

# Lawyer Insights

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## Five Ways That Companies Botch Workplace Investigations

by Ryan M. Bates

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Investigating workplace misconduct isn't easy. The perils and pitfalls are endless, even for those with considerable experience. This is especially true in the #MeToo era where a company's actions—or inactions—can instantaneously be publicized, tweeted and shared. The pressure is on companies now, more so than ever, to respond quickly and appropriately to allegations of workplace misconduct. Failing to do so will not only hit the corporate checkbook, but could subject the company to reputational damage that could take years to recover from.

Below are the five most common mistakes made by companies when responding to allegations of workplace misconduct:

### **Failing to Elevate a Complaint to Human Resources**

In a perfect world, all complaints would be made directly to your company's most competent HR professional, who would immediately engage the company's investigation protocols. This is not a perfect world. Most complaints are not made directly to HR, legal or risk management. They're made to low- and midlevel managers. Legally speaking, when those managers—no matter how sophisticated they are—are aware of the complaint, the company is on notice and must take appropriate action.

Managers should be trained to recognize and immediately elevate any such complaints. While this is a rather straightforward notion covered in any basic management training, many complaints never make it to the appropriate person and, thus, never get the chance to be investigated.

Two scenarios are particularly common in this regard:

First, the employee tells a manager that his or her complaint is "off the record." This typically comes in the form of, "I don't want anything done about this, but I think you should know [insert horrible workplace event]." In the HR world, nothing is off the record. Nothing. Ever. While the manager may feel obliged to respect the complainant's privacy, there are appropriate ways to do that—and failing to elevate an issue is not one of them. Fortunately, this is easily remedied. When a complaining employee ventures down the "I just want you to know but want nothing to be done" road, the manager must interrupt the employee and explain that the responsibilities of his or her position may require action to be taken.

Second, the employee lodges a complaint to management and is told "go speak to HR." The employee never follows up with HR. More importantly, neither does the manager. While it is entirely appropriate to

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direct an employee to HR, managers must, themselves, follow up with HR to ensure that the complaint reached HR.

## **Failing to Remove an Alleged Harasser From the Workplace**

When harassment allegations surface, it is vital that the alleged harasser be removed from the workplace while the company's investigation is pending. This can easily be accomplished by placing the employee on administrative leave—the preferred option in most circumstances—or, if appropriate, transferring the employee to a different floor or location.

There are several reasons why this is critical.

First and foremost, the company must do all it can to see that the harassment ceases immediately, and removing the alleged harasser is the simplest way to ensure this.

Second, the company must preserve the integrity of its investigation. An alleged harasser can taint the investigation by speaking with witnesses, destroying documents or pursuing other means that would undermine the investigation.

Third, the whole purpose of an investigation is to determine the truth. Generally speaking, employees are less willing to be candid about a colleague's behavior if that colleague is lurking around the office while the investigation is pending.

Fourth, it sends a message to employees that the company takes these types of allegations seriously.

Removing an alleged harasser is a critical step that is often missed by companies—but why? Many companies hesitate to do this for due process reasons—i.e., “We don't want it to look like we are punishing the employee before finding any wrongdoing.” While this reason is well-intentioned, it does not override the many benefits of removing the accused from the workplace.

## **Conducting an Inadequate Investigation**

Juries have high expectations for large companies when it comes to workplace investigations. They expect investigations to be prompt, thorough and professional. Anything less will open up the company's actions to increased scrutiny and second-guessing.

Investigations are commonly flawed for one or more of the following reasons:

- **Slow:** Most run-of-the-mill workplace allegations can be investigated rather quickly. Delaying the start of an investigation or allowing an investigation to linger can be problematic. Yes, you have a business to run and other important matters to attend to. But juries don't fully appreciate that reality. They expect investigations to begin promptly—often immediately—and conclude within a short amount of time.
- **Incomplete:** For whatever reason, many investigations lack the thoroughness that a jury would expect following a serious allegation. This often comes in the form of neglecting to interview a key witness or follow up on a particular allegation. For example, assume that the company receives an anonymous complaint that a senior male manager has had a pattern of harassing female employees for years. The complaint references many female victims but specifically names only

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one. The company interviews the alleged victim and a local HR representative, both of whom deny any knowledge of wrongdoing. Is the investigation complete? Absolutely not. Given that the allegation alleged a “pattern” of harassing conduct over “years,” the company must dig deeper. A good place to start would be interviewing the three female employees who worked most closely with the accused and/or a random sampling of female employees in the workplace. Regardless, the company must do more to fully vet this allegation.

- **Failing to obtain written statements:** In addition to interviewing key witnesses, the company should require each witness to write a statement. Often I have seen this presented as an option—rather than a requirement. Witnesses should be given no such option. The company undoubtedly has the right to require its employees to participate in workplace investigations and providing a written statement is inherent in that responsibility. When the statement is drafted, the investigator should immediately review it to ensure that it is complete and consistent with what was said during the witness’s interview. Also, often, an accused will admit to misconduct in an interview, but will neglect to mention it in the accompanying statement. In such a situation, the statement should be handed back to the individual with the instruction that he or she must supplement his statement with the missing information.
- **Poor documentation:** As any HR professional knows, “If it isn’t in writing, then it didn’t happen.” Despite this golden rule of human resources, investigations are often poorly documented. Immediately after an investigation is concluded, the investigator must compile all documents into an investigation file. Any lack of documentation should, itself, be explained in writing. For instance, if a witness refuses to write a statement or refuses to address a particular topic in his or her statement, the investigator should write a statement explaining the omission.

## Selecting an Inexperienced Investigator

An investigation is only as good as the investigator. Investigations involving serious allegations should be left to experienced investigators who are skilled in eliciting candid responses and assessing credibility. Companies should also be mindful of when investigations should be outsourced. Certain investigations should ideally be protected under the attorney-client privilege and, therefore, should be handled or directed by counsel. Companies should be mindful that the attorney-client privilege is least susceptible to challenge when applied to outside counsel given that in-house counsel often have a blurred role between lawyer and businessperson.

## Failing to Administer Adequate Punishment

“It was a he-said, she-said dispute so we couldn’t discipline anyone.” This is a common phrase that I hear following an investigation. Employers often believe that they operate in a criminal justice-like system where they must prove that misconduct occurred “beyond a reasonable doubt.” Fortunately, employment law has no such requirement. Employers are free to make judgment calls, assess credibility and make employment decisions so long as those decisions are devoid of discrimination. So, in a he-said, she-said dispute, you are free to side with whomever you find to be the most credible party.

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