

Keeping Records of Workplace Investigations

One of the most important but overlooked tasks in a workplace investigation is keeping records of what was done. This article provides some tips on good recordkeeping practices.

HOW TO KEEP GOOD RECORDS

Retain all relevant materials. Because investigative records may be discoverable (subject to review by the opposing party) during litigation or under public disclosure requests, it's important to retain the materials that are relevant to the investigative findings. If investigative notes are later typed or rewritten for clarity, keep the originals so you don't have to explain why notes were destroyed.

KEEP INVESTIGATIVE RECORDS SEPARATE

Investigative records should be kept separate from personnel files. They should be kept very confidential.

KEEP A GOOD INVESTIGATIVE FILE

Typical components of an investigative file include:

- ▲ a log of the investigator's calls and actions by date of event (keep track of the investigation in a way that ensures completeness of the file but that also shows the diligence and promptness of the investigative response);
- ▲ contemporaneous and final interview notes for each witness (remember that each set of notes should include a reference to the dates of the interviews);
- ▲ all communications, e-mails, and letters to and from each witness;
- ▲ all written witness statements, if any;
- ▲ all written complaints;
- ▲ all relevant sections of the policies considered;
- ▲ all documents that were provided by witnesses or gathered by the investigator (each should have a notation of the date received by the investigator);
- ▲ tape recordings, computer files, timecards, calendars, log notes, reports, telephone messages, e-mails, or any other documents that might verify or refute the allegation; and
- ▲ the investigator's report, if any.



TAKE CAREFUL INVESTIGATIVE NOTES

Because investigative notes are potential exhibits in any future litigation, special care should be taken when creating them. The investigator should keep contemporaneous notes of what the witnesses say and the questions asked.

INTERNAL DOCUMENT MANAGEMENT

Documents should be treated with a high degree of confidentiality. Disclosure should be on a need-to-know basis only. That may include disclosure to government agencies investigating discrimination complaints or in response to subpoena or discovery requests.

CONSIDER GOOD REPORT-WRITING PRACTICES

A report is the formal documentation of the investigation. Therefore, it should include all that's necessary but no more:

1. The first question you should ask is whether a report is necessary. The investigator can deliver the summary orally if management is comfortable with that option. For public employers, due process may require a written investigative report that will be provided to the complaining employee and the accused. Public records issues are also a concern.
2. Even if a written report is provided, the management team responsible for the decision on prompt corrective action should review the entire investigative file. If they don't, then they must be able to state with accuracy that the summary they reviewed contains all the relevant factors.
3. Decide whether, and what kind of, recommendations will be included in the report. A report could include recommended findings on whether the allegations

have been substantiated and recommendations on what corrective action to take in response to any substantiated misconduct. If the latter are included, however, and management chooses not to follow the recommendations, the inconsistency can be challenged if a lawsuit is filed. Since those are matters of individual choice, an investigator should consult with management before issuing a report with findings and recommendations.

If corrective action recommendations are included and managers decide not to follow them, there must be a clear and cogent reason for doing so. In most cases, it's better for the investigator's conclusions to be solely a determination of the facts and for recommendations on prompt corrective action to be reported to management orally, if at all. Usually, it's better for a member of HR to make recommendations to management on prompt corrective action because that department is usually in a better position to judge whether the proposed action is consistent with how the employer has treated similar cases in the past.

4. If the report is extensive, it's appropriate to include an executive summary. Generally, it isn't advisable to prepare an extensive report.
5. The report should address each allegation separately. That ensures that no issue is overlooked or overshadowed by other factors.
6. The report should be in plain English. No legalese!
7. If there are findings in the report, it should state what evidence supports particular findings. If the evidence is insufficient to make a finding, that should be explained.
8. Generally speaking, conclusions that use legal terms are inappropriate and may not always be accurate or in the employer's best interests. Therefore, it may be more appropriate to recognize whether the facts show a violation of company policy.
9. When preparing an investigative report, the following guidelines are useful:
 - Begin the report by focusing on the precise nature of the complaint. It may be helpful to break the complaint into

separate allegations and follow each part of the complaint with a listing of the facts found to support or refute each allegation.

- List the factual findings on each issue. Discuss your conclusions on credibility, or list any reasons a conflict in the evidence can't be resolved.
- Don't list the names of witnesses with the statements they made. If requested, you may include a list of the individuals interviewed; however, if the confidentiality of the witnesses is critical, you may want to eliminate names completely. For public employers, if the written report will be provided to the accused, names may be listed for due process reasons. A list of names of those contacted should be included at the beginning of the report, and witnesses shouldn't, unless necessary, be identified by name in the discussion of facts found (except perhaps the complaining employee and the accused).
- Attach to the report a timetable of the investigation.
- Provide a summary of any alleged injury.
- Identify any interim relief provided to the complaining employee.
- Provide a conclusion for each allegation if asked.
- Provide a recommendation if asked.
- Throughout the report, state facts and conclusions in neutral, objective, precise, and thorough language.

Bottom line

Keeping good investigative records is one of the most important tasks of workplace investigations, yet many employers overlook that element. Following the above tips will help you improve your recordkeeping practices.

