EEOC Provides Employers With Key Workplace Investigation Tips: Your 5 Biggest Questions Answered

Insights
6.20.24

Employers recently received some helpful guidance from federal workplace officials to ensure your workplace investigations run smoothly, comply with legal standards, and put you in the best position to reach a fair and reasonable outcome. The EEOC's Enforcement Guidance on Harassment in the Workplace contained some valuable information about investigations that you might have overlooked – but we have you covered. Here are the five biggest questions about workplace investigations raised by the Guidance and our answers to steer you in the right direction.

Workplace Investigations Still Matter

The Equal Employment Opportunity Commission (EEOC) recently published its final guidance on harassment in the workplace, and you can read our summary of the key points here to ensure your harassment prevention policies, procedures, and trainings are in line with current standards.

While the main focus of the Guidance centered on harassment prevention, the EEOC makes clear that workplace investigations matter now more than ever. Prompt, thorough, and effective investigations help you in multiple ways, including with employee morale, retention, safety, and productivity. Investigations also help you mitigate legal risk by avoiding charges and lawsuits and effectively defending those that cannot be avoided.

The Guidance makes clear that an employer is responsible for conducting a "prompt and adequate investigation" once it has notice of potentially harassing conduct – and for taking "reasonable corrective action" to prevent any improper conduct from reoccurring.

So what are the five biggest questions that arise from this Guidance?

1. What does a "prompt" investigation look like?

The Guidance explains that an investigation is prompt if it is conducted "reasonably soon" after an employee complains or the employer otherwise has notice of possible harassment. While this often depends on the specific circumstances, the Guidance gives two examples to help establish investigation timelines.

- On the "prompt" end of the spectrum, the Guidance offers that an employer that opens an investigation into a complaint **one day** after it is made **has** acted promptly.
- On the "not prompt" end of the spectrum, the Guidance offers that an employer that waits **two months** to open an investigation, absent any mitigating facts, very likely **has not** acted promptly.

What about the large area between one day and two months? The Guidance states that what is "reasonably soon" is fact-sensitive and depends on such considerations as the nature and severity of the alleged harassment and the reasons for delay.

The EEOC explains that, for example, when faced with allegations of physical touching, an employer that does nothing for **two weeks** without explanation likely **has not** acted promptly. On top of this, from a practical standpoint, in defending charges or lawsuits alleging workplace harassment, few things are more challenging than having to explain an employer's (including even a single supervisor's) inaction in the face of knowledge of potentially improper conduct. Conversely, employers who act promptly in response to such concerns are generally well positioned to avoid or defend such claims.

2. What does an "adequate" investigation look like?

Investigators often struggle to know how much research, review, and interviewing is enough for a reliable investigation. The Guidance explains that an investigation is adequate **if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."** The Guidance puts some parameters on an investigation and says that it need not entail a "trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved."

The Guidance gives an example of an *inadequate* investigation. In this example, the investigator was "a friend" of a company supervisor, was unfamiliar with federal anti-discrimination laws, and had no experience conducting harassment investigations. After some short interviews, the investigator issued a single-page memorandum concluding, without further explanation, there was "no basis for harassment." The Guidance states that, based on these facts, the employer **did not** conduct an adequate investigation.

Ultimately, the investigation should be conducted in a way reflecting a genuine effort to fairly and impartially determine what conduct occurred, whether it violated a company policy, and if so, what appropriate action should be taken. A one-size-fits-all investigation process does not exist. Investigators must be properly trained and must use sound judgment under the specific circumstances.

3. Has a hybrid work environment lessened the likelihood of workplace harassment?

Many employees operate in a hybrid environment with less in-person contact, leaving some employers to wonder if claims of harassment may decline. The EEOC says: likely not. In fact, claims

of harassment have remained relatively consistent since the onset of COVID-19 in 2020, and even increased in frequency in some years since then.

The Guidance confirms that conduct does not have to be "in-person" to constitute harassment. A hostile work environment claim may include conduct that occurs in a work-related context outside of an employee's regular workspace.

Examples of remote work conduct that could lead to claims of harassment include sexist, racist, or ageist comments made during a virtual meeting or in a group chat and racist imagery that is visible in an employee's background during a virtual meeting.

Given how ubiquitous hybrid and remote work has become post-COVID, you need to train and prepare your investigators to look into claims like these just as promptly, thoroughly, and effectively as they would with any other concern or complaint of potential misconduct.

4. Was there anything else notable in the Guidance about workplace investigations?

Interestingly, the Guidance omits previously cited credibility factors contained in the former *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999). Credibility factors cited in this prior EEOC guidance included:

- **inherent plausibility** – is the testimony believable on its face?
- **demeanor** – did the person seem to be telling the truth or lying?
- **motive to falsify** – did the person have a reason to lie?
- **corroboration** – is there corroborating testimony or evidence?
- **past record** – did the alleged harasser have a history of similar behavior in the past?

While the Guidance did not include these credibility factors, it still expects investigators to be able to make credibility determinations. The Guidance states that it may be necessary for the investigator to make credibility assessments to determine whether the alleged harassment in fact occurred if there are conflicting versions of relevant events. For this reason, the Guidance directs that whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility.

Some investigators have lamented the omission of the credibility factors, believing that they were helpful. However, the EEOC may have just chosen to remain silent on specific factors, given diversity in opinion regarding credibility assessments.

In California, for example, state agencies and some investigator organizations generally discourage demeanor evidence as a reliable credibility factor. The fact remains that investigators should be properly trained on best practices for conducting investigatory interviews, including assessing credibility and making factual determinations in the face of conflicting accounts.

credibility and making factual determinations in the face of conflicting accounts.

5. Does the Guidance add any insight into how to best conclude an investigation?

Yes, the Guidance offers two ideas about the conclusion of an investigation.

- **First, inform the involved parties**. Upon completing your investigation, the Guidance states that you should inform the complainant and alleged harasser of your determination. Where appropriate, you should notify them that you will take appropriate action, subject to applicable privacy laws.

  That does not mean you should always tell the complainant about the specific corrective action taken against the alleged harasser. Generally that is not a best practice. But, at a minimum, you should tell the complainant whether the investigation found the allegations "substantiated" or "unsubstantiated" (and, again, if substantiated, that appropriate action will be taken).

- **Second, retain the records**. The Guidance states that you should retain records of all harassment complaints and investigations. The thinking here is that these records can help you identify patterns of harassment, which can be useful for improving preventive measures, including training. These records also can be relevant to credibility assessments and disciplinary measures.

  The best way to prove that you acted promptly and appropriately in the face of a complaint is often to produce the investigation file and report. As such, it is of the utmost importance – with harassment investigations and all workplace investigations – that investigators properly document their investigations and that you securely store the investigation files once the investigation is completed.

Conclusion

Should you have any questions on workplace investigations or want help reviewing your investigation process, training your internal investigators, or assisting in other workplace investigation needs, please reach out to your Fisher Phillips attorney, the authors of this Insight, or any member of our Workplace Investigations Practice Team. We will continue to monitor any further developments and provide updates, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information.

Related People

Erin Gibson Allen
Of Counsel
412.822.6635
Email

Jeffrey Shapiro
Partner
617.532.5891
Email

Service Focus

Employment Discrimination and Harassment

Litigation and Trials

Workplace Investigations