

Conducting Effective Investigations and Mandatory Reporting



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Agenda

- Why an employer should conduct internal investigations.
- When an employer should conduct an internal investigation.
- Planning Investigations.
- Conducting Investigations.
- Concluding Investigations.
- Internal Investigation FAQs.
- Mandatory Reporting Statutes.

Why Conduct Internal Workplace Investigations?



- Internal investigations are an important tool for responding to employee complaints or incidents because they assist employers in determining:
 - Whether allegations of misconduct have merit;
 - Who was involved in the misconduct;
 - If corrective or other measures should be taken to prevent recurrence and limit employer liability; and/or
 - Preventative steps to avoid similar future incidents.

Why Conduct Internal Workplace Investigations?



- Investigations can also help:
 - Improve employee morale;
 - Increase productivity (when coupled with appropriate corrective action);
 - Reduce turnover rates; and
 - End inappropriate conduct on a district-wide level.



Benefits of Conducting Workplace Investigations

- Federal Law – under the longstanding *Faragher-Ellerth* defense, an employer could defeat a harassment claim if:
 - It attempted to prevent and correct the harassing conduct and had an internal complaint procedure; and
 - The employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer.
- While the defense is no longer available under New York State Law, it likely will be factually persuasive for an employer to have commenced a timely investigation and taken remedial action, when warranted, in a subsequent litigation.

A Reminder for Supervisors ...



- Under the NYSHRL, supervisors and managers can be held individually liable if they encourage, condone or participate in unlawful conduct. Therefore, supervisors should report:
 - A complaint or information they received about all forms of harassment;
 - Employee behavior that they have observed that may be or amount to harassment, including sexual harassment; or
 - Behavior that they suspect is occurring that is sexual harassment or other harassment.
- Examples:
 - Jim sends an email to Supervisor Sarah claiming that he did not receive a training manual provided to other female co-workers and he believes this is because he is a male.
 - Should Sarah report Jim's email?
 - Jim asks Sarah for advice because one of his co-workers referred to him using a racial slur. Jim does not want to make it in to a "big deal," but wants Sarah's advice about how to neutralize the behavior.
 - Should Sarah keep Jim's request for advice confidential?



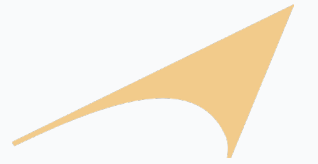
When is the Duty to Investigate Triggered?

- Employers regularly receive complaints of workplace misconduct by employees, including complaints of:
 - Discrimination;
 - Harassment (sexual and otherwise);
 - Retaliation;
 - Health and safety violations;
 - Workplace violence or threats;
 - Workplace drug and alcohol use;
 - Violations of employer rules;
 - Theft or fraud; and
 - Other criminal activity.



When is the Duty to Investigate Triggered?

- Complaints may also come from:
 - The general public,
 - Families, and
 - Students.
- These complaints also must be taken seriously and investigated.



Planning an Investigation

- **Step 1:** Preserve the evidence.
- **Step 2:** Determine who should conduct the investigation.
- **Step 3:** Define the Scope of the investigation.
- **Step 4:** Draft interview outlines.
- **Step 5:** Consult relevant district policies, state and federal law requirements, and collective bargaining agreements.
- **Step 6:** Contact the complainant.



Step 1: Evidence Preservation

- Memorialize the complaint into a written record.
 - Even if the complainant requests otherwise.
- Identify, preserve, and safeguard key potential evidence. This may include:
 - Emails;
 - Computer data;
 - Videotapes;
 - Memos;
 - Timecards;
 - Policies;
 - Personnel files;
 - Student files;
 - Notes; and
 - Anything else relevant to the alleged wrongdoing.
- Spoliation and the chain of custody.
- Litigation hold.
 - “Reasonable anticipation” of litigation.



Step 2: The Investigator

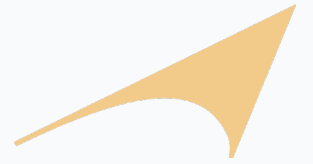
- Attorneys or Non-Attorneys?
 - If attorneys – inside or outside counsel?
 - If counsel – regular or new “independent” counsel?
- School Administrator or staff member?
- Law enforcement?



Step 2: The Investigator

- What is the nature of the complaint?
- What school policies are implicated?
- What laws are implicated?
- If bullying is alleged, should the school's DASA coordinator be alerted?
- If harassment is alleged, should the school's Title IX coordinator be alerted?

Step 3: Scope of the Investigation



- Who should be interviewed?
 - Complainant;
 - Accused;
 - Firsthand witnesses;
 - Former employees; and
 - Unidentified witnesses.
- In what order should individuals be interviewed?
- Where should the interviews take place?
- What evidence is available?
- What questions should be asked during the interviews?
 - Any relevant background or reoccurring incidents?
- What should each witness be told?
- What is the goal of the investigation?
- What interim steps should be taken to ensure a student or employee's safety or well-being?



Step 4: Interview Outlines

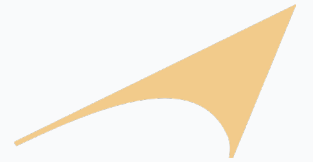
- Outline the topics to be covered with each interviewee and to the extent possible, prepare a list of questions the investigator will ask each person.
 - Don't be wed to a prepared outline.
 - It is important for the investigator to listen carefully to the information each witness provides and ask appropriate follow-up questions.
- Explore the basics in detail, using the following types of standard inquiries:
 - Who, What, When, Where, Why, How?



Step 4: Interview Outlines

- The investigator should also use more specific inquiries:
 - Who was present?
 - What was said?
 - What documents relate to this situation?
 - Are the documents in your possession?
 - What other evidence do you have or know of?
 - What other witnesses may know?
 - Did the complainant report the issue? If so:
 - to whom;
 - when; and
 - what was said?
- Concluding questions.

Step 5: Relevant Considerations



- Confidentiality:
 - Confidentiality is important to the success of an internal workplace investigation.
 - However, confidentiality should not be promised absolutely, and should not be demanded.
- Treatment of complainant and the accused.
 - Placing the accused on leave (*e.g.*, criminal activity, violence, ongoing harassment/discrimination, fraud, etc.)
- Collective Bargaining Agreements:
 - Contractual rights may affect the way an investigative interview may be conducted.

Step 5: Additional Considerations



- Retaliation
 - The NYSHRL and Title VII protect employees who engage in “protected activity” from retaliation. Protected activities include:
 - Making a complaint about discrimination or harassment or suspected discrimination or harassment;
 - Providing information during an investigation; and testifying in connection with complaint.
 - Retaliation is any action taken to alter an employee’s terms and conditions of employment because that employee engaged in protected activities.
 - Any adverse action that could have the effect of discouraging a worker from making a complaint about discrimination/harassment.

Conducting the Investigation



- The investigator should go in with the goal to gather as much information as possible; it's not a mutual sharing of information, but a question and answer session.
- The investigator should:
 - Take accurate notes without conclusions/commentary/editorials.
 - Note credibility assessments (e.g., nervousness, insincerity, inconsistencies).
 - Get details on conclusory responses (e.g., "he harassed me," and "everyone knows.")
 - Ask non-leading, non-judgmental, and open-ended questions.
 - The goal is to get the interviewee to speak openly and candidly.
 - Consider having a second investigator/witness present.
- The investigator should not:
 - Promise confidentiality or require absolute confidentiality.
 - Be vague, ambiguous, or euphemistic about what they are asking.
 - Address the allegations head-on, even if it is uncomfortable.
 - Use conclusory language, e.g., "did you see Sean harass Susan at the party?"
 - Instead: "was Sean at the party?" "did you see him interact with Susan?" "describe the interaction – what was said, where, how often, how loud, any touching? Any emotional expressions?"
 - Rush – instead, they should take their time and schedule a follow-up interview, if needed.
 - Ignore safety considerations. Alert security/law enforcement, as necessary.
 - Let union representatives or others present answer questions or shape the discussion.

Conducting the Investigation



- When interviewing the complainant, the investigator should explain that:
 - They are investigating a particular complaint about action(s) which may violate a school policy;
 - All witnesses will be questioned;
 - The investigation will proceed as quickly as possible;
 - Confidentiality will be maintained to the greatest extent possible, but is not guaranteed;
 - At the conclusion, a decision will be made about what action, if any, is appropriate
- The investigator should assure the complaining party and all witnesses that any retaliation will not be tolerated.

Conducting the Investigation



- When interviewing witnesses, the investigator should avoid:
 - Expressing agreement or disagreement with the witness's statements.
 - Asking for personal opinions as to why the complainant and/or accused may have been motivated to take a certain act
- For each witness, consider in advance what information about the allegations and investigation should be disclosed.
 - For example, identification of the complainant, accused, and other witnesses, and specifics of the complaint.
- Witnesses are highly likely to ask questions, so it is best to prepare for their questions in advance.
 - Generally, investigators should share only enough information for the witness to share the witness's own perspective.



Conducting the Investigation

- Use of surveillance, video/voice recording, etc.
 - Review relevant collective bargaining agreements and school policies to determine if the district can use surveillance methods during interviews.
 - Investigatory procedures are non-mandatory subjects of bargaining:
 - Intentional use of surveillance as a basis of discipline is likely a mandatory subject of negotiation.
 - § 52-c of the New York Civil Rights Law.

Concluding the Investigation



- Is a written investigation report desired and appropriate? Is a written investigation report required by law or policy?
- If yes, consider whether it will be a:
 - Factual report
 - Legal analysis
 - Both
- Privilege and discovery considerations

Concluding the Investigation



- Attorney-Client Privilege:
 - The attorney-client privilege can protect investigation-related materials if the school initiated the investigation primarily to obtain legal advice, rather than primarily for a business reason.
 - If the investigation's primary purpose is to obtain legal advice, employees typically seek to protect investigation-related materials initially and reserve the decision of whether to waive any protection, if appropriate.
- Non-privileged Investigations:
 - A school's internal investigation may not qualify for the attorney-client privilege or work product protections, such as when:
 - A non-attorney is conducting the investigation;
 - The investigation's primary purpose is not to provide legal advice;
 - A law or internal district policy requires the district to conduct the investigation; or
 - The documents were prepared in the ordinary course of business or would have been created in essentially similar form regardless of any anticipated litigation.



Concluding the Investigation

- Communicate the outcome to the:
 - Complainant;
 - Accused; and
 - (When necessary) others involved in the investigation.



Investigation FAQs

- **FAQ 1:** Employee says she's retained a lawyer and won't participate in the investigation if her lawyer isn't present.
 - This request should be rejected, employees are not entitled to an attorney during an investigation.
 - Union members, however, must be permitted to have a representative from the Union present.
- **FAQ 2:** Employee says he doesn't want his statement "on the record." What should the investigator do?
 - There is no such thing as off the record.
 - The employer has a duty to the employee to investigate any complaints.



Investigation FAQs

- **FAQ 3:** Employee comes to HR to report a concern but doesn't want it to be "official" or later asks that it be withdrawn. What should HR do with the information?
 - The employer still has a duty to investigate.
- **FAQ 4:** Employee's mother calls to complain about how her son is being treated at work. Should the complaint be investigated?
 - The employer still has a duty to investigate; it does not matter the source of the complaint.
 - However, this type of complaint should be considered for credibility.



Investigation FAQs

- **FAQ 5:** What do I do if a witness makes new allegations that are not part of the scope of the current investigation?
 - Be prepared to advise the employee that s/he should pursue her/his own complaint through the employer's internal reporting mechanisms.
 - Consider whether re-interviewing witnesses would be helpful in light of new information and should re-interview witnesses whenever necessary.



Investigation FAQs

- **FAQ 6:** Employee refuses to participate in the investigation or asserts her Fifth Amendment right. What is the correct response?
 - Under some circumstances, it may be appropriate to inform a witness that they are obligated to answer questions and that failure to provide truthful answers could result in corrective action.
 - But it is important to keep in mind that:
 - Some civil service employees have the right to union representation during the interview if they may be subject to disciplinary action.
 - Tenured teachers have Cadet Rights and cannot be compelled to provide self-incriminating information and may refuse to answer questions in any pre-hearing investigation that the teacher believes could lead to disciplinary action.
- **FAQ 7:** What do I do if an employee/witness gets hostile or very upset during an interview?
 - Advance consideration should be given to how potentially emotional witnesses should be handled.
 - Consider taking a break or rescheduling.



Mandatory Reporting Statutes

- Education Law § 1126 et seq.
 - Ed. Law §§ 1126-1129
- Social Services Law § 413 et seq.
 - Soc. Serv. Law §§ 413-420





Education Law § 1126 et seq.

- Sets forth a reporting system for allegations of abuse that occur in a school setting.
- Applies to: “Teacher, school nurse, school guidance counselor, school psychologist, school social worker, school administrator, school board member or other school personnel required to hold a teaching or administrative license or certificate” and others.
- Requires school personnel to complete a written report and provide that written report to the school administrator when they receive allegations that a child has been subjected to abuse in an educational setting.
 - The school administrator must then provide a copy of the report to the superintendent.
 - The superintendent must then forward the report to the appropriate law enforcement authorities when there is reasonable suspicion that abuse has occurred.
- The reporter must complete a form designated by the Commissioner of Education and the report must include the name of child, name of child’s parent, identity of person making the allegation and their relationship to the child, name of the person against who the allegation was made, and list the specific allegations.
- These reports must remain confidential and may only be disclosed to law enforcement.



Education Law § 1126 et seq.

- Where there is reasonable suspicion to believe that an act of child abuse has occurred, the school administrator or superintendent must:
 - When the allegation is from the child:
 - Inform the parent and provide parent a copy of the written statement of the parent's rights under the Commissioner's regulations;
 - The school administrator must provide a copy of the report to the Superintendent; and
 - The Superintendent must forward the report to appropriate law enforcement authorities.
 - When the allegation is from the parent:
 - provide the parent with a copy of the written statement of the parent's rights under the Commissioner's regulations;
 - The school administrator must provide a copy of the report to the Superintendent; and
 - The Superintendent must forward the report to appropriate law enforcement authorities.
 - When the allegation is from anyone other than the parent or child:
 - Inform the parent and the provide parent a copy of the written statement of the parent's rights under the Commissioner's regulations;
 - Ascertain from the person making the report the source and basis for the allegation;
 - The school administrator must provide a copy of the report to the Superintendent; and
 - The Superintendent must forward the report to appropriate law enforcement authorities.
 - "In no event shall reporting to law enforcement be delayed by reason of an inability to contact the superintendent." N.Y. Educ. Law § 1128.
- Reporters who reasonably and in good faith make such reports will receive immunity from civil liability.



Social Services Law § 413 seq.

- Applies to:
 - School official, which includes, but is not limited to, school teacher, school guidance counselor, school psychologist, school social worker, school nurse, school administrator or other school personnel required to hold a teaching or administrative license or certificate.
- Requires:
 - Mandatory reporters to “report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child...”



Social Services Law § 413 seq.

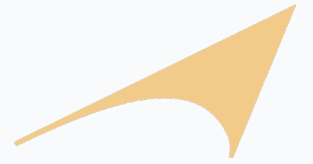
- Reporting:
 - These reports must be made “immediately.” - Soc. Serv. Law § 415
 - The individual must make a report to the mandatory reporting hotline AND “immediately notify the person in charge” of the facility.
 - 2 steps to making a report:
 - Call the Mandatory Reporting Hotline (800) 342-3720. -AND-
 - Prepare and submit a written report on Form DSS- 2221-A within 48 hours of the of the oral report.



Questions?



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