



SUMMER 2007

## **EMPLOYER BULLETIN:**

### ***CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS***

Each investigation of discrimination or harassment involves several key considerations:

**Who will investigate?** The investigator should be someone in management who is knowledgeable about the company's policies and procedures. Further, the individual should be experienced in conducting workplace investigations. Lastly, the individual should be a credible witness as he/she could be your "key witness" if the matter is eventually litigated.

**Determine who will be interviewed.** The investigator should determine, prior to commencing the investigation, who will be interviewed. At a minimum, the complainant, alleged harasser, and any third party witnesses identified by either should be interviewed. During the course of the interviews, the company may learn about other witnesses who could be interviewed.

**What documents will be needed as part of the investigation?** The investigator should collect all company written policies and procedures, handbooks, personnel files, witness statements and written complaints that are associated with the investigation.

**Preparing for the interview.** Prior to interviewing witnesses, prepare a list of initial questions to which you know you will need answers. The list need not be exhaustive, but should include questions about dates, times and locations regarding specific incidents of the alleged conduct involved. Ensure you have scheduled the interview(s) to take place in a quiet location free from disruptions and always have a third party present as a witness and/or notetaker. Always conduct separate interviews and do not have more than one witness in the same room.

**Notetaking:** Only record what the witness says. Do not include your own interpretations, beliefs, assumptions or conclusions about the facts stated.

**Timing.** The investigation should be undertaken as soon as possible and completed promptly. Delay in addressing the situation could result in memories fading, documents disappearing or lead to the occurrence of another incident.

**Confidentiality and non-retaliation.** Advise witnesses the substance of the investigation will be kept confidential to the extent reasonably possible. Do not promise complete confidentiality as this is not a certainty. However, you can state that the information will be shared only with those who have a need to know. Further, all written documentation concerning the investigation should be filed in a secure manner and not in a personnel file. All witnesses should be advised they will not be retaliated against for participating in the investigation.

**Type of questions to ask.** The investigator's role is that of a fact finder. He/she is a neutral third party whose job is to listen and hear both sides of the story. Investigators must be objective and sensitive to each witness. Open ended questions such as who, what, where, when and how should be asked as these elicit the most factual information. Follow up questions may be more detailed and focused in order to develop a chronology of events.

**Interviewing the complainant.** Allow the complainant to tell his/her entire story and ask the complainant to clarify any factual statements that are unclear or contradictory. Make sure you obtain specific dates, names of individuals involved and their work relationship, specific actions that occurred and names of witnesses if applicable. Advise the complainant that he/she will not be subject to retaliation for filing the complaint. Ask the complainant if he/she has ever made a complaint to any member of management in the past about the same conduct. Have the complainant identify any witnesses to the alleged conduct or other individuals who have been subject to the same conduct. Obtain any documents from the complainant related to the

alleged conduct, *e.g.*, their notes, etc. Find out what type of remedy the complainant is looking for whether it be during or after the course of the investigation even though this is not what the company might ultimately do if it finds improper conduct.

**Interviewing the alleged harasser.** Disclose each incident of alleged harassment made by the complainant and give him/her an opportunity to respond to each allegation. Ask the alleged harasser to give his or her version of the facts and to identify any and all witnesses related to the allegations or defenses. Ask whether there are any employees whom the alleged harasser believes the investigator should interview and why. If the alleged harasser is the complainant's supervisor, obtain a history of the individuals' working relationship and the complainant's performance history. If the alleged harasser refuses to cooperate, advise that the company is obligated to conduct the investigation and it will have no choice but do so without his/her participation.

**Provide assurances.** During the interviews, the investigator should make several assurances (*e.g.*, that no conclusion has been reached). The investigator should also indicate appropriate action will be taken at the conclusion of the investigation if necessary. However, the investigator should never guarantee a specific result or action. The complainant should be reminded the company has an open-door policy and that if any additional incidents occur during the investigation, this should likewise be reported. The company should feel free to provide information or raise concerns during the investigation. Finally, the investigator should remind the parties that retaliation will not be tolerated.

**Drawing conclusions.** If it is determined after the investigation that the complaint is valid, **prompt** and **remedial** action should be taken to stop the harassment and to prevent its recurrence. The company should undertake procedures to monitor the workplace to prevent the possible recurrence of such conduct or retaliation against the complainant.

If the investigation reveals that the complaint is invalid and was made without good faith and with a

malicious intent, disciplinary action may be taken against the complainant for filing a false claim.

**The investigative memorandum.** The information obtained from the investigation must be memorialized in a factual, accurate and concise written investigative memorandum. The memorandum should be signed and dated by the investigator. The **investigative memorandum** should include the following information:

- a summary of the complaint;
- a determination as to whether the alleged conduct violates the company's policy and if so, what provision;
  - identity of all parties involved in the investigation;
  - identity of all witnesses interviewed, the date of the interviews, a summary of their testimony, and who was present at each interview;
  - whether there is any evidence that the employer should have known of this harassment or were there any prior incidents or charges of any nature;
  - a conclusion as to the factual findings and discussion of the investigator's conclusions, including credibility, conflicting facts and other factors taken into consideration in drawing the conclusion;
  - a description of the corrective action, if any, taken to address the complaint; and
  - whether this was communicated to and agreed to by the complainant.

**ANY FURTHER QUESTIONS SHOULD BE DIRECTED TO HEATHER G. PTASZNIK AT (313) 259-8586 OR JOHN T. BELOW AT (313) 259-8597**

<p><b>KOTZ, SANGSTER, WYSOCKI AND BERG, P.C.</b> 400 Renaissance Center, Suite 3400 Detroit, Michigan 48243-1618</p> <p>E-Mail: <a href="mailto:kswbinfo@kotzsangster.com">kswbinfo@kotzsangster.com</a> <a href="http://www.kotzsangster.com">www.kotzsangster.com</a></p> <p>Telephone (313) 259-8300      Facsimile (313) 259-1451</p> <p><b>THE INFORMATION CONTAINED HEREIN IS NOT INTENDED AS LEGAL ADVICE AND IS PROVIDED SOLELY FOR INFORMATIONAL PURPOSES.</b></p>
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