



Investigating Complaints of Harassment & Discrimination in Construction



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Investigating Complaints of Harassment & Discrimination in Construction

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Overview of Harassment

■ Harassment:

- ▣ Actions or behavior that is “severe or pervasive” enough to alter conditions of employment
 - ▣ Tangible employment action *or*
 - ▣ Objectively and subjectively offensive
- ▣ Totality of circumstances
- ▣ Title VII is not a “general civility code”

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Overview of Discrimination

- ▣ Applies to all protected characteristics: National Origin, Age, Disability, Sex, Color, Race, Religion, Failure to conform to Gender Stereotype

■ Discrimination:

- ▣ Adverse job action based on protected characteristic.

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Benefits of an Effective Investigation:

- Provides a sound evidentiary basis for action
- Minimizes labor relations issues
- Professionalism/credibility
- Cost Effective
- Opportunity to improve performance, identify systemic issues

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Investigative Process

- Complaint/Allegation
- Preliminary Analysis
- Investigation Plan
- Fact Finding Interviews/Evidence Gathering
- Post Interview Activities
- Conclusions/Recommendations
- Written Report
- Follow Up/Feedback

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Planning and Preparation

- Identify the goals and objectives of the investigation
- Identify potential conflicts/costs
- Identify the appropriate investigator/investigative team
- Develop a timetable and interim measures
- Gather related documents/information

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Managing the Investigation

- What is the allegation?
- Who is the employee at issue?
- Are there any issues/requirements?
- Does the organization face a threat?
- How much time is available/needed?

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Managing the Investigation

- Any impact on Union relations or investor relations?

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Legal Considerations

- Is there reasonable grounds for an investigation?
- Avoid damage to the accused's reputation
- Contain the investigation through appropriate lines of communication and internal controls
- Maintain Confidentiality

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Legal Considerations

- Ensure objectivity in the investigation
- Conduct investigation to a high standard
- Ensure high quality of record keeping
- Disclose enough information to the accused to allow them the opportunity to respond meaningfully to the allegations

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Preparation Considerations

- Consider use of second interviewer/observer
- Be aware of cultural/gender/racial issues
- Establish medical problems that may affect interview
- Review all documents

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Preparation Considerations

- Preserve original documents as well as working copies
- Consider order of interviews

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Interview Integrity

- Do not participate in the interview if you have a perceived bias or conflict of interest
- Do not compromise your integrity. Be sincere and do not be deceitful
- Interviewer integrity will precede the interviewer through the grapevine
- Remain calm, show empathy, be sensitive to personal boundaries

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Interview Strategies

- Cooperative vs. Persuasive

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Cooperative Interview

- Initial objective is to establish rapport
- Employee is encouraged to do most of the talking
- Interviewer is attempting to get the employee's story, gather information, test credibility
- Interviewer asks open questions and uses prodding statements encouraging the employee to continue

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Cooperative Interview

- Non-accusatory
- Flexible/more open-ended questions
- Employee centered
- Low stress
- Develops rapport

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Persuasive Interview

- Employee is confronted with the allegation
- Interviewer presents employee with evidence related to the investigation
- If response does not appear to be truthful, interviewer continues to present evidence to the contrary to what employee has said
- Information previously gathered is used to convince employee to tell the truth

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Persuasive Interview

- Requires considerable time
- Interviewer dominated
- More structured
- Accusatory

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Persuasive Interview

- High stress
- Detailed notes/recorded

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Beginning the Interview

- Describe purpose of interview and role of interviewee
- Identify the company's commitment to the investigative process
- Describe employee's obligation to cooperate
- Discuss confidentiality
- Outline anti-retaliation policy

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Conducting the Interview

Open Questions Can Help Accomplish Several Goals:

- Interviewee's priorities, attitudes, values
- Interviewee's frame of reference and viewpoint
- Allows interviewee to express feelings and reveal facts without feeling threatened
- Allows interviewer to establish understanding and rapport

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Conducting the Interview

- Do not mislead the employee about the nature of the investigation
- Do not mislead the employee about the potential consequences of the investigation
- In certain circumstances, failure to comply with a reasonable request to answer questions constitutes insubordination and can be grounds for discipline

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Conducting the Interview

- Do not subject the employee to persistent questioning
- Put all relevant documents to the employee
- Ask employee for any relevant documentation
- Statements are a major component in the investigative process and, combined with physical evidence, help to reconstruct and establish facts

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Conducting the Interview

- Keep an open mind
- Be a good active listener
- Be prepared to redirect the employee if you get off subject
- Be prepared to change script if you are provided with relevant and significant information

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Conducting the Interview

- The interviewer must be the only person asking a questions, and the employee must be the only one answering the question.
- Consider that notes from interview may be discoverable if litigation follows, unless interview is subject to a privilege. Interviews conducted by an attorney can be confidential pursuant to attorney work-product or attorney-client privilege.

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Conducting the Interview

General Interviewing Techniques:

- Begin with general questions and proceed to more specific ones
- Ask simple, open-ended questions
- Avoid accusatory or confrontational questions
- Repeat important questions with different wording

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Conducting the Interview

- Pay close attention to body language
- Use silence after a question
- Avoid interrupting
- Avoid leading questions
- Ask one question at a time and get specifics

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Conducting the Interview

- Be careful not to name parties or witnesses unnecessarily
- Questions directly addressing the issue should be asked in the same tone of voice as other questions
- Encourage the employee to say as much as possible
- Remember that listening is not just waiting for your turn to speak

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Interviewing Tips

- Employees who sense that you have prematurely drawn a conclusion will become defensive
- Keep personal views, judgments, suspicions contained
- Don't make suspicions known until you are reasonably certain of your facts

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Interviewing Tips

Avoid:

- Too many questions
- A questions within a question
- Lack of questions

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Interviewing Tips

- Interrupting the employee
- Becoming emotional or losing control
- Tunnel vision/prejudging the outcome
- Impatience/rushing to conclude interview

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Interviewing the Complaining Witness

- What happened and when
- Who was involved
- Where did it take place
- Was anyone else present
- Was the first incident or have there been other similar incidents

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Interviewing the Complaining Witness

- Has the complaining witness talked to anyone else about the incident
- Has the complaining witness made any written records
- What is the complaining witness's relationship with the subject
- Can the complaining witness continue to work with the subject

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Interviewing the Complaining Witness

- Is there anything the company can do to assist in improving the relationship
- Establish whether the witness has missed work, sought medical treatment or incurred any expenses as a result of the alleged incident
- Does the complaining witness know of any additional facts, witnesses or documentation that would help the investigation

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Interviewing the Investigation Subject

In addition to other preliminary interview questions, make it clear that:

- This is only an allegation and no one has prejudged the outcome
- Confidentiality is important and every effort will be made to protect his or her reputation
- Current role is to gather facts from all witnesses

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Interviewing Tips

Truthfulness: is signaled by an acute memory, a perceptive recounting of the facts, and a flowing narration.

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Interviewing Tips

- Do not avoid or be afraid to ask the tough or embarrassing questions
- Be brave enough to ask questions that would be rude and intrusive in other situations
- Pay attention if the employee asks the consequences of an action

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Guidelines

- Use open and closed questions where appropriate
- Keep questions simple
- Avoid questions with more than one meaning
- Ask self-appraisal questions
- Encourage cooperation

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Guidelines

- Pursue unanswered questions
- Be consistent in questioning
- Challenge deception where appropriate
- Carefully handle "what if" questions
- Assume more information is available

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Dealing with Resistance

- A common form of resistance occurs when a subject answers a question with a question
- Try simply repeating the same question

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Verbal Evasion

Phrases such as “that’s basically it,” or “I guess that’s about all I can remember” are usually an admission that there is more information that has not been divulged

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Hypothetical Phrases

Using could, should, would or ought indicate uncertainty about what happened. Ask the employee to tell you exactly what they did.

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Maintaining Dignity

A person expressing indignation about the question may indicate deception.

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Objections

Employees may imply a moral objection to a question with a response like, "I don't act like that!" Such assertions may be true, but do not mean that the employee did not do it in this instance. Clarify those statements later in the interview.

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Answering a Question with a Question

This often occurs during a series of relevant questions and may indicate that the employee is answering with a lie.

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Terminating the Interview

- Allow the employee an opportunity to provide additional information
- Leave open the possibility of a second interview, if necessary
- May discuss the existence of inconsistencies
- Thank the employee

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Documentation

- Interview Notes
- Separate notes for each interview
- Record identifying information
- Should be factually based
- Avoid opinions, conclusions, assumptions

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Documentation

- Can include information on body language, attitude, demeanor and behavior
- Prepare summary report as soon after the interview as possible

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Preparing the Executive Summary

- Internal and external purposes

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Preparing the Executive Summary

Minimum Contents:

- All steps taken in the investigation
- Summary of important dates
- Summary of facts identifying the source of the information
- Any information or opinions from experts or others with specialized knowledge

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Preparing the Executive Summary

- Facts relevant to the credibility of the witnesses interviewed
- Other relevant incidents
- Relevant precedent
- Relevant policies, guidelines or laws
- Investigative conclusions

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Preparing the Executive Summary

- Follow up review of process which should be considered
- Recommendation of action

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