



CONDUCTING EFFECTIVE INTERNAL INVESTIGATIONS

Retaliation claims are *currently* one of the most-frequently filed type of claims with both the federal Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing (DFEH). This should be a potential concern for employers because employees who claim to have been harmed do not need to prove their underlying discrimination or harassment claims to prevail on retaliation claims. All they need to show is that they engaged in a protected activity, such as complaining about alleged workplace discrimination or harassment (or wage and hour violations), and that they were subjected to an adverse employment action, such a demotion or discharge, as a result of engaging in the protected activity.

This is true *even if there was no illegal discrimination, harassment or wage and hour violation to begin with*. That is why internal investigations are fertile/a breeding ground for retaliation complaints. Therefore, it is critical for an employer to promptly decide whether to outsource the investigation of an employee complaint, or conduct the objective and thorough investigation in-house.

Here are some guidelines for conducting effective internal investigations:

1. **Obtain written statement from or interview complainant.** If only a verbal report of the alleged wrongdoing has been provided, interview the employee and reduce that report to writing to obtain the facts, clarify the issues and establish a mutual understanding in order to reach a fair resolution. Thank the employee for reporting a perceived violation of company policy, and remind the employee that all complaints must be investigated. Once the complaint is memorialized, the Complainant should review the written document and sign it to attest to its accuracy and completeness. It is prudent to insert a concluding statement such as "I am aware of no other incidents or witnesses other than those identified in this statement." Reassure the employee that he/she will not suffer any retaliation for reporting the complaint, explain what is meant by retaliation and instruct the employee to report any such conduct that

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might follow immediately. Let the employee know corrective action will be taken promptly, where warranted, if a violation has in fact occurred.

2. **Conduct a follow up interview of Complainant (if necessary).** Get any clarification needed, such as confirming names of potential witnesses, dates/times of alleged incidents, as well as copies of any documentary evidence such as emails. Ask if there is anyone else with whom the employee has discussed the alleged policy violation (spouse, doctor, other employees) not identified in her statement, and ask who and when. Also, if the complaint is for alleged harassment or discrimination, and there is no information as to the effect, if any, the perceived harassment has had on the employee, follow up. Ask what remedy the employee seeks by making the complaint, but explain the company is not bound by the employee's wishes. Instruct the employee not to discuss the complaint or investigation with any employee from this point forward so as not to compromise the investigation. During any follow up interview, avoid any subjective or editorial comments. Do not promise the employee's statements will be kept confidential but indicate that to the extent possible confidence will be maintained.
3. **Interview the alleged offender.** Obtain as many facts before interviewing the alleged offending employee. Inform the employee that there has been a complaint of *inappropriate behavior* received by the company which is being investigating under the company's policy. Advise the accused that the company has not formed an opinion regarding the truthfulness or accuracy of the allegations, but that a fair investigation is being conducted in accordance with company policy. Identify each allegations in the complaint. Be specific but do not show the written complaint. If the accused wants time to respond to each allegation, advise the employee that the investigation cannot be delayed and that a response is necessary within the next day or two. Depending on admissions given by the employee or the effects claimed by the complaining employee, the company may wish to consider suspending the accused employee with pay, pending the outcome of the investigation. Instruct the accused not to contact the complainant or any witnesses since it could be viewed as improper retaliation. Be prepared for an emotional response by the accused employee, therefore, you may wish to have a third party present during such interview.
4. **Reduce the Accused's statement to writing.** If the company does not receive a written responsive statement prepared by the accused, confirm each response to each allegation obtained during the interview in a writing to be signed by the accused. Be sure to identify each witness that can support the accused's version in the writing.
5. **Identify the issues in dispute.** Review the statements in the complaint and the response to ascertain what issues are still in dispute and require further investigation.
6. **Consider re-interviewing the complaining party.** If there are only some disputed issues remaining, re-interview the complainant and explain the accused's explanation for the alleged conduct.
7. **Interview all witnesses identified.** Initiate the interview with the fact that the company has received a complaint of alleged improper behavior and that no conclusion has been reached, but that an investigation is being conducted. Advise that the purpose of the interview is to ascertain the witness' knowledge of the alleged conduct, and that confidences will be maintained to the extent possible. Instruct the witness to refrain from discussing the interview or investigation with others. *Refrain from identifying the alleged wrongdoer by name.* Instead ask if the witness has observed any conduct in the workplace that the witness perceives as improper or offensive during the applicable time frame in question. Obtain dates of all incidents and all potential witnesses. Whether the witness corroborates or refutes the original complaints, remind the witness that

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reporting harassment, or other policy violations, is consistent with company policy. Also, remind the witness that the company prohibits retaliation for reporting any improper behavior and to report any such perceived retaliation that may follow. After interviews, each statement should be memorialized in writing, reviewed and signed by witness as to its accuracy and completeness. The company may wish to include a statement that the statements contained in the document are true and correct. Instruct the employee not to discuss the interview with any employee from this point forward so as not to compromise the investigation.



8. **Meet with management and/or legal counsel.** Meet to review outcome of investigation to date to determine whether any further investigation is needed, and if not, how to conclude the investigation. If investigation reveals that conduct in violation of company policy occurred, determine what appropriate remedial action is necessary. Consider past disciplinary action to ascertain how similar improper conduct has been disciplined. If there is no precedential remedial action for a similar offense, consider all circumstances, including prior warnings or discipline, to determine what action should be issued. Transfer of the offender is acceptable but transfer of the complaining employee is not, unless requested. If the complaining employee requests a transfer, it should be confirmed in writing as requested.
9. **Draft report of investigation.** Summarize complaints, response, all witness interviews, results of investigation, clarify violations and action taken to remedy any violating conduct. Draft with accuracy and completeness since it may be seen by a potential audience such as a mediator, judge or jury. Consulting with legal counsel on the final report would be beneficial.
10. **Communicate results to Complaining employee and accused.** CAUTION: Be careful how this is communicated to the complaining employee in the event that the investigation did not reveal violating conduct that required corrective action. Also, there is no requirement to reveal to the complaining employee what, if any, corrective action is taken against the accused.
11. **Limit communications of results within company.** The results of the investigation should be revealed to only key management, including the direct supervisor of each of the parties involved, to ensure that there is follow up periodically to ensure no retaliation ensues. In the case of harassment, if a violation of policy has been found, the company should advise all employees that a confidential investigation has been conducted and that appropriate remedial action to eliminate such wrongful conduct in the workplace has been taken after such action has been implemented. Avoid communicating to others within the company in writing about investigation findings.
12. **Preserve all evidence.** Keep all statements, including all notes taken during investigation. Keep in separate file from employee personnel files. Keep attorney communications regarding investigation separate to ensure attorney-client privilege remains intact.

PRACTICE TIPS: Koumas Law Group offers interactive workshops, presented to both management and staff, tailored to each company's Sexual Harassment policy. Participants learn to identify sexual harassment, become familiar with company policy, and discover what to do if they witness, experience, or receive a complaint of harassment. Workshops are offered in-house and fulfill the legal mandates of state and federal law. Ms. Koumas also conducts internal investigations on behalf of company's, upon receipt of an internal complaint. To discuss the workshops or investigation services, contact Elizabeth Koumas at 619.682.4811 ext. 101.

EMPLOYEE HANDBOOKS 101

Many employers are too casual when it comes to their employee handbooks — which can quickly lead to lawsuits. A thought-out, well-crafted employee handbook is the best way to avoid this problem. Employers should bear in mind that employee handbooks serve many purposes:

- They serve as a Constitution in the workplace by informing employees about the conditions of their employment.
- They help employees understand company philosophy.
- They explain the benefits available to employees.
- They are like a Bill of Rights, detailing the policies and procedures that employees are expected to follow.

Written and constructed well, employee handbooks can be an invaluable resource for employees and management. Poorly written employee handbooks, on the other hand, can lead employees to develop certain expectations contrary to the employer's intent, or give employees rights that they would not otherwise have. Many employee handbooks are replete with mistakes that increase employer liability and make it more difficult for businesses to operate. Here are three of the most costly mistakes:

Mistake #1: Inadvertently creating contractual rights to employment.

"At will" employment, the presumption in California, means a company or the employee can terminate an employment relationship for any lawful reason without notice. The "at will" presumption, however, can be altered by a poorly drafted handbook that inadvertently guarantees employees certain rights. For instance, companies can give employees contractual rights to employment when a policy states that an employee can only be terminated for "cause," or when a policy mandates certain progressive disciplinary procedures before termination. Reiterating the relationship will be at will in employment applications, job offer letters, handbook introductions, discipline policies, and acknowledgments can help reaffirm that fact.

Mistake #2: Inaccurately classifying employees as exempt.

Under both federal and California wage and hour laws, employers are not required to pay *exempt* employees overtime pay. California nonexempt employees, on the other hand, are required by law to receive overtime compensation, and are subject to other wage and hour requirements such as meal and rest breaks.

Up-to-date job descriptions are critical to classifying employee properly. A detailed analysis of an employee's job duties is required to determine whether the employee is exempt or nonexempt. Employers often misclassify employees, and/or mistakenly assume that because an employee is paid on a salary basis, there is no requirement for overtime pay. Under the law, an employee is presumed to be non-exempt *unless* the employee satisfies the requirements of one of the *narrowly* construed exemptions— which includes both a minimum salary and exempt duties.

Poorly drafted handbook policies on employee classifications and overtime can be used against companies as evidence of a violation of the overtime rules and open the door to employee wage claims, including financially crippling class-action lawsuits and/or Private Attorney General Act penalty claims involving large numbers of employees. To avoid confusion, employers should have a seasoned and knowledgeable HR professional involved in determining exempt and nonexempt status before memorializing classification details in their employee handbooks.

Mistake #3: Neglecting to detail procedures for reporting harassment.

Most employers recognize the need to have a policy to protect against illegal discrimination and harassment.

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Many employers, however, neglect to include procedures for reporting harassment or discrimination. These procedures should include, at a minimum, the following:

- Requiring employees who witness or experience harassment to report those incidents directly to members of management who have the authority to investigate and resolve any problems.
- Giving employees the option to report harassment claims to a member of management outside of their chain of command.
- Stating that all reports of harassment will be promptly and thoroughly investigated and disclosures made only when necessary to investigate any incident or as required by law. Keep in mind that employers should never promise employees absolute confidentiality.

Employers may also need to revise policies to deal with the increased reliance on technology, such as email, Internet usage, and office monitoring. Employers should add clear and precise provisions to deal with these technologies that can be abused and misused by employees. Here are some tips:

- Specify each type of equipment that will be subject to monitoring, e.g., email, voicemail, internet access systems, hard drives, laptops, PDAs, and cell phones.
- Include an acknowledgement form in your handbook so that employees understand the monitoring policy and consent to each form of monitoring.
- Add provisions requiring employees to use only hands-free cell phones, PDAs or other devices while driving on company time or en route to conduct company business.

Important policies to consider including in a handbook include but are not limited to the following:

- At-Will Employment
- Employee Classifications
- Voice Mail, Email, Internet, Electronic and Computer Files, and Usage
- Appearance and Hygiene
- Equal Employment Opportunity
- Anti-Harassment & Retaliation and Complaint Procedure
- Accommodation of Disabilities
- Prohibition against Drugs or Alcohol in the Workplace
- Terminations
- Final Pay
- Discipline
- Rest and Meal Periods
- Personnel and Payroll Records
- Overtime, Pay and Authorization
- Payroll Deductions
- Business Expenses
- Leaves of Absence
- Health Insurance Benefits & COBRA



An incomplete or incorrect handbook is more than just a waste of paper. If it is not drafted correctly, a handbook can actually lead you down the very path employers are hoping to avoid: The one that leads to litigation. Whether drafting the first employee handbook or updating one that is decades old, it is always a good idea to have an employment law attorney review your manual.

FUTURE SEMINARS

Effective Discipline and Termination Techniques

Date: April 14, 2011

Time: 11:30am-1:00pm

Location: 5575 Ruffin Road, Suite 250, San Diego, CA 92123

Sponsor: San Diego County Medical Society (858) 300-2781

Must register with SDCMS in advance as KLG client

What you will learn:

- The importance of a written disciplinary policy
- Guidance on properly conducting internal investigations and confidentiality
- Proper implementation of discipline
- The value of effective performance appraisals
- Recommended steps in the termination and layoff process

CA Employment Law From A to Z

Date: June 17, 2011

Time: 8:30am-4:30pm

Location: Holiday Inn Mission Valley/Stadium, 3805 Murphy Canyon Road

Sponsor: Lorman Education Services

Cost: \$339 per person (20% discount for KLG clients)

Continuing education credits available, AIPB, HRCI, HRPD, CPE

What you will learn:

- What is required and why for each of the 22 human resources topics
- Tips on how human resources policies, practices and records can be managed to reduce or eliminate the risk of noncompliance
- Hiring do's and don'ts you need to follow *now* to avoid lawsuits *later*
- Discrimination laws and how to apply them in your workplace
- Navigating the basics of FMLA, CFRA and PDL laws
- Strategies for implementing critical wage and hour basics correctly in your workplace
- Practical discipline and termination techniques - should the worst happen
- Avoiding pitfalls in complying with COBRA and HIPAA guidelines

For more information on topics, contact Ms. Koumas.



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