

At Issue

A RISK MANAGEMENT NEWSLETTER FOR COLLEGES AND UNIVERSITIES



Internal Investigations

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Different events trigger the need for an internal investigation. Employers must address complaints and commence an internal investigation under different laws for incidents involving discrimination and harassment, retaliation, safety violations and workplace accidents, and student-related bullying. For example:

- Title VII of the Civil Rights Act
- Title IX of the US Education Amendments
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- State Human Rights Laws
- OSHA
- State Public Employee Safety and Health Laws
- State Anti-Bullying Laws

Besides legal requirements, colleges and universities face reputational risk if they do not act swiftly and properly. Slip-ups, poorly managed and outright improper or egregious responses and investigations can result in negative attention in both traditional form and through social media. Noncompliance with internal

policies or collective bargaining agreements can also lead to other damaging outcomes.

Under Title VII (which prohibits workplace-based discrimination on the basis of race, color, religion, sex, pregnancy, national origin, age, disability or genetic information), a prompt response to a complaint with a corresponding investigation and (when needed) corrective action may create an affirmative defense for the employer for certain types of claims.

STAGES OF AN INVESTIGATION

While there is no single way to conduct an investigation, there are different phases to the process: notice of a complaint, pre-investigative steps, investigation, conclusion and findings, and monitoring.

Notice of a Complaint

Internal investigations start with notice of a complaint. However, complaints often arrive in different ways, for example, a formal complaint by an aggrieved person, an Equal Employment Opportunity Commission (EEOC) or state-level charge, notice of inappropriate behavior by a third-party, rumors or a request by an employee or student to just “hear them out” and not take any official action. Rumors or reports by friends or coworkers

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should be investigated in the same manner as a formal complaint. In the current legal landscape, there are no “unofficial” complaints; all complaints should be addressed pursuant to the institution’s policies and legal requirements.

Pre-Investigative Steps

This is the planning stage (and perhaps the most important phase) of the process — the time to organize the investigation and determine the purpose, objective and scope — which is driven by the type of complaint and the facts involved. Consider: who are the parties; what is the nature and severity of the claim; who needs to be notified — both internally — including the Title IX officer or intake person — and externally (such as child protective services, law enforcement, the insurance carrier or parents); are there independent witnesses; what evidence is available (electronic and hardcopy); who will be the investigator; what will IT need to collect (such as email, postings on social media and information on company-provided cell phones) and what is the role of counsel?

Initiate interim measures while the investigation is being conducted (i.e., temporary reassignment, sending no contact letters, changing work stations or granting a leave of absence). Such measures should not result in an adverse action or hardship for the complainant. Gather evidence and initiate a litigation hold — a procedure to preserve all relevant information, electronic and paper — when litigation is reasonably anticipated. Explain to the parties what is meant by retaliation. Explain that retaliation will not be tolerated and findings of retaliation can lead to disciplinary charges against the actor.

Selecting the right investigator is important. If an employee is selected, verify that he or she is familiar with policies, procedures and legal principles, and can operate impartially and conduct a professional investigation. At times, due to conflicts of interest, prior history between employees or lack of a qualified candidate, colleges and universities must look outside the organization and retain an investigator, consultant or outside law firm. The attorney who performs an investigation may be prohibited from representing the employer if litigation ensues. Counsel can serve as advisor and consultant to an internal (employee) investigator as well.



Investigation

An investigation is the employer’s process to resolve complaints. Done properly, it will gather relevant facts and evidence to help determine what actions are necessary to resolve the complaint. It can also aid in reducing further incidents of harassment, bullying or unsafe behavior. Additionally, a fair and thorough investigation sends a message that your educational institution takes complaints seriously and will follow through as required.

Conduct the interviews in a setting that protects the privacy of all parties. The complainant should be interviewed first. Re-interview witnesses if necessary or if additional information is obtained. Use two people during interviews; one person can take notes and serve as a witness, and one person can do the questioning.

Employees are mandated to cooperate fully. They should be warned to refrain from discussing the complaint or investigation with others. While confidentiality should not be guaranteed to anyone involved, information can be disclosed to those with a genuine need to know. Reinforce that retaliation will not be tolerated.

Secure all material, evidence and reports in an investigatory file and protect the file. It should not be saved on a shared drive or left in an unlocked cabinet. Bear in mind that the investigation may be discoverable in litigation and could be scrutinized at a later date.

Conclusion and Findings

The final report is for the parties making the final decision, such as imposing discipline, instituting workplace changes, arranging training or providing counseling. The complainant and accused receive only the final conclusions. If you are not actively working with your legal counsel, inform them of your decision before it is released.

The report should summarize the evidence, facts and information gathered from witnesses and other sources. The conclusion is a statement as to whether or not there were any violations of the institution’s policy. Absent an admission by one of the parties, the findings are based on evidence and the credibility of the witnesses.

Inform the complainant and the accused of the findings and the course of action to be taken. Witnesses should not get details of the findings.

Explain how the decision was reached. Allow each party to respond and answer any questions. Document their response to the decision. Reinforce your institution’s position that retaliation will not be tolerated.

The course of action is based on the findings and it should stop the unwanted behavior. If a violation occurred, corrective action should be consistent with the severity of the violation, and in line with internal policies, local law and any employment contracts or collective bargaining agreements. Even if the investigation did not warrant employee discipline, it is a good time to redistribute anti-harassment or other policies, make necessary changes and generate additional training sessions.

Monitoring

Maintain contact with both the complainant and accused regardless of the outcome. Follow-up and check-in with each one periodically and document your efforts. Advise all parties that retaliation will not be tolerated and the employer should be advised if it is taking place.

On February 11, James G. Ryan and Hayley B. Dryer, attorneys from the law firm of Cullen and Dykman, conducted a webinar — How to Conduct a Proper Internal Investigation. Parts of this article were taken from their presentation. The webinar was recorded and can be accessed at <http://www.wrightspecialty.com/news.html>

Zika Virus

The Centers for Disease Control and Prevention (CDC) provides health information for travelers visiting foreign countries. The CDC posted six Alert Level II, Practice Enhanced Precautions concerning the Zika virus in Puerto Rico, the Caribbean, Mexico and other regions (<http://wwwnc.cdc.gov/travel/notices>.)

Regions with active Zika virus transmission include the Americas (with 27 locations listed), Oceania/Pacific Islands and Africa. The virus is spread primarily by bites from infected mosquitos to humans. Symptoms of the disease are fever, rash, joint pain, conjunctivitis, muscle pain and headaches. The CDC has a list of preventive measures at <http://www.cdc.gov/zika/prevention/index.html>, which primarily involve reducing the likelihood of mosquito bites. There is no vaccine to prevent the Zika virus. Women who are pregnant need to take special precautions. The CDC advises pregnant women in any trimester to consider postponing travel to any region where the Zika virus is spreading. If travel is necessary, women should first consult with their health care provider and carefully follow all precautions to prevent mosquito bites during the trip.

INSURANCE ISSUES

When worldwide coverage is in place, insurance should respond to a claim by a student or volunteer who alleges they contracted the Zika virus due to the negligence of an educational institution while on a trip, sponsored travel, or while studying abroad. This may be an uphill battle for the claimant, especially if the trip was voluntary; the school took precautions; it did not



disregard U.S. State Department or CDC alerts or warnings, and obtained properly drafted parental permission forms.

Anticipate claims for workers' compensation benefits from employees who contracted Zika while on a sponsored trip. Benefits under state workers' compensation laws vary, but generally, covered injuries or diseases sustained on employer-approved travel may be compensable.

The CDC fact sheets can be downloaded at: <http://www.cdc.gov/zika/fs-posters/index.html>

Religious and National Origin Discrimination

Muslim and Middle Eastern Communities

The U.S. Equal Employment Opportunity Commission (EEOC) recently posted information reminding employers that federal law (Title VII of the Civil Rights Act of 1964) prohibits the harassment, intimidation, discrimination or retaliation against individuals in the workplace based on national origin or religion. National origin and religious discrimination also involves treating a person unfavorably because they are married to, or associated with, a person of a certain national origin, ethnic group or religion. Employment decisions based on

national origin or religion and harassment in the workplace and harassment by fellow-employees is also prohibited. The EEOC also stated that reasonable accommodations concerning religious practices or dress are required, unless they cause an undue hardship. An EEOC factsheet with information on religious garb can be accessed at the EEOC website http://www.eeoc.gov/eeoc/publications/fs_religious_garb_grooming.cfm





This posting was motivated by the recent terrorist-related events that have occurred domestically and abroad which may increase the likelihood of harassment or discrimination against members of the Muslim and Middle Eastern communities. After the 9/11 attacks, the EEOC reported a 250% increase in the number of religion-based discrimination charges involving Muslims. They established a special reporting code for these types of attacks. Of the 1,036 charges filed under this code in the 10 years following the attack, firing and harassment were the most common allegations.

Besides issues under Title VII, colleges and universities have an additional exposure under Title VI of the Civil Rights Act of 1964, which protects people from discrimination based on race, color or national origin in programs or activities that receive federal financial assistance.

The EEOC's notice regarding religious and national origin discrimination and the Muslim and Middle Eastern communities can be found at: http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_2016.cfm

Information about the U.S. Department of Education – Office for Civil Rights, Education and Title VI can be found at: <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>

News & Views

The Equal Employment Opportunity Commission (EEOC) recently posted their 2015 enforcement and litigation data. Charges of retaliation were the highest – representing almost 45% of all charges filed. <http://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm>

Workers' Compensation

A New Jersey nursing supervisor was not entitled to workers' compensation for injuries sustained as a result of an assault by a coworker. The assault arose from a dispute over a pyramid scheme. The New Jersey Superior Court held that there must be a causal relationship between the accident and employment. *Joseph v. Monmouth County*, No. A-4044-13T3 (N.J. Super. Ct. App. Div. 12/14/15, unpublished).

Distracted Driving

The U.S. Department of Transportation reports a 6.7% decrease in the number of fatal motor vehicle accidents involving distracted drivers, looking at data from 2013 and 2012. Unfortunately, slightly (.7%) more people were injured. The average time your eyes are off the road while texting is five seconds. Drivers between 20–29 years of age are most likely to be involved in a fatal crash resulting from distracted driving or cell phone use. <http://www.distraction.gov/stats-research-laws/research.html>

Top Risk Areas of Concern

According to an article in the University Risk Management and Insurance Association's 2015 URMIA Journal, the top risk areas of concern reported by URMIA members in a survey were cyber and international risk, minors, compliance, and Title IX and sexual assault. There were 55 areas identified; the effect of changing marijuana laws was number 45. <http://www.urmia.org>



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