

INVESTIGATING AND RESPONDING TO HARASSMENT CLAIMS - PART 1: THE COMPLAINT

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What if you were the human resources manager or in-house counsel that received a complaint that Harvey Weinstein, Matt Lauer, Charlie Rose, or any of the other number of recently accused individuals sexually harassed an employee? With the rise of sexual harassment allegations receiving increased scrutiny, retailers need to have proper procedures in place for handling claims of sexual and other harassment in the workplace.

This is the first of a six-part series that will address guidelines and suggestions for conducting investigations of harassment complaints. Each harassment investigation, however, is different, and any investigation should be tailored to fit the particular circumstances.

What Complaint?

A harassment “complaint” need not be written, nor does a “complaint” have to actually be made to anyone. Most of the time, an employee brings a complaint forward to a supervisor or to human resources. However, there are times that supervisors or human resources may “hear through the grapevine,” “shop talk,” or general remarks that someone believes that he or she has been harassed. In these informal “rumor” situations, just as in the situation where a formal complaint is made, prompt investigation and follow-up should be immediately undertaken. Constant vigilance and careful monitoring is one of the ways that we can ensure a workplace free of harassing behavior.

As soon as you become aware of a harassment complaint, consider:

- Harassment investigations must be conducted *promptly*. From the beginning of the investigation, until the complaint file is closed (meaning that disciplinary action if any, is taken and the complainant is advised of the outcome of the investigation), courts have insisted that the investigation be completed in two to ten days, depending on the extensiveness of the investigation. The appropriate deadline for completing the investigation should be established even before the investigation begins.
- Should the investigator be someone besides you? Choose the investigator carefully. This person may ultimately be a trial witness. It should be someone skilled in interviewing and

someone who is not biased. Consider having two investigators present in case what was said later becomes an issue.

- Decide through whom and how contact with interviewees should be made.
- Determine the appropriate format for recording information from witnesses. Options include handwritten notes of key points, a dictated/typed write-up of key points obtained from each witness, signed typed statement from each witness, statement written out by witness in his/her own word, tape recorded interview.

Confidentiality

Most investigations, and in particular harassment and discrimination investigations, can only be effective if confidentiality is maintained during the course of the investigation and, usually, after the investigation has concluded. Confidentiality concerns include not only assuring a complainant of some degree of confidentiality in order not to discourage individuals from bringing complaints, but also preventing damage to the accused in the case of false or overstated accusations.

Confidentiality also helps to assure the integrity of the investigation—preventing destruction of evidence, preventing tampering with witness testimony, etc.

Managers and supervisors should be instructed to keep the subject matter of the investigation confidential.

However, the National Labor Relations Board has held that a blanket policy or rule requesting or requiring all non-supervisory employees to keep the subject matter of the investigation confidential violates the National Labor Relations Act. As a result, for each non-supervisory employee who is a witness in the investigation, you should make an initial determination as to whether to request confidentiality from him/her based on the circumstances surrounding the investigation. The NLRB considerations for whether to request confidentiality by a non-supervisory employee who is a witness in the investigation include:

- Whether the complainant needs protection from retaliation or reputational harm
- Whether the non-supervisory employee needs protection from retaliation or reputational harm
- Whether there is a danger of evidence being destroyed or altered
- Whether there is a danger of testimony being fabricated
- Whether there is a need to prevent a cover-up
- Whether there is a potential for criminal implications

In addition to making an initial determination whether you believe any or all of these factors are present prior to initial interviews, some consideration should also be given to re-assessing these factors as the investigation proceeds. These considerations should be documented as part of the investigation. In addition, consideration should be given to whether to request confidentiality from a non-supervisory employee who is a witness in the investigation only for a limited period of time—e.g., until the investigation is completed.

With regard to whether to request confidentiality from a complainant, you should seek legal advice before doing so.

Keep in mind that with the change in federal administration, the NLRB's views on a number of topics has changed and with new appointees in position, more is sure to come. This area of the law may be a part of that pattern of change and it is advisable to consult with counsel periodically on this subject.

The next post in this series focuses on interviewing the complainant. For questions or additional information, contact the author, or any member of our Retail or Labor and Employment teams.

MEET THE TEAM



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