

Electronic Alert

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Happy New Year! It's Time to Review Policies & Procedures for Workplace Complaints

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Now that 2020 is (finally) over, the new year is a perfect time to re-evaluate how you handle employee complaints of harassment or other misconduct. The ongoing COVID-19 pandemic has changed how many employees work, and while some forms of complaints have become temporarily less prevalent, other complaints have arisen. Further, as employees return to work or settle into a new more permanent remote status, employers would do well to expect a resurgence of workplace complaints.

How an employer responds to a complaint is extremely important. Just last month, the EEOC fined two employers amounts in the six figures for harassment claims that may have otherwise been avoided if the companies had conducted proper investigations.

Everyone hopes that their workforce is happy and functioning appropriately, but when a complaint arises, it is important that you are prepared and that your managers are well trained on how to appropriately respond.

Although receiving a complaint can often feel like a problem, there is a positive aspect that comes with it. The underlying issue exists independent of a complaint, and an employee coming forward provides you an opportunity to respond and handle the situation. Receiving a complaint allows you to both (a) shield yourself against liability from some claims by raising an affirmative defense that reasonable steps were taken to stop and prevent any alleged harassment, and (b) provide you with a solid record on which you can base disciplinary action.

In order to properly address a complaint and take advantage of the silver linings, it is important that you respond promptly, conduct a thorough and fair investigation, and take reasonable action based on the results.

a. **Receiving a Complaint**

Managers and supervisors are often the first to hear a complaint or the preceding concerns, and are the first to have an opportunity to address problematic behavior. It is important that managers and supervisors treat all complaints seriously. It is not the time to complain about receiving complaints or express opinions about the merits of it (or the complainant or the person accused of wrongdoing). Instead, a manager or supervisor should respond to a complaining employee promptly, thanking them for coming forward and expressing how seriously the organization takes complaints. They should also state that the organization will follow up throughout the process and at the conclusion, and invite

questions about that process. Managers and supervisors may benefit from both formal training and informal conversation granting them the appropriate language and tools to respond.

After receiving a workplace complaint, the employer must evaluate whether an investigation is warranted. Some employers investigate all complaints, which helps demonstrate how seriously the company takes them. Although not every complaint necessitates a full investigation, the employer should minimally review the allegations and determine if true, if the alleged conduct violates company policy. An investigation is particularly important for any complaint which includes behavior that could potentially be unlawful or which could lead to disciplinary action for an employee.

But not every investigation begins with an employee complaint. It is important not to wait for an employee to complain if there is an issue that you are aware of. If an employer has heard rumors of behavior that if true would result in an investigation or disciplinary action, it should not wait for a formal complaint before initiating an investigation. Further, sometimes it is apparent that there is some issue in the workplace causing strife amongst employees without a specific cause being known. For example, there may be a history of small complaints between employees, or an employer may hear, either through a formal process like an annual review or through more informal conversation, that employees feel uncomfortable or unsatisfied, or refer to the workplace or coworkers as “toxic.” An investigation under these circumstances, particularly by an outside investigator with a more removed viewpoint, can help identify issues before they become larger problems and provide the insight necessary to put the workplace back on track.

b. Initiating the Investigation

If you chose to initiate an investigation, the next important step is selecting an investigator. Depending on the allegations, an internal investigator such as a human resources representative or in-house counsel may be sufficient. However, for particularly sensitive matters or complaints involving senior management, the specialized experience and greater impartiality of an outside investigator are necessary. This is especially true if there is a possibility that the complaint could eventually lead to litigation, as work done by an HR representative may become discoverable, and an in-house attorney cannot be the same attorney who conducts an investigation and represents the company in subsequent litigation. It should also be noted that Oregon employers cannot use an outside investigator unless they are a licensed attorney or licensed private investigator.

c. Conducting an Appropriate & Reliable Investigation

After you have decided that an investigation is warranted and chosen an investigator, the investigation itself involves reviewing documentation, interviewing witnesses, and writing a report that documents the findings.

The complainant is generally interviewed first, which helps ensure an appropriate scope for the investigation is set, followed by other relevant witnesses and the subject of the investigation last. Each interview should start with a brief explanation of the complaint and the investigator’s role, as well as a description of the investigatory process, a reminder of the company’s policies against retaliation for involvement, and a note regarding the limits of interview confidentiality. The investigator will ask each witness about key facts from their personal knowledge, using open-ended questions. Depending on the scope of the investigation, this may also include more generalized questions about the workplace and observed behaviors of other employees.

The investigation report documents the investigatory process, the evidence reviewed during the investigation, the analysis of documents and facts gathered from witnesses, and conclusions reached

in each element within the scope of the investigation. This may involve making credibility determinations if necessary. This written record allows decision-makers to separately determine the appropriate outcome and next steps after the investigation.

d. Investigation Considerations in the COVID-19 Pandemic

In the midst of a pandemic, today more than ever employers are still trying to maneuver through the complexity of employee issues. Workplace investigations are no exception. Some employers are currently seeing a decrease of the more “typical” complaints as employees are working remotely, but other forms of complaints and issues are more prevalent now, such as OSHA concerns or complaints about COVID-19 and safety protocols. Furthermore, while it may be tempting to hold off on investigating some complaints that may have arose prior to the pandemic (whether due to an abeyance of the problem resulting from remote work or the restrictions of conducting an investigation during this time), it is important that employers timely and adequately respond to all complaints.

Conducting a remote investigation is entirely possible, and in some ways, is more convenient for employees and witnesses. Videoconference applications such as Zoom or Microsoft Teams allow interviews to occur remotely in a manner that is comfortable and convenient for most. This can often allow for an investigation to proceed more efficiently than may otherwise be possible. With little change to protocols, an investigation can occur safely and remotely, resulting in an outcome that is just as sufficient as otherwise.

It is always in the company’s best interest to take all the necessary steps to ensure an appropriate and reliable investigation in response to employee concerns, whether conducting internally or hiring an outside investigator. A proper investigation can help assuage employee concerns, help determine appropriate and necessary action, provide a backstop to the employer when action is taken, and provide a crucial defense if litigation ever results.

If you are considering your policies for responding to employee complaints or determining how to respond to a complaint that you have received, we recommend contacting counsel for further advice.

For any questions related to workplace investigations, contact Wilson Jarrell at 503-276-2181 or wjarrell@barran.com