

Checklist: Preventing and Responding to Internal Retaliation Complaints

Editor's Note: This checklist is meant to assist employers in receiving and responding to internal complaints asserted by current employees and avoiding any potential retaliation claims. Though investigating and responding to internal complaints may present many challenges, following the recommended processes below for handling these complaints can assist a company in avoiding any potential negative reactions leading to allegations of retaliation.

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Creating a Formal Complaint Procedure

- Create a formal complaint procedure outlining the company's commitment to investigating internal complaints and maintaining a workplace free from discrimination, harassment, and retaliation.
- Make clear in the complaint procedure that the company does not tolerate retaliatory behavior and that complainants should promptly report any retaliation associated with having made the complaint.
- Ensure that the complaint procedure includes multiple – but clear and unambiguous – avenues for employees to file complaints.
- Consider creating a method for employees to file anonymous complaints, such as an anonymous hotline or website submission page.
- Perform periodic trainings regarding relevant laws and company policies prohibiting retaliation.
- Educate managers and supervisors to appropriately receive complaints and to notify Human Resources immediately upon receipt.
- Periodically review the effectiveness of the complaint procedure, management's commitment to it, and the comfort level of employees to utilize it.

Investigating the Complaint

- Designate a neutral investigator.
 - o Carefully consider the individual conducting the investigation to ensure neutrality and reduce the potential for conflicts. Keep in mind that the investigator may ultimately become a witness should there be a dispute.
 - o Consider whether to appoint an outside counsel to conduct the investigation. Be aware, however, that conflicts of interest may arise by hiring an attorney that previously has represented the company; further, the attorney-client privilege may not attach to the entirety of the investigation file.
 - o Where possible, identify an individual to assist the investigator and to attend witness interviews to ensure adequate documentation.

- Draft an interview plan identifying all potential witnesses with relevant information.
 - Do not prematurely draw conclusions or propose resolutions.
 - Use funnel method of questioning.
 - Leading questions may be appropriate later to test the witnesses' credibility.
 - Do not attempt to predict or outline potential outcomes.
 - Do not characterize your understanding of any potentially applicable company policies or legal principles.
- Promptly contact the complainant to schedule an initial interview and request supporting documentation.
 - Inform the complainant that the complaint will be kept confidential to the maximum extent practicable, but do not promise absolute confidentiality.
- Determine whether any immediate action is necessary to ensure the complainant feels comfortable in the workplace while the investigation is ongoing.
- In interviewing the complainant:
 - Give the complainant the opportunity to explain in detail the basis for the complaint, and obtain as many details as possible.
 - Ask the complainant to provide a thorough, truthful accounting of the matter.
 - Obtain a complete list of individuals the complainant believes has relevant information.
 - Ask the complainant to provide all relevant documents, or a list of such documents.
 - Inform the complainant that his or her continued cooperation is essential.
- Investigate each claim thoroughly and promptly, interviewing all individuals that may possess relevant, non-cumulative knowledge.
- At the beginning of each interview conducted by an attorney, and particularly in corporate compliance investigations or where there is a potential conflict of interest between the investigator and the witness, provide and memorialize an *Upjohn* notice.
 - An *Upjohn* notice is provided to a company employee to inform him or her that the attorney represents the company and not the employee individually.
 - Do not provide an *Upjohn* notice to the complainant, as it could be perceived negatively and may have a chilling effect on bringing complaints.
- Assure witnesses that the company will not tolerate any retaliation against them for cooperating in the

investigation or for providing information in good faith, nor will the company tolerate any retaliatory conduct on their part.

- o Remind witnesses that they may be disciplined for any retaliatory conduct.
- o Remind witnesses that they should promptly report any retaliation they may experience.
- o Inform witnesses that they may be disciplined for knowingly providing false or fraudulent statements or refusing to participate in the investigation.
- Collect and review documents that may be relevant to the complaint.

Drafting the Investigation Report

- Determine whether the investigation requires a formal report.
 - o Consider not creating a written report if maintaining any privilege of the investigation is a concern.
- List the information reviewed and considered in investigating the complaint, including:
 - o The names of the individuals interviewed; and
 - o Any relevant documents, if the investigation included a review of documents.
- Limit the report to summarizing the facts and making credibility determinations.
 - o When not tasked with providing legal advice, do not provide any such advice.
 - o Avoid making conclusory statements that might be deemed admissions of unlawful conduct by the employer.
 - o Refrain from providing advice regarding what disciplinary action, if any, should be taken.
- Maintain the confidentiality of the investigation.
 - o Keep the findings private.
 - o Only distribute the findings to those necessary to the decision-making process.
- Clearly mark the report as privileged if it is completed by an attorney and is subject to privilege.

Concluding the Investigation

- Provide timely feedback to the complainant regarding the results of the investigation, but do not disclose the specific remedial action taken following the investigation or the details of the analysis that led the company to that action.
- Inform the target of the investigation of any disciplinary action, if necessary, and complete any appropriate documentation regarding the discipline.

- Document the conversations with both the complainant and the target of the investigation.
- Create an investigation file to maintain all relevant investigation documents.
- Make periodic follow-up inquiries to the complainant (if a current employee) to ensure that the issues have been resolved.
- During follow-up communications, remind the complainant that he or she should report any other concerns or issues and that the company does not tolerate retaliation.

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