

Employment Checklists
Federal Compliance Checklists
Work Rules and Employee Conduct

Checklist: Conducting Employment Investigations

Checklist: How to Conduct Employment Investigations

Purpose: A prompt, thorough, and effective investigation into employment-related issues is critical to an employer's ability to resolve internal and external complaints, proactively fix potential problems, manage its workforce, and provide the framework for potential legal defenses. This checklist helps attorneys, human resources, and compliance officials determine the best practices on how to approach and conduct an employment investigation, while keeping in mind that every investigation is unique and requires a tailored approach based on the facts and people involved.

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Reasons for Conducting an Investigation

- To look into formal and informal internal complaints or allegations (including anonymous hotline calls or tips).
- To look into external complaints or allegations by stakeholders, customers, or clients.
- To respond to or answer a lawsuit, agency charge, enforcement action, or government investigation.
- To proactively ascertain whether known or suspected issues could expose the company or its officers/employees to civil or criminal exposure.

Types of Employment Issues That Should Be Investigated

- Discrimination, harassment, and retaliation.

- Health and safety violations.

- Drug and alcohol use in the workplace.

- Whistleblower allegations, such as fraud and theft (including proprietary or confidential material or trade secrets).

- Workplace violence or threatening behavior.

- Other violations of policies, misconduct, inappropriate behavior, or criminal activity.

Concerns to Keep in Mind

Retaliation

- It is imperative to safeguard the accuser/whistleblower and people who participate in the investigation from retaliation. Consider circulating the employer's anti-retaliation policy to all those who are involved in, or are aware of, the investigation.

Privacy/Confidentiality

- The employer, accuser/whistleblower, accused, and witnesses may all desire confidentiality. While the investigation on the whole may be privileged and confidential, it is important to inform those involved that certain details may have to be divulged to others as part of the investigation, and that the employer may further turn information over to the government or other third parties as necessary.

- If electronic mail or files are going to be searched or monitored as part of the investigation, is there a properly crafted written policy in place?

- Pay attention to state laws that could affect an employer's right to conduct electronic searches on company devices, or on an employee's own device if they use it for work purposes.

- Pay attention to state laws that may provide employees with certain privacy rights or otherwise place limitations on an employer's ability to access social media accounts.

□ Be aware of federal and state laws governing drug and alcohol testing, and searches of private belongings or workspaces.

□ Investigators must tread carefully when balancing a legitimate business need for confidentiality against non-supervisory employees' rights to discuss the terms and conditions of their employment with their coworkers (see National Labor Relations Act section below).

Defamation

□ The investigator should take care not to make conclusory statements that could invite a defamation claim. For example, the investigator shouldn't refer to the accused as a "drug user" or make statements like "the employee took trade secrets" during an ongoing investigation.

Discovery

□ Investigation materials could be discoverable in a lawsuit. Having an attorney conduct the investigation could ensure they are protected by privilege and attorney work product. In some circumstances, the employer may want the investigation to be discoverable as part of an affirmative defense to the allegations.

NLRA

□ Investigations must not infringe on employees' rights under the NLRA, which applies to non-supervisory employees, whether or not part of a union. Employees must not be prevented from engaging in protected concerted activity, such as discussing terms and conditions of their jobs.

Unionized Employees

□ Collective bargaining agreements and federal labor law may govern investigations of unionized employees. For example, there may be limitations regarding the process and whether an employee can demand that a union representative be present for an interview.

Preparing for the Investigation

□ Identify the client:

- Consider the scope of representation, including whether the appropriate client is the company, a department/division, the board or a committee of the board, etc.

- Determine whether there are any potential conflicts of interest between the corporate client and individuals.

Federal Compliance Checklists, Checklist: Conducting Employment Investigations

- If outside counsel is selected to conduct the investigation (see below), prepare an engagement letter that can support the basis for privilege.

- Identify goals and scope of the investigation.

- Preservation/document retention notice:
 - Send to individuals who may possess relevant information.

 - Send to IT personnel or others who control the maintenance of such information.

 - Describe categories of information that must be maintained (e.g., e-mails, electronic and hard copy documents, memoranda, calendar entries, etc.).

 - Explain that deletion or destruction of covered information is prohibited.

- Choose an investigator:
 - In-house counsel (speedier and more economical, first-hand knowledge of the business, less objectivity).

 - Outside counsel (greater objectivity, specific expertise, more resources, greater likelihood of maintaining privilege).

 - Human resources, compliance or other non-legal personnel (no privilege, be careful of potential conflicts of interest, but because of their greater familiarity with the company and employees, often used for less complex or initial investigations).

 - Committees (board of directors, audit committee, special committee) sometimes oversee an investigation, but not common to directly conduct the investigation.

 - Outside (non-legal) investigator (accountants, professional workplace investigators). They have no privilege, but may have specific subject matter expertise; lower costs than outside counsel.

- Logistical concerns:
 - Consider whether any internal personnel/supervisory/reporting functions should be changed, or whether any employees should be placed on temporary leave (paid or unpaid).

 - Consider whether any employment practices need to be changed or altered in advance of the investigation.

 - Establish a time frame for the investigation.

 - Determine the location(s) for interviews.

- Determine whether any experts will be needed, such as statisticians, accountants, auditors, or medical professionals.

Federal Compliance Checklists, Checklist: Conducting Employment Investigations

- Review any documents or evidence referenced in the complaint/charge, as well as other documents relevant to the event at issue, such as personnel files, company policies, e-mails, internal memoranda, expense reports, time sheets, spreadsheets, instant messages, etc.
- Create a chronology of events and known facts (to be updated as additional facts are gathered).
- Interview human resources or legal department personnel to understand the employer's business or organization and underlying facts related to the investigation (e.g., relevant policies, employees involved, etc.).
 - Identify witnesses/interviewees:
 - The Accuser/Whistleblower
 - Are they still employed?
 - Are they represented by an attorney or have they already brought a lawsuit?
 - Any employee(s) accused of wrongdoing.
 - All other persons or witnesses identified in the complaint/charge.
 - The supervisor(s) of the accuser and accused.
 - Other witnesses who may have relevant information, such as employees present during alleged acts or with knowledge of the facts and circumstances.
 - Supplement interview list with any other individuals identified in interviews.
 - Order of interviews:
 - Consider which interviewees are likely to have information that you will want to probe or use in subsequent interviews.
 - Prepare an interview outline:
 - Draft key questions.
 - Reference key documents.
- Consider whether there should be a witness present for the interviews (for example, if there are safety concerns, for notetaking purposes, to provide an additional witness).
- Communications with employees about the investigation:
 - In limited situations, consider preparing and issuing a general internal memo or communication to employees, as

appropriate, advising them of the investigation and/or notice of interviews. A communication could include the purpose of the investigation, the need for confidentiality, the right to an attorney, etc.

- If no general communication is appropriate, decide when and how to communicate with employees who will be interviewed as part of the investigation.

Conducting Interviews

Take notes:

- Take detailed notes during the interview.
- Note the location and length of the interview and identify all persons present at the interview.
- Mark the notes “confidential” (as well as “privileged” and “attorney work product.” Note that an Upjohn warning was given, if applicable).

Introduction:

- Summarize purpose of interview and any necessary facts.
 - If interviewer is an attorney, give Upjohn warning – make clear that attorney represents the employer, is not the personal counsel of interviewee, and can't give interviewee legal advice.
 - If employee is a union member, clearly requests union representation, and reasonably believes that the interview could lead to discipline for herself or another employee, the employee may have “Weingarten” rights under the NLRA, including the right to have a union representative or co-worker at the interview.
 - Emphasize confidentiality to the greatest extent possible, but can't be guaranteed.
 - If interviewer is an attorney, or acting under the direction of an attorney, explain that the conversation is privileged and ask interviewee to maintain that privilege (note: the facts/knowledge conveyed by the interviewee aren't privileged).
 - Explain importance of being truthful and forthcoming.
 - Explain prohibition of retaliation against accuser or anyone who participates in the investigation.
- Try to use open-ended, non-leading questions; remain neutral and avoid using conclusory terms like “victim,” “illegal,” “harass,” or “fraud” when discussing the facts, or taking a position on issues.
- Focus on who, what, when, where, why and how questions.
- Obtain background information, including professional history and experience, job title, duties, etc.
- Ask about relationship/history with other witnesses.

Federal Compliance Checklists, Checklist: Conducting Employment Investigations

- Probe every allegation in the charge/complaint. Ask for specific details, including dates, times, locations, persons present and sources of information.
- Follow up on all matters and questions that arise:
 - Inquire about apparent discrepancies.
 - Don't make assumptions.
 - Ask for documents that were mentioned or that are relevant to the subject being investigated.
- Review key documents with the witness.
- Ask if there is anything else the interviewee would like you to know based on the discussion you just had.
- Encourage the interviewee to contact you after the interview with additional memories, thoughts, or documents.

Follow-Up Interviews

- Based on the initial round of interviews and review of additional evidence, conduct follow-up interviews where necessary to clarify details or address discrepancies or new documents/evidence.
- Avoid aggressive confrontations when asking about conflicting information or inconsistencies; sometimes the events were long ago and memories may have faded over time.

Conducting an Investigation

- Documentation:
 - Review and organize your notes.
 - Consider drafting a memorandum from your notes as soon as possible after the interview.
 - If you are an attorney, consider including your impressions and legal observations to strengthen any claim of privilege.
 - If you aren't an attorney (and not under the direction of an attorney), try to refrain from including impressions and conclusions, and simply stick to what was said and observed.
- Draft position statement or answer.
- Draft an investigation report:
 - Consider whether it is better to have a written or oral report, as a written report could be discoverable later.

Federal Compliance Checklists, Checklist: Conducting Employment Investigations

- This may depend on who is receiving the report: the general counsel, audit committee, etc.

 - A report should contain, among other things:
 - A description of the complaint or conduct that triggered the investigation.
 - A list of people interviewed (and witnesses present at each interview) and summary of each interview.
 - A list of documents and evidence reviewed, including relevant summaries.
 - Any unreviewed or unknown evidence.
 - Summarize findings of fact; avoid stating facts in a conclusory fashion (attribute statements to witnesses rather than take them as given facts).
 - Note behavior or statements that bear on the credibility of an interviewee.
 - If applicable, legal conclusion and analysis, which should be a separate section in the report.

 - Depending on the scope of the investigation, consider whether any recommendations should be made, such as a change in policy, or disciplinary or corrective action.

 - Reporting to government:
 - Certain conduct that is illegal or criminal may need to be or may want to be reported to the government.
 - If it is determined not to report to government, consider whether to document the decision not to report.
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