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# **10 Suggestions for Investigating Employee Misconduct**

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NOTES

## 10 SUGGESTIONS FOR INVESTIGATING EMPLOYEE MISCONDUCT

Performing a proper investigation of a complaint against an employee is essential in order to discover the truth, make informed discipline decisions, and protect the rights of both complainant and employee. To be effective, investigations must be well-planned and performed with deliberation. After acting to protect the safety of individuals and property, an employer should determine who will investigate and the scope of the investigation.

### 1. RECEIPT OF THE COMPLAINT: TIMELY TRIAGE IS CRUCIAL

As soon as a complaint is received, management must make an initial assessment of the seriousness of the complaint. Although virtually every complaint is entitled to some level of investigation, complaints that may impact the safety of employees, customers, or the public, as well as complaints indicating discrimination issues, theft, and potential criminal conduct, obviously require a greater level of scrutiny than those relating to minor workplace annoyances. Also, consider who should be notified – the Board of Directors, Tribal Council, General Manager, law enforcement, legal counsel, other employees?

### 2. UNDERSTAND THE LEGAL CONTEXT: KNOW THE RULES

If a rumor or complaint involving an employee relates to the safety of employees or property, it must be treated as a matter of highest priority, and immediate action should be taken to stop the dangerous or destructive behavior. However, except in cases of extreme emergency, no action should be taken until you have taken the following steps:

- a) Review all applicable laws, policies, procedures, and contracts to determine what, if any, rules or rights are involved;
- b) If the matter involves misuse of computers, or if there may be other evidence of misconduct that would need to be preserved, take appropriate steps to secure equipment and/or evidence (i.e. copies of Facebook page, email or text messages, etc.).

### 3. PROTECT THE STATUS QUO

The first step in assessing a complaint of misconduct is to determine if it raises an issue of potential injury to persons or property. If it does, immediate consideration must be given to removal of the employee from the situation pending the investigation. On the other hand, if there

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is little or no potential for injury to people or property if the employee remains on the job pending the investigation, HR should consider allowing the employee to stay on the job during the investigation.

There are a number of ways to remove an employee from the situation pending an investigation, including placing the employee on administrative leave with pay or transferring the employee's responsibilities. Determining which removal options are appropriate depends upon the circumstances of each case.

Consider meeting with the employee to notify him or her of the subject matter of the investigation (provided that it would not prejudice your investigation) and what his or her work situation will be while the investigation is ongoing (e.g. leave with pay, transfer, unpaid suspension).

#### 4. **PLANNING THE INVESTIGATION**

Prior to beginning an investigation, a plan as to how that investigation will proceed should be developed. This plan should identify:

- a) who will be performing the investigation;
- b) who will be interviewed;
- c) an outline of what questions potential witnesses will be asked; and
- d) relevant documents that must be compiled.

Sometimes, a site visit is helpful. The plan should also identify how the investigation will be concluded and who will be responsible for deciding what action should be taken. Determining a schedule for the investigation is helpful in order to ensure that the investigation will be concluded in a timely fashion.

#### 5. **CONDUCTING THE INVESTIGATION**

No two investigations are alike, and virtually every investigation you perform will differ in some (often unexpected) way from the one before it. The purpose of witness interviews is to obtain information, and different approaches are effective with different people. A good investigator recognizes that each interview must be tailored to the personality of the person being interviewed and never treats investigations in cookie-cutter fashion. However, there are a few simple rules that should be followed in every investigation that is performed.

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### **a) Review Documents Beforehand**

Any documents or other materials that have been identified as possibly relevant to the investigation should be reviewed prior to interviewing witnesses. Keep an open mind when identifying potentially relevant documents. Documents often provide useful background for the investigator and, in some cases, will assist the investigator in assessing the accuracy and/or credibility of witnesses interviewed.

### **b) Location of the Interview**

Always hold interviews in as private a place as possible, and try to select a location in which the witness will feel comfortable.

### **c) Interview Each Employee Individually if You Can**

You do not want the recollection of one witness influencing that of another.

### **d) The Same Investigator Should Conduct All Interviews**

One purpose of interviews is to assess credibility. It is impossible for an investigator to assess the credibility of someone he or she did not interview.

### **e) Commencing the Interview**

Always inform the person you are interviewing what his or her role is in the investigation; underscore the need for confidentiality; and explain how the information given to you by that person may be used. You should never promise someone that whatever they say will be kept confidential or that you will protect their identity unless you know that you can keep that promise. You should also explain the prohibition against retaliation for participating in the investigation.

### **f) Recording the Interview**

Always make a contemporaneous written record of the interview. This record should be dated, and all participants in the interview should be clearly reflected in the record. However, if more than one person is present during the interview, make sure that only one set of notes is kept. Remember, this is a record of the interview, not a

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summary of your conclusions. Therefore, you should not include your own impressions of the witness or the investigation in general in that record; those types of comments should be recorded in a separate document.

### **g) Order of Interviews**

Determine whom you are going to interview first and the order of the interview. It is usually best to interview the employee under investigation last, after interviewing all other witnesses and reviewing all other documents (including surveillance tapes, if available). This will help you prepare for the employee under investigation and know when he or she might be deviating from the truth.

### **h) Scope of Questions**

Ask open-ended questions first, and then narrow down to specific questions about the alleged incident. Make sure you understand what the witness is saying, and repeat what the witness has said to confirm your understanding. Once you have a general sense of the employee's knowledge base, focus the interview on facts about which the witness has personal knowledge. Ask the witness about details, who else was present, and who can corroborate his or her testimony.

### **i) Ask the Hard Questions**

If someone is accused of specific conduct, ask that person if they engaged in the conduct, no matter how hard or embarrassing it is to ask the question. You have to have either an admission or denial before you can make an accurate determination of what occurred.

### **j) Understand the Setting**

If the investigator is investigating physical misconduct or is unfamiliar with the location where the alleged conduct occurred, ask the witness to reenact (in detail) what he or she saw and consider a site visit.

### **k) Ending the Interview**

If possible, at the end of each interview, ask the witness if there is anything else of importance that he or she would like you to know

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and if there is anyone else he or she believes you should speak to. At the conclusion of the interview, underscore once again the need to maintain confidentiality.

### I) Tips on Interviewing the Accused Employee

Generally, the employee against whom a complaint of misconduct has been made will be the last (or close to the last) witness to be interviewed by the investigator. Regardless of the nature of the allegations, always treat the employee with respect, and use a non-accusatory tone. Often an investigator will provide the accused with a general description of the allegation and ask for an open-ended response. Let him or her tell his or her side of the story first, and then gradually review the specific allegations in more detail. Additional thoughts to keep in mind:

- Tell the employee the purpose of the investigation.
- Advise the employee that no judgments have yet been made about the validity of the complaint or issue being investigated.
- If the employee expresses anger, let time pass before pressing for a response to a question. Anger is a natural response. Likewise, circle back later if the employee has not responded fully to questions.
- Provide a full opportunity to respond to each allegation.
- Explore all defenses and/or alibis.
- Ask the employee to identify all persons he or she believes should be interviewed as part of the investigation and what information those individuals are likely to provide.
- Ask the employee if there are other steps that he or she feels should be taken in the investigation (however, the investigator should make clear that the investigator will decide the scope of the investigation).
- Reiterate that retaliation against the complainant or other witnesses will not be tolerated.

### 6. MAKING THE DECISION (ABOUT WHAT HAPPENED – NOT ABOUT WHAT THE EMPLOYER SHOULD DO)

- a) Once all the documents/materials have been reviewed and witnesses interviewed, the investigator should go back over the notes taken during the investigation to see if there are

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inconsistencies, whether there are additional people who should be interviewed, and whether it is necessary to speak again with someone who has already been interviewed. Remember, it is all right to go back for more information if it may help clarify something, although, in general, you should try not to interview witnesses multiple times.

- b) Make a decision. Making that final decision is often difficult, particularly if there are contradictions in what people have said and the investigator is forced to decide whom to believe and whom not to believe. However, remember that it is the investigator's absolute obligation to reach a conclusion before the investigation is closed. The investigator can assess the credibility of witnesses and whether a story makes sense, analyze motives, and even rely on hearsay to make a conclusion.
- c) In reaching a conclusion in an investigation, the investigator should use what is called the "preponderance of the evidence" burden of proof. This means that the investigator must decide whether "it is more likely than not" that the underlying allegations occurred as alleged. In this context, the investigator does not need to determine that the conduct has been established beyond a reasonable doubt (the standard for criminal conduct) or by clear and convincing evidence, in order to making a "founded" determination.

### 7. **DRAFT A WRITTEN REPORT**

If an investigation report is warranted by the circumstances, careful thought should be given to what is included in the report. It is important to remember that, if the case is litigated later, the report could very well be admissible in court. A well-written report will be neutral, objective, precise, and thorough. In most cases, a written report should include basic information about the investigation:

- a) A statement of the substance of the complaint that prompted the investigation.
- b) The scope of the investigation and the issues investigated.
- c) A list of the documents and other evidence reviewed.
- d) A list of witnesses who were interviewed. In some circumstances, the witnesses may not be identified by name. The report may or may not summarize what each witness said, depending on the circumstances.
- e) A summary of the accused employee's response to the allegations.



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- f) Factual findings on each issue.
- g) A statement of the investigator's conclusion of whether the complaint is valid or not.

Generally speaking, a written report should not include recommendations as to what, if any, remedial action should be taken unless the investigator is assigned this responsibility. A written report should never include information that is extraneous to the incident being investigated. For example, if the investigation revealed the existence of harassment in the organization more widespread than just that between the complainant and the accused, that is an issue that must be addressed in the proper forum and should not be included in a report of the investigation of a specific complaint. Similarly, if, during the investigation, the investigator develops opinions as to what employees should or should not have done to avoid the incident, those opinions should be raised outside of the context of the investigation and not included in the report.

### 8. **COMMUNICATION OF RESULTS**

After the written report is completed, it is usually provided to the decision maker(s) who will assess the findings and make determinations based on those findings. However, the question often arises as to whether there should be communication with the employee who complained and the witnesses who were interviewed. While there is no one rule, in general, it is wise to let the employee who complained know that the employer has investigated the matter, that appropriate action was taken, and that the employee should report if any further incidents occur. Employers should be careful not to share too many details. It is less clear whether there needs to be any communication with witnesses. Finally, the employer will have to determine what information to share with the person being investigated. There is no one rule for the detail that should be communicated, but the employer must weigh the confidentiality of those involved, fairness, due process (if applicable), and the employer's own grievance or legal process.

### 9. **CHECKLIST: INVESTIGATIONS OF SERIOUS EMPLOYEE MISCONDUCT**

The following is a checklist that can be used in an investigation of employee misconduct. The order of events will necessarily be dictated by the facts of each case.

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### a) Guiding Principles

- ✓ Fairness, impartiality, and affording accused employees a reasonable level of due process.
- ✓ To be effective and upheld when challenged, discipline should be prompt.
- ✓ Compliance with laws and policies concerning confidentiality and reporting.

### b) Consider All Applicable Policies and Employer Rules/Procedures

- ✓ Policies regarding investigation of employee matters.
- ✓ Policies regarding standards of conduct.
- ✓ With misconduct involving computers/technology, consider:
  - Computer use policies, personal use, identifying illegal uses, “no expectation of privacy” statement.

### c) Obtain and Review Personnel File

- ✓ Consider prior misconduct of a similar nature; progressive discipline.
- ✓ Obtain and review the files of both the accuser and the accused in cases where one employee makes a complaint against another employee.
- ✓ Obtain any “informal” supervisor files.

### d) Obtain and Preserve Critical Evidence

- ✓ Consider possible evidence – documents, surveillance video, etc.
- ✓ With computer misuse, it is absolutely critical that you retrieve and secure the computer immediately.
- ✓ Consider chain of custody: IT should oversee; document who obtained the computer, who maintained it to avoid tampering, and how the device was safeguarded/secured.
- ✓ Device should be kept in locked location.

### e) Plan Ahead

- ✓ Identify key witnesses (accused, alleged victim, eyewitnesses, supervisors).
- ✓ Consider the order of investigation.

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- ✓ Document all steps in the investigation.

### f) Interview Witnesses

- ✓ Inquire about, and then obtain/preserve, electronic evidence.
- ✓ Sequester witnesses to avoid a tainted tale or lost evidence.
- ✓ Consider whether another person should be present during interviews.
- ✓ In nearly all situations, the accused employee should be interviewed last (and never first).
- ✓ Fair and impartial inquiry: no leading questions; provide witnesses a chance to explain; and collect facts without passing judgment.

### g) Confidentiality

- ✓ Employee records.
- ✓ Request that witnesses not discuss the case with others.

### h) Consider Litigation Hold Letter

- ✓ A litigation hold letter is a written directive advising custodians of certain documents and electronically stored information to preserve potentially relevant evidence in anticipation of possible litigation.

## 10. DECISION-MAKING CHECKLIST

### a) Discipline

In determining whether it is appropriate to impose discipline, consider the seven factors below. Although these factors are not required to discipline an employee, it is helpful to consider these steps to ensure that the disciplinary action is “fair” to the employee, and it is often a solid defense against the claim that the discipline was a product of illegal motive (i.e. discrimination).

#### i.) Notice

- ✓ Did the employee have notice of the rule or policy alleged to have been violated?
- ✓ Did the employee have notice of the consequences of violating the rule or policy?

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- ✓ Was the rule or policy consistently enforced?

### ii.) Reasonable Rules and Orders

- ✓ Was the rule or policy reasonable?

### iii.) Investigation

- ✓ Did the employer conduct an investigation into the infraction?
- ✓ Did the employer give the employee an opportunity to respond to the alleged infraction?
- ✓ Did the employer use good investigative techniques?
- ✓ Was the investigator trained in performing investigations?

### iv.) Fair Investigation

- ✓ Was the investigation conducted fairly?
- ✓ Was the investigator biased?
- ✓ Did the investigator keep an open mind during the investigation?
- ✓ Did the investigator follow up on the witnesses and documentation provided by the employee and witnesses?

### v.) Proof

- ✓ Did the employer have a reasonable, good-faith basis for believing that the employee violated the rule or policy?
- ✓ What evidence exists to support the discipline of the employee?

### vi.) Equal Treatment

- ✓ Has the rule or policy been enforced against other employees?
- ✓ Have other employees been disciplined for the same or a similar infraction?
- ✓ Is the employee being singled out because the employee is sympathetic to a union or in a protected classification?

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### vii.) Penalty

- ✓ Does the punishment fit the infraction?
- ✓ Have other employees been disciplined in the same manner for the same or a similar offense?
- ✓ Has the employee previously been disciplined for a violation of a rule or policy?

### b) **Termination**

Before making the final decision to terminate an employee, employers should review the facts and circumstances surrounding the decision with a disinterested party, such as another member of management, HR, or legal counsel. You should consider the following issues in conjunction with the seven steps outlined above, before the dismissal:

- Whether organization policies and procedures have been followed.
- Whether or not an employment contract exists. If an employment contract does exist, review the contract to determine whether and under what circumstances termination is appropriate under the contract.
- Whether the employee's personnel file and other documentation support the termination decision.
- Whether the employee is in a protected class or has engaged in protected activity.
- Whether the employee has been involved in a whistleblower complaint or union activities.
- Whether the employee has been informed that his or her performance was inadequate or that he or she violated organization rules or policies.
- Whether the employee has been given an opportunity to respond to or explain any allegations of misconduct or poor performance against him or her.
- Whether the employee was given ample opportunity to improve or correct any performance problems (i.e. whether the termination will come as a surprise to the employee).
- Whether discharge is consistent with the way other employees have been treated.

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- Whether the employee has recently filed for workers' compensation or other protected leave.
- Whether anyone has ever promised the employee that he or she would be terminated only for "just cause" or for certain reasons.
- In addition to the supervisor's input, whether the discharge decision been independently reviewed by others.

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Dan is chair of the firm's Labor and Employment Practice Group. He has over 20 years of experience in representing public and private sector employers, including Indian nations, in labor and employment matters. He has a national reputation for his work. He provides on-the-spot human resources management advice to Indian nations' enterprises to address and resolve employment disputes before they end up in litigation, including leave issues, wage/hour disputes, civil rights, and union matters.

He has arbitrated labor disputes under tribal law and represented Indian nation enterprises in matters before the National Labor Relations Board. Dan and his colleagues at Drummond Woodsum have assisted tribes in implementing and enforcing their own laws governing unions and collective bargaining, employment discrimination, and tribal employment preferences. He has helped design union election procedures for tribes to oversee labor organization elections and he has advised tribes and tribal enterprises on complex issues surrounding union drives.

Dan is an elected fellow of the *College of Labor and Employment Lawyers*. Membership in the College demonstrates "the highest level of character, integrity, professional expertise and leadership" of labor and employment lawyers in the United States and Canada. He has consistently been listed in *Best Lawyers in America* in the category of Labor and Employment Law; in *Chambers & Partners USA Guide* in the category of Employment Law, and in the Corporate Counsel Edition of *Super Lawyers* in the category of Employment and Labor Law.

In addition to his regular service as employment counsel to numerous public and private sector clients, Dan represents employers before federal agencies and in arbitration and employment law trials in both federal and state courts. He also regularly presents at national conferences on employment law and human resources management and is editor of "Litigating the Employment Tort Case," published by the American Bar Association, and serves as Vice-Chair of the Employer- Employee Relations Committee for the American Bar Association.

Dan is a graduate of the Boston College School of Law, where he served as an editor of the *Boston College Law Review*. He served as law clerk to then Chief Judge Gene Carter at the United States District Court for the District of Maine.





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Jeana is a member of the firm's Indian Nations Labor & Employment Group. Jeana provides counseling and litigation services to public and private employers and Indian tribes on all aspects of employment law. Jeana advises and trains clients on workplace issues arising under the Americans with Disabilities Act, the Family Medical Leave Act, Title VII of the Civil Rights Act of 1964, and the Fair Labor Standards Act. She also reviews and writes employee handbooks and policies to ensure compliance with state and federal law and best practices.

Jeana is a graduate of the University of Connecticut School of Law. While in law school, Jeana served as an Editor for the Connecticut Law Review, and worked as an extern for the Criminal Division of the U.S. Attorney's Office, as a teaching assistant for Lawyering Process and Contract Drafting, and as a student attorney for the Mediation Clinic and the Energy and Environmental Law Clinic. She received the Pro Bono Certificate of Recognition from the University of Connecticut School of Law for contributing over one hundred hours of volunteer legal services during her time as a law student. Jeana also published an article while in law school that has since been cited in other law review articles, entitled Domestic Violence in Indian Country: Improving the Federal Government's Response to this Grave Epidemic, 45 CONN. L. REV. 1843 (2013).

