

CAPITOL REGION COUNCIL OF GOVERNMENTS WORKPLACE INVESTIGATION BEST PRACTICES

WHEN TO CONDUCT A WORKPLACE INVESTIGATION:

- Upon complaint about, or observation of, employee misconduct serious enough to warrant significant discipline; or
- Upon employee complaint of mistreatment by supervisor, co-worker or member of public

KEYS TO EFFECTIVE WORKPLACE INVESTIGATIONS:

- Documentation
- Compliance with policies, procedures and collective bargaining agreements
- Fair and impartial
- Consistency in approach, performance, reporting and discipline

THE INVESTIGATION PROCESS

1. Receipt of Complaint or Report of Misconduct

- a. *Review and evaluate*
- b. *Document intake*
 - (1) Acknowledge receipt and inform complainant/reporter of decision to investigate

2. Review Policies and Procedures

- a. *Adhere to any applicable policies or procedures*
 - (1) Do not ignore a complaint that is not submitted in compliance with applicable policies and procedures
 - 1. For example, if the complaint is not directed to the appropriate person/department, notify the employee of receipt of the complaint and inform him/her that you are forwarding it to the appropriate person/department
- b. *Adhere to any applicable collective bargaining agreements*
 - (1) Such as notice provisions, etc.

3. Select an Investigator

- a. *Appropriate Investigator may be*
 - (1) Human resource professional
 - (2) Member of legal department
 - (3) Private investigator/outside consultant
 - (4) Regular or special outside counsel

b. Considerations in selecting an investigator

- (1) Is the investigator identified/dictated by policy, procedure or collective bargaining agreement? If so, adhere to that
- (2) Is confidentiality or privilege desired?
 1. Assume the investigator may become a witness in future court and administrative proceedings
 2. If desirable, attempt to cover with attorney-client privilege or attorney work product doctrine by using attorney or person acting at direction of attorney
 3. But remember, there is no guaranty of privilege (unless of course the investigation is undertaken by counsel in defense of a pending legal matter, and even then exceptions exist).
 4. What is the nature of the case?
 - a. Is knowledge of employer policies and practices particularly important?
 - i. e.g., performance issues and work rule violations
 - b. Is knowledge of the law particularly important?
 - i. e.g., hostile work environment claims, whistleblower and First Amendment retaliation claims?
 - c. Is knowledge of department operations important?
 - i. e.g., police officer misconduct

4. Discuss and Define Parameters with Appropriate Officials and Legal Counsel

- a. Determine appropriate deadlines*
- b. Confirm compliance with policies, procedures and collective bargaining agreement*

5. Conducting the Investigation As The Investigator

- a. Identify and review all potentially relevant materials*
 - (1) Any complaint and related notes
 - (2) Rules, policies, procedures, collective bargaining agreements and instructions
 - (3) Any memoranda or notes about incident or complaint
 - (4) Any statements provided by or obtained from witnesses
 - (5) Any prior investigative files pertaining to subject matter or involved personnel
 - (6) Prior complaints by complainant or concerning same person
 - (7) Personnel files of involved personnel
 - (8) Pertinent business records - time cards, calendars, diaries, audio or video recordings, photographs, logs
 - (9) Physical evidence
- b. Identify Potential Interviewees*
 - (1) Complainant/individuals who observed, raised or reported issue
 - (2) Individuals whose conduct is under investigation
 - (3) Supervisor and coworkers of involved personnel

- (4) Observers
- (5) Others identified as possibly possessing information

c. *Prepare for Interviews*

- (1) Determine issues of investigation
 - 1. Understand relevant and applicable laws, policies, rules or guidelines
 - 2. Identify factual issues that are needed to reach a conclusion
- (2) Determine order of interviews
- (3) Determine format for recording
 - 1. Statements/written interrogatories
 - 2. Notes
 - 3. Audio or video recording
 - 4. Stenographer/court reporter
- (4) Prior to each interview
 - 1. Identify facts to be explored during interview
 - 2. Identify documents to be reviewed during interview

d. *Conducting Interviews*

- (1) Address any employee rights
 - 1. Does collective bargaining afford right to union representation?
 - 2. If interviewee is a union member, has he or she requested union representation?
 - a. union representation is required during investigatory interview if requested by an employee who has a reasonable belief that the interview may lead to discipline (*Weingarten rights*)
 - 3. If employee may face criminal charges, consider affording employee right to legal counsel
 - 4. If you as a government employer plan on ordering, under penalty of discipline, an employee to provide information that may be against his/her criminal interest, you must inform the employee of such order and that the information will not be used to investigate or prosecute them criminally (*Garrity Warning*)
 - a. A sample **Garrity Warning** provides:

*You have all the rights and privileges guaranteed by the Laws and the Constitution of this State and of the United States, including the right to remain silent in a **criminal** proceeding. You do **not** have the right to remain silent during the present investigation and interview; indeed, you may be subject to disciplinary action, including termination of your employment with the _____, for the failure to answer relevant and material questions in proceedings regarding your employment. However, the answers you give to the questions in this interview, or any information or evidence which is gained by*

*reason of your answers, may **not** be used against you in a criminal proceeding.*

- (2) Make appropriate disclosures upon commencement of interview
 1. State what is being investigated
 2. State interviewee's role
 3. State how the information may be used
 4. If the interviewee is the subject of the investigation, explain that purpose is to obtain his or her version of events and provide the employee an opportunity to present any information the employee feels the investigator should be aware of
 - a. If employee refuses to provide information - explain that the employer will base its decision on other information gathered during the investigation, the inferences drawn from the evidence, and the subject's unwillingness to cooperate and provide information
 5. Where applicable, caution that discipline or possibly criminal prosecution may result
 6. Explain that the information obtained will be shared with those who have a need to know, and may include people outside of organization
 7. Explain the employer's desire for confidentiality
 8. Caution that discussions that attempt to influence the investigation or that disclose confidential information may be grounds for disciplinary action
 9. Remind the interviewee that the employer does not permit retaliation or reprisal for making or supporting an honestly believed complaint, or otherwise assisting in an investigation
 10. Remind the interviewee to ask you to repeat the question if he/she did not hear it
 11. Remind the interviewee to ask you to rephrase the question if he/she did not understand it
 12. Ask that the interviewee answer verbally.
- (3) Questioning format
 1. Start with open ended questions
 2. Move to narrower more focused questions
 3. As you progress, you may utilize leading questions utilizing information already provided
 4. Ask one question at a time
 5. Working chronologically is often useful to ensure thorough coverage and often assists the interviewee
 6. Where possible, try and avoid asking uncomfortable, embarrassing questions early in the interview

- a. This can often render the interviewee defensive and less cooperative
- 7. Do not skip the uncomfortable or embarrassing questions, they must be asked
- 8. Remain neutral in tone and expression
- 9. Listen to the answers carefully
- 10. Ask appropriate follow up questions
 - a. Working to always identify specifics of events and actions
 - b. Who, what, where, when, other witnesses
- (4) Concluding the interview
 - 1. Before concluding review important points
 - a. Confirm all pertinent facts, confirm that relevant documents/evidence and that persons with knowledge have been disclosed
 - 2. Thank the interviewee for his/her cooperation
 - 3. Explain what follow up documentation, if any, the interviewee will receive and what the interviewee should do with it
 - a. Consider whether it is helpful to send a letter to the interviewee setting forth the important information provided and asking the employee to sign and return no later than a specified date
 - 4. Ask the employee to keep the investigation and information provided confidential
 - a. Be aware that employees (generally) have the right to discuss workplace issues and hence you cannot (generally) threaten to discipline them for discussing the conduct or incidents at issue
 - b. You can ask them to keep confidential the information they were asked to provide
 - 5. Inform the employee that you will remain in contact, may need to follow up and that continued cooperation is essential
 - 6. Express the employer's commitment to conclude the matter in a timely manner.

e. Documenting Investigatory Steps

- (1) Be sure to keep a log identifying each step of the investigation
 - 1. A step includes each document reviewed, each person contacted or interviewed, and any information received
 - 2. Everything done should be noted by:
 - a. What was done
 - b. Who it was done by
 - c. Date and time it was done
 - d. Consider putting a notation in the log as to why the step was undertaken

6. Investigation Documentation

- a. *Typical components of an investigation file include:*
 - (1) Log of investigatory steps
 - (2) The complaint
 - (3) All communications to and from witnesses
 - (4) Contemporaneous and final interview and document review notes
 - (5) All documents relevant to the issue being investigated
 - (6) Any physical evidence relevant to the issue being investigated
 - (7) Investigator's report, if any
 - (8) Documents reflecting notification of investigation results and any remedial action/discipline
- b. **Investigatory files should be kept separate from the personnel file.**

Do's and Don'ts

Do: Acknowledge in writing receipt of any complaints or reports of misconduct

Do: Investigate complaints and reports of misconduct warranting significant discipline

Do: Investigate complaints of employee mistreatment

Do: Comply with all applicable policies and procedures

Do: Comply with all applicable collective bargaining agreements

Do: Ensure that your union employees are provided union representation during interviews if requested

Do: Document every step of the investigation

Do: Understand that your investigator may become a witness to future court or administrative proceedings

Do: Attempt to complete the investigation in a timely manner, and certainly within the time frame provided by applicable policies, procedures or collective bargaining agreements

Don't: Discipline an employee who refuses to incriminate himself or herself in the absence of a Garrity warning

- Don't: Forget to remind all complainants and interviewees that company policy prohibits retaliation against them***
- Don't: Forget to ask interviewees to keep the investigation and any information provided confidential***
- Don't: Threaten to discipline anyone for discussing the underlying conduct in general terms***