

Documentation Best Practices: Retention, HR Files, Pay Data Reporting

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Document...Document...Document



Avoid or
Minimize
Legal
Liability



Improve
Morale



Improve
Factual
Basis for
Decisions



Set
Example



Demonstrate
Company
Commitment
to Enforce
Policies



Document...Document...Document

1. Initial complaint
2. Preliminary interview with complainant
3. Emergency interim steps
4. Decision to conduct formal investigation
5. Planning the investigation
6. Conducting interviews
7. Documenting the process and result
8. Arriving at a conclusion
9. Making a recommendation to management
10. Implementing investigation results
11. Follow up



INVESTIGATION PROCESS

- **Initial Complaint:**
 - What constitutes a complaint?
 - Take all complaints seriously
 - Methods of complaints
 - Supervisory knowledge of alleged violations
 - Anonymous complaints

INVESTIGATION PROCESS

Initial Complaint:

- **Even when employee requests no action, employer must respond**
 - “Off the record” reports count for this requirement
- **Even when there is no “complaint” the employer must investigate**
 - Just witnessing the conduct is enough to require a response by the employer



INVESTIGATION PROCESS

 report of harassment must be investigated.

- A. Some
- B. Only written
- C. Only formal
- D. Every



INVESTIGATION PROCESS

Initial Interview of Complainant:

- **Don't try to investigate the complaint yourself; report the matter to Human Resources immediately.**



INVESTIGATION PROCESS

Initial Interview of Complainant:

DO

- **Do** Listen
- **Do** Acknowledge
- **Do** Maintain confidentiality
- **Do** Follow up
- **Do** Monitor the worksite

DO NOT

- **Don't** Agree
- **Don't** Promise confidentiality
- **Don't** Promise to fix
- **Don't** Ignore complaint
- **Don't** Treat employee differently
- **Don't** Retaliate



INVESTIGATION PROCESS

- **Possible Interim Emergency Steps:**
 - Imminent danger to health, safety, property, environment or personal dignity
 - Allegations of violence, threats of violence, certain harassment, retaliation, whistleblowing, criminal acts
 - Options for immediate actions



INVESTIGATION PROCESS

- **Is a Formal Investigation Necessary?**
 - Human Resources vs. outside investigator
 - Able to handle internally?



PLANNING THE INVESTIGATION

- **Who will be involved?**
 - Human Resources? Outside consultants/counsel?
 - Department manager?
 - Company executives?
 - Direct supervisor?
 - Union?



PLANNING THE INVESTIGATION

- **Logistics Checklist**
 - Who “owns” the investigation?
 - Who should be interviewed?
 - Time, date, location, order of interviews?
 - Union issues?
 - Notification to witnesses?
 - Preparing, and anticipating questions



PLANNING THE INVESTIGATION

- **Important to strategize to collect as much information as possible**
 - Review personnel files of those involved
 - Collect as much information as you can before interviewing anyone
 - Consider leaves of absence for affected employees
 - Search electronically stored information (e.g., emails)
 - Notify internal team of complaint
 - Decide who will be conducting interviews and when?



PLANNING THE INVESTIGATION

- **Required Statements for All Interviews**
 - Limited confidentiality
 - Duty to investigate
 - Role of investigators
 - Investigation process, timing
 - No retaliation
 - Confirm no bias
 - Cooperation
 - Contact information



INTERVIEWING THE COMPLAINING PARTY

- Remain OBJECTIVE and set tone for investigation
- Get written statement or have complainant sign statement you prepare
- Ask the 6 QUESTIONS (who, what, when, where, why, and how)
- Determine if incident was isolated or series of events
- Get SPECIFICS!
- Identify witnesses

INTERVIEWING THE COMPLAINING PARTY

- Discuss confidentiality of process
- Discuss anti-retaliation policy and provide copy of policy if necessary
- Discuss what complainant seeks from investigation, but avoid giving opinions
- Never agree to forego or limit an investigation, even if requested by complainant





INTERVIEWING THE ACCUSED

- Remain OBJECTIVE
- Ask the 6 QUESTIONS
- Provide opportunity for accused to give any potential explanations or alibis
- Obtain written statement
- Buddy system for interviews—have a witness with you to take notes.



INTERVIEWING WITNESSES

- If current/former employee, review personnel file before interview
- Inform witness that interview is confidential and that breach of confidentiality will result in disciplinary action
- Be alert to privacy rights of both complainant and accused
- Remain OBJECTIVE
- Provide details of the complaint only if necessary to obtain relevant information



INTERVIEWING WITNESSES

- Phrase questions so as not to give unnecessary information
- Do not automatically limit the investigation to witnesses currently employed. Include former employees, friends, relatives, etc., of both complainant and accused, if necessary
- Employer's failure to keep investigation confidential can lead to claims for defamation or invasion of privacy

INTERVIEWING SUGGESTIONS

- **Opening and Closing Statements**

- “I’m here to look into some allegations that have been made.”
- “I want to understand what you have seen or heard.”
- Participation is voluntary
- Limited confidentiality
- Anti-retaliation





INTERVIEWING SUGGESTIONS

- **Explain Role of Each Investigator**
- **Treat Interviewee with Dignity**
- **Questions**
 - Open-ended and broad
 - Chronological
 - Tough or embarrassing questions
 - Then go to specifics



INTERVIEWING SUGGESTIONS

- **Issue of leading questions**
- **Allow silence**
- **Special situations**
 - “He said, she said,” uncooperative witness, etc.
- **Review notes and documentation issues**
- **Witness statements**
 - Complete, accurate, contemporaneous



INTERVIEWING SUGGESTIONS

- **Closing Statement**
 - Anything else I should know?
 - Any other documents I should review?
 - Anyone else I should speak with?



INTERVIEWING SUGGESTIONS

- Look for contradictions
- Consider the interviewee's motives
- Be curious. Leave no questions unanswered
- No group interviews
- Provide adequate time
- Ask about other witnesses
- Take notes (may be discoverable in the future)
- Consider written statement or signed interview summary

AFTER INTERVIEWS

- **Make a Decision**

- Evidence
- Credibility
- Previous behavior
- Logic and consistency
- Applicable policies
- Compare notes
- Testimony of multiple interviewees
- Re-interview witnesses, or interview new ones
- “Cannot include infraction/violation occurred” as a conclusion





AFTER INTERVIEWS

- **Consider Whether to Take Corrective Action**
 - No discipline
 - Written discipline up to, and including termination
 - Training
 - Demotion, suspension and changes in rates of pay



AFTER INTERVIEWS

- **Risk Management Considerations**
 - What have we done in the past, (e.g., prior violations of policy)?
 - What risk factors/protected categories do the parties belong to?
 - What operational considerations do we need to consider, (e.g., transfers, office culture, etc.)?



WRITTEN REPORT

- **Purpose of the Written Report**
 - Evidence of a immediate and appropriate response by employer
 - Accurately document the investigation conducted
 - Provide decision-makers with facts, policy and analysis needed to decide further action
 - Ensure a successful and effective investigation
 - Defend the investigation outcome



WRITTEN REPORT

- **Organization and Content**
 - Factual issue
 - Relevant policies/procedures of the Company
 - Evidence
 - Analysis
 - Conclusion



WRITTEN REPORT

- **Beginning**

- Executive Summary
- Complainant Summary
- Investigation Summary
- Conclusion Summary

- **Middle**

- Factual Background
- Scope of Investigation
- Evidence Considered
- Analysis of Evidence

- **End**

- Findings of Fact
- Conclusion
- Sign & Date
- Exhibits



WRITTEN REPORT

- **Analysis of the Evidence**
 - Acknowledge positions of each party
 - Describe evidence in support of each position
 - Identify the facts
 - Weigh the facts
 - Dismiss irrelevant facts
 - Address credibility of disputed facts



WRITTEN REPORT

- **Assessing Credibility**
 - Consider
 - Inherent plausibility
 - Timeline of events
 - Corroborating evidence
 - Actual knowledge
 - Objective factors
 - Avoid behavioral interpretations



WRITTEN REPORT

- **Reach Your Conclusions**
 - More likely than not that alleged conduct occurred
 - More likely than not that alleged conduct did *not* occur
 - Some of the alleged conduct occurred; some did not
 - Unsubstantiated / inconclusive / cannot determine either way



What Makes A Good Report?: The “3 C’s”

1. Clear

- Language
- Logic

2. Complete

- Documents all aspects of investigation
- Addresses/resolves all issues

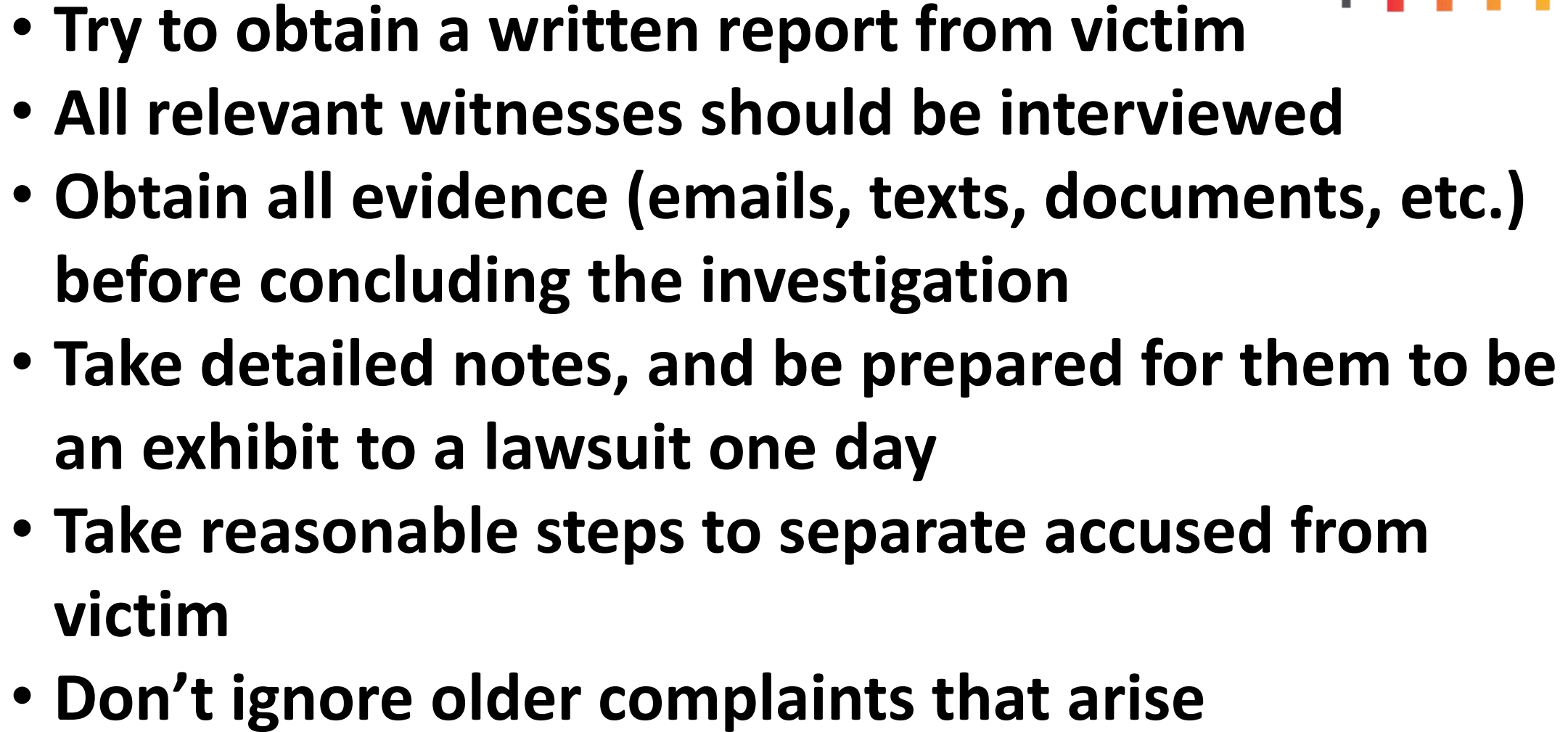
3. Concise

- Direct, succinct
- In “plain English” and easy to read



WRITTEN REPORT

- **Pitfalls to Avoid**
 - Failing to consider audience
 - Unresolved biases
 - Failing to resolve contradictions or conflicting statements
 - Working towards one conclusion (confirmation bias)
 - Making promises or reassurances

- 
- **Try to obtain a written report from victim**
 - **All relevant witnesses should be interviewed**
 - **Obtain all evidence (emails, texts, documents, etc.) before concluding the investigation**
 - **Take detailed notes, and be prepared for them to be an exhibit to a lawsuit one day**
 - **Take reasonable steps to separate accused from victim**
 - **Don't ignore older complaints that arise**

Consistently enforce policy

- **Take action sufficient to ensure the behavior is not reasonably likely to occur again**
 - ✓ Verbal warning
 - ✓ Written warning
 - ✓ Professionalism training
 - ✓ Performance plan
 - ✓ Suspension
 - ✓ Demotion
 - ✓ Termination
- **Do not go easy on high-performing or high-ranking employees**



Thank You!

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