

When do I Need to Investigate?

Most employers have an anti-harassment policy in place and engage in some form of training at the supervisory level on how to prevent harassment. But there is confusion as to what is actually “protected” harassment and what is the best way to respond if credible complaints are presented. The question often raised by employers is “When do I know I need to do something?”

The short answer according to the Department of Fair Employment & Housing (DFEH) is: “anytime you are made aware of behavior that is serious enough to conduct a formal investigation.” The DFEH Guidance also states that “if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate...” This is harder than it sounds.

For instance, assume a waitress reports to HR that she wants to “formally complain” about her male supervisor who is “harassing” her for being habitually being late and has “unfairly” written her up because of absenteeism. She thinks this may be a “hostile work environment.” Does this complaint require an investigation? Does the fact that the waitress uses terms such as “harassment” and “hostile work environment” mean that the complaint is subject to review or could it simply be a supervisor employee dispute that deserves counseling. At a minimum, the issue requires further review because it may or may not be a complaint involving “protected activity” under harassment laws such as the California Fair Employment & Housing Act (FEHA).

Employees are becoming increasingly accustomed to hearing about harassment issues in the media and will sometimes use terms such as abuse, assault, hostile environment, harassment, in communicating concerns even if the incident in question does not meet the legal standard for protection under harassment laws. Careful scrutiny by HR and management over each complaint is now necessary to determine which issues require a due process review and investigation.

If an investigation is warranted, the company has several options to consider in determining how to proceed with the investigation:

- 1) conduct an in-house investigation with HR;
- 2) use retained legal counsel or corporate counsel or
- 3) retain an outside, third party investigative service or firm

Conducting the investigation in-house is likely to be the most cost effective and expedient, assuming HR has the ability to dedicate its full efforts toward conducting a prompt, thorough and potentially time consuming investigatory review. However, managing an in-house investigation can be rigorous for HR, especially if the investigation involves interviewing multiple witnesses, reviewing records and writing a thorough report containing detailed findings. In addition, HR professionals are not often trained on critical investigative techniques such as how to make credibility determinations.

The DFEH advises that an investigator should be “knowledgeable about standard investigatory practices” which includes “investigative technique relating to questioning witnesses, documenting interviews and analyzing information.” Finally, experienced Plaintiff’s lawyers have been known to criticize in-house investigations as not independent or impartial given the appearance of bias inherent in a company employee investigating complaints against management.

Use of the employer’s retained legal counsel is an option for conducting an investigation, but companies should be aware that a conflict of interest may prevent that counsel from representing the organization if a lawsuit is filed.

The most common practice and increasing trend in proceeding with investigations is to retain an external third party investigative firm or association with investigators skilled in employment law matters. These firms are usually able to conduct a prompt, thorough investigative process and produce a report that has a greater chance of standing up to legal scrutiny. They are more likely to be viewed as skilled in investigative techniques and impartial in reporting results- good or bad- to management.

One significant theme in the recent accusations of sexual harassment is the revelation that complaints of harassment have been either ignored, brushed

under the rug or there is an appearance that complaints are not taken seriously. Therefore, whatever form of review or investigation a company chooses in order to respond to complaints must be effective in proving that the company takes reasonable steps to prevent and correct harassment and does not turn a blind eye to credible reports of wrongful behavior in the workplace.

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