



How to Partner with HR to Investigate Everything

Employment and Labor

Litigation and Dispute Resolution



Cheat Sheet

- **Foster a strong culture.** Effective workplace policies, along with a strong culture of proper investigation and consistent enforcement, are imperative for employers to foster a respectful, civil, and legally compliant workplace.
- **Consider an HR-led investigation.** Many companies recommend HR representatives conduct the investigation as attorney-client privilege will be lost if the investigation is disclosed as evidence of a prompt remedial response.
- **Involve in-house counsel.** Even if they are not acting as investigators, in-house counsel can still play a critical role training their non-lawyer colleagues on how to conduct thorough and effective investigations.
- **Follow the steps and document.** Since employers may need to use the investigation as evidence, it is critical to ensure that investigations are conducted properly and documented.

Every company at some point will have to investigate whether an employee, manager, board member, vendor, or even a customer, has violated a rule, policy, or law. And in-house counsel are often confronted with the difficult choice of either conducting the investigation within the legal department to establish the attorney-client privilege over the analysis and recommendations, or turning the investigation over to non-lawyers such as human resources (HR) representatives.

Given that the company may eventually need to disclose the investigation as evidence of its prompt remedial response, which will result in the loss of the attorney-client privilege, many companies recommend HR representatives conduct them. While in-house counsel may not be conducting every investigation, they still play a vital role in preparing their non-lawyer colleagues to be thorough and know how to be effective.

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In-house counsel can start by reminding human resources teams that the fundamental goal of an effective investigative process is to find out whether the rules, policies, or law have been followed to foster a respectful and legally compliant workplace. They should also be reminded that where workplace policies are actively and consistently enforced, not only are lawsuits mitigated, but they are a critical step in managing employee engagement.

Fostering a respectful workplace is serious business. In fact, there is a growing body of evidence that shows that creating such an environment is necessary for optimal performance. Thus, make sure they know:

- Established policies should be appropriate for the particular workplace.
- HR policies should be regularly disseminated to employees and they should be regularly trained on following them.
- Policies should be consistently enforced through a standardized complaint and investigation process.
- HR and in-house lawyers should periodically review the policies' effectiveness.

And it is paramount that policies be consistently and fairly enforced through a standardized complaint and investigation process.

Implement two mantras to guide HR

Guard against the possibility that an issue isn't addressed by helping human resources foster a management culture based on two mantras: "How can I help you?" and "We investigate everything."

This will accomplish several workplace policy goals.

First, it will develop a culture in which human resources and managers approach employee concerns with a welcoming and problem-solving attitude. Second, it commits HR and managers to take all concerns — not just the big ones — seriously and to follow the complaint, investigation, and resolution process for each one. Finally, and perhaps most important, it fosters an environment where employees feel psychologically safe to raise their concerns in the first place.



Although the mantra, “we investigate everything,” may sound daunting, it really is not. As in-house counsel are well aware and can help non-lawyer colleagues recognize — not every complaint requires the same level of scrutiny and time. Simple issues require limited scrutiny and complex ones warrant more time and energy.

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Furthermore, in-house counsel can assist HR in guarding against complaint fatigue (i.e., this employee is a constant complainer about small things so this time this complaint can be disregarded), which can result in a costly mistake. Explain that the company provides other remedies for false allegations and chronic complainers. Failure to investigate should not be one of them. Instead hammer home the mantra, we investigate everything – period.

Are initial complaints being received?

Despite the fact that policies may be in place, the workplace investigation process can break down at the outset if employees are unsure how to report their concerns or if, as is more often the case, HR and managers are uncertain about whether something even constitutes a complaint or should be investigated. In fact, sometimes HR may be unaware of a situation, only to later find out that a manager knew about it for months but did not recognize it as a complaint.

Managers must be trained on:

- The many forms of what constitutes a “complaint” (e.g., a formal written letter to HR, an anonymous voicemail, an off-hand comment about an issue, etc.);
- Taking all complaints, regardless of form, seriously; and
- What to do when they receive a complaint or become aware of a potential issue.

Ensure HR is prepared to take emergency interim measures

After receiving an initial complaint, in-house counsel can partner with HR to determine whether emergency interim measures are needed to protect employees from harm. For example, such measures may be necessary when the allegations involve imminent danger to employee health, safety, personal dignity, or property (e.g., allegations of violence, threats, harassment, retaliation, certain whistleblowing claims, and reports of criminal activity).

Common interim emergency measures include temporary transfers, suspension of the accused, increased supervision, or additional security. However, in-house counsel should advise HR that it is generally inappropriate to alter the work status of the employee who made the complaint, as it could create the appearance of retaliation or have a chilling effect on future reporting from all employees.

Strategically plan the investigation

The extensiveness of the investigation should depend on the nature of the allegations. Nevertheless, in-house counsel can assist HR in ensuring that the typical investigation plan is the consistent and considers:

- Who within the HR team will conduct the investigation;
- Witnesses to interview;
- Order of their interviews;
- Documents to review; and
- Outline of questions for witness interviews.

Choosing the investigator

Whenever possible, the investigator should be someone experienced and trained in conducting workplace investigations. Generally, those experienced in HR are preferred for a few reasons.

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First, they are typically well-versed in applicable workplace policies and practices. Second, they are aware of how such policies have been applied in other situations, which helps to ensure that they are consistently applied. Third, since they are in a separate department, the parties involved in the investigation are more likely to view the investigation as neutral and objective.

Finally, because employers may ultimately need to disclose the investigation as proof of its prompt investigation and response, designating someone from HR to conduct the investigation as opposed to in-house counsel avoids the potential for waiver of the attorney-client privilege.

Although it may seem obvious, the subject of an investigation should not be involved as an investigator. Unfortunately, this scenario, such as a manager investigating allegations involving themselves, is not uncommon, and is always a poor practice. If this occurs due to staffing needs, as is often the case when this happens, employers should consider hiring an outside investigator.

Making the investigation as confidential as possible

At the outset, HR should be advised that the investigation and the witnesses involved should be kept as confidential as possible. Obviously, this helps prevent future claims of retaliation and stigmatizing witnesses, and it guards against unnecessary workplace disruption resulting from avoidable gossip and rumors.

However, assure HR knows that confidentiality should not be promised to witnesses or the complaining party in exchange for their cooperation. Instead, HR should inform participants that only those who need to know will be informed.

Within management, any discussion of the allegations and the progress of the investigation should be kept to the investigating HR team, the assigned legal support, and any direct oversight management until the matter is concluded.



Ordering of interviews

Assist HR in strategically planning the order of interviews taking into account the fact finding that will be needed. Generally, the complainant should be interviewed first and the accused should be interviewed near the end of the investigation. As an alternative, the accused may be interviewed after the complainant, but investigators should be prepared to re-interview the accused for follow-up purposes after the interviews of other witnesses.

Timing of investigation

In-house counsel are well aware of the expectations of judges and juries concerning the timing of

investigations following complaints. Confirm HR knows that judges and juries expect prompt investigations. Although the timeframe will depend on the nature of the allegations, the goal should be to begin the investigation immediately after receiving the complaint and to conclude it within 24 hours, three days, if needed, or seven days, at the most, if essential. While it is critical to complete the investigation in a timely manner, keep in mind that sometimes additional time may be required due to the nature or complexity of the complaint, and the scope of the investigation required to resolve it.

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If the investigation takes longer, HR should document why the additional time was required (e.g., availability of the evidence or witnesses, or access to necessary records). Always remember that a delayed investigation, unless justified, can become equivalent to conducting no investigation at all.

Conducting witness interviews

Opening statements

Regardless of which witness is being interviewed (i.e., subject, complainant, eyewitness), certain opening remarks should be made. Ensure that the investigator informs the interviewee:

- The employer has a duty to investigate all complaints;
- The witness has a duty to assist;
- What the role of the investigator is;
- The general investigation process and timing of the investigation;
- There is no preplanned outcome;
- The interview confidentiality is limited; and
- There will be no retaliation for participating in the investigation.

Interviewing environment

In this age of pandemics, whether the interviews are conducted by in-person interviews, following the current safety protocols, virtual video conferences, or simply by phone, is less important than making sure to ask the right questions.

Witnesses should be interviewed separately. The investigator should remain objective, set a calm tone, and focus on asking the “5 Ws and 1 H”: *Who* was there, *what* happened, *when* did it happen, *where* did it happen, *why* did it happen, and *how* did it happen? Much like in a deposition, these questions should start as broad and open-ended, then focus on chronologically probing specific details, and finally end with any tough or embarrassing questions.

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Obtaining specific details and understanding the chronology of events are the keys to a successful interview. The investigator should always conclude interviews with the following three questions:

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- Is anything else the employer should know;
 - Are any other documents that should be reviewed; and
 - Is there anyone else that should be interviewed?

While they can be important clues, counsel investigators to avoid focusing too much on physical cues (such as tone of voice, perspiration, posture, etc.) to determine the veracity of a witness. Even experienced investigators often misinterpret them. Sometimes the best barometer of truthfulness is whether the information provided is plausible and makes sense logically and chronologically.

Finally, investigators should manage common traps such as refusals to participate, requests to record the interview, or requests for a representative or a lawyer to be present. Typically, such requests can and should be rejected, except in situations involving union employees.

Interviewing the complainant

Advise the HR team that there are a few unique issues to keep in mind while interviewing the complainant.

First, the investigator should immediately focus on minimizing concerns about retaliation. The complainant should be reassured that there will be no retaliation for making the complaint and participating in the investigation, and the interviewer should refer to the appropriate non-retaliation provision in the employee handbook. Second, the investigator should address the common request by complainants to limit or even forgo an investigation by explaining that such actions would be inconsistent with the culture of “we investigate everything.” Third, the investigator should not ask the complainant what remedy he or she desires.

Appropriate action following a completed investigation is the employer’s decision to make. And, inviting the complainant to weigh in on actions to be taken can create unnecessary tension if the employer determines that a different action is warranted under the circumstances.

After conducting the interview, the investigator should prepare a written statement, based upon information obtained during the interview, for the complainant to review and sign. This presents another opportunity for them to verify their version of the facts or to clarify where it needs correction. It is preferable to prepare the written statement promptly after concluding the interview. This will enable you to capture any information when memories are fresh as well as clarify any gaps in information. Perhaps more importantly, if you wait to do so, you risk delaying the investigation.

Interviewing the subject

The goal of the interviewing the subject of the investigation is to give them an opportunity to tell their side of the story, especially concerning any witnesses and documents that may support their version of events. Following the interview, draft a written statement for the subject, for the subject to review and sign. This presents another opportunity for them to verify their version of the facts or to clarify where it needs correction.

As an aside, the subject of the complaint is often curious about the timing of the investigation and how things will be handled. The investigator can inform the subject that the matter is being handled expeditiously, but there is no need to confirm a turnaround time with the subject. The investigator should also refrain from committing to any outcome or potential ones. It is best to merely inform the subject that the purpose of the investigation is to gather facts so that the complaint can be resolved in

an appropriate manner.

Documenting the investigation

Emphasize to HR that the investigation itself is, ultimately, only as good as the written report about it. If a lawsuit is threatened or actual litigation follows, the report will be a key exhibit (and the lack of a report, or a poorly written one, will damage the employer's defense). The written report should be completed in the same 24 hours, three days, or seven days timeframe noted above.

Therefore, the report should accomplish a few goals. It should accurately document the investigation that was conducted; provide evidence of a timely and impartial response; and provide sufficient information about the facts, policy, and analysis for the decision-maker to decide the matter and defend the outcome.

At the very least, the report should contain a statement of the allegation, the relevant policy or procedure at issue, a description of the witnesses interviewed and documents reviewed, a summary of the facts, an analysis of the evidence, and a recommended conclusion. The conclusion should generally be listed as "substantiated," "unsubstantiated," or, rarely, "inconclusive."

The report should be written in common, non-legal language that a typical juror would understand. That in mind, caution investigators against arriving at a legal conclusion. Assure investigators understand that their role is not to decide whether the law was violated.

Arriving at a conclusion

Experienced investigators know that, even with the best processes in place, unconscious biases can creep in. Being aware of this fact alone is the first step in limiting its effect. The second step is to base the conclusion on the facts and not the demeanor or reputation of the witnesses.



With any complex set of circumstances, the truth often emerges from the timeline of events, inherent plausibility of witness descriptions, corroborating evidence, and other objective factors — not subjective ones. Therefore, consider asking an investigator different from the one who conducted the investigation to review the facts and arrive at a conclusion. Since that investigator has no connection to the underlying investigation, this may help prevent subjectivity from creeping in. Good processes stick to facts and logic to reach a conclusion.

Implementing appropriate action

Regardless of whether the allegations are substantiated or not, at the end of the investigation, advise HR that those involved need to be reminded of the relevant workplace policies. And require them to sign off that they have reviewed and understand the policies.

If substantiated, possible options for appropriate action should include progressive steps of discipline, such as training, changing pay rate, and termination. Which action to apply should be based on prior disciplinary history and how the employer has handled similar situations. Consistent outcomes for policy violations are a hallmark of good workplace investigation processes.

Following up

Failure to follow up is one of the most cited criticisms by complainants and outsiders (such as a judge or jury who may be called upon one day to review the investigation).

After implementing appropriate corrective action, ensure that HR knows to follow up with the parties to make sure that the corrective action eliminated the issue. Failure to follow up is one of the most cited criticisms by complainants and outsiders (such as a judge or jury who may be called upon one day to review the investigation). Ascertain, therefore, that HR makes it a priority to set a date to check back with the complainant, the subject, and key witnesses to make sure the remedy implemented worked.

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