



A Practical Guide to Conducting In-House Workplace Investigations

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Margaret E. Long, County Counsel, Modoc and Trinity Counties,
Assistant County Counsel, Alpine and Sierra Counties
David A. Prentice, City Attorney, Inyo, County Counsel, Alpine and Sierra Counties

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This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

CAUGHT IN THE ACT: A Practical Guide to Conducting In-House Workplace Investigations

Prepared and Presented by
Margaret Long & David A. Prentice



Introduction¹

Allegations of employee misconduct can be plentiful within a public agency and present a serious risk of liability if not handled correctly. When an employee makes an oral or written complaint, the employer should take immediate steps to stop the alleged action, protect involved parties and begin investigations. Immediate response to a complaint and the initiation of an investigation will yield the best results. While it is easier to hire an outside investigator to conduct the investigation, this is not always financially or practically feasible, and it's important for agencies to know how to conduct a fair and thorough investigation internally. The purpose of this training is to provide public agency counsel with the tools to conduct and supervise in-house employee investigations that will stand up in a court of law, if necessary.

¹ This training is focused on generalized investigation. Investigations for Police Officers and Firefighters will be different and are covered under the Police Officers Bill of Rights and the Firefighters Bill of Rights.

The following steps should be taken as soon as the employer receives a verbal or written complaint:

Step 1: Taking the Complaint

Once an employer has received a complaint, or knows, or has reason to know, that a violation has occurred in the workplace, an investigation should commence promptly. Counsel should be involved in this process from the very beginning. There is no single definition of “prompt” in the context of initiating an investigation. Variables unique to each situation impact the “promptness” analysis, including the number of witnesses and the complexity of the allegations.

The first step is obtaining a full understanding of the complaint, and to begin the process of documentation. This task is usually accomplished by Human Resources/in-house staff, under the supervision of counsel, and should be commenced within days of receiving the complaint. The results of this first step will define the scope of the investigation going forward.

The process of taking the complaint should include:

- Receive Complaint (written or oral):
 - Ask the Complainant to submit the complaint in writing and provide as much detail as possible. See Sample Complaint Form.
 - Hold an initial meeting where you inquire: “What happened?”
 - Take notes as Complainant describes the issues.
 - Allow Complainant to do the talking, but lead him/her with basic questions: “Who, what, where, and when?”
 - Ask for the identification of possible witnesses.
 - Ask for relevant documents/evidence:
 - Emails, Texts, Notes
 - Make sure they feel safe.

Step 2: Provide Interim Protection

One of the first considerations may be the need to take immediate measures for the protection of the accuser or the alleged victim. Separating the alleged victim from the accused may be necessary to guard against continued harassment or retaliation. Actions such as a schedule change, transfer or leave of absence may be necessary; however, complainants should not be involuntarily transferred or burdened. These types of actions could appear to be retaliatory and result in a retaliation claim. The employer and the accuser must work together to arrive at an amenable solution and serious consideration should be given to whether moving the respondent is preferable to moving or otherwise impacting the complainant. Employers may wish to seek legal advice prior to making any decisions.

Considerations

- Allegations, if proven, would be a terminable offense;
- Probability of interference with investigation;
- Probability of misconduct during investigation;
- Respondent in Complainant's chain of command;
- Impact on Agency operations;
- Can Respondent be transferred, or telecommute?
- Schedule changes to avoid contact with Complainant.

See Sample Notice of Administrative Leave.

Step 3: Determine the Need/ Legal Duty to Investigate

Legal Duty

- Employers have a duty under state and federal law to adequately investigate any employee's charges and claims of discrimination, retaliation, or harassment.
- FEHA provides that employers must "take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Cal. Gov. Code § 12940(k))
- Title VII requires employers to "take all steps necessary to prevent sexual harassment from occurring." (Title VII of the Civil Rights Act of 1964)

Prevent Liability

- Under FEHA, "an employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Svs. v. Sup. Ct. (McGinnis)* (2003) 31 Cal.4th 1026, 1042)
- Under Title VII, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." (*Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 765)
- If an employer has adequate policies and procedures for reporting and responding to employee complaints, it may be able to reduce potential damages and liability.

Potential Consequences of Failure to Investigate

- Violation of Policy and State and Federal Law;
- Policies and Procedures viewed as ineffective, meaningless, or retaliatory by employees;
- Discourages complaints and opportunity to resolve workplace issues prior to litigation;
- Undermines Government Agency's position in disciplinary appeals and litigation.

Reasons to Conduct a GOOD Investigation

Cotran v. Rollins Hudig Hall Int'l, Inc. (1998) 17 Cal. 4th 93

In *Cotran*, the plaintiff had been accused of sexual harassment by two female employees. The employer conducted a thorough investigation and concluded that those allegations were true. In fact, those allegations were false. Both women later admitted that there had been no harassment, but that they had been consensually involved with the plaintiff.

The California Supreme Court found that the proper role for the jury is to determine whether, in making its determination, the employer conducted an ***appropriate investigation*** and reached ***reasonable conclusions*** based upon that investigation. In other words, ***whether the employer acted in "good faith."*** The employer does not have to prove that the alleged misconduct actually occurred. Rather, the employer must show that it reasonably believed that the alleged misconduct took place and otherwise acted fairly.

Silva v. Lucky Stores, Inc. (1998) 65 Cal. App. 4th 256

In *Silva*, applying the *Cotran* standard, the court found that a misconduct investigation was adequate because fifteen (15) employees had been interviewed over a full month of investigation and no facts supporting any claim of pretext were advanced. In the context of upholding the investigation in *Silva*, the court emphasized that the investigator must be trained in how to properly conduct workplace investigations. The *Silva* court also held that methods of recording and memorializing witness interviews must be accurate, complete, and trustworthy. From *Silva*, we have learned that:

- Investigation must be timely;
- Investigator must be competent and well trained;
- Investigator should use an established system to investigate claims.

Step 4: Select the investigator

The appropriate investigator should possess all of the following:

- An ability to investigate objectively without bias.
- No stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.

In addition, the investigator should be in a position to maintain confidentiality, be respected within the organization (because his or her conclusions will be used to make a determination), have the ability to act as a credible witness and, if internal, have the likelihood of continued employment with the public entity.

Employers generally use the resources of experienced HR professionals, legal counsel (inside or outside) or a third-party investigator. There are distinct advantages and disadvantages to each type of investigator that can be selected:

Human Resource Staff. HR is the most common choice. Employers often assign the responsibility for investigations to HR professionals because of their specialized job training as well as prior experience in conducting workplace investigations. HR representatives hold a particular advantage because of their superior interpersonal skills; employees typically feel comfortable with them and are willing to confide in them. HR also has the ability to remain impartial, is familiar with the employees, and has knowledge of the organization and of employment laws. The disadvantage is that employees may associate HR representatives too closely with the organizational management and therefore not perceive them as neutral in the investigation. Additionally, management may object if the HR professional has a close personal connection with any of the involved employee(s).

Third-Party Investigators. They are more commonly used when an employer does not have an internal person who possesses the necessary qualifications or the time to conduct the investigation, or if the person accused is among the senior leaders in the organization. They can provide objectivity that an internal investigator may lack. Under the California Private Investigator Act (“CPIA”), an external investigator hired to conduct a workplace investigation must either be a state licensed attorney or a state-licensed private investigator². You cannot use a retired employee or HR consultant to do the investigation.

Legal Counsel Investigations, both In-House and Outside. These investigators have ethical and privilege considerations. They must disclose to the parties involved in the investigation the purpose of the investigation and the attorney-employer relationship. Legal counsel investigators should clearly disclose that the organization, not the accused employee, is the client. Outside counsel brings objectivity to the investigation but lacks knowledge of the employer’s culture and the employees. In-house counsel does have knowledge of public entity culture and its employees. However, both in-house and outside counsel can be perceived as intimidating, which could restrict the employees’ willingness to be open and provide information.

² California Business and Professional Code section 7520-7839

Conflicts of Interest

Potential conflicts of interest should be taken into account when determining who will conduct your investigation. *Nightlife Partners v City of Beverly Hills* (2003) 108 Cal.App. 4th 81, and *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, both tell us that it is inappropriate for one person to simultaneously perform both advisory and prosecutorial functions and that an attorney may occupy only one position at a time and not switch roles from one meeting to the next.

Attorney-Client Privilege

For an investigation report to fall within the protection of the attorney-client privilege, the “dominant purpose” of the workplace investigation must be to obtain legal advice or legal services.³

The protection of attorney-client privilege is one of the advantages to having the investigation conducted by an attorney. However, the privilege can still apply to an investigation performed by a non-attorney if an *Upjohn* letter/warning is issued. The *Upjohn* letter formally documents that the non-attorney is working at the direction of legal counsel to gather facts necessary for the attorney to give legal advice.⁴ All witnesses should be given an *Upjohn* warning, as well, which states that the investigation is confidential and being done at the direction of legal counsel in order to gather facts necessary for the attorney to provide legal advice.

See *Upjohn Letter and Warning*.

Team approach. An employer might also consider a team approach. Teams provide a multitude of experience, resources and ideas. A team may make up for areas a single investigator may lack, such as experience, expertise in employment law, the ability to obtain witness information or knowledge of internal issues and culture. Generally, a good team, which is often an outside attorney working with HR, covers all internal and external gaps that would be associated with a single investigator. The team approach provides the ability to collaborate in the event that the accuser, the accused or a witness alters his or her earlier statements.

Step 5: Preserve Evidence

The first issue the investigator should consider is whether there is a need to secure evidence, such as a computer hard drive or electronic communications. Investigators should be cautious, however, and consult internal policies regarding access. The public entity may have an approval process that needs to be followed before preserving or accessing electronic information.

³ *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 746.

⁴ *Upjohn v. United States* (1981) 449 U.S. 383.

The following is a list of evidence that the investigator may consider preserving:

- Personnel Files
- Timecards/Other Time Records
- Medical Files
- Expense Files
- Project Files
- Documents in Possession of Others
- Electronic Data
 - Email
 - Voicemail
 - Videotapes
 - Internet Searches
 - Social Media (if available and provided)

It is important to keep track of the source of each document received. Some investigators find it helpful to maintain a spreadsheet of documents that references the source of the document, date received, and a short summary of the document. Documents can then be numbered and referenced by their Exhibit number in the investigative report. Please See Sample Document Log.

Investigators should be cautious in making sure any search of an employee's office or other area in which the employee has a reasonable expectation of privacy is consistent with Federal and State laws. Investigators should seek legal advice before conducting searches.

Step 6: Ensure Confidentiality

Due to the fact that most investigations concern allegations of personal or professional wrongdoing, the public agency has a vested interest in making sure the allegations are not broadcasted. It is critically important to prevent unnecessary harm to a respondent's reputation if the charges are not substantiated. Complainants and witnesses also have privacy rights and may need to be protected from retaliation. It is therefore important not to disclose information regarding respondents, complainants or witnesses to individuals who do not have a "need to know."

Best practices in protecting privacy/confidentiality rights include:

- Avoiding the use of unsecured e-mail during the investigation;
- Ensuring that the confidentiality of documents (hard copy and electronic) is maintained; and

- Avoiding discussion of the allegations except as necessary to solicit information from parties and witnesses.

Despite these cautions about privacy and confidentiality, it is important for investigators not to promise anonymity to any of the involved individuals. **An employer should never promise absolute confidentiality to any party involved in the investigation.** Investigators may assure participants and witnesses that protection of their identity, and the information they provide, will be maintained to the extent possible, within the limits of the law and the legitimate needs of the investigation. It may be necessary to reveal the name of a party or witness in order to investigate the matter effectively.

Employer’s Ability to Limit Communications Regarding Ongoing Investigations

The Public Entity may restrict communications only if it can show a legitimate business justification outweighs associational rights, and that the dissemination of information regarding the investigation among employees would interfere with the Public Entity’s ability to conduct an effective investigation.

- Blanket Policies Do Not Justify Restrictions on Employees Associational Rights
 - NLRB – *Banner Health*. The Board has ruled that a blanket policy that requires employees not to discuss a complaint with other employees while it is under investigation violates employees’ rights under Section 7 of the NLRA to communicate with coworkers about wages, hours, and other working conditions. Employer must demonstrate a legitimate business justification that outweighs the employees’ Section 7 rights. A blanket policy does not meet the employer’s burden *per se*. (*Banner Health System* (2015) 362 NLRB 271.)
 - PERB – *Perez v. LACC*. The Board, following *Banner Health*, ruled that a “no-contact” instruction issued to a Respondent in an investigation interfered with Respondent’s employee rights under EERA (statute governing labor relations in public schools and community colleges). The employer included the “boilerplate” language pursuant to District policy that was aimed at preventing the employee from tainting evidence. No evidence of any specific concerns was presented. (See also *Los Angeles Community College District* (2014) PERB Dec. No. 2404-E.)

Step 7: Create a Plan for the Investigation

An investigation must be planned in advance to be effective and properly executed. A complete plan should include:

1. What are the issues that need to be investigated?
2. Which policies apply and should be reviewed?
3. Who should be interviewed?

4. Is the order of witness interviews important?
5. Does the environment for interviews matter?
6. What documents are relevant?
7. What physical evidence is relevant?
8. What questions should be asked?

Step 8: Develop Interview Questions

Questions should be developed ahead of time in the planning stage, although additional questions will be added throughout the investigation as more evidence and information is shared. Good questions are relevant and designed to draw out facts without leading the interviewee; they should be open-ended to elicit as much information as possible.

For Sample Questions, See Sample Questions for Complainant, Respondent and Witnesses.

Step 9: Conduct Interviews

Once the appropriate investigator has been selected, an investigation plan has been developed and interview questions have been created, interviews can be conducted. The investigator should inform all parties involved of the need for an investigation and explain the investigation process. Caution should be used when stressing confidentiality of the investigation process as this can be seen as interference with employee rights to engage in concerted activity under the National Labor Relations Act (NLRA).

The investigator should focus on being impartial and objective in gathering and considering relevant facts. Preventing pushing the investigation in any particular direction is imperative. The investigator should never offer any opinion or say anything to interviewees that will discredit his or her impartiality. Objectivity must be maintained with every interview.

Taking notes, looking for inconsistencies, and obtaining leads for more evidence and potential witnesses are goals of the interview process. Asking the employee to write down what happened may help uncover inconsistencies. There may be a disparity between what the employee is willing to commit to paper and what he or she verbalized in the interview.

Investigators should be cautious when conducting interviews to avoid any harsh interrogation tactics that could result in charges such as coerced false confessions and false imprisonment.

Lybarger Admonishment

A *Lybarger* admonishment derives its name from *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822. In interpreting Government Code Sections 3303(e) and (h), the California Supreme Court determined that whenever a supervisor/manager interrogates an employee and (a) it

appears that the employee may be charged with a criminal offense as a result of his misconduct, or (b) the worker refuses to answer questions on the ground that the answers may be *criminally* self-incriminating, the questioning must be preceded by a “*Lybarger* admonishment.”

The employee must also be advised that among other things, the employee has the right to remain silent and not incriminate himself, but:

- (1) His silence could be deemed insubordination, leading to administrative discipline, and
- (2) Any statement made under the compulsion of the threat of such discipline (i.e., incriminating statements) could not be used against him in any subsequent criminal proceeding.

See Sample *Lybarger* Admonishment.

Requests for Representation

The complainant may ask to bring someone to the interview. Unless the written procedures speak to this issue (most do not), this is left to the investigator’s discretion. It is probably best to make the complainant comfortable by allowing a support person to be present, provided that person is not expected to be a witness and provided the support person agrees to maintain the confidentiality of the information. If the complainant is represented by counsel, it is customary to allow counsel to be present; the complainant will likely refuse to participate if counsel’s presence is denied. The investigator should speak to counsel before the proceeding and inform the complainant’s counsel that he or she should not interfere with the interview and should allow the complainant to speak for himself or herself.

The respondent also may request to bring a representative to the interview. If the respondent is part of a bargaining unit, *Weingarten*⁵⁵ rights apply; thus, since the interview may lead to discipline, the employee must be permitted to bring a representative. Employees need not be informed of the right to union representation, nor is postponement required when a particular union representative is not available as long as another representative is available. The union representative may speak on behalf of the employee but the employee may be required to respond to job-related questions. The union representative does not have the right to cross-examine or interrogate supervisors or third parties who may be present. If the respondent is not part of a bargaining unit, there is no right to representation. However, as with requests from the complainant, the investigator may determine to allow a representative to be present in the interest

⁵⁵ NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975); See also *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617.

of obtaining the best cooperation from the respondent. In such cases, the representative needs to agree in advance to maintain the confidentiality of the information.

Witnesses may request to bring a representative, but do not have a right to representation even if the witness is part of the bargaining unit. The only time a witness has a right to representation is when an interview may lead to discipline. Generally, witnesses should not need a representative present since they can be assured that they are not the subject of the investigation, and that the law protects them from retaliation. When a witness is hesitant to cooperate, investigators should inquire as to why the witness is concerned as there may be a way to address the concern.

Investigators should try gentle reassurance and ask if the witness would at least be willing to answer a few general, background questions. (Often once the witness gets talking, the level of cooperation increases.)

Recording Interview

Some investigators tape record their interviews so they can have a verbatim record of the exchange and free themselves from the task of taking notes during the interview. Investigators who choose to tape record their interviews must have the consent of all parties to the interview. Failure to obtain such consent is a criminal offense.⁶ The consent to be taped should be given orally by each individual present once the tape is running.

Interview Approach	
Do	Don't
Have a second representative present.	Record the interviews secretly, fail to take notes, or go in without a plan.
Review the purpose of the interview with the witness.	Reveal information that should be kept confidential.
Ask non-leading, non-judgmental and open-ended questions to promote information gathering [who, what, where, when, how?].	Get aggressive or judgmental.
Ask, "Is there anything else?"	Prevent witness from talking freely.

Step 9: Make a Decision

Through the investigation, the investigator must be careful not to jump to any conclusions before all the facts are available. Once the interviews are conducted, other necessary procedures, such as evidence collection, should be completed. Once any credibility issues have been resolved, the

⁶ Penal Code section 632.

investigator will evaluate all the information for a formal recommendation. The investigator or member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigative report. The employer must consider all the parties involved as well as organizational processes, not just whether the accused is guilty, in the final determination.

Credibility Finding

Investigators must determine employees' credibility. Interviews often provide differing accounts and even conflicting versions of the events. Be aware that the issue is very personal to employees involved. Because of the personal and emotional nature of the issue, their individual perceptions of what happened may be clouded by personal interests, or if their jobs are on the line, they may even lie.

Inexperienced investigators sometimes believe there is no further obligation to make a finding if the two sides provide conflicting information and there are no witnesses to the incident. This is a fundamental misconception of the investigator's role. It is the investigator's obligation to make credibility determinations based on all of the information.

Certain factors should be applied in making such determinations⁷:

- Plausibility - Is the witness's version of the facts believable? Does it make sense?
- Demeanor - Does the witness seem to be telling the truth?
- Motive - Does the person have a reason to lie?
- Corroboration - Are there documents or other witnesses that support the witness's version of events?
- Past record - Does the alleged wrongdoer have a past record of inappropriate conduct?

When an investigator is having a difficult time making a credibility determination, the best approach is usually to re-interview people with relevant knowledge. Sometimes the interviewee will make statements that are inconsistent with the information he or she provided earlier. This inconsistency would weigh against the person's credibility. Conversely, if a person is able to tell of events in a similar fashion on multiple occasions, his or her credibility is strengthened.

Step 10: Develop Written Summary Investigation Results

The employer should consider preparing a final investigative report. The organization should keep a clear paper trail of the evidence, such as examining documentation of previous employee behavior and incidents. The investigator should have a clear record of everything done and any findings, as well as other steps taken during the investigation. Employers should also document

⁷ EEOC Recommendations.

interviews with the complainant, the respondent and witnesses. Investigators should ensure their notes from interviews are as factual as possible, contain as much relevant information as possible, are dated, and indicate the duration and time of the interviews.

The most effective investigative reports are those that use short, clear sentences. The report should discuss all material evidence, whether or not it supports the investigator's conclusions. The report should make findings on all material factual disputes. A factual dispute that does not relate closely to the essential aspects of the complaint may be left unresolved at the discretion of the investigator (although such "minor" disputes often relate to credibility and should, therefore, be addressed). The report should include references to exhibit numbers and relevant exhibits should be attached to the report.

The following are the required elements of an investigative report:

- Scope and manner of investigation;
- Summary of the allegations;
- The response to the allegations;
- Summary of the evidence, including witness interviews;
- Credibility determinations;
- Findings of fact; and
- Legal conclusions (but only if called for under the applicable procedures).

The "**scope and manner of the investigation**" is a brief summary of the policies and procedures governing the investigation and the steps the investigator took in gathering information. The investigator may set forth a list of people interviewed and a summary of the documents reviewed. The investigator may discuss any procedural issues that arose, as well as any interviews or evidence the investigator chose not to obtain or was unable to obtain (and why).

The "**summary of the allegations**" is either a verbatim recitation of the complaint, or a summary of the complaint in the investigator's own words. Since most written complaints generally do not contain each and every factual allegation, it is usually helpful for the investigator to summarize the allegations in full and attach the written complaint as an exhibit.

The "**response to the allegations**" is a summary of the respondent's version of the events. If the allegations are numerous, it is helpful to set forth each allegation followed by the respondent's response. Again, the tone of this section should be neutral and objective.

The "**credibility determinations**" is where the investigator carefully describes the factors that weigh in favor of – and against – the witness's credibility and should set forth his or her determinations. As stated above, the question is not whether the person is "lying," but whether the person's statements are credible based on all of the evidence.

In the “**findings of fact**” section of the report, the investigator should apply a four-step process: (1) define the issue; (2) identify the relevant policy or law; (3) set forth the evidence that weighs in favor of the complainant’s allegations, as well as that which detracts from it, and; (4) make a finding by explaining why the evidence supporting or refuting the allegation is more persuasive.

Findings Example #1

“We conclude that this allegation occurred. We base this finding on the fact that . . .”

Findings Example #2

“We conclude that this incident likely did not occur. We base this finding on the fact that . . .”

Findings Example #3

“We are unable to determine with reasonable certainty that this event occurred as alleged. We base this finding on the fact that . . .”

Standard of Proof

The “findings” section should state the standard of proof the investigator is applying. Investigators should be mindful of the standard of proof applicable to the investigation. Most investigators will be applying the “preponderance of the evidence” standard of proof as that is the standard used in most civil proceedings. It is a lower standard of proof than that used in the criminal context (proof beyond a “reasonable doubt”).

“Preponderance of the evidence” means that one body of evidence has more convincing force than the evidence opposed to it. It is useful to think of a preponderance of the evidence as a 51% (or more) certainty that a fact has been established.

Legal Advice

Investigators will often seek legal advice during the course of an investigation. It is important to keep all written communications containing legal advice (e.g., letters and e-mails from attorneys and notes of conversations with attorneys) in a separate file so the information does not become commingled with the investigative file. The investigative file may at some point need to be turned over to a third party and it is important not to waive the attorney-client privilege by disclosing legal advice.

The report should contain a “legal conclusions” section only if required by law or policy, and after consultation with legal counsel.

The goal of the document is to ensure that if a court, jury or government agency were to review it, the reviewers would conclude that the employer took the situation seriously, responded immediately and appropriately, and had a documented good-faith basis for any actions taken during or as a result of the investigation.

Step 11: Closure of Investigation

Once a decision is made, the employer should notify both the complainant and the respondent of the outcome. It is important to let the complainant know that the organization took the complaint seriously and took appropriate action. The organization must ensure the complainant agrees that he or she has been properly heard and understood, even if he or she is not in agreement with the results. The investigator should set a time frame to follow up with the complainant to ensure there are no other issues and that he or she is settling back into the work environment. The employer should encourage communication and follow-up until the complainant is comfortable again. Finally, the investigator should remind all parties to preserve confidentiality as appropriate.

When necessary, employers must take corrective action that is appropriate to the situation, such as discipline, up to and including termination. The employer should:

- Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
- Determine if education, such as sexual harassment training or anger management training, would be beneficial to the individual(s) involved, or all employees.
- Consider if the need exists to review, modify or redistribute workplace policies.
- Determine whether a review of the investigation and complaint resolution processes is necessary.

Final Matters.

The report should be provided only to counsel, the administrator or department head who assigned the matter to the investigator. The investigator should continue to safeguard the confidentiality of the investigation and all evidence received. Any outside requests for information should be referred to legal counsel.

Some investigators retain only their final report and exhibits; they destroy their notes once the investigative report is finalized. Other investigators retain their interview notes. There really is no right or wrong answer to the question of whether to retain interview notes. However, the investigator should keep in mind the advantages and disadvantages of each approach. The investigator should understand that if he or she retains interview notes, they will be disclosed to both sides should the matter end up in litigation. Thus, the interviewer will have to explain any discrepancies that may exist between the interview notes and the investigative report. On the other hand, some investigators find that certain peripheral information contained in interview

notes does not make it into the final report and yet can be helpful if the investigator is called to testify. The investigator should be consistent in his or her practice.

Conclusion:

In summary, a good investigation should contain the following elements:

- An Impartial Investigator;
- Is Prompt and Thorough;
- Ensures All Witnesses Interviewed, Documents Gathered and Reviewed and Relevant Facts Uncovered;
- Is Well Documented;
- Its Findings are Well-Reasoned and Supported by Evidence and Appropriate Credibility Determinations;
- Confidentiality and Privacy Rights are protected;
- Results are Communicated in Appropriate Manner to Complainant and Respondent;
- Appropriate Action is Taken to End the Inappropriate Conduct, if applicable; and
- Policy/Procedure Improvements and Training Opportunities are Identified and Shared with Appropriate Officials, and Action is Taken to Rectify Processes or Other Shortcomings

Margaret E. Long 2240 Court Street Redding, CA 96003 (530) 691-0800 margaret@plelawfirm.com	David A. Prentice 5242 N. Palm Ave., Suite 108 Fresno, CA 93704 (559) 500-1600 david@plelawfirm.com
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SAMPLE COMPLAINT FORM

NAME: _____	DEPARTMENT: _____
WORK TELEPHONE: _____ HOME TELEPHONE: _____	HOME ADDRESS: _____ _____
IMMEDIATE SUPERVISOR: _____	DEPARTMENT HEAD: _____

Basis of Complaint: _____

Date of alleged act: _____

Describe the alleged act and any harm it has caused you:

Attach additional sheets and documents as needed. Number of pages attached: _____

Name, position and telephone number of employee(s) familiar with your complaint:

How is each person named above knowledgeable regarding this matter?

What documents/evidence support your allegation of the alleged act?

CERTIFICATION: I certify that the information supplied is true and correct to the best of my knowledge.

Complainant Name:

Date:

SAMPLE LETTER PLACING ON ADMINISTRATIVE LEAVE

Date

Name

Address

Dear Employee:

This letter is to notify you that effective _____, you are being placed on paid administrative leave pending the resolution of an administrative investigation related to your employment.

This action is being taken as a consequence of allegations which have resulted in an active investigation regarding (e.g., your use of county information technology assets). You will remain on administrative leave until further notice.

During the period of your administrative leave, the following applies:

1. You are prohibited from entering any property owned or operated by your employer, which is not open to the public.
2. You shall immediately surrender all employer-provided property in your possession, including but not limited to office and building keys, computers and other communication devices.
3. You may be called back to work or for an investigatory interview at any time during business hours. Failure to be readily available during business hours may subject you to disciplinary action.
4. You will not discuss the investigation with any county employee or potential witness to the events being investigated. (USE ONLY IF LEGITIMATE REASON)
5. While on paid administrative leave, you are to remain available for your employer to reach you between the hours of 8:00 a.m. to 5:00 p.m. If you plan on being unavailable, please contact me and provide notice of your unavailability.

If you have any questions, please contact me.

Sincerely,

cc: Human Resources

Sample *Upjohn* Letter and Warning

Date

Name

Address

Re: Non-Attorney Assisting Legal Counsel in an Internal Investigation

Dear _____:

I am legal counsel for _____ and have been retained/assigned to provide legal advice regarding the following investigation: _____. I have asked that you assist me in gathering relevant facts in order for me to provide such legal advice. In gathering such relevant facts, you will at all times be working at my direction, and your communications with me are protected by the attorney-client privilege. The attorney-client privilege belongs solely to _____ (insert name of public entity) and not you. That means that only _____ (insert name of public entity) may elect to waive the attorney-client privilege and reveal our discussion to third parties.

In order for this discussion to be subject to the privilege, it must be kept in confidence. All of your communications with me regarding this investigation should be labelled as “Prepared at Request of Counsel. Attorney-Client Privilege/Work Product.” All documents related to this investigation should be retained in a separate location and treated confidentially. You should not discuss this investigation with anyone other than me without my pre-approval.

You should advise all individuals you interview of the above attorney-client privilege. Specifically, you should advise all individuals interviewed as follows:

“I am working at the direction of legal counsel and conducting this interview to gather facts to give to the assigned lawyer. The lawyer will rely on these facts to provide advice to _____ (insert name of public entity). The interview is part of an investigation to determine the facts and circumstances of _____ (brief description of allegations), in order for the attorney to provide legal advice on how best to proceed. My notes and reports of your communications with me are protected by attorney-client privilege and are attorney work product. The attorney-client privilege belongs solely to the public entity and not you; in other words, the attorney I am working with represents the City and not you and there is no attorney-client privilege between you and the City’s legal counsel or me. While all of the information you provide to me will be shared with the City, it will only be shared with individuals necessary to investigate and resolve

any of the issues raised in the investigation. To be clear, only the public entity can waive the privilege and reveal our discussion to third parties. You are required to keep our conversation in confidence, except you may discuss this notification with your attorney. Do you have any questions? Are you willing to proceed?”

Please let me know if you have any questions.

Sincerely,

Sample Evidence Log

In re Investigation of: _____

Investigator: _____

Evidence #	Date Collected	Source of Evidence	Description of Evidence
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			

SAMPLE QUESTIONS FOR COMPLAINANT

Meeting with: _____ **Date:** _____

Investigator(s): _____

Introduction:

- Thank the employee for his/her time and cooperation.
- Address the nature of what is being investigated.
- Explain that the matter under investigation is serious and the employer has a commitment/obligation to investigate the claim.
- Explain that no conclusion will be made until all of the facts have been gathered and analyzed.
- Keep the matter confidential to protect the integrity of the investigation.
- State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information, or failing to be forthcoming can be the basis for corrective action, up to and including termination.

Questions:

1. Who committed the alleged inappropriate behavior?
2. What exactly happened?
3. When did the incident occur or is it ongoing?
4. Where did the incident occur?
5. How did you react?
6. Did you ever indicate that you were offended or somehow displeased by the act or offensive treatment?
7. Who else may have seen or heard the incident?
8. Have you discussed the incident with anyone?
9. Do you know whether anyone complained about inappropriate behavior by that person? If yes, who?
10. How has the behavior affected you and your job?
11. Did you seek any medical treatment or counseling as a result of the incident?
12. Are there any notes, physical evidence, or other documentation regarding the incident(s)?
13. Is there anyone else who may have relevant information?
14. Do you have any other relevant information?
15. What action do you want the employer to take?
16. Do you feel safe to return to work?

SAMPLE QUESTIONS FOR WITNESSES

Meeting with: _____ **Date:** _____

Investigator: _____

Introduction

- Express appreciation for the employee's time and cooperation.
- Explain the nature of what is being investigated.
- Note that the matter under investigation is serious and that the employer has a commitment/obligation to investigate this claim.
- Emphasize that no conclusion will be made until all of the facts have been gathered and analyzed.
- Keep the matter confidential to protect the integrity of the investigation.
- Stress that any attempt to influence the outcome of the investigation by discussing it with others, retaliating against anyone who participates, providing false information, or failing to be forthcoming can be the basis for corrective action, up to and including termination.

Foundation Questions

1. Please describe any inappropriate or offensive behavior that you have experienced or witnessed. What did you see or hear? When did this occur? How often did it occur?
2. Are you aware of behavior by the accused toward the complainant or toward others in the workplace?
3. What did the complainant tell you? When did he or she tell you this?
4. Do you know if the complainant reported the concern to his or her supervisor?
5. Upon learning of the incident(s), did you report it to your supervisor?
6. Do you have any notes, physical evidence or other documentation regarding the incident(s)?
7. Do you know of any other relevant information?
8. Are there other persons who have relevant information?

SAMPLE QUESTIONS FOR RESPONDENT

Meeting with: _____ **Date:** _____

Investigator(s): _____

Introduction:

- Thank the employee for his/her time and cooperation.
- Address the nature of what is being investigated and provide a copy of the notice of the Complaint.
- Provide *Lybarger* Admonition, if necessary.
- Explain that the matter under investigation is serious, and the employer has a commitment/obligation to investigate the claim.
- Explain that no conclusion will be made until all of the facts have been gathered and analyzed.
- State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information, or failing to be forthcoming, can be the basis for corrective action, up to and including termination.
- The purpose of the interview is to obtain a thorough and accurate understanding of what has occurred, and to identify all evidence and witnesses who may have knowledge of the incident.
- Keep the matter confidential to protect the integrity of the investigation.

Questions:

1. What occurred?
2. If denied, what motive would anyone have to make these allegations up? Where were you at the time alleged incidents occurred? Who witnessed your presence?
3. When did it happen?
4. Where did it happen?
5. How did it happen?
6. Who did or said what? In what order?
7. How did the complainant(s) respond?
8. Are you aware of any other incidents involving the complainant(s)? If so, who? What? Where? When?
9. Are you aware of any other complaints by the complainant(s)?
10. Do you know why it happened?
11. Are there any notes, documents, or other evidence to support your version of the facts?
12. Who else may know relevant information?
13. Did you discuss the incident(s) with anyone prior to this interview? If so, who?

SAMPLE *LYBARGER* ADMONISHMENT

You are about to be interviewed as part of an administrative investigation. As a result, neither your statements, nor any information or evidence which is gained by such statement, can be used against you in any subsequent criminal action.

You are being ordered to answer questions specifically related to your employment. Your failure to answer questions directly related to this administrative investigation may result in disciplinary action, up to and including your discharge. You are further ordered to be truthful in all your statements. Failure to be truthful will be considered insubordination and will subject you to further disciplinary action, up to and including termination.

I hereby acknowledge receipt of the foregoing admonishment.

Signature

Date

SAMPLE INVESTIGATIVE REPORT
Complaint of Sexual Harassment
Made by Claimant X
November 1, 2017

Investigation conducted by Investigator Y

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I. Scope and Manner of Investigation

On October 20, 2017, Claimant X reported sexual harassment by Respondent Z. This was reported to Supervisor M. On October 25, 2017, the City asked me to conduct an investigation into Claimant X's claims.

In investigating the allegations, I interviewed the following individuals on the dates noted.

Name	Date
Claimant X	October 26 th
Supervisor M	October 26 th
Witness Wendy	October 26 th
Witness Frank	October 27 th (by phone)
Witness Suzie	October 27 th
Respondent Z	October 28 th

II. Claimant X's Claims

- A. Inappropriate Workplace Remarks
- B. Inappropriate Workplace Conduct
- C. Invitations to Socialize Outside the Workplace
- D. Miscellaneous

III. Respondent Z's Responses to the Allegations

- A. Inappropriate Workplace Remarks
- B. Inappropriate Workplace Conduct
- C. Invitations to Socialize Outside the Workplace
- D. Miscellaneous

IV. Summary of Witness Interviews

- A. Witness Wendy
- B. Witness Frank
- C. Witness Suzie
- D. Supervisor M

V. Credibility Determinations

The account provided by Claimant X diverges from the account provided by Respondent Z. Thus, it is necessary to make credibility determinations. In making such determinations, certain factors are relevant to the fact-finder: (1) the inherent plausibility of each person's story; (2) corroborating evidence that would tend to support or contradict each person's story; (3) each person's motive to lie; and (4) each person's demeanor; that is, whether the person appears to be telling the truth when interviewed about the incident.

A. Claimant X's Credibility

I did not find Claimant X to be credible in many respects.

The reasons for this finding are as follows . . .

B. Respondent Z's Credibility

I found Respondent Z to be credible.

The reasons for this finding are as follows . . .

C. Credibility of Other Witnesses

VI. Findings

1. Summary of the Issue(s)

The issues to be determined through this investigation are:

- A. Did Respondent Z sexually harassed Claimant X?

2. Relevant Policy or Law

The City has a Sexual Harassment Policy, which is attached hereto.

3. Finding of Facts

Based on the facts presented and my credibility assessments, I make the following findings of fact:

- A. In making findings of fact, I have applied a preponderance of the evidence standard.
- B. Respondent Z tried to kiss Claimant X on one or two occasions. Respondent Z hugs and kisses other employees and co-workers. Claimant X found this conduct to be unwelcomed and asked him to stop. Respondent Z did not try to kiss or hug Claimant X after she told him she did not want him to do so.
- C. Claimant X did not report the incident to Supervisor M until . . .

4. Final Determination

Findings Example #1

“We conclude that this allegation occurred. We base this finding on the fact that . . .”

Findings Example #2

“We conclude that this incident likely did not occur. We base this finding on the fact that . . .”

Findings Example #3

“We are unable to determine with reasonable certainty that this event occurred as alleged. We base this finding on the fact that . . .”

INVESTIGATION CHECKLIST

- ☐ **Step 1: Taking the Complaint**
- ☐ **Step 2: Provide Interim Protection**
- ☐ **Step 3: Determine if Need/ Legal Duty to Investigate**
- ☐ **Step 4: Select the Investigator**
- ☐ **Step 5: Preserve Evidence**
- ☐ **Step 6: Ensure Confidentiality**
- ☐ **Step 7: Create a Plan for the Investigation**
- ☐ **Step 8: Develop Interview Questions**
- ☐ **Step 9: Conduct Interviews**
- ☐ **Step 10: Develop Written Summary of Investigation Results**
- ☐ **Step 11: Closure of Investigation**