

HOW TO INVESTIGATE RETALIATION IN THE WORKPLACE

Case IQ

Investigating a workplace incident or complaint is important to protecting employees and your organization. But if you don't work to prevent retaliation against the reporter, you're allowing another, potentially more damaging, issue to slip by.

Retaliation is a lose-lose situation. First, it makes the reporter/victim fear speaking up, along with the negative retaliatory behaviors they experience (e.g., harassment, fewer projects, social isolation). It also puts your organization at risk; you could face a lawsuit from the retaliation victim. Plus, if employees don't raise concerns for fear of retaliation, you could miss red flags of workplace issues until they are serious, widespread problems.

In this tip sheet, Meric Bloch shares his top tips for effectively and efficiently responding to and investigating retaliation claims in your organization.

1. Develop written policies.

Develop a written anti-retaliation policy and guidelines on how retaliation should be reported and investigated. The policy and guidelines must be accessible to your employees.

2. Design an investigation process.

Your investigation process should outline the specific steps that your investigators consistently follow when investigating retaliation claims.

3. Empower employees to report their concerns.

Your organization needs to build a culture of trust if you want your employees to speak up. Employees often fail to report witnessing misconduct because they fear retaliation.

4. Understand the concern.

Once you receive the report, speak with the reporting employee to understand the core problem they are reporting. Make sure to learn whether they have direct knowledge of the key facts or if their knowledge is based on second-hand knowledge, speculation, or opinion.

Just because the employee uses words like “retaliation” does not mean you have a retaliation case. Understand the specific facts behind the label. Claimed retaliation could also be poor perception management by managers, unfair favoritism, or improper decision making.

5. Determine whether the allegation is credible.

Are there additional initial facts that lead you to believe that it is possible that a violation has occurred? This gives you a basis to begin an investigation.

6. Frame your allegation.

You do not investigate whether the alleged facts occurred. You do not investigate whether retaliation happened. You investigate whether the policy was violated.

Frame the allegation as: The investigation will seek to determine whether Larry Green improperly withdrew his approval for Janet Tipton to work remotely, in violation of the anti-retaliation policy.

7. Identify your elements.

To determine whether the policy was violated, you need to gather sufficient information to prove or disprove each of the elements of the violation.

To prove a violation, you would need to gather sufficient information to prove that it is more likely than not true that (i) Janet engaged in a protected activity, such as contacting HR to report Larry's unprofessional conduct; and (ii) that Janet suffered some negative employment action like withdrawing permission to work remotely that now means Janet needs to hire a home health aide for her elderly mother; and (iii) Janet's report to HR was the motivating factor for Larry's withdrawal of permission.

8. Gather your evidence.

Your interviews and document reviews should focus on proving and disproving each of the elements. Other topics, such as whether Larry has engaged in unprofessional conduct, are outside the scope of your investigation.

Procedural fairness requires you to interview Larry to learn his responses to the evidence you have gathered. Larry is entitled to give you his side of the story, to offer information that might show his motives were legitimate, and mitigating circumstances.

Retaliation investigations focus mostly on learning the motivating factors. The other two elements can be proven true easily.

9. Make a finding.

When your fact-gathering is complete, you should make your findings according to each of the elements. If the evidence shows that each of the elements is more likely than not to be true, a violation has occurred.

10. Prepare an investigation report.

Your report shows the organization responded timely and impartially to the concern. The report accurately documents the investigation steps taken and the evidence gathered.

11. Deal with the aftermath.

Employees may be concerned and sensitive after the investigation. HR and management need to monitor the workplace to ensure that perceptions are managed carefully, and managers take a 360° view of their actions.

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