

TEN CRITICAL CONSIDERATIONS FOR EFFECTIVE INVESTIGATIONS

#1 DO YOU HAVE CRITICAL POLICIES IN PLACE?

- Considering the nature of your business and number of employees, among other things, some HR policies may not be necessary or require as much detail. However, every employer should reflect on how it is communicating rules and expectations in the following areas:
 - **Employment Policies**
 - At-Will Employment Statement
 - Non-discrimination
 - Anti-Harassment
 - Retaliation
 - **Workplace Behavior Policies**
 - Social Media
 - Remote Work
 - Workplace Violence
 - Drug and Alcohol
 - **Recruitment and Compensation Policies**
 - Recruiting and Hiring
 - Compensation
 - **Safety and Compliance Policies**
 - Workplace Injury
 - ADA Reasonable Accommodation
 - Religious Accommodation



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- **Employee Conduct and Attendance Policies**
 - Discipline
 - Dress Code
 - Attendance
 - Tardiness
- **Leave and Work Schedules Policies**
 - Leaves
 - Bereavement
 - Meals and Break Periods
 - Prohibition on off-the-clock work
- **Workplace Relations and Technology Policies**
 - Immigration
 - Supplemental Workforce
 - Equal Employment Opportunities
 - Electronic Communications
 - AI Expectations/Considerations

#2: DO YOUR EMPLOYEES UNDERSTAND THE POLICIES?

- All relevant policies should appear in a comprehensive employee handbook.
- Handbooks should be reviewed regularly for relevance and compliance.
- However, inclusion of policies in your handbook is not enough.
- You need to openly discuss critical policies with staff to ensure understanding and make sure employees understand how and where to report allegations of misconduct or noncompliance.

#3: DO EMPLOYEES KNOW HOW TO REPORT SERIOUS CONFLICT/ MISCONDUCT?

- Your policies should direct people to the appropriate person/department to report misconduct, whether that's the same person for all issues or different depending on the situation.
- Explain alternatives if employees don't feel comfortable talking to the designated person.
- You can allow anonymous reports but be transparent about any limitations, including your ability to engage back and forth with the complainant.
- You need to investigate certain types of potentially unlawful misconduct even if the reporting party changes their mind and no longer wants to pursue a complaint.
- Clearly communicate that complainants are protected from retaliation.

#4: DO STAFF MEMBERS UNDERSTAND SITUATIONS IN WHICH THEY ARE AUTHORIZED TO ADDRESS A COMPLAINT ON THEIR OWN, AS OPPOSED TO INVOLVING SPECIFIC MEMBERS OF HUMAN RESOURCES, MANAGEMENT, AND/OR LEADERSHIP?

- Any staff member who may receive a report of misconduct needs to know the steps and people involved in resolving it.
- Any staff member who may receive a report of misconduct needs to understand situations in which they are (a) responsible for investigating/communicating with parties and (b) when they **MUST** inform someone else in their department or in management to ensure timeliness and compliance with relevant policies and the law.
- Reflect on reoccurring behaviors/areas of concern and consider what can be done to prevent/minimize and have a plan to address these situations when they arise.

#5: DO YOU HAVE CLEAR EXPECTATIONS WITH RESPECT TO:

A. How to document/intake a complaint

- Document both the complaint itself and its transmission to your go-to investigation staff member
- Besides certain communications with counsel, all correspondence about the complaint and the people involved is subject to disclosure in the event of litigation

B. How to correspond with impacted parties

- Communicate how the investigation process works, what to expect as the process continues, and any behavioral expectations during the process to the complainant and the accused

C. Where to store/log supporting evidence

- Create an investigation file and diligently organize

D. When to notify law enforcement

- There are situations when you will notify law enforcement. However, that does not mean you stop your own investigation. They are investigating criminal conduct. You are investigating policy violations.

#6: DOES THE INVESTIGATOR UNDERSTAND THE BURDEN OF PROOF?

- The investigator's job is to determine whether it is more likely than not that the alleged conduct occurred—the preponderance of the evidence standard (51 percent).
- How do you get there? Look at:
 - Emails, text messages, Slack messages, Microsoft Teams messages, and the like between the parties (pre- and post-complaint);

- Emails, text messages, Slack messages, Microsoft Teams messages, and the like between the parties and others relevant to the complaint;
- Other relevant emails, text messages, Slack messages, Microsoft Teams messages, and the like that are relevant to the investigation;
- Other documentary and non-documentary evidence relevant to the investigation (i.e., written memoranda, video footage, photographs, audio files, voicemails, social media posts, screen shots, etc.); and
- Information gathered during interviews with the parties, and other witnesses, that tends to support – and tend to not support – the complaint.

#7: DOES THE INVESTIGATOR UNDERSTAND THE LIMITS OF “CONFIDENTIALITY”?

- Do not promise absolute confidentiality or anonymity, and be sure that any requests for confidentiality comply with state, federal, and local law.
- Before commencing an investigation, discuss (internally) how you will keep the investigation as confidential as possible.
- Tell all employees of their need to help maintain the integrity of the investigation.
- Interview non-employees only when essential, as they face no repercussions for failure to comply with confidentiality expectations.
- Be mindful about what is disclosed to people and when.

#8: DOES THE INVESTIGATOR UNDERSTAND HOW TO SYNTHESIZE THE INFORMATION PROVIDED AND EVALUATE CREDIBILITY?

- It is investigator’s job to evaluate relevance and credibility of evidence
 - Evidence is relevant if it makes a fact more or less probable than it would be without the evidence (tends to prove or disprove responsibility).
 - Credibility assessments are necessary to evaluate evidence and resolve material issues in dispute between parties’ accounts. Credibility is not just about whether someone is telling the truth; it’s about their account’s reliability, consistency, and plausibility.
- Investigators consider the following dimensions in someone’s account:
 - Primary: corroboration or lack thereof, observation and capacity to observe, and consistent or inconsistent statements.
 - Secondary: plausibility, motivation to lie, bias, reputation for veracity or deceit, past history, manner of responding to questions (evasion), demeanor (disfavored).

#9: DO YOU HAVE AN ESTABLISHED REPORT FORMAT FOR DOCUMENTING FINDINGS AND ANALYSIS?

- Always create a report, regardless of the investigation's findings.
- The report should stand on its own in the event of external scrutiny.
- Report contents should include:
 - Executive summary
 - Background information
 - » Nature of complaint
 - » How investigation was initiated
 - Findings and conclusions
 - » Evidentiary standard
 - » Quick reference
 - » Roadmap for report
 - Investigative approach
 - Individuals interviewed
 - Attempted interviews
 - Documents/other evidence considered
 - Other relevant procedural details
 - Any limitations on investigation
 - Summary of facts gathered
 - Information about departments, individuals involved, events leading up to the complaint, and the complaint itself
 - Demonstrate how we got here and what we learned
 - Analysis of complaints
 - Assess both sides of each issue
 - Address credibility
 - Explain your analysis
 - **Reach a factual and/or policy finding!**
 - **CAUTION: Do not make a legal finding– i.e., do not make a finding regarding whether a person engaged in sexual harassment, engaged in discrimination, etc. Your findings should be limited to whether a particular factual allegation occurred and, if so, whether it violates policy.**

- Findings and conclusions
 - Conclude with the same quick reference/roadmap as the executive summary
- **Note: Don't forget to circle back with the complaining party and the respondent once the investigation is complete.**

#10: DO YOU AUDIT OR TRACK ANY RESULTING DISCIPLINE TO ENSURE CONSISTENCY?

- It's recommended that you audit and review the discipline of employees to ensure consistency.
- If you are ever forced to litigate a discrimination or accommodation claim, the former employee may argue that the discipline/treatment differed from similarly situated employees.
- If your records include vastly different responses to similarly situated individuals, you will have to explain how you came to those decisions.
- Disparate treatment claims can arise years after an employee leaves, on the eve of the statute of limitations. Be prepared and have documentation on hand to respond quickly.

Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change, with or without notice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.