

The Top 5 Pitfalls To Avoid When Conducting Workplace Investigations

By: Julie A. Vogelzang

Virtually all managers and HR professionals have found themselves in the position of having to investigate complaints of potential wrongdoing. Of course, employers are specifically required to investigate certain things, particularly allegations concerning harassment or discrimination. All such investigations should be prompt, neutral, thorough and effective. Even those complaints that do not touch upon a legally protected right are often the subject of investigations because employers strive to follow policies and to maintain morale and perceptions of general fairness in the workplace. This article overviews the most common pitfalls when conducting internal investigations.

PITFALL NO. 1: Failing to Promptly Begin the Investigation

Virtually all investigations need to be started promptly upon learning of an issue in the workplace. First, policies must be followed and most policies demand a prompt investigation. Second, even in the absence of policies, harassment and discrimination laws require promptness in conducting investigations. Third, one of the worst things a company could face is a jury trial where a juror believes that the company lagged in looking into the issues, thus leading to the potential for ongoing misconduct that was not stopped immediately.

PITFALL NO. 2: Failing to Use an Experienced and Neutral Investigator

For those situations that legally require an investigation, such as a claim of sexual harassment, employers err if they randomly assign the investigation to someone without experience. If that person doesn't interview all of the appropriate witnesses, or doesn't review the personnel or other files that are significant, the employer can face potential exposure for the failings of the investigator, in the form of claims of an inadequate investigation or punitive damages aimed at punishing the employer.

Anyone who is tasked with conducting investigations should be trained on how to properly and thoroughly conduct an investigation. It is often prudent to have the company lawyer oversee the investigation to ensure the proper steps are being taken. In some situations, it may be advisable to hire an outside, experienced investigator to conduct the investigation. This is a good idea if a high level manager is accused of misconduct, or if the accusation is unusually significant or involves a large number of witnesses.

Finally, the investigator must be "neutral;" that is, someone who does not have a stake in the outcome of the investigation and someone who is not herself a witness to the issues being investigated.

PITFALL NO. 3: Punishing the "Victim"

Often the best-intentioned employers decide to transfer the party who is bringing the complaint, or to put that person on a paid leave. Sometimes, separating the involved parties seems like the best course of action, especially during the pendency of an investigation. While this is often a good idea, taking any action that could be perceived as harmful or embarrassing to the "victim" can be detrimental to the employer. When possible, it is better practice to temporarily transfer or suspend the accused with pay pending the investigation. This way, the person bringing the complaint is not punished or put in any disadvantaged position for having come forward.

The same goes for those companies which have a practice of forcing the "victim" to confront the accused. Again, it places pressure on the victims and can put them in an awkward position if they are forced to confront the very person they are complaining about.

PITFALL NO. 4: Not Having a Reporting Structure in Place

Like much else in business, it is prudent to set up an “investigation team” at the outset. This is so that the investigation and any actions taken do not fall exclusively on the shoulders of one person. If there are layers of management involved, issues can be vetted by a group rather than one person, and any subsequent claims against the investigator of wrongdoing, lack of thoroughness, bias, etc. are significantly minimized.

In many cases, HR personnel conducts the investigation and then reports the findings to management. This is often a fine practice. In such cases, the HR employee can report her or his process, findings and recommendations and management can make the decision on what action to take if any. In other cases, as mentioned, employers use their lawyer to oversee the investigation to ensure that the reporting process is being competently handled and that HR and upper management are legally protected.

PITFALL NO. 5: Promising Confidentiality

Finally, anyone who has ever conducted an investigation knows that one or more witnesses invariably ask for confidentiality, or they state that they will only reveal what they know under conditions of confidentiality. Investigators err if they promise to keep information gleaned during an investigation confidential. This is because such a promise usually cannot be kept. The investigator will be reporting the statements to management; they may be sharing the statements with other witnesses so that a thorough investigation can be conducted; and if there is ever a lawsuit brought, the statements will likely need to be disclosed at that time.

Whenever HR personnel or management is approached with a complaint or a concern, they can indicate that it will be treated as sensitively as possible, but that it does need to be addressed by the company.

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