
Workplace Investigations Toolkit



California
Employers
Association™

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Workplace Investigations Overview

It is in every employer's interest to look into workplace issues no matter how big or small. When they occur, the employer should assess the concern, and when appropriate, have a trained investigator promptly investigate, and then take corrective action. Being proactive will help avoid bigger issues down the line.

Obligation to Investigate

Once an employer learns about a complaint of unlawful conduct or a company policy violation, the employer should initiate a workplace investigation. If the complaint concerns **harassment, discrimination, or retaliation**, the company is legally obligated to take "all reasonable steps" to **prevent and promptly correct** the conduct, under the California Fair Employment and Housing Act (FEHA). This includes the obligation to conduct a workplace investigation. The FEHA requires that the investigation is:

- Timely;
- Thorough;
- Objective;
- Provides the accused an opportunity to respond to the allegations;
- Includes a well-reasoned conclusion, supported by substantial evidence; and
- Results in prompt corrective action, as appropriate.

Employers should also investigate complaints regarding other company policy violations, such as **bullying, workplace violence, fraud, or misconduct**. Even if the complaint is limited in scope or does not sound "serious," there should always be some level of further review and documentation. Careful scrutiny by HR and management over each complaint is necessary to determine which issues require a full investigation under the FEHA. This is illustrated below:

An employee complains to you that her supervisor is creating a "hostile work environment." When you follow up with the employee, she says that the supervisor is "strict" about the employee's attendance, and often writes her up for being tardy. At this point, the allegation likely only requires further review, such as reviewing the employee's timesheets, following up with her supervisor regarding the reasons for the absences, and verifying consistent application of the policy across the employees in that department. Even if you find no policy violation, you should still document your findings. The documentation may include notes regarding the timesheet review, conversations with the employee and supervisor, and your conclusions.

Now assume that when speaking with the employee, she claims that the supervisor favors her male coworkers and allows them to frequently miss work or show up late. The supervisor allegedly never counts these absences against the male employees. Because the allegation raises gender discrimination, a protected category under the FEHA, the employer should conduct an **investigation satisfying the FEHA's requirements**. This likely requires interviewing witnesses, reviewing the other employees' personnel files, preparing a formal report of factual findings, and engaging in prompt corrective action, if warranted. When allegations indicate harassment, discrimination, or retaliation, many employers choose to retain a third-party investigator, discussed further below.

Employers can learn more about investigation requirements in the [Civil Rights Department Workplace Harassment Prevention Guide](#).

Investigation Triggers

“Knew or Should Have Known”

When is an employer's obligation to conduct a workplace investigation triggered? The standard under the FEHA is when an employer **knew or should have known** about alleged harassment, discrimination, or retaliation. Note that this is not only when a supervisor or human resources receives a formal written complaint, but also includes many other circumstances. Below are some examples:

- The employee verbally expresses a concern or complaint;
- The supervisor or management observes inappropriate conduct;
- An employee complains on behalf of their coworker;
- The supervisor or management learns of persistent gossip and/or rumors that would constitute a policy violation if true;
- A lawsuit or administrative charge is filed against the company, including by a current or former employee. (*Be sure to consult legal counsel in this situation.*)

Timeline to Initiate and Complete Investigation

An investigation must be *timely*. This means that once you learn about a complaint, it requires immediate attention. The investigation should reasonably begin within days, not weeks. Although there is no exact timeline under the law, a “best practice” is that the investigation should begin within 48 hours of receiving a complaint or information about unlawful conduct and/or a company policy violation.

The investigation should also be resolved in a timely manner, as reasonable under the circumstances. A good rule of thumb would be striving to complete the investigation within two

weeks. Of course, circumstances may require more time depending on if witnesses are unavailable, the number of issues involved, finding the appropriate investigator, etc. The employer should document these circumstances to show that they were diligent.

The Civil Rights Department (“CRD,” formerly known as “DFEH”) says this about investigation timeliness: “If the allegation is not urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation in a few weeks (although that depends on several factors, including the availability of witnesses).”

Choosing an Investigator

The next step is choosing an appropriate investigator. In California, the investigator must be:

- 1) an in-house employee (with or without outside assistance);
- 2) a licensed attorney; or
- 3) a licensed private investigator.

It would likely be the most cost effective if an in-house employee conducts the investigation, such as a human resources manager. However, managing an investigation in-house can be overwhelming, especially if it involves multiple parties and allegations, or conduct that took place years ago. It is also important that the employee assigned to handle the investigation is qualified, experienced, and professionally trained in investigatory processes, or works with a trained professional through the process. (Note: CEA HR professionals can assist your staff in conducting an internal investigation and guide them through the process. Learn more [here](#).)

Alternatively, the company may bring in an independent, third-party investigator to handle it. Remember, one of the FEHA’s investigation requirements is that it is *objective*. Plaintiff’s lawyers often attack in-house investigations as unfair, given the appearance of bias when an in-house employee is investigating allegations against someone they may directly report to in their role. Thus, when the allegations concern *executives or upper management*, it is often advisable to retain a third-party (such as a licensed attorney) to conduct the investigation and remove actual or perceived bias. If not, the company may not be able to use the investigation as a defense in court, and may even face additional claims for failing to satisfy the FEHA’s requirements.

Investigation Planning

Temporary Personnel Changes

While the investigation is ongoing, human resources or management should consider any appropriate temporary personnel changes pending the investigation’s outcome. For example, if an employee is alleging that their supervisor is harassing them, the employer should make

efforts to assure that the employee does not have to continue reporting to that supervisor during the investigation. This will mitigate risks of further harassment and/or retaliation after the employee's complaint was received.

If the allegations are serious, such as sexual harassment or workplace violence, the employer should consider placing the accused on a paid administrative leave during the investigation. Most importantly, ***make sure not to retaliate against the complainant*** or any witnesses to the investigation. If you do make temporary personnel changes while the investigation is ongoing, you should not reduce the complainant's hours or pay, or transfer them to a less desirable location or shift time (i.e., the night shift).

Gathering Evidence

Once you have selected an investigator, the next step is for the investigator to determine the scope of the investigation. While this may change based on the interviews and other information obtained, this will help the investigator determine what policies in the company's employee handbook may be relevant, as well as documents and evidence, such as personnel files, disciplinary records, timesheets, emails, text messages, screen shots, organizational charts, and video surveillance.

Investigations should not be "fishing expeditions," in which the investigator unnecessarily intrudes into an employee's privacy. Be sure to consult your company's policies regarding employees' reasonable expectations of privacy with respect to business correspondence on personal devices.

The investigator should create a list of witnesses to interview who may have relevant information. This list may change as the investigator learns more information. The investigator is not obligated to interview every witness named by the complainant or every person who may have relevant information. A trained investigator has good common sense and judgment to determine who should be interviewed.

Preparing Witness Questions

After gathering evidence and reviewing policies, the investigator should prepare an outline of questions or list of topics for the interviews. While the outline of questions should not be viewed as a "script," it is a useful tool to help keep the interviews focused and thorough. Remember, you may learn new information during an interview which requires additional questions that are not included on your outline. Investigators must be adaptable.

In general, questions should be open-ended to elicit information from witnesses. It is especially important to refrain from direct questions early on in the interview. This may lead the witness to start answering questions in the way they *think* you want them to respond. As the interview goes

on, it may make sense to start asking more direct questions if the witness has not already provided you the desired information. Below is an example:

- Open-Ended Question: Has your supervisor Jason ever been inappropriate or made you feel uncomfortable?
- Direct Question: Is it true that your supervisor Jason squeezed your waist when he walked by you in the manufacturing plant last Tuesday?

When drafting questions for your outline, think about answering: ***Who, What, Where, When, and Why*** for each allegation. The investigator should not frame questions in a way to “confirm” their suspicions or draw conclusions prior to the interviews. A trained investigator understands the importance of keeping an open mind and looking into any inconsistencies. The investigator may not get direct answers to questions and may experience “he said, she said” situations, so the goal is to adequately assess credibility of witnesses to come to a reasonable conclusion at the close of the investigation.

Below are Sample Interview Questions from the Equal Employment Opportunity Commission (EEOC), which employers may use as a guide:

- [Questions for Complainant](#)
- [Questions for Accused](#)
- [Questions for Witnesses](#)

Witness Interviews

Scheduling Interviews

The investigator should work with Human Resources or the company’s main point of contact to schedule witness interviews. This may require consulting with an employee’s supervisor about their work schedule/availability. However, this does not mean that the investigator must explain the purpose of the meeting to the supervisor. In fact, it is important not to give witnesses too much advance notice about the interview, so they do not prepare ahead of time and talk with other employees about it.

When scheduling, the investigator should also account for whether a translator is needed for any witnesses who may speak a different language. It is not recommended to use other bi-lingual employees who work for the company, as this raises not only confidentiality concerns, but the potential for bias. Rather, the company should retain a neutral third-party for this purpose. (Note: CEA has HR Advisors fluent in English and Spanish that may assist your company, including during workplace investigations.)

Note: An employee’s participation in an investigation interview is *compensable* time.

Request for Representation

Generally, witnesses, including the complainant and accused, do not have the right to have a representative, friend, family member, or coworker present in their interview. An exception is that union employees have a right to have a union representative present for the interview.

Refusal to Participate and Anonymous Complaints

The investigator may encounter a situation in which a witness, including the accused or complainant, refuses to participate in their interview. The investigator must always still *proceed with the investigation*, even if the person refusing is the complainant. The investigator should attempt to get the witness to participate and document those attempts. If the witness still ultimately refuses, the investigator should note the refusal in their report.

While the investigator cannot “force” a witness to attend their interview, if the person is a current employee, the company may discipline them for insubordination. *However*, if the person who is refusing to participate is the complainant, this is not recommended. The investigator should thank the complainant for bringing forward their concerns and explain that, in order to ensure a thorough investigation, more information from them is necessary. Document any and all communication with the complainant in the investigation report. If the company intends on disciplining the complainant, it is recommended to consult legal counsel to avoid claims for retaliation.

Similarly, even if a complainant is “anonymous,” the matter should be investigated in the same manner as a known complainant. While the investigator’s knowledge may be more limited, they should still assess the environment, speak with employees, and use the available information to reach conclusions.

What if the complainant changes their mind and wants to rescind the complaint? If reassuring the employee that the complaint will be handled professionally and with as much confidentiality as possible does not persuade them to reconsider, continue with the investigation with the information you have.

Location of Interviews

The investigator should also give some thought about where to conduct the interviews. At a minimum, it should be in a private, closed-door setting where others cannot hear (and ideally, cannot see the interviewees). If the interviews are going to be conducted in an employee’s office, consider whether others share walls and may overhear the interviews. Even if this is not an issue, witnesses may be hesitant to speak with the investigator if other coworkers are in close proximity. Ideally, the location should not be in an area where witnesses will be seen “coming and going” and beg the question: “What’s happening in there?”

Order of Interviews & Considerations

Generally, the investigator should begin by speaking with the complainant to understand the full scope of the allegations. Next, it is often best to speak with the accused. Lastly, the investigator should interview witnesses who may have relevant information.

There are times when it makes sense to interview the accused later in the investigation or even last. Additionally, an investigator may need to conduct follow-up interviews with the complainant, accused, or other witnesses if the investigator learns new relevant information that was not addressed in the initial interviews. Again, the investigator must rely on their training and good judgment in making these determinations.

The investigator is not obligated to reveal the identity of the complainant to the accused or witnesses. However, they must give the accused an ***opportunity to respond to each allegation*** and present any counter evidence. This may lead witnesses to form conclusions about who complained, but the investigator need not confirm the complainant's identity.

If the complainant prepares a written complaint, it is not a best practice to share it with the accused. Instead, incorporate the complaint's allegations in your outline of interview questions. Nor should you share any of the allegations with the accused or other witnesses *before* their interview. This will almost certainly compromise the investigator's findings, as it allows witnesses time to reflect and craft their answers, and potentially share that information with others, rather than provide spontaneous responses.

At the conclusion of each interview, some investigators will request the witness to read the investigator's summary of the interview and sign a statement confirming its accuracy. However, this is not necessary and generally not recommended. A witness may "push back" and challenge the investigator's notes, or attempt to "take back" what they said. It is best to preserve the integrity of the investigator's observations.

What to Say in Every Interview

At the start of every interview, the investigator should address the following with each witness:

- **Cooperation:** Witnesses have a duty to cooperate and answer questions honestly and completely. The investigator should reassure witnesses that they are not in trouble and that their participation is helpful to understand the scope of the situation.
- **No Retaliation:** The company has a strict anti-retaliation policy meaning that the employee cannot be disciplined, terminated, or be subject to negative consequences based on their participation. The investigator should direct the employee to report retaliation concerns to Human Resources, management, etc., in accordance with the company's policies.
- **Limited Confidentiality:** The investigator cannot promise complete confidentiality, but only confidentiality *to the extent possible*. The investigator should explain that the

investigation requires that some information will be shared with witnesses, and that the accused will be given an opportunity to respond to the allegations. Additionally, the results of the investigation will be shared on a “need to know” basis, such as with human resources.

- **Investigation Procedure:** Explain your investigation procedure, such as how you are taking notes, what will happen with that information, and how the witness can get in touch with the investigator to provide more information.
- **Video Interviews:** If you are conducting interviews over video, verify to the interviewee that you are alone in your office and that you are not recording the interview. Make sure the interviewee confirm the same on their end.

Note: Generally, it is not recommended that employers instruct witnesses not to discuss issues raised in the investigation interviews. This is because employees are protected under the National Labor Relations Act (NLRA) in discussing the “terms and conditions” of employment with their coworkers. If you would like to instruct employees to keep the information confidential, consult legal counsel.

Interview Tips

As a rule of thumb, the witness should speak 80% or more of the time during the interview. The investigator should be engaged in active listening. Below are some additional tips to navigate witness interviews:

- Start off with easy questions about the person’s job position, background, shift schedule etc., to make the witness feel comfortable.
- Do not interrupt or fill in gaps.
- Be aware of sophisticated or manipulative witnesses who may “derail” the conversation and go off on irrelevant tangents. Ask yourself – did they answer my question?
- Avoid questions that call for speculation or opinion.
- Ask for clarification.
- Ask questions in a chronological/systematic order.
- Be straight-forward. The investigator’s job is not to trick anyone. The goal is to gather the facts to come to a reasonable conclusion.
- In addition to writing down what a witness says, also include descriptions about non-verbal cues (eye contact, body language, etc.).

Reaching Conclusions

Credibility Determinations

Understanding how to make credibility determinations is an art form and often requires specialized training. As a general matter, investigators should consider these factors:

- **Inherent Plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying? What were their non-verbal cues and body language?

- **Motive to Falsify:** Did the person have a reason to lie? Will lying benefit them? Are they fearful of retaliation?
- **Corroboration:** Is there witness testimony or documentation that tends to support or disprove the allegations? Are there any inconsistencies?
- **Past Record:** Has the accused been disciplined for similar conduct in the past? Was the complainant recently disciplined? Did the complainant complain before or after their discipline?

The investigator has the authority to make credibility determinations, and use these determinations to reach specific factual findings about the allegations. This means that even if the investigator is in a situation where it is “one employee’s word against the other,” and there is no other evidence, the investigator may use credibility determinations about the witnesses to reach a conclusion.

For additional guidance, refer to our [Credibility Assessment Fact Sheet](#).

Preparing the Report

An FEHA investigation should result in a written report. Typically, the report should include all witness interview summaries, relevant company policies, evidence reviewed, and of course, conclusions for each allegation. Employers may use this [Report Template](#) to get started.

The report is confidential and should be kept separate from employee personnel files. It should be shared with human resources or management only on a “need to know” basis. Should the employer receive a request to review the report, whether from the complainant, accused, a witness, or anyone else, the employer should consult counsel before disclosing the report.

Note: This can be an especially tricky issue if the persons involved in the complaint include those who run the company, such as shareholders and board of directors. Be sure to obtain legal advice on this issue following a request from an involved shareholder or board member to view the report.

Once the report is in its “final form,” investigators have different practices in choosing to retain or destroy their extraneous notes, such as notes taken during witness interviews. The Civil Rights Department states the following, “It is considered a recommended practice to retain all documentation . . . handwritten notes should also be retained.” If you do decide to destroy any extraneous notes, make sure all pertinent information is in the final report, including evidence reviewed, dates, full names of witnesses, and summaries of their interviews, including all relevant information revealed. Make sure that you are consistent in your retention practices.

Findings for Each Allegation

For each allegation at issue, the investigator should determine in the report whether it is founded or not. The standard of review is based on a “preponderance of evidence,” meaning the

investigator should answer: Is the allegation ***more likely than not*** true or untrue? The Civil Rights Department describes this standard as “fifty percent plus a feather.”

Based on all documentation, witness interviews, credibility assessments, and available evidence, the investigator should find for *each allegation* that it is one of the following:

- **Founded:** This means the allegation is *more likely than not true*.
- **Unfounded:** This means the allegation is *more likely than not untrue*.
- **Inconclusive:** This means the investigator *does not have enough evidence* to determine one way or the other whether the allegation is true. The investigator should do their best to avoid an “inconclusive” finding if possible.

Moreover, the investigator should explain why they reached that particular conclusion, providing their analysis of the evidence.

Note: The investigator’s role is to determine whether there are any violations of *company policy*. It is **not** the investigator’s role to form legal conclusions (i.e., whether a party would have a claim or defense in court).

Prompt Corrective Action

Once the company receives the investigation report, it must engage in “prompt corrective action,” as appropriate. The company should assess whether there are findings of policy violations, as well as the severity and number of violations. As with any other disciplinary issue, the company should refer to its own policies and practices and maintain consistency in its disciplinary action. It is important that the extent of the corrective measure or disciplinary action is consistent with the conclusion in the report. Corrective action may involve discipline, such as a written warning, performance improvement plan, suspension, termination, etc. It may also involve coaching or additional training, such as harassment prevention training.

These determinations are extremely fact specific. As such, it may be advisable to consult with counsel in this situation, particularly when there are findings of discrimination, harassment or retaliation policy violations. Making these decisions with counsel will be confidential because of attorney-client privilege.

Closing the Investigation

Once the report is complete, the employer should close out the investigation. For all witnesses, HR or management should speak to them *individually*, thank them for their participation, remind them about the company’s anti-retaliation policy, and let them know the investigation is concluded.

For the complainant, the company should additionally let them know whether any of the allegations were founded or not, and that the company is taking prompt corrective action (if applicable). However, it is important to note that any disciplinary action against the accused is **confidential information**, so this should not be shared with the complainant.

For the accused, let them know whether there were findings of any policy violations against them and the specific policies at issue. Engage in any disciplinary action, as appropriate, based on the investigation findings. Any disciplinary action against the accused should be maintained in their personnel file.

Generally, the report itself should not be shared with any of the parties involved, unless otherwise advised by legal counsel. Maintain a copy of the report for **at least four years**. The report should not be included in anyone's personnel file. Instead, it should be kept in its own separate, confidential file.

CEA members can download sample Notice of Investigation Closure Letters on our website under [HR Forms](#).

Following Up

Once the investigation is closed, be sure to follow up with the complainant periodically to make sure that the issues have been resolved. After the follow-up, it is a best practice for the complainant to sign a statement confirming that the behavior (i.e., harassment) has stopped, and that they are instructed to report if anything further happens. Assure them that they will not be retaliated against for their complaints.