

WORKPLACE INVESTIGATIONS

The Workplace Investigation Playbook

The neutral-investigator methodology, intake, scoping, witness interviews, evidence preservation, credibility, finding letters, and closure. The step-by-step process that produces a defensible investigation.

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EEOC

AFFIRMATIVE DEFENSE

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THE NEUTRAL-INVESTIGATOR STANDARD

This playbook reflects the methodology empathiHR uses in practice, aligned with the EEOC's guidance on prompt, impartial investigation and the Association of Workplace Investigators' Guiding Principles. It is written so an HR leader can follow the process, and so counsel can see that the process is defensible.

01 • Purpose

Why the investigation is the defense

When a harassment complaint arrives, the investigation is not an administrative formality, it is the moment the employer either builds or forfeits its legal defense. A prompt, impartial, well-documented investigation is the operational proof of the "reasonable care to prevent and promptly correct" element of the Faragher/ Ellerth affirmative defense.

1 • Intake

triage

2 • Plan

scope

3 • Gather

evidence

4 • Interview

witnesses

5 • Decide

findings

Prompt • Impartial • Documented, then corrective action and follow-up.

The EEOC frames reasonable care as requiring a complaint process that provides a "prompt, thorough, and impartial investigation" and "immediate and appropriate corrective action when it determines that harassment has occurred." Critically, a botched or absent investigation undermines the employer's own element *even if the employee unreasonably failed to complain*, because the employer's duty is independent. The investigation is where that duty is met and documented.

THREE WORDS DECIDE EVERY INVESTIGATION'S LEGAL VALUE

Prompt: delay is the single most-cited mistake and grows liability by the day. **Impartial:** the investigator must be neutral in fact and perceived as neutral. **Documented:** the file is what carries the employer's burden of proof later. Miss any one and the investigation stops protecting you.

02 • Step One

Intake & triage

The first hours set the tone, and the evidentiary record. The goals of intake are to capture the complaint, protect the parties, preserve evidence, and lock in impartiality before anything else happens.

Receive the complaint, in whatever form it arrives

Complaints come in many forms: a formal written report, a verbal comment to a manager, an anonymous tip, an exit-interview revelation, or simply witnessed misconduct. Do not require a written complaint to trigger review. As soon as management learns of alleged harassment, it must decide whether a detailed fact-finding investigation is necessary.

Put interim measures in place

Interim measures limit retaliation, minimize contact between the parties, and prevent the loss or destruction of evidence. They may include administrative leave or a schedule change. One rule is essential:

MOVE THE ACCUSED, NOT THE COMPLAINANT

If separation is needed, relocate the alleged harasser, not the person who complained, unless the complainant prefers otherwise. Any interim measure that penalizes the complainant can itself become unlawful retaliation and can convert a defensible case into strict liability.

Give the no-retaliation instruction and protect impartiality

At intake, remind all involved of the prohibition on retaliation. And build in impartiality structurally: the alleged harasser must not supervise the investigator and must have no direct or indirect control over the investigation.

Counsel checkpoint. Before interviews begin: is there a litigation hold in place, an interim measure that does not disadvantage the complainant, and a documented no-retaliation instruction? Confirm that no measure affecting the complainant is a tangible employment action connected to the alleged supervisor harassment, which would make the defense unavailable.

03 · Step Two

Scope & the investigation plan

Two roles, kept distinct: the *employer* defines the scope, the issues to be investigated, while the *investigator* controls the process. Confusing the two is a common source of challenge.

Define scope in writing

Scope states the specific allegations and issues to be examined. If the investigator uncovers issues beyond the initial scope, they should notify the employer, with documentation, so the employer can decide whether to expand scope or open a separate investigation. If the employer restricts access to evidence, documents, or witnesses, the investigator should document those restrictions.

Build the investigation plan

A good plan identifies the potentially relevant evidence and how to obtain it; who will be interviewed, in what order, and why; the admonitions each witness will receive; logistics; and general lines of inquiry. Plans are living documents, adjust them as new witnesses and evidence emerge.

Evidence to gather

Emails, texts, social media, digital records, personnel and sensitive files, timelines, policies, handbooks, and any prior investigation materials.

Witnesses & order

Typically complainant, then respondent, then witnesses, though the order is the investigator's call and may change as facts develop.

Confidentiality

Safeguard confidentiality without promising anonymity or complete confidentiality, and follow current NLRB limits on blanket confidentiality instructions.

Timeline

The standard is "prompt." There is no fixed statutory day-count, but move quickly and document the reasons for any unavoidable delay.

O4 · The Investigator

Choosing a neutral investigator

The investigator must be impartial in fact and perceived as impartial by the participants, skilled enough to do the work, and given adequate time. Who you choose can decide whether the findings hold up.

INTERNAL VS. THIRD-PARTY NEUTRAL INVESTIGATOR

Internal investigator may work when...	A third-party neutral is advisable when...
The matter is routine and lower-risk	A senior executive or leader is the respondent
A trained, genuinely neutral internal person exists	Litigation risk is high or the claim is severe
The organizational hierarchy does not compromise objectivity	No internal investigator could be perceived as neutral
Confidentiality can be maintained internally	The credibility of the outcome itself is at stake

INVESTIGATOR, NOT ADVOCATE

The investigator's job is to find facts, not to defend the organization. An investigator who behaves as an advocate undermines the neutrality that makes the findings credible. empathiHR serves as the third-party neutral precisely so the record shows independence.

O5 · Step Three

Preserving the evidence

How evidence is handled in the first hours and days can determine whether it is admissible later, or whether the organization faces sanctions for spoliation.

Issue a litigation hold

A litigation (legal) hold instructs employees and systems to preserve relevant material. It should specify the types of documents, communications, and data; define the relevant date range; identify custodians; and require acknowledgment of receipt.

Maintain chain of custody

Document how each piece of evidence was identified, collected, stored, and transferred, who handled it, when, and why, so its integrity can be shown. For electronically stored information, consider whether a digital forensic examiner is needed to locate and retrieve it without altering it.

SPOILIATION IS SELF-INFLICTED

Deleted texts, wiped devices, or a folder that 'disappears' during an investigation can be far more damaging than the underlying complaint. Preserve first, investigate second. Keep records of *all* complaints, too, without them you may miss a pattern by the same individual.

O6 · Step Four

Witness interviews

Interviews are where the facts, and credibility, are established. The goal is to create an environment that elicits reliable information and to document it consistently.

Open every interview the same way

Explain the investigator's role and the purpose of the investigation, then give admonitions on confidentiality, the prohibition on retaliation, the duty to cooperate, and the duty to tell the truth. Conduct interviews privately; for remote interviews, confirm the witness is alone in a private setting. If an interview will be recorded, in audio or on video, say so up front and obtain the participant's consent as required by applicable recording-consent laws before recording begins.

Ask open-ended, non-leading questions

Beginning with open-ended, non-leading questions elicits more reliable information than closed or leading ones. Ask for specific detail without pushing witnesses to guess, and ask each for other witnesses and evidence. Give the complainant and respondent each a fair chance to present their position and to respond to contrary accounts, seeking a specific admission or denial as to each allegation.

Two rights to know before you interview

Weingarten (union)

A unionized employee may request a union representative at an interview they reasonably believe could lead to discipline. The right must be requested; the rep must be a union agent, not a personal attorney or family member.

Upjohn (counsel-led)

When an attorney conducts interviews, the Upjohn warning tells each interviewee that counsel represents the company, not the individual, and that the company controls the privilege.

07 · Weighing It

Assessing credibility

When accounts conflict, the investigator must weigh credibility. The EEOC identifies five factors, none of them, on its own, decisive.

1. **Inherent plausibility.** Is the account believable on its face? Does it make sense?
2. **Demeanor.** Did the person appear to be telling the truth, or evasive?
3. **Motive to falsify.** Does the person have a reason to lie?
4. **Corroboration.** Is there supporting testimony or physical evidence, witnesses, contemporaneous accounts, documentation?
5. **Past record.** Does the alleged harasser have a history of similar behavior?

THE CAVEATS MATTER AS MUCH AS THE FACTORS

No factor is determinative. The absence of eyewitnesses does not defeat a complainant's credibility, harassment often happens behind closed doors. And a past record does not, by itself, prove it happened again. Weigh the factors together, and record the reasoning.

O8 · The Bar

The standard of proof

Workplace investigations use the **preponderance of the evidence** standard, after weighing everything, is it more likely than not that the alleged conduct occurred?

"Preponderance of the evidence refers to the quality and reliability of the evidence and the credibility of witnesses, not merely the volume of testimony."

EEOC guidance, paraphrased

This is a lower bar than the criminal "beyond a reasonable doubt" standard, and it is the investigator's job to understand it and apply it consistently. State the standard used in the report so the finding's basis is transparent.

09 · Step Five

The report & finding letters

The report is where the investigation becomes evidence. A defensible report documents the process, the evidence, the findings, and the reasons for them.

WHAT A DEFENSIBLE INVESTIGATION REPORT CONTAINS

Component	What it establishes
Scope & issues	The allegations examined, consistent with the employer-defined scope
Process	How information was collected; any significant obstacles encountered
Evidence relied upon	Documents, communications, and testimony that informed the findings
Policies involved	The specific policies at issue, where applicable
Standard of proof	The evidentiary standard used (preponderance of the evidence)
Findings & reasoning	Reasoned findings supported by the evidence, including credibility assessments

Once the determination is made, by the investigator or a reviewing management official, the parties should be informed of the outcome and of the corrective measures taken. "Finding letters" to the complainant and respondent are the standard vehicle for that communication.

10 • After

Anti-retaliation & closure

The investigation is not over when the report is filed. Management must take whatever measures are necessary to ensure retaliation does not occur, and must be able to show it did.

- Scrutinize employment decisions affecting the complainant and witnesses during and after the investigation.
- Monitor the complainant's treatment to ensure no retaliation by the harasser or others.
- Take corrective action reasonably calculated to stop the conduct, and communicate it to the parties.
- Check in with the complainant (roughly three to six months later) to confirm nothing new has occurred.
- Document each of these steps, the follow-up is part of the defense.

WHY FOLLOW-UP PROTECTS THE DEFENSE

An employer cannot argue an employee should have complained while tolerating retaliation against those who do. A single act of retaliation can undo the defense for every future complainant. Monitoring, and documenting the monitoring, is what keeps the reporting channel credible.

11 • Avoid

Mistakes that create exposure

The same errors surface again and again, and each one is avoidable with process and documentation.

Mistake	Why it creates legal exposure
Delay	Weakens evidence and grows liability; if harm continues after the employer knew, it is usually liable
Prejudging / bias	Filters evidence through an early conclusion and destroys the neutrality the findings depend on
Ignoring informal complaints	Creates a documented moment of inaction that is very hard to defend later
Non-neutral investigator	Someone under the respondent's control violates the EEOC's impartiality rule
Thin scope / missed witnesses	Leaves gaps that opposing counsel will exploit
Poor evidence handling	Risks spoliation sanctions and inadmissible evidence
No corrective action after a finding	Defeats the "prompt corrective action" prong of the affirmative defense
Retaliation or no follow-up	Creates a new claim and undermines the reporting process for everyone

RUN IT AS A REPEATABLE PROCESS

empathiHR conducts prompt, impartial, video-documented investigations as a neutral third party, with interviews recorded only with participant consent and in line with applicable recording-consent laws, and delivers the defensible file every one of these steps is designed to produce. Schedule a compliance assessment to pressure-test your current process.

Schedule a compliance assessment • 866.240.6618 • empathihr.com

Important

About this guide

Educational information, not legal advice. This guide is provided by empathiHR for general educational purposes. It is not legal advice and does not create an attorney–client or consultant–client relationship. Employment law changes frequently and varies by jurisdiction, industry, and the specific facts of each situation.

Investigation requirements vary by jurisdiction, by collective–bargaining agreement, and by the facts of each matter, and rules on witness confidentiality instructions continue to evolve at the NLRB. Confirm your specific process with employment counsel. Before acting on anything in this guide, review your policies, programs, and specific circumstances with qualified employment counsel. empathiHR works alongside your legal counsel to build and maintain the operational program described here.

Case citations, statutes, and figures were current as of the update date on the cover and should be re–verified against primary sources before you rely on them. Where the law is unsettled or a figure is not fixed by statute, this guide says so.



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