

8. WITNESS INTERVIEWS

Guiding Principle: There are many effective ways to conduct witness interviews. The investigator should create an environment that maximizes the likelihood of obtaining reliable information and should document (either through notetaking and/or recording, or some other method) the witness' statements in a reliable and consistent fashion.

Key factors to consider:

- a. The investigator should strive to establish rapport and obtain complete information from witnesses.
- b. The interview presents a unique opportunity to gather information necessary to assess witness credibility. The investigator should determine the credibility of witnesses relative to one another.
- c. An environment that is safe, private, and reasonably comfortable is conducive to a productive interview. If the interview is conducted by video or phone, the investigator should confirm the witness is alone, or with a representative, in a private location free from distractions.
- d. At the outset, the investigator usually explains their role and the purpose of the investigation, and provides admonitions concerning information such as confidentiality and retaliation.
- e. Generally, beginning the interview with open-ended, non-leading questions is more likely to elicit probative information than closed-ended, leading questions. However, the investigator should ask appropriate follow-up questions to gather comprehensive and thorough information from the witness. The goal is to ask questions in a manner that allows the witnesses to fully share whatever relevant information they have.
- f. Witnesses generally should be asked to provide as much detail and specific information about the incidents in question as possible, without guessing, though estimates may be appropriate. Witnesses should also be asked to identify other relevant witnesses, information, and documentation.
- g. The complainant and respondent should be provided with an opportunity to present their positions and to correct or challenge relevant statements contrary to their positions. The investigator should seek specific admissions or denials as to each allegation.
- h. Witnesses should be permitted to take breaks and leave the room.

9. DOCUMENTING THE INVESTIGATION

Guiding Principle: The investigator should document the steps taken during the investigation, the evidence collected, and the investigator's decision-making process, so that there is a reliable record to support the investigator's findings.

Key factors to consider:

- a. There are many different ways to effectively document an investigation. Whichever method is used, the investigator should take steps to ensure the reliability of the documentation.

- b. The investigator should consider documenting: (1) the process used to collect the information considered; and (2) occasions on which significant obstacles were encountered.

10. INVESTIGATION FINDINGS

Guiding Principle: The investigator's findings should be consistent with the scope of the investigation, as defined by the employer.

Key factors to consider:

- a. Generally, an investigator concludes the investigation by making factual findings that directly address the scope of the investigation. If requested by the employer and the investigator is qualified to do so, the investigator may also determine if there was a violation of policy or may recommend corrective or remedial personnel action to be taken. In rare circumstances, the investigator may be asked to reach a legal conclusion.
- b. The investigator should strive, in good faith, to make reasoned findings supported by the evidence gathered, which may include assessing witness credibility, as appropriate.
- c. The investigator should clearly understand the applicable standard to be used in evaluating the evidence and should use that standard. In most workplace investigations, "the preponderance of the evidence" standard is appropriate. That means, after weighing all the evidence, whether it is more likely than not that the alleged wrongdoing occurred.

11. REPORTS

Guiding Principle: If requested by the employer, the investigator should provide a report to the employer at the conclusion of the investigation.

Key factors to consider:

- a. The employer decides the form of the report (i.e., oral v. written). The investigator should consider discussing the merits of potential report formats with the employer.
- b. At a minimum, a report should set forth the investigation process, what evidence was gathered, what the findings are, and the reasons for the findings. The report may be written and may be done in summary form. If an oral report is provided, there should be documentation of the findings that were delivered to the employer and the reasons for those findings.
- c. A written report usually contains:
 - i. A statement of the scope and the issues;
 - ii. An explanation of the investigation process;
 - iii. A discussion of the evidence relied upon by the investigator;
 - iv. An identification of the employer's policies involved, if applicable;
 - v. An identification of any evidentiary standard used; and
 - vi. A statement of the investigator's findings.

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Guiding Principles FOR CONDUCTING WORKPLACE INVESTIGATIONS



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1000 Westgate Drive, Ste 252
St. Paul, MN 55114-1067
1+844-422-2294 • office@awi.org

www.awi.org

The principles and key factors contained herein are of a generalized nature and are intended for both in-house and third-party investigators conducting impartial workplace investigations. Because every investigation presents different circumstances, it may be necessary or desirable in any given investigation for an investigator to deviate from the identified principles or key factors. Accordingly, any such deviation or decision not to adhere to the identified principles or key factors does not necessarily render an investigation inadequate.

Introduction

Founded in 2009, the Association of Workplace Investigators is a professional membership association for attorneys, human resource professionals, private investigators, and others who conduct, manage, or have a professional interest in workplace investigations.

Our mission is to promote and enhance the quality of impartial workplace investigations. AWI's Guiding Principles Committee developed this brochure in collaboration with AWI membership.

The first version of the Guiding Principles was published in 2012. This revision was published in 2020 and is based on numerous suggestions submitted by AWI members. The Guiding Principles remain focused on impartial workplace investigations.

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer's policies, standards, ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned findings based on the information gathered.

These Guiding Principles were developed to assist investigators and enhance the quality of workplace investigations.

1. DECISION TO CONDUCT AN INVESTIGATION

Guiding Principle: An employer should consider initiating a workplace investigation when indicated by law, policy, or practice.

Key factors to consider:

- a. Are there facts in dispute that implicate legal, policy, or practice concerns for the employer?
- b. Even if key facts are not in conflict (e.g., the respondent admits the alleged conduct occurred), the employer may still need to determine, for example, the motivation for the conduct, the number of persons affected, or the extent of harm so it can take steps to mitigate the impact of the conduct. Whether or not a violation is one of policy or of law may influence the decision.
- c. Does the complaint allege wrongful conduct related to the complainant's protected class or protected activity? If not, the employer may consider whether the conduct alleged nevertheless violates the employer's policies, practices, or expectations.
- d. Allegations may call for an "organizational assessment" or "climate survey" (e.g., friction within a work group that may not rise to the level of unlawful conduct or a violation of policy) instead of an "investigation."

2. CHOICE OF INVESTIGATOR

Guiding Principle: The investigator should be impartial, objective, and possess the necessary skills and time to conduct the investigation.

Key factors to consider:

- a. Whenever possible, the investigator should be someone who

is, in fact, impartial and who is perceived by the participants to be impartial.

- b. An investigator should have the requisite skills to conduct the investigation. Such skills are typically acquired through relevant training, education, and experience.
- c. Employers may choose to use an internal investigator. In such a case, the hierarchy of the organization should be considered in order to avoid the fact or perception of bias or compromised objectivity.
- d. Employers who choose to retain outside investigators should consider any licensure requirements that may be applicable.
- e. An investigator should appreciate the distinction between the role of impartial investigator and that of advocate. If the investigator is licensed, such as an attorney or private investigator, the investigator should consider how any rules or obligations attached to that license may impact how the investigator conducts workplace investigations.
- f. An individual overseeing an investigation, whether the investigation is conducted by an internal or external investigator, should avoid exerting undue influence on the investigation. This does not preclude the individual from taking other necessary steps. For example, an individual overseeing an investigation on behalf of an employer may take steps to preserve evidence, provide necessary notifications to employees and witnesses, and determine the scope of the investigation.
- g. The employer and investigator should consider whether specialized expertise is required to conduct the investigation. The employer and investigator should consider whether the investigator possesses the requisite expertise, whether the investigator should partner with someone who possesses the requisite expertise, or whether the investigator should decline the investigation.

3. SCOPE OF INVESTIGATION

Guiding Principle: The employer and the investigator should develop a mutual understanding of the scope of the investigation, meaning the issues to be investigated.

Key factors to consider:

- a. The employer determines the scope of the investigation. The employer and the investigator should discuss the scope at the beginning of the investigation to ensure the investigator understands what is to be investigated.
- b. The scope of the investigation is different from the investigative process. The investigator generally decides the investigative process, unless the employer's policies dictate the process to be followed.
- c. During the course of the investigation, the investigator may become aware of issues that are beyond the initial scope of the investigation. If this occurs, the investigator generally should provide appropriate notice to the employer, which may include documentation, so that the employer can determine an appropriate course of action.
- d. If requested to do so by the employer and if the investigator agrees, the investigator should include the additional issues within the scope of the investigation. Alternatively, the employer may choose to address the additional issues in a different manner, such as conducting a separate investigation.

- e. If the employer restricts the investigation or the investigator's ability to conduct an impartial investigation, it is prudent for the investigator to document these changes or restrictions. Such actions might include the employer restricting access to evidence, including documents or witnesses, that the investigator deems reasonably necessary to make reasoned, thorough factual findings on the scope of the investigation.

4. INVESTIGATION PLANNING

Guiding Principle: The investigator should engage in planning for an effective investigation.

Key factors to consider:

- a. The investigator should consider what potentially relevant evidence may exist, including witnesses, documents, and electronic information, and how to obtain them. This may include e-mails, text messages, social media postings, other digital evidence, personnel and sensitive files, timelines, policies, procedures, handbooks, and relevant prior investigation materials.
- b. The admonitions to be communicated to witnesses and the manner in which they will be given should be determined in advance, in consultation with the employer. These include, for example, the prohibition against retaliation, the requirement to cooperate in the investigation, to maintain appropriate confidentiality, and to tell the truth during the interview.
- c. The investigator should determine who will be interviewed, in what order, and for what purpose, subject to changes due to witness availability or new information learned during the investigation.
- d. Planning may include deciding who will schedule interviews and how, interview logistics, how to gather documents and other physical evidence, and identifying and providing necessary resources to the investigator.
- e. Adjustments to the investigation plan may be needed as a result of new developments or newly-discovered witnesses or evidence.
- f. The investigator should prepare general lines of inquiry to be addressed during witness interviews.

5. COMMUNICATING WITH EMPLOYER REPRESENTATIVES AND WITNESSES

Guiding Principle: A determination should be made as to those persons with whom the investigator will communicate about the investigation, taking into consideration issues of privilege and potential conflicts of interest.

Key factors to consider:

- a. Investigators usually communicate with the employer or its agents about the following: (1) the scope of the investigation, the admonitions to be given, and the type of report to be produced; (2) the process for obtaining evidence, scheduling, and logistics; and (3) background information.
- b. If feasible, an investigator should avoid communicating outside the interview process with anyone who is or may be directly involved in the matters being investigated, or with anyone who is or may be interviewed on substantive matters.

- c. If feasible, the employer representative should not be a witness or participant in the matter being investigated.
- d. If feasible, an employer representative other than the investigator should handle the investigation logistics, including noticing and scheduling witness interviews.
- e. The employer representative and the investigator should consider whether third parties may be present during interviews, if requested by a witness. This includes union representatives if, for example, the employee is covered by a collective bargaining agreement. However, an attorney investigator must be cognizant of the rules of professional responsibility, including rules concerning contact with a represented party.
- f. The investigator should avoid communicating factual findings before the investigation is complete.

6. CONFIDENTIALITY AND PRIVACY²

Guiding Principle: The investigator should take steps to safeguard the confidentiality of the investigation without guaranteeing anonymity or complete confidentiality.

Key factors to consider:

- a. The investigator should maintain the investigation file in a manner that will protect the confidentiality of the information contained therein, consistent with the employer's instructions and any legal requirements.
- b. The investigator should consider the extent to which the investigator reveals information to a witness in order to conduct an effective interview, while ensuring that all parties have a full and fair opportunity to understand and respond to the complaint.

² There have been significant legal developments regarding proper confidentiality instructions to witnesses. These developments should be considered.

7. EVIDENCE GATHERING AND RETENTION

Guiding Principle: The investigator should gather relevant evidence.

Key factors to consider:

- a. In determining the evidence to gather, the investigator may consider, without limitation:
 - i. The nature of the allegations;
 - ii. Laws and policies, for example, the employer's electronic communications and media policies;
 - iii. The probative value of the evidence, weighed against the costs of gathering the evidence, in terms of available financial resources, time, and potential disruption to the workplace; and
 - iv. Whether outside expertise is needed, for example, a digital forensic examiner to help locate and retrieve electronically-stored evidence.
- b. If the investigator requests evidence from the employer that the employer declines to produce, it may be prudent for the investigator to document this.