

PUBLICATION

Analysis of an Investigation, Evidence, Communication and Implementation

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As an employment lawyer, I am often faced with situations where the employer could have avoided a lawsuit, or at least minimized liability, by conducting a prompt and thorough investigation of workplace complaints. With proper planning and the implementation of good organization and investigation techniques, an employer can conduct an investigation that can both save an organization from potential exposure to legal claims and assist greatly the ability to defend those legal claims that do arise. The Best Practices listed below will provide employers with some helpful examples of what they should and should not do when performing an investigation.

Dos

1. Do be a neutral investigator and listen with an open mind.
2. Do give the accused notice of the specific accusations and a meaningful opportunity to respond before determining disciplinary action, if any.
3. Do tell the Complainant how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations.
4. Do make sure you ask the complainant or alleged victim for any physical evidence that might exist, including documents such as e-mails or voicemail messages.
5. Do pay close attention to the initial reaction of the accused to the charges and note objective indications of reactions.
6. Do document any unsuccessful attempts to interview potential witnesses.
7. Do take interim action (if necessary) to prevent further misconduct and/ or retaliation. (Also inform all witnesses that retaliation directed at anyone who participates in the investigation should be reported immediately and appropriate disciplinary action will be taken if retaliation is demonstrated).
8. Do consider conducting additional training as a preventive measure.
9. Do be consistent in your adherence to an effective investigation procedure. This may help to show that the employee's failure to use the corrective opportunities available was unreasonable.
10. Do report back to the complainant and to the accused to provide any necessary reports, and/or to enact any corrective, remedial measures.

Don'ts

11. Don't act or appear to act out of malice toward the complainant regardless of whether you think he or she is making a valid complaint.
12. Don't convey information during the investigation that has no proper purpose.
13. Don't discuss the situation with persons who have no "need to know."
14. Don't make statements believed to be true without having a factual basis for belief in their truth.
15. Don't reveal what you know. The interviewee may assume that you know more than you actually do and will tell you all he or she knows, which may be more than you know yourself.
16. Don't prevent an interviewee from leaving the meeting if he or she chooses to leave.
17. Don't ask leading questions.
18. Don't ask questions that call for a legal conclusion.

19. Don't put investigation documents into the personnel files of any party. (There should be a separate "investigation" file).
20. Don't engage in conduct that would give the next potential Complainant a claim that his or her failure to take advantage of any preventative or corrective opportunities was reasonable. (Follow procedures and be responsive to the Complainant. If it appears to others that the Company was/ is not responsive to one Complainant, it might give a second Complainant an argument that the Company wasn't going to take any action anyway so reporting would have been fruitless thereby hampering the Company's right to use the affirmative defense.