

# BEST PRACTICES FOR CONDUCTING INTERNAL HARASSMENT INVESTIGATIONS

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An anti-harassment policy is in place; anti-harassment prevention training is conducted; and the organization has established a culture that doesn't tolerate harassment. But, despite the organization's best efforts, along comes a harassment complaint. What happens now? The investigation.

Organizations have a legal obligation to promptly investigate all harassment claims and conduct of which they are aware. To avoid legal liability from a poorly executed investigation, consider these best practices when conducting an internal investigation:

- ❖ **ACT PROMPTLY**: A prompt and effective response not only helps the organization avoid legal liability, but also demonstrates the organization's commitment to taking these matters seriously.
- ❖ **AVOID REQUIRING A WRITTEN COMPLAINT**: While it can be helpful when a victim puts their complaint in writing, a victim's reluctance to do so does not relieve the organization of its duty to investigate. Avoid requiring a victim to provide a written complaint as a condition of an investigation. Instead, where a victim is unwilling reduce their complaint to writing, train individuals receiving complaints to prepare a written summary of what was reported.
- ❖ **DETERMINE NECESSARY IMMEDIATE ACTION**: Consider whether immediate action is necessary to stop or prevent the alleged conduct from continuing while the investigation is pending, but ensure that such action is not retaliatory against the complainant. Measures may include temporarily transferring an individual to another group, removing reporting lines, or placing a party on administrative leave.
- ❖ **SELECT INVESTIGATOR(S)**: The anti-harassment policy should provide for the investigation to be conducted by unbiased individuals with expertise in conducting investigations. The investigator(s) should be discreet, committed to maintaining the privacy of all individuals involved in the investigation, and knowledgeable about organizational policies and applicable state and federal laws. Obvious candidates include human resource professionals and in-house legal counsel. Association Executives should consider removing themselves from investigations, as it would be hard for an Association Executive to be perceived as neutral. When internal staff lacks the necessary experience or the complaint involves a high-level executive or prominent member, the organization may want to consider hiring a third-party investigator or engaging outside legal counsel.

Regardless of who is selected to investigate, be sure to involve human resources and legal counsel when assessing the investigation outcome and determining any disciplinary action.

❖ **AVOID PROMISING CONFIDENTIALITY:** Confidentiality should never be promised to anyone involved in the investigation, as it is inevitable that information may need to be disclosed during the course of the investigation. And, the organization should avoid mandating the complainant or respondent to keep the existence or details of the investigation confidential. While organizations may encourage participants to keep the investigation confidential and to use discretion, an outright confidentiality mandate may run afoul of state and federal laws.

❖ **CONDUCTING INTERVIEWS:** Any individual with potential knowledge of the facts and circumstances surrounding the complaint should be interviewed. The interviewer should ask open-ended questions, and avoid making any conclusory statements or legal conclusions. Sufficient time should be allotted in order to gather information from each individual, but interviews may need to be extended or follow-up interviews conducted to ensure all relevant information is gathered. However, in order to bring the investigation to a swift conclusion, organizations should avoid allowing the investigative process to linger. Finally, state law may enable the organization to compel, and even discipline, any employee who refuses to participate in the investigation.

❖ **DOCUMENT INVESTIGATION:** To ensure accuracy and completeness, the investigator(s) should carefully document all information learned during each interview, and promptly issue an investigative report upon conclusion of the investigation. The investigative report should include a summary of the factual findings and conclusions, as well as a summary of the information learned from each interview and any relevant evidence reviewed. Note that the investigative report should be limited to the factual findings and determinations, and should not include conclusory statements or legal conclusions.

❖ **DETERMINE DISCIPLINE:** If the investigation supported the allegations, the organization should work closely with human resources and legal counsel to determine appropriate disciplinary action. Potential disciplinary action may include oral or written warnings, specialized training, suspension, demotion, or even termination. When determining appropriate discipline, be careful not to impose varying degrees of discipline from what the organization imposed for similar conduct in the past. That said, the imposition of different discipline may be justified based on a specific circumstance. To avoid discrimination claims, the organization should be sure to carefully document the reasons for this conclusion.

- ❖ **COMMUNICATE OUTCOME**: The organization should promptly communicate the outcome of the investigation both the complainant and the accused. Note, however, that the communication need not be detailed or in writing. Simply informing the parties that the investigation was conducted, and appropriate discipline was imposed, is sufficient. If the allegations were not supported, or the investigation was inconclusive, the organization may communicate that it will continue to monitor the situation, and encourage future conduct to be reported immediately. Be sure to document in the investigative file that this step was completed.
- ❖ **DO NOT RETALIATE**: Except where an allegation is made in bad faith, meaning the complainant knew the allegations to be false when the complaint was made, federal and state law prohibits an organization from retaliating against an individual for making a harassment claim, even when the investigation did not corroborate the complaint. Never take negative action against an individual based on making a complaint, and be sure to include an anti-retaliation statement in the organization's anti-harassment policy.
- ❖ **ASSESS LESSONS LEARNED**: Regardless of the outcome of the investigation, organizations should proactively assess any lessons learned. This is a great time to determine whether, for example, the organization's policies need to be reexamined, if additional anti-harassment training should be conducted, or if there are better methods to monitor or prevent these situations moving forward.

While an organization's goal should always be to provide an objective, fair and thorough investigation, an internal investigation is not a hearing, and an organization need not provide parties the rights traditionally included as part of a hearing process. Therefore, an organization may properly deny requests such as to record an interview or to appeal the investigatory findings.

Through prompt and thorough action, an organization will not only reaffirm its commitment to providing and maintaining a harassment-free environment, but taking these actions will help improve morale, reduce turnover, and increase productivity for all.