



Complex Workplace Investigations 2014 Montana SHRM Conference May 8, 2014

Introduction

Workplace issues such as complaints, misconduct, or alleged harassment/discrimination affect the entire organization. At one time or another, human resource (HR) practitioners will need to respond to a complaint, evaluate alleged misconduct, or determine if policy has been violated in the workplace. These events require HR professionals to develop a plan, conduct interviews, gather facts, sort out the details, and reach a conclusion that often leads to an employment decision. Workplace investigations need to be non-biased, thorough, and well-documented. Findings and reports are often subject to challenges during a lawsuit and review by external agencies. In addition to documenting management responses to complaints and allegations, a well-done workplace investigation can also benefit employers in other ways like finding amicable solutions to workplace conflicts, identifying and resolving barriers to organizational effectiveness, and demonstrating the employer's commitment to objective and appropriate treatment of employees.

Learning Objectives

This program will address issues associated with conducting complex workplace investigations including:

- Identifying issues, defining scope and developing plans;
- limiting the scope of investigations to workplace issues;
- addressing issues where off-site or off-duty conduct is affecting work performance;
- ensuring workplace fact-finding is comprehensive and balanced;
- anticipating challenges from the subject(s) of investigations;
- developing effective recommendations to resolve workplace issues and improve organizational performance; and
- documenting findings in a clear and understandable manner so they can be used by management to make employment decisions.

The information contained in this handout represents suggestions for HR Practitioners. You should always consult a qualified attorney licensed to practice in your jurisdiction regarding any specific legal problem or matter.

Investigation Scope and Plan

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| Workplace issues requiring investigation | <ul style="list-style-type: none">• Responding to a complaint or grievance• Evaluating alleged misconduct• Determining if a policy violation has occurred in the workplace• Initiating formal investigations versus informal inquiries |
| Determining your approach | <ul style="list-style-type: none">• Identifying issues• Defining the policies or standards potentially violated• Determining the company's responsibility• Defining the scope• Developing an investigation plan• Determining interim steps required during investigation (e.g., administrative leave, separating employees, changing reporting relationships/shifts, etc.)• Developing plans for the treatment of parties, identifying what they think is fair, and determining how to communicate and implement the process (including considering the impacts on the work unit)• Implementing strategies to avoid perceived or actual retaliation |
| Typical investigation sequence | <ol style="list-style-type: none">1. Reviewing all relevant documentation (e.g., written complaint, emails, written witness statements, etc.)2. Interviewing the complainant3. Interviewing witnesses4. Interviewing the subject5. Evaluating findings in relation to relevant standards and policies6. Preparing your report7. Providing/implementing recommendations |
| Referral to or cooperation with outside parties | <ul style="list-style-type: none">• Law enforcement, mental health professionals, attorneys, private investigators• Workplace violence• Allegations of crimes (e.g., theft, assault, exploitation, drugs)• Issues outside the workplace (e.g., off-duty stalking or assault, certain pre-employment inquiries into personal character) |
| Maintaining documentation throughout investigation | <ul style="list-style-type: none">• The information you will present and how you will present it• Summary report (introduction, methodology, list of witnesses, findings, recommendations) – report or portions of report may be exhibits• Interview summaries• Documentation (report attachments)• Relevant policies or standards• Notes and documents (subject to discovery - considerations for note taking) |

Interviews

Interview opening remarks

- Explain the purpose of the interview/investigation
- Protection from retaliation for participation
- Requirement for truthful responses/avoid speculation
- Conveying confidentiality vs. need-to-know; right to privacy; and the requirement to report any findings of violation of policy
- Requirement/instruction to not discuss this with anyone else
- Anticipated next steps/outcomes

Areas of inquiry

• Complainant

- Who, what, when where and how: *Who* committed the alleged inappropriate behavior? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How* did it affect you?
- Has your job been affected in any way?
- What preceded the incident?
- What did you do or say?
- What happened in addition to or since the incident?
 - Who may have seen or heard the incident? Are there any persons who have relevant information? Was anyone present when the alleged behavior occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged inappropriate behavior?
- With whom have you discussed the incident?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the behavior affect you? Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?
- What solutions do you propose?

Areas of inquiry

• Witnesses

- Who, what, when where and how.
- Define the chronology of events and compare complainant, witness, and subject responses.
- What preceded the incident?
- What did the offender do or say?
- What did the subject do or say?
- Who else may have seen or heard the incident?
- With who have you discussed the incident?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Areas of inquiry

• Subject

- Provide details regarding the allegations (who, what, when, where, how)
- What is your response to the allegations?
- If you feel any of the allegations are false, why might the witnesses 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 or witnesses?

Evaluating Information

Investigation development

- Limiting the scope of investigations to workplace issues & addressing issues where off-site or off-duty conduct is affecting work performance,
- Addressing additional issues or allegations that arise
- Determining relevance of information

Ensuring workplace fact-finding is comprehensive and balanced

- Talking to relevant witnesses
- Allowing subjects to respond to allegations
- Identifying potential complainant or witness motives
- Identifying gaps in information
- Documenting unsubstantiated allegations or actions that do not violate policy
- Understanding the perspectives of the complainant and the subject of the complaint and using them to their and the organization's advantage

Validating information and issues of credibility

- Seeking documentation or witnesses to back up allegations
- Identifying inconsistent statements or omissions
- Avoid jumping to conclusions regarding credibility
- Assessing logic and consistency of story
- Relaying information regarding demeanor
- Presenting all relevant information so decision-makers (e.g. management and legal counsel) can draw accurate conclusions or identify areas for further inquiry

Anticipating challenges

- Pre-determined outcome
- Not talking to enough people
- Investigator bias
- Witness impeachment (omissions, inconsistent statements)
- Importance of coordination with legal counsel if significant disciplinary action or termination is indicated

Developing effective recommendations

- Resolve workplace issues and improve organizational performance.
- Recommendations may be separate from report
- Identify recommendations from complainants, witnesses and subject
- Develop recommendations based on policy, procedure and precedent
- Develop recommendations based on best practices in human resource management
- Consult with other professionals as appropriate
- Communicating investigation results

Documenting findings

- Signed interview statements** For investigations that will likely lead to significant employment actions, prepare a typed interview summary, have the interviewee review the summary, and have them sign the summary attesting that “the information I have provided is true and complete to the best of my knowledge.”
- Introduction** The report introduction should include why by whom the investigation was initiated, the involved individuals and/or work units, the purpose of the investigation and report (e.g., the specific areas being evaluated), the dates the investigation took place, and guidance for management on what to do with the information (e.g., determining potential corrective action, providing due process to subjects, debriefing with involved parties, etc.).
- Methodology and list of interviewees** The methodology and list of interviewees should describe how the investigation was conducted (e.g., the sequence of events, information considered) and a list of interviews conducted including the date/time, interviewee name, and interviewee role (e.g., complainant, subject, witness) and title).
- Findings** Summarize the findings of the investigation including whether or not the subject’s conduct violates policies or standards; the information (e.g., evidence or witness statements) that lead to these conclusions, citation of the specific policy or standard violated; and any other relevant issues (e.g., themes or potential solutions to problems) identified during the investigation.
- List of attachments** Provide a detailed list of all attachments including the written complaint(s), signed interview statements, relevant policies, emails or other correspondence, etc.
- Submission** Include the date of the report and the name/signature of investigator.

Ensure management can use the report to make and defend employment decisions.

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