Workplace Investigations

Employers may be required to conduct a workplace investigation for various reasons. There may be a complaint of a violation of a workplace policy or procedure, harassment or discrimination, an outside investigation that triggers an internal review by the employer, or there may be an occupational accident that, legally, requires an investigation. Under various civil rights and whistleblower protection laws, such as Title VII of the Civil Rights Act or Dodd-Frank, as well as health and safety laws, it is either required or good practice for employers to investigate complaints or accidents and take appropriate action.

Recent court cases reflect additional civil rights protections and investigative requirements in the context of employers that receive federal funds to provide educational programs or activities (i.e., medical residency programs). Further, the wave of national movements (e.g., #MeToo, #TimesUp) on sexual harassment and gender-based and racial discrimination has spurred increased reporting, leaving employers with the complex task of investigating credibility-based claims of discrimination and harassment.

New York's own new discrimination and harassment law overhaul mandates employers to include certain information about their investigative process in the employer’s policy handbook, and provide a complaint form for complainants to use.

The practice of conducting investigations can also help an employer improve employee morale, increase productivity (when coupled with appropriate disciplinary action), reduce turnover rates, and end inappropriate conduct on a company-wide level.

Additionally, internal investigations can be crucial to an employer’s ability to prepare a comprehensive defense against (or avoid altogether) potential regulatory, civil, or criminal liability. For example, for the purposes of some laws, employers may waive an important defense if they fail to promptly investigate harassment allegations.

In this chapter, we cover the reasons, and best practices, for conducting a workplace investigation.

**Types of Workplace Issues Warranting Investigations**

The first category of circumstances that may warrant a workplace investigation is a suspected or reported instance of discrimination or harassment under an anti-discrimination or harassment law. Employees or their colleagues can allege violations of federal, state or local anti-discrimination laws based on membership in a variety of protected classes. Violations of anti-discrimination statutes can also include allegations of sexual harassment or harassment based on membership in a protected class.

A second category of circumstances that could trigger a workplace investigation involves alleged violations of workplace health and safety statutes, particularly where an employee has sustained a serious injury or has died. Health and safety issues are regulated by the federal [Occupational Safety and Health Act](http://www.westlaw.com/Document/I0f9fbf8cef0811e28578f7ccc38dcbee/View/FullText.html?originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (OSH Act), state health and safety laws, and state [workers’ compensation](http://www.westlaw.com/Document/I0fa00ce4ef0811e28578f7ccc38dcbee/View/FullText.html?originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) laws. Where less serious allegations arise, internal safety audits are a good way to identify safety hazards and issues before the [Occupational Safety and Health Administration](http://www.westlaw.com/Document/I0f9fbf8eef0811e28578f7ccc38dcbee/View/FullText.html?originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (OSHA) is alerted to potential safety violations. To the extent possible, safety audits and reports should be conducted at the direction of the employer’s inside or outside legal counsel to increase the likelihood that the [attorney-client privilege](http://www.westlaw.com/Document/I03f4dac1eee311e28578f7ccc38dcbee/View/FullText.html?originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) will apply to the investigation. Employers must keep in mind that internal audits are only beneficial if the employer follows through and corrects any issues identified in the audit. An employer can significantly harm itself by conducting an audit, identifying safety concerns, and then failing to take any action to remedy those issues. If those problems later result in an accident or injury, the safety audit is likely to be used as evidence that the employer was aware of the hazards and willfully disregarded the danger to its employees.

Thirdly, an actual or threatened workplace violence incident requires an employer’s immediate response to handle or prevent the occurrence where possible. An investigation should follow as soon as the immediate risk of violence is suppressed. Internal investigations into workplace violence should be guided by internal policies and procedures communicated to all employees, including a zero-tolerance workplace violence policy, written protocols for responding to violence or credible threats, and related prevention and response training for supervisors and managers.

Fourth, there may be investigations into drug or alcohol abuse or distribution in the workplace, or investigations focusing on impaired employees. Drug and alcohol use in the workplace is typically a violation of employer policy, but it also can give rise to safety issues if the intoxicated employee is working around dangerous equipment or prone to violent tendencies while under the influence of drugs or alcohol. If drug or alcohol testing is required as part of any related investigation, the investigator should be well-versed in the ADA and applicable state or industry-specific laws and regulations (generally limited to the transportation industry) to ensure compliance, including laws governing the medical and recreational use of marijuana. Employers should also be familiar with OSHA’s recommendations regarding post-incident drug testing to minimize the risk of potential retaliation claims under the OSH Act for reporting workplace accidents.

Investigations may also be necessary to investigate workplace policy violations, which can take many forms, such as fraud; theft of inventory, expensive equipment, or money (either physical theft or electronic theft through embezzlement); or theft of trade secrets and other proprietary data. In addition, employers must enforce their rules of conduct in order for these rules to be taken seriously by employees (and courts in litigation matters).

**Complaint-Based Investigations**

Any time an employee makes make an allegation of harassment or discrimination to the designated person in the employer's harassment policy (usually the human resources manager or other senior member of management) or reports the harassment or discrimination to management, that employee should be regarded as having raised a complaint. But what about when an employee makes a complaint to a supervisor and asks the supervisor not to take any action? Has a complaint been made? Can the employer afford not to act on the information even though the reporting employee asks the employer to refrain from doing so? These are not easy questions. Their answers in a legal sense may depend on the nature of the information reported and the identity of the person receiving the information. From a human resources perspective, however, it is never prudent to ignore any report of harassment, discrimination or suspected retaliation.

Employers should also remember that employees are, generally, not required to use any specific language to make a complaint. Often, employees will refer to something as bullying or harassment. The allegations of bullying in particular should be considered carefully. Even though bullying is, technically, not illegal, it could constitute harassment where the underlying conduct is targeted at a specific person due to their protected characteristic. Similarly, employees will often casually refer to conduct as discrimination or harassment. Even though there may not be, at least initially, evidence of any discrimination or harassment, as those terms are defined by law, the employer has to take the allegation seriously until it is satisfied that there has been no unlawful conduct. Often, employees simply cannot get along or there are interpersonal conflicts, but the employer will not know for sure that there is no legal issue until the employer conducts an investigation.

Managers must be trained and reminded to report any complaint of harassment, discrimination or retaliation immediately to the correct person, no matter how minor it seems or how informally it was raised. Managers should also promptly report any harassment or discrimination which they observe.

Managers should not investigate such complaints on their own unless they have been designated and properly trained to do so. Nor should they suppress information for fear that it will result in the termination of a valuable employee, such as a star sales representative. It is important for managers (and everyone in the employer organization) to remember that in the long run, it will be better for the employer to find out the truth regarding such allegations, even if it is uncomfortable in the short run. It is valuable if all complaints are brought to a central forum (typically the human resources department) and that both informal and formal complaints are appropriately documented in order to ensure a consistent company response, track patterns, and address climate and concerns.

**The Mechanics of a Workplace Investigation**

An investigation can be the employer's most reliable source of information about the complainant's allegations. Based on a thorough investigation, the employer will be better able to make informed decisions about what remedial or disciplinary action should take place.Also, if a regulatory complaint or lawsuit arises out of the internal complaint, the investigation offers the employer some protection. The employer will also be in a better position to determine the merits of the case, how to resolve the case and whether to indemnify or offer legal representation to an individual manager or employee accused of harassment or discrimination. Further, as explained previously, a prompt investigation and corresponding corrective action, if any, may provide the employer with an affirmative defense or limit its liability exposure.

The goals of a good investigation should include:

* to seek the truth
* to gather facts fairly and impartially
* to listen with an earnest intent to understand
* to learn, not assume
* to tend to the needs of the individual party or witness
* to search for corroboration where it should reasonably be expected to exist
* to gather all relevant information
* to maintain professionalism and consistency in process and procedures.

The most effective investigations are those that follow thoughtful and informed policies, procedures and practices and are conducted by trained and experienced professionals. Given the many moving parts of a workplace investigation, advance consideration must be given to key elements of effective practice, including:

* clear communication about behavioral expectations and prohibited conduct
* dissemination of accessible policies and procedures to all employees
* communication of reporting options and support resources
* consistent adherence to institutional policies
* a multidisciplinary team or administrative response
* centralized reporting and recordkeeping
* the use of trained and experienced investigators free from actual bias or conflict of interest
* consistent documentation
* appropriate training for all employees, with separate training for managers and supervisors on how to respond when employees present complaints to them first.

**Conducting an Investigation**

There is no one best way to conduct an investigation, although there are many ways to make mistakes. Given the complexity of employment cases and the attendant legal impacts, it is always prudent to consult with counsel before embarking on an investigation and, as necessary, through the course of the investigation. The following summary illustrates common practices, but there is no one-size-fits-all investigations. The key is to tailor the investigation to the context and circumstances, which can also involve considerations of privacy and cost effectiveness.

When a complaint is made, a productive initial conversation with the complainant is often a critical first step in determining whether a formal investigation may be necessary. Likewise, obtaining a complete and accurate statement regarding the complaint is essential to determine the extent of the investigation required. The following steps should be taken promptly in order to ensure that an investigation is effective.

1. **Conduct an effective intake interview.** An informed investigation will begin with an investigator trained in effective interviewing techniques. The gathering of good information starts with attention to location, time and needs of the complainant. The interviewer should be well versed in the law and company policy elements that may be at issue. The fact gathering should begin with prioritizing active listening with an earnest intent to hear and understand the complainant's context and complaint. As part of the intake interview, the interviewer should seek to understand what occurred, when it occurred, what current concerns the complainant may have and how the complainant may wish to proceed. Depending upon the information conveyed by the complainant during the intake interview, the interviewer may want to provide the complainant with copies of the relevant policies, discuss available supports, and evaluate informal resolution and the formal investigatory process considering the known information. Importantly, the interviewer should not make any promises to the complainant about what action the company will take in response to the complaint. The interviewer will also want to convey to the complainant that the company will keep the investigation as confidential as possible, but certain key individuals within the company must be provided information about the complaint so that the employer can take appropriate action. Finally, the interviewer should carefully document information gathered in the intake interview and follow up with a written communication to the complainant.
2. **Consider whether the complaint implicates any external reporting obligations or warrants immediate steps to protect the safety of the complainant or the workplace.** In some instances, the reported conduct may trigger institutional reporting obligations to child protective services, law enforcement authorities or regulatory agencies. Intake interviewers should be trained in these legal requirements and consult with legal counsel to evaluate any reporting obligations. In addition, reported conduct that poses an immediate risk to the safety of any individual should be reported to law enforcement and appropriate safety precautions should be taken.
3. **Length of interviews.** Ensure that adequate time is arranged to conduct the interviews. The interviews should not be rushed or cut off before completion to ensure all available information is properly gathered.
4. **Location.** Determine where the investigator will conduct the interviews. Generally, the interviews can and should be conducted at the employer’s worksite to minimize disruption to those being interviewed. At times, however, it may be appropriate to conduct the interviews off-site. Regardless of whether the interviews are conducted at the workplace or off-site, they should be conducted in a discreet location, where no one can see or hear their substance.
5. **Determining documents to be used in interviews.** For each interview, consider which documents should be used (for example, offensive emails, letters to the complainant, analysis of a computer drive, photographs, and so on). As with sharing other information, generally provide only enough evidence to enable the witness to fully share the witness’s own perspective to promote confidentiality.  Request any documents and information regarding the individuals being accused of wrongdoing, the complainant, or witnesses. Often, reviewing a personnel file will disclose information about the credibility and overall strength of someone’s witness statement.
6. **Instruct the complainants regarding the investigation.** The complainants should be told that their complaints will be considered and evaluated fairly under the relevant policy and investigated. The complainants should be reminded that the company's policy prohibits any retaliation against an employee who makes a good faith complaint. Often, it is good to put this reminder in writing. The complainants should be advised to contact the investigator immediately if they believe that any retaliation is occurring. The complainants should also be told that while they can discuss the matter with anyone for the purpose of care, support or exercise of workplace rights, there maybe circumstances where the investigator will ask the complainants not to discuss the matter with potential fact witnesses during the fact-gathering process. The investigator should communicate that the purpose of the request is to ensure the integrity and effectiveness of the investigation and is limited in time (during fact gathering), persons (potential fact witnesses) and content (the report under investigation). Finally, the complainants should be told that the investigation will be treated as private, but the investigator might need to discuss the matter with those necessary to the investigation or affected as a result of the investigation.
7. **Reduce the complaint to writing and provide a summary for the complainant to review.** Having complainants write their own complaints has been a longstanding common practice, but it may pose a barrier to making a report or participating in the investigation process, particularly if there is a language or other communication impediment. A more effective practice in many cases is to have the intake interviewer document the complaint based on the information provided by the complainant. The interviewer is best positioned to identify relevant information, be familiar with policy elements, and capture the necessary details to move the complaint forward.

Even if the complainant fails to put the complaint in writing, it should still be investigated. As an example, in a harassment/discrimination scenario, the written complaint should indicate:

1. **Conduct a thorough and informed interview.** During an investigation, employers may have to interview the employee who has made the complaint, any witnesses to the alleged incidents, and the employee who was accused of the wrongdoing.

At the outset of the interview, establish a courteous and professional demeanor with all witnesses, including the complainant and accused. Once this is established, there are at least six introductory observations that should be made in every interview: (a) Explain the process to the complainant and witnesses; (b) Identify clearly who the investigator represents; (c) Do not promise confidentiality; (d) Request that employees cooperate fully in the investigation and use their best judgment and discretion when discussing the investigation with others; and (e) The investigator should inform each witness that the witness must provide candid and truthful information. The investigator should advise the interviewee that if false testimony is provided in connection with the investigation, the interviewee could be subjected to discipline, up to and including termination.

In general, questioning of witnesses should begin with open-ended questions that allow for free recall. As necessary, the investigator can use focused recall, multiple choice or yes/no questions to follow up. The investigator should be alert to nonverbal communication, pay attention to tone of voice and volume level, maintain attentive posture and good eye contact and exercise reflective listening in framing next questions. The investigator should also avoid asking questions that imply a value judgment and, when posing questions that may be difficult or sensitive, consider explaining the reason for the request. The goal of the investigator should be clarification, not interrogation.

The investigator should encourage complainants to explain what happened in their own words, uninterrupted if possible. Potential questions and areas of inquiry include: “Can you tell me what happened?” and “What are you able to tell me about your experience?”

The investigator should also elicit information about events to build a timeline of the incident and relationship(s) of the parties.

Because there are often no eyewitness accounts and little to no physical evidence in cases of harassment or discrimination, most investigations require a careful assessment of credibility. Investigators should carefully consider evidence of disclosure, the process through which an individual discloses a traumatic event. Disclosure may involve a process, not a singular moment in time. It can be accidental or purposeful in nature and can evolve in stages (i.e., denial, tentative, active, recantation and reaffirmation). Depending on the severity of the conduct, it is not uncommon for details of an incident to evolve over time.

1. **Make a detailed record of the conversation with the complainant.** When documenting interviews, the investigator should take detailed notes of interviews (or record them in some other manner consistent with company policy and applicable law). Because the details are often essential to assessing credibility and identifying opportunities for corroboration, it is important to use verbatim quotes where possible, particularly when capturing "ring of truth" details. Include the name of the interviewer, date, time and location of the interview, who was present and length of the interview. This document may become an important piece of evidence if the complainant or the alleged wrongdoer sues the employer. It is important that the interviewer document only the facts as stated by the complainants and not their opinions or conclusions about the interview. Do not tell the complainant whether you believe him or her.
2. **Remain neutral, do not show emotions or offer opinions.** Do not promise complete confidentiality, but do discuss the contours of privacy and the sharing of information in the need-to-know circle.Do not promise that the respondent will not come to know of the complaint. As the investigation progresses, provide clear communication about how the information will be used.Do not promise to keep the complainant's identity from the alleged wrongdoer. Pre-investigative training is vital to developing informed expectations about when a complainant's identity may or must be shared. As the investigation progresses, ensure that the complainant is informed if their identity is going to be shared with the respondent.

Do not tell the complainants whether you believe them. Provide instead an investigative approach that is open, professional and neutral. Listening should be with an earnest intent to understand the complainants' perspective.

Do not promise that the respondent will be disciplined. Instead, share what the employer will do, follow the policy to fairly and thoroughly investigate the complaint, provide resources and interim measures, and reach a fair and equitable outcome based on the facts and circumstances.

1. **Consider using an investigative team or having a witness present for the interview with a complainant.** As permitted by available resources, employers should seek to use a team of two investigators for each investigation. The use of an investigative team is protective of all parties, encourages better communication and can provide for more effective fact gathering and accurate documentation. It can also help to prevent biases and support the exercise of sound judgment in evaluating credibility considerations.

**Initial Discussion with the Employee Accused of Wrongdoing**

The initial interview of the respondent is a critical part of the investigation. In many aspects, the interview of the respondent should follow a similar approach to the interview of the complainant. Care should be taken to be professional, respectful and open to fully exploring and understanding the respondent's account of the incident(s). The investigator should reiterate that the allegations will be fairly investigated and evaluated in a manner consistent with company policy. The interviewer should inform the respondent of the allegations made and review relevant employer policies. In addition, the respondent may be told that there is a possibility of disciplinary action if the complaint is substantiated, but that the company will provide the respondent with a full and fair opportunity to respond to all allegations before reaching a determination as to whether any violation of company policy has occurred. The respondent should also be given the opportunity to present information, documents and other evidence and identify potential witnesses who may have relevant information.

The investigator should examine pre-incident behavior, a description of incident and post-incident behavior; explore where the accounts diverge; seek clarification for explanations that do not make sense; allow a respondent to reconcile inconsistencies with known evidence, information or witness statements; be attentive to physical reactions to questions such as changes in body language or eye contact; and balance fairness while conducting a thorough interview.

The investigator may request an explanation of what happened in the respondent's own words, uninterrupted if possible; compile the sequence of events for building a timeline of the incident and relationship; review oral, written and electronic communications between the parties and with others; look into the complainant's words and actions; seek facts and information to determine elements of a crime or violation of a company policy; explore access, opportunity, motive and means; evaluate evidence of consciousness of guilt; look for exculpatory evidence, other avenues of inquiry and additional witnesses; and inquire whether any part of the incident was photographed or recorded. The investigator should also explore potential motive or bias of all parties and listen carefully to the responses to the questions: (a) Did the respondent answer or avoid the question; (b) Did the respondent shift blame or distract; and (c) Did the respondent minimize or trivialize the incident?

It is usually best to instruct the respondent to immediately keep contact with the complainant to a minimum and to inform the respondent that the parties may be separated during the investigation. The respondent should be given a strict warning not to retaliate against the complainant and, when appropriate, instructed to keep the matter confidential in order to respect privacy concerns, prevent rumors and protect the integrity of the interview process. Finally, the respondent should be advised that any violation of these instructions will be considered as possible grounds for disciplinary action, up to termination. The interviewer should also address available support and resources, including, for example, the existence of an employee assistance plan. The investigator should discuss next steps and timing, including, if appropriate as determined by the investigator, the opportunity to review the individual's statement and agreement for follow-up interview and ensure that the respondent understands available rights and resources. It is usually best to incorporate all of these instructions and warnings in a letter or memo to the respondent.

**Deciding Who Should Conduct the Investigation**

Deciding who should conduct the investigation is a key preliminary consideration. Employers may use an “internal” or third-party investigator, and that investigator may or may not be an attorney. The most usual investigators are a human resources representative or an in-house or outside attorney of the company.

The investigator has to be able to conduct an impartial investigation, and be well trained. Depending on the nature of the issues, an employer should also consider whether to involve law enforcement authorities in the investigation, and the extent to which HR should be involved even if not conducting the investigation.

Advantages of using an internal investigator include:

* Familiarity with the corporate culture and the personalities involved, as well as with employer rules and regulations and how they are enforced, enabling the investigator to get started more quickly.
* Uniformity in the investigative process, reducing the risk of discrimination allegations.
* Credibility with employees, if the chosen investigator has developed a reputation for fairness.
* Cost effectiveness.

In contrast, using an external investigator can be advantageous due to increased objectivity, given the lower likelihood of familiarity with any of the individuals involved. The expertise and experience of a professional investigator can help complaining individuals perceive that the investigation is fair and independent. Also, if using an external attorney, there is a stronger presumption of privileged communications than with internal attorneys, who often provide business advice in addition to legal advice.

**Attorney or Non-Attorney Investigator?**

Another important factor in choosing an investigator is whether the employer should use an attorney (whether an attorney from the employer’s legal department or from an external law firm). Using an attorney investigator allows the employer to apply the attorney-client privilege to the investigation in many situations.

However, the attorney-client privilege is not absolute. Where an in-house attorney plays a business and a legal role, the privilege may not apply if a court deems the attorney to have been conducting the investigation primarily for a business purpose, rather than in the attorney’s legal role. However, the privilege generally applies if providing or seeking legal advice is one of the significant purposes of the investigation, even if there is also a business purpose.

When deciding whether to use an attorney investigator, employers should consider potential waiver of the privilege. For example, an employer may decide to waive attorney-client privilege and affirmatively use an investigation in the defense of a harassment case. Additionally, the choice of an outside attorney as investigator may disqualify that attorney from representing the employer in ensuing related litigation if a court deems the investigator a fact witness.

If an attorney is conducting the investigation, the attorney should provide the employees with an “Upjohn warning,” explaining that the attorney represents the company, not the employee. The attorney should make it clear that the attorney-client privilege that applies to communications between the company’s attorney and employees belongs to the company, and the company may choose to waive this privilege and disclose what the employee has said.

In most cases, the HR department should be involved in the planning and execution of an investigation. To preserve the attorney-client privilege when HR conducts any witness interviews without the involvement of counsel, HR should indicate on all interview notes and other documents that a significant purpose of the investigation is to seek legal advice or that the interview is being conducted at the direction of counsel for the purpose of seeking or providing legal advice. In addition, all witnesses and participants in the investigation should be informed of the investigation’s purpose.

Similarly, HR should be involved in the assessment of the appropriate outcomes of the investigation, including determining what discipline, if any, should be imposed. Consistent treatment of employees is key to avoiding discrimination claims and an employer’s HR department is typically the repository for information regarding how others accused of the same or similar conduct have been treated.

In some cases it is impractical, imprudent, or inappropriate to involve the HR department. For example, if one of the members of the HR department is accused of wrongful conduct or if only a handful of individuals can be apprised of the investigation (such as in an insider trading situation), the HR department should not be involved.

**Involving the Police**

Employers with a reasonable suspicion that one or more members of their workforce has engaged in unlawful activity should always consider involving law enforcement in the investigation. Employee conduct that might prompt law enforcement involvement includes, but is not limited to, threatened or actual workplace violence by or against an employee, sexual assault by one employee toward another or toward a member of the public, theft, insider trading, bribery, antitrust violations, and fraud. Employers should also consider any affirmative legal obligations to report the wrongdoing (for example, there may be affirmative obligations to report criminal conduct endangering children).

Employers should also appreciate that involving law enforcement may draw negative media attention, and have a potential impact on the employer’s customers or business functions. Employers should consider the possibility that law enforcement personnel may request or require the production of internal documents or witness interviews with employees. Lastly, involving one law enforcement agency may necessarily result in additional government agencies being involved, due to the fact that many enforcement agencies now collaborate and share information.

**Determining how to Treat the “Accused”**

It may be necessary to take immediate measures to stop alleged wrongful conduct by removing the accused employee from the workplace, or at least from the employee’s current position, pending completion of the investigation. Situations requiring this type of action usually involve criminal activity, ongoing harassment, violence, fraud, workplace violence, and anticompetitive activities.

Where the alleged wrongful conduct is limited to another individual, it may be possible to simply transfer the accused employee to another department or work location until the investigation is completed. But where that is not practical, an employer may prefer to place the accused employee on a leave of absence from work. The absence may be paid or not, depending on several factors. For overtime exempt employees, a leave of absence pending an investigation cannot result in a reduction of the exempt employees’ predetermined salary. While exempt employees may be subject to deductions in their salary as a penalty for the violation of a safety rule, that is not the case if an employee is placed on leave pending the employer’s investigation. However, if the exempt employee will be suspended for a full week and will not perform any work during that time, an employer may be able to withhold pay from such an exempt employee. When it comes to nonexempt employees, employers are not required to pay such employees pending an investigatory leave of absence unless a collective bargaining agreement requires otherwise.

Where the conduct being investigated involves a supervisor and the supervisor’s direct or indirect report, an employer should strongly consider modifying the relevant reporting relationship pending completion of the investigation to avoid further harassment or intimidation of the accused or disruption to the work environment.

**Recording Investigatory Interviews**

There are pros and cons to transcribing interviews. The primary benefit is that the employer has a complete and accurate record of the information shared during the interview, which can be reviewed at a later date. The recorded testimony itself can later become an important piece of evidence for use with a flip-flopping witness or someone who later asserts his own claims. The principal drawback, however, is that recording interviews can sometimes have a chilling effect on the interview process and cause employees to divulge less than they otherwise might have shared. The recording (or transcription of it) may also be discoverable, depending on the nature of the investigation and any subsequent legal proceedings.

The interviewer should not use ambiguous shorthand characterizations during the interviews. In addition, the interviewer should not maintain any drafts of the report to avoid potential disclosure and litigation issues later.

Employers should assume that all documents gathered and written during the course of the investigation may be viewed by a jury. Accordingly, the investigator documenting the investigation should avoid speculation and gratuitous conclusions. The investigator should restrict documentation to what the investigator was specifically told and anything the investigator specifically viewed.

**Anticipating the Unexpected in Investigations**

Although there are countless ways in which unanticipated issues may arise in the course of an investigation, the following issues occur with some regularity and need to be considered in advance:

1. **What if an employee refuses to participate?** Some employees refuse to participate in investigative interviews. Case law supports the position that an employer may compel an individual to participate in an investigatory interview (subject to a union employee’s right to demand representation during the interview) and may discipline (up to and including discharge) an individual who refuses to participate. This issue needs to be considered and resolved before the investigation commences, so the investigator is not left in an untenable position. The employer may elect to adopt a progressive disciplinary approach for an individual who refuses to participate, so long as doing so does not compromise the investigation, and so long as the employee is told that the progressive discipline does not compromise the individual’s at-will employment.
2. **What if an employee wants to record the interview?** Some interviewees request the right to record the interview. This request should be rejected. As noted above, at times recording can have a chilling effect on the open exchange of information. Even more problematic if the interviewee is the party doing the recording, the employer loses control of the recording when the interviewee leaves the room. The interviewee could share the recording with other employees, digitize and share it publicly, or provide it to an attorney for potential litigation purposes. However, in certain jurisdictions, it may be possible for an interviewee to surreptitiously (and legally) record the interview.
3. **What if an employee wants to bring along a friend?** Some employees who are being interviewed request the right to have a friend in attendance. Sometimes the friend is a coworker; other times the friend is someone from outside the organization. Regardless of whom the employee-witness may wish to bring, the request should be rejected (unless the employee has the right to bring someone because the employee’s contract provides so). However, in certain circumstances, unionized employees have the right to have a union representative present during the investigative interview. If a union representative does join an interview, the investigator should be sure not to allow the union representative to disrupt the interview or answer for the witness.
4. **What if an employee wants to bring along an attorney?** This request should be rejected. Allowing an attorney to attend may prove disruptive to the interview process, be intimidating to a non-attorney investigator, and create a more adversarial environment than desirable.
5. **What if the witness raises new claims?** During the course of an investigative interview, the witness may describe conduct that adversely affected the witness. For example, during a sexual harassment investigation, a non-complaining employee being interviewed may reveal that they, too, were a victim of sexual harassment. The employee might even reveal that he or she was a victim of a sexual assault by another employee. The investigator must be prepared to advise the employee to pursue his/her own complaint through the employer’s internal reporting mechanisms. Additionally, the investigator should always consider whether re-interviewing witnesses would be helpful in light of new information and should re-interview witnesses whenever necessary.
6. **What if the employee threatens the investigator?** Some interviews become emotionally charged and volatile. Advance consideration should be given to how potentially emotional witnesses should be handled. If problems nevertheless arise that were not anticipated or even considered likely, the investigator needs to know how to end the interview diplomatically. A volatile situation needs to be defused promptly. The interview can resume at a later time with at least one witness present.
7. **What if the interview takes longer than expected?** Although investigations should be completed promptly, they should also be as thorough as necessary to discover the relevant facts. If an investigative interview is taking longer than expected, the investigator should notify subsequent interviewees of the expected delay, but continue the interview until all relevant information has been obtained.
8. **What if something completely unexpected arises?** There are times when something completely unexpected arises at an investigative interview. A witness may complain of chest pain. A witness may have an emotional breakdown. A witness may recall personal painful psychological experiences from his past that are debilitating. To be most effective, the investigator needs to know when to bring an interview to an abrupt halt. An interview can always be rescheduled for another day.

**Post-Interview Activities**

After the initial investigation has been concluded (the relevant documents have been reviewed and the interviews have been conducted), the data must be organized. A review of the collected information may reveal that follow-up interviews with certain witnesses are necessary. These interviews should be conducted promptly.

In many investigations, the investigator has to make credibility determinations, especially when two or more employees offer conflicting accounts of the same basic events. When making these determinations, investigators should consider biases, predispositions, and other factors that may influence an interviewee’s factual portrayal of a particular situation or individual. Investigators also may notice other variables bearing on a witness’s credibility, including nervousness, insincerity, internal inconsistencies in the facts reported, changing story/explanation, general reputation for integrity and honesty, and past problems of a similar nature. To the extent an investigator accredits one witness or discounts another witness as a result of these or other observations, the investigator needs to document these reactions. Particularly if numerous employees are being interviewed (especially over a compressed time frame), the investigator must record these observations contemporaneously to ensure that they are recalled accurately.

**Making Factual Determinations**

Depending on the nature of the assignment given to the investigator, the investigative report should focus primarily on factual findings and determinations. The investigator should report the facts and let the employer draw the appropriate legal conclusions. In other words, the investigator should avoid making conclusory observations, particularly those involving legal conclusions (for example, “Employee X engaged in race discrimination” or “Employee X sexually harassed his subordinate female employees”). This is true not just in the final report but in the notes prepared by the investigator during the interviews.

**Drafting the Report**

A final report detailing the investigation and its findings is critical to demonstrate that the employer took the allegations seriously and responded appropriately. The employer must document any decision reached. Documentation should include a review of the complaint, a summary of each witness's account of the relevant facts and the investigator's conclusion with an explanation of reasons. As noted above, it is usually important that the investigator not make any legal conclusions if their role is limited to finding facts through the lens of a policy violation. Legal analysis should be left to trained counsel.

Additional report-writing considerations for an investigator include:

* Be familiar with the employer's policies, procedures and definitions.
* Develop a template/format for reports and use it consistently across investigators.
* Decide what terms will used for the parties and witnesses and be consistent across investigators.
* Develop standard language for commonly cited issues.
* Talk about how to communicate facts and concepts to somebody who has never spoken with the parties or who is not familiar with the employer's policies/procedures.

Language in the report should be professional, neutral and balanced. The chronology and substance of the investigation should be addressed as follows in the report:

* In general, write in chronological order.
* Identify all witnesses interviewed and the dates of the interviews.
* Note who was present at the interviews and where they occurred.
* List any other evidence collected and date and manner of collection.
* Where applicable, explain reasons for failure to interview witnesses or failure to collect pieces of evidence.
* In a nonjudgmental way, outline where a party's statement is consistent or inconsistent and where a party's statement is corroborated or refuted by other available information.
* Be accurate and detailed in describing the incident, the parts of the body, the physical acts that occurred, location, injury, acts, elements of force, coercion, threat, etc.
* Be objective in the description of all information.

Consistent with the employer's policy and protocols, consider whether to provide the parties with the opportunity to review a preliminary report in order to identify additional witnesses or sources of information, reconcile conflicts in information, and ensure the sufficiency of the investigation. Depending on the scope of the investigator's role, the analysis of the facts may include the following elements:

* the specific policy violation and relevant elements of the violation,
* the burden of proof (preponderance of the evidence),
* an evaluation of the evidence in light of the elements along with a rationale for the finding,
* an overview of the demeanor, interest, detail, motive, bias and corroboration,
* clear analysis and reasoning, and
* relevant portions of the evidence as it relates to the investigative conclusions.

**The Employer’s Response to the Investigation**

The appropriate employer response depends on whether the allegations are corroborated, disproven, or inconclusive.

1. **The Allegations Are Corroborated.** If the allegations are established by the investigation, the next question for resolution is how the employer should respond. In some instances, the proper response is abundantly clear. For example, if an employee has engaged in a sexual assault, theft, insider trading, or a host of other wrongful conduct, discharging the employee and informing the appropriate authorities is most often the appropriate discipline. For less egregious offenses, the employer should consider the full array of disciplinary measures.
2. **The Allegations Are Disproven.** Where the investigation disproves the allegations, the employer needs to inform the employee who made the allegations that the allegations were disproven. The employer should inquire why the employee made the allegations to discover any other issues affecting the employee’s judgment. Here, however, it is important that the action taken not be perceived in a way that undermines the employer’s policies or discourages the future reporting of wrongful conduct. Additionally, to minimize the risk of liability for retaliation claims, the employee who brought the complaint should not be penalized, unless the employer determines the employee made the allegations in bad faith and is not protected under any anti-retaliation provisions.
3. **Inconclusive Investigation.** The third potential outcome of the investigation is that the allegations are neither proven nor disproven (for example, a “he said/she said” sexual harassment allegation, with no corroborating evidence on either side). In this case, employers should consider ongoing monitoring, change in the reporting relationship, and workplace training on the issues implicated by the investigation.

To minimize the risk of liability for retaliation, it is important that the complaining employee not be penalized for bringing the complaint, even though the allegations were not corroborated. For example, the complainant should not be transferred to a different position or location against the employee’s will.

**Communicating the Outcome of the Investigation**

At the conclusion of the investigation, the employer should communicate the outcome to the complaining employee and the accused. This communication should occur promptly following the completion of the investigation and consultation with those involved in the investigative process. The communication does not have to be and should not be detailed. For example, the following communication to the complaining employee could suffice:

*”We appreciate the fact that you brought your concerns to our attention. Because the allegations you presented involved a violation of internal employer policy, we promptly initiated an investigation into your allegations. Numerous individuals were interviewed and additional evidence was reviewed. Our review largely corroborated the allegations you made. Consequently, the Employer has imposed appropriate discipline on Employee X, consistent with our policies and past disciplinary practices. We will continue to monitor the situation carefully to ensure that there is no repeat of any of the conduct you described. Of course, if you personally experience any of this conduct at any time in the future, please report this situation to our HR Department immediately. Similarly, if you experience any behavior that you consider to be retaliatory in any way, please report this situation as well. Again, thanks for bringing this problem to our attention.”*

As for the accused, a different message should be conveyed, depending in part on the nature of the discipline that has been imposed. With respect to others involved in the investigative process (for example, the other individuals who were interviewed), relatively little information needs to or should be conveyed to protect the privacy of those involved. Depending on the nature of the allegations, these individuals can simply inform the participants that the investigation has been concluded, and the employer has addressed the matter consistently with its policies and past practices. More detailed information should be shared only on a “need-to-know” basis.

When apprising company officials about the outcome of the investigation, the investigator should avoid sharing copies of the report if possible, to preserve any work-product privilege that may attach.