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From Allegation to
Resolution:
**Best Practices for a
Legally Compliant
Workplace Investigation**

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Why Do We Conduct Investigations?

- Can resolve issues at the lowest possible level before EEs get an attorney and/or the government involved.
- Sends a message that the ER expects EEs to comply with policies relating to unacceptable conduct.
- Allows EEs to feel they have been heard/treated fairly.
- Will assist in defending the ER if litigation is filed.



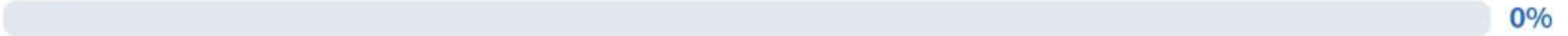
When is an Investigation Necessary?



- Possible violations of ER policy or procedure.
- Possible violations of the law, such as EEO or wage and hour issues.
- Potential for risk to the ER/EEs/the public.
- Anonymous allegations?
 - Be open. EEs may fear retaliation
 - If not enough details to properly investigate, is there another appropriate response?

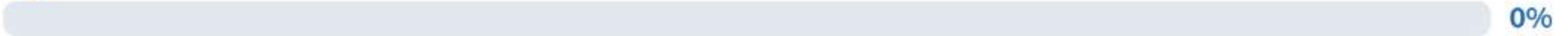
How Many Workplace Investigations Have Been Conducted in Your Workplace in the Last Few Years?

None



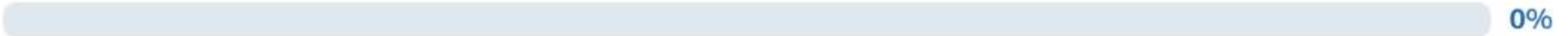
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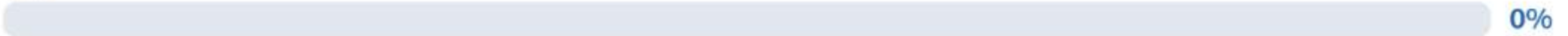
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10 or More



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What Can Happen When You Don't Investigate

- Example: EE complained that her supervisor and store manager made lewd jokes about her breasts, and that the supervisor tried to kiss her. ER did not investigate.
- Result: Verdict for plaintiff of \$1 in economic damages, \$35,000 for emotional distress, and \$50,000,000 in punitive damages (later reduced to \$5,000,000)

Kimzey v. Wal-Mart Stores, 107 F.3d 568 (8th Cir. 1997).





Other Problems Caused by No Investigation (or a Poorly Done Investigation)

- If a problem does exist, it will not be properly remediated.
- Sends a message to EEs that policies don't really mean what they say.
- May cause EEs to be reluctant to report future incidents.
- Litigation.



A “Prompt and Thorough” Investigation

- Failure to be prompt and thorough can result in loss of evidence.
- Failure to collect evidence quickly can send you down the wrong path.
- Be sure not to have unexplained gaps in the investigation timeline. Delay or indifference (even the appearance of) can be costly in litigation/government enforcement process.
- But do not commence the investigation until preliminary issues are addressed, such as who needs to be informed (legal, PR, other stakeholders)? Avoid silos.

Other Issues to Address Before Investigating

- Leave for the complainant.
- Leave for the accused.
- Other potential changes to the work environment.





Who Should Investigate?

- Avoid all real or perceived conflicts of interest. Neither the complainant nor the accused should be in the supervisory chain of the investigator.
- Use an investigator who is trained in the skills that are required for interviewing witnesses and evaluating credibility.
- Investigator should have good attention to detail, be a good listener and be able to follow-up as appropriate.
- Investigator should show fairness and respect to all involved, take out the emotion and keep an open mind to avoid prejudging the situation.

Who Should Investigate?

- Does not need to be an attorney (consider the privilege issue).
- Investigator should:
 - Be comfortable with their role.
 - Be able to deal with potentially uncomfortable subjects.
 - Be discreet.
 - Be capable of making findings in the face of conflicting evidence.
 - Be able to write a concise and coherent report.

Who Most Often Conducts Investigations in Your Workplace?

Me

0%

An HR Professional

0%

Security Department

0%

An Outside Investigator

0%


Other

0%

Make a Plan

- Set the scope of the investigation so you have guiding parameters.
- Be prepared to explain/defend why you did what you did.
- Avoid ever having to say, “I never considered that . . .”



A person wearing an orange long-sleeved shirt is sitting at a desk. Their hands are visible; one is on a laptop keyboard and the other is holding a pen over a document. The document has a colorful bar chart and some text. A white coffee cup is also on the desk. The background is blurred, showing what appears to be a window with greenery outside.

Collect and Review Relevant Documents

- Personnel files
- Time records
- Documents in possession of claimant/respondent/witnesses
- Emails
- Texts (on a company or personal cell phone?)
- Camera/video footage
- Internet search history

A Word About R-E-S-P-E-C-T

- Dignity and respect are basic elements of the employment relationship.
- Even where one EE has been accused of wrongdoing, this is not an “us vs. them” situation.
- Disrespect becomes part of every charge or lawsuit, adds fuel to the fire.
- The accused is also a potential plaintiff.
- So – unless required under the circumstances, no walks of shame, security escorts, public statements, etc.

Nuts and Bolts of the Investigation

- Who should be interviewed?
 - Complainant
 - Alleged wrongdoer
 - Witnesses
 - Supervisor/managers
 - Anyone else identified during the of the investigation
- In what order?
- How to set up the interview?
- One or two interviewers?
- Are follow-ups necessary?



Opening the Interview

- Introduction
 - Name, title and role
 - Short statement about why the meeting is taking place
- Explain the process
 - Neutral investigation
 - Goal is to have an open and honest discussion
 - Answer any process questions



Opening the Interview

- Non-retaliation policy
- Explain to anyone who is interviewed
- Explain where to go regarding any retaliation concerns
- Address confidentiality (is there an ER policy?)
- Establish expectations
- Do not make any guarantees
- Confirm no recording and no one else present, if remote. Do Weingarten rights apply?



Individual Interviews – The “Funnel” Method

- Start with open-ended questions.
 - Don’t disrupt train of thought
- Move to more narrow questions as you get more information.
 - Who? What? Where? When?
- Aim for all relevant information.
- Summarize back to the witness to make sure you understand.
- If a witness does not remember, use methods to refresh their recollection.

Obtaining All Relevant Information

- Use active listening
 - Don't be wedded to your outline
 - Listen to subtle changes and clarify
- Follow up on cues from the witness
 - Eye contact
 - Gestures
 - Body language
- At the bottom of the funnel, get the final answer and make sure the subject is exhausted. Recap and ask, "Is there anything else?"



Closing the Interview

- Thank the interviewee for their time and participation.
- Let the interviewee know how to contact you if they think of anything else/details they would like to add.
- Remind the interviewee
 - Confidentiality
 - Non-retaliation
- Are signed statements appropriate/necessary?

Making Credibility Determinations

- Sometimes the investigator must make credibility determinations.
- The dreaded “he said/she said” situation.
- Be careful to suspend preconceptions.
- Consider whether bias affects credibility determination.



~~Lies~~
Truth

Making Credibility Determinations: What We Can Learn from Model Jury Instructions

- In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.
- In considering the testimony of any witness, you may take into account:
 - the opportunity and ability of the witness to see or hear or know the things testified to;
 - the witness's memory;
 - the witness's manner while testifying;
 - the witness's interest in the outcome of the case, if any;
 - the witness's bias or prejudice, if any;
 - whether other evidence contradicted the witness's testimony;
 - the reasonableness of the witness's testimony in light of all the evidence; and
 - any other factors that bear on believability.

Documentation Do's:

- Write objectively.
- Summarize what you know, giving dates, times and witnesses as applicable.
- Give specific responses to the allegations raised by the complaint.
- Give concrete examples, when possible, to document the alleged wrongdoing.
- Use quotes – but only when an actual quote.
- Use relevant facts regarding credibility.
- Make a recommendation, if appropriate under the circumstances.





Documentation Don'ts:

- Make legal conclusions.
- Repeat unsubstantiated opinions, rumors or hearsay as fact.
- Make unnecessarily controversial comments.
- Use quotes as shorthand. Avoid putting words in the mouths of any witness.
- Use relevant facts regarding credibility.

Don't Leave Complainants Hanging

- Periodically update complainants that the investigation is active and ongoing.
- Otherwise, they will assume you are doing nothing.
- Do not share any details with the complainant.



Closing the Loop

- Advise the complainant on conclusion of investigation, in writing, if possible. Remember that the complainant is not entitled to know details about personnel actions taken with respect to other EEs.
- Remind complainant where they can go with additional concerns.
- Impose discipline and/or other remediation, as appropriate.
- Review any systemic problems identified in the investigation.
- Consider updating policies, (more) training, coaching, etc.



Avoid Common Mistakes

- NOT following your own policies and procedures.
- NOT being consistent.
- NOT holding EEs accountable.
- NOT following up with witnesses and/or the complainant as appropriate.



After the Investigation: Retaliation Concerns

- 3-month presumption.
- Retaliation can take many forms.
- More than just formal discipline or termination.
- Pay attention to rumors, exclusion from meetings, the assignment of less challenging or less desirable projects, poor performance reviews, etc.

Questions?

