

## **Workplace Investigations: “Who, What, Where, When, (*and especially*) How”**

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### ***Workplace Investigations***

Employers must often conduct an investigation after receiving information that something unlawful might have happened in the workplace. State and federal laws actually *require* investigations in certain situations, such as after an employee complains of harassment or discrimination. In other situations, employers *should* conduct an investigation even if not formally required by law. But *how* do you prepare and conduct an adequate investigation? The law provides very little guidance on this issue, though some basic principles have developed over time. Keeping these principles in mind, and using them in all investigations, can help meet the general goals contained in state and federal employment laws.

### ***When are investigations required?***

Investigations’ “traditional” role has been under equal employment opportunity (“EEO”) law, such as those prohibiting unlawful harassment and discrimination. They have long been seen as part of employers’ duty to take action after receiving an employee complaint, discovering information such as inappropriate e-mails or internet use, or hearing rumors or third-party reports of harassment.

An effective investigation policy can also help show that the employer satisfied its obligation to take all steps “reasonably necessary” to prevent and promptly correct unlawful harassment. Proper investigations may even provide a defense to liability in some states, or to damages in others. For these reasons, the development, communication and application of consistent, predictable investigation procedures are essential parts of employers’ risk-management strategy.

### ***What does a good investigation require?***

Some laws have general terms that *sound* like specific requirements but really are goals, such as “prompt,” “thorough,” “objective,” “interactive,” and “reasonable.” None of these goal-oriented terms say *how* to conduct an investigation, but some agencies such as the federal Equal Employment Opportunity Commission (“EEOC”) have provided their own guidance.

The EEOC's guidelines suggest the following steps:

### **Interview Witnesses**

#### **Complainant:**

Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you? How did you react? What response did you make when the incident(s) occurred or afterwards? How did the harassment affect you? Has your job been affected in any way? Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment? Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person? Are there any notes, physical evidence, or other documentation regarding the incident(s)? How would you like to see the situation resolved? Do you know of any other relevant information?

#### **Alleged Harasser:**

What is your response to the allegations? If the harasser claims that the allegations are false, ask why the complainant might lie. Are there any persons who have relevant information? Are there any notes, physical evidence, or other documentation regarding the incident(s)? Do you know of any other relevant information?

#### **Third Parties:**

What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace. What did the complainant tell you? When did s/he tell you this? Do you know of any other relevant information? Are there other persons who have relevant information?

### **Make Credibility Determinations**

**Inherent plausibility:** Is the testimony believable on its face? Does it make sense?

**Demeanor:** Did the person seem to be telling the truth or lying?

**Motive to falsify:** Did the person have a reason to lie?

**Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that

they occurred) or physical evidence (such as written documentation) that corroborates the party's story?

**Past record:** Did the alleged harasser have a history of similar behavior in the past?

### **Making a Determination**

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

### ***Adapting the EEOC Method***

The EEOC suggestions sound like journalism school – good old “who, what, where, when, how.” This format works well for almost all factual as well as EEO investigations; employers should consider adapting it for use whenever investigations are required and, even when not required, when the employers want to investigate workplace issues such as performance and misconduct. Using consistent, predictable procedures will help show both that an employer was prepared to deal with workplace issues in advance and that it acted in good faith when reaching its conclusion on any issue. This can go a long way toward showing compliance with employment laws and – as an added bonus – avoiding expensive employment claims and lawsuit.

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