

Oregon State Government Investigations Toolkit

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CHIEF HUMAN RESOURCES OFFICE



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INTRODUCTION

Welcome to the Oregon State Government Investigations Toolkit. This toolkit was designed with you, the HR professional, in mind. We trust you will find this to be a valuable resource and reference as you prepare for and conduct personnel investigations. This toolkit is a compilation of investigation best practices, information and resources.

Questions or Suggestions?

Contact the CHRO Policy Unit at chro.policy@oregon.gov.

DISCLAIMER

Although this toolkit is intended to be a useful guide, it does not and cannot override federal and state law, administrative rules and collective bargaining agreements. Further, this guide is not a substitute for ongoing agency or professional organization training. While the intent is to periodically update the material to comply with applicable laws, rules, policies and bargaining agreements, it is incumbent upon the user to use the current and effective laws, rules, policies and agreements. Where in conflict, the applicable law, rule, policy or bargaining agreement provision takes precedence over information contained in this toolkit.



INVESTIGATION BEST PRACTICES

The best practices and guidance set forth here are not an exhaustive list or a checklist, but rather general guidance and considerations when performing investigations.

HOW DO WE DEFINE INVESTIGATION?

Investigation is defined as the process in which an investigator gathers factual information based on allegations and provides a sound, factual basis for decisions by management. The investigation should also produce reliable documentation used to support management actions. Finally, an investigation of employees should reveal whether any policy violations have occurred, identify (or exonerate) specific employees who are alleged to have violated state policy, and put a stop to further wrongful actions.

COMMON ELEMENTS OF INVESTIGATIONS

These common elements are not necessarily in a set order. Each investigation is different and should be treated independently and according to the specific situation and facts. These elements are things agencies and the selected investigator should take into consideration before, during and throughout the investigation. In most respects, these are considered best practices for conducting workplace investigations.

1. Recognize when an investigation is necessary.
2. Understand the allegations – Is the complaint alleging harassment? Improper governmental conduct? Is this a performance issue?
3. Select the appropriate investigator(s).
5. Plan the investigation outline, witnesses and documents needed.
6. Outline the relevance of each witness.
7. Conduct the interviews.
8. Create a documented report of the findings and/or decide if a report is necessary.
9. Establish security for files and records.
10. Be prepared to modify and update the plan as needed based on new information that might come to light as the investigation progresses.



1. WHEN DOES AN AGENCY NEED TO CONDUCT AN INVESTIGATION?

One of the most important skills in managing a workforce is knowing when an investigation is in order. Here are some situations that generally call for investigations:

1. An employee files a formal complaint or grievance.
2. An employee reports a questionable situation, but says he or she does not want to make any trouble.
3. An employee is suspected of misconduct.
4. Allegations of rule violations.
5. All allegations of violations of the Statewide Harassment and Discrimination policy 50-010-01; these are to be distinguished from unprofessional or inappropriate workplace conduct.
6. Allegations of violations of the Statewide Maintaining a Professional Workplace policy 50-010-03.
7. Allegations of violations of the Managing Improper Governmental Conduct policy 50-090-01.
8. Performance issues.

2. UNDERSTAND THE ALLEGATIONS.

It is important to identify the actual complaint or situation that needs to be investigated:

- Is it poor performance?
- Has there been a failure to follow directions or a directive?
- Is there a possible policy violation?
- Is there possible harassment, sexual harassment, discrimination or retaliation involved?

3. SELECT APPROPRIATE INVESTIGATOR(S)

Choosing an investigator

When selecting an investigator an agency should consider the following:

- The investigator's objectivity, impartiality, potential biases or any actual or perceived conflicts of interest.
- The investigator's experience conducting investigations.
- The investigator's familiarity with the agency, and/or industry and its policies, laws and procedures.
- The investigator's professionalism.
- The investigator's availability.
- The return on investment with hiring an outside investigator.
- The investigator's credibility and ability to effectively communicate, either verbally or in writing, the findings, including as a witness in any legal proceeding.



- The investigator's reputation, credibility and knowledge about the relevant issues.
- The investigator's interviewing skills.
- The investigator's ability to develop and follow a plan, and communicate well with various personalities and in varied situations.
- The investigator's ability to maintain confidentiality to the extent the law allows.

Possible investigators

- Agency Human Resources staff
- A manager
- An outside investigator such as a consultant, attorney (DOJ, SAAG), another agency's HR staff or DAS CHRO staff
- An agency investigator
- Agencies may need to involve experts in technical matters when technical issues are involved, such as the existence or deletion of computer files.

Investigators need to be objective

- Do not discount an employee who has made prior complaints.
- Treat all complaints as if they are the employee's first complaint.
- Avoid becoming jaded or forming opinions before the investigation is complete.
- Do not pass judgment or form an opinion based on personal feeling or prior dealings. If the assigned investigator cannot be objective, the investigation needs to be reassigned.
- Never make conclusions unless you have facts and data to back it up.
- An investigator must be able to identify if they become too close to the topic or a witness, and their judgment may be impacted.

Outside investigators

Consider using an outside investigator in these cases:

- Personnel investigations of the agency head, or any executive team member with a direct line of authority over the potential internal agency investigator, involving non-criminal conduct.
- Personnel investigations of the agency head, or any executive team member with a direct line of authority over the potential internal agency investigator, involving criminal conduct subsequent to a law enforcement investigation.
- Violation of the Statewide Harassment and Discrimination policy.
- Violation of Maintaining a Professional Workplace policy.
- Investigations pursuant to Managing Improper Governmental Conduct policy.
- Investigations of ethics violations, code of conduct violations and criminal behavior.
- Allegations directed towards a human resources professional.



4. MAKE A PLAN, IDENTIFY WITNESSES AND NECESSARY DOCUMENTS

Employers are legally mandated to investigate harassment, discrimination, retaliation, safety and certain other types of complaints.

Once the decision to investigate has been made, HR professionals should first create a plan that answers these questions:

- Who will investigate?
- What are the specific allegations?
- What evidence needs to be collected?
- Who will be interviewed and what information do I need from them?
- Is the workplace safe and productive? Does the accused need to be duty stationed at home?

It is important to promptly begin an investigation once the agency receives the complaint or has knowledge of allegations or violations.

Clearly define the purpose of the investigation and the scope of the investigation. If you don't understand the purpose of the investigation you will get off track.

The agency should move quickly to determine who knows what about which aspect of the situation under investigation. Keep in mind waiting too long might mean potential witnesses leave the organization, become intimidated or otherwise influenced, forget important details, or be out of the office and are thus unavailable when needed. Knowing who the witnesses are is necessary for the scheduling and order of interviews, which can make a big difference in the development of the facts. Always be ready to add to the witness list if other names come up during the investigation.

Equally important is identifying which documents are needed. Memos, time cards, policies, personnel files, journals and logs must be found and secured. Nothing is worse than discovering that certain documents are needed, then finding out the documents have been shredded or otherwise purged as part of a routine procedure.

Always be prepared to modify and update the plan as needed based on new information that might be discovered as the investigation progresses.



5. OUTLINE THE RELEVANCE OF EACH WITNESS

Best practice for anyone who is planning to interview witnesses is to sit down beforehand and note what information the witness may know about the allegations or violations. It is important to draft out possible questions or create an outline of the issues to ensure the investigator covers all the information. Each situation demands different questions because the elements of each investigation are rarely the same. Generally, each witness will need to provide information on what they saw, when they saw it, who else was there, why something happened (if known), and what happened next and so on. However, some witnesses will know a lot more than others, which is why the investigator needs to be prepared to customize the questions asked of certain people. Consider asking open-ended questions rather than direct, specific questions. This allows an opportunity for the witness to respond in a more narrative fashion while providing the investigator context for direct questions. The investigator needs to have a talent for thinking of new questions on the spot and following up on information as it presents.

6. CONDUCT THE INTERVIEWS

This step is, of course, what many people have in mind when they think of workplace investigations. The following is a list of things successful investigators do in order to learn information relevant to the allegations/violations:

- Start the interviews soon after the situation arises.
- Utilize the 5-Ws: What, Where, When, Why and Who.
- At the beginning of the interview read a statement to the subject regarding the expectations of confidentiality, being honest and forthcoming, no retaliation, and their rights (Weingarten/union or, if management service, the right to a co-management employee support person or an attorney), as appropriate. Make sure the representative or support person are not also potential witnesses to the allegation(s). Also establish the roles and expectations of all individuals participating in the meeting.
- If an employee requests a representative be present during the interview, verify the representative is not also a witness. If the requested representative is also a witness in the case, you will need to explain to the employee that they will need to select another representative that is not a witness in the investigation.
- Take good notes or record, if appropriate (be upfront if you are recording and state on the record that all parties are aware they are being recorded). Ask if anyone else is recording the interview.
- Hold the interview in a private, quiet location.
- Do what you can to make the interviewee comfortable.
- Never promise absolute confidentiality (the agency may have to release documents and names of witnesses due to public records law or other legal requirements). You can assure witnesses the agency will do its utmost to protect employee privacy unless required by law to do otherwise.



- Keep the interview focused on the allegations, but don't discount additional information received in the course of an interview.
- Do not interrupt witnesses – be an active listener.
- Start with general, open-ended questions, then graduate to more closely-focused questions to clarify details.
- Repeat important questions a couple times throughout the interview but with different wording, to ensure the witness provides a similar answer. Follow up with additional clarifying questions if the answer differs from prior information.
- Avoid confrontational or accusatory questions; this is a fact finding meeting.
- Pay attention to witnesses' body language.
- Use silence after a question to encourage reticent witnesses – people often feel a need to "fill in" periods of silence.
- Be ready with follow-up questions if needed.
- Stay calm and avoid asking questions in an aggressive, demanding manner. Understand witnesses may be nervous and need assurance that this is a safe place.
- Avoid threats or psychological manipulation.
- If the subject of the investigation refuses to participate or answer questions, be prepared to explain to the subject that, as the employer, you may compel their participation and failure to do so could be addressed through a separate personnel investigation process that could lead to discipline. Furthermore, inform the subject that failure to participate may result in the employer making decisions in the investigation without their input.
- Ask straightforward questions to get straightforward answers and always be respectful.
- Interview each party separately, in private, to uphold confidentiality, maintain objectivity and minimize peer pressure.
- Take detailed notes and look for inconsistencies, opportunities for clarification, additional evidence, and the names of other potential witnesses.
- Don't jump to conclusions. Always wait until you finish the investigation before making a decision about whether an allegation is substantiated and the corrective action needed. Never offer any opinion or say anything to interviewees that would indicate you have already reached a conclusion (such as, "I believe you," "this is a meritless complaint," etc.).



7. REPORT - PUTTING IT ALL TOGETHER

Since the main goal of an investigation is to produce a reliable set of facts on which to base a decision, the investigator will need to be clear and concise in their explanation of the facts. Sometimes, the investigator only reports the facts to a higher manager and, other times, the investigator may be asked to recommend options for next steps.

When an agency conducts a factually based, thorough investigation, it can support and defend the decisions made as a result of the findings.

The Investigation Report

Investigation reports may be in writing or verbal. However, every report should include:

- The scope of the investigation.
- A description of the allegation(s).
- A statement of why certain allegation(s) are not being covered in the investigation, if applicable.
- The facts surrounding the allegation(s) with specific dates or timeframes.
- Applicable policies or guidelines.
- The witnesses interviewed.
- Summaries of witness statements.
- Summary of the subject's statements.
- Documents reviewed.
- Key factual findings and credibility determinations.
- Specific conclusions.
- Recommendation of next steps, if requested.
- The name of the person making a final decision.
- Issues that couldn't be resolved or remain unclear due to lack of evidence or witness(es).



8. ESTABLISH SECURITY FOR FILES AND RECORDS

Maintain a separate investigation file. Maintain an investigation file, separate from personnel files, that includes:

- (1) All interview notes
- (2) All communications with witnesses
- (3) All written witness statements
- (4) All documents that support/refute the allegation
- (5) The investigator's report
- (6) Any recorded statements and transcripts
- (7) Relevant policies
- (8) Notice of closure to applicable parties

Preserve evidence. If there is any evidence of the alleged misconduct beyond witness statements, such as emails, instant messages, or video surveillance, take all necessary steps to protect and preserve it. It is a best practice to preserve all business records, whether in paper or electronic form, as soon as you learn about a dispute. This is especially important if you reasonably anticipate a legal claim. Do not destroy any evidence until after the time to file a claim has passed.

Protect confidentiality to the extent possible. Protect the confidentiality of the investigation to the best of your ability. However, avoid promising confidentiality, since it may not be possible to keep all information completely confidential. Instead, explain to individuals involved in the investigation that the agency will keep information confidential to the extent the law allows. Report information learned from the investigation only to those who have a legitimate or legal need to know. The state's public records law does allow for specific exemptions, but this must be weighed against the public's right to know. If you receive a public records request for an investigation file and do not know what can and cannot be released, seek the advice of the Labor & Employment Section at the Oregon Department of Justice. See also the "Maintain Confidentiality" section below for more information on confidentiality.

Maintain Confidentiality. Don't have a blanket rule concerning confidentiality. To protect the integrity of investigations, it is a common practice for employers to ask employees to avoid discussing the investigation with co-workers. Encourage all those involved in the investigation to keep the proceedings confidential to protect the integrity of the process. If word leaks out, other employees will lose trust and might refuse to share what they know. You also want memories preserved and not influenced by other witnesses' perception or recollection.



A word of caution is in order for the HR team as well. Never share information with a colleague if he or she wasn't directly involved. Anyone with knowledge of the facts of an investigation can potentially become a witness in any future legal proceedings.

Don't promise an employee that his or her complaint will remain confidential; it may become necessary to share certain information at some point.

9. TAKE STEPS TO PREVENT RETALIATION.

Make sure employees understand they will not be retaliated against for raising complaints or participating in an investigation. Notify all parties and witnesses of the anti-retaliation provisions of relevant state human resources policies. When concluding a witness interview, remind the witness that if they feel they are retaliated against to report it immediately to the appropriate person.

10. FOLLOW-UP

Even after a written report is submitted, HR must take additional steps:

- Submit the findings to the decision-maker (typically not the investigator), who will determine what corrective action to take, if any. The decision-maker, either a high-level HR professional, manager or appointing authority, should determine how people in similar situations have been treated.
- Reintegrate the employees involved back into the workplace, shifting focus from the complaint to the changes the investigation has brought about, if any.
- Remind managers that retaliation won't be tolerated, and check back within six months to ensure that there has been none.
- Review the investigation to determine any lessons learned.
- Look for patterns in complaints that might suggest more training is needed to avoid similar problems in the future.
- Following the conclusion of the interview, notify the relevant parties of the closure and share any relevant information, if applicable. Confirm the complainant feels he or she has been properly heard and understood, even if he or she disagrees with the results, if known. Additionally, set a timeframe to follow up with the complainant to ensure the conduct is no longer occurring.

OTHER CONSIDERATIONS WHEN CONDUCTING INVESTIGATIONS

'He Said, She Said' Cases

Before interviewing witnesses, gather physical evidence that might validate or discredit the complaint. For example, e-mail messages might show that a male supervisor has made inappropriate sexual comments to a female employee, which corroborates the female employee's complaint.



Determining Witness Credibility

When there are conflicting versions of events in harassment cases, the U.S. Equal Employment Opportunity Commission suggests using the following factors to assess witness credibility:

- **Plausibility.** Is the witness' version of the facts believable? Does it make sense?
- **Demeanor.** Does the witness seem to be telling the truth? Note: nervousness does not equal lying.
- **Motive.** Does the person have a reason to lie?
- **Corroboration.** Are there documents or other witnesses that support the witness' version of events?
- **Past record.** Does the alleged wrongdoer have a past record of inappropriate conduct?

Be Quick but Thorough

- It's critical to quickly investigate an allegation.
- Stretching an investigation out over a lengthy period tells employees the alleged misconduct isn't important.
- As time goes by, it will become more difficult to collect evidence and get witnesses to talk. Details are forgotten. Documents disappear. Bad behavior continues.

Consider Consultation with DOJ

In some cases you may want to consider consulting legal counsel before launching an investigation. The investigation, as well as all documents related to it, might become part of a lawsuit if the employee ultimately files a legal claim.

10 Common Investigation Mistakes

1. Failing to plan.
2. Ignoring complaints.
3. Delaying investigations.
4. Losing objectivity.
5. Being distracted during interviews.
6. Using overly aggressive interview tactics.
7. Not conducting a thorough investigation.
8. Not asking follow-up questions.
9. Not doing a thorough review of all information prior to preparing or verbally sharing the report of findings.
10. Failing to follow-up with those involved.



INVESTIGATION CONSIDERATIONS: THE FOLLOWING GUIDANCE MAY BE UTILIZED UPON RECEIPT OF A COMPLAINT OR ALLEGATION OF HARASSMENT OR DISCRIMINATION.

The chronology cited below is a generalized approach that can vary depending upon the specific facts of a particular case, the order of events and notifications. Any report of harassment, sexual harassment, and discrimination may have varying nuances that require additional steps or actions on a case-by-case basis; thus, it is not an all-inclusive outline.

IMMEDIATELY upon receiving a complaint, the following determinations should be examined/made prior to taking further action:

- Is the person making the complaint the alleged victim or a witness?
- Do I need to contact the alleged victim?
- Is this an alleged crime?
- Is this alleged sexual harassment, workplace harassment, or discrimination based on protected class status?
- Do I need to report this to, or consult with, the police, HR, the agency director, DOJ, CHRO or LRU?
- What do I need to consider regarding Labor?
 - Weingarten?
 - Garrity?
 - Is consultation with the Union a benefit in this case?
- What potential risks do I need to mitigate?
 - Is there a safety risk to the alleged victim?
 - Is there an immediate risk to other staff?
 - Is there an immediate risk to the evidence?
 - Is there an immediate risk to the agency?
 - Has there been a prior complaint that is similar in nature with the same victim, alleged violator, or within the unit, etc.?

WITHIN 24-48 HOURS

Consider whether duty station at home or administrative leave is appropriate at this time. The action may also be taken at a later time if found to be necessary.

Is it possible to temporarily reassign the alleged violator? Is it appropriate to grant a request by the complainant to be temporarily reassigned? Is there a manner in which the work can still be accomplished that protects the complainant and reduces risk to the agency?

Acknowledge receipt of allegation if not already done.



Provide notice to all parties that retaliation is not tolerated.

WITHIN 72-96 HOURS

Assign investigator

Develop investigation plan

WITHIN A WEEK

Begin investigatory interviews / fact gathering

CONCLUSION OF INVESTIGATION

Ensure closure with the complainant, accused and witnesses

DISCLAIMER: All situations may be discussed with CHRO policy consultants, DOJ and other resources to fully vet and ascertain the specific needs and approach that reflect the appropriate action was taken on the complaint.



INITIAL ACTION UPON RECEIPT OF COMPLAINTS OF SEXUAL HARASSMENT

The examples below are not comprehensive and are not definitive. They are intended to provide a general guideline on what kinds of incidents may prompt an agency to duty station an employee at home or place them on administrative leave, temporarily reassign the employee, or leave the employee in the workplace pending the outcome of an investigation. Agencies should make an evaluation as to the potential risks of leaving the accused staff member in the workplace or with access to state information resources or systems in consultation with your agency Human Resources office.

Each case is unique and should be evaluated based upon the specific facts and circumstances of that particular case.

Consultation with HR, DAS CHRO, DAS Labor relations or DOJ may be warranted when making this decision.

Any of the following actions warrants a conversation with the accused staff member to reassure them a full and fair investigation is being conducted:

- Duty stationing an employee at home
- Placing the employee on administrative leave
- Temporarily reassigning the employee
- Leaving the employee in the workplace pending the outcome of an investigation

All assurances to the accused staff member should include the action taken is not reflective of a decision of guilt of the allegation but rather as a risk mitigation measure for both the agency and employee.

In any case that is potentially criminal in nature, ensure the agency head and the agency communications department is notified.

SCENARIOS

1. Employee A reports that Employee B just sexually assaulted them by groping them.

- a. Because of the potential **criminal nature** of this case, the agency should consider duty stationing Employee B at home. If Employee B's work lends itself to working from home, then Employee B could be assigned to work remotely.
- b. If allowing Employee B to work remotely, the agency should consider the nature of the work and potential exposure to further complications.
- c. The agency should consider contacting law enforcement.

2. Employee A reports that Employee B follows them out of the office every night and sits in their car and watches them until they drive away.

- a. The initial action taken in this case could depend on the presence of any other information provided by Employee A and the perception of risk posed to Employee A.
- b. This may warrant notifying Employee B to ensure they conduct themselves in such a way as to avoid the perception of additional incidents, pending the investigation.
- c. Because of the potential criminal nature of this case the agency should consider duty stationing Employee B at home. If Employee B's work lends itself to working from home, then Employee B should be assigned to work remotely.



d. The agency should consider contacting law enforcement.

3. Employee A reports that Employee B is always commenting on what they are wearing and how they appreciate how revealing it is.

- a. This may warrant reassigning Employee B to another work area or other duties to reduce the possibility of further incidents, pending the investigation.
- b. If Employee B was actually Manager B, then duty stationing or reassigning may be appropriate, pending the investigation.

4. Employee A reports that Employee B is consistently ogling or leering at them and making them feel uncomfortable.

- a. This may warrant reassigning Employee B to another work area or other duties to reduce the possibility of further incidents, pending the investigation.
- b. If Employee B was actually Manager B, then duty stationing or reassigning may be appropriate, pending the investigation.
- c. This may warrant notifying Employee B of the complaint to ensure they conduct themselves in such a way as to avoid the perception of additional incidents, pending the investigation.

5. Employee A reports that Employee B repeatedly tells sexually charged jokes in the office.

- a. This may warrant notifying Employee B of the complaint to ensure they conduct themselves in such a way as to avoid the perception of additional incidents, pending the investigation.

6. Employee A reports that Employee B is repeatedly asking them out on dates even after they have told Employee B “no” and that they are not interested in going out.

- a. This may warrant notifying Employee B of the complaint to ensure they conduct themselves in such a way as to avoid the perception of violations or additional incidents, pending the investigation.

7. Employee A reports that Manager B offered to put in a good word with the selection committee in exchange for a date.

- a. Because of the severity of the allegation the agency should consider duty stationing Manager B at home, pending the investigation. If Manager B’s work lends itself to working from home, then Manager B should be assigned to work remotely.

8. Employee A alleges being sexually assaulted by Employee B after their date last night.

- a. Because of the potential criminal nature of this case the agency should consider duty stationing Employee B at home. If Employee B’s work lends itself to working from home, then Employee B could be assigned to work remotely.
- b. The agency should consider contacting law enforcement.



FORMS AND SAMPLE LETTERS

FORMS

[DAS Complaint Form](#)

[Investigator Self Evaluation Questionnaire](#)

SAMPLE LETTERS

[Opening Letter to Complainant](#)

[Opening Letter to Subject](#)

[Closure Letter to Complainant](#)

[Closure Letter to Subject](#)

[Closure Letter to Witness](#)

[Duty Station at Home with Pay – Represented](#)

[Duty Station at Home with Pay – Management service](#)

[Administrative Leave with Pay – Management service](#)

TRAINING AND RESOURCES

HARASSMENT AND DISCRIMINATION FREE WORKPLACE TRAINING

iLearn training –

[DAS - CHRO - Maintaining a Harassment Free and Professional Workplace](#)

[DAS - Maintaining a Professional Workplace Policy Review](#)

[DAS - CHRO - Preventing Sexual Harassment](#)

POLICIES-

[Harassment and Discrimination Policy](#)

[Maintaining a Professional Workplace Policy](#)