

Guide to Workplace Investigations Checklist



PRE-INVESTIGATION

- ☐ Develop an effective **internal complaint procedure** (such as a hotline, etc.) to encourage employees to report concerns internally.
 - ☐ Create an **anti-retaliation policy**, and conduct anti-retaliation trainings for employees and managers.
 - ☐ Create a **code of conduct and ethics programs** that identify whistleblower retaliation as a form of misconduct.
- ☐ Review and update company policies concerning **monitoring of phone and email communications** as well as the use of **ephemeral messaging platforms** and **employee chat/channel applications**.
- ☐ Draft **investigation protocols** in advance so that the organization understands which constituents will handle which kinds of problems and whether certain kinds of investigations will be conducted under attorney-client privilege.
- ☐ Include constituents from Human Resources, compliance, internal audit, loss prevention, in-house legal, and outside counsel on the investigations team as appropriate.
- ☐ Ensure the investigations team comprises an appropriate group in conjunction with a company's Diversity, Equity, and Inclusion program.
- ☐ Determine the evidentiary standard that will apply (reasonable cause, as likely as not, preponderance of the evidence, etc.).

PRELIMINARY INVESTIGATION

- ☐ Conduct a preliminary assessment of the strength of the allegations, considering the source, motivation, specificity, proof, and materiality, and deciding whether an investigation or further inquiry is warranted while keeping an open mind.
- ☐ Identify, gather, and review any and all forensic or electronic information (e.g., emails, iMessages, cell phone texts) relevant to the investigation.
- ☐ Identify any applicable employment agreements before beginning an investigation.
- ☐ Review employees' background information maintained by the company (e.g., a witness's personnel file).
- ☐ Review relevant information in publicly accessible databases and perform web searches.

INVESTIGATION PLAN

- ☐ Create an investigation plan:
 - ☐ Identify the scope of the investigation.
 - ☐ Consider the timeframe for completion.
 - ☐ Specify what will and what will not be investigated.
 - ☐ Determine what documents, emails, text messages, and/or other evidence needs to be collected.
 - ☐ Determine who has relevant information.
 - ☐ Decide who will be interviewed.
 - ☐ Decide where the interviews will be conducted (i.e., remote or in person) and who will be present for the interviews.
 - » If conducting an interview via video or phone, ask the witness to confirm that they are not recording or allowing anyone else to record. Check the laws of the states where the witness and counsel are situated to identify two-party consent states. If the witness or counsel is in a two-party consent state, consider telling the witness that counsel does not consent to being recorded.
- ☐ Develop interview questions and consider the sequence of interviews.
- ☐ Monitor employee conduct while the investigation is ongoing.

WITNESS INTERVIEWS

- ☐ Give **Upjohn** and **Johnnie Poultry** warnings when appropriate.
- ☐ For unionized employees, inform them of their **Weingarten** rights.
- ☐ Ensure **confidentiality** to the maximum extent possible.
- ☐ Ensure the witness is speaking from **personal knowledge**—if they are relying on what they learned from another person, ask the witness to identify the other person.
- ☐ Have two people from the investigations team attend each interview (one to ask questions, one to take notes, and both as witnesses).
- ☐ Ask **open-ended questions**, and do not suggest answers to questions.
- ☐ Be prepared to answer **common witness questions** and to deal with witnesses who may be **lying or minimizing**.
- ☐ Instruct interviewees **not to discuss** the subject with co-workers, with the press, or on social media to preserve privilege, and advise the witness of policies in the event they are contacted by a third party about the same subject matter.
 - ☐ Discuss with the client **messaging to employees** if employees are contacted by law enforcement or the government.
 - ☐ Consider the risks of instructing employees not to talk to law enforcement or the government.
 - ☐ Consider the benefits of telling employees they have the right to counsel if contacted and are under no obligation to speak.
- ☐ Provide the witness with contact information in the event more information becomes available, or anything new is remembered, and encourage the employee to report any further incidents they believe constitute harassment, discrimination, or retaliation.
- ☐ Draft an **Interview Memo/Report** directly after the interview, if appropriate.

REACH A CONCLUSION

- ☐ Create a **written report**.
- ☐ Alternatives to a written report: Consider a **limited written report** or an **oral report**.

POST-INVESTIGATION

- ☐ **Communicate the results:** Take steps to ensure that communication of the results is limited to those who need to be apprised for business reasons and to preserve attorney-client privilege, if applicable.
- ☐ Audit employees who may have allowed the event to occur.
- ☐ Institute any remedial training as necessary.
- ☐ Evaluate the effectiveness of the investigation program.
- ☐ Review and revise personnel policies and procedures as appropriate.