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INTERNAL INVESTIGATION CHECKLIST

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Table of Contents

	Page
Preface.....	1
I. Notice of Potential Harassment or Other Misconduct	1
II. Establishing Policies for Preventing Harassment or Other Misconduct and Conducting Investigations.....	2
III. Commencing the Investigation.....	4
A. Obtain Background Information on the Complainant and the Accused	4
B. Analyze the Complaint.....	4
C. Prepare for the Investigation.....	5
D. Do's and Don'ts	6
IV. The Interviews	9
A. Interviewing the Complainant	9
1. Preliminary Issues to Discuss with the Complainant	9
2. Investigating the Allegations.....	10
3. Do's and Don'ts.....	12
B. Interviewing the Accused.....	13
1. Preliminary Issues to Discuss with the Accused	13
2. Investigating the Allegations.....	14
3. Do's and Don'ts.....	16
C. Interviewing the Witnesses.....	17
1. Preliminary Issues to Discuss with the Witness	17
2. Investigating the Allegations.....	17

3. Uncooperative Witnesses.....	19
4. Do's and Don'ts.....	19
D. Re-Interview the Parties or the Witnesses if Necessary	20
V. Summarizing the Results of the Investigation	21
A. Analyzing the Investigation.....	21
B. Making a Determination Regarding the Merits of the Complaint.....	22
C. Deciding Corrective and/or Disciplinary Action	23
D. Prepare the Investigative Report	26
E. Prepare the Investigative File	27
F. Discussing the Results of the Investigation	27
G. After the Investigation Is Completed.....	28
H. Do's and Don'ts	29
VI. Recap: 11 Costly Mistakes	29

Internal Investigation Checklist

Preface

Employers are required by law to take prompt action to investigate complaints of harassment or other misconduct.¹ This obligation arises immediately upon notice of the misconduct, and poses a duty upon the employer to ensure a prompt and thorough investigation of each and every allegation is conducted. We have provided a checklist of best practices for employers to follow when investigating complaints and to help safeguard against lawsuits and charges that might arise from complaints of harassment or other misconduct.

I. Notice of Potential Harassment or Other Misconduct

Once an employer is put on **notice** that potential harassment or other misconduct has occurred, there arises a duty to take prompt, effective remedial action to stop the misconduct. Notice can be provided in a number of ways, including:

- Internal complaints (written or oral).²
- Notice of lawsuits.
- Informal reports.
- Hotline calls to corporate compliance.
- EEOC complaints.
- Observations.
- Anonymous letters and/or messages.
- Union grievances.

¹ In some circumstances the complainant or accused might be someone not directly working for the organization, such as an employee of a third-party vendor or a visitor. Nonetheless, an investigation is still required. For ease of presentation in this checklist, it is assumed that the complainant and accused are employees. Also, the same analysis would apply if the complainant or accused was a volunteer.

² Avoid the term “verbal,” as it includes both oral and written communications. In common parlance, many people use “verbal” as a substitute for “oral.” As a result, if the written notes of the investigation reference a “verbal complaint” or “verbal abuse,” there will be ambiguity regarding whether the complainant made an oral or written complaint or the abuse was oral or written.

- Exit interviews.

DON'T:

- Don't ignore complaints from disgruntled or departing employees.
- Don't wait for an informal complaint to turn into a lawsuit.
- Don't ignore an "off the record" complaint – there is no such thing. Never agree not to investigate an allegation of harassment or other misconduct.

DO:

- Follow up on each and every complaint, regardless of the merit of the allegations.
- Investigate all complaints, whether the complainants request an investigation or not.
- If your organization has insurance coverage for employment-related claims, timely report a claim to all applicable insurance companies and/or your insurance broker. Your insurance policy might cover the costs of the internal investigation, including the expense of retaining a lawyer to conduct the investigation.

II. Establishing Policies for Preventing Harassment or Other Misconduct and Conducting Investigations

Employers should try to adhere to established policies and procedures for resolving complaints. To the extent possible, investigations of alleged harassment or other misconduct should be conducted with a well-organized and consistent approach. **The focus of the investigation is on whether the conduct in question violated the employer's internal policies prohibiting harassment or misconduct in the workplace.**

Prior to the receipt of complaints, employers should:

- Establish effective antiharassment, antidiscrimination, antiretaliation, and other misconduct policies.³
- Have in place a simple method of reporting complaints of harassment or other misconduct that is easily accessible to all employees, volunteers, and visitors to the workplace.

³ It is advisable for employers to have additional, more general set of policies relating to appropriate workplace conduct, a procedure for employees to report workplace misconduct, and the consequences for violating those policies.

- Provide alternatives with respect to whom to report the harassment or other misconduct.
- Ensure that the foregoing policies and complaint procedures are disseminated to all employees, at the time of hire, in employee handbooks, on wall postings, via electronic access, and through periodic training sessions.⁴
- Train and educate employees on policies and complaint procedures.
- Identify and train individuals who will investigate complaints of harassment or other misconduct.
- Train supervisors to recognize and respond to incidents of harassment or other misconduct and to report the incidents to the human resource department, the Executive Director/CEO, or other individual identified in the complaint procedure.
- Ensure that procedures for investigation of complaints are consistent.
- Establish a workplace culture of ethical compliance, including an environment that is welcoming of employees, volunteers, and others coming forward with complaints and concerns. When employees see that their employer is receptive to receiving internal complaints and takes the complaints seriously, they are more willing to give the employer a chance to resolve a problem before filing a complaint with the EEOC, OSHA, or other administrative agencies.

DON'T:

- Don't select an investigator who is perceived as biased.
- Don't select an investigator who has a friendship or reporting relationship with the complainant or the accused.

DO:

- Select an investigator who is knowledgeable and responsive to issues and complaints of harassment or other misconduct.
- Try to identify at least two investigators within the organization to handle complaints of misconduct.
- Try to select investigators who are members of at least one of the protected categories.

⁴ Because nonprofits are permitted to have volunteers, they should have a parallel set of policies and distribution and training practices with respect to their volunteers inasmuch as volunteers can engage in or be the victims of inappropriate harassment or other misconduct.

- If necessary, hire an experienced outside investigator.

III. Commencing the Investigation

It is imperative that employers respond **quickly** and **effectively** to complaints of harassment or other misconduct. Within 24 hours of receipt of a complaint, employers should acknowledge the complaint and begin planning an investigation. The investigator should contact the complainant, and ensure that the complaint will be kept as confidential as possible and that an immediate investigation will be conducted.

Prior to investigating the complaint, the investigator should perform the following tasks:

A. Obtain Background Information on the Complainant and the Accused

- Review the complainant's personnel file, job description, and performance reviews.
- Review the accused's personnel file, job description, and performance reviews.
- Look for documentation that the complainant and the accused received (1) copies of the employer's antiharassment, antidiscrimination, antiretaliation, and other relevant misconduct policies and complaint procedures and (2) periodic training about these policies and procedures. Documentation would include signed receipts for employee handbooks, training session attendance sheets, and minutes of staff meetings where these topics were discussed.
- Identify any previous charges, complaints, or grievances filed by or against the complainant or the accused.

B. Analyze the Complaint

- Identify the issues arising from the complaint.
- Analyze the applicable employer policies, guidelines, and practices to determine whether or not a violation might have occurred.
- Determine the focus and goal of the investigation.
- Consider the scope of the investigation (e.g., who is being investigated, what actions are being investigated, and the timeframe involved in the actions). The investigation should not be a fishing expedition to find some type of violation, but rather should be limited to allegations brought forward

by the complainant. However, the scope should not be set in stone, as the investigation of a minor issue can quickly expand when evidence of a more serious issue is uncovered.

- Identify all potential witnesses, if available from the complaint.

C. Prepare for the Investigation

- Identify at least two, objective and unbiased investigators to conduct the investigation. Possible investigators include human resource personnel, private investigators, outside consultants, and/or legal counsel.
- Prepare an investigative work plan and an outline of questions for the complainant, the accused, and potential witnesses. When preparing the questions, think about ways to phrase them in order to minimize or eliminate the need to disclose, either explicitly or implicitly, the source of the facts underlying your questions. This will help to minimize the risk of retaliation.
- Decide the preliminary order of interviews.
- Notify Board members, managers, and employees of the allegations on a strictly “need to know” basis. Consider having a Board member involved in the investigation if there aren’t two, objective and unbiased investigators with the skill set needed to conduct the investigation, provided the Board member is not named in the complaint or a witness with relevant knowledge regarding the complaint.
- Identify documents to be reviewed with each individual and determine the relevancy of each document. If documents appear to be missing from a file, make a note to discuss with the identified individual.

Possible documents to review include:

- Written complaint and/or any notes written by the Company’s representative who received the oral or written complaint.
- Policies, procedures, and instructions.
- Electronic data (e.g., emails, text messages, voicemails, and other communication systems)
- Prior relevant complaints.
- Prior relevant investigation files.
- Personnel files of the individuals involved.

- Collective bargaining agreements.
- Other relevant business records.
- Consider separating the complainant and the accused pending the results of the investigation, or honoring the complainant's request for transfer – document the fact that the complainant requested the transfer. The complainant should not be subjected to an adverse employment action as this could give rise to a claim of retaliation.
- If possible, at the outset of an investigation, consult in-house or outside legal counsel who is aware of the substantive law regarding the allegations.
- Reach out to the complainant, the accused, and all relevant witnesses to schedule interviews.
- While conducting the investigation, keep in mind that people other than the accused might need to be disciplined. Disciplinary policies should apply to:
 - Wrongful conduct – violators.
 - Ignoring and not reporting violations – condoners.
 - Failure to detect by supervisors – sleepers.
 - Refusal to cooperate with an investigation – uncooperatives.
 - Retaliation – retaliators.

D. Do's and Don'ts

DON'T

- Don't delay the start of the investigation. This is probably the most important rule for conducting investigations of harassment or other misconduct in the workplace. Delaying an investigation will subject the employer to the risks that the investigation will be deemed insufficient, and the employer will lose the right to assert the defense that it embarked on a prompt and thorough investigation upon receipt of the complaint. In addition, promptness sends a strong signal to employees that the organization takes complaints seriously.
- Don't be limited by your interview outline or investigative work plan.

- If possible, don't search the accused's locker, desk, or personal items prior to consulting the employer's legal counsel as such action potentially could lead to a claim of invasion of privacy.
- Don't make any conclusions regarding the merits of the allegations prior to speaking to all parties involved in the investigation and reviewing the available relevant documents.

DO:

- Inform all parties of: (1) the importance of maintaining confidentiality during the investigative process and (2) the employer's zero-tolerance policies for harassment, discrimination and retaliation against anyone who in good faith complains about harassment or other misconduct or participates in an internal investigation.
 - **Note:** Employees have a right to discuss the terms and conditions of their employment, including discipline or ongoing disciplinary investigations involving themselves or coworkers. An employer is allowed to restrict those discussions only when the employer has a legitimate and substantial business justification that outweighs employees' rights. It is the employer's responsibility to first determine during each investigation whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover-up. Only if the employer determines that such a corruption of its investigation would likely occur without confidentiality is the employer then free to prohibit its employees from discussing these matters among themselves.
 - It is also the employer's responsibility to justify a prohibition on employees discussing a particular ongoing investigation. An employer must proceed on a case-by-case basis. An employer cannot simply impose confidentiality requirements in all cases or in all cases of a particular type. An employer's determination that confidentiality is necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.
- If the accused or an employee-witness refuses to cooperate with the investigation, then advise the employee that the employee is obligated to cooperate with the investigation and a failure to cooperate might result in disciplinary action, up to and including discharge. You want to state this in a firm, professional matter-of-fact manner and not in an aggressive, threatening way.

- Understand that:
 - The complainant, the accused, or an employee-witness might request to tape record the interview. Note that photography and audio or video recording in the workplace are protected if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. There might be certain circumstances where an employer can refuse to allow photography, such as protecting trade secrets or the photographing of vulnerable persons (such as children and victims of sexual abuse). Because investigatory interviews are normally done in private offices, conference rooms, or offsite, generally there is no need for such protections. An employer should consider recording interviews if it knows that employees are recording them, in order to have unedited versions of the interviews.

You should ask interviewees if they are recording the interview. Even if they say “no,” they might still be doing so. As a result, it is important that the interviewers act professionally and without bias throughout the interview, including during breaks.

- During investigations, employees at times request that their lawyer or another witness be present during the interview. This presents complicated issues. On the one hand, refusing such a request might make the investigation appear unfair and it might cause the witness/complainant not to cooperate in the investigation. On the other hand, allowing a lawyer to attend might make the interview more difficult as the lawyer will likely be looking for mistakes or omissions in the interview process or might try to interfere with the interview (e.g., by coaching the witness).
- If possible, when such a request is made contact the employer's legal counsel for advice. Significantly, lawyers that are present during an investigation can be considered witnesses if the case is eventually litigated by the complainant.
- In a unionized setting, an employee who is asked to participate in an investigatory interview that might lead to discipline of the employee has the right to request a union representative be present. The union representative is not entitled to interfere with the meeting.
- Allow flexibility in your interview schedule and investigative work plan as you gain more understanding of the facts during the investigation.
 - Approach the investigation from an unbiased perspective. Ensure that the investigators selected to conduct the investigation do not have a conflict of

interest and are not fact witnesses with relevant knowledge regarding the matter being investigated.

IV. The Interviews

Arrange to meet with the complainant, the accused, and anyone else who might have relevant knowledge of the incidents surrounding the complaints of harassment or other misconduct. Attend each interview with an open mind and document the date and name of individuals present at the meeting. Be sure to take detailed and accurate notes of the information provided.

It is preferable that two investigators be present at each interview. Consider having one investigator taking the lead on asking the questions while the other investigator takes detailed notes. Near the end of the interview, take a break so that the two investigators can privately discuss whether any additional issues or questions should be addressed.

A. Interviewing the Complainant

1. Preliminary Issues to Discuss with the Complainant

- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then request the complainant not to speak to others about the investigation. Advise the complainant that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a thorough investigation.
- Inform the complainant that the employer does not tolerate retaliation for complaints of harassment or other misconduct or for participating in an internal investigation. Request that the complainant immediately report any complaints of retaliation to you.
- Provide the complainant with an overview of the employer antiharassment, antidiscrimination, antiretaliation, misconduct, and disciplinary action policies. Assure the complainant of the employer's commitment to the policies.
- Inform the complainant that a prompt and thorough investigation will be conducted.
- Obtain background employment information from the complainant. Inquire as to how the complainant came to work for the employer. Ask the

complainant to provide an overview of the complainant's position and job responsibilities.

2. Investigating the Allegations

- Obtain information relating to the complainant's relationship with the accused. When did the complainant first meet the accused? What, if any, is the nature of their relationship (reporting, social, personal, dating, etc.)?
- Discuss the "**5 W's**" – **Who**, **What**, **Where**, **When**, and **Why** of each allegation in the complaint. **Get specifics.**

Sample questions to ask about each alleged incident of misconduct include:

- Who was involved in the complained of misconduct?
 - Where did the alleged misconduct take place? Was it in the workplace, during a virtual meeting, or offsite?
 - Were there any witnesses? If yes, whom?
 - What transpired between the accused and the complainant that formed the basis of this complaint?
 - When did the complained of incident take place? Get specifics – date, times, etc.
 - Why does the complainant think the accused would have caused the alleged incident?
 - Did this type of incident occur more than once? If yes, please provide the details.
 - What was the complainant's response when the incident occurred?
 - What was the complainant's response after incident?
 - Did the complainant tell anyone about the incident? Who? When? Where?
 - Had the complainant been offended in the workplace by anything before the incident?
- If there is a span of time between the alleged misconduct, ask the complainant what prompted the complainant to report the incident now instead of at the time of the incident.

- Ask the complainant if there are any other witnesses or people with knowledge of the incidents, and the extent of their knowledge.
- Ask the complainant whether the complainant is aware of anyone else who has experienced similar misconduct and how the complainant acquired this information.
- Ask if the complainant previously complained of the misconduct to anyone else, including coworkers, friends, and family. If yes, request the identity of these individuals and when the complainant reported the misconduct. Ask if any action was taken after the incident was initially reported.
- Periodically summarize what the complainant has told you to ensure accuracy and to demonstrate to the complainant that you are carefully listening.
- If the complainant claims the misconduct has negatively impacted the complainant's job performance or mental state, ask for further explanation from the complainant. Ask if the complainant has sought treatment.
- Ask for any documentary evidence that the complainant believes supports the complainant's allegations of misconduct, including any relevant emails, notes, text messages, social media messages, photographs, voicemails, and audio or video recordings.
- If the complaint involves graffiti or other visual forms of harassment, locate and photograph the offending material, remove and preserve it if possible, or permanently cover it up if it cannot be removed. The employer should document the "visual form of harassment" as thoroughly as possible, making sure the pictures taken accurately reflect the size, wording, depictions, etc. In no event should the offending material be left in place.
- Specifically ask "what prompted you to report this" and "is there anything else the accused has done that you have not spoken about?"
- Ask the complainant what specific relief and/or solutions the complainant is looking for. However, don't make promises to provide the requested relief.
- Ask the complainant if there are any other incidents of harassment or discrimination, other misconduct, or any other relevant information, that the complainant hasn't told you about.
- At the conclusion of the interview, inform the complainant that the investigation is to continue. State that the investigator(s) might have to meet with the complainant again after other interviews. Inform the

complainant to contact you immediately regarding any concerns (including retaliation) or follow-up issues the complainant might have and any additional facts or events that the complainant might not have mentioned during the meeting with you. Remind the complainant of the Company's antiretaliation policies and confidentiality.

- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are messy, difficult to read, or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the complainant is trying to tell you. Rather, write down specifically what the complainant is saying. If you are unsure about what the complainant said, ask the complainant to repeat or clarify what was said. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views regarding the claim or a particular allegation.
- Don't stick to a limited format of questions – cover the points in an interview outline but also listen to the complainant's story and ask specific follow-up questions.
- Don't use leading questions when interviewing the complainant.
- Don't defend the accused or the complainant. Find a balance between providing comfort and trust for the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.
- Don't be confrontational.
- Don't rush the interview; allow the complainant to fully respond to questions.

DO:

- Ask open-ended questions that allow the complainant to tell the complainant's own story.

- Be polite (but firm when necessary), as the complainant will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do clarify inconsistencies, if relevant.

B. Interviewing the Accused

1. Preliminary Issues to Discuss with the Accused

- Introduce yourself and explain that the purpose of the interview is to review allegations of misconduct or concerns raised. Explain the allegations in very general terms, without being too vague to allow the accused to tell the accused's story. Avoid being too specific at the outset, as this might allow the accused to tailor the accused's responses during the interview.
- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then direct the accused not to speak to others about the investigation. Advise the accused that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a proper investigation.
- Inform the accused that the employer does not tolerate retaliation for complaints of misconduct or for participating in an internal investigation. Request that the accused immediately report any complaints of retaliation to you.
- Provide the accused with an overview of the employer antiharassment, antidiscrimination, antiretaliation, misconduct, and disciplinary action policies. Remind the accused of the employer's commitment to the policies.
- Inform the accused that a prompt and thorough investigation will be conducted.
- Obtain background employment information from the accused. Inquire as to how the accused came to work for the employer. Ask the accused to provide an overview of the accused's position and job responsibilities.
- Initially, explain to the accused why the accused is being interviewed, without revealing the name of the complainant. Assure the accused that the employer has not reached any conclusions regarding whether the

alleged misconduct occurred. See if the accused offers the name of the complainant without you having to provide the complainant's identity.

- If the accused does not identify the complainant, do **not** provide the accused the name of the complainant if you have sufficient additional facts that make it unnecessary to disclose the complainant's identity (e.g., three people came forth with similar allegations of misconduct or the alleged misconduct occur in a group meeting setting).

2. Investigating the Allegations

- Obtain information relating to the accused's relationship with the complainant. When did the accused first meet the complainant? What, if any, is the nature of their relationship (reporting, social, personal, dating, etc.)?
- As necessary, explain the specifics of each allegation made against the accused. Review one allegation at a time – that is, don't lay out all of the allegations at same time.
- Discuss the **5 W's** of each allegation against the accused. At a minimum, ask the accused to confirm or deny each allegation; however, still try to elicit more information if possible with respect to each allegation.

Sample questions to ask about each alleged incident of misconduct include:

- Who was involved in the incident that transpired between the accused and the complainant?
- What transpired between the accused and the complainant that would give rise to complaints of misconduct?
- Why does the accused think the complainant filed this complaint of misconduct?
- Where did the alleged misconduct take place?
- When did the complained of conduct occur?
- Does the accused know of any other complaint of harassment, discrimination, or other misconduct the complainant has lodged with the employer or any other employer?
- Has the accused ever been accused of misconduct before in this workplace?

- Has the complainant ever told the accused that the complainant does not like certain conduct and asked the accused to stop?
- Has the complainant initiated any jokes, gestures, or behaviors that could be considered to be harassing or discriminatory?
- If the accused denies allegations, ask why the accused believes the complainant has raised these allegations. Discuss what potential motives might exist to cause the complainant to report these complaints.
- If the complainant confirms the truth of the allegations, but claims they were not unwelcome, ask why the complainant believes the conduct was welcomed.
- Ask for any documentary evidence that the accused believes supports the accused's position, including any relevant emails, notes, text messages, social media messages, photographs, voicemails, and audio or video recordings.
- Ask the accused if there are any other witnesses or people who might have relevant information, and the extent of their knowledge.
- Periodically summarize what the accused has told you to ensure accuracy and to demonstrate to the accused that you are carefully listening.
- At the conclusion of the interview:
 - Remind the accused of the employer's policies against harassment, discrimination, retaliation, and other misconduct. Provide the accused with a copy of the policies and consider having the accused execute an acknowledgement of receipt for the policies. Inform the accused of possible disciplinary actions that could be taken in the event the accused retaliates against the complainant for filing the complaint or any of the witnesses for participating in the investigation.
 - Inform the accused that the investigation is to continue. State that the investigator(s) might have to meet with the accused again after other interviews. Inform the accused to contact you immediately regarding any concerns (including retaliation) and follow-up issues the accused might have and any additional facts or events that the accused might not have mentioned during the meeting with you. Remind the accused of confidentiality.
- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are messy,

difficult to read, or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the accused is trying to tell you. Rather, write down specifically what the accused is saying. If you are unsure about what the accused said, ask the accused to repeat or clarify what was said. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views or opinions regarding the claim or a particular allegation.
- Don't stick to a limited format of questions – cover the points in an interview outline but also listen to the accused's story and ask specific follow-up questions.
- Don't use leading questions when interviewing the accused.
- Don't defend the accused or the complainant. Find a balance between assuming the good faith of the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.
- Don't be confrontational.
- Don't rush the interview; allow the complainant to fully respond to questions.

DO:

- Ask open-ended questions that allow the accused to tell the accused's own story.
- Be polite (but firm when necessary), as the accused will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do clarify inconsistencies, if relevant.

C. Interviewing the Witnesses

1. Preliminary Issues to Discuss with the Witness

- Introduce yourself and explain that the purpose of the interview is to review allegations of misconduct or employee concerns. Explain the allegations in very general terms, without being too vague to allow the witness to respond to your questions and fill in, confirm, and/or deny the details of what happened. Avoid being too specific at the outset, as this might allow the witness to tailor the witness' responses during the interview. Normally there is less need to discuss all the allegations with each witness.
- Address confidentiality at the beginning of the interview. As discussed above, if an investigation will be compromised without confidentiality, then direct the witness not to speak to others about the investigation. Advise the witness that you will maintain confidentiality of the information discussed to the extent reasonably possible, but that you might be required to disclose some information in order to conduct a proper investigation.
- Inform the witness that the employer does not tolerate retaliation for complaints of misconduct or for participating in an internal investigation. Request that the witness immediately report any complaints of retaliation to you.
- Provide the witness with an overview of the employer antiharassment, antidiscrimination, antiretaliation, misconduct, and disciplinary action policies. Remind the witness of the employer's commitment to the policies.
- Obtain the witness' background employment information. Ask the witness to discuss the witness' position and job responsibilities.
- Obtain the witness' relationship with the accused and/or the complainant. If the witness is not an employee, obtain the witness' relationship to the employer.

2. Investigating the Allegations

- Provide a broad overview of allegations of misconduct. This will allow the witness to discuss the witness' own version of events surrounding the complaints of misconduct. To the extent possible, do **not** identify the names of the complainant and/or the accused if you have sufficient additional facts that make it unnecessary to disclose their identities (e.g., three people came forth with similar allegations of misconduct or the alleged misconduct occur in a group meeting setting).

- Inform the witness that no conclusions regarding the substance of the complaint have been made.
- Ask questions designed to elicit information from the witness while providing minimal information to the witness.

Sample questions to ask include:

- What is the witness' relationship with the complainant and the accused?
 - Did the witness observe any inappropriate conduct on the part of the complainant or the accused? If yes, find out details.
 - Did the accused engage in the complained of conduct? If yes, find out details. If no, then ask why the witness thinks the complainant made the complaint.
 - Review the lists of sample questions set forth above for the complainant and the accused to see if you should ask any of those questions to the witness.
- If the witness is unable to corroborate events, ask why the complainant, the accused, or another witness might have suggested the witness be interviewed. Generally, there is no need to disclose the name of the person who made the suggestion.
 - Ask for any documentary evidence that the witness might have related to the allegations, including any relevant emails, notes, text messages, social media messages, photographs, voicemails, and audio or video recordings.
 - Ask the witness if there are any other witnesses or people who might have relevant information, and the extent of their knowledge.
 - Periodically summarize what the witness has told you to ensure accuracy and to demonstrate to the witness that you are carefully listening.
 - Ask if the witness is willing to sign a statement if necessary. If possible, prepare written statements for signature from impartial witnesses only with the advance advice from the employer's legal counsel.
 - Inform the witness to contact you immediately regarding any concerns (including retaliation) and follow-up issues the witness might have and any additional facts or events that the witness might not have mentioned during the meeting with you.

- At the conclusion of the interview, the investigation team should review their written notes for accuracy and completeness. If the notes are messy, difficult to read, or contain shorthand, they should be rewritten or typed to improve legibility and clarity.

3. Uncooperative Witnesses

- Attempt to establish rapport and explain the investigative process in some detail (without disclosing the names of the complainant, the accused, and other witnesses if possible).
- Communicate the employer's policies against harassment, discrimination, retaliation, or other misconduct, and inform the witness that the investigative process assists in ensuring the employer's policies are being followed.
- Communicate the employer's policy regarding participation in internal investigations. If the witness is an employee and refuses to cooperate with the investigation, then advise the witness that the witness is obligated to cooperate with the investigation and a failure to cooperate might result in disciplinary action, up to and including discharge. You want to state this in a firm, professional matter-of-fact manner and not in an aggressive, threatening way.
- Document the extent of the witness' refusal to cooperate.

4. Do's and Don'ts

DON'T:

- When taking notes, don't jot down what you think the witness is trying to tell you. Rather, write down specifically what the witness is saying. If you are unsure about what the witness said, ask the witness to repeat or clarify what was said. Don't include interpretations, beliefs, assumptions, or conclusions.
- Don't communicate your personal views regarding the claim or a particular allegation. Don't slant the investigation in favor of the complainant or the accused.
- Don't stick to a limited format of questions – cover the points in an interview outline but also listen to the witness' version of the facts and ask specific follow-up questions.
- Don't use leading questions when interviewing the witness unless the witness is being uncooperative.

- Don't defend the accused or the complainant. Find a balance between assuming the good faith of the complainant and not prejudging the accused.
- Don't promise complete confidentiality from the employer.
- Don't be afraid to ask the embarrassing questions if necessary.
- Don't be confrontational.
- Don't rush the interview; allow the witness time to fully respond to questions.
- Don't threaten or intimidate a reluctant witness to provide information. Simply remind the employee-witness of the witness' duty to assist in the investigation and, if it still seems the witness is refusing to cooperate, simply note that in your investigation notes.
- Don't over-investigate – follow the scope of the investigation.

DO:

- Establish a position of neutrality.
- Ask questions that allow the witness to tell the witness' version of the facts.
- Be polite (but firm when necessary), as the witness will likely be more forthcoming.
- Take detailed notes of the interview.
- Do elicit facts and not rumor, opinion, or supposition.
- Do clarify inconsistencies, if relevant.

D. Re-Interview the Parties or the Witnesses if Necessary

- Attempt to verify information obtained in other interviews or documents.
- Be direct; address material contradictory information.
- Try to keep the source of contradictory information confidential.

V. Summarizing the Results of the Investigation

The final step in an investigation is to analyze the information gathered to date, take steps to resolve the complaint, and closeout the investigation.

A. Analyzing the Investigation

- Summarize the information obtained from the accused, the complainant, and the witnesses. Include the dates each individual was interviewed and the identity of the investigators and anyone else who was present during the interview (e.g., a union representative, a sign language interpreter, or a lawyer).
- Draft a detailed statement of the facts, including a chronology of the events as described by each individual participating in the investigation.
- Determine the existence of any evidence supporting/undermining facts. For example, consider any documents, emails, notes, text messages, social media messages, photographs, voicemails, and audio or video recordings.
- Consider behavioral factors and body language (e.g., eye contact, defensive tone, emotion) of the complainant, the accused, and the witnesses when assessing the credibility of their stories. Be sure to factor in how such individuals interact with coworkers under normal circumstances (e.g., because of cultural or personal reasons, such as shyness or a disability, an individual might not make regular eye contact in day-to-day interactions).
- Establish and identify other indicia of the credibility of the complainant, the accused, and the witnesses, such as their reputations for honesty, any reasons that might have to lie, reluctance or refusal to answer, selective memory, and the overall believability of their stories.
- Identify any factual inconsistencies in and among the accounts of the events provided by the complainant, the accused, and the witnesses.
- Identify facts that would indicate conduct was more likely than not either welcomed or unwelcomed, and distinguish between the two when applicable. For example, the complainant might have tolerated or begrudgingly participated in inappropriate banter with coworkers for a period of time in order to fit in or not be criticized, but over time the banter or related conduct became more extreme and/or intolerable. Note that continuous inappropriate banter could be an indicator that a supervisor was aware – or should have been aware – of the banter and never took action to stop it, in which case the supervisor should be appropriately disciplined if warranted.

- If possible, consult with the employer's legal counsel prior to reaching conclusions as to the merit of complaints being investigated.

B. Making a Determination Regarding the Merits of the Complaint

- Determine which version of the facts is most credible.
- Determine whether evidence is sufficient to establish that the alleged misconduct occurred and whether the employer's policies were violated.
- In evaluating the conduct, consider, among other things, the following factors, which bear on whether inappropriate misconduct occurred and the degree of discipline that might be appropriate:
 - Frequency and pattern of coworker and supervisory conduct – is the conduct repetitive and pervasive or random and isolated?
 - Were incidents occurring "on the job," during virtual communications, and/or in "social settings"? Were the virtual communications or social settings in any way related to work?
 - Did the conduct consist of comments, communications, messages, suggestions, and/or innuendo or did it extend to indecent or unwanted propositions, touching, and/or direct observations of a sexual nature?
 - Was there supervisory tolerance of, contribution to, or direct participation in inappropriate conduct or a hostile work environment?
 - Was crude, vulgar, or other highly-offensive language used? Was it annoying or severe?
 - Did the conduct consist of isolated jokes and/or teasing or persistent pressure for dates and/or display of sexually-explicit material?
 - As to disputed issues, what evidence have you obtained that supports or undermines the statements made by the complainant, the accused, and any witnesses?
 - How much is direct evidence? How much is circumstantial or hearsay?
 - Was the conduct truly "welcomed" or was it acquiesced to and tolerated by the complainant because the complainant could not risk losing employment?
 - What are the reputations of the complainant, the accused, the witnesses, and other participants for truthfulness and/or credibility?

- Did the misconduct extend to the entire department/working unit or was it limited to a few actors?
- Are there undisputed facts between the claimant's and the accused's versions of what occurred?
- Did the conduct of the accused constitute inappropriate conduct even if it did not constitute a policy violation?

C. Deciding Corrective and/or Disciplinary Action

- Consult applicable policies to determine the appropriate disciplinary action with respect to findings of misconduct.
- Give consideration to the nature, duration, and seriousness of the misconduct when determining the nature and extent of corrective or disciplinary action. For example, in the absence of any additional facts, a supervisor's demands for sexual favors in order for an employee to stay employed would be viewed as significantly more serious than a nonsupervisory coworker's request for a date with no threat involved.
- Consider the accused's position when making the disciplinary determination because depending upon the factual findings, a more severe penalty might be appropriate for a supervisor than a nonsupervisory coworker.
- Factor in prior misconduct by the accused, and whether the Company has a progressive discipline policy. A well-written progressive discipline policy should provide that progressive discipline can be skipped in cases of serious misconduct.
- Consider disciplinary action taken in previous cases involving other employees. Try to be consistent with discipline given for similar misconduct, especially where imposing different discipline might be seen as having a disparate impact on persons in a protected class (i.e., accused employees who are members of a protected class receive harsher discipline for similar misconduct).

However, if the prior discipline is determined in retrospect to have been inadequate or if a new manager has higher expectations for the workforce than the prior disciplining manager had, then stronger discipline might be appropriate. In addition, it is permissible to impose a stronger disciplinary measure on supervisors. Document the reasons for imposing harsher or lesser discipline.

- Take remedial action if necessary. Examples include, but are not limited to:
 - Re-issue antiharassment, antidiscrimination, antiretaliation, and other relevant misconduct policies and complaint procedures to the accused and possibly to the entire work group or to the entire workforce at all locations. Consider new or refresher one-on-one training for the accused and possibly for the entire work group or for the entire workforce at all locations. Also evaluate if similar misconduct might be occurring in other parts of the organization.
 - Discuss the incident with the accused and others who might have participated in the misconduct or failed to act sooner to stop it.
 - Ensure that the offensiveness of the misconduct is clearly understood by the accused and other wrongdoers.
 - Call for its cessation.
 - Point out the potential consequences if corrective action is not taken or the misconduct is repeated in the future.
 - Request an apology.
 - Decide on the punishment to be imposed on the accused:
 - Issue a written reprimand to the accused.
 - Change the job assignment of the accused.
 - Transfer the accused.
 - Place the accused on probation.
 - Suspend the accused without pay.⁵

⁵ If the accused is an “exempt” employee for wage-hour purposes, the employer must make sure that any suspension without pay is implemented in a manner that does not violate the federal Department of Labor’s rule relating to docking the pay of exempt employees. In particular, 29 C.F.R. 541.602(b) provides that:

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of **safety rules of major significance**. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more **full** days imposed in good faith for

- Make the accused bonus ineligible.
- Lower the performance rating of the accused.
- Demote the accused.
- Dismiss the accused.
- Decide if discipline needs to be imposed on:
 - Supervisors who ignored the misconduct or who should have detected the misconduct had they been diligent.
 - Employees, including supervisors, who refused to cooperate with the investigation or engaged in retaliatory conduct.
- In those instances where the investigative results do not support a finding that the accused engaged in conduct violative of the employer's policies, no remedial action might be necessary. However, if the investigation reveals that some employees (or volunteers) in the workforce are not cognizant of the employer's policies, consider providing additional training, which can range from a redistribution of the applicable policies (accompanied by a memo from senior management) to virtual or in-person group training sessions.⁶
- Document any disciplinary action taken against the accused, and, if possible, have the accused sign the notice of corrective action taken against the accused. If the accused refuses to sign the corrective action form, note the refusal to sign and any reasons the accused provided for the refusal.⁷ Document any other corrective actions taken (e.g., harassment prevention training sessions conducted).

infractions of workplace conduct rules. **Such suspensions must be imposed pursuant to a written policy applicable to all employees.** Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence. [Bolding added.]

⁶ Employers are obligated to conduct periodic harassment prevention training and should not wait to conduct such training until after misconduct is reported. In addition, updated periodic training permits employers to educate employees (and volunteers) about evolving expectations, such as not discriminating against individuals based on their gender identity or expression, sexual orientation, or marital status, or other protected characteristics.

⁷ See footnote 8 below for a further discussion of how to deal with employees who refuse to sign corrective action forms.

Also document any disciplinary action taken against any other persons as a result of the investigation.

D. Prepare the Investigative Report

- Include the following in the Investigative Report:
 - Summary of the allegations.
 - Remedy requested.
 - Summary of relevant policies, procedures, rules, or instructions.
 - Summary of the interviews with the complainant, the accused, and the witnesses.
 - Description of relevant documents reviewed.
 - Chronology of events.
 - Statement of findings of fact (allegation-by-allegation). Identify whether the allegations are factually substantiated, not substantiated, or partially substantiated and why. Stick to the facts and do not editorialize or use accusatory language (e.g., no: “The supervisor dropped the ball” vs. yes: “The supervisor did not report the issue to HR.”).
 - Statement of conclusions drawn from the allegations (if requested). Frame the conclusions in relationship to any violations of the Company’s policies, procedures, rules, or instructions.

Don’t summarize or conclude any violation of state or federal law has occurred. You are not a lawyer.

- Explain credibility determination. If facts alone do not support credibility determination, describe the elements affecting credibility determination.
- Discussion of recommendations for the actions to be taken (if requested).
- Don’t include any legal advice or communications with internal or external legal counsel since such communications are privileged and the report might become discoverable in litigation.
- Note: Depending upon the circumstances, a written investigative report is not always required.

E. Prepare the Investigative File

- Include the following in the investigative file:
 - Complaint.
 - Log of investigator's actions, including dates.
 - Statements and/or interview notes from the complainant, the accused, and the witnesses.
 - Documents related to the complaint and other relevant physical evidence.
 - Investigative Report.
 - Documents regarding follow-up meetings with the complainant and the accused and the corrective actions taken (e.g., training provided as part of corrective action).
- **Be sure the investigative file is accurate and complete and does not contain extraneous materials or privileged communications – the file might be subject to discovery in a subsequent legal proceeding.**
- **The investigative file should be kept by the human resource department, separate and apart from any personnel file and accessible only to those investigators involved in that particular investigation.**

F. Discussing the Results of the Investigation

- Report to the complainant and the accused that the investigation is concluded and that appropriate action has been taken, but do not provide a copy of the written report. You are not obligated to provide extensive details of investigation findings or provide copies of the investigation file.
- If you were not able to substantiate allegations, inform the complainant. If the complainant does not believe the matter was satisfactorily handled, allow the complainant to advise what additional actions the complainant would like to see taken.
- If disciplinary action was taken against the accused, you can advise the complainant that appropriate action has been taken against the accused. If the complainant asks what action or discipline was imposed, you should advise that such information is subject to employee confidentiality.

If a witness asks about whether anyone was disciplined, you should advise that such information is subject to employee confidentiality.

- Remind the complainant and the accused that the employer will not tolerate retaliation and the complainant should immediately report any retaliation to you or some other designated person (e.g., the Chair of the Board's Personnel Committee).
- Consider providing a statement for the complainant to sign stating that the complainant has been informed that the investigation has concluded.
- If disciplinary action is being assessed against the accused, consider providing a statement for the accused to sign stating that the accused has been informed of the results of the investigation, is in agreement with any disciplinary action/corrective action taken as a result of the investigation, and promises not to engage in the same or similar misconduct in the future.⁸
- If any of the conduct has been a repeating pattern, consider revising the employer's policies and training to emphasize the unacceptable nature of the conduct in attempt to minimize the reoccurrence of the conduct in the future.
- Submit the Investigative Report to the appropriate individuals on a need-to-know basis, but not if they were accused of wrongdoing: your manager, the Director of Human Resources, the Executive Director/CEO, the Chair of the Board's Personnel Committee, or in-house legal counsel.

G. After the Investigation Is Completed

- Periodically follow up with complainant to ensure that complained of conduct has not resumed and there has been no retaliation.
- Document the results of any follow-up conversation with participants.
- Ensure that no retaliation has taken place as a result of a person having, in good faith, complained about misconduct or participated in the internal investigation. Carefully review subsequent employment actions (e.g.,

⁸ Some employees will refuse to sign corrective action forms, especially if the forms require the employees to acknowledge the wrongdoing occurred and promise not to engage in such misconduct in the future. If an employer wants to minimize the risk that an employee will push back, the form could merely require that the employee acknowledge receipt of the correction action form. However, it is preferable that an employee acknowledge the wrongdoing occurred and promise not to engage in such misconduct in the future.

If an employee refuses to a sign corrective action form, then the employer should document that fact on the form and consider whether such refusal is grounds for further discipline.

performance reviews, promotions and demotions, and compensation decisions) for signs of retaliation.

H. Do's and Don'ts

DON'T:

- **Don't make blanket, conclusory statements that any illegal conduct occurred; e.g., don't write "Allegations of illegal harassment substantiated."** Rather, if applicable, state that the accused engaged in inappropriate conduct that violated the Company's policy, procedure, rule, or instruction relating to [insert topic] that warrants disciplinary action.
- Don't destroy any of the documentation after completion of the investigation and maintain it in a file separate and apart from employees' personnel files. Notes that were messy, illegible, or contained shorthand and therefore were rewritten or typed to improve legibility and clarity can be shredded.
- Don't automatically reassign the complainant to a new position, department, or location because such action could be seen as punitive or retaliatory. If the complainant requests a transfer, then try to get the complainant to make a written request that indicates that the request is being made voluntarily.
- After investigation is completed, don't discuss any information obtained during the investigation with others, except on a strictly "need to know" basis.

DO:

- Do make sure that notes provide an accurate account of the parties' interpretation of the events.
- Do make sure the record of disciplinary action taken against the accused or other wrongdoer is placed in the employee's personnel file.

VI. Recap: 11 Costly Mistakes

1. Ignoring the complaint.
2. Delaying the start of the investigation.
3. Selecting an investigator who is viewed as biased to either the complainant or the accused.
4. Guaranteeing "absolute and complete" confidentiality.

5. Failing to interview and listen attentively to the complainant, the accused, and other relevant witnesses.
6. Failing to maintain the confidentiality of the complaint and the investigatory process.
7. Threatening, coercing, or intimidating the witnesses.
8. Failing to complete the investigation promptly.
9. Failing to protect the complainant and the witnesses from retaliation.
10. Failing to follow up with the complainant after the investigation is completed.
11. Failing to take appropriate disciplinary or other corrective action, especially after promising to do so.

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