Wednesday, February 9, 2011

The fundamental element of an employer’s efforts to enforce its anti-harassment and antidiscrimination policies is an effective method of investigating complaints. The following are tips for conducting such an investigation.

Don’t hesitate. Investigate!

A delay could severely undermine the investigation. Moreover, excessive delay will send the message that the organization does not take complaints of harassment or discrimination seriously and may result in the complainant looking for relief outside the organization. Complaints made anonymously, or by employees who are no longer employed, should also be investigated. Once a complaint is received, regardless of from whom, or how, the employer has been put on notice that a problem may exist.

Select investigators carefully

Seek a person with the personality or interpersonal skills to get witnesses to “open up” and tell their stories without fear of reprisal. The investigator should be a credible, responsible employee, preferably one in a management or human resources position. The manner in which the investigator handles the investigation can be as important as the final outcome.

If the alleged harasser or discriminator is a highly placed individual whose position would make it difficult to get an objective inside investigator, or if the investigation raises complex factual or legal issues, consider using someone from outside the organization.

Ensure no retaliation

At the outset, advise the complaining employee, and any witnesses who are interviewed, that if anyone takes any action against him or her that is believed to be retaliation, it should be reported immediately to the investigator, the person who took the original complaint or a member of management. Stress to the accused that no negative action must be taken against the complaining employee or any witnesses. Then, make sure it doesn’t. Retaliation can be an independent basis for liability, even if the harassment or discrimination complaint lacks merit.

Document, document, document

Create a separate file for the investigation. Keep it in a place where only the investigator or member of management has access to it. This investigatory file should contain: (1) a copy of the original complaint; (2) detailed notes of each interview; (3) the name of each witness, whether that person was interviewed, and if not, why not; (4) any notes or documents provided by any participant in the investigation; (5) a final report summarizing findings and conclusions; and (6) follow-up monitoring, if any.
Be thorough

Begin by interviewing the complainant. Explain the purpose and procedure of the investigation. Make the interviewee feel comfortable with his/her choice to complain, but make sure the complainant knows that it likely will not be possible to keep his/her identity and allegations confidential. Inform the complainant that, to the extent possible, he/she will be informed of the outcome of the investigation. Emphasize honesty and cooperation.

Find out what happened, in chronological order, by asking open-ended questions (who, what, when, where, how), then follow up with more specific questions. Try to make the interviewee be as specific as possible.

Gather evidence. Ask for any documentation, such as notes or pictures. Ask for the names of any other witnesses. Ask if the interviewee knows of anyone else who has encountered similar conduct. Tell the employee that if he/she recalls anything else, to contact the investigator immediately.

When interviewing the accused, be sure to explain the purpose of the investigation and that no determination has yet been made. Use the who, what, when, where, and how approach, and don’t forget “why” - try to determine the accused’s intent. If the accused denies any allegations, ask whether he or she thinks the complainant has a motive to lie. Ask the accused if there are any witnesses or other persons whom he or she thinks should be interviewed in the course of the investigation. The remainder of the interview mirrors the investigation of the complaining party.

Witness interviews must also be conducted. Explain the investigation’s purpose, that the complaint involves a serious matter, that the witness is not accused of wrongdoing, and that the organization needs full and honest cooperation. Distinguish between first- and second-hand information. Consider having the witness sign a statement. Advise those interviewed that the Company’s anti-retaliation policies applies to them.

Interviewees should be asked to not discuss their interviews with anyone else, especially while the investigation is ongoing.

Follow-up interviews with the complainant, the accused and witnesses should be conducted, if necessary, based upon information learned during the investigation.

Finally, remember - details, details, details!

Make a determination and communicate the results

Determine whether any actionable harassment or discrimination occurred. If the focus was harassment, was the alleged conduct unwelcome? Would the conduct in question have offended a reasonable person? Consider whether there have been any previous complaints or accusations against this same employee.

Prepare a final report which should contain:

- The time of, and information regarding, the initial complaint;
- A summary of the basic allegations of the case;
- A summary of the interviews, including credibility assessments;
- A summary of the investigator’s factual findings;
- A statement of the recommended remedial action.

Present the investigation report to the individual who will make a final decision as to what action, if any, is called for. This person should thoughtfully evaluate the summary, and not merely provide a “rubber stamp.”

Meet separately with the accused and the complaining employee. Where applicable, tell the complaining employee that remedial action has been taken. In some cases, however, it may not be appropriate to disclose the specifics. Remind the employees of the anti-harassment and antidiscrimination policies.

Follow Up

Follow up with the complaining employee on a regular basis to ensure he/she is satisfied with the company’s response and that there has been no additional inappropriate conduct or retaliation. Advise the employee to immediately notify the company in the event the conduct continues or he/she suspects retaliation.

Conclusion

A comprehensive anti-discrimination and harassment policy and a well trained work force is the best approach to
avoiding claims of discrimination and/or harassment. In the event complaints are received, a timely and comprehensive investigation can prevent or limit employer liability.

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