

Presenting a live 90-minute webinar with interactive Q&A

EEO Internal Investigations: Guidance for Employment Counsel

Planning and Conducting Effective Investigations of
Discrimination, Retaliation and Harassment Claims

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Part I: Pre-Investigation Strategies

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The Post-*Faragher/Ellerth/Vance v. Ball* *State* Importance of Investigations

Investigations that Fall Short May Backfire – in a Big Way

- ▶ In 2014, James Castelluccio, a former IBM vice president, was awarded over one million dollars in 2014 by a federal judge after a jury in Connecticut found that the then-61-year-old employee was wrongly terminated because of his age.
- ▶ Before the trial and afterward, U.S. Magistrate Judge Thomas P. Smith harshly criticized IBM's internal handling of an age-discrimination complaint that Castelluccio had taken to HR before he was let go.
- ▶ While IBM's HR investigator had concluded that the executive was treated fairly, the judge said the HR report was one-sided and blocked IBM from submitting it as evidence at trial. Specifically, he noted that the HR report failed to include evidence favorable to Castelluccio, including his performance reviews.

Avoid These Investigation Mistakes

- ▶ Failing to plan.
- ▶ Ignoring complaints.
- ▶ Delaying investigations.
- ▶ Losing objectivity.
- ▶ Being distracted during interviews.
- ▶ Using overly aggressive interview tactics.
- ▶ Not conducting a thorough investigation.
- ▶ Failing to reach a conclusion.
- ▶ Failing to create a written report.
- ▶ Failing to follow up with those involved.

Typical Investigation Goals

- ▶ Comply with the law
- ▶ Promptness
- ▶ Confidentiality
- ▶ Thoroughness
- ▶ Fairness
- ▶ Protect the Company/Brand
- ▶ End inappropriate behavior/prevent future occurrences
- ▶ Encourage informal dispute resolution

Investigations May be Triggered by Many Things

- ▶ A formal complaint or grievance.
- ▶ Casual reports or comments.
- ▶ Unexplained changes in behavior, morale, or productivity.
- ▶ Theft suspicions or inventory losses.

- ▶ Suspicions of other misconduct.
- ▶ Rumors.
- ▶ Administrative agency inquiry (*e.g.*, EEOC, OSHA, DOL).
- ▶ Receipt of lawsuit.

- ▶ Drug or alcohol use suspicions.
- ▶ Safety concerns, including workplace violence or accidents.
- ▶ Harm to property or others.

Before the Need to Investigate Arises

1. Review, revise or establish clear policies on which all relevant employees are trained.
2. Designate and train appropriate “investigators.”

Planning the Investigation

Initial Decisions

- ▶ Is an investigation necessary?
- ▶ Should any interim personnel action be taken during the investigation?

Is an Investigation Necessary?

Advantages of resolving case informally –

May limit/reduce:

- ▶ Hard feelings
- ▶ Rumors
- ▶ Costs of litigation or administrative action

* Even informal resolutions should be documented.

Should any Interim Personnel Actions be Taken During the Investigation?

What situations?

- ▶ Violence or harassment to employees, third parties on Company property
- ▶ Stalking
- ▶ Fraud
- ▶ Whistle-blowing
- ▶ Other

Possible Interim Personnel Actions:

- ▶ Leave of absence with or without pay
- ▶ Suspension with or without pay
- ▶ Temporary transfer

Communications Regarding Removal From The Workplace:

- ▶ Whom to consult beforehand?
- ▶ Before or after confrontation?
- ▶ Make things better or worse?
- ▶ What to tell colleagues?

Pre-Investigation Strategies: Cover Who, What, When, Why and How

- ▶ When can/should the investigation occur?
- ▶ What law(s) govern the investigation?
- ▶ What investigation techniques will be used—forensics, surveillance, email reviews, etc.
- ▶ Who is the most appropriate investigator?
- ▶ Who are the witnesses?
- ▶ What documents should be collected, preserved and reviewed?
- ▶ Who will decide what, if any, discipline will be imposed?
- ▶ How will the results and findings be documented?

Who: Selecting the Right Investigator

- ▶ Consider:
 - Skill level.
 - Relationships to any of the parties of the investigation (and potential bias).
 - If affiliated or relationship exists, investigator should bow out to avoid perception of bias.

Look for an investigator who is:

- ▶ Respected.
- ▶ Able to be assertive.
- ▶ Understands the “big” picture.
- ▶ Knows the Company policies, procedures and applicable law(s).
- ▶ Has good interviewing skills.

- ▶ Can communicate verbally and in writing.
- ▶ Ability to develop rapport with witnesses.
- ▶ Be non-confrontational.
- ▶ Maintain objectivity.
- ▶ Makes a good witness.
- ▶ Can take thorough notes.
- ▶ Maintains confidentiality.
- ▶ Manages conflicts that arise from breach of confidentiality.

Investigators: Potential Options

- Human Resources
- In-house Investigator
- Outside/Independent Party
- In-house Counsel
- Outside Counsel

Should the Company Attorney be the Investigator?

When should an employer appoint an attorney to conduct an EEO internal investigation—and what special considerations arise from the attorney's involvement?

Consider:

- ▶ Privilege issues
- ▶ Ability /desire to use results in subsequent litigation
- ▶ Knowledge of the Company/expertise in area of law

Who: Identify the Witnesses

- ▶ Complainant
- ▶ Witnesses identified by complaint
- ▶ Alleged wrongdoer
- ▶ Witnesses identified by alleged wrongdoer
- ▶ Witnesses identified by investigator
- ▶ Witnesses identified by Company

What: Identify the Issues

Discrimination claims:

- ▶ Race
- ▶ Religion
- ▶ Gender/Sexual Harassment
- ▶ National Origin
- ▶ Age
- ▶ Physical or Mental Disability

What: Identify the Issues

Unjust Treatment:

- ▶ Promotion
- ▶ Discipline
- ▶ Compensation
- ▶ Assignments
- ▶ Work
- ▶ Worksite

What: Identify the Issues

- ▶ Violence in the workplace
- ▶ Fraud/theft
- ▶ Retaliation
- ▶ Wage and hour violations
- ▶ Other violations of law or Company policy

What: Identify and Collect the Relevant Company Policies and Other Documents

- ▶ Employee handbook
- ▶ HR policies and practices
- ▶ Benefits booklets
- ▶ Ethics guidelines
- ▶ Finance guidelines
- ▶ Security guidelines
- ▶ Emails
- ▶ Personnel files
- ▶ Medical/other files
- ▶ Company website/blogs/social networking sites

When: How Quickly Must the Investigation Occur?

- ▶ The investigation should commence and conclude “promptly.”
- ▶ No definitive interpretation of “prompt” has emerged from the courts, nor is one possible given the variables that impact each investigation, such as the number and availability of witnesses, the length of time the complainant takes to recount the wrongdoing alleged, and the complexity of corrective action required in response.

- ▶ However, investigations started the day of an employee's complaint have been found to be timely, as have some that have commenced a few days or within a week after the initial complaint. Employers who wait more than a week to investigate may be asking for trouble.

How: Create an Investigation Plan

- ▶ Send complaint confirmation letter
- ▶ Nail down the issues
- ▶ Assure due process
- ▶ Reaffirm confidentiality and cooperation
- ▶ Send personnel action notice, if necessary
 - Outline issues under investigation
 - Pay status and expected duration
 - Assure due process
- ▶ Consider drafting formal/standard opening/closing remarks for interviews
- ▶ Consider pros/cons of written witness statements

Part II: Conducting the Investigation

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CONDUCTING THE INVESTIGATION

▪ **GATHERING EVIDENCE / LITIGATION HOLD NOTICES**

- Litigation Holds
- Document Review
- Witness Interviews

▪ **MANAGING THE PEOPLE / INSTRUCTING MANAGERS**

- Former Employees
- Separate Counsel

CONDUCTING THE INVESTIGATION

■ PRIVILEGE ISSUES

- Participants
- Advice of Counsel Defense
- Litigation Hold Notices
- Waiver
- Withholding Confidential Information
- Self-Critical Analysis Privilege
- Privileges held by Governmental agencies
- Deliberative Process Privilege
- Work Product Doctrine
- Attorney-Client Privilege

▶ PART III: POST-INVESTIGATION STRATEGIES

Documenting the Investigation (and Results)

- ▶ Determine whether and to what extent the investigation is/should be covered by the attorney-client privilege and/or attorney work product doctrine OR
- ▶ Whether the investigation will be used to support of an affirmative defense in potential litigation

(Assuming non-privileged investigation)

- ▶ Create a “Confidential” Memorandum to File
 - Define the issue(s) investigated
 - Identify dates of complaint and relevant incident(s)
 - Identify dates and duration of investigation
 - Summarize investigative steps taken
 - Include names (and titles) of persons who conducted investigation
 - Include names of persons interviewed in conjunction with investigation
 - Attach all relevant documents and witness statements
 - Include a copy of any relevant employer policies or guidelines
 - Generally relate facts, not opinions
 - State conclusions in non-legal terms, with appropriate caveats
 - Describe remedial action taken in response to allegations
- ▶ Create documentation even when the investigation was informal, or the solution was simple
- ▶ Have counsel review initial draft
- ▶ Segregate any privileged thoughts/communications
- ▶ Consider whether and to what extent witnesses should confirm statements in writing.

Evaluating the Evidence Obtained

- ▶ There are typically at *least* two sides (and two potential plaintiffs)
- ▶ Consider whether accounts of the incident(s) are plausible
 - Everyone may be right; no one may be right
 - What is the source of the information? First-hand knowledge or something else?
 - Did the witness contradict himself/herself?
- ▶ Assess the credibility of the complainant, the accused, and any other witnesses
 - Evaluate body language/demeanor; assess interviewees' reactions to allegations; determine consistency of statements made; were there any major "omissions" of information?
- ▶ Consider corroborating evidence, background and context
 - Review relevant e-mail or written communications; interview additional witnesses
- ▶ Are there any patterns of behavior/ potential motivating factors?
 - Have there been other complaints regarding the conduct of the accused?
 - Has the complainant made frequent complaints that have proven to be unfounded?

POST-INVESTIGATION STRATEGIES

▪ DETERMINING REMEDIAL ACTION

▪ MINIMIZING THE RISKS OF EMPLOYEE RETALIATION CLAIMS

- Policy
- Warning
- Follow-Up