

8 Steps on How to Handle a Discrimination Complaint

Federal, state and local laws prohibit discrimination based on a wide range of characteristics, including (for example) age, pregnancy, religion, gender, disability, race, ethnicity, color, creed, sexual orientation and national origin. These laws likewise impose a number of serious penalties on employers who fail to follow these prohibitions. Thus, prudent employers should take claims of discrimination in the workplace seriously.

This article outlines what every covered employer should do when handling any type of complaint of discrimination. In short, employers should promptly, fairly and thoroughly investigate all claims of discrimination - and document their efforts in doing so.

Step 1: Determine Whether a Complaint Has Been Made

Employers should keep in mind that the term *complaint* is broadly defined. A complaint may be oral or written and may be made to a supervisor, HR, or even an outside hotline designated by the employer to receive complaints. Regardless of how the complaint is received, an employer is obligated to respond to all complaints of discrimination. An employer should make every effort to investigate every complaint or report of discrimination regardless of how the employer becomes aware of the issue.

Step 2: Acknowledge That the Complaint Has Been Received

Employees are often hesitant to report instances of discrimination. When an employee makes a complaint of discrimination, the employer should respond to the complaint in a prompt, sensitive and proactive manner. If a complaint has been submitted in writing, an employer representative should confirm with the employee that the complaint has been received. After receiving a written or verbal complaint, the employer should let the employee know the following information:

- The employee should be told that a prompt and thorough investigation will be conducted to look into the allegations the complainant has raised. It is advisable to provide the employee with a brief explanation about how the investigation will be conducted.
- The employee should be provided with a copy of any relevant policies regarding religious discrimination.
- The employee should be informed that the complaint will remain confidential to the greatest extent possible. However, the employer should not provide assurances of complete confidentiality. While it is extremely important to keep an

investigation contained, it is also necessary to discuss the matter with those individuals who need to know or who can provide useful information.

Step 3: Document the Complaint

When an employee complains of discrimination, the employer should immediately begin to take detailed notes that provide an accurate account of all relevant information. Any written notes of conversations should be purely factual and should not include any conclusive statements or opinions. It is important to remember that no conclusions should be made until an investigation has been completed.

The employer should begin to create an investigation file. The employer should make a copy of its discrimination policy as it read at the time of the alleged discrimination and complaint and should place a copy of the policy, as well as any acknowledgment forms signed by any relevant parties, in the investigation file. The employer should note in the file when the complaint was made and who first received the complaint. The employer should also gather together any additional documents or evidence that the employee has provided and any other relevant information and compile it in an investigation file to be provided to the investigator. Such evidence may include notes, emails, letters, etc.

Step 4: Choose an Investigator

Before the employer can begin to investigate the complaint of discrimination, the employer must select an appropriate investigator. In some cases, it may be more appropriate to hire an outside investigator (e.g., someone who conducts investigations professionally and is not employed by the employer). Often, attorneys are retained to conduct investigations. However, the employer should not hire an attorney to investigate the claim if the employer wants that very same lawyer (or that attorney's law firm) to defend the employer if the employee ever sues for discrimination in the future.

If the employer determines that it will handle the investigation internally, the investigation should be conducted by a management level employee who is trained on how to properly run an investigation. In addition, the investigator should make a good witness and be an individual who neither the complainant nor the alleged wrongdoer reports to or with whom either party has a relationship, thus eliminating any potential bias or conflict of interest.

Step 5: Promptly Interview the Reporting Employee

After the investigator has reviewed the employer's notes regarding the complaint, any written complaint of discrimination and any other relevant information that has been placed in the investigation file, the investigator should set up a meeting with the reporting employee to interview him or her with respect to the allegations. At this meeting the investigator should:

- Begin by assuring the reporting employee that the report is appreciated, is taken seriously, and will be kept confidential as far as possible. These assurances should help to calm the reporting employee's understandable anxiety or anger about the incident underlying the report.

- Confirm to the reporting employee that the employer encourages reporting of any type of discrimination and from any source. This confirmation allows the employer again to affirm its commitment to providing a productive and safe workplace for all of its employees.
- Take notes that reflect all relevant facts, including who did what, when, where, for how long, and in whose presence. These notes will form the basis of the investigator's eventual conclusions, so they should be clear and thorough. Because such notes may be able to be obtained by the other side during a lawsuit, these notes should also be professional, and omit any of the investigator's own feelings, reactions, or doubts about the reporting employee's story.
- Confirm that the reporting employee has conveyed all relevant information, can remember no other details, and has no other report to make. Once the reporting employee confirms that there is no other pertinent information, this fact should be included in the investigator's notes.
- Tell the reporting employees to forward any other relevant information to the investigator as promptly as possible. This follow-up direction helps ensure that the employer's eventual disciplinary action (if any) will be based on a complete factual record.
- Ask that the reporting employee not discuss, publicize, or share with anyone else the report or the investigation. This request serves to insulate the employee from any type of retaliatory harassment, to prevent corroboration among interested witnesses, and to underscore the seriousness of the investigation.
- Tell the reporting employee that the investigation will conclude as promptly as reasonably possible. The investigator will need time to review the facts reported by the complaining employee, to do a thorough investigation, and, possibly, to confer with legal counsel. Thus, the investigator should not pin the employer down to any particular date for completion of the investigation, but the investigator's prompt contact with the reporting employee should give the employee some comfort that the investigation is moving as swiftly as possible.

If the reporting employee is under a real and immediate threat of further discrimination or harassment, the investigator may need to coordinate with management on appropriate immediate remedial steps and interim solutions (e.g., temporary reassignments, paid leave of absences, closer supervision).

Step 6: Promptly Interview Possible Witnesses

The investigator should then schedule a face-to-face appointment as soon as possible with each potential witness (i.e., those named or implicated by the reporting employee). In interviewing these possible witnesses, the investigator should:

- Explain that there has been a report of discrimination and that the witness is not under investigation or in any trouble. Few employees enjoy being interviewed

about a discrimination claim, so these first few words of explanation should be calming, reassuring, and non-confrontational.

- Tell the witness that this appointment is merely part of the process of investigating the report and that their identity will be kept confidential as far as possible. To ease the anxiety or anger the witness may feel at being interviewed, the investigator may choose to explain that there is a policy that must be followed. This act normalizes the situation and helps the witness understand their place in the larger context of the investigation.
- Take notes that reflect all relevant facts, including what the witness saw, said, did, and heard firsthand about the incident(s). Again, these notes should be clear, thorough, and objective.
- Confirm that the witness has conveyed all relevant information and can remember no other details. Again, once the witnesses confirm that they have no other information; this fact should be included in the investigator's notes.
- Tell the witnesses that they should forward any other relevant information to the investigator as promptly as possible.
- Ask that the witness not discuss, publicize, or share with anyone else the report or the investigation.
- Let the witness know that the investigation will conclude as promptly as reasonably possible.

Step 7: Promptly Interview the Alleged Wrongdoer

After talking with the reporting employee and each potential witness, the investigator should schedule a face-to-face appointment with the alleged wrongdoer. (This meeting should be attended by the alleged wrongdoer and two independent individuals (e.g., an HR representative and a manager who outranks the alleged wrongdoer).) In this interview, the investigator should:

- Explain that there has been a report that the person engaged in prohibited discrimination, but that the investigator (and employer) have come to no conclusions about the report one way or the other. The alleged wrongdoer will normally feel - and will often show - immediate discomfort with the interview. This should not be taken as a sign of guilt or innocence, and the interviewer should work to maintain a calm and professional manner.
- Let the alleged wrongdoer know that this interview is simply part of the procedure that the employer uses to understand all the facts. Again, this provides a reasonable context for the interview, and alerts the person that there will be an opportunity to dispute or provide an explanation for the allegations.
- Provide a summary of the alleged discrimination including the date, time, place, and witnesses to the alleged incident. It may help at this point to emphasize that this is just one side of the story.

- Ask that the individual provide their *side of the story*. This request makes explicit that the employer is interested in knowing all of the facts.
- Take notes that reflect all relevant facts, including what the individual saw, said, did, and heard about the incident(s). Again, these notes should be clear, thorough, and objective.
- Confirm that the individual has conveyed all relevant facts and can remember no other details.
- Tell the person that they should forward any other relevant information to the investigator as promptly as possible.
- Request that the individual not discuss, publicize, or share with anyone else the report or the investigation.
- Let the individual know that the investigation will conclude as promptly as reasonably possible.

Step 8: Draw Conclusions and, if Necessary, Impose Discipline

As promptly as possible, the investigator should conclude the investigation and provide a set of findings to the employer. Until then, the investigator and employer should never:

- Make assumptions about any person's truthfulness;
- Decide not to investigate;
- Forget to check all available documents (e.g., emails, time cards) that may corroborate or undermine one party's version of the facts;
- Stray from established procedures for handling complaints;
- Ignore governmental (e.g., EEOC) requests or complaints; or
- Reach any conclusions before the end of the investigation.

With the investigator's findings in hand, the employer should determine either that no discipline will be imposed (because no wrongdoing was shown) or that appropriate discipline will be imposed. If discipline is imposed, the employer must be sure that:

- The punishment is appropriate to the level of severity of the offense - the more clearly wrong or harmful the action, the greater the punishment; and
- The punishment is consistent with past practice and punishments received by similarly situated employees in similar circumstances.

In any event, employers should never retaliate in any way against the reporting employee - even if the complaint has no legal merit. Courts often interpret retaliation as any type of negative treatment (e.g., a change in job assignments, even if at the same

pay scale) which would discourage an employee from bringing a complaint of discrimination. Courts also look at the temporal proximity between the complaint and the retaliatory conduct. As such, employers should be especially cautious in taking any adverse actions that affect the work, pay, or conditions of employment of any reporting employee for at least several weeks (if not months) after the report. If it is necessary to take any adverse employment actions against a reporting employee, the employer should have a well-documented legitimate business reason for doing so.