

EMPLOYER INVESTIGATIONS

DFEH issues important guidance on investigating harassment complaints

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On May 2, 2017, the California Department of Fair Employment and Housing (DFEH) released its Workplace Harassment Guide, which advises employers how to develop an effective antiharassment program, respond to and investigate claims of harassment, and take appropriate remedial actions. The guide, found at <https://www.dfeh.ca.gov/files/2017/05/DFEH-Workplace-Harassment-Guide.pdf>, follows up on regulations the Fair Employment and Housing Council enacted in 2016.

Given the imperative that employers take all appropriate steps necessary to prevent and remedy workplace discrimination and harassment, DFEH's guidance—although already recognized and followed by many employers—is welcome reinforcement.

Preventing harassment

The guide summarizes the components of an effective antiharassment program, starting with a clear and understandable policy that's distributed and discussed with employees at regular meetings (e.g., every six months). Components of an effective program include:

- “Buy in from the top,” with management serving as a role model;
- Two-hour training for supervisors and managers as required by Assembly Bill (AB) 1825 and AB 2053;
- Specialized training for complaint handlers;
- Policies and procedures for responding to and investigating complaints;
- Prompt, thorough, and fair investigations of complaints; and
- Prompt and fair remedial action.

Investigative process

The guide's main points can be summarized as follows:

- **Conducting a prompt investigation.** It is essential that investigations into allegations of harassment are promptly initiated and completed.
- **Selecting an investigator.** The investigator should be knowledgeable about standard investigative practices, and laws and policies related to harassment. External investigators must either be licensed private investigators or attorneys.
- **Conducting a fair investigation.** The guide addresses the interview sequence and the notice the accused harasser should receive about the allegations. The guide states that although an investigator doesn't need to interview every witness the accuser or the accused harasser identifies, "any witness whose information could impact the findings" should be interviewed. Equally important, all documents that can confirm or undermine the allegations must be gathered and retained.

We have two critiques. First, the guide doesn't address the perennially debated issue of whether investigative interviews should be tape-recorded. Our perspective is that interviews should ordinarily be recorded, after clear notice is given to interviewees—at least in states that don't have a "mutual consent" limitation on tape-recording. That will allow

the employer to readily prove the content of interview statements, if they are put at issue. California *does* have a "mutual consent" limitation on audio recording, so you *must* obtain a California employee's consent to be recorded.

Second, management in unionized workplaces must remember that the accused has a right to request a union representative if he has a reasonable belief that discipline could result from the interview. That right was established in 1975 by the National Labor Relations Board in *NLRB v. Weingarten, Inc.*, and adopted in 1982 by the Public Employment Relations Board (PERB) in *Rio Hondo Community College District*. There are also special notice requirements applicable to police and firefighters.

- **Promising confidentiality.** Employers should promise only limited confidentiality. Moreover, while you can direct managers to keep an investigation confidential, giving such a directive to employees presents a more complicated issue. Recent decisions protecting employees' right to communicate with union representatives and other employees on matters affecting their employment include the NLRB's 2012 ruling in *Banner Health System* and PERB's 2014 ruling in *Los Angeles Community College District*.
- **Maintaining the investigator's impartiality and objectivity.** An employer must assess not only actual bias by the investigator but also the perception of bias (e.g., the investigator's position within the

organization or his relationship with the accuser or the accused).

- **Questioning employees in a proper, noninterrogative manner.** The guide emphasizes the importance of nonadversarial questioning—seeking information through open-ended questions and eschewing interrogation techniques.
- **Making credibility determinations.** Detailed guidance for making credibility determinations is provided in the form of a nine-factor list:
 - (1) Inherent plausibility—whether the offered facts are reasonable;
 - (2) Motive to lie (based on the existence of bias);
 - (3) Corroboration—whether a witness corroborates any of the allegations or responses to the allegations;
 - (4) Extent a witness could perceive or recollect the matter;
 - (5) History of honesty/dishonesty;
 - (6) Habit/consistency for engaging in the conduct at issue;
 - (7) Inconsistent statements;
 - (8) Manner of testimony—hesitations in speech and indirect answers; and
 - (9) Demeanor.

- **Satisfying the burden of proof.** A “preponderance of the evidence” standard (more likely than not) applies to all findings.
- **Reaching no legal conclusions.** The guide cautions investigators against making legal conclusions (findings about whether the conduct at issue violated the law). At the start of every investigation, employers should instruct investigators about their role. Will they only be making factual determinations, or are they also assessing whether the conduct violated workplace policies?

Special issues

The guide addresses a few special issues, notably:

- **Employee asks to drop the case.** It is rarely (if ever) appropriate for an employer to accede to an employee’s insistence that a matter not be investigated.
- **Anonymous complaints.** While anonymous complaints must be investigated, it is often useful for employers confronted with such complaints to conduct an “environmental assessment” or survey to ascertain the existence of harassment.
- **Assurances of no retaliation.** The investigator must inform all parties—the accuser, the accused, and any witnesses—that they will not be retaliated against for their complaints, their participation in

the investigation, or any statements they make as part of the investigation.

Documentation and remedial action

Investigators must document the investigative process, including steps taken, witness interviews, investigative notes, witness statements, findings, and any documents that were received and relied on. (Note: Many employers and investigators, including the authors of this article, have a policy and protocol of not retaining investigative notes.)

Employers have to take prompt remedial action when there is proof of misconduct. Behavior need not rise to a policy or legal violation to warrant action—you must take steps to prevent and correct all harassing behavior. The guide provides the following examples of remedial action: training, verbal counseling, one-on-one counseling/executive training, last-chance agreement, demotion, salary reduction, rescinding a bonus, and termination.

Bottom line

In recent years, investigations have taken center stage during litigation, and the investigator's qualifications—and the methods she used to conduct the investigation—have been subjected to intense scrutiny. While the DFEH's guide focuses on harassment, it's equally applicable to investigating claims of discrimination and retaliation. More important, as an agency publication, the guide is authoritative and can be used to defend your actions during litigation.

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