



# Barrett Legal Brief

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## LABOR AND EMPLOYMENT Internal Investigations

A guide for human resource professionals on handling, conducting, and concluding internal investigations.

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### GUIDELINES FOR CONDUCTING AN INTERNAL INVESTIGATION

Conducting an internal investigation is an important part of any human resource professional's job. Face-to-face interviews are an important part of the process, because they can help an employer assess the demeanor, credibility, motivation, and potential hostility of a witness. To obtain as much information as possible while minimizing the risk of distortion or bias, human resource professionals should consider the following guidelines:

- **Prepare a checklist.**

The key to an investigation is information, information, and information. A proper checklist of the areas of inquiry will ensure that the needed information is obtained during an interview.

- **Maintain a positive attitude.**

Be calm and polite. Encourage the witness to be forthcoming.

- **Stress that the interview is voluntary.**

Reassure the witness that he or she will not be retaliated against for either providing information or refusing to assist in the investigation.

- **Conduct the interview in a private place.**

Conduct the interview in the office of the witness or in a neutral conference room, rather than the office of a supervisor or superior.

### Laws Impose an Affirmative Obligation to Investigate

There are various laws and statutes that create a duty to investigate by the employer when a claim has been made by an employee. These laws include:

- **Anti-Discrimination Laws and Civil Rights** impose an affirmative duty to investigate and take prompt remedial action when complaints of harassment are raised. Employers risk liability if allegations are made, nothing is done, and further harm results. In many instances, liability can be avoided if the employer demonstrates that it undertook an immediate and complete investigation followed by immediate and appropriate corrective action.
- **Health and Safety Laws** in the workplace, under both federal and state law, also impose an affirmative duty on employers to investigate potential safety and health hazards. For example, under federal law, OSHA imposes a general duty on employers to maintain a safe workplace and to protect employees from workplace violence.
- **The Drug-Free Workplace Act** requires employers with government contracts to provide a drug-free work environment. This obligation includes a duty on employers to investigate and eliminate drug use in the workplace.

Due to the risk of lawsuits alleging the negligent hiring, supervision and/or retention of employees, background investigations into applicants and employees are important to avoid liability. This is especially true in light of workplace violence claims.

In addition to these specific laws, an employer, usually through its human resource professional, has a general duty or interest in investigating allegations and claims that include theft, drug use, discrimination, threats, assaults, and harassment. Failure to take prompt action in response to reports of such activity can lead to increased exposure to liability if it is later shown that an act, omission, or other harm could have been avoided if a prior complaint had been investigated.

- **Always consider having at least two people other than the interviewee present.**

A second person can verify what was said in case the witness later changes his or her version of the facts. If the witness is an employee, the additional person present for the employer should be someone in the need-to-know category.

- **Listen.**

The purpose of the interview is to obtain facts. If the interviewer does all the talking, no new facts will be uncovered.

- **Ask open-ended questions.**

Asking questions that require a narrative response will encourage the witness to expound and thereby provide additional information.

- **Ask follow-up questions.**

Be sure to ask questions such as who, what, when, where, why, and how. These simple questions frequently unearth additional information.

- **Ask for a written statement.**

If a witness is cooperative and friendly, ask the witness to write a statement in his or her own words. This statement commits the witness to the facts relayed to you and becomes a valuable tool in continuing the investigation. When the statement is complete, give a copy of it to the witness.

- **Keep the identity of the participants private.**

In discussions of the investigation, do not disclose the name of the witness except to those few individuals who need to know.

- **Transcribe the notes of the interview.**

Do this immediately after the interview is concluded. Be aware of inflated, vindictive, or false leads.



# TIPS ON CONDUCTING AN INTERNAL INVESTIGATION FOR HUMAN RESOURCE PROFESSIONALS

Most human resource professionals will need to conduct investigations during their careers as a part of their job duties. Investigations are most often required for allegations that include theft, drug use, discrimination, threats, assaults, and harassment.

An employer's potential liability is often dependent on the quality and manner in which the investigation was conducted. This is why it is important that any internal investigation should have as its objective improving the decision-making process. This goal can be accomplished only if there is a thorough understanding of the facts. Investigations that are performed properly can mitigate or prevent the potential for morale problems, legal problems, and, ultimately, financial losses to the company. Poorly-run investigations can do just the opposite. These tips will help create a fair and thorough investigation process.

## **TIP #1: WITNESSES**

When conducting an investigation, it is important that more than one company witness be present, if at all possible, throughout each step of the investigation. Having witnesses can reduce the possibility of mis-documenting information, as well as reducing or preventing witnesses from later denying their earlier statements.

## **TIP #2: DOCUMENT**

Preparing summaries of the information gathered and requesting the provider of the information to sign the summaries, will also assist in the documentation of the investigation. Interviewers should take thorough, contemporaneous notes during the entire investigation.

## **TIP #3: CONFIDENTIALITY**

Find a location that provides sufficient privacy for an open flow of information. The investigation should remain as confidential as possible. However, be careful not to promise complete confidentiality. It is usually difficult to maintain complete confidentiality when additional witnesses will be interviewed. To help offset the inability to maintain strict secrecy, it is advisable to relay to each interviewee the company's commitment to conducting a fair and impartial investigation.

## **TIP #4: INTERVIEW**

At the beginning of the employee's interview, state the reason for the interview, and explain the allegations as well as the facts and the documents that support those allegations (without disclosing confidential sources).

During the investigation, interview questions should be asked which tie directly to the issue at hand. Open-ended questions are often best. It is important to document answers and recite back to the interviewee to make sure that your understanding of the qualifications/events are, in fact, accurate. Once you have an accurate understanding, be sure to document the facts, not your opinion of the facts.

Give the target employee an opportunity to provide mitigating information – all the reasons or circumstances why the employee feels his or her actions were justified or the facts provided to you are incorrect. The key to a fair and complete examination of the facts is the ability to remain open-minded and impartial and to ask pointed follow-up questions that are based on the facts gathered during the investigation. The due process interview should be non-adversarial, open, and candid.

## **TIP #5: SUMMARIZE and FOLLOW-UP**

At the conclusion of the interview, write a summary of the interview, including listing questions that were asked and answers that were provided. If the interview raised issues that require further investigation, follow up on them.

# POST-INTERNAL INVESTIGATION MATTERS

An internal investigation has been completed, but now a decision must be reached. If the investigation related to a claim or allegation that will result in discipline, the investigator must, usually, discern the credibility of witnesses and relevant comfort levels with the information gathered. Once this has been done, the appropriate management individuals should make an educated decision as to how to move forward based on the information gathered.

In the discipline arena, once the information is gathered, in addition to coming to a conclusion as to what actually happened, the company must also assess the severity of the conduct, what level of discipline will deter the conduct from occurring again, and what parameters of discipline are mandated by relevant labor laws, labor agreements, or policy handbooks.

It is important to treat all employees fairly. To determine whether a termination is fair, an employer might subject the decision to a “smell test.” In other words, would a reasonable person consider the termination fair? The answer to this question should be based on the facts and conclusions reached during the investigation, not on emotion.

The employer, therefore, should consider objective factors, such as:

- **What is the employee’s performance history and how long has the employee worked for the company?**  
If the employee had a good performance record for years, it may be unfair to terminate for one instance of poor performance.
- **How severe was the employee’s misconduct?**  
Termination is usually considered fair for serious infractions.
- **Was this the employee’s first offense?**  
It may be unfair to terminate for a first offense unless it is for very serious misconduct such as violence, theft, or espionage.

- **Was the employee given notice through a progressive disciplinary process? Were other employees treated similarly under similar circumstances? Are there any hidden motives or miscommunications?**

A termination must be consistent with an employer’s personnel policies, and the policies must be consistently applied. For example, if there is a progressive discipline policy, it should be followed in every case that results in termination (except in cases of serious misconduct).

In assessing whether policies have been followed, consider these factors:

- **Was the policy published? Was the employee aware of the policy? How has the policy been enforced in the past? Does the policy have procedural requirements to be followed? If so, have they been followed?**

It is important that the decision to terminate be reviewed by management. Review by the manager of the supervisor requesting the termination reduces the chance that bias entered into the decision.

Courts have ruled that individual corporate officers, managers, and supervisors can be liable if they “intentionally or improperly” interfere with an employee’s relationship with the employer. The key to determining if such liability exists is determining whether or not a supervisor had a proper motive for terminating an employee. If the supervisor was acting with a “bona fide organizational purpose,” then liability will most likely not be found. Upper management should review all termination requests, especially in high-risk cases, to ensure that a termination is not the result of bias or improper actions.

Lastly, once the decision is made, the decision should be relayed to the relevant parties, documented within the appropriate individual’s personnel file, and a summary prepared documenting the company’s actions.



# RESPECTING EMPLOYEES' PRIVACY RIGHTS DURING AN INTERNAL INVESTIGATION



Terminating an employee is a serious action and should be treated by your company as a step that warrants substantial investigation, documentation, and assessment. Following the guidelines herein can help to ensure that terminations are performed in a fair, just, and legal manner. An employer must respect employees' privacy rights when conducting internal investigations in response to a claim or allegation. However, at the same time, it is necessary and important for the employer to obtain all of the relevant factual information. In most instances, the investigation must be conducted promptly and thoroughly.

In conducting an investigation, employers must balance their right as an employer to investigate and take disciplinary action against an employee's right to be free from an unreasonable invasion of his or her privacy. It is very important that employers understand that employees who divulge information gained in an investigation to third parties potentially risk liability for defamation claims. In general, defamation is a false and unprivileged oral or written communication to a third party that injures the reputation of the employee. Employers have a qualified privilege to divulge even defamatory information to persons who have a demonstrated "need to know" of the information, such as individuals conducting the investigation or those who implement the company's disciplinary policies. However, the privilege can be lost if the information is disseminated or communicated to individuals who are not on a "need to know" basis or who are not employees of the company.

In many instances, employers, as part of the investigation process, will attempt to conduct surveillance or searches. Employers should be aware that there is potential liability for utilizing such procedures. To avoid invading an employee's privacy or violating wiretapping laws, the company should let employees know, in writing, that their calls may be monitored. Additionally, if surveillance is going to be conducted, any surveillance must be conducted in a reasonable manner. Surveillance is usually permissible when the employer can prove that there is a business-related reason for the investigation.

If an employer is going to search work areas, files, or computers, a policy on searches should be contained in the Employee Handbook to dispel any expectation of privacy on the part of employees. All employees should understand and be aware of a company policy that allows the employer to conduct reasonable searches of desks, files, computers, and other personal work areas when an employee is suspected of theft or other misconduct.

In some instances, it may be preferable or necessary to have a third party conduct the investigation, such as when the objective neutrality of those conducting the investigation in-house could be questioned. Using an outsider to conduct an investigation can reduce the chance that an aggrieved party could assert the investigation was a sham and thereby reduce the risk that the matter could result in costly litigation.

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For questions regarding these and other labor and employment issues, contact a member of  
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