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Thompson Coburn's
Annual Labor, Employment and
Employee Benefits Law Seminar



Sailing Through Troubled Waters

Issues and Best Practices in Workplace Investigations

Thompson Coburn's Annual Labor,
Employment and Employee Benefits Law Seminar

Purpose: Investigations Matter



- Employers have an obligation to investigate complaints
 - Harassment/discrimination
 - Title VII, ADA, ADEA
- Corrective action can provide a defense to liability
 - Ellerth/Faragher

Purpose: Investigations Matter



- Practically: investigation provides opportunity to remedy problems
- Significant damages
 - Back pay
 - Emotional distress
 - Punitive damages
 - Attorneys' fees

Scope: Complaint



- “Should have known” standard
- Complaint does **not** have to be written
- Anonymous complaint is sufficient
- Specific incident/general unfair treatment
- Combined discrimination/harassment complaints
 - Title VII, ADA, ADEA

Scope: Complaint



- Beyond discrimination/harassment:
 - Threats against others
 - Vandalism and other sabotage
 - Violations of work rules
 - Safety problems – OSHA
 - Sexual impropriety
 - Theft
 - Drugs/alcohol

Attorney-Client Privilege



- Be careful not to waive, especially where outside counsel is involved
 - “Legal capacity”
 - Ellerth/Faragher
- If using outside counsel, take strategic steps to protect privilege
- Bifurcate process

Plan: How to Run The Investigation



- Steps of investigation:
 - Pre-investigation
 - Investigation
 - Make a determination
 - Post-investigation issues

Pre-Investigation



- Consider running investigation through Legal Department
 - Ensure that all communications are directed to the Legal Department to protect attorney-client privilege
- Identify potential witnesses
- Determine if there are other documented reports of related activity

Pre-Investigation



- Determine if it is necessary to transfer or place the subject of the complaint on leave
 - Review personnel file of subject of complaint
 - Other complaints? Outcomes?
 - Current/former supervisors

Pre-Investigation



- Create confidential investigation file
- Cooperate fully with the ensuing investigation
- Review complainant's personnel file
 - Possible motivations?

Pre-Investigation



- Consider reviewing computers and other company technology of complainant and subject of complaint
 - Consent
- Work with HR and/or the Legal Department to prepare a timeline
- Remember: promptness!

Pre-Investigation



- Schedule witness interviews
- Develop an outline of questions
 - Open-ended preferred
 - Neutral language
- Review company policies
- Consider contacting insurance carrier
- Consider consulting outside counsel
 - Attorney-client privilege

Investigation



- Prompt
- Thorough
- Confidential
- Fair
- Documented
- Follow-through

Investigation



- Goals
 - Establish sound, factual basis for decisions
 - Produce reliable documentation to support decisions
 - Determine whether policies were violated
 - Reveal whether misconduct occurred
 - End further wrongful actions

Investigation



- Select an investigator
 - Two individuals are preferable (consider whether gender is important)
 - Consider an investigator from outside of department with trustworthy reputation
 - Remember that the investigator may become a witness
 - Attorney-client privilege reminder

Investigation



- Investigator(s) should:
 - Schedule interviews promptly
 - Keep contemporaneous notes throughout investigation
 - Documentation is key
 - Reminder: the notes may later be evidence
 - Be cautious and thorough
 - Don't make conclusions before the investigation is complete

Investigation



- Interview complaining party
 - Retaliation is prohibited
 - Neutrality and impartiality are imperative
 - Do NOT promise complete confidentiality
 - “Need to know”
 - Use open-ended questions, but obtain specific information

Investigation



- Interview complaining party
 - Get witness names
 - Repeat the story to complainant for accuracy
 - Consider preparing statement
 - Document facts
 - Remember, NOT opinions
 - Complainant expectations/follow-up

Investigation



- Interview subject of the complaint
 - Suspected of misconduct or policy violation
 - Purpose to obtain information
 - No judgments; maintain impartiality
 - Provide opportunity to respond to accusation(s)
 - Ask for additional witnesses' names
 - Retaliation is prohibited

Investigation



- Interview witnesses
 - Who, what, where, when
 - Avoid “fishing expeditions”
 - No preconceptions
 - Exposed to similar conduct
 - Avoid discussing interview/allegations
 - Emphasize that retaliation against the complainant or others is prohibited
 - Thank witness for time and cooperation
 - Document everything

Concluding the Investigation



- Analyze the results of the investigation
 - Witness credibility
 - Demeanor
 - Consistency
 - Chronology
 - Corroboration
 - Plausibility
 - History/Motivation

Concluding the Investigation



- Gather and review all relevant documents
- Determine whether policy was violated
- Consider preparing a full report of investigation
- Inform complainant and the subject of the complaint of the determination

Concluding the Investigation



- If reasonable evidence exists that a violation has occurred:
 - Assess the severity
 - Ensure that the discipline decided upon is consistent with past practices
 - Review labor agreements and policy handbooks
 - Document the disciplinary actions taken

Concluding the Investigation



- If reasonable evidence exists that NO policy violation has occurred:
 - Inform the complainant and the subject of the complaint that the investigation did not substantiate the complaint
 - Reiterate company policy
 - Emphasize that retaliation is prohibited

Concluding the Investigation



- If the investigation results are unclear:
 - Follow the steps for unsubstantiated complaints/suspicion
 - Possibility of a second level of investigation, if appropriate
 - Law enforcement
 - Private investigator
 - Continue to monitor the workplace

Important Reminder



- Document the results of the investigation
- Ensure incident files are current with results from investigation and subsequent activity
- Keep investigative file separate
- Follow record retention policies

Other Issues



- Third parties/customers
 - Complaints should be investigated even if not by an employee
- Beware of claims by the subject of the complaint
- Emails between investigator and others
- HIPAA/ADA

Employee Crimes



- Investigation
 - Confidential
 - Prompt, statute of limitations
 - Decide whether leave is appropriate
 - Employee safety
 - Document everything
 - Do not retaliate against complainant
- Notifying Law Enforcement
 - Facts, not speculation
 - Risk of disruption in workplace

Wrap Up: Recommendations



- Consider investigation with Legal Department guidance
- Be careful about documentation and correspondence
- Give the subject of the complaint every opportunity to be heard

Wrap Up: Recommendations



- Interview former employees if available
- Remind all that retaliation will not be tolerated
- Share the results and/or resolution of the investigation with the complaining party and the subject of the complaint

Wrap Up: Recommendations



- Avoid dismissiveness – do not suggest that inappropriate conduct was “welcomed” by the complaining party
- Be thorough – interview the complaining party, the accused, AND other witnesses
- Neutral language: rather than asking employees if they have been “harassed,” etc., ask if they witnessed behavior they found inappropriate/in violation of Company policy

Wrap Up: Recommendations



- Information disclosure: protect information on “need to know” basis
- Investigation documents should be stored separately from personnel files
 - Create a permanent, confidential investigatory file
- Avoid instructing witnesses not to talk to the complainant

Most Important Rule . . .



Keep an Open Mind!



Questions?

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