

## EMPLOYMENT LAW

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*Glenn Duhl provides a step by step process to best investigate workplace harassment complaints.*

## How to Conduct an Effective Harassment Investigation

### ABOUT THE AUTHOR



**Glenn Duhl** is a shareholder of Zangari Cohn Cuthbertson Duhl & Grello P.C., representing management in defense of employment law and litigation matters. He is an experienced aggressive litigator who zealously represents his clients in trials before federal and state court judges, juries and arbitration proceedings. Representative matters include breach of contract, wrongful termination, discrimination, defamation, trade secret misappropriation, restrictive covenants, wage and hour, emotional distress, sexual harassment and class / collective action litigation.

Glenn is a member of the IADC Employment Law Committee. He serves as author and contributing editor for numerous ABA employment law publications (ADEA, FMLA, FLSA, CT Wage & Hour, At Will Employment), and teaches substantive and procedural employment law and litigation seminars to fellow lawyers and employers (disability accommodations, human resource policies and practices that prevent lawsuits, advanced employment law, e-discovery, winning at trial). He may be reached at [gduhl@zcclawfirm.com](mailto:gduhl@zcclawfirm.com).

### ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

An employer's internal investigation of a harassment complaint often determines whether there will be a lawsuit filed and what the employer's potential exposure will be. Employers should follow this eleven step process after receiving a complaint of harassment.

**STEP ONE: INTERVIEW THE COMPLAINANT.**

First, obtain the complainant's story. Be sure to define each offensive act or statement, establish a chronology of events and ask the complainant for *facts* to support conclusory statements (i.e., "what words did s/he say that made you feel uncomfortable?"). Also, ask for and/or confirm the identities of all witnesses or persons with knowledge and secure an explanation of the scope of their knowledge. This is also the first opportunity to gather physical evidence and documents. Obtain copies of all emails, text messages, notes, memoranda, diary entries, records, photos and all other physical evidence. In addition, begin to evaluate potential damages. Determine whether the complainant missed work, incurred any unreimbursed medical or other expenses as the result of the alleged harassment. Throughout the interview, *AVOID GIVING THE IMPRESSION THAT YOU EITHER BELIEVE OR DISBELIEVE THE COMPLAINANT.* At the conclusion of the interview, review the points contained in your notes with the complainant to confirm accuracy and completeness.

**STEP TWO: MEMORIALIZE THE COMPLAINANT'S FACT STATEMENT.**

Following your interview with the complainant, take time to document the complainant's fact statement. Prepare a memorandum documenting the complainant's allegations; use a chronological format and include references to the identities of witnesses, physical evidence and claims of damages. After completing it, ask the complainant to review it and make any desired changes. Then, have the complainant sign and return the statement.

**STEP THREE: INTERVIEW THE ALLEGED OFFENDER(S).**

Now it is time to get the other side (or another side as witnesses may have a different version of the events than either the complainant or the accused). Inform the accused that a complaint has been filed, which the employer is investigating under its harassment policy. As when interviewing the complainant, inform the accused that the employer has formed no opinion about the allegations and the investigation is being conducted in a fair and unbiased method.

At the start of the interview, provide the accused with a copy of the complainant's statement. Permit sufficient time for the accused to study it and respond. (NB: There is no right to counsel or any other assistance during an internal investigation, although unionized employees are entitled to have a

representative present.) Ask the accused to respond to each factual allegation by admitting, denying and/or explaining. As with the complainant, ask the accused to identify all witness(es) who might support the accused's version of events to the extent it differs from the complainant's. If the accused denies the complainant's allegations, seek alternative explanations (i.e. "could s/he have misunderstood you?"). Then, instruct the accused not to contact the complainant or any identified witnesses about the complaint because such conduct could be viewed as unlawful retaliation. Warn the accused that any such conduct reported by the complainant and confirmed by subsequent investigation could lead to discharge.

**STEP FOUR: OBTAIN A WRITTEN STATEMENT FROM THE ACCUSED.**

As with the complainant, give the accused the opportunity to submit a written statement summarizing his/her position and identifying each person who would corroborate his/her version of events.

**STEP FIVE: REVIEW THE WRITTEN STATEMENTS.**

Review the written statements of both the complainant and the accused; identify points of agreement and disagreement. Separately list facts in dispute for continuing investigation.

**STEP SIX: RE-INTERVIEW THE COMPLAINANT.**

Re-interview the complainant to discuss the accused's version of events. Highlight any facts in dispute and ask the complainant to respond.

**STEP SEVEN: INTERVIEW FACT WITNESSES.**

Interview witnesses offered by the complainant and the accused. Inform each witness about the general nature of the investigation, that s/he has been named as a witness, that the investigation is confidential and information shared during the interview must remain confidential, and that unauthorized disclosure of information shared could result in disciplinary action. Start with open-ended questions about the complaint of harassment: Is the witness familiar with the employer's policy prohibiting harassment? Has the witness ever observed any violations of the policy? If yes: Who? What? When? Where? Witnesses? Next, identify the complainant and relate what s/he has said that would be within the witness's knowledge. Ask the witness to respond with any information s/he may have. Follow up with more pointed questions, particularly with respect to disputed facts. If credibility is an issue, ask whether the complainant or the accused would have any reason to provide inaccurate or misleading information. At the close of the interview, review the information provided by the witness, point by point. Ask the witness to sign your notes of the interview and to make additions or deletions

as are appropriate to ensure that the statement accurately reflects his/her understanding of events.

**STEP EIGHT: REVIEW AND DETERMINE THE RESULTS OF THE INVESTIGATION.**

After interviewing witnesses and investigating the claim, meet with management, human resources and/or counsel to review the results of the investigation. Determine if further investigation is required, and if not, how to conclude the investigation. Focus on two questions: **(1) What occurred?** That is, what actually happened? This is a determination of fact based upon the information uncovered during the investigation; it can involve credibility assessments. (NB: The employer is entitled to rely upon information obtained during its investigation, even if that information later is proved to be inaccurate, so long as the employer had a *good faith basis* for its belief.) **(2) Do any of the events that occurred constitute harassment in violation of law and/or the employer's policy?** Best practices are to make this determination in consultation with counsel.

**STEP NINE: IF THE INVESTIGATION REVEALS THAT HARASSMENT OCCURRED IN VIOLATION OF THE EMPLOYER'S POLICY, DETERMINE (AND IMPOSE) APPROPRIATE DISCIPLINARY ACTION.**

If the investigation reveals that harassment occurred, the employer is required to take action reasonably calculated to end the

harassment. Review human resource case histories to determine what discipline has been used in the past for similar infractions, and use similar disciplinary actions if they proved effective in promptly remediating the complained of conduct. If there is a lack of historical precedent, determine the seriousness of the offense in light of the facts and circumstances. Serious and repeat offenders should be disciplined most harshly, particularly if there has been a prior warning. Although a first offense need not necessarily result in discharge, employers need to be aware that courts and juries will judge the discipline by its effectiveness in eradicating the harassment. A warning letter may have little effect. If the harassment continues, the employer may be held strictly liable for failing to adopt the right course of action. Transfer of the offender may be an acceptable remedy. Transfer of the complainant is not, unless the complainant requests it. If you have questions or are uncertain about what disciplinary action is appropriate, consult counsel.

**STEP TEN: COMMUNICATE THE RESULTS OF THE INVESTIGATION.**

After determining the appropriate action, communicate the results of the investigation to the parties (the complainant and the accused), and to the parties' superiors. Prepare a script for separate face to face meetings with the complainant and the accused. Summarize the nature of the charge, the scope of the investigation, the findings and the reasons for them. Any

written communications should be reviewed with counsel *prior to delivery* to ensure that all statements are supportable factually and that no admissions are made that could injure the employer's legal position vis-à-vis either the complainant or the accused.

If the investigation results in a finding that harassment did *not* occur: Care must be taken in how that result is communicated to the complainant. In no event should you belittle the complainant or accuse him/her of providing false testimony about the accused (unless definitively established and cleared with counsel). Assure the complainant that your policies guarantee a workplace atmosphere free from unlawful harassment and the right to bring a complaint of harassment at any time s/he feels that guarantee has been violated.

If the investigation results in a finding that harassment *did* occur: In the event harassment is found, a management team should meet with the offender to communicate the findings, request any rebuttal information that s/he seeks to have addressed, and to communicate the disciplinary action the company has elected to impose. The offender should be charged strictly with avoiding any conduct that could be perceived as retaliatory such as accosting, calling or writing to the complainant, or otherwise encouraging third parties to harass the complainant because of his/her complaint.

The employer need *not* inform the complainant what disciplinary action has

been taken in the event that harassment is found to have occurred. The complainant should be thanked, however, for bringing the issue to management's attention so that it could be promptly investigated and effectively resolved. The complainant should be informed that the offender has been directed to take no retaliatory action against him/her and that if such retaliation does occur it should be reported immediately to management for prompt follow-up.

The results of the investigation should also be communicated to key managers and officials in human resources and parties' superiors in a confidential management meeting. Instruct managers what—if anything—to say to subordinates. Where the accused is exonerated by the investigation, managers should be instructed to so state if asked. Where harassment did occur, managers should inform subordinates that the employer conducted a confidential investigation and took appropriate steps to eliminate any unlawful discrimination.

Consider providing remedial training to supervisors and subordinates, reinforcing company policy prohibiting harassment and retaliation, and reinforcing the employer's intent to strictly enforce the policy with appropriate disciplinary action.

**STEP ELEVEN: CLEAN UP THE FILE.**

Complete a report detailing the investigation. Ensure that essential exhibits



(documents, meeting notes, witness statements, emails, etc.) are maintained. Refer notes to counsel for review (preferably prior to any administrative charge or judicial proceedings). To be sure, a timely, comprehensive investigation will be well worth the effort and will be the best means to avoid costly and potentially embarrassing results.

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