

At Issue

A RISK MANAGEMENT NEWSLETTER FOR
ELEMENTARY AND SECONDARY SCHOOLS



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, schools 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, schools 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 school 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 school’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 school’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 school trip or school-sponsored travel. 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 school-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>

GPS Tracking for School Buses

GPS tracking on school buses is becoming more common as technology improves and the cost of GPS tracking systems becomes more affordable.

HOW DOES IT WORK?

Depending on the system, the tracking unit is installed in the bus where it gets its power source. A passive GPS tracking system will monitor the location of the bus and store the data on a memory card. It may be part of a camera surveillance system. The information is then accessed and analyzed at a later time. The more popular active (or real-time) tracking system functions differently. The data is sent

automatically at certain intervals to a tracking portal or system where it can be read and analyzed on a laptop, mobile app or other device while the bus is in operation on a route or trip.

Besides location, GPS systems can track speed, deceleration rates, door openings, bus warning lights, stop arms, wheel chair lift activation and idling times, among other things. With some systems, parents can be given access to data regarding bus location and estimated arrival times.





IS GPS TRACKING A GOOD IDEA FOR SCHOOL BUSES?

As with any system, there are advantages and disadvantages. Whether or not to purchase a GPS tracking system is a local decision. While GPS tracking is not new, its popularity is increasing and many new buses are being delivered with onboard GPS technology. From a safety perspective, real-time tracking allows administrators to locate and monitor a vehicle while it is in route, helping to defend against fraudulent hit and run claims. GPS tracking can disprove criminal allegations of assault by an operator or attendant by showing where a vehicle was at a specific time. It can document speed and prove that warning lights were in use. Child-check or verification systems require the driver to deactivate an audio warning system at the rear of a bus, reducing the likelihood of leaving children behind when parked. When equipped with a motion detector, a message is sent through the GPS system if the motion detector is activated. Other advantages include enhanced service, greater route compliance and efficiency, reduced idling times, driver efficiency (including fewer unauthorized stops or detours) and fuel savings.

When an employee's actions at work are being monitored, complaints about "big brother" or invasion of privacy can be expected. As with many developing technologies, courts and regulators are in a catch-up role when existing laws do not address current operations and school practices. Administrators and school counsel need to explore questions about an employee's reasonable expectation of privacy when using employer-owned vehicles or equipment; if there is a legitimate school-operation purpose; if employees were notified of the tracking system, and how information is used for nonworking employee time. Check the language in employment contracts, local law, or collective bargaining agreements.

How specific information is used is important. Location, speed, idling time, route completion and other information should be used in the same manner for all employees. If used unevenly against one person — especially if that person is the member of a protected class — it could lead to charges of harassment, discrimination or retaliation.

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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