

INVESTIGATIONS UNPACKED

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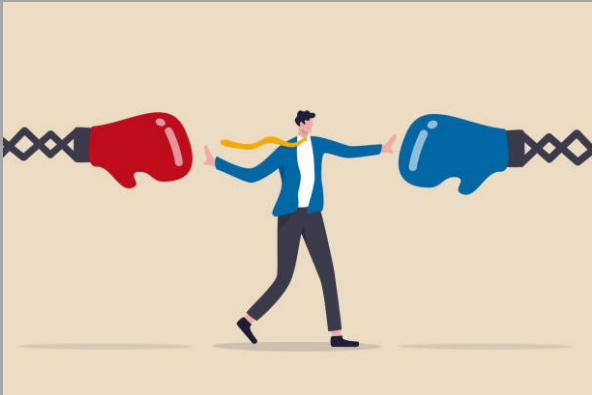


Legal Disclaimer

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with legal counsel for individual responses to questions or concerns regarding any given situation.

CONFLICT MANAGEMENT



Workplace conflict is inevitable, but it can and should be addressed

- What is the employer's role in managing workplace conflict?
 - Fostering a culture designed to prevent conflict
 - Encouraging strong employee relations
 - Facilitating fairness, trust, and respect among all employees
 - Addressing workplace issues and complaints
 - Mitigating/managing risk and threats of liability
- Number of reasons why conflict can exist in the workplace
- A workplace investigation is one of the many tools that you should deploy to resolve workplace conflict



PRE-INVESTIGATION

- Don't wait for a formal complaint. If you suspect or have informal knowledge that misconduct is occurring, initiate an investigation.
- At the preliminary/pre-investigation stage consider whether to:
 - Place accused on immediate leave.
 - Temporarily transfer employee(s).
 - Change supervisory responsibilities.
 - Be concerned about a safety issue.
- Do preliminary search of available records.
- Plan for the investigator to focus on the investigation over the next few days.



PREPARE A STRATEGY FOR THE INVESTIGATION

- Include a timeline.
- Include a chronology of witness interviews.
- Schedule sufficient time for note-taking between interviews.
- Prepare an outline of questions.
- Consult company policy and any union or arbitration agreements for possible restrictions or specific procedures.
- Consider consulting with an attorney.



POTENTIAL LIABILITY



Improper investigations can generate more liability than they mitigate

- Breach of contract
- Invasion of privacy
- “False light” disclosures
- Defamation
- Eavesdropping and wiretapping
- False imprisonment
- Intentional infliction of emotional distress
- Wage and hour claims
- **Discrimination, harassment, and retaliation**
- **Failure to prevent discrimination, harassment, and retaliation**
- **Negligent hiring, supervision, and retention**
- **Wrongful termination**



Step One

DETERMINE WHETHER TO INVESTIGATE

Consider whether you are required by law to investigate or whether you should investigate

- **Required investigations:** Federal and state law require employers to investigate:
 - Complaints about unlawful harassment, discrimination, or retaliation;
 - Potential/threatened workplace violence;
 - Potential safety hazards and/or violations; and
 - If the investigation is required by contract.
- **Optional investigations:** Other misconduct, including, but not limited to:
 - Alleged petty theft, damaged property, timesheet fraud, off-the-clock work, etc.
- **Difficult situations:** What do you do if...
 - An employee makes a complaint, but tells you not to do anything
 - E.g., *“I am having some problems with Mark, but please don’t do anything.”*
 - You observe potential misconduct or suspicious activity, but no complaints are made
 - Does the conduct suggest unlawful conduct?

Step Two

SELECTING THE INVESTIGATOR(S)

Different types of investigations require different investigators

Consider the following:

- An investigator's background, training, education, and skills should be appropriate to the type of investigation being conducted
 - Sexual harassment vs. financial misconduct
 - Safety violations vs. retaliation
- Authority of complainant or accused vs. authority of investigator
- Perception of bias; avoidance of conflicts of interest
- Potential investigators:
 - Human resources representatives
 - Management team members
 - Attorneys (in house counsel and outside counsel)
 - HR consultants
 - Private investigators
- Co-investigators; second chairs; backup investigators





Step Three

DEFINING THE SCOPE OF THE INVESTIGATION

What constitutes an “adequate” investigation?

- At minimum, an investigation must include:
 1. Notice to the accused of the claimed/alleged misconduct; **and**
 2. An opportunity for the accused employee to respond.
- Other standards include:
 1. Fairness
 2. Findings supported by substantial evidence
 3. Good faith belief in evidence
- Not required to interview all potential witnesses; but should interview witnesses with potentially relevant information
 - Follow leads/trails if potentially relevant to the investigation
 - Discover potential witnesses or sources of information
 - Consider the source’s potential for providing relevant information

Step Four

GATHERING EVIDENCE

Identify, locate, and preserve all relevant (and potentially relevant) evidence

- Potential evidence:
 - Documents/records
 - Letters, forms, papers, invoices, etc.
 - Things
 - Statements/testimony
 - Eyewitness accounts
 - Electronically stored information
 - E-mails, computer files, voicemails, text messages, GPS tracking, etc.
- DO NOT discount eyewitness accounts and witness statements
 - “He-said-she-said” does not necessarily mean you cannot reach a finding
- **Act promptly** to gather all relevant and potentially **relevant** evidence
- Gather and analyze tangible evidence **before conducting interviews** (if possible/feasible)

Step Five

CONDUCTING INTERVIEWS

The “heart” of the investigation

- Plan out interviews thoroughly and carefully
 - Remember! Goal is **to seek** truth; manage all parties’ biases
- Consider the order of interviews (sequencing)
 - Generally, interview complainant first, percipient witnesses next, and accused last
- Location
 - Neutral ground vs. supervisor’s office
 - Where will investigator be seated vs. interviewees
- Explain that the company has an obligation to investigate, interview is one step in the investigative process, company will not reach a decision without reviewing all relevant evidence, company will not retaliate against employee for participating in the investigation, please keep this confidential until after the investigation is concluded
- Re-interview; follow-up questions
- Maintain confidentiality to the extent possible
- Ask open-ended questions; limit leading questions



Step Five

CONDUCTING INTERVIEWS

Asking open-ended questions

- Open-ended questions allow the witness to describe the incident in their own words
 - Open-ended questions gather more information
 - Critically important when interviewing the accused
- Closed or leading questions, limit the scope of information that the witness can provide
 - Leading questions tend to prompt a “yes” or “no” response
 - Leading questions can “put words in the witness’s mouth”

Leading Question	Open-ended Question
<i>Did Mark threaten to punch you?</i>	<i>What did Mark say?</i>
<i>Did Mark grab your leg for 30 seconds?</i>	<i>How long was the physical contact?</i>

CONDUCTING INTERVIEWS

Tips for structuring interviews and formulating questions

General pointers for witness interviews:

- Begin with non-threatening questions (which you should generally already know the answer to)
 - Get comfortable, get interviewee talking, gauge truthfulness, establish a baseline for the witness's responses and behavior
- DO ask follow-up questions and “follow the trail”
- DO NOT assume responses
- DO ask the Five W's (who, what, where, when, and why)
- DO NOT stop at legal conclusions; DO NOT prompt legal conclusions
 - E.g., “*Samantha retaliated against me.*” (legal conclusion)
 - E.g., “*Were you sexually harassed?*” (prompts legal conclusion)
- DO ask the same questions different ways (“cross-questioning” or “restating”)



Step Five

CONDUCTING INTERVIEWS

Using “cross-questions” or “restating” questions

- Use cross-questioning to test the reliability/credibility of a witness’s story
- Cross-questioning is asking multiple questions about the same thing (restating your question)
- Use this technique for critical factual questions
- Sets the stage for the witness to either support or contradict their prior statements
- **Here is what this might look like:**
 - *How long was your shift that day?*
 - *When did you clock in?*
 - *When did you clock out?*
- **Here is another example:**
 - *Where was Mark standing when John touched you?*
 - *Where were you and John in relation to Mark?*
 - *I’m not sure I am following—how close was Mark to the car?*



Step Five

CONDUCTING INTERVIEWS



Interviewing the complainant

Objective: Help the complainant to describe their story in their own words

- What happened?
- When (date, time, duration)?
- How many times?
- Where did it happen?
- Did anyone else see it happen?
 - What did they say? What did they do?
 - Where were they when this happened?
- Did you report this to anyone in management? What did they do?
- **Ask the uncomfortable questions, if relevant:**
 - Was there physical contact? Can you describe it?
- **Conclude with a catch-all question:**
 - E.g., *“Is there anything else you want to tell me?”*

Investigation Statement

Date & Time:		Date of Hire:	
Employee Name:		Emplid:	
Job Title:		Department:	
HR Representative:		Supervisor:	
Employee Phone/Email:		Translated by:	

Explain the following to the employee:

1. You are looking into a complaint made. You are gathering facts and will take notes.
2. All information will be kept confidential to the extent it can. Only individuals who will address the situation or are involved will be given “need to know” information.
3. Tell the complainant that you will review the issue with HR Leadership to determine the next steps.
4. The nature of the issue will determine who will handle any investigation. All issues covered under any anti-harassment or other inappropriate behavior policies will immediately be reviewed with the VP of HR.
5. If you are not able to address the issue immediately, tell the complainant that you will let them know how the issue will be investigated, with a status update within 24 hours.

Please write details of the employee issue below (make sure you are listening and writing down the facts):

- 1. Question: Describe the issue or problem. Be specific, include location(s), date(s), etc. What happened, when, where, were there any witnesses?**



2. Question: Has this issue happened in the past? If so, how long?

3. Question: Have you discussed this issue with anyone? If so, who, when and why?

4. Question: Were there any witnesses? Or are there any written records, texts, emails related to the incident?

5. Question: Is there anyone else with similar concerns? What are those concerns?



6. Question: What other information/facts may be important for me to know?

7. Question: What do you want to see happen with this issue?

8. Thank you for bringing the issue to my attention. Our process is to gather all of the facts, speak with any witnesses and then review with the HR Leader to ensure that we treat the incident with fairness and are objective in finding a resolution. We will be in contact with you and will let you know who will be investigating this issue and once the investigation has concluded. We ask that you not speak with anyone else about this incident. Reminder, we have a non-retaliation policy. Does this process seem appropriate for you?

The above is a correct representation and statement from employee, _____, of what was discussed with the HR Representative.
(Print Name)

Employee Signature: _____

Date: _____

Human Resources: _____





Step Five

CONDUCTING INTERVIEWS

Exercise—interviewing the complainant

A supervisor, Tim, tells you that an employee named Daisy has recently complained to him about another supervisor named Mark. According to Tim, Daisy says “Mark sexually harassed her.”

Specifically, Daisy alleges that Mark, her supervisor, has been sending her unwanted text messages for the past two years.

Daisy further alleges that this past week, Mark grabbed her butt while she was getting into her truck.



Step Five

CONDUCTING INTERVIEWS

Interviewing witnesses

Objective: Determine the extent to which the witness perceived the incident in question; gather information that can corroborate or refute the complainant's story

- What did you witness?
- When did this happen?
- Where did it happen?
- Where were you when it happened?
- Who was involved?
- What did they do?
- What did you do?
- Did anyone else see the incident?
- Did you tell anyone about what you saw?
- **Conclude with a catch-all question:**
 - E.g., *“Is there anything else you want to tell me?”*



Step Five

**CONDUCTING
INTERVIEWS**

Exercise – interviewing witnesses

During your interview with Daisy, she tells you that the physical contact occurred in the parking lot while everyone was leaving for the day. Daisy says that there were roughly 15 employees in the parking lot that day. Daisy also says that Samantha, a coworker who is also supervised by Mark, witnessed the incident because Daisy and Samantha walked out to the parking lot together that day.

Daisy thinks that John, another coworker who is supervised by Mark, might have witnessed the incident because John usually parks next to Daisy.

You know from experience that Samantha and Daisy are close “work” friends.

Step Five

CONDUCTING INTERVIEWS

Interviewing the accused

Objective: Provide the accused with an opportunity to present their side of the story

- Pointers:
 - Avoid forming an opinion prior to interviewing the accused
 - Pay attention to biases that may affect your judgment
 - Focus on building rapport with the accused
- Potential questions:
 - What happened?
 - Is there any reason anyone would lie about the incident?
 - Where were you when the alleged incident occurred?
 - Were there any witnesses that can corroborate your whereabouts?
 - Is there any evidence to support your side of the story?
- **Conclude with a catch-all question:**
 - E.g., *“Is there anything else you want to tell me?”*



Step Five

CONDUCTING INTERVIEWS

Exercise—interviewing the accused

During your interview with Samantha, Samantha said that she remembers walking out with Daisy on that day and thinks that Mark might have been near them. However, Samantha did not see Mark touch Daisy (although she said that would not surprise her because “Mark is a creep”).

During your interview with John, John said he does not remember Mark being in the parking lot that day. However, John did say that on several occasions, he has seen Mark staring at Daisy. Further, John said that Mark frequently tells inappropriate sexual jokes, but only when it is “just the guys.”

Neither Samantha nor John know anything about the alleged text messages.

REACHING A DECISION

Weigh credibility, consider degree of relevancy, analyze relevant and credible evidence, and decide course of action

- Prepare the investigator's report:
- In weighing witness credibility, consider the following:
 - Inherent plausibility
 - Motive to lie
 - Corroboration
 - Witness's ability to perceive, recall, and communicate
 - History of honesty/dishonesty
 - Inconsistent statements
 - Demeanor (however, be careful how much you rely on this factor)
- Management decides the course of action after reviewing the investigator's factual findings

REACHING A DECISION

Preparing the investigator's report

- In preparing the investigator's report:
 - Be objective, neutral, and concise
 - Support factual findings with evidence
 - Do not reach a legal conclusion
 - Anticipate being cross-examined in subsequent litigation
 - Demonstrate the adequacy of the investigation by describing the investigation in the report (describe the investigation "roadmap")
 - Includes dates, times, durations, names, statements, documents, etc.
- Sample summary of findings:
 - *Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.*



Step Six

REACHING A DECISION

Exercise—preparing the investigator’s report

During your interview with Mark, Mark strongly denied touching Samantha in any way that day and initially denied being in the parking lot. However, after several questions, Mark admitted to being in the parking lot on the day in question. Mark also admitted to texting Daisy one time (over a year ago) to ask her to dinner, but he says that he never text her again once she declined his offer.

Mark admitted to telling sexual jokes to his coworkers, but said that he “never tells those jokes around the girls.”

Prepare your summary of findings.

A+ Farms

California Operations

DATE: January 10, 2025

DRAFTED BY: Snow White, Human Resources Manager

RE: Unprofessional Conduct in violation of Company Policies

Overview of Incident

On January 2, 2025, around 10:00am, Donald P. Duck, Farm Manager, called the HR Office to discuss an issue that had come up in his A+ Farm District. He called me to report that one of the employees for the contractor (FLC Supreme) reported that he was being harassed by the crew boss and was afraid to come forward due to retaliation. This complaint triggered an investigation by both the A+ Farms and FLC Supreme teams. Below is our findings and recommendations:

Complaint concerning Oscar Del Angel included the following:

1. Violation of J. G. Boswell's harassment and retaliation policy.
2. Violation of the Code of Conduct policy.
3. Violation of Close Relationships policy

Complaint concerning Gaston included the following:

1. Violation of the company's harassment and retaliation policy.
2. Violation of the Code of Conduct policy.
3. Violation of Close Relationships policy

Interviews Conducted

Between 01/02/2025 through 01/03/2025, Snow White conducted interviews with:

1. 01/02/2025 – Employee #1, Humberto (FLC Supreme Employee)
2. 01/03/2025 – Employee #2, Mickey Mouse, (FLC Supreme Employee)
3. 01/03/2025 – Employee #3, Buzz Lightyear, (A+ Farms Employee)
4. 01/03/2025 – Employee #4, Gaston, (FLC Supreme Crew Boss)

All of the above interviews took place in person with Snow White as interviewer and Goofy, FLC Supreme representative.

Snow White drafted all statements and provided to each employee for their review and signature.

Summary of Findings

Here are the findings based upon the interviews conducted:

1. Violation of Sexual Harassment Prevention by FLC Supreme Crew boss, Gaston, despite having completed trained about the company's zero tolerance policy for harassment in the workplace on 12/17/22 and 12/6/24. He recently received the mandatory 2-hour

2. Unprofessional Behavior: Gaston telling employees he will do what he wants, telling employees the more someone makes a request, the less they will get it, Not making attempts to help employees understand how decisions are made.
3. General perception of retaliation when employees speak up/report concerns in the form of crew assignment, not rotating them in jobs/crews.

Conclusion of Findings

Violation of the Company Harassment and Retaliation Prevention Policy

Violation of the Code of Conduct policy

After completing the investigation, the information collected strongly indicates that Gaston has participated in and allowed for inappropriate comments of a sexual nature to occur in the workplace.

Recommendations

Based upon all the evidence reviewed, we make the following recommendations:

1. Terminate Gaston's employment effective immediately.
2. Meeting with employees to retrain on the company's harassment prevention policy.
3. A debrief should occur between the Manager and his direct reports so expectations can be established to avoid similar incidents in the future. Details of the investigation should not be shared, but general terms should be communicated as to what behaviors will not

Step Seven

DETERMINING DISCIPLINE

Management should consider several factors

Consider such factors as:

- Seriousness of the incident and circumstances
- Employee's past conduct
- Nature of any previous incidents
- General practice (customary practice) as it relates to the incident
- How employees in similar situations were disciplined in the past
- Has there been any recent training related to this type of situation



Step Eight

COMMUNICATE THE RESULTS

Generally, only communicate results on a need-to-know basis

- Who needs to know?
 - At minimum, the complainant and the accused
 - Possibly the other individuals that participated in the investigation
 - Where the employer has a duty to prevent the complained-of conduct, e.g., harassment, the employer might disclose the results to a broader work group
 - If employee(s) were terminated, ensure security personnel are notified.
- Employers do not need to communicate the specific discipline imposed
 - Instead, advise employees that the company has taken steps to prevent any recurrence of the misconduct
- Opportunity to reinforce company policies
- Remind employees that the company prohibits retaliation



LET'S PRACTICE



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