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How to Conduct an Effective Harassment Investigation

The Need for an Anti- Harassment Policy

It is a given that all employers should have a well-publicized Anti-Harassment policy that prohibits all types of harassment in the workplace, including sexual harassment. It is also a given that such a policy should clearly explain to employees the company's complaint and investigation procedures, and the policy should contain an assurance that no individual who files a complaint or cooperates with an investigation of a harassment complaint will be the subject of retaliation. Promulgation of an anti-harassment policy not only helps an employer establish certain defenses to discrimination claims under federal law, but it may be required by statute in certain states in which you operate. Likewise, conducting regular training for employees and supervisors about harassment issues can minimize the likelihood of claims and contribute to a more conducive work atmosphere. Training may also be required by some state laws.

Conducting the Investigation

An essential element of an Anti-Harassment policy is an employer's commitment to investigate claims filed by employees. Under the discrimination laws, an employer that becomes aware of alleged workplace harassment is required to conduct an investigation and take *prompt, effective remedial action*. An effective investigation is one that is conducted by an impartial investigator trained in the skills of interviewing witnesses, evaluating credibility, and drafting clear and appropriate reports. The investigator should also be an individual who can testify effectively if the claim ends up in court or before an administrative agency. Conducting effective investigations can be a complex undertaking. It is therefore advisable for employers to take steps to train those charged with investigative responsibility.

Here are some key issues that arise during harassment investigations:

- ♦ **An employee files a complaint but asks for total confidentiality. What do you do?**

An employer has a duty to investigate claims of harassment. Therefore, it cannot promise complete confidentiality. The person receiving the complaint should explain that the company will investigate, but will maintain confidentiality to the greatest extent possible, and only people with a need to know will be informed.

- ♦ **An employee tells an investigator about a number of serious acts of harassment but refuses to divulge any names. What do you do?**

You should inform the complainant that the company will not be able to properly conduct an investigation without identification, making it possible that the alleged conduct will continue and even worsen. If the complainant still refuses to divulge names, the company should attempt to obtain as much information as possible and try to identify the department where the conduct is allegedly occurring, to conduct its own investigation.

- ♦ **A lengthy investigation has just concluded and the bottom line result remains the classic “he said, she said” problem. What action should the company take?**

An investigator should reach a conclusion at the end of the investigation. If the evidence is inconclusive, a conclusion to that effect should be reached. However, the employer may wish to take other measures such as republishing the company’s Anti-Harassment policy and conducting general training and monitoring of workplace conduct. The investigator should also assure the complainant that there will be no retaliation for having brought the complaint.

- ♦ **A material witness to the investigation refuses to speak to the investigator without her attorney present. What should you do?**

The company has no duty to allow the individual to bring an attorney. You should explain to the employee that the company's policy is that investigations are conducted without attorneys.

- ♦ **The alleged harasser insists on having a fellow employee as a representative during the investigative interview. What should you do?**

As a result of the NLRB’s decision in the Epilepsy Foundation of Northeast Ohio case, nonunionized as well as unionized employees have the right, upon request, to have a co-worker present during an interview which they reasonably believe may lead to discipline. The employer may decline to conduct the interview and make a decision in the absence of that information, but questions would then arise about the adequacy of the harassment investigation itself.

- ♦ **An employee has made a complaint against an individual who has recently left the organization for wholly unrelated reasons. Should the company pursue the investigation?**

Yes. While no other steps can likely be taken against the accused, it is important that the organization ensure that no other or inappropriate activities were engaged in by other employees. Further, if other employees witnessed harassing behavior, failure of the organization to investigate may be perceived as condoning the activity by the former employee.

- ♦ **An employee has made a complaint about harassment by an employee of a vendor, and the employee and his company refuse to cooperate in the investigation. What do you do?**

An employer must investigate and take prompt remedial action, even if the alleged harassment is by third parties. The company should do as thorough an investigation as possible in-house, and then make every effort to obtain the cooperation of the vendor company, or take such other reasonable steps as declining to allow the third-party employee back on the premises or even canceling any contract with the third party.

Investigating harassment claims is both an art and a science. Employers should make every reasonable effort to equip their investigators with the tools necessary to do this job effectively.

Assistance to FMI Operator Members

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