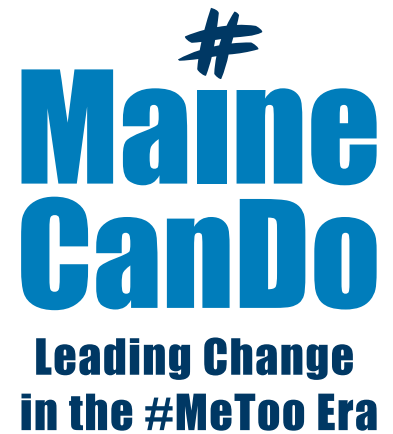


Harassment Investigations

When? Who? How?



There are several scenarios that employers may encounter which may warrant further investigation. Common scenarios include an employee who reports a questionable situation but does not want to make trouble or wants to handle it alone; or an employee who files a formal report but insists on remaining anonymous/confidential.

But when should an employer investigate? When do you need to seek outside assistance?

There is no one-size-fits all answer to the question of whether, when or how an investigation into possible harassment should be conducted. Decisions must be made and judgments exercised on a case-by-case basis, and no two situations are likely to be the same.

The common denominator is that every issue of harassment and every attempt to resolve it has serious consequences, both legal and organizational. While it may be tempting for an employer to try to handle a harassment situation in-house to minimize attention or cost (especially if it seems like a “simple” issue), in virtually every case an employer should not go it alone. Getting advice from an employment attorney, human resources consultant or similar source -- even if only a brief check in -- will help assure that the decisions and next steps are right for the employer, the affected employees, and the organization.

When to Investigate

While an investigation may feel daunting for small businesses and nonprofits, organizations have a legal obligation to investigate illegal harassment and to determine an appropriate remedy. It is also in the employer’s interest to assure a safe working environment for all employees. Utilizing the “knew or should have known standard” **an investigation must take place if any level of supervisor was “on notice” of illegal harassment or with the exercise of reasonable care should have known about the conduct.**

In addition, an investigation should be undertaken in the case of:

- A written or verbal formal complaint.
- A complaint to a supervisor about “unfair treatment” or “hostile environment” or “harassment.”
- An employee or other third-party report of a concern about what is happening to another employee.
- Offhand comments/overheard conversations about illegal harassment.
- A “confidential” complaint with enough detail to investigate.
- An anonymous tip.

It is critical that the entity define the scope of the investigation up front. In the case of a formal report, the employer should:

- Clarify the nature of the allegations with the reporting employee at the outset.
- Discuss the scope of the investigation with the reporting employee.
- Determine the scope of investigation, preferably with the help of employment counsel or other outside expertise.
- Be flexible about the scope as the investigation unfolds. It may change.
- Identify an investigator: In-house? Outside resource?
- Make sure the investigator understands his or her charge and authority. Does the employer want a factual investigation to determine what happened (and did not happen)? Does the employer want conclusion(s) about whether there has been violation of policy and/or law? And/or recommendation as to remedy/ discipline?

Who Should Investigate?

In addition to understanding what happened, **a good investigation should be prompt, thorough, and impartial.** Investigators must be able to:

- Differentiate between firsthand knowledge, hearsay, gossip, and rumor.
- Weigh evidence and make credibility determinations.
- Make sound conclusions based on accurate findings.
- Reach a conclusion based on a “more likely than not” standard.

To achieve the best outcome for all involved, it is crucial to select an investigator who is capable of undertaking a quality investigation based on its nature and projected scope.

The individual chosen must be:

- Able to establish a connection/build rapport with all the parties.
- Trained and experienced in conducting personnel investigations (preferably harassment).
- Knowledgeable about the applicable legal issues.
- Able to ask tough, embarrassing questions. Able to track down information, follow up, adapt scope as necessary.
- Objective and not invested in particular result: free from bias or agenda and perceived to be so.
- A good note-taker and report-writer.

In-house or External? Considerations When Selecting an Investigator

- What is the type of violation? Is it policy or law or both?
- How severe are the allegations? If true, would they likely lead to termination?
- Who are the complainant, respondent, and witnesses?
- What are your resources in-house? Does your in-house investigator have up-to-date training, experience, and availability?
- Are there actual or perceived bias associated with the decision makers?
- What are the potential costs, including upfront, overall, and hidden (ex. reputational) costs in either scenario?

If the organization chooses to use someone in-house, the investigator must not be biased and must have, and be perceived to have, an open mind. The individual must be aware of their implicit biases and be free from assumptions based on the parties' respective positions, appearances, cultural or family backgrounds, political beliefs, academic, social or extracurricular activities, or anything else. The case must be judged on its own merits.

If the employer decides to retain an outside investigator, there are ample resources to choose from. Experienced and competent investigators may be employment lawyers, paralegals, human resources experts, and/or law enforcement personnel.

Regardless of credentials, a potential investigator should:

- Have experience conducting workplace harassment investigations and writing harassment investigation reports (accept no substitutes).
- Provide references for their work.
- Be able to describe in general terms their process for conducting harassment investigations.
- Describe how they handle recurring issues like confidentiality, difficult witnesses, credibility conflicts, and (if applicable) union representation.
- Notify you if they have been called on to testify or defend an investigation.

How to Investigate

In delicate situations such as sexual harassment in the workplace it is always best to have a subject matter expert at your side. For this reason, our first recommendation is ALWAYS to call an external investigator to learn about their services before you decide to go it alone.

We've provided these checklists to help you gain an understanding of the kind of work they'd be doing for you so you can better manage them.

Investigation Planning Logistics

- ___ Identify a point person to coordinate interviews and manage investigation logistics.
- ___ Determine a location for the party/witness interviews. It should be neutral and private.
- ___ Determine the order for the witnesses.
- ___ Determine who will be allowed to be present during interviews. Supporters? Legal counsel? Union representative? Notetaker?
- ___ Set up a confidential investigative file to include relevant policies, procedures, personnel files, and records.
- ___ Consider known facts and identify potential sources of information: witnesses, electronic evidence, documents, security video.
- ___ Consider whether searches (of computers, electronic devices, physical sites) are appropriate and necessary and how to conduct them. Work devices only or personal cell phones, etc.?
- ___ Consider whether social media (photos, comments, information) will be included.
- ___ Develop a working timeline of events.
- ___ Identify issues and frame questions.
- ___ Prepare an outline of questions for parties and witnesses.

Interview Basics

- ___ Build a rapport.
- ___ Let the interviewee talk without interruption - be comfortable with silence.
- ___ Plan out questions but follow up and let conversation evolve naturally.
- ___ Use funnel method of questioning: broad to narrow.
- ___ Use the “W” questions: Who, what, where, when, how, how do you know that?
- ___ Avoid “leading” questions (i.e. questions that presume an answer).
- ___ Establish a timeline of events.
- ___ Get clarification of any answers that are unclear or vague or use unfamiliar slang.
- ___ Don’t interrogate.
- ___ Avoid asking for opinions, speculations, conclusions, or character evidence.
- ___ Save difficult questions for the end of the interview.
- ___ Make sure to ask the difficult questions!
- ___ Ask: Anything else?
- ___ Give an opportunity for follow up by providing your contact information in case the interviewee wants to follow up.

Complainant Interview

- ___ Thank the person for coming at the beginning and end of the interview.
- ___ Give brief explanation of nature of matter you are investigating.
- ___ Acknowledge difficulty of the conversation and the importance of being accurate and truthful.
- ___ Explain expectations of confidentiality, candor, and cooperation. Deal honestly with requests for confidentiality.
- ___ Explain that you will be taking notes/recording to be sure you get all of the information down accurately.
- ___ Build rapport.
- ___ Explain the process of the investigation in a supportive manner to seek the person’s cooperation. Make no promises about outcomes.
- ___ Reassure the person that all information will only be disclosed on a “need to know” basis and identify the individuals who will be informed.
- ___ Reassure the person that retaliation is strictly prohibited, give examples of retaliatory behavior, and identify who they should contact if retaliation occurs.
- ___ Be sympathetic in a neutral manner such as “I know this is hard to talk about” or “I am sure this is difficult for you.”
- ___ Allow complainant to give statement in his or her own words, uninterrupted.
- ___ Obtain confirmation of the details of the complaint – who, what, where, when, how, why.
- ___ Interview the complainant using open ended questions:
 - What are you able to tell me about...?
 - What are you able to tell me about how that made you feel?
 - What are you able to tell me about what your thought process was when...?
 - Can you tell me more about...?
 - Can you help me understand?
 - Can you tell me what happened next?
 - Can you elaborate on...?
- ___ Ask the person if they have any questions about the process.

Witness Interview

- ___ Thank the person for coming at the beginning and end of the interview.
- ___ Provide a brief explanation of nature of matter you are investigating and why the interviewee is being included in investigation - limit the disclosure to the extent possible.
- ___ Acknowledge difficulty of conversation and the importance of being accurate and truthful.
- ___ Explain expectations of confidentiality, candor, and cooperation.
- ___ Explain that you will be taking notes/recording to be sure you get all of the information down accurately.
- ___ Build rapport.
- ___ Explain the process of the investigation in a supportive manner to seek the person's cooperation.
- ___ Reassure the person that all information will only be disclosed on a "need to know" basis.
- ___ Reassure the person that retaliation is strictly prohibited, give examples of retaliatory behavior, and identify who they should contact if retaliation occurs
- ___ Get details of complaint – who, what, where, when, how, why.
- ___ Obtain any relevant documents.
- ___ Learn about other witnesses.
- ___ Ask the person if they have any questions about the process.

Respondant Interview

- ___ Thank the person for coming at the beginning and end of the interview.
- ___ Provide a brief explanation of nature of matter you are investigating.
- ___ Acknowledge difficulty of the conversation and the importance of being accurate and truthful.
- ___ Explain expectations of confidentiality, candor, and cooperation.
- ___ Explain that you will be taking notes/recording to be sure you get all of the information down accurately.
- ___ Build rapport.
- ___ Explain the process of the investigation in a supportive manner to seek the person's cooperation.
- ___ Reassure the person that all information will only be disclosed on a "need to know" basis.
- ___ Allow respondent to give statement in his or her own words, uninterrupted.
- ___ Interview for clarification, don't interrogate. Give the respondent a full and fair opportunity to present his or her side.
- ___ Obtain details – who, what, where, when, how, why.
- ___ Ask the respondent to explain inconsistencies with known evidence and provide an opportunity for the respondent to explain/refute all evidence disclosed by complainant/witnesses.
- ___ Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- ___ Seek facts and information regarding possible elements of policy violation
- ___ Seek facts and information that could explain or defend Respondent's alleged conduct
- ___ Reassure the person that retaliation is strictly prohibited, give examples of retaliatory behavior, and identify who they should contact if retaliation occurs.
- ___ Provide opportunity for Respondent to explain/refute all evidence disclosed by Complainant
- ___ Ask the person if they have any questions about the process.

Writing the Report

Before you begin writing the report, think about how to make the report understandable to someone who has never spoken with the parties and who is unfamiliar with the organization's policies and procedures. It should also be easy to read and be able to stand on its own as a full description of the complaint, the process, the investigation, the evidence, the findings, and the conclusions. It should use consistent terminology and must be able to speak for itself in the event of an internal/external review.

Background & Procedural History

- ___ Orient the reader so they can best follow the report.
- ___ Explain how and why an investigation ensued and what policy and procedure are relevant.
- ___ Include relevant portions of the policy and any definitions.
- ___ Explain when the investigation began.
- ___ Introduce the parties and the association with the organization/business.
- ___ Explain any factors that will help the reader better understand the investigation, investigation process, etc.
- ___ Explain timeline of investigation and account for any delays.

Information Considered

- ___ Identify all information reviewed (emails, texts, photographs, video, instant messages, social media).
- ___ Identify the witnesses interviewed (including the date, location of the interview, who was present, and the connection of the parties to the investigation).
- ___ Identify witnesses suggested but not interviewed and provide the reason(s) why they were not interviewed.

Evidentiary Standard

- ___ Explain the evidence standard used: preponderance of the evidence - more likely than not.

Report Contents: Structure

- ___ Brief summary of complaint.
- ___ Procedural history and timeline of investigation.
- ___ Applicable policies and procedures.
- ___ List of persons interviewed and documents and evidence received.
- ___ Identification of the evidentiary standard used.
- ___ Findings of fact.
- ___ Credibility assessments.
- ___ Rationale and conclusion.
- ___ Recommendations only if appropriate and within scope of investigation.
- ___ Attachments – key documents if any.

Factual Findings

- ___ Organize the factual findings by alleged policy violation.
- ___ Include disputed and undisputed facts.
- ___ For disputed facts, articulate how they were resolved. Cite the evidence on which the conclusion is based and if based on credibility alone, why one person was found to be more credible than another.
- ___ Be detailed and precise.

Addressing Conflicting Accounts

- ___ Conflicting accounts does not equal “inconclusive.”
- ___ What does the evidence say beyond “the conflicting accounts?”
- ___ Preponderance of the evidence is a low burden – 50% plus a feather.

Making Credibility Assessments

- ___ Consider the individual’s general demeanor (for example, does the person appear to be honest and cooperative versus evasive, argumentative, or hostile?). Take care to differentiate between nerves and evasiveness/untruthfulness.
- ___ Consider the impact of trauma. Individuals who have experienced trauma may respond to these conversations in a variety of different ways. Some characteristics we associate with untruthfulness may be a trauma response. For this reason, consider multiple indicators of credibility, not simply demeanor or response. Consider your own biases and make sure/be careful they are not unduly influencing your judgment.
- ___ Consider the person’s opportunity and capacity to observe the event.
- ___ Are there any prior inconsistent statements about this matter?
- ___ Are there contradictions or inconsistencies with other evidence (witnesses, emails, texts, receipts, photos/videos)?
- ___ Consider possible motivations. Does the individual has a motive to lie?
- ___ Consider the probability/improbability of the person’s account of events. Use logic and common sense.
- ___ Consider whether the person has lied before about other matters.
- ___ Consider admissions that justify behavior. (“I was just joking.”)

Rationale & Conclusion

- ___ Organize by alleged policy violation.
- ___ Explain why the factual findings give rise to a policy violation, or not.
- ___ If report simply summarizes the evidence and states, “I find by a preponderance of the evidence that responding party violated organization’s policy,” it reveals nothing about how the conclusion was reached. Reasoning must be explained.
- ___ If within scope, make a determination as to whether the conduct did or did not violate the policies by a preponderance of the evidence.
- ___ If within scope, make recommendations for discipline or remedy. Past discipline and past practice must be considered.

Outcome

- ___ Notify both parties of results.
- ___ Determine if complainant gets copy of report (usually not at the internal stage).
- ___ Monitor for retaliation and follow up periodically.
- ___ Maintain documentation in confidential file.
- ___ Provide training when and as needed as part of follow up or remedy.
- ___ Make policy amendments and clarifications that have been identified through the process.
- ___ Review and debrief about the process with the relevant team or management (What went right? What went wrong? How can we improve our process?)
- ___ Determine if the incident needs to be communicated with higher levels of the organization (ex. Board Members).

The information contained in this document is not intended to be legal advice and is for informational purposes only. If you need legal advice, please contact an attorney. For additional information and resources, please visit mainecando.org.