Preventing, Investigating and Remediying Workplace Complaints

Investigation Checklist

I. Preventing Workplace Complaints

- Critical policies
  - Sexual and Other Harassment
  - Workplace Violence
  - Code of Conduct and Ethics Standards
  - Electronic and Other Communications

- Examples of situations that may merit an investigation
  - Suspected substance abuse
  - Attitude problems
  - Discrimination/harassment complaints
  - Threats
  - Vandalism and other sabotage
  - Violation of policies
  - Workplace theft
  - Safety problems
  - Anti-competitive activities

- Effective complaint procedure
  - Designate knowledgeable and sensitive individuals to receive complaints.
  - Inform and remind employees of complaint process.
  - Allow oral complaints.

- Training
  - Employees
  - Managers

II. Preparing For An Investigation

- Design and implement an investigation plan.
  - Maintain a short list of potential investigators.
Investigator should be knowledgeable about state and federal employment laws.
Investigator must conduct a thorough investigation.
Must be objective.
Determine if outside counsel should investigate (i.e. possibly for complaints concerning senior management, etc.).

Design and implement a process for collecting/securing evidence.

Information flow/status reports.

Determine who receives information.

III. Investigating Workplace Complaints

Investigation ground rules

Begin investigation as soon as practicable after employee complains or once the company has reason to believe that inappropriate conduct, violation of policy, etc. has occurred.
Involves Human Resources/senior management.
Consult with outside counsel at outset and throughout investigation to protect investigation by attorney-client privilege to the extent possible.
Determine if employees are represented by a union. If so, collective bargaining agreements grievance procedures and Weingarten rights apply. (See XI below.)

Follow your investigation plan.

Select an investigator – Investigator should keep an open mind and speak to everyone involved before making a determination.

Collect and secure evidence.

Review personnel file(s) of both Complainant and alleged Offender to determine if there are previous complaints or recent disciplinary action.
Journals.
Recordings.
Photographs.
Voice mails.
E-mails.

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☐ Telephone records.
☐ Receipts.
☐ Other relevant documents.
☐ Other relevant evidence.

☐ Identify potential witnesses – Determine appropriate order of interviews on a case-by-case basis.

☐ Maintain investigative file with detailed notes of each interview and each step of the investigation process.

☐ Conduct witness interviews.

☐ Have a witness (preferably the same witness) present at all interviews.

IV. Interviewing the Complainant

☐ Explain the investigation process. You want to obtain facts and clarify any issues in order to reach a fair solution.

☐ Discuss confidentiality, expressing that you will maintain confidentiality to the extent possible and information will be disseminated only on a “need to know” basis. Do not promise absolute confidentiality, as it will impede your obligation to conduct a thorough investigation. Explain legal duty to investigate allegations even if Complainant does not want you to.

☐ Review relevant policies with Complainant.
  ☐ Review the Company’s no retaliation policy. Explain what constitutes retaliation, if necessary.

☐ Questions

  ☐ First, let Complainant give his/her story. Take notes. Record all details, such as date, time and place of conduct, witnesses or others involved, and any documents mentioned.
  ☐ In questioning Complainant, begin with general questions and move on to specific questions.
    ☐ General, non leading questions.
      ☐ How long have you worked with alleged Offender?
How would you describe your relationship with him/her (i.e. manager/subordinate)?

More specific questions.

When did the incident occur? (date, time and place)

Highly specific questions.

Describe the incident (details, including exact words, if applicable).

Who was involved in the incident? What was each person’s involvement?

To whom have you spoken regarding the incident?

Has anything like this happened before?

How did the incident affect you?

How would you like to see the matter resolved?

Go through all relevant events chronologically, again, to be sure that you have a record of all details of complained of conduct, including exact words, if possible: who said what to whom; what was his/her response; and so on.

Determine identity of all persons involved in conduct (consider asking for contact information if necessary and appropriate).

Determine identity of any witnesses to conduct (consider asking for contact information if necessary and appropriate).

Complainant’s response to the conduct.

Response to alleged offender.

Comments to others.

Explore whether Complainant knows if any other employees have been subjected to the same or similar conduct.

Explore how Complainant would like the situation resolved. (Do not promise requested resolution – any resolution will be based on all facts and circumstances.)

Obtain any documents or evidence.

Invite the Complainant to contact you with any additional information.

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V. Interim Remedies

☐ Determine whether the Complainant and the alleged Offender should be separated, pending the investigation.

☐ Separate the parties.
☐ Leave of absence.
☐ Suspension (with or without pay).
☐ Eliminate supervisory authority.
☐ Instruct alleged Offender to cease conduct.

VI. Interviewing the Alleged Offender

☐ Inform the alleged Offender of the allegations against him/her.

☐ You may not have to identify the Complainant if the allegations are of general unacceptable behavior.

☐ Explain the investigation process -- obtain facts, clarify any issues in order to reach a fair resolution.

☐ Review the Company’s relevant policies; including the possibility of disciplinary action if the Company concludes that inappropriate conduct or a violation of Company policy occurred.

☐ Review the Company’s no retaliation policy. Explain what constitutes retaliation, if necessary.

☐ Discuss confidentiality – will maintain confidentiality to the extent possible and information will be disseminated only on a “need to know” basis. Do not promise absolute confidentiality – will impede your obligation to conduct a thorough investigation.

☐ Questions

☐ Begin with general, non-leading questions, move on to specific questions, make sure you obtain all the facts related to the complaint and the alleged Offender’s response thereto.
General, non leading questions.
- How long have you worked with Complainant?
- How would you describe your relationship with him/her (i.e. manager/subordinate)?

More specific questions.
- When did the incident occur? (date, time and place)

Highly specific questions.
- Describe the incident (details, including exact words, if applicable).
- Who was involved in the incident? What was each person’s involvement?
- To whom have you spoken regarding the incident?
- Has anything like this happened before?
- How did the incident affect you?
- How would you like to see the matter resolved?

Obtain any documents or evidence.

Invite the alleged Offender to contact you with any additional information.

VII. Reassess Interim Remedies

Further assess whether interim remedies are necessary, pending the investigation. You may want to consult with outside counsel.

- Separate the parties.
- Leave of absence.
- Suspension (with or without pay).
- Eliminate supervisory authority.
- Instruct alleged offender (and/or Complainant) to cease conduct.
VIII. Interviewing Witnesses

☐ Explain that the Company has received a complaint of inappropriate conduct, violation of policy, etc.

☐ Explain the investigation process – obtain facts, clarify any issues in order to reach a fair solution.

☐ Discuss confidentiality, expressing that you will maintain confidentiality to the extent possible and information will be disseminated only on a “need to know” basis. Do not promise absolute confidentiality, as it will impede your obligation to conduct a thorough investigation.

☐ Review the Company’s no retaliation policy. Explain what constitutes retaliation, if necessary.

☐ Questions.
  ☐ In questioning witness, begin with general, non-leading questions. Move on to specific questions. Make sure you obtain all the facts relating to the Complaint.
  ☐ General, non leading questions.
    ☐ How long have you worked with Complainant?
    ☐ How would you describe your relationship with him/her (i.e. manager/subordinate)?
  ☐ More specific questions.
    ☐ When did the incident occur? (date, time and place)
  ☐ Highly specific questions.
    ☐ Describe the incident (details, including exact words, if applicable).
    ☐ Who was involved in the incident? What was each person’s involvement?
    ☐ To whom have you spoken regarding the incident?
    ☐ Has anything like this happened before?
    ☐ How did the incident affect you?
    ☐ How would you like to see the matter resolved?
IX. Prepare a Final Written Report

- Obtain any documents or evidence.
- Invite the witness to contact you with any additional information.

- Review all notes, statements and evidence.
- Determine whether any further interviews are required.
- Analyze each person’s story and assess credibility.
- Determine whether a violation of Company policy or inappropriate conduct has occurred.
- Prepare draft report, detail steps taken and reasons for conclusions. Do not make legal conclusions, i.e., sexual harassment occurred.
  - All drafts should be addressed and forwarded to outside counsel.
  - Discuss with outside counsel what to do with investigation notes.

X. Remedying Workplace Complaints

- Inform Complainant and alleged Offender of conclusions.
- Impose appropriate disciplinary action, if necessary. (Determine who may be subject to disciplinary action, e.g., Complainant, alleged Offender, third parties.)
  - Potential disciplinary action:
    - Verbal warning.
    - Written warning.
    - Second written warning.
    - Suspension (with or without pay).
    - Termination.
- Follow-up with Complainant to ascertain whether he/she has experienced retaliation or further inappropriate behavior.
Follow-up with alleged Offender to ensure that disciplinary action, if any, is effective.

XI. Information Regarding Union Employees

Weingarten Rights – Union employees may have a representative present during an interview that might reasonably lead to disciplinary action. Non-union employees do not have this right.

Collective Bargaining Agreements (CBAs) supersede handbook policies, to the extent that CBAs and policies are inconsistent.

Be mindful of any grievance procedure for Union employees.