

Workplace Investigation Tips & Strategies



TERCH &
ASSOCIATES
HUMAN RESOURCES EXPERTS

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Fears & Apprehensions

Common HR concerns about investigations

- Scared about making a mistake?
- Not sure who to believe?
- Not sure where to start?
- Don't want to be too invasive?
- Worried about liability?

Ethical Concerns

Conflict of Interest

- When a relationship or interest of an investigator makes them unable to be independent and do honest work.
- When there is a reasonable perception that the above may be true. Must be based on some actual fact – not just generalized worry.

Liability Concerns

- Qualified Immunity
- Reasonableness
- Defamation (per se)
- Breach of confidentiality
- Unauthorized access of information
- False representation/fraud
- Trespassing/Invasion of Privacy

Types & Parts of Investigations

Fact-finding is when the investigator seeks evidence to determine what, if anything, occurred. This is the evidence gathering process and includes determinations of credibility.

Conclusion-making is when the investigator, after having made judgements about the facts and stated the reasons why, determines if the conduct violated policy and, if so, why they made such a conclusion.

Standards of Proof

- Reasonable suspicion
- Probable cause (C)
- **Preponderance of the evidence**
- Clear & convincing evidence
- Proof beyond a reasonable doubt (C)

Preponderance of the Evidence

“Preponderance of the evidence” is the appropriate and uniform standard for making determinations of fact and conclusions in workplace related investigations. This standard is, essentially, the question “Is it more likely than not that...”

Preponderance of the Evidence

It is critical that the facts you gather support your determination. Your determination must be supported by the totality of facts and not simply conclusions based upon guesses, hunches, or belief.

Ask yourself “If a reasonable outsider read my final report, would they come to a similar conclusion that I did?”

He Said/She Said: Determining Credibility

Determining credibility is a critical function of conducting internal investigations. Many cases are simply one person's allegation against another person's denial.

How do you determine credibility? What are the factors you'd consider?

Credibility Determinations – 5 Legitimate Factors

- **Inherent Plausibility:** Is the testimony believable? Does it make sense?
- **Demeanor:** Does the person seem to be truthful or deceptive?
- **Motive to Falsify:** Is there any motive to lie?
- **Corroboration:** Are there any corroborating witnesses or evidence?
- **Past Record:** Does anyone have a record of conduct that impacts your determinations?

Credibility Determinations

When choosing to credit one person's testimony over another's, be sure to explain why you did so in your report. Go through each factor and list relevant information.

Don't be averse to listing counter-points. Sometimes one factor is supportive of one side and the other factor supports the other side. Just be transparent and clear. State why.

Step 1: Choosing an Investigator

- Conflict of interest issues
- How close is the person to the main parties?
- Any familial or reporting relationship?
- Is the investigator also going to make discipline decisions, if needed?
- The higher up, the more likely you want an outside investigator
- Availability
- Skill

Licensing

Both MN and WI require investigations, including workplace investigations, to be conducted by a licensed investigator, except:

- When conducted by a licensed attorney or insurance adjuster
- When conducted by employees (not contractors) of the organization who conduct their work solely on the employer's premises.

Step 2: Interview Complainant

Conduct a thorough interview with the complainant. Get their story locked down and be sure all the facts they allege are detailed. Don't be impatient.

Interviewing

- Cover the entirety of the relationship because context matters
- Look for claims that can be tested and corroborated
- Identify possible evidence (emails, texts, calendars, journals, etc)
- Identify possible witnesses
- Develop a timeline

Step 3: Interviewing/Notifying the Respondent

I choose to notify the respondent early in the investigation:

- They may simply admit to the allegations
- They are on notice about non-retaliation policies
- Reduces time to design a story or position that may be less than true
- Obtain evidence/witnesses that may support their story

Placing Respondent on leave

Should we place the respondent on paid leave pending the investigation? Factors to consider:

- Risk of harm to complainant, respondent, or other person
- Risk of lost or altered evidence
- Cool-off period

Respondent's Rights

- Weingarten (union only – right to be represented in investigatory interview)
- Tennessen warning (applies only to public employees in MN and should also be provided to all witnesses and even complainant)
- Garrity (sometimes used in matters that may be criminal in nature)

Tip: No Promises

Don't promise or imply a commitment to anything to anyone, including:

- Absolute confidentiality
- Timeline to resolution
- Outcome

Step 4: Witnesses

- Interview all potential witnesses
 - Identified by either party
 - Identified by you based on your investigation or knowledge
 - Avoid being too narrow in your questions
 - Look for corroboration of either party's claims

Conducting Interviews

- Develop rapport.
- Lay the foundation. Why are we here?
- What is my role and goal? How are investigations conducted?
- Can you walk me through....
- Narrative – from before until after (not start to finish)
- Let me bring you back to....
- Pointed questions

Tough Questions

In certain cases, very direct and explicit language is required:

- Use the words that were used, don't clean them up.
- Ask them to not be politically correct or sensitive in sharing their story. Have them be as direct as possible.
- Avoid giving the impression that you are surprised or shocked.
- Clarify what they know vs. but they “picked up” or assumed.

Boat



Tip: Consistent Audio Recordings

If you choose to record one interview in an investigation, you need to record all of them. Don't pick and choose. Be consistent.

Tip: Allow Revisions

Be sure each party and/or witness is informed that they can add to, amend, or correct anything they've told you. Many people are anxious when being interviewed and may miss important details. Allow the parties to email you information that they later recall or remember or wish to clarify after the interview.

Step 5: Obtain Evidence

Evidence may be:

- Testimonial: statements provided by parties or witnesses
- Documentary: surveillance footage, emails, texts, or documents
- Physical (uncommon in workplace): broken glass, stolen merchandise, fingerprints

Handling Evidence

Evidence should be secured and preserved. For example, if you have video footage of the incident, you'd have it downloaded on a jump drive or other media before labeling it and securely storing it with your investigative file.

Chain of custody is a document that tracks who the evidence is given to, when, and for what purpose. Keep the documentation!

Step 6: Draft Report

- Reports should be in the first person. Not “this investigator was contacted on...”
- Reports should be concise but substantively thorough.
- Reports should be proofread from the perspective of a disinterested third-party: Does this look thorough and impartial to a third-party or does it look slanted?
- Do not leave out exculpatory information – be transparent.

Inflammatory Language

- Avoid inflammatory language unless a direct quote from a witness or party that you can back up.
 - "XXX has a pattern of concocting lies."
 - "XXX ignores directives with impunity."
- This language makes it appear you have an interest in the outcome and makes you look partial – it affects your credibility.

Tip: Toss or Keep?

Some investigators keep their entire investigative file, including audio recordings and notes either indefinitely or for long periods of time (e.g., three years) while others have a practice of destroying them at the conclusion of each investigation.

Pick a policy and stick with it for all cases. Don't pick and choose.

Questions

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