

INVESTIGATION CHECKLIST: DO's AND DON'Ts

A. Planning

- Determine purpose and scope of investigation
- Who should investigate?
 - Single or multiple departments?
 - ? Include security? IT? legal counsel? other?
 - Investigator(s) should be free of bias and appearance of bias.
- Determine timeline by which investigation should proceed / be completed.
- Will investigation tread into unfamiliar territory? If so, review do's and don'ts with legal counsel.
- Is litigation likely? If so, involve legal counsel.
- Is there potential criminal liability? If so, involve legal counsel and determine whether Security and/or law enforcement should be contacted?
- Take appropriate interim action, if warranted (e.g. possible suspension or transfer of alleged wrongdoer).

B. Selecting Investigative Tools

- **Review materials appropriate to investigation**
 - Personnel policies
 - personnel files
 - HR records of previous complaints involving accused and accuser
 - medical and/or disability files
 - surveillance tapes
 - e-mails
 - drug testing results
 - conviction check results
 - background check results
 - security records of entering and leaving building
 - work schedules and/or employee time sheets
 - expense reports and payroll records
 - network or system log in records
 - Internet use reports
 - documents on employees' local hard drives, personal network drives, and other devices
 - work phone records of incoming/outgoing calls and voice mail messages
 - phone, email and instant messaging records on company cell phones
 - social media content
 - external records (e.g. phone company or bank records)

- **Consider other investigative tools**

- reasonable suspicion drug or alcohol test
- “mystery shopper”
- psychiatric or medical fitness for duty exam
- private investigator
- cameras, video recording

C. Interviews

- Use two HR professionals; one to ask questions and one to take notes and act as witness.
- Begin with complainant...then corroborating witnesses...then alleged wrongdoer.
- Conduct interview in private setting/minimize interruptions.
- If decision maker or accuser relies upon a third party, interview that person. Do not rely upon hearsay if it can be avoided.
- Consider whether Security should be nearby or on stand-by
- Explain purpose of interview.
- Let all interviewees know that...
 - The company takes these allegations very seriously.
 - It is expected that employees will actively participate in investigations and respond truthfully to all inquiries.
 - There will be no retaliation. If interviewee believes anyone is retaliating, it should be reported immediately.
 - Confidentiality is requested from all. Water cooler conversations about the investigation or questions asked in interview could impair the investigation.
 - Neither interviewer nor company can guarantee confidentiality to the interviewee, but will exhibit discretion and share information only on a need-to-know basis.
- Outline questions pre-interview.
- Have copies of relevant documents available to show to witness.
- Begin with facts (who, what, where, when, why, how).
- Ask open-ended questions (“Tell me about...”).
- Listen to answer/observe body language.
- Ask follow-up questions as appropriate based upon answers received.
- Ask interviewee if there are additional documents or other evidence that relate to the investigation.
- Create a written record of interviews/timeline that includes dates, locations and participants (including second HR rep).
- Document impressions: (e.g. witness evasive, angry, tearful, inconsistent). Remember...document the behavior and observations, do NOT draw conclusions!

- Ask interviewee to write his/her own statement in addition to notes. If interviewee resists, type up your notes and have him/her – in your presence – review and edit/sign-off on your notes.
- Do not communicate your personal views of the claim or a particular allegation.
- Do not characterize interviewee's responses or provide an opinion in your notes or during any of the interviews.
- Do not point out inconsistencies in interviewee's responses and attempt to resolve them.
- Revise scope of investigation, as appropriate, to follow up on new information raised in interview.
- Re-interview employees to verify information obtained in other interviews or documents. Try to keep the source of contradictory information confidential.

- **Complainant (in addition to above)**

- Ask complainant what outcome he/she is looking for.
- Do not make any promises (other than that the company is undertaking a thorough investigation)
- Provide complainant with a deadline by which you reasonably expect to complete the investigation.
- Update Complainant if investigation will extend beyond deadline so he/she knows the investigation is still in process.

- **Accused (in addition to above)**

- Give the accused full opportunity to share his/her side of the story.
- Don't disclose identity of witnesses other than Complainant.

D. Reaching A Conclusion

- **Tools to Determine Credibility:**

- Memory
- Perception
- Consistency with statements of others and with contemporaneous written records (e.g. time or cell phone records, e-mails, etc.)
- Consistency of witness's own accounts
- Bias (What else is going on in the workplace? Any ulterior motive?)
- Witness's ability to observe
- Witness's prior history of (mis)conduct
- Plausibility of account (common sense)
- Body language and behavior during interviews and investigation

- **Decision-Making**

- Review and evaluate all of the evidence.
- Review policies/determine violation (if any).
- Prepare a written factual (NOT conclusory) investigation summary if appropriate. Include:
 - The time of, and information regarding, the initial complaint;
 - A summary of the basic allegations of the case;
 - A summary of the interviews, including credibility assessments;
 - A summary of the investigator's factual findings;
 - A statement of remedial action recommended to final decision maker.
- Decide if disciplinary action is appropriate.
- Decide if counseling or other remedial action is warranted even if no policy violation occurred.

E. Communication and Follow-Up

- Communicate separately to complainant that investigation is completed.
 - If appropriate, communicate results of investigation in general terms.
 - Communicate to complainant any actions to be taken that directly impact complainant.
 - Avoid specifics when addressing actions that only impact others.
- Decide if third parties (law enforcement/regulators) should be notified.
- Communicate separately to the accused that investigation is complete.
 - Impose discipline if appropriate.
- Ensure information is communicated only to those with "a need to know."
- Ensure no retaliation. Monitor regularly and carefully.
- Audit internal operations that allowed event to occur.
- Revise operational and personnel policies/procedures if and as appropriate.
- Re-train and re-distribute policies if and as appropriate.

F. Preserving Evidence

- Does evidence need to be safeguarded?
- Has electronic data been saved?
- Have key documents been identified and preserved?
- Should photographs be taken to preserve evidence (*e.g.*, evidence of physical injury, defacement of property, offensive graffiti or posters, etc.)?
 - If so, date and time each photo.
- Maintain a separate investigative file – in a secure place - that contains all original documents, statements, photos and other items of evidence relied upon in investigation.

G. PRACTICES TO AVOID

- ✓ DO NOT copy anyone on documents who is not in the direct decision making loop/avoid “cc”ing scores of others. The fewer in the loop, the better.
- ✓ DO NOT retain drafts. Once a final document is complete, discard the drafts.
- ✓ DO NOT begin interviews by asking leading questions. (e.g. “Didn’t you inappropriately touch Jill?” or “Isn’t it true that you falsified your time?”)
- ✓ DO NOT discuss the investigation or results with anyone who does not have a compelling business need to know.
- ✓ DO NOT diagnose a medical or psychological illness as the reason for the problem (unless the accused requests a reasonable accommodation).
- ✓ DO NOT stereotype any of the accused, victims or witnesses.
- ✓ DO NOT ask judgmental questions.
- ✓ DO NOT appear to have made up your mind.
- ✓ DO NOT promise complete confidentiality to the alleged victim or any witness – you have a legal duty to investigate and, where appropriate, to allow the accused employee to know the allegation against him or her.
- ✓ DO NOT promise an “off the record” discussion. An allegation of unlawful conduct cannot be ignored even if the employee asks that you take no action.
- ✓ DO NOT coerce witness, or refuse to let witness leave the room.
- ✓ DO NOT allow witness/accused to bring legal counsel to the interview. This is not a courtroom.
- ✓ DO NOT allow witness/accused to refuse to cooperate with the investigation, even if there is a threat of criminal jeopardy.
- ✓ DO NOT incorporate a guarantee of best investigation practices in company policy, but DO keep this list as an informal confidential guideline.

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