

Guidelines for Investigating

Guidelines for Investigation of Harassment, Discrimination and Workplace Misconduct Complaints

A. Initial Response

Your (and the Company's) initial response to an employee's complaint of harassment or discrimination often is key to protecting the employee and the Company. For this reason, what you say and do in response to a complaint is critical.

Below are some "do's and don'ts" for responding to a complaint. While neither list is exhaustive, these guidelines should help steer you in the right direction.

Do Not :

- Tell the employee to go "work it out" with the employee with whom he or she is having a problem.
- Tell the employee that he or she is overreacting or is too thin-skinned.
- Tell the employee to ignore the conduct because the offending person is "harmless" or "doesn't mean anything by it" or "is just joking" or "that's just the way he or she is."
- Require the complaining employee and the offending employee to meet with you together to "work it out" or "work through their differences."
- Agree to keep the complaint just between you and the complaining employee and take it no further.
- Agree to do anything other than investigate the concern and take appropriate action.

You Should:

- Tell the employee you appreciate him or her bringing this matter to your attention.
- Listen attentively to the complaint and take careful notes if possible.
- Repeat your understanding of the complaint to the complaining employee to ensure that your understanding is correct and that the employee has told you everything.
- Assure the complaining employee that the Company takes these matters seriously and will investigate and take appropriate action.
- Tell the employee to bring any additional concerns to your attention immediately.
- Contact _____ [name or job position] _____ immediately.

B. General Rules

- Notify ____ [name or job position] ____ immediately if you become aware of a potential harassment or discrimination problem.
- Consider placing the “victim” or the “accused” on leave during the investigation.
- If an investigation is necessary, select an investigator who does not work directly with the alleged victim and accused. Usually it is better to have an investigator who is outside the “chain of command” of either employee and one who is not personal friends with either.
- Select an investigator who is personable and can make witnesses comfortable.
- Select an investigator who is familiar with the Company’s policy on harassment, discrimination and workplace conduct, and the legal issues presented.
- It may be preferable to have two investigators working together.
- Outline the preliminary and closing statements to be made and the information to be covered before any interviews.
- Witness interviews should be conducted in a private setting.
- Allow sufficient time for each interview to allow for a thorough interview without the witness feeling rushed. If possible, the interview should be conducted at an offsite location so that the witness will not be questioned by co-workers when returning to work following the interview.
- Each witness should be cautioned, at the beginning *and* the end of the interview, about the confidential nature of the interview. They should be told not to discuss the interview with co-workers, friends, family members, or anyone at all.
- This caution should include a specific statement that the interviewee is not to assume that any other employee is entitled to know about the contents of the interview.
- Take extensive notes. Try to draft notes in a statement form as you are taking them. If this cannot be done, draft a statement at the end of the interview, review it with the witness, and have the witness sign it. Provide a copy if requested. **Do not include your opinions about the facts or the credibility of the witness in your notes.**
- Do not store investigation materials in anyone’s personnel file. Rather, maintain those materials in a permanent confidential investigative file marked as such.
- Witnesses (except the accused) should be specifically informed that they will not be retaliated against by anyone based on any information that they provide during the interview and that the interview will remain confidential to the extent possible.

- If the witness wants to know if statements made during the interview will “get someone into trouble,” they should be told that a thorough investigation will take place and the Company will evaluate the facts uncovered and take appropriate action.
- Do not interview anyone as a witness if you do not have some reason to believe the person may have information related the incident being investigated.
- Do not tape record interviews. Tape recorders are intimidating.
- Do not allow witnesses to tape record the interviews.
- Do not tell witnesses what other witnesses have said.
- Should a witness refuse to cooperate or participate, excuse that witness and notify _____ for further instruction.

C. Interviewing the Complainant

- Interview the complainant in a location other than the normal workplace, if possible. Give the complainant as much time as necessary to relate each and every incident of harassment or discrimination.
- Stress the need for confidentiality.
- Stress that no retaliation will occur for statements made or information provided in good faith in the interview.
- Take notes as described above.
- Pay particular attention to independent sources of corroboration. These sources include witnesses, written correspondence, *etc.* Specifically and carefully note dates, times, places, and names if the complainant can remember them.
- Require the complainant to be as specific as possible with his or her allegations, even if it is distasteful or unpleasant for him or her to recount. In other words, do not accept characterizations, such as “inappropriate touching” or “offensive comments.” Require the complainant to tell you exactly what happened or what was said and when and where it occurred. Even the smallest detail may have significance.
- Assure the complainant that the interview will be kept as confidential as possible within the bounds of conducting a thorough investigation.
- At the end of the interview, reiterate the importance of confidentiality.
- Do not attempt to predict the outcome of the investigation or the actions the Company may or may not take other than completing the investigation. However, you should ask the complainant what he or she believes would be a reasonable solution to the problem.

- Thank the employee for bringing the matter to your attention.
- Remind him or her to bring any additional concerns to your attention.

D. Interviewing Other Potential Victims

- Inform the witness of the extremely confidential nature of the interview and that they are not to discuss it with anyone.
- Witness interviews should initially be limited to those witnesses identified by the complainant as persons with knowledge.
- Advise witnesses that you are asking questions regarding a complaint about a potential violation of Company policy and review the policy with the witness.
- Stress that no retaliation will occur for statements made or information provided in good faith in the interview.
- Take notes as described above.
- Ask “open ended” questions that do not directly accuse anyone of anything. For example, in a sex harassment investigation do not ask questions such as “Have you ever seen Joe Jones grab Sue?” Rather, questions could be in the nature of:
 - “Has any employee or manager of the Company ever made comments or statements to you of a sexual or similar nature that you felt were inappropriate in a business setting?”
 - “Has any manager or employee of the Company ever made comments or statements to you about your appearance or your personal life that you felt were inappropriate?”
 - “Has any employee or manager of the Company ever made inappropriate gestures towards you or touched you inappropriately or attempted to touch you inappropriately?”
 - “Have you ever witnessed any of these things (touching, attempted touching, in appropriate comments, propositions, *etc.*) happening to any other person?”
 - “Has any other employee of the Company ever complained to you that comments or actions of this type were occurring?”
 - “Have you ever felt it necessary to avoid working with certain people at the Company at certain times and places because you were concerned by activities of this type?”
 - Have you ever complained to any supervisory employee about conduct you believed to be inappropriate?

- If the answer to any of the above questions is yes, the interviewer should follow up at the same degree of detail that is suggested above for the complainant. In other words, ask the witness to describe in specific detail the conduct or comments that the witnesses found inappropriate or made him or her feel uncomfortable or conduct or comments directed at others the witness believed to be inappropriate in the workplace.
- At the conclusion of the interview, remind the witness of the confidential nature of the interview and tell the witness not to assume that any employee has a need to know about the contents of the interview. Specifically, tell the witness that they are not to discuss it with friends, co-workers, and family members.
- Thank the witness for his or her cooperation.

E. Interviewing Fact Witnesses

- Fact witnesses are witnesses who may have information relevant to the investigation, but who may not have experienced or witnessed the alleged harassing or discriminatory conduct.
- Stress the confidential nature of the interview.
- Advise witnesses that you are conducting an investigation for the Company. It is not necessary to tell them the specific nature of the complaint or concern or the persons involved.
- Tell the witnesses that the investigation is confidential and they are not to discuss the contents of the interview with anyone, including co-workers, family, or friends.
- Take notes as described above.
- Limit the questioning of a fact witness to the specific facts they are supposed to know. For example, if the sole purpose of interviewing a particular witness is to determine whether someone attended a particular meeting, you should not question the person generally about the specific allegations being investigated.
- You may ask whether the witness has ever witnessed comments or conduct that he or she believed was inappropriate. If the answer is yes, ask the witness to describe each such incident.
- Thank the witness for his or her cooperation.

F. Electronic Files

- E-mail and other electronic files that were used or accessible to the complainant and/or the accused should be preserved as of the date the Company became aware of the complaint. Maintaining these records in an unaltered states is important. The failure to do so may have

a negative effect in any future legal action. The IT Department should be involved to preserve the integrity of the information.

- Once the files are secured, electronically-stored information such as e-mail and internet use records should be reviewed if the allegations or investigation suggest that relevant information may be found there.

G. Documents

- To the extent possible, the investigator(s) should personally gather personnel records, payroll records, and any other documents necessary for the investigation. This will minimize the involvement of other clerical employees in the process.
- The investigator should handle all word processing tasks and make all copies personally. If possible, word processing should be performed on a “stand alone” word processor with secure document storage. If this cannot be accomplished, documents should be kept on removable storage devices rather than a hard drive or network server. Be sure to make sufficient copies of the storage device to avoid the risk of loss or damage.
- The investigator(s) should personally shred unneeded drafts, copies, *etc.*
- All statements and other documentary evidence should be stored in a separate secure file kept by the investigator(s).
- There should be no generalized “briefings” to groups of people, such as “management teams,” directors, *etc.* without discussing the meeting in advance with counsel.
- In drafting statements, remember that all statements and drafts thereof will be available to the opposing side if a charge or lawsuit is later filed. Investigator’s statements should be as thorough and truthful as possible. They should *not* include the investigator’s subjective impressions or opinions.

H. Interviewing the “Accused”

- Before the interview, make a list summarizing each allegation made against the accused.
- Inform the accused that you are conducting an investigation required by law and Company policy.
- Tell the accused that the interview, as well as the entire investigation, is being kept confidential to the extent possible.
- Tell the accused that no judgments have been made about the validity of the complaints, but that each will be investigated fully.
- Review each allegation with the accused and allow him or her to respond to them in detail.

- Allow the accused to explain his or her general relationship with the complainant.
- Take notes as described above.
- Consider allowing the accused to write a rebuttal to each allegation
- After reviewing any written rebuttal, you should question the accused based on his or her written response.
- Make specific notes of any witnesses that the accused names so that they can be interviewed as well.
- Tell the accused that retaliation is against both the law and Company policy and that he or she is not to retaliate against any complaining party, nor is he or she to discuss the allegations with him or her.
- Tell the accused that the investigation is ongoing and that no conclusions have been reached.

I. Concluding the Investigation

- Follow up with all witnesses and evidence uncovered in the interview of the accused. Conduct any additional interviews needed.
- If there is more than one investigator, the investigators should meet to compare notes and organize the results of the investigation into a brief report or synopsis without reaching any conclusions.
- The investigator(s) should meet with the decisionmaker(s) for a full review and discussion of the investigation.
- Following the discussion, a conclusion should be reached regarding the validity of the complaints and appropriate action to be taken.
- Consider consulting legal counsel at this stage, or earlier in the process, to help ensure fairness and the protection of the legal rights of both the accused and the Company.
- Written conclusions ordinarily should state facts and not “legal conclusions” such as “engaged in harassment” or “violated the law.” Instead, you should describe the specific conduct that is alleged and/or confirmed to have occurred. Sometimes, the available information is not clear enough to determine everything that happened. If so, your written conclusion should so state.
- If you conclude from the investigation that the misconduct occurred, determine the appropriate action necessary to ensure no future misconduct and discipline the employee who engaged in misconduct (e.g., warning, transfer, demotion, suspension, discharge,

training, monitoring, probation). If the evidence did not establish misconduct, determine whether further communication of expectations still is appropriate to ensure professional and respectful conduct. Prepare appropriate written documentation, including statement that retaliation is prohibited.

- Meet with the complainant to explain conclusions and actions taken related to the complaint. Always reaffirm the Company's commitment to the EEO Policy, including the anti-retaliation provision.
- The follow up communication to the Complainant should include conclusions, thanks for making report, assurance of no retaliation, and expectation to report promptly any further concerns.
- If appropriate, follow up at a future date with the Complainant and others as necessary to ensure no future problems.
- Document necessary follow up steps, such as training or other communication steps taken to help prevent any future problems.