

PARTICIPATOR

GUIDANCE ON CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS

December 2017



Q. An employee recently complained that she feels she is being harassed by her supervisor, and we want to conduct a workplace investigation. Should we investigate her complaint ourselves? How do we put together an internal investigation?

A. Deciding whether to conduct an internal workplace investigation or seek the services of an outside investigator can be difficult. Depending on the nature of the allegations and the employees involved, conducting the investigation internally may create a host of questions and concerns about neutrality or bias. On the other hand, retaining the services of an outside investigator (whether it's a law firm or an HR consultant) may escalate an already tense situation and cause resentment or suspicion among your employees. Although it's important to handle employee complaints consistently, deciding who will investigate them is often a fact-specific determination that should be analyzed on a case-by-case basis.

Conducting the Investigation

If your company decides to move forward internally, you'll have the benefit of quickly de-escalating the situation by promptly addressing and investigating the employee's concerns. Choose your internal investigative team carefully to ensure as much objectivity and neutrality as possible. Most internal investigators are HR professionals, managers, or business owners.

The team should never include the individual against whom the complaint was alleged. Employees must be able to speak candidly about their workplace conditions in a non-confrontational environment, and an employee shouldn't be forced to face her alleged harasser directly unless she agrees to do so before an arranged meeting. In a neutral workplace investigation, the investigative team acts in good faith and listens fairly to both sides. Investigators shouldn't be personally involved in the alleged incident(s) of harassment, should have a thorough understanding of company policies and EEO obligations, and should be able to remain impartial, objective, and fair during the investigation.

The Equal Employment Opportunity Commission (EEOC) has published general guidelines for conducting effective workplace investigations, available at <https://www.eeoc.gov/policy/docs/harassment.html>. It should be the goal of the investigators to gather all relevant facts and speak to all employees who may have knowledge of the allegations. The investigative team should aim to gather facts about when and where the incident(s) occurred, who was involved, whether there were any witnesses, the nature of the offensive conduct (e.g., discrimination, harassment, retaliation), and the effect of the alleged incident(s) on the complaining employee (e.g., anxiety, inability to perform work duties, hostile work environment).

Asking the complaining employee to provide a written statement is often helpful, and some employers have developed a complaint form for that purpose. The employee who was accused of misconduct should also have a fair opportunity to respond. Moreover, it's important to emphasize throughout the investigation that no employee who has made a complaint or is participating in the investigation will be retaliated against, either by management or by coworkers. Be clear that any employee who exhibits retaliatory behavior will be disciplined appropriately, up to and including termination.

continued on Page 2

continued from Cover Page

Documenting the Investigation

It's highly advisable to document your investigation throughout the entire process. Keep a record of when the complaint was made, who was interviewed, when and where the interviews took place, who was present for the interviews, what was disclosed, what the ultimate findings were, and what action was taken and why. Having a careful record of the investigation will be extremely important if the EEOC or the North Dakota Department of Labor ever asks you to produce evidence that you conducted a fair and neutral workplace investigation.

However, be aware that investigative notes and documentation probably won't be privileged material in a future lawsuit, which means your notes may be used as evidence. Therefore, your documentation should focus on clear and concise fact-finding; should be accurate; should be written contemporaneously with, or soon after, each interview; should identify the note-taker and when the notes were taken; should be reviewed and signed by the interviewee; should not admit any liability or fault by the company; should be free from retaliatory language against any employee; and should be free from opinions and conclusions.

All investigative notes and findings should be kept in a confidential file separate from your personnel files. Only certain documents generated during the investigation should be placed in an employee's personnel files (e.g., recommended discipline, probation, termination, or training). It's a good idea to have your legal team review your documentation to ensure that it's properly drafted and eliminates or reduces your legal liability in future lawsuits.

Concluding the Investigation

Once all interviews have been conducted, the investigator should carefully review the notes and consider inconsistencies, credibility, specific evidence, any behavioral patterns, and the strength of witnesses' observations and statements. Ultimately, the investigator must determine whether a company policy was violated, whether the alleged conduct occurred, and what the company's response should be. Any action you take should be reasonable and responsive to the employee's complaint, and you must ensure consistency with company policy, past practices, EEO guidelines, and any legal requirements.

continued on Page 4

RISK SERVICES

HAS YOUR ENTITY SIGNED UP FOR THE MS-ISAC YET?

The Multi-State Information Sharing and Analysis Center (MS-ISAC) provides a wealth of cyber security resources **free of charge** to all state, local, tribal and territorial (SLTT) governmental entities. Some of the MS-ISAC benefits include:

- **CERT Incident Response:** MS-ISAC can provide incident response performed by SANS certified and experienced incident handlers who are experts in incident response, computer forensic analysis, and malware analysis. This unique skill set combination enables the Computer Emergency Response Team (CERT) to more holistically investigate and report on the activities that may have taken place on the computing infrastructure, as well as enabling them to coordinate with, and augment, existing incident responders and malware analysts on the ground. CERT can perform remote or on-site analysis that helps answer questions regarding a specific event, incident or investigation in a manner that is accurate, repeatable, and concise.
- **Network and Web Application Vulnerability Assessments:** MS-ISAC can perform both network and web application vulnerability scans in order to help identify vulnerabilities that could be leveraged by malicious entities to gain unauthorized access to a victim's infrastructure, disrupt service, or cause other system

continued on Page 3

RISK SERVICES

continued from Page 2

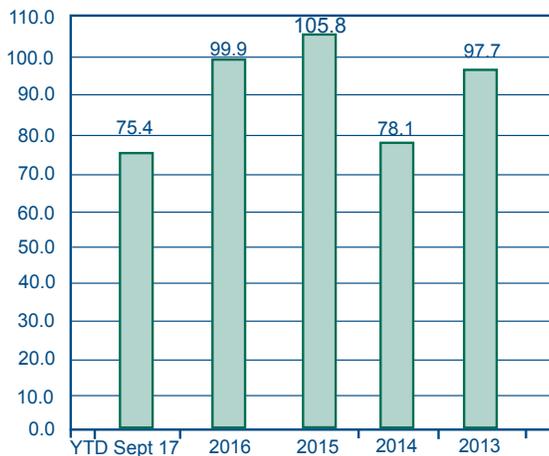
issues. In an effort to help enable your organization to be better prepared for the current threat you face, the MS-ISAC can provide a free network vulnerability scan of up to 10 public facing IP addresses and five web site domains, which also includes the website's subdomains. Once the scans have been performed, the results will be reviewed and sent in the form of a report, with the most significant vulnerabilities identified.

- **Cyber Threat Intelligence:** In cases where an SLTT government is being targeted by a malicious cyber actor, the Intelligence Analysis team can provide information regarding the specific actor, group, and previous incidents, as well as offer additional assistance and recommendations to mitigate or prepare for targeting.
- **Suspicious Emails:** SLTT governments can receive analysis of phishing and other suspicious emails by either forwarding the email or sending it as an attachment to suspiciousemails@cisecurity.org.

To sign-up for the MS-ISAC, go to www.cisecurity.org/ms-isac. From there, click the Join MS-ISAC link to begin the registration process. The NDIRF strongly encourages all members to sign-up for this free cyber security resource. If you have questions or concerns, please contact the NDIRF Risk Services Manager, Brennan Quintus, by phone at 701-751-9105 or by email at Brennan.Quintus@NDIRF.com. ■

FINANCIAL INSIGHTS

OPERATING RATIO



The operating ratio shown above is the sum of NDIRF's loss and expense ratio less the investment income ratio. The operating ratio is a measure of NDIRF's profitability and is the principal determinant of the Fund's financial solvency and stability. A ratio less than 100% means that a company is profitable and the lower the ratio the more profitable a company is. Both 2015 and 2016 were record losses with 2016 ending as our highest loss year ever, but at the September timeframe investment income was higher in 2016 to offset those losses. In 2017, we are currently tracking towards a more typical loss year for NDIRF with an increase in premium and no severe weather events so far. ■

FROM THE CEO

After about 100 of these brief columns, spanning the past 25 years, we have reached the finale. I plan to retire in early 2018 and want to use this space, this month, to extend my thanks and appreciation to the many NDIRF staff, board members and appointed counsel; NDIRF member officials and employees; North Dakota insurance agents and brokers; political subdivision association directors and staff; and state legislators, officials and staff with whom it has been my privilege and pleasure to work since 1992. It is possible to fail all by oneself but it is not possible to succeed that way - I have been blessed with a lot of help over the years and am grateful to all of you for all of it.

It has also been my good fortune to have spent the past 25 years working on a project – the NDIRF – where I believe completely in its goals, operating philosophies and intrinsic worth to the citizens of North Dakota. The string of NDIRF's success has been long but not uninterrupted - we experienced a couple of difficult years in 2015 and 2016. As 2017 nears a close, however, we are on track to arrest the impact of recent high claim activity and are poised to continue the quality service to North Dakota's political subdivisions for which the NDIRF has become known. Best wishes for a Merry Christmas and Happy New Year! ■



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continued from Page 2

Although your response must address the specific situation that you investigated, it's important to ensure consistency in your responses to certain types of allegations. For example, if you offer antidiscrimination training and probation to the harasser after you substantiate claims of sexual harassment, you should consider whether you intend to implement the same action the next time you're faced with a sexual harassment complaint. Employees generally look for fairness in their workplace, and you can expect your workers to scrutinize the investigation process for objective implementation of company policies. Inconsistency in applying your policies or complying with EEO guidelines can lead to lawsuits.

Common corrective actions taken at the end of workplace investigations include oral or written discipline, probation, termination, changes to the supervisory relationship, and workplace training. If you have any questions about the type of action you should take, reach out to your legal team for further guidance.

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The NDIRF office will be closed Monday, December 25th and Monday, January 1st, 2018.

NDIRF BOARD OF DIRECTORS ELECTION

Annually, at least two seats on the nine-member NDIRF Board of Directors are up for election. The election is held by member voting through solicitation of proxies by mail or voting in person at the NDIRF Annual Meeting. In 2018, directorships representing the member categories of "Cities", "Counties" and "Others" are up for election. The incumbent board members are Chris West, Mayor of Grafton ("Cities"); Cindy Schwehr, Barnes County Commissioner ("Counties"); and Randy Bina, Executive Director of the Bismarck Parks and Recreation District ("Others"). Elected officers or employees of NDIRF members, from among the respective categories electing a director in a given year (for example, "Cities", "Counties" and "Others" in 2018), are eligible to serve as directors.

Any eligible person wishing to be considered by the NDIRF Nominating Committee as a director candidate must complete and submit a Candidate Application Form by January 31, 2018. To obtain a copy of the form, please contact the NDIRF office by phone at 1-800-421-1988; by mail at P.O. Box 2258, Bismarck, ND 58502; or via e-mail at steve.spilde@ndirf.com; and direct your request to the attention of the CEO. ■