

Conducting Internal Investigations

Reference Materials

THE IMPORTANCE OF EMPLOYMENT INVESTIGATIONS

Proper investigations help ensure that our employees are treated fairly. Properly investigating claims of harassment or other employee misconduct is one of the most important ways that you can help protect the company, and failure to do so can lead to significant liability for the Company. You are entrusted with an important responsibility.

In any event, in today's litigious environment, the opportunity to keep a bad situation from becoming a lawsuit is golden. A good investigation of employee claims is a powerful tool that can help the company defend itself when allegations of employee misconduct end up in litigation, and can even prevent such issues from resulting in litigation altogether.

UNDERSTANDING YOUR ROLE AS AN INVESTIGATOR

An employment investigation is the gathering, determination and documentation of facts concerning allegations of a violation of the law or company policy in the workplace. Your role is to determine whether the conduct occurred.

The proper role for the workplace investigator is (1) to gather and document facts about alleged workplace misconduct by interviews or other means; (2) to evaluate and reach conclusions about any competing versions of the facts; and (3) to document the investigation and management's response. If a conclusion cannot be reached, the investigator's job is to assure management that all reasonable steps have been taken to ascertain the truth, and to present the conflicting versions comprehensibly. The investigator must at all times ensure that his or her investigation was fair, unbiased, and in good faith. Investigators are not acting as lawyers. They should rarely, if ever, make conclusions concerning whether the law has been violated.

WHEN WILL YOU CONDUCT AN INVESTIGATION?

An internal investigation should be conducted whenever there is a credible allegation of a violation of the law, an employment-related policy (e.g., EEO, Harassment) or a significant provision of an organization's Code of Conduct.

WHAT ARE THE BEST PRACTICES IN AN EMPLOYMENT INVESTIGATION?

There is no perfect recipe for performing an employment investigation; the investigator's actions will depend largely on the facts and circumstances of each case. Some investigations are simple and others are very complex. However, please keep a few basic principles in mind when conducting investigations:

- *You must be unbiased.* Ideally, investigators should have nothing at stake in the result of the investigation. Investigators must be free to reach conclusions appropriate to the facts.
- *The investigation must be thorough and appropriate under the circumstances.* Few investigations can uncover every conceivable fact that might pertain to an allegation of misconduct. Few even can employ the resources available in the average civil lawsuit. Nevertheless, an investigator who fails to uncover a fact that might have been discovered before litigation was commenced may be called upon to explain why this fact was not considered earlier. For this reason, it is

critical for the investigator to plan at the outset the resources to be employed. Who will be interviewed? What records should be obtained and reviewed? What other steps should be considered? These decisions should be reviewed continuously until the final conclusions are recorded.

- *Give the employee under investigation given all reasonable opportunities to be heard.* This factor is critical in litigation. You must give the accused a full chance to tell his or her side of the story. This may include an opportunity to identify witnesses on his or her behalf, to present documents, to offer a written statement, and to suggest reasonable follow-up actions by the investigator.
- *You must reach reasonable conclusions concerning the facts.* The investigator must do more than simply collect the facts. There is an obligation to evaluate them and come to a reasonable factual conclusion. This means you must at times evaluate the credibility of the people interviewed; just because two people disagree does not mean that the investigation is inconclusive. *You must properly document the investigation.* One of the central goals of an employment investigation is to develop a clear and complete documentary record. It must show that: (1) the investigation was properly performed; (2) its conclusions are fair, reasonable, and supported; and (3) prompt, adequate remedial action was taken. Documentation must include records of all interviews, review of other evidence, and a report that supports the conclusions reached. Failure to present management with a reasonable record of these facts leaves the investigator exposed and subjects management to charges of inadequate attention to the problem. All documents in an investigation should be prepared with the expectation that the document will be at issue in subsequent litigation. Every effort must be made to avoid inflammatory, incorrect, or other inappropriate comments that may detract from the serious professional purpose of the investigation.
- *Be prepared to recommend prompt, effective action to remedy misconduct.* Although it may not be possible to determine in every detail what occurred, the investigator must evaluate the evidence, and, if appropriate, recommend “prompt remedial action” for past misconduct and ensure that no misconduct or retaliation occurs in the future. It is the employer’s duty to take such action.

UNDERSTANDING INTERNATIONAL CONSIDERATIONS

With increasing globalization, multinational companies need to consider an array of international legal requirements and cultural expectations to ensure compliance with appropriate employment obligations during an investigation. Key decisions need to be made as to whether the investigation is covered by legal privilege, the extent to which personal data might be involved in jurisdictions outside the U.S., differences in whistleblower protections, disciplinary constraints and disclosure concerns. Jurisdictions vary greatly in whether a privilege is available, how whistleblowers get protected, how data and privacy interests get protected, and what if any restrictions are placed on disciplinary options. Minimizing risk during an investigation depends as much on jurisdictional considerations as it does on careful planning and implementation of best practices.

CONDUCTING AN EFFECTIVE INVESTIGATION

HANDLING EMPLOYEES DURING THE INVESTIGATION

Removing the Accused from the Workplace

If the alleged misconduct is serious enough to potentially warrant termination, it is often necessary to take the accused person out of the workplace pending completion of the investigation. This should be considered in situations where you want to: prevent general disruption, limit possible retaliation, minimize contact between the accused and the victim, prevent further loss of property, provide investigators greater flexibility in locating and meeting with witnesses, eliminate the opportunity for the accused to tamper with evidence, prevent intimidation of witnesses, or lessen the stress on the victim and/or accused as well as other employees involved.

To remove an accused employee from the workplace will require you to place the employee on administrative leave or suspension for a day or more. Follow the company's administrative leave policy or guidelines when doing this.

As you would with any employee, treat employees subjected to suspension with professional courtesy and respect. Tell the employee that the purpose of the investigation is (at this time) not disciplinary but rather designed to protect the interests of the company and all of the employees while the investigation is completed. Placing the employee on suspension also heightens the need to complete the investigation quickly.

Temporary Measures with Respect to the Claimant/Victim

The law requires that employers take *immediate* action to stop any harassment or risk of workplace injury or illness. In addition, almost all employment laws provide specific guarantees against retaliation. Immediate and vigorous actions to ensure the welfare of all involved employees should be the investigator's and employer's first concern. Some examples are:

- Removing of the accused from the workplace with pay
- Removing of the complainant with pay
- Instructing the people involved not to communicate and to avoid any harassment or retaliation
- Referring employees to the Employee Assistance Program (EAP) or other counseling resources (take care to consider possible privacy and disability law concerns)
- Reimbursing employees for losses caused where grounds for such reimbursement are reasonably clear
- Monitoring of the workplace by human resources or operational management
- Providing employees with a clear and confidential means of communications for further complaints or concerns

- Communicating company policies (including any rights under applicable laws) clearly and promptly to employees
- Keeping key management personnel apprised of the status of the investigation

PLANNING

Outline an Investigation Plan

An investigation plan must be tailored to the events you are investigating. You should consider the following activities and determine whether they should be included in your investigation:

- Interview of the complaining party
- Interview of the accused
- Interviews of supervisors and managers
- Interviews of third party, or “collateral,” witnesses
- Review of documents, including company reports, videotape, phone records, photographs, computer files, etc.
- Follow-up interviews with the alleged victim, the accused and other witnesses
- Review of personnel files and/or records of past incidents, if any
- Review of company policies and practices

Prepare for Witness Interviews

Almost all investigations require interviews. Consider the following when outlining your interview plan:

- List the individuals you want to interview.
 - a. *The Complaining Employee.* Typically you will interview this person first. You will want to get complete details from the employee, along with names of witnesses or others who may have information.
 - b. *The Potential Victim.* If the potential victim is not also the complaining employee, interview him/her next. Discuss the information you received in the complaint and seek verification of the facts and additional details.
 - c. *The Accused/Wrongdoer.* The investigator must in almost every instance interview the accused/wrongdoer as part of the investigation to get his/her side of the story. Courts require that the “accused” be given a “reasonable opportunity to respond” to the charges against him/her. The timing of the interview will depend upon the nature of the particular

investigation. When you interview the accused, get complete details from him/her as well as the names of others who may have information about the charges.

d. *Collateral Witnesses.* Interview all individuals whom you suspect have knowledge or information about the subject incident(s). Do not limit your investigation to interviewing only those whom the complainant or accused have identified. Also, think about the order in which these interviews should be conducted. Do not rush ahead when it is necessary to wait to talk to an important witness.

- Prepare your interview questions.

Before you meet with witnesses, think about the questions you must ask. One way to come up with questions is to consider what information each witness might have. Also, think about questions that will make the person comfortable about being straightforward with you. Keep your questions factual and neutral, e.g., ask if the witness “heard any statements,” not whether the witness “heard any threats.” Review the sample interview forms at the end of this document for a review of questions that may be appropriate when conducting witness interviews.

Review any documents that might relate to the matters you are investigating. Documents can be a source of questions. If you need to clarify the information on the document, prepare the questions you need to ask to get the clarification. Before the interviews, you should also review the personnel files of the employees involved.

Review any notes you have of prior interviews or information you have already received in the investigation. Review what others have said about the person you are preparing to talk to so that you can ask for a response, confirmation, or rebuttal.

CAUTION: Be sure to listen carefully to the information you get in response to your prepared questions. You may need to probe for additional information based on what the witness tells you.

CONDUCTING THE INVESTIGATION

Preserving Evidence

A critical part of an investigation is the maintenance of the evidence. An investigative file should be kept in a secure place to maintain confidentiality. Do not forget to consider nontraditional forms of documents such as computer files and e-mail.

Investigation files should be kept separate from general personnel files. The one exception to this is any disciplinary memo that is issued at the conclusion of the investigation. *Investigators must be keenly aware that the documentary evidence created and maintained in the investigation file will presumably be disclosed and analyzed in any litigation concerning the investigation. Accordingly, **every** comment or document in the file should be carefully considered.*

Selecting Investigative Tools

Often, the primary investigative tool selected will be the interviewing of employee witnesses. Techniques and suggestions for conducting such interviews are outlined below.

Interviewing Witnesses

An effective interview is the core activity of the investigation. Assure the witness that the company will not permit any retaliation. Stress that no conclusions have been reached but, rather, that you are merely investigating the allegations. The following are general pointers for effective witness interviews:

- Conduct interviews in private so no one can overhear.
- Begin with general, open-ended questions, such as “How long have you worked for the company?”, “How long have you known...?”, “Who do you report to?”, “Tell me a little about the general environment of your store.”
- If possible, have another person present to be a witness and to take notes. You can explain the other investigator’s presence is to assist you and to take notes so you can concentrate on the interview. However, normally only one investigator should conduct the actual interview. You do not want the witness to feel “ganged up on.”
- Do not prevent the witness from leaving. Do not lock the door of the room where the interview is conducted or prevent the witness from leaving the room. If a witness wants to leave, explain that it is important for you to get all the facts so that you can make the best decision possible. However, if the witness still wants to leave, let him/her go immediately.
- If a witness is unwilling to talk to you, ask why.

A witness may be afraid that the accused or the company will retaliate. You must reassure such a witness that retaliation is not tolerated and encourage him/her to report any acts of retaliation.

A witness may not want to “rat” on a friend or be seen as an informant. Explain to the witness that you are simply trying to collect all relevant facts before a decision is made. You may remind the witness that, as an employee, he is obliged to answer your questions. If the witness claims not to know anything, and you suspect he is not being truthful, remind him that if you find out he has not been forthcoming, he may be subject to discipline. As a last resort, if the individual will not talk to you, tell him that he is being instructed to answer your questions and that failure to do so is insubordination. If the person still refuses to answer, terminate the interview and consult Human Resources.

Some additional tips:

- Never tape record an interview unless specifically instructed by Legal.

- Do not label the alleged misconduct for the witness, such as “sexual harassment” or “theft”, as doing so may influence the witness’s responses. Tell the witness that you are conducting an investigation into a situation that has come to your attention.
- Tell the witness that no decision has been made yet; you are just trying to get all of the facts and information.
- Ask open-ended questions. Narrow the questions if the witness is not giving you responsive answers.
- Ask for details. Find out where the witness got the information. Ask the same question more than once in different ways if you suspect the witness is not being straightforward.
- Do not tell the witness what other witnesses have said, unless you need to clarify a discrepancy or in some cases to refresh the memory of a witness.
- Find out who else may have information that could shed light on the investigation.
- Make detailed notes while the witness is present. Record every point the witness makes, even though you may not think it is important at the time.
- Listen objectively and do not pre-judge the witness’s story.
- Ask each witness to keep the interview confidential. Tell the witness that you want to get each person’s version from his own knowledge and not from what he heard others say. However, be cautious because a witness will frequently disregard instructions on confidentiality. Bear that in mind as you decide the order for your interviews.
- Assure each witness that you will maintain confidentiality to the extent possible. However, you cannot and should not guarantee any witness that what he or she tells you will not be told to anyone else. You can tell witnesses that the information they give you will only be given to people with a need to know who will also be requested to keep information confidential.
- Assure each witness that the company prohibits retaliation against any employee for cooperating in an investigation. Tell the witness to report any instances of retaliation immediately.
- Let the witness know about relevant company policies such as the policy against harassment and discrimination, safety policies, open communication policy, and policy against retaliation.
- Give the witness the opportunity to contact you if he/she has further information. If you later determine that you need to ask a witness additional questions, do not hesitate to call him/her back for a second interview.

- Interview every person the suspected wrongdoer names. The wrongdoer must have the opportunity to exonerate him/herself.

Before concluding the interview, the investigator should review the information obtained with the witness to ensure that it is accurate and complete. Then the investigator should give the witness the opportunity to add anything else that he or she so chooses. If the investigator is interviewing the complainant, the investigator should tell the complainant that once the investigation is concluded, the complainant should be contacted. If the investigator is interviewing the employee who allegedly engaged in misconduct, the investigator should tell the employee that, at the conclusion of the investigation, he or she will be contacted and that, depending on the results of the investigation, possible disciplinary action may be taken. Lastly, the investigator should request that all witnesses keep the investigation in confidence.

Reviewing Other Evidence

Collect and review all other information that may touch upon the matter that you are investigating. Consider reviewing correspondence and other documents, reports, videos, phone records, attendance and payroll records, handwritten notes, supervisor's notes and personnel files. Also, review all computer files, e-mails and other records that may be stored on the computer's hard drive, as well as the hard copy the files. You should be aware that computer records which employees may think they have deleted are often still retrievable.

Confronting the Accused/Wrongdoer With the Evidence

If the information you obtain in an investigation indicates that misconduct occurred, confront the accused/wrongdoer. Tell the employee what you have discovered and ask if the employee has any information to add or explanation to give you. If you receive an explanation for any of the evidence, check it out. For example, investigate further if the accused/wrongdoer informs you that another employee has a bias or a document contains erroneous information.

REACHING A CONCLUSION/ PRESENTING YOUR FINDINGS

Investigators ultimately reach findings regarding the allegations in question. Even in those instances when the investigator cannot choose between conflicting versions of the facts, he or she must carefully document the specifics and summarize why a clear determination could not be made. It is important for management to be aware of all of the factual evidence, as the company may need to take certain actions to ensure compliance with the law and company policy.

When you have completed the interviews and reviewed all relevant documents and information, you will need to conduct **a thorough evaluation** of everything you have gathered. As you evaluate the evidence, consider the following:

- Was the witness credible?
- What motivation might the witness have to be less than truthful?
- Did the accused demonstrate a pattern of misconduct? Does the alleged victim have a history of making complaints?

- Did the accused deny the charges or admit that he/she made a mistake?
- Was the complaint timely or untimely? How does this relate to the event, if at all?
- Were there eyewitnesses with direct knowledge of the incident(s), or only circumstantial evidence?

Once you have evaluated the evidence, carefully prepare your findings. **Do not use terms that are legal conclusions; i.e., “Based on the evidence, the manager committed sexual harassment.” Generally, the conclusion will either be that the complaint was unfounded and the misconduct did not occur, or the complaint was truthful and at least some misconduct occurred.** Sometimes at the conclusion of an investigation, although the facts in the complaint may have been true, there may also be mitigating circumstances. To help you reach the appropriate conclusion for a workplace investigation, consider factors such as the following:

- Does the company have a policy against the behavior?
- Did the accused/wrongdoer know about the policy?
- Does the accused/wrongdoer admit or deny the misconduct?
- Was any law violated?
- How strong is the evidence? Is it more likely than not the misconduct occurred?
- Has the investigation been thorough? Are there any gaps that need to be investigated before a decision is reached? Have you made any assumptions that need to be verified?
- Has the accused/wrongdoer committed violations in the past?
- How long has the employee been employed?

COMMUNICATING THE RESULTS

Once the investigation is complete and a conclusion has been reached, the company must communicate the results.

To the Accused/Wrongdoer

You will always communicate the results to the accused employee. Give the employee the specific factual basis for the determination and, where necessary, impose discipline. In determining the appropriate discipline, consider:

- The seriousness of the misconduct
- The employee’s position (supervisors and managers can be held to a higher standard of conduct)
- The employee’s employment history and length of service

- Whether the employee has been disciplined for similar behavior before
- How the company has treated other employees who have committed similar offenses

HINT #1: Avoid using legal terms to describe the employee's misconduct. For example, be careful before you state that the employee committed "theft." The legal standard for finding someone guilty of theft is "beyond a reasonable doubt," which only a jury or court can do. Therefore, it is always better to describe the behavior as "a violation of company policy" and specify the policy.

HINT #2: Doing a good job of communicating to the employee why the decision to discipline or terminate him/her was made, including the evidence that was considered in doing so, might convince the employee not to bring a claim against the company. If he/she sees that the evidence you have is solid, he/she may feel it is better to just accept the decision.

To the Complaining Employee

If an employee initially brought the suspected misconduct to the company's attention, it may be appropriate to let the complaining employee know the result. The nature of the complaint or misconduct will dictate what and how much you tell that person. At a minimum you should let the complaining employee know that his/her complaint was not ignored.

In the case of prohibited harassment (e.g., sex, race, age), the company is legally required to notify the alleged victim of the results of the investigation and what discipline, if any, was taken against the accused harasser. *You must be careful not to give too much information to the complaining employee.* The accused/wrongdoer, as well as the witnesses in the investigation, have certain privacy rights. It is sufficient that if you are required to or decide to report information to the complaining employee to let him/her know the ultimate result only. The complaining employee does not need the details.

FOLLOW-UP

At the conclusion of the investigation, it is important to ensure the integrity of any documentation that has been collected, including notes and witness statements. Keep all the information in an investigation file separate from the personnel files, so that the company may rely on those records for later use. Remember that any document in a personnel file is discoverable in many states, as may be most of the witness interview documents created in the investigation.

Sample Investigation Documents

SAMPLE RECOMMENDED INVESTIGATION CHECKLIST

SAMPLE WITNESS INSTRUCTIONS

SAMPLE INTERVIEW QUESTIONS & ANSWERS

SAMPLE INVESTIGATION-INTERVIEW FORMS

SAMPLE RECOMMENDED INVESTIGATION CHECKLIST

Throughout the investigation process, keep in mind the seven steps of an internal investigation: (1) planning; (2) preserving evidence; (3) selecting investigative tools; (4) interviewing witnesses; (5) reaching a conclusion; (6) communicating the results; (7) follow-up.

1. Step One – Planning

- ☐ What is the purpose of the investigation?
- ☐ What is the triggering event?
- ☐ Who will be the person with overall responsibility for the investigation?
- ☐ Will the investigation be subject to the attorney-client privilege?
- ☐ Will law enforcement have to be involved at any stage?
- ☐ Is later civil litigation likely?

2. Step Two – Preserving Evidence

- ☐ Preserve Loss Prevention Surveillance Video?
- ☐ Have key documents been safeguarded?
- ☐ Has key electronic data been safeguarded?
- ☐ If electronic data has been erased, can it be restored?
- ☐ Has physical evidence been stored properly to avoid deterioration?
- ☐ Have photographs been taken? Date and time of each photograph recorded?

3. Step Three – Selecting Investigative Tools

- ☐ Reviewing company records
- ☐ Reviewing personnel files
- ☐ Searches: desk, lockers, purses, employees, etc.
- ☐ Electronic data: voice mail, e-mail, computer files
- ☐ Surveillance video
- ☐ Accessing background check records
- ☐ Using outside investigators

- ☐ Using the attorney-client privilege

4. Step Four – Interviewing Witnesses

- ☐ If possible, use two professionals in the interviews; one to ask questions and one to witness and take notes. This is especially desirable when interviewing the accused.
- ☐ Create a written record of each interview
- ☐ Explain the purpose of the interview
- ☐ Emphasize that the company takes this matter very seriously and that an investigation is being undertaken which includes witness interviews
- ☐ Ask open-ended questions
- ☐ Avoid leading questions
- ☐ Avoid myths and stereotypes
- ☐ Ask non-judgmental questions
- ☐ Avoid the appearance of favoritism
- ☐ Avoid adopting interviewee's legal conclusions/labels to characterize the behavior in question
- ☐ Observe and record not only the spoken words of the witness, but also physical and verbal reactions
- ☐ Inform the witness that confidentiality is important and instruct the witness not to discuss this matter with other employees
- ☐ Explain that retaliation will not be tolerated

5. Step Five – Reaching a Conclusion

- ☐ Consider credibility determinations. Factors include:
 - Memory
 - Perception
 - Veracity (truthfulness)
 - Corroboration or lack of corroboration
 - Bias of witnesses
 - Consistency of accounts

- Prior misconduct or lack thereof
- Plausibility of accounts
- Review other evidence collected

6. Step Six – Communicating the Results

- ☐ Communicate results of investigation to complaining employee
- ☐ Communicate results of investigation to “victim” if different from the complainant
- ☐ Evaluate whether communication to law enforcement agencies is appropriate
- ☐ Take steps to ensure communication of information only to those who have a “need to know”
- ☐ Communicate the closure of the investigation to the accused, whether the allegations were substantiated and, if appropriate, whether any disciplinary action is forthcoming

7. Step Seven – Follow Up

- ☐ Maintain separate records of investigation
- ☐ Take steps to ensure that no retaliation is taken against complaining employees
- ☐ Audit internal operations which allowed event to take place
- ☐ Revise operational and personnel procedures and policies as appropriate
- ☐ Evaluate the effectiveness of the investigation itself
- ☐ Create a single, definitive and legible draft of notes

SAMPLE WITNESS INSTRUCTIONS:

Who you are and what you are doing

My name is _____. I am here to conduct a workplace investigation.

Since this is a workplace investigation, it is a serious matter and is being conducted in accordance with company policy. Our objective is to find out what happened here so we can advise management accordingly. To accomplish that, we would like you to assist us and share your side of the story. We very much appreciate your time and cooperation. I will not mislead you or lie to you. I expect that you will not lie to me. Lying in the course of the investigation can lead to serious consequences.

I will be taking notes because I want to make sure that I document what you say with complete accuracy.

Your job

You expect that you will cooperate fully, with complete candor, and respond to all questions and requests honestly. Is that understood? If you do not understand a question, please let me know, and I will clarify it. If you do not ask for a clarification, I will assume the investigator understood the question.

I am interested in what you have to say based on your own personal knowledge. Please do not speculate. If you do not know the answer to a question, please say so. Don't guess. Or if you are guessing, please let me know.

Confidentiality

We will be handling this investigation in as confidential a manner as possible. – Information we are gathering will be shared only on an absolute need to know basis. ONLY to Management Employees: 'Please do not discuss this investigation or matters we discuss here today with anyone. Out of respect for all involved, we would like you to keep this information we discuss here confidential.'

(DO NOT MAKE THIS GENERAL INSTRUCTION FOR NON MANAGEMENT EMPLOYEES)

Retaliation

We will not tolerate any type of threat or retaliation against anyone who reports a violation or cooperates in an investigation. If you receive any such threats, or feel uncomfortable in any way, please advise me or _____ immediately.

Other Instructions

Please do not ask me who reported a violation or who else may be cooperating in the investigation. We want to protect the reputation of all parties involved in the investigation.

Please do not draw any conclusions as a result of this interview. This interview is only part of the investigation.

My goal is to obtain truthful and the most accurate information possible. If later you happen to remember anything that you couldn't recall here today, or you want to supplement or correct something you said to me, please call me at _____.

QUESTIONS YOU MAY BE ASKED DURING THE INVESTIGATION

By the Complainant or a Witness

- Can I lose my job for reporting this complaint?
- Suggested Answer: The Company absolutely prohibits retaliation for coming forward with a discrimination or harassment complaint. If you feel that you have been retaliated against, please tell me or your supervisor.
- Will everyone find out what I've told you?
- Suggested Answer: We limit knowledge of your complaint and the investigation to those with a need to know. Keep in mind, however, that to complete a thorough investigation we will have to discuss your complaint with the person you accuse and any witnesses.
- What if I decide not to participate in the investigation?
- Suggested Answer: Once we learn of an allegation of harassment or discrimination, we are under a legal duty to investigate, whether you cooperate or not. I encourage you to fully cooperate so that we can resolve this situation quickly and effectively. [For witnesses: If the situation becomes serious enough, you may be subject to discipline for refusing to cooperate.]
- Do I have to reveal information if I promised someone else I would keep it a secret?
- Suggested Answer: I understand your dilemma but the Company's first priority is resolving complaints of harassment or discrimination. Again, you will suffer no retaliation for participating in this investigation. There also may be disciplinary consequences for refusing to cooperate in an investigation.
- Can I have a lawyer/co-worker/family member present during our interview?
- Suggested Answer: Due to confidentiality concerns, I will have to conduct the interview with you alone.
- What if someone gets fired based on what I tell you?
- Suggested Answer: Our first concern should be resolving discrimination and harassment issues. If there is any fall-out, we will

handle it. Remember, you will not be retaliated against for talking to us.

- Will you tell me what happens after you complete the investigation?
- Suggested Answer: [Complainant] We will tell you how we have resolved the issue.
- Suggested Answer: [Witness] Due to confidentiality concerns, we cannot tell you the results of the investigation.

By the Accused

- Can I have a lawyer/co-worker/family member present during our interview?
- Suggested Answer: Due to confidentiality concerns, I will conduct this interview with you alone.
- Could I be sued individually?
- Suggested Answer: In some cases, yes. If that happened, we would determine the best course of action for your representation.
- Can I sue the complainant?
- Suggested Answer: That is a decision to be made purely between you and a lawyer.
- Can I discipline or coach this employee now that s/he has brought a complaint against me? I don't think I can work with someone who has leveled these accusations against me.
- Suggested Answer: We do not intend to hinder you in doing your job, but we must tread carefully in this situation. It will be a good idea for you to run decisions that may adversely affect the complainant by HR ahead of time. If possible, we may try to change supervisory authority so that you can limit your interaction with the complainant. Please remember to avoid doing anything that could be perceived as retaliatory.
- If I am absolved of these accusations, will you fire the complainant?
- Suggested Answer: It is certainly too soon to tell how this will all be resolved. One thing you should be aware of is that the prohibition against retaliation applies even when we cannot conclusively decide whether the discrimination or harassment occurred, as long as the plaintiff had a good faith belief that it did.

- Will I find out what the other witnesses said when you interviewed them?
 - Suggested Answer: In the end, we will tell you what conclusions we have drawn and why, but confidentiality issues do not allow us to tell you the exact substance of the interviews. Please remember that you should not discuss the allegations or the investigation with the complainant or any witness, to avoid the inference of retaliation.
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- How could you believe her/him over me?
 - Suggested Answer: This investigation is about reaching a finding based on the facts available to us. If we hear of an allegation of harassment or discrimination, under the law, we have an absolute duty to investigate.

SAMPLE INVESTIGATION-INTERVIEW FORMS

GENERAL INTERVIEW FORM

Open ended questions:

- “How long have you worked for The Company?” _____
- “Who do you report to?” _____
- “Tell me a little about the general environment of your department.”

Tell me about your work environment in general and describe what happened:

Nature of allegations:

Dates and locations of alleged incidents:

To whom were the allegations first reported? When were they reported, and how?

Where did the incident take place?

When (date and time) was the incident?

Did you witness the alleged incident?

Where were you?

Who else was present?

What happened?

What did you see?

What (word for word, if possible) did you hear?

Did anyone else do or say anything during the incident?

Is there anything else that you recall about the incident?

[Repeat and use wherever appropriate]

Is there anything else you would like to add about this incident?

Do you have any theories as to the reason or motive for the incident?

Have you had any conversation(s) with anyone about anything related to the incident?

Do you know whether anyone else has, or claims to have, any information about the incident?
(Interview all identified witnesses or potential witnesses if possible.)

Are you aware of any documents (writings of any kind) that relate in any way to the incident?

Are you aware of any physical evidence that may relate in any way to the incident?

Are you aware of any electronic evidence that relates in any way to the incident?

Are you aware of any similar incidents?

Is there anyone else that you think I should talk to?

Are there any other files, records, or objects that you think I should examine, or that might refresh your memory?

Is there anything else, no matter how remote, that I should know about?

Is there any other evidence or fact that you believe would help us resolve this?

Here is my card. If you think of anything else, no matter how trivial, or if anything at all comes up, please call me. Thank you for your cooperation.

[Remind interviewee that confidentiality is required and that retaliation will not be tolerated.]

Name of Investigator: _____

Date: _____

ACCUSED PRE-INTERVIEW CONSIDERATIONS

- Prepare for the investigation meeting with the accused. This meeting should take place in private, although as the investigator, you may arrange to have a witness present as appropriate. The investigator should outline the allegations in advance to ensure that all subjects are discussed.
- Provide the accused with a copy of the harassment, discrimination, equal employment and/or general misconduct policy as appropriate. Emphasize the organization's commitment to enforcing the policy. This step should be followed even if it is suspected that the allegations are not true.
- Answer any pre-interview concerns or suspicions that the accused person may have about the investigation.
- Advise the accused generally about the investigation and policies against retaliation.
- Ask direct and detailed questions based on information provided by all witnesses, such as those on the following interview form.

ACCUSED INTERVIEW FORM

OPENING FOR THE INTERVIEW:

1. Thank the person for coming in. Inform accused that the purpose of the meeting is to talk about allegations of workplace misconduct made against him/her.
2. Explain the following to the accused:
 - No decision will be made until all the information has been collected.
 - This is your chance to tell your side of the story.
 - Retaliation is prohibited.

Open Ended Questions:

- "Let's talk about why we are here today."
- "Tell me about your working relationship with_____."

Were you and the complainant working together on the date(s) complainant says the harassment or other misconduct occurred?

Do you recall any interaction with complainant on those dates?
If so, what was the context of the interaction?

Were there any witnesses present? (All identified witnesses should be interviewed.)

What was the substance of any conversation between you and the complainant?

Expect an adamant denial. For each denial, request that the harasser identify corroborating witnesses or evidence, and detail any “alibi.”

If the accused acknowledges any conduct, ascertain and document what occurred. Try to get as many details as possible, even though this may be uncomfortable for the accused. Use additional pages if necessary. Ask open ended, non-judgmental questions, such as:

Did the accused engage in the alleged conduct?

If so, describe the circumstances and frequency of the conduct?

Did the accused threaten the complainant in any way?

How long was the incident? For example, a few seconds or five minutes?

Where did the incident take place?

Were there any witnesses to the incident? If so, who were the witnesses?

How did the complainant respond to the incident? Did he or she make any effort to bring it to a halt?

How did the accused feel about the incident at the time it occurred?

Did the accused do or say anything that could have been misunderstood or could be intentionally misrepresented?

Ask the accused about his/her beliefs or suspicions as to why the reports or complaints have been made (such as ulterior motives, prior consensual relationships, retaliation by the complaining employee, attempts at job security in the face of poor performance evaluations, etc).

Did the complainant engage in any conduct which the accused felt was inappropriate or made the accused feel uncomfortable?

Has the complainant ever said or done anything that would lead the accused or others to believe that the complained-of conduct was not "unwelcome?"

What is the level of supervision between the accused and the complainant?

How frequently do the accused and the complainant work together?

Has the accused previously been accused of harassment, discrimination or other misconduct?

If so, what were the circumstances?

Other:

[[Advise that if the evidence establishes misconduct, the organization will take appropriate disciplinary action against the accused and the complainant will be fully informed that the investigation has been completed, and whether the allegations were substantiated. The complainant, however, is not provided with any information about the specifics of any disciplinary actions, but should be informed that the company is addressing the issue appropriately.]]

Here is my card. If you think of anything else, no matter how trivial, or if anything at all comes up, please call me. Thank you for your cooperation.

[Remind interviewee that retaliation will not be tolerated.]

Interviewer: _____

Date: _____

Complaint Intake Form
INITIAL ANALYSIS

MATTER: _____

COMPLAINANT(S): _____

DATE OPENED: _____

I. General Summary of Complaint:

☐ Written complaint attached ☐ Summarized below

II. Preliminary Checklist (check after evaluating)

☐ Management notified/consulted ☐ Workplace safety/violence concern
☐ Address current status of parties ☐ File opened

III. List of Allegations (attach separate sheet(s) if necessary)

| |
|----|
| 1. |
| 2. |
| 3. |
| 4. |

III. Preservation of Documents / Evidence

- | | |
|---|--------------------------------------|
| ___ Pertinent employer policies | ___ Police reports, official records |
| ___ Employee files and evaluations | ___ Pictures, charts, data |
| ___ Incident reports, memos, correspondence | ___ Evidence from project files |
| ___ Relevant email or computer files | ___ Performance ratings/ other data |
| ___ Other materials (list): | |

Other Tasks or Resources Needed:

WITNESS WORKSHEET

| WITNESS NAME & POSITION | REASON FOR INTERVIEW | DATE SCHED. (COMPLETED <input type="checkbox"/>) | LOCATION OF INTERVIEW |
|-------------------------|----------------------|--|-----------------------|
| 1. | | <input type="checkbox"/> | |
| 2. | | <input type="checkbox"/> | |
| 3. | | <input type="checkbox"/> | |
| 4. | | <input type="checkbox"/> | |
| 5. | | <input type="checkbox"/> | |
| 6. | | <input type="checkbox"/> | |
| 7. | | <input type="checkbox"/> | |
| 8. | | <input type="checkbox"/> | |
| 9. | | <input type="checkbox"/> | |
| 10. | | <input type="checkbox"/> | |
| 11. | | <input type="checkbox"/> | |
| 12. | | <input type="checkbox"/> | |

(Add additional witnesses as necessary)

SAMPLE MEMORANDUM

CONFIDENTIAL

TO: Management Decision Maker

FROM: Investigator

DATE:

RE: Investigation of Claim by Complainant

A. OVERVIEW OF ISSUES (attach separate sheet(s) if necessary)

[General description of the assignment: “Employee came to me with a complaint about her supervisor, John Doe. Employee asserts that Mr. Doe has violated the company policy against harassment/discrimination by engaging in the following activities.”]

[illegible]

[illegible]

[illegible]

- [illegible]

E. **FACTUAL FINDINGS:** A short factual finding on each allegation with reasons (attach separate sheet(s) if necessary)

- Likely occurred as alleged.
- Likely did not occur as alleged.
- Unable to determine whether likely to have occurred as alleged.

[e.g. “(Allegation No. 1 ____): We find that this incident likely did not occur as alleged. We base this on the fact that there was no other person in the department who observed the allegation, even though many were there at the time. Mr. Doe credibly denied the allegation. Mr. Doe’s documentation of the event, submitted at the time, appears to be a reliable description of what occurred and there is no evidence, other than Ms. Employee, that conflict with it.”]

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

