

HOW TO CONDUCT A SEXUAL HARASSMENT INVESTIGATION

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This Handout provides general guidance and strategies to HR professionals, managers and business owners on conducting effective sexual harassment investigations. Although this Handout focuses on sexual harassment, the advice in it applies equally to racial, age-based and other types of harassment investigations.

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Conducting an investigation into an internal employee complaint of harassment is one of the most important employment law/HR functions an employer can be required to perform. It is important not only because your organization is required by federal law to act immediately in a serious, unbiased manner, but also because the investigation will *directly* impact your legal risks. A prompt, thorough and effective investigation can minimize your legal liability—even prevent an EEOC Charge or lawsuit from ever being filed. On the other hand, an incomplete, biased, or delayed investigation can actually enhance your chances of getting sued. A poor investigation can also increase your risk of punitive damages, trigger new harassment complaints from co-workers, and harm productivity and morale.

I. Interviewing the Complaining Employee

The most important interview you will conduct in your investigation is that of the complaining employee. All sexual harassment complaints are unique and, therefore, every investigation is also unique. Yet, these **Ten Tips** will apply in almost every situation:

1. **Start Immediately.** Your investigation needs to begin immediately. This means that same day, maybe the next day. It does not mean next week. This must be treated as an absolute priority.
2. **Choose Your Investigator.** The investigator should be unbiased and experienced in conducting sensitive workplace investigations. In many situations it will be appropriate for an internal Human Resources professional to handle the inquiry (for smaller companies it may be a senior manager). In certain cases, however, it is advisable

to involve outside legal counsel. One significant benefit is that the attorney-client privilege and attorney work product doctrine will apply and may protect certain communications from being disclosed to the other side in litigation. The experience and skills that legal counsel bring to the table at this stage may also save you litigation costs in the long run.

3. **Private Setting.** Make the employee's experience as comfortable as possible. The setting should be informal. If requested by the employee, you may need to have the meeting after hours or away from the office if necessary for confidentiality and privacy purposes. In-person is of course ideal. If you cannot be in the same physical location as the employee and you must do the interview by phone, be sure the employee is in a private setting where he or she can speak freely.
4. **No Distractions.** It is important to focus on the employee. You need to convey the seriousness with which you are treating the employee's concerns. Avoid looking at your watch, checking your phone or laptop, or allowing other interruptions.
5. **Preliminary Remarks.** Indicate your appreciation that the employee brought this matter forward. Encourage him/her to speak freely and give all of the facts. Remind the employee of the need to be truthful and accurate especially in making allegations of this nature. Emphasize your company's zero tolerance of any type of harassment and its commitment to resolving complaints.
6. **Thorough Questioning.** It is critical to get the whole story. At a minimum, be sure to ask:
 - What happened?
 - Who was involved, and what are their positions relative to the employee (supervisor? subordinate? executive? co-worker? contractor?)
 - When did the incident take place?
 - Where did it take place?
 - Were there any observers? Who?
 - How many incidents were there?
 - Has the employee talked to anyone else at the company about this issue? Who?
 - Are there any written documents, emails, voicemails, or text messages relevant to the complaint? Ask for copies.
 - Has the employee kept any written records or diaries that are relevant to the complaint? Any personnel file memos or other notes?
 - Have other employees had similar concerns?
 - Has the employee had other interactions (positive or negative) with the offending employee? What did those involve?
 - What does the employee think is motivating the objectionable conduct?
 - How has the conduct affected the employee and his/her work?
 - Does the employee have any additional facts or information that would be helpful to your investigation?

*Note - It is helpful to ask “wrap up” questions that commit the employee to closure of an issue. Examples: “*Have you now told me all of the improper remarks he said to you?*” “*Is this the complete list of witnesses?*” “*If I could recap, the basis for your complaint is these two emails she sent to you in February?*”

7. **Get a Written Statement.** Ask the employee to write down his or her allegations. This is best if done either in the interview or right afterwards. The purpose is to avoid misunderstandings and ensure that you have the employee’s entire version of events documented. Ask them to sign it.
8. **Closing Comments.** Thank the employee again for bringing the complaint forward. Let him/her know that the Company will make efforts to keep the investigation confidential, but in order to investigate properly it is very difficult to keep the person’s identity and allegations a secret. Assure the person that the Company prohibits retaliation and ask him or her to report any retaliation to you immediately. (Retaliation includes further harassment, termination, failure to promote, failure to give raises, etc.).
9. **Allow the Employee to Take the Day Off.** Unless the employee asks to stay at work or if business needs will not allow it, it is usually best to invite the employee to take the rest of the day off. This shows you are supportive and taking the matter seriously. It also removes the employee from the workplace and decreases the chance of problematic interactions with the accused.

10. **Take Precautions to Prevent Interactions Between the Employee and the Accused.** Until the investigation is completed, the employee should not have to interact with the accused—in person, by phone, by email. This is usually accomplished by placing the *accused* employee on administrative leave or suspension, depending on the results of his/her interview. Certainly, any reporting relationship between the two should be immediately suspended. The complaining employee should normally not be transferred to a new location or job (unless requested or advantageous for the employee) because it could be perceived as retaliation.

Common Questions. Here are answers to some common tough questions about interviewing the complaining employee:

- ***What if the employee mentions going to the EEOC?*** An appropriate response would be something like: “That is certainly your right if you feel it is appropriate. But this is separate from that, and as your employer we need to hear and investigate your concerns.”
- ***What if a co-worker, and not the alleged target of harassment, makes the complaint?*** You should still investigate. Start by getting as many facts as possible from the co-worker and then reach out to the target. Sometimes the target won’t talk to you. If that happens, document your request to speak with him or her, and the response. It is also advisable to go ahead and question the accused employee based on the complaint you did receive, and proceed sensibly from there.

- *What if the employee tells you to “do nothing”?* You cannot honor that, obviously. If improper conduct has occurred you have an obligation to stop it. The fact that the complaining employee asks you not to take action does not lift your legal duty imposed by federal law to take prompt corrective action to stop and prevent harassment from occurring.
- *What if the employee asks if you think the conduct is offensive or if it constitutes “harassment”?* Avoid giving your opinion on the alleged conduct. Certainly do not admit anything is “harassment” per se, as that is a legal conclusion and could be very harmful to your position in litigation. Your role in this interview is to supportively gather facts, not to judge, leap to conclusions, or take sides. Remember to remain unbiased and open-minded.

II. Interviewing the Accused Employee

The second interview in your harassment investigation should usually be with the employee *accused* of inappropriate conduct. Sometimes it may make sense to interview other witnesses first. In most cases, however, you will want to speak with the accused and then immediately take steps to ensure he/she will not interact with the target, such as by placing the person on administrative leave. Your goals in this interview: to conduct a fair but firm questioning, nail down their story with as many specific details as possible, and judge their credibility.

A. Preliminary Remarks

Your initial remarks to the person accused of harassment should express the seriousness of the matter, request honesty and confidentiality, prohibit any contact with the complaining employee, and prohibit retaliation or interference with the investigation.

Example: A sample preliminary statement follows:

- *We are conducting an investigation into a complaint we received about your conduct toward a female employee. We need to ask you some questions and want to give you a chance to respond to the claims. Our goal is to gather all of the relevant facts.*

- *Harassment is strictly prohibited by Company policy and the Company takes this matter very seriously. We ask that you do the same.*
- *I need to go over some ground rules:*
 1. *We request that you be truthful in all of your answers and give complete information. Providing misleading or untrue information in this investigation will subject you to discipline, including termination, regardless of the ultimate findings.*
 2. *You must not contact the complaining employee in any way while this investigation is pending. This means no face-to-face contact, no emailing, no calling, and no texting.*
 3. *You also must not attempt to influence any employee's testimony in this investigation, encourage anyone to change his/her testimony, or encourage anyone to give untruthful testimony. Making any employee feel uncomfortable or coerced in this investigation is strictly prohibited. Retaliating against the complaining employee or any witness is also strictly prohibited.*
 4. *Is this clear? Do we have your complete agreement on these points? Do you have any questions?*

*A note of caution on requesting complete confidentiality by the employee (e.g., “*You may not discuss this with anyone*”): The National Labor Relations Board (NLRB) takes the position that demanding employees keep investigations confidential, and not discuss them with their co-workers, violates their rights under the National Labor Relations Act. This holding applies to non-supervisory union *and non-union* workers.

B. Start Out General, Then Focus In

It is usually logical to start out with general questions about the alleged incident or conduct, then focus in on specifics. Let’s face it—this is awkward and uncomfortable for everyone in the room, and this tactic will help the person get comfortable talking to you. It also shows that you are there to hear this person’s side of the issue, not to blindside, bully, or trick them.

Example: If the allegation is that John made an offensive sexual remark to Ashley after her presentation in last week’s staff meeting, you could start with:

- “Do you recall last week’s staff meeting?”
- “Who was there?”
- “What did you think of Ashley’s presentation?”
- “Did you talk to Ashley during or after the meeting?”
- Who else was standing there?
- “What did you say to her?”
- “Is there *anything else* that you said?”

If the employee does not volunteer making the remark in question, you can then focus in and nail down the answer:

- "Did you say anything to Ashley that could have been offensive?"
- "I need you to think really hard and be sure. It was reported to us that you said "*give the quote.*" Did you say that?"
- "Did you say anything similar to that?"
- "How sure are you?"
- "Are you 100% sure you did not say that or anything similar?" (Requiring the person to place a "percentage of certainty" on their answers is a good way to test credibility).

If the conduct is denied, ask the accused if there is any reason the complaining employee would have to lie. If they provide a reason, ask for supporting evidence such as text messages, e-mails, or other documents, and also for other witnesses who may have information on this point. For example: if John tells you he broke up with Ashley last week and she texted him that she would "get revenge at work," get a copy of the text (and then you will need to re-interview Ashley).

C. Get the Full Story in Chronological Order

Ask questions which force a person to relate events chronologically. This helps them to remember details, and helps you in nailing down their story. Comparing different chronological versions of an event also helps resolve credibility issues later on.

Example: Assume the complaint is that during a work conference at a hotel, John propositioned Ashley during dinner and a few hours later barged into her hotel room. Ask John to take you through his evening hour by hour. Ask him to detail his whereabouts and activities in chronological order, asking for approximate times and amount of time spent. If John tells you he ate dinner at a separate restaurant at 6:00, watched TV in his room from 7:00-9:00, and was asleep by 9:30, you can then compare that to other witness accounts, hotel access card data, and other evidence to test its credibility.

D. Final Remarks

Before ending the interview, be sure that the person has told you everything he or she knows. Specifically ask if there is any other information or documentation (including emails, texts, etc.) which may assist you in reaching a resolution. Ask the person if there are any questions you have not asked which he/she feels you should have asked. Importantly, remind the person about the ground rules stated above, especially that they are not to contact the complaining employee.

E. Administrative Leave

After interviewing the accused, you need to consider placing the employee on some form of administrative leave or suspension pending the conclusion of your inquiry. If the employee admitted engaging in conduct that violates your anti-harassment policy, administrative leave/suspension is certainly appropriate. It also may be appropriate even when the conduct is denied if the employee's continued presence at work could: (1) intimidate the complaining employee; (2) intimidate other employees/potential witnesses; (3) result in contact with the complaining employee; or (4) distract or interfere with your ability to do a thorough and prompt investigation. This is particularly likely if the accused employee is a manager or supervisor.

Common Questions. Here are answers to some common tough questions about interviewing the accused employee:

- ***Should I keep the complaining employee's identity a secret?*** Many investigators worry about disclosing the identity of the complaining employee. If that person is the *target* of the improper conduct, however, it is practically impossible to meet your obligation of doing a thorough investigation and not disclose the target's identity. (If the complaining employee is a co-worker or friend of the target, you may not necessarily need to tell the accused who initially complained, unless the conduct is denied and you need to ask whether the

complaining employee has motives for false accusations).

- ***What if the accused employee refuses to cooperate?*** Explain that you have an obligation to investigate and resolve the complaint. Explain that if the employee refuses to provide you with the relevant information he or she has, that refusal will be factored into your assessment of the facts and the person's credibility, plus you will have to base your decision solely on all the other information gathered in the investigation.
- ***What if the accused becomes belligerent or threatening?*** State that unprofessional conduct will not be tolerated and any refusal to cooperate will be factored into your assessment. If the belligerence persists, promptly end the interview, initiate any internal security protocols, and place the person on immediate suspension.
- ***What if the accused asks for a lawyer to sit in the interview?*** You do not have an obligation to allow a lawyer to sit in on the interview. For employees who are members of a collective bargaining unit, they have the right to have union representation present in the interview.

III. Interviewing Other Witnesses and Obtaining Other Evidence

INTERVIEWING OTHER WITNESSES

A. Who Else Should Be Interviewed?

Now that you have interviewed the complaining employee and the accused employee, you need to decide whom else to speak with. You do not want to involve more people than necessary, but you must balance that with conducting a thorough inquiry. This will largely depend on the nature of the allegations. If the complaint is “James has made dozens of sexual comments to me and all 10 women in our entire department over the last year,” that will involve more witness interviews than a complaint that “James sent me an inappropriate email.” The latter may require no additional witnesses at all.

Consider the following when creating your interview list:

- Potential eye witnesses to the objectionable conduct (including those who were present but saw nothing)
- Co-workers who have also recently interacted with the accused employee
- Any employees whom the complaining or accused employee *requested* that you interview

- Any “alibi” witnesses identified by the accused employee
- The accused employee’s supervisor and/or manager

B. Go Over the Ground Rules

Each witness should be given an abbreviated version of the ground rules given to the accused employee (see *Interviewing the Accused Employee*, above), especially emphasizing the need for honesty and full cooperation.

C. How Much Information Do You Share?

Many investigators are concerned about sharing too much information with witnesses. Should you maintain the complaining employee’s anonymity? Or the accused employee’s? Should you keep the actual allegations a secret? It is certainly a good idea to use discretion, but you must balance that with your ultimate responsibility under federal law: to do a prompt and thorough investigation.

Example: If Supervisor John is accused of making sexual advances toward Tiffany in the break room, consider how you could conduct a thorough inquiry without identifying the parties. You could generally ask: “Did you see anything inappropriate during morning break yesterday?” But many employees may just say “no,” hoping it will end your questioning, or ask what you mean. In order to nail down what actually happened, you will need to ask if they saw any interactions between John and Tiffany, and if so, what were they.

D. What if a *Non-Employee* is a Potential Witness?

Many companies have contractors or leased employees at their worksites. Sometimes these workers, who may not be your employees, may be important witnesses in a harassment investigation. The same may be true of employees of an important client or customer. Should you involve them?

This depends on how material and critical their testimony is to the case and your company's internal position on involving outside third-parties. If a leased worker needs to be interviewed, it makes sense to arrange the interview through the leasing company (in order to avoid, or at least preserve your defenses to, a joint employer situation). If the worker is employed by your most important client, it may be wise to get approval through the client point-of-contact before approaching the witness directly.

***Note of caution:** third-party contractors who your company treats as non-employees can still sue your business for race discrimination under 42 U.S.C. § 1981. An employment relationship is not a prerequisite for such discrimination claims, as it is under Title VII or most state discrimination laws. So if the complaining party is a contractor, not an employee, you should still conduct an investigation and put a stop to any inappropriate behavior in your workplace.

E. Ask About Hearsay

Many times witnesses will assume you do not want to know about hearsay—things they “heard about” from someone else but did not witness first-hand. You certainly do want to know about hearsay, and you should ask for it. Ask “Even though you did not see anything, did you hear about anything that happened?” and “Was there any gossip around the office about what happened?” Many times this will lead you to additional witnesses with first-hand encounters.

OBTAINING OTHER EVIDENCE

E-mails, text messages and other electronic and written communications can be important evidence in your investigation. Sometimes they can prove or disprove the allegations of harassment. How can you obtain this kind of evidence?

First, remember that you can, and should, simply ask the employee for this evidence. Many investigators forget this point, or think it is too invasive. For instance, if Tiffany complains about emails that John sent from his personal email to her personal email, ask her to forward them to you. If she complains that John sent her inappropriate text messages, ask her to show them to you on her phone (and you can take a picture of them) and/or forward them to your cell phone. When you interview John, you can first get him to confirm his personal email address and cell phone number, and then ask him questions about the emails and texts Tiffany produced.

You can and should always ask the accused employee for any “exculpatory” emails and other evidence as well. For instance, if David is accused of “harassing” Angie by calling her cell phone with work assignments more than any other employee, his cell phone call log may reveal that he called male employees just as frequently. You should ask to see his call log in order to fully investigate this aspect of Angie’s claim.

How about obtaining emails from email accounts at work? Can the employer search those as part of the investigation? What about reviewing an employee’s internet use? If the complaint is that John viewed pornography at work, and he denies it, you want to be able to review what websites he has visited.

The answer to whether you can do this depends on: (1) how your policy is written; and (2) whether the employee received notice and consented to the policy. Your email/internet policy should clearly state (among other things) that:

- the employer has the right to monitor employees’ use of email/internet; and
- there is **no expectation of privacy** in their use of email or internet at work.

Here is sample language for your policy:

For business and legal reasons, the Company reserves the right to monitor the usage of its Electronic Communication Systems (the Company’s e-mail, internet, cell phones, fax machines, computers and networks) and to monitor and inspect any and all information received, contained or transmitted on its Electronic Communication Systems (including all related hardware and storage devices). In exercising this right, the Company may, among other things, inspect files, data, or messages (including those that may appear to be deleted), electronically scan employees’ e-mail for information or activity that may violate this Policy, identify Internet sites viewed by employees, and view text messages sent on cell phones. Where the Company deems it appropriate, it may disclose to third parties activities or information identified from monitoring or inspection. **Employees do not have any expectation of privacy in connection with their use of the Electronic Communication Systems, or with the transmission, receipt, or storage of information in connection with their usage of the Electronic Communication Systems.**

You also want to be able to prove the employee was notified of these rules and consented to them. The best way to do this is with a signed acknowledgement. While a generalized acknowledgement to the employee handbook will work, a specific acknowledgement identifying your email/internet policy is preferred.

Should you obtain written statements from witnesses?

This is a good question to ask legal counsel. In some situations it may not be feasible or helpful, but generally, yes, it is a good idea to have a signed statement from a key witness either proving or disproving the complaint.

IV. Conclusions and Closure

Now that you have finished your fact-finding, you must make some conclusions. The first question is whether some form of misconduct actually occurred. If it did, you need to decide what type of corrective action is warranted, taking into account what your company has done in similar situations. Finally, you should take steps to minimize your organization's risk of retaliation complaints by the complaining employee.

A. Did Misconduct Actually Occur?

In some investigations, the answer may be obvious. Perhaps the accused employee admitted the conduct or the evidence is so strong and corroborated that you can conclude it occurred. If so, you can skip to the next section.

In other cases, however, you may have a “he said-she said” situation, or one where it is hard to tell exactly what happened. When you are assessing the credibility of conflicting witnesses, consider these factors:

- Has the complaining employee complained before?
- Has the accused employee been accused of similar conduct before?
- Whose story was more specific and detailed (more credible)...versus vague and evasive (less credible)?

- Whose story was solid and consistent each time it was repeated...and whose story changed with different iterations?
- Whose body language indicated truthfulness, with direct eye contact, a confident posture and minimal fidgeting?
- How quickly did the employee come forward after the conduct occurred? Was it reported right away, or is the timing of the complaint suspicious (right before a termination meeting or anticipated poor performance review)?
- How inherently plausible or implausible are the allegations themselves?
- Are there any documents, emails, or text messages that support or contradict the allegations or defenses?

After weighing all of these factors, you should make a determination. If you are unable to “break the tie” in order to make a definitive conclusion whether any violation occurred, then you should still have a serious discussion with the accused employee, review your harassment policy with him or her, and emphasize that he or she must not retaliate against the complaining employee. Be sure to document this conversation.

B. What Corrective Action is Appropriate?

If you conclude that misconduct occurred which violates your company’s policies, you must decide what level of corrective action is proper. The U.S. Supreme Court

mandates that the corrective action be effective to end the harassment. Some employers have a “zero tolerance” harassment policy, which calls for termination for *any* violation. This kind of policy makes the discipline decision quite simple, although as a note of caution, it can be difficult to enforce in a unionized workforce.

Other employers take a more graduated approach and review many different factors. Among those that should be considered:

- **How serious was the offense?** Was it a single text message, or unwelcome physical contact? The more serious the offense, the more serious the discipline should be.
- **What has your company done in similar violations?** For internal fairness reasons as well as legal ones, your discipline in this situation should be the same as in similar ones. If you impose more harsh discipline against an older worker, one with a disability, or of a different race, for example, that person may then challenge their discipline by bringing an EEO claim against you.
- **How long has the employee been employed at the company and what is his/her performance record?**
- **Does the employee have any prior discipline?** And specifically, has the employee ever been disciplined for violating your harassment policy?

- **Did the employee receive your harassment policy and go through harassment training?** This is hopefully always a “yes” answer. Without either one of these critical defenses to a harassment lawsuit, your risk of liability vis-à-vis the complaining employee is significantly increased. It may also factor into what level of discipline is proper for the offending employee.
- **Are there any “mitigating” or “aggravating” factors?** For example, did you conclude definitively that the accused employee was untruthful during the investigation? Or did the employee curse and become belligerent during the interview? If so, these should be factored in and could increase the penalty imposed.

Who should make the decision? In deciding what discipline to impose, it is important to use a consensus approach among at least two decision-makers. This is to avoid allegations that a particular person was biased or unfair. In a larger organization, it may be the employee’s manager, director and a Human Resources professional. In a smaller company, it could be the business owner and the employee’s manager. These individuals should review the investigation results and reach a joint decision.

What form of discipline should be imposed? In many cases, termination may be the only appropriate response. For some offenses, it may be proper to suspend the employee without pay and/or place them on a last chance “final” warning. For less serious, first-time, isolated offenses, it may be proper to provide a written warning. In any situation where the employee will remain employed, you should require

him/her to sign off on your harassment policy and go through harassment re-training. (Hopefully they have already been through your company’s training program at least once.)

You can also build “barriers” within your organization to reduce contact with the complaining employee. This also helps reduce your risk of retaliation (see below). For example, if the offending employee was a supervisor, you may decide to remove his/her supervisory status and transfer the individual to a separate department from the complaining employee.

C. Minimizing Retaliation Risks

Once an employee complains about harassment, if he or she then suffers an “adverse employment action” (demotion, termination, salary reduction, undesirable schedule, etc.) because of the complaint, they can assert a retaliation claim. This is true even if your investigation concluded that no harassment occurred. Taking steps to protect your company from a retaliation claim is an important part of handling every investigation.

1. Follow Up With the Complaining Employee

It is considered good business practice and common “respect” to circle back with the complaining employee once the investigation is completed. It does not need to be a long conversation. Thank the employee for bringing his/her concerns forward. Tell him/her that a thorough investigation was conducted and has been concluded. Remind the employee that retaliation against him/her is prohibited, and ask the

employee to promptly report any further incidents to you, his/her manager, etc.

- If the harassment allegations were not substantiated, politely let the employee know that and state “the Company considers this matter concluded.”
- If the harassment allegations were substantiated and corrective action was taken, you must be careful about (i) the privacy interests of the accused employee and (ii) making admissions against the interests of the Company. It is not advisable to tell the employee the specific conclusions or corrective action. Instead, assure the employee generally that “the matter has been handled and appropriate action taken, but as a matter of policy we cannot disclose the specifics to you.”

It is also a good idea to follow-up your meeting with a letter to the employee recapping your meeting.

2. Remind Key Employees of Your No Retaliation Policy

The complaining employee’s supervisor, manager, and anyone else who may make decisions about him/her should be reminded about the company’s no retaliation policy. If they have any question going forward with what they can and cannot do, remind them to immediately get advice from Human Resources or higher-ups in your organization before taking action. You should also be sure to prevent or minimize contact between the complaining employee and the alleged offender.

3. Carefully Review Adverse Decisions

Does “no retaliation” mean you can never discipline the complaining employee? Or criticize their performance? Or change their schedule? No, but it means their complaint cannot be taken into account. It also means you have to be extra careful to ensure there are solid facts to support your actions.

If the complaining employee’s performance review is due, for example, and her manager has scored him/her much lower than in prior reviews, there needs to be solid reasons, examples, and documentation to justify the decreased rating. If the complaining employee is accused of violating company policy, there needs to be a thorough and impartial investigation and solid justification for discipline before taking any action against him/her.

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If you have any questions or need assistance with an internal investigation, you should consult with experienced employment counsel.