

Conducting Workplace Investigations:

A Step-by-Step Guide



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1. Strategizing for an Investigation

Disputes between co-workers and between employees and their bosses are almost inevitable—which is why every HR professional must know how to gather the necessary facts to find out what’s going on.

Even when workplace conflict doesn’t rise to the level of a lawsuit, it costs organizations in time, energy and creativity. There are a lot of reasons employers are reluctant to get involved early on—fear of making things worse; too busy; belief that employees will (or should) resolve issues on their own; don’t like conflict; not sure how to get started; not really their business; etc.

Employers may be concerned about creating documentation that tends to show a lot of “problems” or issues in the workplace. However, the benefits of being able to show a solid investigation program, including promptly addressing issues big and small, can outweigh the liabilities. Additionally, such documentation can be used to “prove a negative”—that the employer has not had numerous types of employee complaints, that no one had complained about a particular employee before, etc.

Whether it’s a small inquiry that might involve only a couple of questions, or a weighty investigation into serious allegations of misconduct, being deliberate and intentional about an investigation will create a more helpful and less disruptive process.

Take some time to think about and plan your inquiry even for simple, seemingly routine issues. If the situation is complicated—or if a red flag about possible legal claims goes up in your mind—a well-planned investigation can be critically important.

Not only will careful and evenhanded fact-gathering lead to the best possible decision, it will also enhance the credibility of the involved managers and the organization.

One of the challenges you face is that the clock is always ticking, and it tends to tick faster in the minds of employees who become ensnared in an investigation, who want resolutions quickly. When a company has to explain in court that important steps weren’t executed in a timely manner, juries—who tend to “judge things from what they see on TV,” says Ann Kotlarski, attorney for Payne & Fears of Los Angeles—often think someone was just trying to stall.

These basic steps apply to any fact-finding mission:

Step 1: Making a plan

Remember, some workplace conflicts must be addressed without delay to avoid legal problems. But, regardless of how urgent the situation, there are important first steps to take before any fact-gathering, interviewing or document retrieval begins:

1. Stop for a moment. Step back to put the situation into perspective. Don't act on impulse. Give yourself an opportunity to think about what to do. Avoid the temptation to prejudge the situation based on what you think you already know.

Decide whether a formal investigation is necessary; some problems can be resolved without a full-scale investigation. Consider whether you need more facts than one or two employees can provide.

2. Identify and list the specific issues, complaints and concerns involved in the situation you're looking at. There may be several. Before going any deeper, make sure you understand what company policies apply to the situation.

3. Consider whether to get an outsider involved—typically your employment lawyer, an investigator or, possibly, the police. It's possible that a front-line supervisor or manager and/or an HR representative will suffice.

4. Write a list of the information you need and the questions you need to ask, working from the specific issues you just identified. Then, note where that information is and who needs to be interviewed.

5. Decide who needs to know about the issue. A small group may need to know specifics, while others may need to know only that a claim is being investigated. Most people in your organization won't have a need to know, and should not receive information about the investigation.

6. Institute a document retention plan. Make sure information you need isn't destroyed or in jeopardy of being compromised or altered. Get access to or control of written files and notes. Capture and freeze access to electronic files and emails.

7. Decide who will contact the people to be interviewed and what each of them will be told.

Step 2: Gathering the information

It is important to keep an open mind and learn from information *as you gather it*. That way, you will be able to expand or shrink the scope of the investigation in accordance with what you are learning.

First, review all pertinent documents, emails, data and files. This will almost always include the personnel files of involved employees. It will, in most situations, also involve a supervisor's notes pertaining to involved employees.

Then, schedule and conduct interviews. Remember to give yourself time in between interviews to make notes and think about what you heard.

Employees are obligated to cooperate with their employers' investigations. Moreover, employers are justified in terminating any employee who refuses to participate in an investigation.

This is especially true when the employer has a policy clearly stating that employees are expected to participate in workplace investigations and that refusing to do so will subject employees to discipline.

Step 3: Reaching a conclusion

Once you have gathered all the information you can, management decision-makers need to reach conclusions and decide on what action to take.

At this point, it's appropriate to meet with the employee or employees who brought the issue.

Tell them that management has looked into the complaint and taken action that should address their concerns. Invite them to report any follow-up concerns. Then periodically contact them to find out if any new problems or issues have arisen.

If discipline or job action is to be taken, only the individual being punished needs to be told the specifics.

Who should perform the investigation?

The first advantage offered by internal investigators is their low cost, as they typically are already on your company's payroll. Speed of deployment is also an advantage, because they are already familiar with your organization, its procedures and goals. They may already be located in or near the site of the complaint or dispute.

Because of internal investigators' proximity to the workplace and its employees, they can also have improved fact-finding abilities and often cause less of a disruption in the ordinary course of business.

Although utilizing an internal investigator has its benefits, there are also disadvantages. Among these is the fact that some investigators cannot remain impartial during the investigation, as they could be interacting with friends and co-workers.

Another disadvantage is decreased efficiency. Unless an organization is large enough to dedicate a sufficient number of employees to investigate, the complex issues of an investigation plus employees' regular duties can prove too heavy a workload. Yet another drawback of using in-house personnel is that employees' knowledge or training may be too narrow to achieve the necessary fact-finding requirements.

Keep it in mind...

Written statements are poor cousins to live testimony. They tend to be incomplete, and often raise new questions. A face to face interview is always preferable, and an interviewer who shows up with a pre-printed form to conduct one falls into the trap of feeling overly satisfied just because all the checkboxes get ticked off.

You can't gag talk about investigations

For years, attorneys urged employers conducting HR and other workplace investigations to make the employees they interview swear to keep the conversation confidential. Witnesses, the lawyers advise, should tell no one what they were asked or what they said—at least until the investigation is concluded. The idea is that the investigation might become tainted if witnesses discuss what was said.

Not so fast. In one recent case, the National Labor Relations Board (NLRB) concluded that a confidentiality clause used by aerospace company Boeing violated employees' rights to engage in concerted activity under the National Labor Relations Act (NLRA). Boeing's policy prohibited employees from discussing pending investigations. Instead, they were supposed to refer all questions to the HR professional conducting the investigation.

The policy banned employees from discussing investigations with anyone, "other than company employees who are investigating this issue or your union representative."

The NLRB concluded that the policy was far too broad and prevented employees from participating in so-called concerted activity by effectively issuing a gag order. The NLRB said any confidentiality policy must be tailored to minimize its effect on concerted activity.

Boeing asked if making the rule a recommendation would pass muster. The proposed recommendation still required employees to sign a confidentiality notice and still urged them not to discuss the investigation. The NLRB said that wasn't good enough.

This is not the only case setting precedent about blanket policies that act to gag employees. In 2012, the NLRB held in its *Banner Health System* case that federal law prohibits an employer from making a blanket demand for confidentiality during an investigation.

Under federal law, non-management employees in both unionized and nonunionized settings have the right to engage in “concerted” activities for their mutual aid and protection. In *Banner*, the NLRB held that a complaining employee’s legal right to discuss workplace concerns with co-workers is not outweighed by an employer’s interest in maintaining the integrity of an investigation.

The NLRB stated, however, that an employer may request confidentiality based on an individualized assessment that reveals case-specific risks and takes into account whether

- witnesses need protection
- evidence might be destroyed
- testimony might be fabricated or
- there might be a cover-up.

The NLRB confirmed its *Banner* position in a January 2013 advice memorandum. It addressed a policy of paper mill operator Verso Paper, which prohibited employees from discussing ongoing investigations. The NLRB found the policy too broad, because it did not require a case-by-case analysis of confidentiality needs.

Check your handbook for any confidentiality policies. Does your rule prohibit discussing working conditions and salary? Are employees told they can’t discuss sexual harassment, discrimination or other investigations in which they are participating? All those are red flags for an unfair labor practices charge. Have your attorney review your policy.

Keep it in mind...

An absent complainant seems like a wronged one. Juries often automatically think of suspensions and even paid administrative leave as punitive measures. Although they are often necessary, you'll have to convince a jury exactly why they were.

2. Interviewing Employees

One of the most important and effective tools available in conducting an investigation is the investigatory interview.

Employees must cooperate and participate—and have no Fifth Amendment right against self-incrimination, unless they work for a public-sector employer.

The employer holds most of the cards and can require both participation and truthfulness. Not cooperating or lying is grounds for discipline, regardless of the original charge. The investigation may result in valuable admissions or other evidence of guilt, the commission of lies, failure to answer or even show that the employee didn't do what the employer thought he or she did.

Why the interview?

An interview offers:

- An opportunity to get unvarnished, real-time responses to questions
- A chance to observe the witness's demeanor (body language, attitude, remorsefulness or lack thereof)
- A chance to assess the likelihood that, if given another chance, the conduct would or would not recur

In addition, an interview can provide valuable evidence to support a later employment decision, if necessary.

A successful investigatory interview requires a carefully prepared agenda. Keep in mind that one size does not fit all. The nature of the offense, the nature of the evidence of wrongdoing, the culture of the organization and the personalities of the individuals involved are all considerations that can influence how you should conduct an investigatory interview.

Who should attend?

The employer needs to be represented, at a minimum, by an interrogator and a note-taker. The interrogator needs to focus on questions, the responses and follow-up questions. Also include someone who has more direct knowledge of the subject matter at hand. If you suspect that the target of your investigation might give untruthful or exaggerated answers,

you can bring in the knowledgeable witness at the end for another round of questioning that challenges the credibility of the information previously provided.

Obviously, the targeted employee will be present. If the target is a unionized employee and there is a reasonable likelihood that information provided in the investigatory interview will result in the target being disciplined, the employee is entitled to a representative—if the union contract requires it or the employee asks for representation. If the employee asks and is improperly refused, no information gathered during the interview may be used in a disciplinary proceeding. If the employee requests representation, you can proceed by:

- Allowing a representative
- Canceling the meeting
- Informing the employee that if the request for a representative is not withdrawn, no meeting will be held
- Holding the meeting, but not using any information that is gathered

In a nonunion setting, employees have no right to a representative or lawyer. However, since one size does not fit all, there are considerations that support allowing a “representative” to be present.

Establish the ground rules for the representative’s role in the meeting. It should be limited to making sure questions are understood and the answers provided are also understood. There will be no coaching the target or signaling answers, no answering for the target, no conferring before an answer is given and no recasting answers with spin.

The questions

Careful planning should go into the subjects to be covered, form and order of the questions, what information already possessed is to be shared and when. Use decision trees to help with a line of questioning. A script and outline can be useful to keep on track and also be useful exhibits in later proceedings. Have a list of topics to cover—but be wary of preparing too many specific questions, as they can be limiting.

"Your job during an investigation is to obtain information, not convey it," says attorney Ann Kotlarski. To that point, how confident are you that you would never make the mistake of emitting the phrase, "Are you serious?" or even, "That must have been really hard for you," and in doing so skewing a complainant's responses and tainting the truth? Remember always that your job is to come to a conclusion on the very specific issue you are investigating, and you should not venture out from that goal if you can help it.

An employee who comes forward to speak with you should be thanked for their decision. Then explain that the company takes the concern seriously and will conduct a thorough investigation before reaching any conclusions. Emphasize that he or she will not be retaliated against for making the complaint.

Keep it in mind...

You can actually be *too* thorough. Over-interviewing can make an inquiry seem unfocused and confused if useless information is presented from parties on the periphery of the case.

Timing issues

Consider when the interview should occur. You could suspend the target for a day or two or conduct the interview right away before he or she can destroy evidence or make up an excuse.

If there is more than one witness or target, it may be important to interview them separately but simultaneously. This will avoid any comparing of notes or meshing of stories, and maximize the possibilities of inconsistency and valuable admissions.

Where to interview

Consider the most effective place to hold the interview. Is there a strategic reason for the employee to feel comfortable? Do you want the employee to let his guard down? Should the surroundings be familiar or unfamiliar? Do you want the employee uncomfortable and uneasy? Give thought to where attendees should sit in the room—across from each other? On the same side of the table?

Why to interview

Never lose sight of the reason for the interview. Remember that there is no Fifth Amendment right to protect a refusal to answer or a failure to cooperate. Also remember that lying can be an independent reason for discipline.

Go into each interview with an open mind. You are putting together the pieces of a puzzle. Serve the puzzle and its ultimate solution above your own beliefs, or even the people who have an interest in what the puzzle looks like when all is said and done.

Written statements: Good or bad?

Written statements are helpful when you have concerns that an employee might change a story later. Know also, however, that they can go a long way in raising an employee's anxiety level, and they tend to narrow his or her focus.

A 2012 NLRB decision (*American Baptist Homes of the West*) held that in union workforces, witness statements obtained by employers in workplace investigations under promises of

confidentiality no longer may be routinely withheld in responding to union requests for information. Now, the rule is that if requested by the union, witness statements must be disclosed unless the employer establishes legitimate and substantial confidentiality interests, separate from any promise of confidentiality to the employee, such as an actual showing that the individual giving the statement is likely to suffer union harassment. Also, the employer must always bargain with the union over whether there is another way to provide the information that meets the employer's confidentiality concerns.

Don't leave them hanging

Employees always want to know where they stand in an investigation and how much involvement is expected of them going forward, and you curb gossip and speculation by giving them specific dates and times when you will contact them next. Assure them that you will keep them in the loop as much as possible.

Depending on the circumstances, it may be important to check back in with an employee who complained periodically to make sure things are going well, and that there's no sense of retaliation. This can be done using open-ended questions like, "How's it going? Is there anything I need to be aware of?" Be sure to document such follow-up conversations.

Keep it in mind...

When filling out necessary forms before and during an investigation, it helps to bolster the organization's credibility if the employee watches you do so. It instills an image of proactivity and lets them know steps are being followed accurately, with their input always a pen stroke away.

How to determine credibility

In-house investigators (usually a human resources manager) often do a good job of interviewing the right people and documenting the interviews, but then fall short when it comes time to analyzing the evidence.

For example, many investigators falsely believe they can't conclude that a violation of policy occurred unless they have independent witnesses to the allegations. This mistake leads to action not being taken when it should. So what's an investigator to do when confronted with conflicting stories? Here are some guidelines.

Use a lower burden of proof

In every lawsuit, one party has the burden of proving his or her case. In a civil case, the person bringing the lawsuit (the plaintiff) has the burden of proof. However, he or she must meet this burden only by a "preponderance of the evidence," which means that it is more likely than not that the allegations occurred. This burden is much easier to meet than the "beyond a reasonable doubt" standard that is used for criminal cases.

Investigators of workplace wrongdoing often wrongly believe that they must show it occurred "beyond a reasonable doubt." Instead, the investigator should be using the lesser standard of preponderance of the evidence.

See if 'baseline' behavior changes

Determining whether an employee committed wrongdoing is difficult when, as is often the case, there is no direct witness. Harassment cases are a prime example. This is where credibility determinations come in handy. One thing the investigator can look for is changes in a witness' demeanor. To do this, the investigator must observe the "baseline" behavior of the witness. That is, how does that person behave when being questioned about something neutral.

The investigator should take time to make the employee comfortable and get background information. During that time, the investigator should be observing the person's behavior. Then the investigator can compare the baseline behavior with the manner in which the person answers questions about the allegations.

Is there a change in eye contact or body language? Are there significant pauses before the employee answers the question? These are clues to credibility.

Listen for evasive responses

It's usually difficult to make a determination based solely on the demeanor of the accused person. That's why it's vital to listen carefully to responses. Many people will not lie outright. Instead, they'll give indirect answers to questions that could incriminate them.

If a witness will not answer directly after being asked the question a few times, this is a strong indication that he or she is not being truthful.

Listen for important contradictions

An investigator will feel much better finding someone not credible if the investigator can turn up actual contradictions in that person's statements. For the contradiction to be significant, it should be about something that is both important and not explained by memory problems.

For example, many people are bad with dates. The fact that there is a contradiction about when something happened is often not significant. However, a contradiction about what the witness did, what the witness said or who was present usually would be significant. The investigator should give the witness an opportunity to explain contradictions, and then evaluate whether the explanation makes sense.

A good way to get a witness to contradict him/herself is to ask about the same events multiple times. For example, the investigator can question the witness about the key issue at an initial interview and then again at a follow-up interview a few days later. To really evaluate the information, the investigator should ask for plenty of detail.

Don't discount contemporaneous witnesses

There may be no direct witness to the wrongdoing itself, but there may be people who witnessed odd subsequent behavior, or the emotional fallout that ensued. These people are called contemporaneous witnesses and they can have a big impact on an individual's credibility. This is especially true if the witness is not a close friend or family member and, therefore, not someone who would typically lie for the witness.

Make a determination and support it

After all the facts are gathered, the investigator should make a determination about whether each allegation happened or not. Investigators shouldn't take the easy way out and say they can't make a determination because of conflicting evidence. Instead, they should weigh the evidence, make credibility findings and come to a determination based on a preponderance of evidence. The investigator should support this determination in writing using factors such as the ones explained above.

Your notes of each interview should reflect the facts and information provided by the interviewee, not your impression of whether the interviewee's rendition is truthful or accurate.

Of course, there are occasional cases that cannot be decided because both parties truly are equally credible. However, using the factors described here, a determination can and should be made in most cases.

3. The Most Delicate Case: Navigating a Harassment Investigation

According to the Equal Employment Opportunity Commission (EEOC), the first step in preventing and correcting harassment is to establish, distribute, and enforce a policy prohibiting harassment and setting out a procedure for filing complaints. Your policy should make it clear that the employer will not tolerate harassment based on race, sex, religion, national origin, age, or disability, or harassment based on opposition to discrimination or participation in complaint proceedings. Don't forget to include a provision stating that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation.

Establishing a complaint procedure is a little more involved than explaining to employees what the policy prohibits. The EEOC recommends the following elements in order to make the procedure clear and complete.

- The employer should encourage employees to report harassment to management before it becomes severe or pervasive.
- The employer should designate more than one individual to whom employees can go with complaints, and should ensure that these individuals are in accessible locations. The employer should also instruct all of its supervisors to report complaints of harassment to appropriate officials.
- The employer should assure employees that it will protect the confidentiality of harassment complaints to the extent possible.

The next step is the investigation. The EEOC guidelines set out three conditions for a legally strong harassment investigation.

1. An employer should conduct a prompt, thorough, and impartial investigation. The alleged harasser should not have any direct or indirect control over the investigation.
2. The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information.
3. Before completing the investigation, the employer should take steps to make sure that the harassment does not continue. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. Other examples of interim measures are making scheduling changes to avoid contact

between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

The last step in ensuring you're armed against vicarious liability is to take corrective measures. This means that if you determine harassment has occurred, you must take immediate measures to stop the harassment and ensure it doesn't recur. Disciplinary measures for the harasser can range from a written warning placed in his/her personnel file to termination, and should be proportional to the seriousness of the offense. You should also correct any effects of the harassment by, for example, restoring leave taken because of the harassment or removing negative evaluations in the harassee's personnel file that arose from the harassment.

Suspect an employee is being harassed? Ask if she wants an investigation

Some employees may be embarrassed when they experience sexual harassment. They may feel too uncomfortable to come right out and repeat offensive comments they heard. What should HR do?

You could ask questions to elicit specifics. Or you could simply explain the company's sexual harassment policy and ask whether the aggrieved individual wants the company to start an investigation. Then note his or her response.

If specifics aren't offered or the investigation offer is declined, you can later argue that the employee chose not to take advantage of your policy and therefore can't now complain that you didn't stop the alleged harassment.

Unless the harasser was her supervisor and she was fired, demoted or otherwise suffered serious consequences before you had a chance to do something, her failure to follow the policy is a solid defense.

Keep it in mind...

When interviewing a witness, try to elicit the identity of the complainant and the accused, rather than volunteering this information beforehand. For example, you might ask, "Do you know why I'm talking with you today?" Or, "Can you think of any conduct that occurred recently between anyone that might be considered a violation of company policy?" Anytime you can avoid leading someone to a conclusion, it helps establish harder facts.

What to ask

When investigating an employee's complaint of harassment—sexual or otherwise—tailor your inquiries to the facts of that case.

Ask the complainant

- Who committed the alleged harassment? What exactly occurred? When and how often did it occur, and is it still going on? Where did it occur?
- How did you react? What response did you make when the incident occurred or afterward?
- Has your job been affected in any way?
- Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?

Ask the alleged harasser

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any notes, physical evidence or other documentation regarding the incident(s)?

Ask third-party witnesses

- What did you see or hear?
- What did the complainant tell you? When did she tell you that?

4. The Mistakes to Avoid

1. Ignoring complaints

Failing to take action on a complaint is one of the biggest mistakes employers can make. Choosing not to conduct an investigation after learning of allegedly inappropriate conduct may result in the company being legally responsible for harm caused to any employee, client or others due to the inappropriate conduct. Investigate regardless of how frivolous or unfounded the complaint appears, or who complained.

Note: Just because a complaint is anonymous does not excuse failure to investigate.

2. Not having a plan

Create a preliminary plan for the investigation so you understand the purpose of the investigation. Think about these five W's:

- Why are you investigating?
- Who will conduct the investigation?
- Who are the witnesses that need to be interviewed?
- What evidence needs to be collected?
- What is your investigation timeline?

3. Taking too long

Delaying the start of an investigation may lead to employer liability. Particularly in harassment and discrimination cases, deciding to wait to begin an investigation may be viewed as subjecting the employee to additional unlawful behavior.

Your timing goal: to strike a balance between adequately preparing for the investigation and avoiding unreasonably long delays.

4. Not training investigators

Poorly trained investigators can't promptly respond to complaints, making the inquiry ineffective. Train several employees to conduct an impartial, professional and credible investigation.

Another option is to hire a trusted HR colleague or use in-house counsel or an outside attorney to conduct the investigation. No matter who you choose, making sure that the investigator is trained and able to begin the investigation promptly is key.

5. Accepting half-measures

Conducting a sloppy investigation by failing to interview necessary witnesses, failing to review relevant documents and ignoring potential issues that come up during the investigation can create just as much legal exposure as not doing an investigation at all.

6. Conducting unlawful searches

Searching an employee's personal belongings or monitoring certain communications without consent can violate several federal and state laws. Avoid liability by informing employees of surveillance policies. Obtain their consent to monitor and access information on any devices employees use at work.

7. Interviewing too aggressively

Aggressive tactics may result in legal claims such as false imprisonment and coerced confessions. More practically, you risk dissuading employees from cooperating in the investigation, thus failing to understand what happened.

Advice: Conduct interviews in appropriate locations, outline questions in advance and use open-ended questions when possible, to get the entire story.

8. Promising confidentiality

Never promise an employee that his or her complaint will remain confidential. There will always be certain information that must be disclosed in order for a thorough investigation to be completed. You run the risk of a possible violation of federal labor law if you demand absolute confidentiality by the witnesses.

9. Failing to create a report

Document investigation processes and findings to support the company's action regarding the allegations. Failing to document evidence, results of interviews and other relevant findings is just as bad as failing to conduct an investigation.

Prepare a report for every investigation. Include a summary of the matter; the identity of all parties and witnesses; a description of the documents, findings and credibility determinations; and recommended action.

10. Pulling punches at the end

Failing to reach a conclusion and take the necessary steps to address misconduct will ultimately expose the employer to legal liability. Once the report has been completed, a determination should be made regarding whether misconduct occurred and what appropriate actions should be taken.

Make sure the complainant does not suffer any adverse employment actions resulting from the determination unless you can prove that the allegations were made in bad faith.

It is possible that you may conclude that not only was the complaint untrue, but it was intentionally meant to mislead. You may discipline an employee for making a false complaint, but this can be risky because it can look like retaliation for making the complaint. Make sure that you can prove that the complaint was both objectively untrue *and* that the complainant *knew* his or her complaint was untrue when he or she made it.

Keep it in mind...

Attorney Ann Kotlarski offers a tip about how to end a fact-finding interview. Remember that people like to be asked for their opinion and feel part of the process, so try closing with, "If you were me, where would you turn next?" You might even ask, "What would you like to see happen here?" The goal is to keep that investigatory roadmap growing outward so the truth is wholly uncovered—while your own opinions, biases and emotions are left in the dust.

Act in advance: 7 situations you should document every time

True HR pros and the managers they work with know that a workplace investigation is always over the horizon, and they create a routine that prepares them for any eventuality. This includes accurate documentation about seemingly minor incidents that could come up later. Here are seven occurrences you should always write up:

1. Excessive tardiness, unexcused absences. Accurate attendance records—listing dates and times—form the backbone of many decisions to discipline or terminate.

2. Incompetent job performance. Describe what the employee did or did not do, how that violated your rules or standards, and the consequences of the poor performance. Cite attempts you make to help the employee improve.

3. Failure to comply with policy or with established safety procedures. Specificity matters here, too. Detail the policy or procedure that was violated. Especially where safety violations are concerned, document that you counseled the employee.

4. Physical violence, verbal threats. Especially if your zero-tolerance policy requires termination, spell out exactly what happened.

5. Complaints of sexual harassment or discrimination. These complaints often turn into lawsuits. Include details of your investigation. Assume that your records will become evidence in court.

6. Proven instances of on-the-job impairment. Explain why you believe the employee was under the influence. Document that you followed established protocols for alcohol or drug testing.

7. Positive performance. A file containing only negative comments can make it look like you had it in for the employee. Give credit when it's due.

5. Investigation Forms

The following pages contain forms to aid you while documenting the investigation process.

Employee Report Form

Employee name: _____

Report date: _____

Nature of concern:

Action requested by employee:

Log: Employee Concerns

| Ref. # | Report Date | Employee | Department | Issue | Resolution + Date |
|--------|-------------|----------|------------|-------|-------------------|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Employee Interview Record

Interviewer: _____

Interviewee: _____

Date, time, location: _____

INITIAL STEPS

- THANK EMPLOYEE FOR COMING FORWARD.
- ASSURE THE EMPLOYEE THAT THE COMPANY TAKES ALL CONCERNS SERIOUSLY.
- EXPLAIN THAT THE EMPLOYEE IS PROTECTED FROM RETALIATION.
- ISSUE APPROPRIATE AND LEGAL CONFIDENTIALITY INSTRUCTIONS AND ADVISE THAT THE INVESTIGATORS' OWN CONFIDENTIALITY IN THIS MATTER MAY NOT BE GUARANTEED DUE TO THE NATURE OF THE INVESTIGATORY PROCESS.
- ESTABLISH WHICH OF THE INTERVIEWEE'S OWN QUESTIONS YOU WILL AND WILL NOT BE PERMITTED TO ANSWER AT THIS TIME.
- ASK IF THE INTERVIEWEE NEEDS CLARIFICATION ON ANY POINT BEFORE PROCEEDING.

Documents reviewed

- Company policies
- Personnel files
- Other investigation materials:

Findings:

Findings (cont.)

Conclusions:

Recommended action:
