



Workplace Investigations Reports & Outputs

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Agenda:

I. Complaint investigations

**II. Programmatic
investigations
and audits**



I. Complaint investigations

**Harassment, discrimination,
retaliation, reasonable
accommodation**

Goals of Complaint Investigations

- Ensure effective and efficient operations
- Project fairness and enforce policies
- Prevent lawsuits, set up defenses
- Legal compliance

Areas of Concern

- Protected categories, discrimination
- Harassment
- Retaliation
- Reasonable accommodations

Employer Liability

Why should employers be concerned?

- Co-worker liability
- Supervisor liability
- Third-party liability

Elements of a Lawsuit

What will courts be interested in?

- Policies
- Conduct
- Effects
- Employer involvement and response



Laying the Groundwork

What can you do to reduce the occurrence of misconduct?

- Develop employer policies
- Conduct employee training
- Supervise supervisors
- Conduct prompt investigations



Developing Employer Policies

- What's prohibited/required
- Anti-retaliation
- Complaint process
- Confidentiality
- Corrective action
- Reasonable accommodations

Training

- Policy review
- Classroom/interactive forum
- Attendance/acknowledgment
- Repetition – annual harassment training



Complaint Investigation General Principles

- Promptness
- Thoroughness
- Communication
- Confidentiality
- Impartiality



Complaint Investigation General Principles

- Consistency
- Interim measures
- Documentation
- Use of counsel
- Use of external investigator



Complaint Investigation Process Discrimination, Harassment, Retaliation

- Interview complainant
- Interview alleged wrongdoer
- Re-interview complainant (if necessary)



Complaint Investigation Process Discrimination, Harassment, Retaliation

- Interview third-party witnesses
- Review information and make determination
- Act on results of investigation

Complaint Investigation Process Documentation

- Witness statements
- The report
- Professionalism, neutrality
- Timelines and thoroughness, witnesses not contacted, information not reviewed
- Write it for a jury
- Considerations if done at direction of legal counsel



Complaint Investigation Process Documentation

- Attorney client privilege
- Self-critical analysis
- Use of reports for defense against claims



Employer Actions Following Complaint Investigation

- Oral or written warning or reprimand
- Transfer or reassignment
- Demotion
- Reduction of wages



Employer Actions Following Complaint Investigation

- Suspension
- Discharge
- Training/counseling of wrongdoer
- Monitoring of wrongdoer

Employer Actions Following Complaint Investigation

- Restoration of victim's leave
- Expungement of victim's negative evaluations
- Reinstatement of victim
- Apology by wrongdoer
- Monitoring treatment of complaining employee
- Correction of any other harm

Handling Uncorroborated Complaints

- Crediting uncorroborated allegations
- Remedial response
- Disciplining complaining employee

Special problems

- Failure to cooperate
- Interference and suborning testimony of other employees
- Disciplinary consequences

Reasonable accommodations

Process:

- Document request
- Collect information on need for and entitlement to accommodation (beware limitations on collection of pregnancy information)
- Interactive dialogue
- Undue hardship

Reasonable accommodations

Report and output:

- Eligibility for accommodation
- Short-term leave considerations
- Light duty considerations
- Accommodation preferred, accommodation provided
- Document expenses, changes



I. Programmatic investigations and audits

Safety & Health;
I-9s;
Wage and Hour;
Equal Pay;
Leave Usage

Goals of Programmatic Investigations

- Evaluate effectiveness of policies and programs
- Legal compliance, including with IL Equal Pay Act certifications
- Project concern and effort on subject matter
- Preparation for possible governmental administrative investigations, citations, and penalties

Safety & Health

- Accident investigations
- Investigations required by OSHA and industry standards and certification requirements
- Internal program investigations
- Safety walkarounds

Safety & Health

- Accident investigations
- Policy allowing employees to report injuries and illnesses without fear of retaliation
- Blanket post-accident drug tests viewed as retaliatory
- Employer must have reasonable belief that drug use may have contributed to accident or to injury

Safety & Health

- Accident investigation outputs
- Compliance with reporting requirements (300 logs, reporting serious injuries)
- Disciplinary outcome
- Hazard recognition
- Safety improvement
- Safety goal program implementation

Safety & Health

- Investigations required by OSHA and industry standards and certification requirements
- Job specific hazard assessments – PPE
- Many OSHA standards require periodic investigations, and written certifications
- Some standards apply to only certain companies, others apply to nearly all (i.e., Emergency Action Plans, Fire Extinguishers)

Safety & Health

- Investigations required by OSHA and industry standards and certification requirements outputs
- Legal compliance
- Defense against future investigations, citations
- Maintenance of industry certifications

Safety & Health

- Internal program investigations
- Conducted to evaluate effectiveness of safety programs and efforts to mitigate hazards and risks
- Reduce workers compensation exposure
- May provide penalty reduction in event of citations

Safety & Health

- Internal program investigations outputs
- If the audit is being performed at direction of legal counsel, maintain confidentiality
- Self-critical analysis privilege is weak for safety and health voluntary internal audits
- Employer may have to disclosure audit to defend against citation or to qualify for penalty reduction

Safety & Health

- Safety walkarounds
- Periodic, at least annual, walkthrough of production and operation areas to evaluate compliance with safety rules and work instructions
- Necessary for unpreventable employee misconduct affirmative defense
- Output: written assessment, discipline

I-9 Internal Audits

- Determine process, who will perform
- Review to determine I-9s for all employees and to determine any errors or needs to change
- For current employees, specific rules on making changes, with transparency requirements
- <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/90-correcting-errors-or-missing-information-on-form-i-9>
- Goal is to avoid exposure to I-9 penalties by correcting problems before ICE finds them

Wage and Hour

Purposes:

- Legal compliance
- Avoid liquidated damages (willful violations) and interest and personal liability

Wage and Hour

Subjects:

- Classification of employees as salaried exempt
- Review of practices impacting overtime liability (bonuses, off shift work, unpaid meal breaks, revision of recorded working time)
- Review for improper wage deductions



Equal Pay

Purpose: identify and take steps to correct and minimize discrepancies in pay between women and men, and between African-Americans and employees outside this protected category

Promote fair and competitive compensation practices

Support required Equal Pay certificate attestations

Leave Usage & Attendance

Purposes:

Promote consistent discipline and enforcement of attendance and leave rules and avoid discrimination claims

Document performance problems relating to overuse of leave and poor attendance

Review for potential FMLA abuse

Outputs of Programmatic Investigations

- Safety & Health – safety and operations management
- I-9s - HR
- Wage & Hour – HR, financial
- Equal Pay Act – Board/Officers
- Leave Usage – HR and operations management



Questions?

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