



Common Workplace Investigation Mistakes

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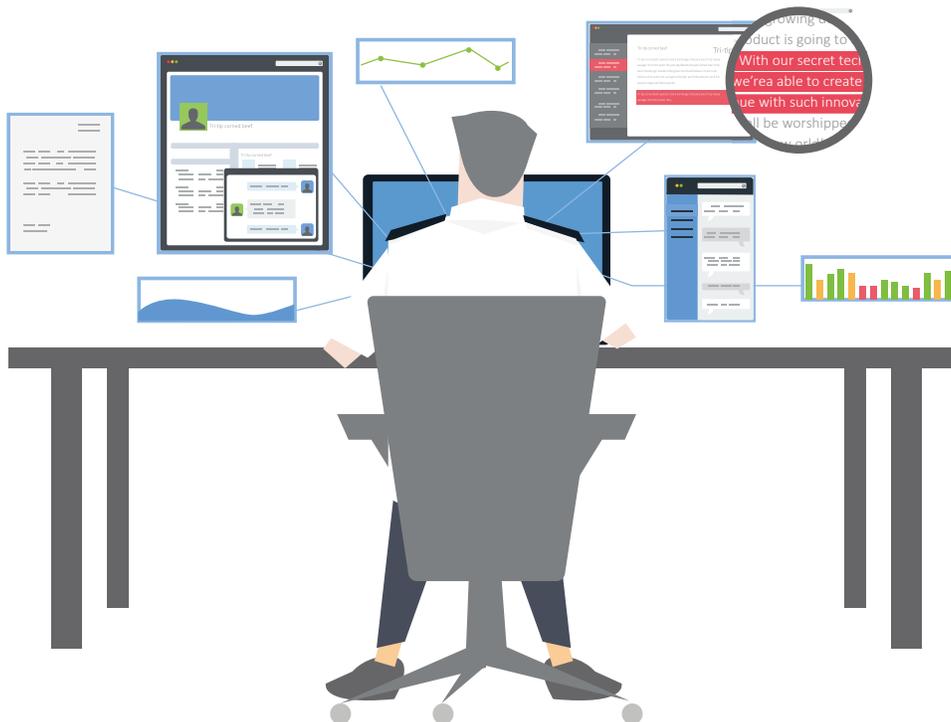
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Common Workplace Investigation Mistakes

Conducting a proper workplace investigation can be a challenge for any organization. The investigation needs to be timely, impartial, and reach a factual conclusion that can stand up to scrutiny – potentially in a court of law. Numerous articles have been written by HR professionals and labor law attorneys regarding the most common mistakes organizations make regarding workplace investigations. Frequently, committing these mistakes has serious financial and legal ramifications for the company.



Mistake

#1

Failing to Initiate an Investigation

One of the most frequently cited errors companies make is failing to investigate after receiving a complaint of inappropriate behavior in the workplace.ⁱ It makes no difference whom allegations are against, whether an employee, supervisor, manager, vendor, or even a client. The courts have upheld employees' right to a safe working environment free from discrimination, harassment, or other negative conduct – particularly after notice of such wrongdoing has been given to the company.ⁱⁱ

Sometimes employees simply “want to make the employer aware of an issue,” but specifically do not want to become entangled in a workplace investigation. Nonetheless, cautions Susan Hiser, an attorney representing employers in all matters of employment law, even if the reporting employee refuses to cooperate with the investigation, the employer is legally obligated to investigate.ⁱⁱⁱ

Undertaking a forensic-grade workplace investigation can be daunting, even intimidating. Not only are there a plethora of potential legal and regulatory landmines to navigate, but gathering the requisite detailed information for the investigation – which can be quite voluminous – can in itself seem like a mountainous hurdle.

Mistake
#2

Poor Selection of the Investigation Team

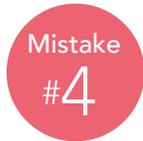
Choosing the proper investigation team is critical to a successful investigation that will stand up in court if the need should arise. Not only does the investigation team need the proper experience and expertise, but they must be objectively defensible as unbiased and without a conflict of interest. Particularly in cases involving alleged sexual harassment or discrimination, the team must be composed of individuals representing a balance on both sides of potential dividing lines. For example, if the allegation is one of racial discrimination, the team should be composed of equal numbers of minority and non-minority members.

If the proper team balance cannot be found internally, the company should hire an outside investigative team to ensure the investigation is above reproach.

Mistake
#3

Lack of Objectivity

Above all, the investigative team and the investigation must be impartial, objective, and focused only on gathering evidence that leads to a conclusion of the facts of the allegation. Even the appearance of a lack of objectivity could jeopardize the findings of the investigation. Personal opinion about the individuals involved, or even the ramifications of a particular finding, have no place in a workplace investigation. If you perceive the emotions of any of the investigators run a little hot around a particular investigation topic or the person(s) under investigation, it's best to swap them out to avoid the risk of subjectivity tainting your investigation and the consequences that come with that.



Failing to Investigate Thoroughly

Many reasons may contribute to a failure to be thorough.

For example:

- Investigators may have personal familiarity with the individuals involved or have similar past experiences which may bias his or her investigation ^{iv}
- Investigators may fail to develop a plan and scope for the investigation ^v
- Investigators may conduct poor interviews or use poor interview techniques which do not encourage interviewees to divulge the truth
- Investigators may fail to familiarize themselves with relevant policies, rules, laws, documents, and personnel files

Whatever the reason, a lack of investigative thoroughness may lead toward the wrong conclusion and may open the organization to significant legal liability.

Mistake
#5

Poor Interviews during the Investigation

Investigative interviews are crucial to any successful workplace investigation. They are a necessary part of the process providing invaluable collaboration of known facts, new facts of consequence, as well as providing direction for further investigation as needed. However, a poor interview by an inexperienced investigator or an interview conducted in an overly aggressive manner can result in gathering misinformation or even jeopardize the defensibility of the investigation conclusion.

Investigators should thoroughly review applicable evidence before conducting an interview and interview persons with possible knowledge of the alleged incident before interviewing the accused individual. This will assist in developing pertinent questions for the accused individual, and may even serve to gain a confession without cohesion.



Failing to Document Thoroughly

Closely related to a failure to investigate thoroughly is a failure to document the investigation thoroughly. Improper documentation invariably produces an incomplete record. Without a complete record, the company may not have a defensible position if later the allegation and investigation are submitted to a court of law.

A complete documentation includes interview notes, meeting details, recitals of pertinent policies, notes on when information was requested and received, and notes regarding any roadblocks to the investigation.



DOCUMENTATION SHOULD ALSO ENUMERATE ALL COLLECTED PHYSICAL EVIDENCE, AND CONTAIN COPIES OF DIGITAL OR WRITTEN EVIDENCE. REMEMBER, IT IS MOST OFTEN BETTER TO OVER-DOCUMENT THAN TO BE FOUND IN A COURT OF LAW WITH AN INCOMPLETE RECORD.

Mistake
#7

Failure to Create a Detailed Report & Finding

A fair, thorough, and well-documented investigation may have been conducted, but the work is not yet through. The critical part of any investigation is a well-supported and reasoned conclusion. However, the mistake is often made to avoid providing a conclusive finding citing conflicting evidence. Such a result may be worse than not conducting any investigation.

Every investigation should be concluded with a report. Minor investigations may only require a brief summary. However, investigations leading to disciplinary action – including employee discharge – need a full, detailed report.

The report should summarize the relevant facts, review the documented evidence and other materials, provide a determination of credibility regarding the gathered materials, as well as develop a thorough analysis of the investigating team's factual findings and conclusions.





Putting Employee Privacy Ahead of Company Needs

Employers are well aware that monitoring certain communications without consent can violate numerous state and federal laws – exposing the company to legal and civil liability. However, Investigators have a duty to conduct a thorough investigation, and courts have upheld that an employee’s right to privacy does extend to an investigation so long as the information reviewed and documented as part of a workplace investigation is of legitimate concern to the investigation.

Investigators need to properly balance employee privacy and the needs of the company – foremost of which is to conduct a timely and impartial investigation that reaches a factual conclusion and can hold up to legal scrutiny. While proper investigative restraint should be exercised, protecting employee privacy in issues and facts not related to the investigation, the company needs to quickly gather the information relevant to the investigation without worrying about “stepping on toes.”



Failure to Monitor the Workforce

Rarely does material workplace misconduct spring up without warning – people take progressive steps toward behavior that results in a reportable incident.^{vi} Ignoring the tale-tail warning signs of progress toward reportable or unacceptable behavior can be costly – even before a workplace investigation is initiated. It is far easier and more cost effective to deal with potential issues before an official allegation is made that requires an investigation.

Creating a safe and productive workplace is no accident – and relying on pre-employment interviews and background checks is not enough. Employee misconduct rarely manifests during the first few months of new employment when the new employee knows he or she is under greater scrutiny from management. However, over time small indiscretions, perhaps of nominal impact initially or when viewed in isolation, can add up and lead to explosive consequences if not addressed.



How Veriato Can Help

With [Veriato 360](#), employers can quickly respond to allegations of employee misconduct by reviewing both the complainant's and the accused's detailed record of communicues and other computer usage. Veriato 360 employee monitoring software provides unparalleled visibility into the communications and online activity of company employees and contractors. Companies have a full-fidelity activity log for everyone interacting with their data and using their network resources, including:

- Applications used and websites visited, including online searches
- Documents opened and files transferred
- Network activity, including email, webmail, chat, and IM
- Login and session activity, including keystrokes

Applying a consistent recording policy across your employee base eliminates any potential for a charge of 'singling out.' The data is presented in a clear, context-rich manner. Because the solution is built to facilitate accurate investigations, it leaves far less open to interpretation than solutions that are not. This means you have unbiased data on which to base your findings.

Investigators can easily review applicable evidence and documentation before conducting any interview with Veriato 360's screen shot playback feature. Additional insight is given into the context of the documented evidence. Investigators may thus build a comprehensive, detailed, and factual storyline of actual events, motivations, and behaviors to corroborate interviews and other evidence gathered.

ⁱ Ferrara, David M and Alyssa Campbell, Esqs. "Workplace Detective: 10 Investigation Mistakes to Avoid." Business Management Daily. Capital Information Group: Falls Church. June 15, 2015.

<http://www.businessmanagementdaily.com/43781/workplace-detective-10-investigation-mistakes-to-avoid?cigx=d,kac%2Cstid.38188%2Csid.%2Clid.4%2Cmid.35042>

ⁱⁱ "Avoid Workplace Investigation Mistakes." Nolo. Nolo: Berkley. 2017.

<http://www.nolo.com/legal-encyclopedia/avoid-workplace-investigation-mistakes.html#>

ⁱⁱⁱ Hiser, Susan Hartmus. "Top 10 Mistakes Employers make in Investigating Employee Complaints." Corp! Magazine. Corp! Magazine: Warren. March 4, 2010.

<https://www.corpmagazine.com/executives-entrepreneurs/expert-advice/top-10-mistakes-employers-make-in-investigating-employee-complaints/>

^{iv} France, Angela. "Workplace Investigations: Common Mistakes to Avoid." PCT Law Group. PCT Law Group: Alexandria. May 23, 2016.

<http://pctlg.com/workplace-investigations-common-mistakes-avoid/>

^v Perez, Patti C. "Top 10 Workplace Investigation Mistakes: Part 1." Ogletree Deakins. Ogletree Deakins: Greenville. October 14, 2015.

<http://ogletree.com/shared-content/content/blog/2015/october/top-10-workplace-investigation-mistakes-part-i>

^{vi} Hassell, Bravetta. "Get Ahead of Employee Misconduct." Chief Learning Officer. Human Capital Media: Chicago. December 28, 2016.

<http://www.clomedia.com/2016/12/28/get-ahead-employee-misconduct/>

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