

## **SEVEN NOT SO OBVIOUS TIPS FOR EFFECTIVE INVESTIGATIONS**

When an employee makes a workplace complaint of any kind, a thorough investigation is imperative to avert or prepare for any potential lawsuit. During a typical investigation an employer interviews the complaining and responding party and any outside witnesses. In certain instances, California law mandates an investigation as part of an employer's duty to prevent or cure workplace harassment. In many companies, in-house counsel or an HR representative conducts these investigations. However, at times an outside investigator is needed to perform the investigation to prevent a conflict of interest.

Commonly investigated complaints range from sexual harassment and discrimination to complaints of a "hostile work environment," which may result from personality conflicts and are not otherwise legally actionable. If investigated, these complaints and conflicts can actually protect the company from litigation and often assist in resolving conflicts among employees and improving the workplace environment and employee productivity. The following are seven tips that every human resource specialist should know about conducting investigations of workplace complaints:

### **1. INVESTIGATE EVERYTHING, EVEN PERSONALITY CONFLICTS**

Investigations can be used as a powerful tool to resolve workplace conflict. Companies should use investigations as a preventative tool to let employees know they - and their grievances - are being taken seriously, and to send the signal that inappropriate behavior in the workplace will not be tolerated. Investigating minor issues on the front end, instead of waiting until complaints are raised about blatantly unlawful conduct, minimizes lawsuits and workplace conflict.

### **2. SUPPORT YOUR FINDINGS WITH SPECIFIC DOCUMENTS**

After conducting an investigation, include everything that supports the central findings, particularly workplace policies and written reports of witnesses, in a final report. The preparer of the report should cite to any specific policies that were potentially violated, and quote verbatim from a witness interview or report whenever possible. The goal is to be a neutral, fact-finding party, so relying on external documents to support the central finding adds credibility and impartiality.

### **3. AVOID CONFLICTS OF INTEREST BY HIRING AN OUTSIDE INVESTIGATOR**

When possible, hire an expert to conduct the investigation in order to save time and money, and to prevent potential conflicts of interest in the long run. HR personnel or policies may become the focus of the investigation and hiring an outside investigator prevents that from becoming a conflict of interest. Professional investigators will also generally get the job done quicker and more efficiently.

Hiring an investigator that is also a licensed attorney is ideal. The California Business and Professions Code requires that investigators be licensed. Hiring an attorney satisfies that requirement and means that an investigation can be defended in a court of law. Employment attorneys also know the kinds of facts that determine liability. Keep in mind, however, that an attorney who is involved in interviewing witnesses may be called as a witness if litigation ensues so it is vital to have an outside attorney (as opposed to your advising counsel) do the investigation.

#### 4. ALLOW FOR SILENCE

There is a strong temptation during an investigation to keep the stream of conversation going. Popular thought suggests that making the witness more comfortable means capturing more information. However, investigators should allow for silence during an investigation. Silence often accompanies deep thought, recall, or hesitation. Jumping in too soon will influence the witness or interrupt his stream of thought. The pause itself is often an indication that the witness has more to say, so allow him time to find the words.

#### 5. CONSIDER THE CULTURAL BACKGROUND OF YOUR INVESTIGATOR

Consider the cultural environment of your workplace and hire an investigator who is familiar with it. For example, if you have a Spanish-speaking population in your workforce, finding a bilingual investigator may allow you to capture the kind of nuances that can prove critical to a successful investigation. Likewise, a female complaining of sexual harassment may be more comfortable talking with a female investigator. Above all, hire an investigator who is comprehensive, objective, fair, and professional, and obtain confirmation from the employee that she or he is comfortable with the assigned investigator.

#### 6. ASK DETAILED QUESTIONS WHEN INTERVIEWING AN UNCOOPERATIVE WITNESS

Investigators generally question witnesses as if conducting a direct-examination (i.e. using softball questions broad in scope); however, investigators should ask detailed questions in cases of an uncooperative witness. An uncooperative witness may be more willing to verify or negate one small piece of information at a time as opposed to drawing broad conclusions. Take details already learned from other witnesses and question the uncooperative witness about each detail individually, as opposed to expecting a hostile witness to give you the main facts about an incident.

#### 7. INTERVIEW THE WITNESS WHEREVER SHE WILL BE MOST COMFORTABLE

Consider interviewing your witness in an unorthodox setting (i.e. not at the office) if needed. Setting may affect the quantity and quality of the information you receive. Find a place where your witness will be comfortable and conduct the investigation there. Interviewing a witness at her home, for example, may make sense when the complainant is reluctant to divulge information about another employee.

*Diana Maier, a member of the NCHRA Legislative Committee, is an employment attorney who practices in San Francisco and conducts investigations into all manner of workplace complaints. She graduated from Stanford Law School in 1998 and has been practicing trial and employment law since that time. She opened up her own employment practice in 2003 to emphasize affordable, preventative legal advice for employers. She is a fluent Spanish-Speaker.*