



Investigations in Healthcare Employment Litigation

Why conduct investigations?

- Ensure the safety of your staff and patients.
- Build trust in the organization.
- Your policies require them.
- They are expected in nearly all employment cases.
- Litigation cost savings. Years of discovery can be obtained in days.
- Provide a defense to liability and gain trust of the trier of fact.
- Mainly to resolve issues before they become bigger problems.

Initial Considerations

- **Get the complaint in writing**, either from the complainant or the person who received the complaint. The person who gets this does not have to be the ultimate investigator.
- **What are the trigger terms and what terms were not used** (discrimination, treated differently, retaliation, patient safety, any mention of protected classifications)?
- **At the beginning of the investigation, remind everyone involved of policy against retaliation.**
- **Identify the best person to conduct the investigation.** Who are the parties involved and how sensitive are the issues? Is an outside investigator necessary?
- **Identify the subjects of the investigation.** Recognize that these can change as the investigation progresses.
- **Identify the purpose of the investigation and desires of the parties involved.** Document these desires because they may change over time. A complainant's request that the issue be dropped doesn't end the obligation to investigate!
- **Identify potential motivations.** Why is this issue being brought to management's attention at this time? Are these continued complaints because of performance management and the perceptions



that creates? (But keep in mind that an employee can have performance issues AND also have legitimate workplace concerns that need to be addressed!)

- **Identify the goals of the investigation.** Resolve issues internally and/or defend potential claims? Are the parties current or former employees?
- **Set timeline expectations/goals and have someone monitor deadlines.** It can be a negative fact in litigation if the investigation was not completed in a prompt manner. The law may require prompt remedial measures which depends on a prompt investigation.

Investigation Tips

- **Act quickly to determine what evidence exists.** Witnesses, documents, policies and procedures, emails, text messages, journals, calendars, computer files, chat groups, social media communications, audio or video recordings, time records, badge scans, incident reports. Be sure to ask and confirm what evidence does exist and what does not exist. Some items (like surveillance video) may have a limited window for requesting before it is destroyed.
- **Goal is to find evidence to prove or disprove.** Collect evidence for future reference as memories fade.
- **Ask the complainant, “what documents do you have that may help support your complaint?” and “what documents if any have you collected related to these issues?”** Document their response. Request copies.
- **Pay attention to and document any unusual body language exhibited in the witness interviews.** Don’t expect to remember things that are not documented. Facts and observations that led to credibility determinations can be important evidence.
- **Keep the circle of those who know about the investigation as small as possible.** Only those who “need to know” and only the specific information they need to know. One of the best defenses to a retaliation claim is that the decisionmaker wasn’t aware of the prior protected activity.
- **Make sure the investigator is not biased.** Is there a subconscious desire not to have to address issues with executives? Get the right people involved, which may include a third party. Understand that the initial person assigned to investigate may not be the best person to finish the investigation as facts are developed and more people become involved.
- **What about rabbit holes?** These may be important holes. Plaintiff’s lawyers and juries are quick to latch onto rabbit holes you didn’t go down.



- **What about general statements that several employees are witnesses or can corroborate?** Try to confirm all potential witnesses early. Identify all available witnesses, even those described but not named (tall woman in radiology). Interview those witnesses and document the interviews. Consider getting statements. Remember that some of these individuals may leave the organization or become disgruntled in the future.
- **What about hearsay?** View it as an opportunity to gather more evidence. It may lead to further confirmation of facts or non-facts.
- **What if the employee has already filed an EEOC Charge? Or is represented by counsel or the union?** How does that change your investigation strategy/plan?
- **“Play it out to the end.”** How will this investigation ultimately be perceived by a judge or jury?

Results of investigation

- **Make a determination.** He said/she said is not the end of the investigation. Denials do not end the investigation. Evaluate credibility. Given the full context of all available evidence and the credibility of the parties, is it *more likely than not* that the event occurred?
- **Take action.** Even if you are unable to validate the complaint, remind the alleged bad actor of your policies and expectations and document that you did this. Remind them that behavior like what was alleged is grounds for discipline, up to and including termination. Evaluate whether additional workplace training may be appropriate.
 - What about situations where a confirmed bad actor is supremely valuable to the organization? What if someone says, we cannot afford to lose that person? Hopefully you’ve identified that concern early enough in the process to determine whether the investigation should be privileged. Is there corrective action short of termination that would effectively remedy the issue?
 - What about situations where the investigation reveals the complainer is really the problem? Follow your policies with respect to discipline and performance management, even if the issues arise during the course of the investigation. Do your best to guard against the perception of retaliation. Continue to investigate all new concerns that arise.
- **Whether the complaint is validated or not, circle back with the complainant** and document that you did so. While you may not be able to share specific disciplinary details, the complainant should be informed whether their complaint was validated and whether action has been taken. Thank them for bringing the issues to your attention. Reinforce that you have heard them, that you take their complaints seriously, and that they should come to you again if they have additional concerns or



information to provide. Often lawsuits get filed simply because a complainant believes (mistakenly) that nothing was done in response to their complaint.

- **Someone is not going to be happy with the result.** Have a plan of communication, potential questions, and potential responses. Assume you may be recorded or your emails will become exhibits someday. Act accordingly.
- **At the conclusion of the investigation, remind everyone involved of the policy against retaliation and the requirement to immediately report any perceived retaliation.**