**How to Conduct a Disciplinary Investigation**

**Getting Started**

When faced with an employee disciplinary issue that merits further investigation, it is critical that the HR business partner take adequate steps to ensure the proper enforcement of workplace rules. A well-executed investigation helps to avoid risk exposure to greater liability from either outside enforcement agencies or employee legal claims. The basic purpose of the investigation is to determine facts necessary to make an informed, reasoned workplace decision.

Not all employee disciplinary issues carry the same weight. As such, determining the scope of the investigation depends largely on the subject matter of the violation.  It is important to review the nature of the Company’s obligations (legal and organizational) in regard to the issue.

It is the HR business partner’s responsibility to decide what type of investigation is appropriate under the circumstances. In some circumstances, a manager may be able to manage the process on their own with an HR review of the disciplinary action. Others might require active participation from HR, for example:

* Certain disciplinary issues do not need extensive investigation, such as an allegation that an employee arrived an hour late for work.
* An investigation related to falsifying time records may be limited to speaking to the alleged wrongdoer, a supervisor and a payroll representative.
* Other investigations, such as a workplace violence investigation, may require multiple witness interviews, additional security measures and outside law enforcement assistance.
* Harassment investigations may include supervisors, HR, counsel, compliance department representatives and various witnesses.

**Must Haves**

The following basic elements are essential when conducting an effective workplace investigation:

1. **Objectivity is a critical component** of the overall process and should be a key determiner in the selection of an investigator.
2. The investigation should be **conducted in a prompt manner** to preserve relevant evidence and enable witnesses to more accurately recall the facts.
3. **Preparation for the investigation** should include:
- determining the investigator
- making a list of potential witnesses
- identifying and/or obtaining relevant documents, materials and practices
- developing preliminary questions to be asked
- consideration should be given as to whether to contact legal counsel in developing an overall strategy and/or assisting in the decision-making process
4. **Anyone with relevant information should be interviewed.**
5. The **entire process should be documented**, including interviews, evidence and any action that is taken. Throughout, consideration should be given to the question, “How will the evidence and overall process be viewed if a charge or lawsuit results?” It is best to have signed statements from all parties.
6. The **‘Five Ws’** should be considered in preparation for the investigation and throughout the process:
- What happened?
- When did it happen?
- Where did it happen?
- Who was involved?
- Why did it happen?
7. Promises of confidentiality should be avoided, and instead, management should explain that information will be shared on a need-to-know basis. Also, it is important to communicate that there will no retaliation for registering a complaint or for participating in the investigation.
8. In general (there are exceptions) the employee under investigation should be notified of the concern and given the opportunity to detail their “alternative narrative” and answer any questions. They should be informed of anti-retaliation requirements against witnesses and of the need to not interfere in the investigation by talking to witnesses about the investigation or trying to influence them.
9. The interview should begin with broad, open-ended questions that give the witness an opportunity to describe events. Follow-up questions serve to clarify what was said and to “peel back the onion” in order to obtain additional facts. Questions asked should allow the investigator to determine relevant facts and assess the credibility of information provided.
10. At the conclusion of the investigation, a written report should be prepared that documents steps followed, information obtained, decisions reached, any actions taken and other pertinent information. If corrective action is taken, it should be administered in a timely manner.

**Steps in the Disciplinary Investigation**

The following steps will guide you through the investigation process:

1. Contact Necessary Departments, Supervisors or Employees
2. Prevent Destruction of Investigatory or Related Documents
3. Choose an Investigator
4. Decide Whom to Interview as a Witness
5. Exercise Care in Communicating Investigative Information
6. Decide Whether to Conduct Any Searches, Surveillance or Monitoring
7. Promptly Schedule and Conduct Events in the Investigative Process
8. Reach a Determination and Take Corrective Action, If Appropriate
9. Document Effectively

Each step is detailed below:

**Step 1: Contact Necessary Departments, Supervisors or Employees**

Based on the scope and nature of the investigation, and depending on the infraction, the alleged wrongdoer's immediate supervisor, inside or outside counsel or other managers should be contacted by HR. IT departments should be notified if there is a need to search computer files or mobile devices. Any interplay within departments should be coordinated, e.g., legal, compliance or IT departments.

Certain allegations may result in an employee being suspended for the duration of the investigation, e.g. allegations of violence or sexual assault, allegations of criminal misconduct (such as theft of money or trade secrets), whistleblowing claims, or other serious incidents. Should you determine that suspension is necessary for the investigation, you should communicate the suspension to the employee (with or without pay) and the expected length of the suspension.

In some cases, you may need to include security, legal, internal audit, or risk management depending upon the incident.

**Step 2: Prevent Destruction of Investigatory or Related Documents, Even if Previously Scheduled**

It is important to prevent the destruction of any investigatory or related documents. Courts do not look kindly upon an employer that fails to identify, locate and preserve relevant records as soon as it is placed on notice of a possible court claim. Now is also a good time to review any policies or documents that might be valuable in the investigations:

* Policy or Guideline Examples
* Employee Document Examples
* Employee Handbook
* Employee’s Personnel File
* Code of Conduct Policy
* Employee’s Performance Review
* Security Manual
* Expense Reports
* Expense Policy
* Complaints or other performance notations

**Step 3: Choose an Investigator**

An organization may choose as its investigator an in-house counsel who is not a witness to the investigation –or- a fair, impartial HR representative as an investigator. As a general rule, if the matter concerns a harassment allegation, the investigator should not be the direct supervisor of the alleged wrongdoer or the complaining witness. The investigator should be impartial, objective and properly trained on how to conduct a workplace investigation.

**Step 4: Decide Whom to Interview as a Witness**

Employers should strive to speak to all witnesses to the incident(s), or those who may have information on the alleged infraction or violation. Careful consideration should be given to the order of witnesses. The complainant and the alleged wrongdoer may have to be interviewed multiple times based on other witness accounts or newly acquired information. It is important to make sure the employee under investigation understands that discussions which interfere with the investigation and discussions or actions which feel like retaliation to other employees may result in termination.

**Step 5: Exercise Care in Communicating Investigative Information**

Maintaining the confidentiality of an investigation reduces workplace gossip and other distractions, guards against retaliation against any witnesses or complainants and promotes procedural integrity. However, even though an employer may wish to keep the investigation completely confidential, employees may have the right to discuss the disciplinary procedures under the National Labor Relations Act (NLRA). These protections apply whether the workplace is unionized, partially unionized or union-free.

**Step 6: Decide Whether to Conduct Any Searches, Surveillance or Monitoring**

In some cases, conducting a search of the employee's personal workspace is relevant to the investigation (e.g., regarding a workplace theft accusation). You may want to review relevant emails and electronic files. When conducting trade secret theft investigations, it may be advisable to have the IT department analyze employer-issued laptops and mobile devices. Generally, searches of an employee's person should not be undertaken by agents of the employer. If such a search is deemed necessary in a theft investigation, the employer should contact law enforcement.

**A. Employee Privacy Concerns**

Employers should guard against invasion of privacy claims during the disciplinary investigation. Depending on the employer's location, employees could file claims based on various state privacy laws related to employee searches or surveillance.

In addition, employers should use caution when using electronic or video surveillance, tapping into telephone conversations and tracking employees' movements. Federal and state laws limit an employer's ability to surveil employees in places where they have a reasonable expectation of privacy.

**B. Labor Environments**

In unionized environments, employers should consult the collective bargaining agreement (CBA) and comply with any applicable provisions. Discipline is a mandatory subject of bargaining, so that investigations and discipline will be addressed in the CBA. In addition, the CBA may address conditions under which employees may be searched.

**C. Public Employers**

If the employer is a public entity or public contractor employer, added notice, due process and constitutional requirements may apply. In addition, public employees may have Fourth Amendment protections against unreasonable searches and seizures.

**Step 7: Promptly Schedule and Conduct Events in the Investigative Process**

Witness interviews should be coordinated close in time and conducted promptly. Employers should guard against undue influence issues. Investigators need not interview everyone with knowledge of the incident(s), if the additional interviews would be duplicative or fact corroboration is no longer needed.

When conducting disciplinary meetings or interviews, employers should be aware of state or local laws limiting recording of conversations (e.g., state wiretap laws). In addition, public employers or unionized employers may have additional procedural responsibilities when conducting investigatory meetings (e.g., an employee may have the right to union representation during an interview). Employers should conduct investigative meetings with an individual in addition to the investigator and the witness present. Having a second pair of eyes and ears attend the investigative meeting is particularly important during a harassment investigation, which may have a greater likelihood of resulting in legal action.

Finally, employers should conduct any necessary or appropriate testing during the investigative process, including drug testing. However, employers may be constrained from conducting a particular test by either federal or state laws and regulations, an employee's employment contract or an applicable collective bargaining agreement.

**Step 8: Reach a Determination and Take Corrective Action, If Appropriate**

Upon the conclusion of an investigation, employers should determine whether the issue meriting a disciplinary investigation has a basis in fact, and what corrective action should be taken, if any. Under certain laws (e.g., various state fair employment laws), immediate and appropriate corrective action must be taken when an employer learns of an incident requiring investigation. Otherwise, an employer may be subject to greater liability under an enforcement agency investigation or based on an employee court claim.

In some instances, employers may be legally obligated to report certain workplace violations (e.g., safety violations). Failing to satisfy any reporting requirements may result in the employer's increased exposure to fines and penalties. Absent any legal requirements, however, prompt action following a thorough investigation makes good business sense. Fair enforcement of work rules improves employee retention and overall morale and promotes integrity within the workplace.

In formulating a recommendation for action, consider the following:

1. Were any of the Company’s policies, guidelines, or practices violated?
2. If so, would you consider the violation a serious offense?
3. What has the Company done in the past with regard to similar violations?
4. Are there any Federal, state or local laws that require you to take specific action?
5. How long has the employee been employed by the Company?
6. Does the employee have a track record of violating policies?
7. What is the employee’s performance history with the Company?
8. Are there any other mitigating circumstances that could affect your decision?

If the investigation was prompted by another employee, be sure to follow up with the employee letting them know that the investigation is complete and appropriate action has been taken. Be certain not to share any confidential information regarding the investigation.

**Step 9: Document Effectively**

Employers should keep adequate documentation of each step in the investigatory process. In addition, they should be prepared as if they could eventually end up in court. These documents should be kept in an investigation file that is separate from the employee's personnel file. Any resulting discipline should be included in the employee's personnel file.

Remember that you may need to send detailed investigation information to the unemployment office to back-up your decision in the case of a termination, to include timecards, signed statements and other information.

 **Note**: Review state laws for state-specific provisions.

Written by a Catapult Advisor