

HOW TO CONDUCT A LAWFUL WORKPLACE INVESTIGATION

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By Raymond L. Hogge, Jr.

Introduction

Employers today are faced with a variety of legal risks if they fail to adequately investigate the qualifications and conduct of their employees. For example, claims for negligent hiring and negligent retention are being asserted with increasing frequency, and the surest way for an employer to be held liable for sexual harassment is to get notice of the problem but fail to conduct an investigation. Investigations, however, also confront employers with potential legal claims. For example, conducting a polygraph examination of an employee may give rise to employer liability under the Polygraph Protection Act. This article is designed to introduce employers, managers, supervisors and human resource professionals to some of the most frequently encountered legal and business issues raised by employer investigations, and will provide suggestions on how employers can effectively manage the risks accompanying investigations while still enjoying their benefits.

Reasons for Workplace Investigations

Workplace investigations are needed for many different reasons. For example, an employer must conduct an investigation of any complaint of sexual harassment (and take any remedial action determined to be appropriate) in order to avoid liability for any such harassment that occurred. An employer may wish to implement drug testing, which is a form of workplace investigation, to comply with regulatory requirements or to address a workplace substance abuse problem. A security breach involving trade secrets may trigger a workplace investigation. Whatever the reason for a particular workplace investigation, however, all such investigations are conducted for one overriding purpose: to enforce a company policy. In the examples cited above, the company policies in question are its policies against sexual harassment, its policy against substance abuse, and its policy requiring confidentiality concerning trade secrets.

Adopt Written Policies

Workplace investigations or their results will often be challenged, especially if used to support a termination or if used as a defense to a claim of discrimination. It therefore is important that the policies enforced by a workplace investigation be expressed in writing. Written policies are taken more seriously and given greater credence than policies which are unwritten, and provide better support for an investigation as compared to unwritten policies. Written communication of policies to employees highlights the company's commitment to those policies, and also will contribute significantly to supporting a workplace investigation against a legal challenge.

Just as the company policies which are enforced through the workplace investigation should be written, so too should the employer adopt a written workplace investigation policy and distribute it to its employees. Doing so will produce a number of important benefits to the company. As discussed above, it will demonstrate the company's commitment to conducting such investigations, and will enhance the investigation policy's chance of surviving a legal challenge. It will put employees on notice that such investigations may be conducted, which will reduce the risk of claims arising from the investigation. It will deter violations of the underlying policies, since employees will better appreciate the steps the company will take to enforce them. A properly drafted investigation policy will usually enhance employee morale in the long run, because it will demonstrate to them that the company will protect them against inappropriate conduct by coworkers. It can also be an important tool to deter unionization of the workforce, since it will show employees that the company operates by rules which ensure that every employee receives fair treatment.

While most employers should distribute a written workplace investigation policy to its employees, this does not mean that every investigative step should be described in the policy. To facilitate effective investigation, as well as for the sake of brevity, the details of an investigation typically should not be disclosed to employees. Such matters are more appropriately addressed in a supervisor's manual or in an investigation handbook.

Ensure Consistency with Established Policies

There may arise unforeseen circumstances where it is necessary for an employer to deviate from its established policies and procedures for workplace investigations. In most situations, however, workplace investigations should be consistent with (or at least not inconsistent with) the established workplace investigation policy. It also should be consistent with the established policies the investigation is conducted to enforce. Even if the employer is not contractually bound to proceed as described in its policies, its failure to do so may undermine its credibility, may damage employee morale and trust, and may leave the company vulnerable to organizing campaigns by unions. Perhaps of most immediate importance, deviation from established policies and procedures may cause otherwise favorable evidence obtained through the investigation to be excluded from consideration by a jury (e.g., exclusion of drug test results due to failure to maintain the chain of custody), or may cause the employer to incur liability which it otherwise could have avoided (e.g., for inadequate investigation of a complaint of sexual harassment).

Interview All Potential Witnesses

All potential witnesses should be interviewed. Important facts can come from unexpected sources, and an employer's failure to obtain those facts will be hard to justify at trial if the employer acts inappropriately based upon a lack of knowledge which could have been obtained through more thorough interviews. Interviews should be conducted discreetly, and in such a way as not to call attention to the investigation, the matter being investigated, the reporting party, or the accused.

Interview the Reporting Party

If the investigation involves a report or complaint by one employee against another (e.g., a sexual harassment complaint), first conduct a thorough interview of that employee. Be professional, friendly, and patient. The employee may be more upset about the matter than is first apparent. Above all, listen.

The employee may be embarrassed about revealing certain details of the matter in question, or may not wish to discuss it at all. This can happen where, for example, the matter was initially reported by a third party. At this point, the employer should be understanding but firm. It should be explained to the employee that the company is legally obligated to investigate all reports of misconduct, and that all employees are expected to cooperate in company investigations. If the employee refuses to cooperate or disavows any wrongdoing toward him/her, the employer should require him/her to sign a memorandum to that effect.

Interview the Accused

You should interview any employee suspected or accused of misconduct, and should do so early in the investigation. This will provide information necessary for effectively interviewing other witnesses. If the witness interviews yield information conflicting with the information provided by the accused, consider interviewing the accused a second or third time to give him/her an opportunity to explain the conflict.

Treat the accused employee the way you would want to be treated if you were in his/her shoes. Do not treat the employee as if he/she had been determined to be guilty in advance. Doing so can turn a guilty employee into a victim in the eyes of a jury. It also can undermine employee confidence in the system, and damage morale.

Ask Questions

The following are suggestions for maximizing the effectiveness of questions asked during an investigation:

- Start with the general, and work toward the specific. For example, start with "Have you noticed any problems or tensions in your department" rather than "Have you noticed your supervisor making inappropriate sexual remarks to his/her secretary?"
- Do not interrupt. Let the witness give as much information as possible in response to each question, even if the answer appears rambling or unresponsive.
- Do not ask leading questions. Leading questions are questions which suggest the answer, and they undermine the reliability of the information. Instead, ask open-ended questions ("who, what, when, where, how"). For example, ask "What happened next?" instead of "Is that when he/she touched him/her?"

- Use silence. If you feel the witness is being evasive or withholding information, maintain eye contact with the witness, remain silent, and wait to see if more information may be forthcoming.
- Pin down the facts. After the witness has given all the rumors, gossip, and hearsay he or she has to offer, pin down the facts about which the witness has first-hand, personal knowledge. Some witnesses who are making a good faith effort to cooperate may have difficulty separating what they know from what they have heard, so be patient and helpful rather than antagonistic. Ask questions such as: "Did you hear him/her say that, or did someone else tell you about it? When did he/she say it? To whom did he/she say it? How did you hear it? Where was he/she when he/she said it? Where were you? What were his/her exact words?" Another useful technique is to ask the witness if he/she could swear to the stated facts under oath in court.
- Ask for the names of other potential witnesses, and request a brief description of the information they may have.

Obtain Available Documentary and Similar Evidence

The employer should examine any documentary or other evidence which may be relevant to its investigation. This may include, for example, letters, memoranda, expense records, telephone records, computer files, time sheets, and e-mail. Care should be taken to comply with applicable laws governing, for example, interception of electronic messages, and to avoid invasion of privacy claims.

Do Not Restrain Employees

Do not physically restrain an employee, or make an employee's ability to leave the workplace or any part of it contingent upon his/her cooperation. Doing so can lead to claims of false imprisonment and tort liability.

Take Protective Measures

The accused should be advised not to retaliate against the reporting employee or any of the witnesses, and that any such retaliation would be grounds for discipline up to and including discharge. The employer should consider separating the employees if requested to do so by the reporting employee or if there exists any threat of workplace violence.

Maintain Confidentiality

All information gathered during the investigation should be treated as confidential. It should be disclosed only on a need-to-know basis. Some information, however, will need to be disclosed in order to conduct an adequate investigation. If information potentially is defamatory, it should not be disclosed to other employees without first consulting the human resources director or legal counsel.

When interviewing an employee, the employer should explain that the discussion is not to be disclosed by the employee to anyone. Each employee should be reminded that disclosure of information concerning the investigation may result in discipline, up to and including discharge. You should not promise the employee absolute confidentiality. Instead, you should assure the employee that the company will keep the information provided in confidence to the extent that doing so is consistent with its investigation, but that some disclosure by the company may be necessary.

Keep Records of the Investigation

Detailed written records should be maintained regarding each step of the investigation, including each witness interview. In some circumstances, it may be appropriate for the employer to have employees sign written statements. All such records should be maintained in confidential investigation files.

Employers should remember that all investigative records may be subject to discovery in litigation. While many courts have given privileged status to records of internal investigations, the current trend is to allow discovery of such records either because they are not privileged or because the privilege has been waived by reliance upon the investigation as a defense to liability. An employer therefore should not put anything in investigative records that it would not wish to be displayed to a jury.

Conclusion

One of the most effective risk-management tools available to employers is a properly conducted workplace investigation. The best way to conduct a particular workplace investigation, however, depends upon numerous considerations, including legal limitations and requirements, concerns regarding employee morale, the costs of the investigation, the potential for liability relating to the matter under investigation. Moreover, workplace investigations require the application of knowledge and skills which many supervisors and managers may not possess, and when the need for an investigation arises there may be little time for learning. Therefore, employers should act proactively to set up policies and procedures for investigations *before* they are needed, and to train supervisors and managers in those policies and procedures *in advance*. Many employers also will want to designate a particular person or department as having primary responsibility for workplace investigations, to ensure consistency in the conduct of investigations and to enhance the centralization and availability of information. Taking these actions will improve the ability of the employer to investigate claims of workplace misconduct, to remedy any misconduct found, to prevent future misconduct, and to minimize the liability of the employer in any legal actions brought against it.