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Strategies for Ensuring Effective Workplace Investigations

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Employers are often faced with complaints of harassment, discrimination, retaliation, and other kinds of misconduct. While no two investigations are identical, specific strategies exist to help conduct effective workplace investigations, which in turn helps build trust within the organization, lends a listening ear to the aggrieved and accused employees, and protects the organization from liability. This alert highlights strategies for ensuring that your workplace investigations promote organizational integrity, establish fair treatment, and foster a positive work environment.

1. Identify the Scope.

Defining the scope of a workplace investigation is fundamental to its success and efficiency. A well-defined scope acts as a roadmap, preventing investigators from pursuing irrelevant leads while ensuring all pertinent issues are thoroughly examined. Without clear boundaries, investigations risk becoming unfocused fishing expeditions that waste resources, delay resolution, and potentially create additional liability. Investigators must identify the specific allegations and the relevant time period(s), parties involved, and evidence. They should also establish which policies are at issue and may have been violated. This framework helps maintain objectivity and ensures investigations remain focused on substantiating or disproving specific claims rather than expanding into tangential matters.

2. Create Your Investigation Plan.

The moment a complaint is reported, the clock starts ticking. It is imperative to promptly investigate and to not unreasonably delay an investigation or to appear unresponsive to the allegations made. A timely investigation is critical to resolving and addressing any issues and to asserting possible defenses should the matter lead to litigation. While an effective investigation isn't necessarily completed overnight, companies should consider timelines of one week, two weeks, or sometimes a month depending on the nature of the claims, the number of documents to review, and the number of interviewees involved.

The investigator should come into each witness interview armed with an outline of questions to help guide the discussion. While the outline need not be followed rigidly, the outline can help the investigator stay organized, ensure key topics are covered, and help maintain a structured flow, ultimately leading to a more focused and successful interview. Additionally, the investigator should consider what the relevant documents are and ensure that all documents pertinent to the claims have been reviewed. For instance, does the investigator have access to relevant emails, text messages, complaints to HR, disciplinary documents, and personnel files? Though it is not uncommon for new documents to be discovered during an interview, the investigator should enter the interview with a grasp of what the file entails.

Last, when establishing a plan, choose a location where the interviewee will feel comfortable speaking frankly and truthfully. The environment of the interview can play a significant role in shaping the outcome of the interview. If the interviewee feels embarrassed, threatened, or spotlighted, the interviewee may not speak with full candor. To the extent possible, interviews should take place in a private room free from distractions or visibility to the interviewee's colleagues. Off-site conference rooms or even remote interviews during which the interviewee is at home are encouraged. In some cases, it may be necessary to choose different locations for the various interviewees depending on the circumstances. In other words, a high-level manager with a secluded office may be interviewed in a different setting than an intern assigned to a cubicle alongside other colleagues. The investigator should also consider whether the individuals being interviewed are hourly employees who need to be compensated for the time spent participating in the investigation.

3. Decide Whether Immediate Action is Necessary.

Businesses may be confronted with the issue of whether it is necessary to take immediate action after a complaint is reported. Depending on the nature of the complaint, taking immediate steps to protect the complainant may be critical. This may take the form of paid temporary leave, schedule adjustments, or physically separating the workspaces of the complainant and accused to prevent any further misconduct. Employers must be aware, however, that such decisions should not go so far as to burden or inconvenience the complainant and their ability to perform their job duties during the investigation. For example, placing the complainant on an unpaid suspension or transferring their work location without their consent can be perceived as retaliatory and is not recommended. Similarly, an employer must consider whether to remove the accused from the workplace pending investigation, temporarily reassign the accused to an alternative work assignment, and/or whether to compensate the accused if they are suspended pending investigation. Each investigation is unique and may warrant different circumstances during the pendency of an investigation.

4. Communicate the “No Retaliation” Rule.

One of the most pressing considerations is ensuring that a workplace investigation does not result in retaliation. Every interviewee should be told at the outset that retaliation will not be tolerated against those who complain or those who participate in investigations. It must be made clear that acts of retaliation will be subject to disciplinary action, up to and including termination. Workplace investigations can place employees on the defensive, because they often feel like they are being accused of wrongdoing, even if they are not. This can lead to a sense of personal attack, fear of repercussions, and a desire to protect themselves by minimizing their involvement. Thus, communicating a “no retaliation” rule is critical in

protecting the company and encouraging participation in the process. Employees should be instructed not to retaliate against anyone and should similarly be put on notice to report any retaliation they may face as a result of their own participation.

Additionally, the investigator must explain that information provided during the interview may be shared with others only if absolutely necessary. Interviewees should understand that complete confidentiality cannot be guaranteed and may be virtually impossible to maintain in the event that a lawsuit arises. Should litigation be pursued, the interviewee should know that relevant parties will require copies of all statements and case-related documents. At the same time, the investigator can reassure the subject that they intend to uphold confidentiality as much as possible and that they plan to gather all available facts before reaching any conclusions.

5. Choosing the Right Investigator.

One of the most avoidable hiccups is choosing the wrong investigator. The choice of investigator directly impacts the investigation's credibility, effectiveness, and legal defensibility. Employers should pay heed to choosing an investigator with awareness and sensitivity. Differences in background, understanding, and experiences might affect communication styles, power dynamics, and interpretation of events.

6. Remain Impartial.

Impartiality is key. The investigator should focus on maintaining a neutral and impartial tone throughout the course of the interview so as to not discredit impartiality or cause the interviewee to question their motives. While it may be tempting to gain the interviewee's trust by acting like you are on their side, any flaws in the process can be used to challenge the credibility of the investigation's findings, leading to potential legal liability for the employer.

7. Reaching a Determination and Communicating to all Parties.

After conducting the initial interviews and any necessary follow-up interviews, there should be a formal conclusion to the investigation memorialized in writing. The final written report should reach an ultimate conclusion as to the facts and whether policies were violated, but should not opine on issues of law or use legal terms. The report should also highlight a section that provides a clear statement of the findings of the investigation on each key issue, including any issues that were not resolved. The final report should also include a list of the parties involved, employer policies or guidelines relevant to the investigation, and the parties responsible for making the final determination. The report should assess the credibility of witnesses. Did the interviewee display a clear sense of personal interest in the results of the investigation? Is the interviewee's job on the line and would they have any reason to be untruthful? Does the interviewee have an obvious animus towards the complainant or accused? The investigator should be assessing the interviewee's subjective credibility in ensuring whether their answers are truthful and accurate.

The investigator may be tasked with issuing a recommendation on the employment decision, at which point a member of the business, in consultation with legal counsel, will assess, finalize, or reject that recommendation. If tasked with issuing the business a recommendation, the investigator should clearly identify the basis for their recommendation in an impartial manner using the facts and information

obtained during the course of the investigation.

Last, effective communication is paramount when closing an investigation. An organization may want to consider the following approaches: providing appropriate notifications to involved parties while maintaining confidentiality, communicating outcomes to relevant stakeholders without disclosing sensitive details, ensuring transparency about the process and commitment to organizational standards, and offering support resources for employees affected by the investigation.

8. Closing the Investigation.

Closing a workplace investigation is a delicate and crucial process that requires careful attention to detail, legal compliance, and organizational integrity. The manner in which an investigation is concluded can significantly impact employee trust, organizational culture, and potential future legal implications. Based on the investigation's findings, the organization will want to develop a clear and actionable plan for resolution. This may include:

- Disciplinary actions for substantiated misconduct;
- Targeted training or educational interventions;
- Policy revisions or organizational practice improvements;
- Mediation or conflict resolution strategies for interpersonal issues.

An investigation's closure is not the end of the process, but a new beginning. Organizations should work to implement a follow-up plan to monitor the effectiveness of corrective actions, conduct periodic check-ins with the involved parties, track any recommended organizational changes, and assess the long-term impact of the investigation's outcomes. By approaching the closure of a workplace investigation with thoroughness, empathy, and strategic insight, organizations can transform a potentially challenging situation into an opportunity for positive change and continuous improvement.

Best practices in a workplace investigation are easier read than followed. If you have any questions about workplace investigations, please reach out to a Vorys labor and employment attorney.