

# WHY INVESTIGATE? A LEGAL PERSPECTIVE

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August 2, 2013*

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## AFFIRMATIVE OBLIGATION IN THE CONTEXT OF SEXUAL HARASSMENT

### FEDERAL LAW<sup>1</sup>:

#### 29 CFR 1604.11(f):

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

### EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT:

“ . . . employer has an affirmative duty to investigate complaints of sexual harassment . . . promptly and thoroughly.”

#### *SUMMA V. HOFSTRA UNIVERSITY* 708 F.3d 115 (2nd Cir. 2013):

“In determining the appropriateness of the employer's response, we look to whether the response was immediate or timely and appropriate in light of the circumstances, particularly the level of control and legal responsibility the employer has with respect to the employee's behavior.”

### STATE LAW:

#### GOVERNMENT CODE SECTION 12940(k):

“It is an unlawful employment practice . . . [f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

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<sup>1</sup> This article discusses investigations in employment. With respect to compliance standards applicable to investigations of sexual harassments of students, see *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Title IX, Office of Civil Rights (January 19, 2001).

## AFFIRMATIVE OBLIGATION IN OTHER CONTEXTS

### WRONGFUL TERMINATION:

Evidence of "good faith"—*Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal.4th 93 (1998).

### SAFETY ISSUES:

Cal-OSHA requires employers to do everything "reasonably necessary" to protect the life, safety, and health of employees.

### DRUG ABUSE:

The Federal Drug-Free Workplace Act requires government contractors to investigate and eliminate drug users in the workplace.

## WHY INVESTIGATE: RISK MANAGEMENT PERSPECTIVE

- ✓ Learn from mistakes. ". . . we can always do better . . ."
- ✓ Insurance will require an investigation.

## WHY INVESTIGATE: HUMAN RESOURCES PERSPECTIVE

- ✓ Resolve problems within the company.
- ✓ Assist in building trust in employees.
- ✓ Increased productivity.
- ✓ Deter employee from making false claims against another employee.
- ✓ Prevent escalation of an already serious situation.
- ✓ Opportunity for corrective action.

## WHAT TO DO IN AN INVESTIGATION

How employers respond to and investigate internal complaints of harassment, discrimination and other misconduct allegations can have a serious impact both legally and practically, affecting employee morale, productivity and workplace culture.

Listed below are common do's and don'ts in responding to and investigating employee complaints.

- ✓ Do take all complaints seriously, particularly where the complaining party has a history of complaints.
- ✓ Do think about who should conduct the investigation. It is advisable to have the assistance of counsel, but watch for later disqualification in litigation.
- ✓ Do utilize the least intrusive investigatory method to determine the truth.
- ✓ Do conduct a sufficiently thorough investigation, including interviews of all parties and witnesses identified by the parties.
- ✓ Do ask the complaining party what remedy he or she wants to see occur.
- ✓ Do ask questions designed to elicit relevant information without repeating the accusations.
- ✓ Do conduct the investigation immediately after the accusations are made.
- ✓ Do a fair accurate and reliable memorialization of the accusations.

- ✓ Do give the accused an opportunity to respond to the charges.
- ✓ Do make sure you obtain all relevant information to make an appropriate and defensible business decision.
- ✓ Do gather evidence of the credibility of all witnesses — trust your instincts.
- ✓ Do remind involved parties of their obligations — confidentiality, non-retaliation, truthfulness and candor, and consequences for not cooperating.
- ✓ Do treat all parties and witnesses with respect.
- ✓ Do test the validity of a supervisor's reasons if quid pro quo is the issue.
- ✓ Do consider patterns of behavior or similar situations that have occurred in your organization when determining appropriate remediation.
- ✓ Do follow-up to ensure offending behavior has stopped, no retaliation has occurred and remediation has been successful.

#### THE DON'TS OF AN INVESTIGATION

- ✓ Do not rush — create an investigation plan.
- ✓ Do not ignore serious accusations to the point that the investigation occurs only after the lawsuit is filed or a lawyer is involved.
- ✓ Do not accept a complaining employee's characterization of an incident as unlawful harassment or discrimination — employees sometimes incorrectly label personality and management issues.
- ✓ Do not promise confidentiality.
- ✓ Do not view the investigatory process as proving a foregone conclusion.
- ✓ Do not allow an inexperienced person to conduct the investigation.
- ✓ Do not asking leading questions suggesting an answer.
- ✓ Do not allow investigators to spread more information gossip during the course of their investigation.
- ✓ Do not forget that there are constitutional privacy rights in the work place.
- ✓ Do not assign people to conduct investigations if they have an axe to grind.
- ✓ Do not write legal conclusions as factual findings.
- ✓ Do not render judgments on matters on which reasonable minds may differ.
- ✓ Do not ask questions which arguably defame another person.

- ✓ Do not unnecessarily intrude on another person's privacy unless absolutely necessary.
- ✓ Do not fail to investigate just because the complainant has failed to complain or protest.
- ✓ Do not assume that the occasional off-color joke or use of sexual terms by the complainant will create a defense of welcomeness.
- ✓ Do not rely on feelings.
- ✓ Do not rely on the complainant's welcome conduct with others.
- ✓ Do not forget to create a close-out report that includes allegations, applicable policies, witness interviews, evidence, facts, conclusions and action taken.
- ✓ Do not fail to monitor your workforce and seek out potential discriminatory disparities.

### RESTRICTIONS ON INVESTIGATIONS

- ✓ Privacy rights.
- ✓ Defamation.
- ✓ False imprisonment.
- ✓ Intentional infliction of emotional distress.
- ✓ Assault and battery.
- ✓ Malicious prosecution and abuse of process.
- ✓ No illegal surveillance.
- ✓ No polygraphs.

### PREPARING FOR THE INVESTIGATION

- ✓ Choose the right investigator:
  - ▣ Objective
  - ▣ Neutral
  - ▣ Integrity
  - ▣ Credible
  - ▣ Trained
- ✓ Inside investigator or outside investigator
- ✓ Attorney-driven investigation
- ✓ Follow established procedures

- ✓ Management witness
- ✓ Gather relevant documents

IMPLEMENTATION OF INVESTIGATIVE RESULTS
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STATUTORY OBLIGATION IN CONTEXT OF SEXUAL HARASSMENT:

- ✓ Federal law: 29 CFR 1604.11(f): ". . . immediate and appropriate corrective action . . ."; EEOC Policy Guidance on Sexual Harassment.
- ✓ State law: Government Code Section 12940(i): "It shall be an unlawful employment practice ' . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'"

ADDITIONAL NONSTATUTORY IMPLEMENTATION STRATEGIES IN THE CONTEXT OF SEXUAL HARASSMENT:

- ✓ Inform the complainant and the accused of the results of the investigation and the basis for the conclusions.
- ✓ Corrective action must be consistent with the severity of the conduct.
- ✓ Consider appropriate remedy for the complainant.
- ✓ Follow-up with the complainant and the accused.

ADDITIONAL NONSTATUTORY IMPLEMENTATION STRATEGIES IN OTHER CONTEXTS:

- ✓ Embezzlement: Determine if termination, civil action and/or criminal prosecution is appropriate.

➔ IN ALL CASES, IMPLEMENT THE RESULTS IN A TIMELY MANNER.

IMPLEMENTATION OF INVESTIGATIVE RESULTS DETERMINING APPROPRIATE CORRECTIVE ACTION
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- ✓ How egregious was the conduct?
- ✓ What is the harasser's employment record?
- ✓ What discipline was imposed in previous harassment cases?

- ✓ Does the employer have any policies on progressive discipline?
- ✓ Does the accused have an employment contract or subject to a collective bargaining agreement?

IMPLEMENTATION OF INVESTIGATIVE RESULTS
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MEETING WITH THE COMPLAINANT AND THE ACCUSED: Be Prepared to Answer the Following Questions:

- ✓ Will the results of the investigation be placed in my personnel file?
- ✓ Who in the company will be made aware of the results?
- ✓ How will the corrective action affect my future in the company?
- ✓ How can I work with the complainant/accused in the future?
- ✓ I don't agree with your conclusions, what are my options?