Security Executive Council Publication Series

The IT Security Response to Misconduct Allegations

Guidelines for Successful Investigations in Organizations

by

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Intended Audience:

Ideal for human resource managers, site, facility or small business owners or managers, safety managers or anyone else that may be the first person to receive a report of wrongdoing, regulatory violations, or allegations about someone else's behavior.

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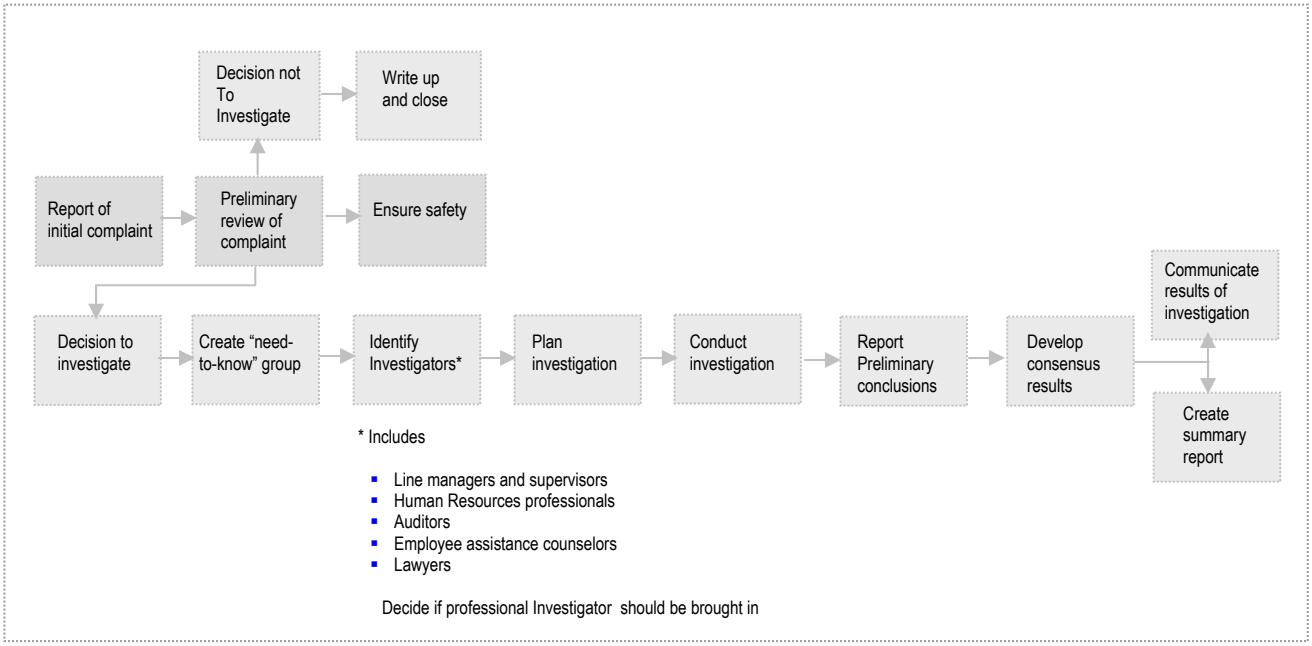
Reported Incident/Case Investigation Process



Introduction

This book is written for non-security professionals working for organizations such as small businesses or governmental entities who have been given responsibility for investigations, including those relating to employee conduct. This book discusses issues and best practices for many types of employee-related investigations, and assists non-security professionals with issues and best practices to conduct effective investigations. In cases where the organization has a security professional, it is recommended they are consulted on matters of investigations

This book often will use, for illustrative purposes, the example of a harassment investigation or similar human resources issue. Non-security professionals may become involved in investigations of potential workplace harassment or other violations of their organization's human resources policies. The need for such an investigation might arise from an anonymous hotline call, a complaint to the security professional, or the involvement of the security professional by another discipline in the organization, e.g., by a legal or human resources professional. Unless otherwise noted, the principles described in the harassment investigation illustration are generally applicable to all employee and security related investigations in general.

Investigations are often complicated, time-consuming, and time-sensitive. The correctness of the actions taken is dependent in large measure upon the quality of the investigation that the non-security professional conducts or leads. Well-conducted investigations are essential to protecting the organization legally, protecting the rights of employees and observing the organization's human resources policies and principles, and protecting the organization legally.

The following materials are designed to help non-security professionals prepare for and conduct investigations into alleged violations of law or organization policy. By investigating, we mean fact-finding, often gathered for others who will make decisions based upon your work. Of necessity, we discuss at the outset the obvious fact that many issues do not require investigation and many other issues require the consultation or involvement of persons other than those conducting the investigation. Some of the advice reflects lessons learned when the spotlight of litigation has been placed upon an investigator's practices. It is hoped these materials will yield better investigations, better decisions and, yes, fewer and more defensible lawsuits.

II Reasons to Investigate

When an employee or third party claims that one of the organization's policies has been violated, the first decision the organization must make is whether the issue deserves further investigation.

A. Legal requirement to investigate

The following issues frequently come to the attention of the organization and normally must be investigated by the organization either because the law imposes a duty to investigate or the law holds the organization liable for any consequences of its failure to investigate and correct a problem:

- Harassment
- Discrimination
- Potentially violent employees
- Criminal violations
- Organizational policy violations

All claims or evidence of criminal violations must be investigated by the organization. Investigators should contact legal counsel immediately when they learn of a possible criminal violation.

There are many legal and nonlegal reasons to investigate alleged violations of an organization's human resources policies:

- Protecting the rights of employees
- Employee relations benefits
- Obligation to uphold the organization's human resources principles
- Determining the facts
- Determining the appropriate response to the situation
- Determining the potential criminal and civil liability of the organization and any managers or supervisors involved
- Determining whether the organization has any legal defenses to any potential claims
- Reducing civil liability by demonstrating a good-faith response to the issue
- Possible public relations benefits

There also are several reasons not to investigate certain alleged violations of human resources policies:

- For whatever reason, corrective action by management is not possible or within the organization's control
- The misconduct or issue involved is not sufficiently serious
- The matter can be resolved satisfactorily by another means, such as counseling
- The allegation lacks credibility on its face

Frequently, in the course of investigating one issue, investigators will uncover additional allegations of a violation of law or organizational policy. Even though these additional allegations are outside the scope of the original case, the organization might have a legal or policy obligation to investigate. Whoever is conducting the

investigation needs to flag these and the organization should make a judgment as to whether to pursue these additional investigations. The investigator can create significant liability for the organization by uncovering allegations or issues that are ancillary to the original investigation, but not fully investigated. Often, these other allegations can be investigated at a later time, but normally should not be ignored simply because they will slow down the original investigation or are not relevant to the initial allegation.

B. Legal "knew or should have known" standard

The employment laws relating to harassment and discrimination, as well as other laws, impose liability upon employers when they "knew or should have known" about a problem and did not take appropriate action to solve the problem. Until the investigator is certain that he or she possesses all of the information available to evaluate the issue appropriately, the investigation should continue. Many human resources problems, not to mention lawsuits, develop because a complaint is made, no investigation occurs, and the complaint is not dealt with in an appropriate manner. For example, if the investigator does not really know how badly an employee was harassed, the organization does not know whether only an oral reprimand to the harasser is appropriate. The legal and human resources risk is not just the failure to investigate, but the failure to prevent further harassment.

Appendix: Investigation Checklists

Identifying Investigators:

- Are special skills required?
- Should an attorney conduct the investigation?
- Are there actual or potential conflicts of interest that should be addressed?
- Are the proposed investigators objective and resistant to pressure?
- Will any party claim the proposed investigators are biased?
- Are the proposed investigators the individuals who can maximize the information obtained in interviews?

Planning the Investigation:

- Minimize witness intimidation
- Form investigative team and divide duties
- Establish a time frame for completion of the investigation
- Prepare confirmatory memorandum to complainant
- Obtain and review relevant documents
- Consider special investigative techniques
- Identify interviewees
- Establish an interview location
- Arrange interview order
- Prepare opening and closing comments
- Prepare set of written interview questions
- Plan for multiple interviews
- Decide whether to obtain written statements
- Take detailed notes of investigation planning process

What Not to Do:

- Do not ignore an "informal" complaint
- Do not assume you will remember the case later – record it!
- Do not skip over opening and closing statements during the interview
- Never assume innocence or guilt
- Avoid terms with criminal law implications
- Do not ask "yes" or "no" questions
- Don't assume you can do it all – know when to seek professional help

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