

Top 10 Mistakes Employers Make in Conducting Workplace Investigations



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Mistake #1: Accepting the characterization of an incident as discriminatory without clarifying whether the incident really involves discrimination.

- ▶ Start by asking yourself whether you have actually received a complaint of some form of illegal harassment or discrimination.
- ▶ Don't get caught up with labels.
 - In questioning, notes, and reports.
- ▶ Ask for specific descriptions of the conduct alleged.
- ▶ Understand the difference between misconduct vs. poor performance.



Mistake #2: Delaying the commencement or taking too long to complete an investigation.

- ▶ Time is of the essence. Undue delay suggests:
 - Indifference;
 - Evidence is not compelling; or
 - Employer is padding the file.
- ▶ Delay could subject the complaining employee to further harassment.
- ▶ Act before the point becomes moot (such as in the case of a discriminatory promotion).



Mistake #2: (continued)

- ▶ On the other hand ...
 - Don't be so hasty that you conduct a shoddy investigation.
 - Keep in communication with the complaining party/accused.
 - Consider suspending the offending employee with pay.



Mistake #3: Failing to take complaints of discrimination seriously.

- ▶ Particularly if the complaining employee has a history of complaints or is generally regarded as a disgruntled employee or a troublemaker.
- ▶ Take each complaint seriously, regardless of how frivolous it appears to be.
- ▶ Supervisors should NEVER go it alone.
- ▶ Make sure that someone within HR is aware of all investigations in order to ensure consistency.



Mistake #4: Failing to conduct an investigation when the employee just wants to make the employer aware of a concern.

- ▶ For example, when an employee says that they do not want anything done or said about it at this time.
- ▶ Complaints of harassment must be investigated in order to meet legal obligations.
 - Complaints of discrimination should also be investigated.



Mistake #4: (continued)

- ▶ Investigate even without a complaining party's cooperation.
- ▶ Document an employee's refusal to assist you during the investigation or to provide requested information.
- ▶ Do not promise confidentiality ...



Mistake #5: Promising the complaining employee that the employer will keep the complaint confidential.

- ▶ Disclose information on an as-needed basis in order to conduct a fair and thorough investigation.
- ▶ Tell the employee instead:
 - You will take every reasonable precaution to ensure confidentiality to the best of your ability.
 - You cannot fully investigate and keep their complaint confidential.
 - You will disclose information only on an as-needed basis.



Mistake #5: (continued)

- ▶ Tell others that this is a confidential matter and request that they not discuss it with anyone.
- ▶ You cannot require non-managerial employees to refrain from discussing their concerns with others.



Mistake #6: Not thinking through the implications of who should conduct the investigation.

- ▶ NEVER the employee's supervisor.
- ▶ Consider the following:
 - Someone with whom the parties and witnesses will be comfortable speaking.
 - At least one person who belongs to the same ethnic, gender, or racial classification as the complaining party, if possible.
 - Issues of privilege if using inside counsel.
- ▶ Advisable to have two people present.
- ▶ Consider outside counsel or third-party investigator.



Mistake #7: Not conducting a sufficiently thorough investigation.

- ▶ This includes:
 - Not interviewing all parties involved.
 - Not talking with all of the relevant witnesses identified by the parties.



Conducting the Interview of the Complaining Party

- ▶ Ask the complaining party to explain their concerns.
- ▶ Start with general questions and move to specifics, making sure that you review each incident or issue in detail.
- ▶ Be specific, even if it's embarrassing.
- ▶ Get the full names of any comparators, including differences in treatment.
- ▶ Distinguish between what they know and what they think they know.



Conducting the Interview of the Complaining Party (continued)

- ▶ Be sensitive to the timing of events.
- ▶ Get the names of anyone who witnessed or has knowledge of alleged incidents.
- ▶ Review any previous complaints raised.
- ▶ Advise them of the procedures to be followed during the investigation and to contact you if they think of something else that you should know.



Conducting the Interview of the Accused Party

- ▶ Start by generally describing the purpose of the interview.
- ▶ If a claim of harassment:
 - Tell the alleged harasser that a named individual has made a complaint, but do not initially provide all of the specifics.
 - Rather, ask general questions about conduct they have engaged in with that individual.



Conducting the Interview of the Accused Party (2)

- ▶ Go back to the beginning, and tell the employee each of the allegations or facts that have caused the company to investigate. Move from the general to specific.
- ▶ Find out if the accused has any allegations to make against someone involved.
- ▶ Inquire about what the accused believes the motivation of the complaining party to be.



Conducting the Interview of the Accused Party (3)

- ▶ Obtain names and contact information for anyone having information.
- ▶ Review any previous complaints made against the accused employee.
- ▶ Get copies of any supporting notes or documents.
- ▶ Tell the accused to contact you if they think of something else that you should know and advise as to the prohibition against retaliation.

Conducting the Interviews of Witnesses

- ▶ Determine which witnesses are relevant to your investigation.
- ▶ Determine whether to conduct interviews of certain witnesses before speaking for the first time with the accused party.
- ▶ Generally speaking, these interviews should follow the same guidelines stated above.
- ▶ Follow up with the complaining party and/or the accused party if any new facts are raised by witnesses.

Mistake #8: Not asking the complaining party to identify others outside their protected class who have been treated differently.

- ▶ Doing so helps you to ascertain whether the alleged conduct was discriminatorily motivated.
 - Could be a defense to a discrimination claim.
- ▶ Also ask the complaining party what they would like the company to do in response to their complaint.
 - Make no promises.
 - Do not suggest possible remedies.



Mistake #8: (continued)

- ▶ Make sure you understand the effect of the alleged conduct (i.e., denied a promotion, etc.) so that an adverse action can be rectified, if appropriate.



Mistake #9: Failing to document the investigation in an appropriate manner.

- ▶ Review your notes to make sure they're complete.
- ▶ If information needs to be added, do so now.
- ▶ Be as specific as possible (names, dates, details, etc.).



Mistake #9: (2)

- ▶ If questions arise, consider interviewing parties or witnesses again.
- ▶ Also consider interviewing parties to get their responses to items raised.
- ▶ In the case of harassment, consider whether it is necessary to take immediate action prior to the investigation being completed.
 - Typically, I would not place the complaining party on a leave of absence unless they have requested it or other circumstances warrant.



Mistake #9: (3)

- ▶ Determine whether a written report is required.
- ▶ Inform parties (not witnesses) of the results of the investigation.
- ▶ Advise parties and witnesses of the prohibition against retaliation.



Mistake #10: Failing to monitor your workforce.

- ▶ This includes the failure to seek out potential discriminatory disparities instead of waiting for a complaint to be filed.
- ▶ Have managers and supervisors police their areas of responsibility.
- ▶ Put a stop to the telling or distribution of racial, ethnic, or religious, etc. jokes.
- ▶ Be careful of office banter relating to race, sex, sexual orientation, age, etc.



Mistake #10: (continued)

- ▶ If necessary, meet with employees and make sure they understand that such conduct will result in disciplinary action if it continues.
- ▶ Ensure no improper uses of computers or emails.
- ▶ Document all discussions with employees and efforts to curb harassment/discrimination.



Best Practices

- ▶ Take all complaints seriously and don't make assumptions based on reputation.
- ▶ Train your supervisors and managers to recognize potential complaints of harassment.
- ▶ Conduct a sufficiently thorough investigation, including interviews of all parties.
 - Do not be vague.
 - Do not be embarrassed to ask specific questions about the conduct alleged.



Best Practices (continued)

- ▶ **Make credibility assessments.**
- ▶ **Keep your investigation to the issue of whether there has been a violation of the company's policy. Do not make legal assessments about whether harassment has occurred.**
- ▶ **Document the investigation in an appropriate manner.**
- ▶ **Monitor your workforce for inappropriate conduct instead of waiting for a complaint to be lodged.**



Thank You!



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