

Conducting an Internal Investigation

Delaware Valley Employment Law Conference

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TOPICS TO BE COVERED

- Recognizing the need for an investigation
- Reasons for conducting investigations
- How to prepare for an investigation
- Common mistakes in interviews
- Order of interviews
- Conducting an effective interview
- Uncooperative witnesses
- Decision-making based on the results of an investigation
- Documentation

CIRCUMSTANCES THAT WARRANT AN INVESTIGATION

- Suspected employee misconduct
- Employee complaints
- Customer or vendor complaints
- Anonymous complaints
- Workplace accidents
- Theft or suspected theft

RECOGNIZING THE NEED FOR AN INVESTIGATION

An employer may need to conduct an investigation even if:

- No one requests that an investigation be conducted
- The person complaining requests that no investigation be conducted
- The person complaining states that he or she is speaking “off the record”
- The employer’s policy requires that complaints be in writing, and no written complaint has been filed
- The relevant facts appear to be incontrovertible

REASONS FOR CONDUCTING INVESTIGATIONS

- Gather facts and relevant evidence, so that appropriate employment action can be taken
- Obtain information that may assist the employer in defending against employment claims
- Act of investigating may assist employer in avoiding liability
- Affords a wrongdoer the opportunity to lie
- Locks in witnesses to facts, before there is an opportunity to collaborate or to conform their stories to the evidence
- Demonstrate employer's seriousness in addressing issues of possible misconduct
- Demonstrate employer's fairness in addressing issues of possible misconduct

PREPARING FOR THE INVESTIGATION

- Determine whether to use an attorney
- Investigate promptly
- Determine who should participate in the investigation
- Don't "wing it"
- Review the allegations
- Review relevant policies
- Review relevant personnel files
- Create a consistent opening statement for use with witnesses
- Prepare an outline of questions to be asked
- Select a private and quiet interview space

OPENING STATEMENT FOR WITNESS INTERVIEWS

- Attempt to put witness at ease
- Explain reason for interview
- Explain importance of truthful and complete information
- Explain confidentiality rules that apply
- Explain employer's rules against retaliating and procedure for reporting retaliation

COMMON MISTAKES DURING INVESTIGATORY INTERVIEWS

- Approaching the interview with a closed mind
- Disclosing the evidence before questioning the witness
- Making admissions harmful to the employer
- Promising confidentiality
- Demonstrating bias
- Failing to document the interview
- Automatically telling witnesses not to discuss the complaint with others

ORDER OF INTERVIEWS

- Complainant
- Accused
- Witnesses identified by Complainant or the Accused known to the employer
- Complainant

INTERVIEWING THE COMPLAINANT

- Consider whether to have a scrivener/witness
- Ask specific questions to elicit specific details
- Ask for identification of witnesses or other persons with knowledge
- Inquire into possible biases or motives to lie
- Ask if there is anything that the Complainant wishes to add
- Advise the Complainant that the employer will inform him/her of the results of the investigation

INTERVIEWING THE ACCUSED

- Start with open-ended questions
- Proceed to specific questions, based on the information already obtained
- Ask about motives for the Complainant to lie
- Ask if there is anything that the Accused wishes to add
- Repeat admonition against retaliation

DEALING WITH UNCOOPERATIVE WITNESSES

- Ask the employee why he or she is refusing to cooperate
 - Concern about how it will look to peers
 - Uncomfortable and afraid of repercussions
 - Desire to be liked
- Attempt to alleviate the employee's concerns
- Advise the employee of the consequences of continued non-cooperation
- Instruct the employee to cooperate

LEGAL RIGHTS OF THE ACCUSED

- No Fifth Amendment privilege against self-incrimination
- No right to legal representation
- *Weingarten* right to representation by union or fellow employee, if employer is unionized

INTERVIEWING THE UNCOOPERATIVE ACCUSED

- If the Accused invokes the Fifth Amendment:
 - Advise him/her that the Fifth Amendment prohibits only the government from compelling testimony
 - Advise him/her that an employer may discipline or discharge employees for refusing to provide information
- If the Accused demands legal representation:
 - Advise him/her that there is no right to legal representation
 - Consider alternatives
- If the Accused refuses to answer or is evasive:
 - Tell the accused that it is in his/her best interest to cooperate, as a failure to do so will leave the allegations un-rebutted.
 - Warn the Accused that he/she could be subject to discipline or discharge, for insubordination, for refusing to cooperate

SHOULD YOU OBTAIN WRITTEN STATEMENTS

- Advantages:
 - Preserves the witness' statement
 - Assists with further interviews
- Disadvantage:
 - Can slow down the investigation

OVERZEALOUS INVESTIGATIONS

- Overbearing conduct or physical restraint of employees during interviews places the employer at risk for lawsuits:
 - False imprisonment
 - Intentional infliction of emotional distress
- Factors determining whether an interview exceeds permissible limits:
 - The time and conditions under which the questioning takes place
 - The content and form of the questions asked of the witness
 - The physical and mental condition of the witness at the time of the interview

CONFIDENTIALITY

- When interviewing, always ask the witness to maintain the confidentiality of the information discussed during the interview
- Explain why confidentiality is necessary
 - Do investigation witnesses need protection?
 - Is evidence in danger of being destroyed?
 - Is testimony in danger of being fabricated? or
 - Is there a need to prevent a cover up?
- Do not promise confidentiality

CONFIDENTIALITY

- Explain that the employer will attempt to maintain confidentiality, but that the employer may need to reveal certain information
- Reveal information to witnesses only to the extent necessary to gain information from them
- Reveal information to management only on a need-to-know basis

THE DETERMINATION

- Review all of the evidence
- Consider the type and quality of the evidence (e.g.- personal observations v. mere rumor or gossip)
- Consider the quantity of the evidence
- Assess witness credibility
- Consider biases and motives of the witnesses
- Proof to an absolute certainty or beyond a reasonable doubt is not required
- Make the best judgment that you can based on the information obtained and on your experience and intuition

RULES OF DISCIPLINE

- Does the Company have a rule prohibiting the type of conduct in which the employee engaged?
- Does the Company inform employees of the existence of the rule?
- Do you believe that the accused has violated the rule?
- Was the investigation fair?
- Is the discipline that will be imposed consistent with the discipline imposed in the past on other employees who have violated the rule under similar circumstances?
- Does the discipline fit the offense?

LAST RULE OF DISCIPLINE

The Ultimate Question: Would the employee have been discharged even if the employee was not:

- Active in the union?
- In a protected category (age, sex, race, disability, etc.)?
- Someone who complained about discrimination or harassment?
- Returning from FMLA leave?
- A “whistleblower”?

REMEDIES

- Determine corrective action or remedial measures
- Consider policies and practices
- If issuing corrective action, remember that the purpose of that action is to:
 - Deter the employee and others from engaging in similar conduct in the future
 - Establish a basis for more severe discipline, if the employee engages in further misconduct
 - Communicate to employees that certain types of conduct are unacceptable
 - Help the employer avoid liability, if the employee should engage in further misconduct

INVESTIGATORY REPORTS

- Should a report be prepared in all cases?
- Should the report be written or oral?
- Should the report include only facts and conclusions, or should it also include recommendations?

PREPARING THE REPORT

- Be mindful of the fact that the report could be used by or against the Company in litigation:
- Report should contain:
 - Background information
 - An explanation of the situation prompting the investigation
 - An explanation of actions taken to investigate
 - Identification of the witnesses interviewed
 - Identification of the documents reviewed
 - Significant, relevant documents, as attachments

PREPARING THE REPORT

- Report should identify date and author of report
- Report should be prepared in a manner that would educate a person who has little familiarity with the Company or with the employees involved in the investigation
- Report should not include admissions
- Person preparing the report should consider attorney-client privilege issues

THANK YOU



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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

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