
CONDUCTING A PROPER WORKPLACE INVESTIGATION

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LEGAL DISCLAIMER

- Disclaimer: The information presented today is a general overview of the law.
- It is not intended to be legal advice to be applied to any specific situation. Employment law is a fact dependent area of law. If you are facing an employment law issue with which you are unfamiliar, consult your attorney.

OVERVIEW

- Importance of investigations
- When to conduct an investigation
- Steps to take in an investigation
- Common pitfalls
- Questions?

IMPORTANCE OF INVESTIGATIONS

- Employers have a duty to prevent and correct harassment
- Most investigations involve the potential of a lawsuit—a properly conducted investigation may prevent the lawsuit before it begins and provide a defense in a lawsuit

WHY: PROVING BASIS FOR TERMINATION

- An employer can terminate an employee for any lawful reason. The following are examples of unlawful reasons:
 - Race
 - Sex/gender
 - Religion
 - Age
 - Disability
 - National Origin
 - Citizenship
 - Exercise of a legal right (FMLA, OSHA Complaint, Whistleblower, etc.)
 - Sexual orientation?
- However, when faced with a lawsuit, an employer needs to be able to prove the real reason for the termination

WHEN TO CONDUCT AN INVESTIGATION

- Whenever an employee makes a complaint
 - Harassment
 - Hostile work environment
 - Discrimination
 - Retaliation
 - Whistleblower
- For allegations of other employee misconduct
- Before terminating an employee “for cause”

ND LEGAL STANDARD FOR INVESTIGATIONS

- The North Dakota Supreme Court has “defined good cause to mean ‘fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.’”
- Rather, an adequate investigation may be satisfied by a variety of flexible procedures which afford employees a fair opportunity to present their position.

Thompson v. Associated Potato Growers, Inc., 2000 ND 95

PRE-COMPLAINT: HAVE A POLICY

- Have a plan or policy, in writing, that addresses the actions you will take when a complaint is made
- This policy should:
 - Define responsibilities
 - Outline procedures/timeline
 - Outline situations where investigations will take place
 - Address confidentiality and disclosure of information
 - Address document retention

STEP I: ADDRESS THE COMPLAINT

- Address the complaint with the complainant:
 - Provide them with a copy of relevant policy (complaint/investigation)
 - Make them aware of the investigation process (timing, steps, etc.)
 - Address confidentiality concerns
- Ensure no adverse action will be taken against the complainant
- Preserve evidence

STEP 2: CHOOSE AN INVESTIGATOR

- HR should be involved
- Consider:
 - Internal v. External
 - Training and other qualifications
 - Objectivity
 - Confidentiality

STEP 3: CREATE A PLAN

- Outline the issue
- Create a witness list
- Identify other sources of information
- Review any relevant policies/procedures
- Review applicable law

STEP 4: INFORMATION GATHERING

- Conduct Interviews
- Collect Written Statements
- Collect Physical Evidence
 - Physical documents
 - Emails
 - Video

STEP 5: EVALUATE EVIDENCE & MAKE CREDIBILITY DETERMINATIONS

- Inherent plausibility
- Demeanor
- Motive to falsify
- Corroboration
- Past record

STEP 6: REACH A DETERMINATION

- Organize all information obtained
- Draft a written report
- Present the report to the final decision maker

STEP 7: CORRECTIVE ACTION

- Immediate and appropriate:
 - Remedial measures
 - Reinstatement, restoration of leave, apology, expungement of negative evaluations
 - Disciplinary measures
 - Transfer/reassignment, demotion, suspension, discharge, training/counseling

FOLLOW-UP

- Was the action taken effective?
- Are there further steps that should be taken?
- Monitor situation to ensure no retaliation

POTENTIAL PITFALLS

- Unreasonable delay
- Biased investigator
- Lack of documentation – if its not in writing, it is hard to prove it happened
- Retaliation against complainant

QUESTIONS?

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