about tape recording. Obtain legal advice before recording.
5. Review notes at end.
6. Will you transcribe notes?
7. Are notes privileged?
8. What format will your notes be in?

**Interviewing the complaining employee**

Remember this list during the initial interview with the complaining employee:

1. Set the stage — assure the employee that the complaint is being taken seriously and that it will be handled properly.
2. Written statements — ask for signature and date. Even if you have a full written statement, conduct the interview.
3. Take the opportunity to define the scope.
4. Seek to define conduct period and limit by person, behavior, or time.
5. Ask the complaining employee to define terms used and provide specific examples of terms such as “harassment, discrimination, retaliation, inappropriate, offensive.”
6. Allow ample time.
7. Build rapport.
8. Ask the employee what action he or she is seeking. This isn’t a guarantee of action you will take, but it’s important evidence and key to determining the appropriate consequence.
9. Probe for corroborating witnesses or documents.
10. Ask “Is there anything else” at least two or three times and reflect in your notes that you asked.
11. Don’t editorialize or comment.
12. Review confidentiality.
13. Discuss retaliation issues.
14. Take notes.
15. Review notes at the end.
16. Ask “Have you spoken to anyone else about this?”
17. If so, to whom?
18. Have you written a statement or would you like to do so?
19. Have you spoken to anyone in management about this?
20. If so, to whom?
21. What was the reaction of the person(s) with whom you spoke?
22. Have you kept or created any notes, diary entries, or records that have anything to do with this complaint or the events we are discussing as part of this complaint?
23. Do you know of any other employees who may have the same or a similar complaint or concern?
24. How do you know the alleged offender? (Only through work, or is there some other relationship?)
25. Have you had any other problems with the alleged offender on or off the job other than the one(s) being discussed today?
26. How have you been affected, and what have you done about it?
27. What are you hoping for as a result of bringing this complaint?
28. Ask the complaining party to sign and date the notes and make any appropriate corrections.

**After the initial interview**

Consider this list after the interview with the complaining employee:

1. Create a plan; use policy and/or legal standards as a guide.
2. Define the scope.
3. Create a timeline/outline.
4. Create an initial witness list.
5. Determine required testimony — oral and documents.
6. Determine interview order for other relevant witnesses.

**Other interview issues**

Think through the following:
1. How to talk to non-employees.
2. How to talk to minors. Ask if the employee wants a parent or guardian present.
3. How to handle an employee who refuses to be interviewed.
4. What to do if an employee tries to “take the Fifth.”
5. How to handle gossip and personal opinions from witnesses.
6. What about disciplining employees who discuss the investigation.
7. What to do if the accused demands to bring an attorney.
8. How to handle union employees.

**Interviewing the alleged offender**

Here are some issues to consider:
1. No matter what conduct is alleged, be straightforward and unbiased.
2. Don’t use cute terms to discuss body parts.
3. Discomfort — what if you are too uncomfortable to proceed?
4. Make sure you allow the accused to tell her side.
5. Decide whether to give the alleged offender the name of the accuser.
   Consider —
6. Whether the accuser is not the victim.
7. Whether many others witnessed the event.
8. That the alleged offender needs a meaningful opportunity to respond.
9. The increased risks of retaliation.
10. Ask for names of witnesses and suggestions of documents.
11. If the alleged offender denies the conduct, ask why others may have made the allegation.
12. Allow as much time as necessary.
13. Confidentiality — decide who will be informed and consider those who already have been informed.
14. Ask that all other participants keep the allegations and information discussed during the interviews confidential.
15. Review the policy against retaliation, which should also include threats of retaliation or attempts at retaliation. You also should make clear that this applies not only to the complaining party, but also to any person assumed to be complaining, any witness, or any person assumed to have been a witness or participant.
16. Inform the accused that no conclusions will be made until the investigation is complete.
17. In addition to the basic questions about who, what, where, when, and why, you may wish to request other specific information from the alleged offender. Of course, whether you ask these questions will depend on the exact allegations you’re investigating:
   a) If the alleged offender is a supervisor, get the names of others she has supervised.
   b) Did the complaining party ever inform the alleged offender that the conduct was unwelcome? If so, how and when?
c) How did the complaining party respond to the conduct under investigation?
d) How does the alleged offender characterize the conduct of the complaining party?
e) Has any other manager or employee ever requested that the alleged offender refrain from using certain offensive language?
f) Has the alleged offender ever gone out with the complaining party socially? With other employees? What happened?
g) Does the alleged offender have any documents concerning the complaining party or the incidents that are the subject of the complaint?
h) Names of witnesses with a brief summary of what those witnesses may know or may have seen.
i) If the alleged offender claims that the allegations are false, ask for reason(s) why the complaining party would make up the allegation or exaggerate facts to support the allegation.

The witness list

In addition to the complaining party and the alleged offender, you may also wish to interview:
1. Witnesses who directly observed a relevant incident or conversation.
2. Witnesses with relevant information.
3. Witnesses identified by the complaining employee and the accused.
4. Authors or creators of relevant documents, e-mails.

Follow-up interviews

Consider this list when following up on interviews:
1. It may be necessary to return to the complaining party about facts learned from further investigative interviews.
2. It may be necessary to return to one or more witnesses or to the alleged offender.
3. Telephone calls may be useful.
4. Review notes.

Office searches

If your investigation includes a search, consider the following:
1. Privacy concerns.
2. Trespassing concerns.
3. Differences between private and public employers.
4. Benefits and hazards of searches of computers, e-mail, desks, purses, briefcases, etc.

Completing the investigation

Consider the following when wrapping up:
1. Re-interview as necessary.
2. Review notes.
3. Compare the allegation with findings.

Decision making process

Consider the following:
1. Review the evidence.
2. Review credibility determinations.
3. What are you trying to determine?
   a) Policy violation?
   b) Unlawful conduct?
   c) Appropriate discipline?

Resolution

1. Review past practice and organizational policies.
2. Discipline and remedial action.
3. Who determines discipline?
4. Is there a need for remedial training to a supervisor? An entire department?

Writing the report

Here are some preliminary considerations:

1. Is it privileged?
2. What should be the content?
3. What should be the format?
4. Who receives a copy?

Report content and format

Here are tips for your report:

1. Writing the report — putting it all together
   a) The goal is a reliable set of facts for a decision-maker to reach a conclusion.
   b) Tie various facts and documents together to show what it all means.
   c) Focus on the facts.
   d) Rely on your documents.
2. Report content
   a) Description of situation at issue.
   b) List of witnesses and documents used as evidence.
   c) Summary of the relevant information from each witness and document.
   d) Assessment of credibility of each piece of evidence, explaining how it relates to the elements of the alleged issues.
   e) Findings of fact on each element of the alleged violation or offense.

Communicating the decision

Keep these items in mind when communicating to the parties:

1. Review the nature of the allegations and inform the complaining party whether you found policy violations.
2. Inform the complaining employee about any discipline imposed on the alleged offender.
3. Remind the alleged offender about policies against retaliation.