

CHOOSING THE RIGHT PERSON TO CONDUCT A WORKPLACE INVESTIGATION

As an employer, you will most likely be faced at some time with a complaint of harassment. What you do after receiving this complaint could determine whether you are able to resolve the matter in-house and consistent with your harassment-free workplace policy, or whether you end up with a workplace in chaos and involved in litigation.

By now, every employer in California probably knows that it must respond to harassment complaints with an investigation. The standard in the human resources industry requires that an investigation be prompt, thorough, and effective. Accordingly, many articles have been written suggesting the best way to meet that standard. This particular article will focus on the first step of the investigation process – choosing the right person to investigate the complaint.

First of all, your investigator should be viewed by employees as someone who is unbiased, fair, and impartial. Even the appearance of bias could be a problem. In that regard, the investigator should not have a personal or work relationship with either party to the complaint. For instance, you would want to avoid using an investigator who carools, regularly shares lunch, supervises, or socializes with one of the parties. Using an investigator who reports to one of the parties could also be problematic – especially if there is a direct reporting relationship. Likewise, the investigation should not be supervised or controlled in any way by a person who fails to meet the impartiality test.

In addition to being impartial, the investigator should be experienced and trained in conducting investigations. They should have acquired the skills necessary to:

- ask questions in a non-aggressive manner,
- calmly elicit information from witnesses who are reluctant to participate,
- collect and evaluate documentation,
- handle confidential information with discretion,
- make credibility decisions, and
- reach conclusions based on the findings.

One of the questions employers often face is whether the investigation should be done by their legal counsel, or by a third party investigator. The answer to this question depends on a number of factors. In addition to meeting the criteria described in this article, the investigator must have the time to conduct a prompt and thorough investigation, in addition to his or her other duties. Perhaps the company has chosen the perfect person to investigate the complaint, however, that person is unavailable for the next 3 months. Whether that person is someone in-house, the company's legal counsel, or a third party investigator, delaying an investigation to the point where it is no longer "prompt" will be a problem. This delay will become an even bigger problem if the company is unable to offer a reasonable explanation during litigation.

The investigator must be able to write a clear, comprehensive, final investigation report. This written report may be used by the employer to defend itself in litigation, so it is worth the additional investment.

Because the investigator may be called upon to defend the investigation and the final report in a courtroom or at a deposition, the investigator should have excellent communication skills and the ability to be an effective and credible witness.

Finally, if the company wants its investigation to be covered by the attorney/client privilege or the attorney's work product theory, it should have a discussion with its legal counsel to get advice and input on the selection of the investigator.

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