I. Planning and Organization

A. When to Investigate?

- General rule: Investigate when employer receives a complaint or becomes aware of employee misconduct.

- Typical reasons for investigations:
  - Theft.
  - Employee conflicts.
  - Customer service complaints or problems.
  - Absenteeism/tardiness.

- But investigations take time, money and create risk of adverse publicity.

- Consider whether the allegation is obviously false or whether the allegation has already been investigated.

- What is a “complaint”?  
  - Is a rumor a complaint?
  - Must the complaint be in writing?

- Mandatory investigation for sexual harassment complaints.
  - When a complaint is actually made
  - When employer is or should be aware that harassment occurred.
    o For example, where manager witnesses inappropriate conduct.
    o Or where a different employee reports inappropriate conduct.
      ✓ Faragher v. City of Boca Raton, 524 U.S. 775 (1998): “an employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.”
      ✓ Also applies to other forms of “unlawful harassment.”
      ✓ Employer cannot avoid liability by isolating itself from its supervisors; Faragher imposes duty to take reasonable care to prevent and correct harassing behavior.

B. Purpose and Goals of Investigation

- Needs to be considered early, because it impacts who should do the investigation and the scope of the investigation.

- Purpose is distinct from goal

- The “purpose” is generally to uncover all the relevant facts to make an appropriate decision.
• The “goal” could include enforcing company policies, avoiding or limiting exposure to a lawsuit, preserving the company’s reputation.

• Goals may change as information becomes available

• Usually appropriate time to involve Human Resources; also useful to get early buy-in from management on appropriate goals

• Goals will affect several aspects of investigation:
  − Its scope.
  − Who conducts it.
  − Who the results are reported to.
  − Whether the results are to be made public.
  − What will be the publicity plan or response.

C. Who Should Investigate?

• Options:
  − Managers;
  − Assistant managers;
  − Regional Human Resources Coordinator;
  − Regional Director of Operations;
  − Director of Human Resources;
  − Other corporate management;
  − Outside counsel;
  − Other third-party investigator (e.g., human resources consultant).

• Often a team of two or more investigators is effective.
  − Two people able to observe more about witnesses & facts;
  − Differing perceptions of facts give a fuller picture;
  − Two individuals can corroborate events if investigation becomes the subject of potential tort claims.

• Consider diversity of investigatory team.
  − Diversity in race, gender, communication styles, company position;
  − Diversity increases likelihood that interviews will be successful.

Factors in Selecting Interview Team

• Ability to understand purpose of investigation.
  − Reduction of liability for harassment;
  − Locating source of other problems: theft, conflict, service failures.

• Ability to understand business impact of investigation.
  − Impacts on operations and employee morale.
• Fit between communication styles of interviewer and interviewee.
  − Ability to develop rapport;
  − Ability to obtain admissions;
  − Ability to understand interviewee.

• Independence from the object of the investigation.
  − Avoid being vested in any result;
  − Suggests investigator from outside the immediate workplace.

• Personal Integrity

• Effectiveness as a potential witness in a jury trial.
  − Lawyer has disadvantage, because company will not want to disclose privileged communications with attorney.

• Ability to keep investigation privileged.
  − Lawyer has advantage, as portions of the investigation may remain privileged as attorney-client communications, particularly conversations with supervisors

• Ability to maintain confidentiality.
  − Crucial to avoiding collateral torts.

• Good writing skills.
  − Ability to take thorough, accurate notes and/or generate appropriate report.
  − Can be important for use as evidence later on.

• Good speaking skills.

• Sufficient experience and skill in investigations not only to do a good job but also to be able to convince any observer that a good job was done.

• Sufficient expertise in the subject matter of the investigation to understand the issues and know what information is needed to fully address all the relevant questions.

• Necessary resources and available time.

**Choice Depends on Nature of Investigation**

• Manager likely to be involved in most investigations.
  − Exception might be where manager’s conduct is at issue or impartiality could be questioned.

**D. Who Is Responsible For The Investigation?**

• Person who will receive the investigation report and decide whether it is sufficient and make decisions or recommendations based on the investigation.
• Person must have sufficient authority; sufficient independence; and sufficient knowledge to direct, analyze and act.
II. Conducting the Investigation

A. Develop an Investigation Plan

- Have a clear idea of what the investigation is about
  - Collateral issues may arise, but should be dealt with separately.
  - E.g., theft investigation that reveals employee conflicts.
    - Deal with the theft first; don’t allow investigation to be routed into conflict issues;
    - Use subsequent investigations if appropriate.
- Write down your plan.
  - Identify problem (alleged harassment, theft, etc.).
  - Identify persons with knowledge.
    - “Must-interview” and “might-interview” lists.
  - Identify other sources of information (documents, e-mail, customers).
  - Include timetable or chronology.
  - Include a step to reassess information gathered and investigation plan.
  - Identify process to reach conclusion, including decision-makers.
- Written investigation plan demonstrates appropriate process, without prejudging issues.
- Also keeps investigators focused on purpose of investigations.
- Plan should include prompt steps to preserve evidence or to protect employees in cases with physical threats/harassment.
- Memo to relevant employees regarding preservation of evidence.
- “Copy” hard drives.
- Put a hold on normal document destruction process.
- Consider blocking access to databases or e-mail
- Create an investigation file and maintain in a secure place.
  - Limit access to those with a need to know.
  - Do NOT put investigative documents in complaining employee’s personnel file.

B. What Investigation Tools will be Used?

- Investigation plan should include anticipated use of investigation tools.
- Tools include:
  - Witness interviews;
  - Documents;
  - Workplace searches;
− Photographs/video of the scene;
− Review of electronic files;
− Surveillance;
− Background/credit checks; and/or
− N.B.: polygraphs are generally prohibited by law.

C. Witness Interviews

• Conduct individual interviews.
  − Group dynamics may prevent effective communication.

• Usually, you will be faced with at least one complaining employee and one accused employee.

D. Timing of Interviews

• Generally, interview complaining employee first.
  − Need to know what the basic problem is.
  − Significant possibility that complaining employee will need to be re-interviewed as additional information comes to light.

• If possible, interview “accused” employee immediately after interviewing complaining employee.
  − Problem fresh in investigators’ minds.
  − Lessens perception of unfairness to accused by providing early opportunity to refute charges.
  − Mitigates possible invasion of privacy concerns that can arise if you “interview around” the accused.
  − Downside is possibility of having to interview accused again.

• Interview individuals identified by other interviews as having relevant knowledge.

• Consider whether re-interviews are necessary given the substance of later interviews.

E. Preparing for the Interview

• Be ready since you may only get one shot.

• Make an outline of questions.

• Consider interview strategy.

• Identify and review documents to show witness and make copies for the witness to review.

• Review personnel file of witness before interview.

• Review company policies at issue.
F. Conducting Interviews

- Conduct in a private place.

- Disclose purpose of interview.
  - Inform accused that the interview is designed to provide an opportunity to relate his or her version of the event(s) and to advise management of other factors, witnesses, or documents.
  - Inform others of general purpose of interviews to investigate events.

- Assure employees that no retaliation will result from participation.

- Require management employees to not discuss the matter with anyone without a need to know.

- Request that non-management employees not discuss the matter with anyone else, to respect the privacy of those involved and to protect themselves from a defamation claim.

- Make the following disclosures:
  - Who the investigator represents (if the investigator is an attorney or from outside the company).
  - The general purpose and process of the investigation.
  - Investigation is necessary to determine whether there has been any improper conduct.
  - Importance of telling the truth and making full disclosure.
  - Confirm that the employer is seeking the truth, whatever it may be.
  - Employer will not permit retaliation against employees involved in the investigation (and the employee should let the investigator know promptly if any occurs).
  - While the investigator will keep the investigation as confidential as possible, he/she cannot promise complete confidentiality since the results of the investigation may be disclosed to management or to investigative agencies if appropriate.
  - No conclusions have been reached, investigator is only trying to investigate allegations.
  - Responsibility of the witness to cooperate.
  - Directive to preserve documents.

- Rights to representation if allowed by company policy or if employee is represented by a union and the employee reasonably believes that the meeting may result in discipline.

- Consider putting disclosures in writing and having witness acknowledge receipt.

- Don’t make other agreements with witnesses.

- Avoid conduct that could be viewed as intimidation.
  - Threats of adverse action.
• Don’t try to win the case in the interviews.

• Avoid loaded, leading, compound or accusatory questions.

• Try to start with open-ended questions.

• Periodically summarize and review.

• Concentrate on the facts.

• Use chronological path.
  – What happened next?
    o Specifically identify who said what, and in what order.
    o “What words did you/they use?”
    o “Replay the conversation as it happened”
  – When did it happen?
  – Where did it happen?
  – How long did it last?
  – How did it happen?
  – Who was there?
  – Why did it happen?
  – Who else has information about it?
    o What information?
    o How do they know?
  – Who else have you talked to about this incident?
  – Are there any notes, documents, or other evidence of what happened?
  – Have witness draw a diagram if helpful
    o E.g., “make an X to show where you were standing when this happened; put a Y to show where the other person was; how many feet separated you?”

• Then move to next chronological event.

• Don’t accept conclusory or loaded statements like “he harassed me” or “he screamed at me.”

• Ask follow up questions related to any contradictions or hints in the story.

• Avoid questions that reveal what other witnesses have said.

• Ask close out questions: “Is there anything else?”

• Listen to the witness.
  – S/he may provide new lines of inquiry.
  – Give the witness time to respond.
  – Don’t be afraid of silence.
• When interviewing the complainant:
  − Ask the complainant to make a written statement.
  − Ask who else should be interviewed.
  − Ask if they have ever made this complaint before and, if so, to whom.
  − Tell them you will follow up with them later once the investigation is concluded.
  − Has the accused employee’s conduct affected their ability to work?
  − When following up with complainant, ask them if they have anything else to tell you.
  − Don’t say things that will diminish the seriousness of the allegations or suggest that the investigator has already reached a conclusion.

• When interviewing the accused wrongdoer:
  − Permit the accused to respond to each specific allegation.
  − Demand a factual basis for any contention that the complaining employee is lying or concealing their real motive.

• Consider getting written statements.
  − Generally desirable from the complainant.
  − Not always desirable from others.
    o Will witness be available later?
    o Is witness likely to change story later or “forget”?
    o Are the facts in dispute?

• Take extensive notes, date, and sign.
  − Avoid tape-recording if possible, as it makes witnesses (more) nervous and defensive and may be illegal in some states.

• Prepare summary of interview.
  − This summary will be a source of evidence for the conclusion stage of the interview process.
  − Consider forwarding summary to witness (confidentially) with memo either requesting witness to sign and return or to notify interviewer immediately if it is inaccurate in any respect.

G. Other Sources of Information

• In appropriate cases, additional information can be gathered from documents and third-party interviews.

• Pitfalls for additional sources, such as workplace searches, e-mail, background checks, and polygraphs.

H. Workplace Searches

• Balancing between employees’ “expectation of privacy” and employer’s need to know.
• Put employees on notice that personal areas, such as lockers, offices, break rooms are subject to search and that employees have no “expectation of privacy in such items.”

• Avoid searches of persons or personal items, like wallets or purses.

• Conduct searches reasonably and allow employees an avenue to exit.
  – Avoid “false imprisonment” types of claims.

I. **E-mail Searches**

• Generally, the same balance between employees’ expectation of privacy and employer’s need to know will apply.

• Refer to your company’s electronic communications policy.

• Limit e-mail searches to items that are business-related and not personal.

III. **Concluding the Investigation and Documenting the Results**

A. **Reaching a Conclusion**

• How do you know you are done?
  – Was the Investigation Plan followed?
  – Have all primary witnesses been interviewed and all pertinent documents reviewed?
  – Beware of “paralysis by overanalysis.”
  – Does investigator have enough information to answer the following questions:
    o Was the complaint without merit?
    o Was the complaint valid?
    o Was the complaint unsubstantiated?
  – If the complaint was valid:
    o Was any law violated?
    o Was any company policy violated?
    o Has the accused employee committed similar violations in the past?
    o How long has the accused employee been employed?
    o What are the consequences of the employee’s conduct?
    o Are any policy changes required?
    o What remedial measures are necessary?
    o What types of discipline are appropriate?
    o What has the company done in the past in similar situations?

B. **Documenting the Investigation**

• Written report is most effective means of organizing evidence and conclusions.

• Employer’s opportunity to draft its “Exhibit A” in the event litigation results.
  – Important to show a well-reasoned and well-supported decision.
I.  **Elements of Written Report**

- Description of alleged wrongdoing.
- Description of witness interviews, documents, and other evidence.
- Summary of relevant information gathered.
- Identification of factual conflicts and determinations of credibility.
- Findings of fact based on the credible evidence, but state when any findings are based on personal analysis and opinion.
- Emphasize any remedial action to be taken.

II.  **Elements to Avoid**

- Recitation of irrelevant facts.
- Conclusions not based on the evidence presented by report.
- Other stray remarks adverse to employer’s interests.
  - Unless conducted by a lawyer (and maybe even then), the report is discoverable in litigation.
- Dissemination beyond those with a need to know.

III.  **Use of Report**

- Investigator’s findings and recommendations to be presented to decision-maker(s).
- Approved decision and remedial measures can be identified in a final portion of the report, or by separate documentation.
- Beware that a report can be powerful evidence against the company if the behavior complained of recurs because the company failed to act on the report.
- Communicate results of investigation to complaining employee (but not necessarily the report itself).
- Communicate results of investigation to accused employee.
- Gather all materials related to investigation in one file and keep separate; but note that contents of file will be considered part of the accused employee’s personnel file under Maine law.