AN EMPLOYMENT LAW PRIMER:
HOW TO CONDUCT INTERNAL
WORKPLACE INVESTIGATIONS

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INTRODUCTION

The diversification of the workforce continues to present challenges for employers in managing relations between employees. Employers find themselves faced with romantic relationships between employees and tensions among diverse cultures. When romantic relationships are either unwanted or become sour, or when racial, ethnic or religious tensions are allowed to fester, charges of sexual, racial, ethnic or religious harassment can result. In addition to the ever-present risk of sexual and racial harassment/discrimination charges, the present environment presents a significant risk of religious or national origin harassment/discrimination claims. Employers are at serious risk of lawsuits that can result in substantial monetary liability if they fail to take preventative measures or fail to respond appropriately when problems arise. Moreover, the emotionally-charged nature of discrimination and harassment cases raises the unpleasant prospect of significant adverse publicity.

Under both federal and state law standards, courts look to what employers have done both to prevent discrimination and harassment from occurring in the first place, and whether, in the instance of harassment charges, to respond appropriately when it does occur. Although employers cannot control the actions of their employees, they can control their own actions in how they address and deal with the issue of workplace harassment and discrimination.

INVESTIGATING CLAIMS OF DISCRIMINATION AND HARASSMENT

There is an unfortunate tendency on the part of many supervisors, whether they are high level managers or first line supervisors, to avoid the unpleasant task of addressing employee misconduct and discipline. Supervisors often do not want to be placed in the position of having to make difficult judgment calls about the appropriateness of an employee’s behavior or the veracity of an employee’s explanation of his or her involvement in a particular incident. Yet problem employees create inefficiencies and disruptions within the workplace if they are not identified and their problems effectively remedied.

Discipline – if it is implemented after a careful and thorough investigation – can be an integral part of managing the workplace. Supervisors too often fail to recognize that discipline can have valuable and productive consequences for employees, so long as it is used as a tool for providing corrective action, not punishment. Waiting until employee misconduct is sufficiently serious to warrant discharge is a particularly ineffective way of addressing the problem employee. Not only will the delay call into question the motives of the employer, but the need to resort to discharge will cause the employer to lose its investment in training and developing the employee to become a productive member of the staff. Early investigations of possible misconduct and proper discipline can often
avoid discharges, or at least provide the groundwork for sustaining the discharges should they later be challenged in court or before an administrative agency like the Equal Employment Opportunity Commission (EEOC) or corresponding state agencies.

These guidelines have been created to assist you in addressing and investigating employee misconduct. Although the guidelines relate to general forms of misconduct, claims of racial, sexual or ethnic harassment by employees often present unique issues. Portions of the narrative will accordingly deal specifically with the investigation of harassment claims. Although every guideline discussed below will not necessarily apply to every investigation, they provide a good general outline for properly addressing all forms of employee misconduct. These guidelines cannot and should not, however, substitute for the advice of in-house EEO and human resources professionals and the general counsel’s office.

I. Identify the Problem and Determine the Right Approach

A. Misconduct or Poor Performance?

The first step in the process of investigating employee misconduct and, if appropriate, issuing discipline is to identify the problem and determine the right approach for resolving the problem. Is the problem one of misconduct or poor performance? If the problem is misconduct, some form of discipline is typically appropriate. If, on the other hand, the problem is poor performance, discipline may not be the most appropriate course, at least in the first instance. The better course may be counseling, training or the use of performance evaluations or performance improvement plans.

There are typically three kinds of employees who have performance problems: (1) those who are trying to do the job but cannot for some reason; (2) those who can do the job but fail to perform certain tasks or make mistakes; and (3) those who can or should be able to do the job but will not or do not seem willing to put forth the necessary effort. Discipline may well be the proper course for the third kind of performance problem, even in the first instance. Alternative mechanisms for improving performance, such as counseling or performance improvement plans, may be more appropriate for the first two kinds of performance problems, depending on the severity and the recurring nature of the problem.

B. What is the Cause of the Problem?

Once you have identified the problem, try to determine the cause of the problem – attitude, lack of initiative, personal problems,
substance abuse, lack of training, inflexibility, lack of necessary skills, an irritable nature, a personality conflict, etc. The cause of the problem will often assist you in determining whether discipline is appropriate, and if so, what form of discipline is appropriate.

II. Adequate Notice

The next step in the process of addressing employee misconduct involves a determination of whether the employee has been made aware that his or her conduct could result in disciplinary action.

A. Violations of Rules or Policies

Has the employee’s conduct arguably violated a Company rule or policy? If so, can you establish that the employee was aware of the rule or policy and of the consequences of violating the rule or policy?

1. Identify the rule or policy that has arguably been violated and where it is published in writing.

2. Determine the manner in which the rule or policy was communicated to the employee and when this communication occurred.

3. Have other employees violated this rule or policy, and if so, what sort of discipline has the Company used to address these violations?

B. Misconduct that does not Violate a Published Rule

When there are no published rules or policies addressing the particular misconduct in issue, you must determine whether the employee is aware or should be aware that his or her conduct is improper and must be corrected.

1. There are, of course, several infractions that do not require advance warning because they are obviously improper and warrant severe discipline – for example, theft, fighting, intoxication on the job, blatant insubordination, falsifying Company documents, etc.

2. For other infractions that are not as obvious, it is important that you be able to establish that the employee had some notice that engaging in the conduct in question could result in disciplinary action. For these reasons, it is important
that counseling sessions, whether they take the form of oral warnings or non-disciplinary communications, be documented so that they can be used to substantiate the need for further, more serious discipline should the employee continue to engage in the misconduct.

3. Performance evaluations can also be used as a tool for warning employees about possible misconduct.

III. Preparing To Conduct The Investigation

The next step in the process of addressing employee misconduct is typically the most difficult and time-consuming. You must conduct a thorough, fair investigation to determine whether the employee did, in fact, violate a rule, policy or standard of acceptable behavior.

A. Time is of the Essence

Do not delay in commencing an investigation of employee misconduct. Disciplining an employee three weeks after he or she has been accused of misappropriating Company funds suggests that the problem is not that important or that the evidence of misappropriation is not compelling or had to be trumped up.

1. By the same token, do not be so hasty that you conduct a haphazard, incomplete investigation. Particularly in cases of serious misconduct, if you need time to properly investigate an incident or charge, consider suspending the employee with pay pending the completion of the investigation. Suspensions can always be revoked, extended or modified to become discharges if the circumstances warrant such a change.

2. The timing of an investigation is particularly critical if the misconduct in issue involves a claim of racial, sexual or ethnic harassment by another employee. Delay connotes indifference, which is a serious problem in subsequent litigation. Delay may also subject the complaining employee to future harassment, particularly when the harassment is ongoing. Consider starting the investigation at the same time you receive the complaint by conducting a thorough interview of the complaining employee.

3. The investigation must be conducted in the shortest amount of time that is reasonably possible under the circumstances. The concern with timeliness, however, must be tempered
by considerations of reasonable thoroughness and appropriate documentation.

B. Coordinate with Appropriate Human Resources and Legal Personnel?

1. Before commencing an investigation of employee misconduct, particularly misconduct that involves issues of possible sexual, racial or ethnic harassment, contact the General Counsel’s office and work with the Company’s attorney at each step of the investigation. The General Counsel’s office should review every document at the time it is prepared, be consulted at every step of the investigation and with respect to all strategy issues.

2. There may be occasions when you and the Company’s attorney will want to contact outside counsel for advice. Contacting an outside attorney may seem like overkill, especially if you are confident that the complaint is frivolous, but an hour or two of an attorney’s time in prevention today is much cheaper than hundreds of hours of an attorney’s time defending a lawsuit two or three years down the road.

C. Special Considerations Regarding Harassment Complaints

1. Have you received a complaint of racial, sexual or ethnic harassment?

The first question that you should be asking yourself when an employee complains that he or she has been sexually, racially or ethnically harassed is whether you have really received a complaint of discriminatory harassment. Be very careful about how you “label” or characterize both the employee’s complaint and the investigation. Do not label complaints as sexual, racial or ethnic harassment if they do not really involve these forms of harassment.

- Conduct that is clearly inappropriate and even offensive does not necessarily constitute sexual, racial or ethnic harassment. For example, the frequent use of foul or abusive language in verbal exchanges with a female employee does not necessarily constitute sexual harassment if the content of the verbal exchanges is not sexual in nature.
Sexual harassment is also often dependent on the context in which particular conduct occurs. A kiss on the cheek may well constitute sexual harassment if it is clearly unwelcome and the employee who engages in the conduct knows that the kiss is unwelcome but persists in kissing the employee. On the other hand, a kiss on the cheek on one jovial occasion just before a plant shuts down for the Christmas and New Year’s holiday may be welcome, and such conduct does not necessarily constitute sexual harassment if the incident only occurs once and is clearly intended as a holiday greeting, not as a sexual advance.

“Sexual harassment” is a legal and judgmental phrase that conjures up a host of highly troublesome images, none of which may be appropriate to the complaint you have received. The same is true for other forms of discriminatory harassment. If the phrase “sexual harassment” is sprinkled throughout your investigation notes, the true nature of the allegations may be obscured by the label you have attached to them. In subsequent litigation several years later, you may have trouble disowning the label you chose to use in investigating the complaint, even if you subsequently determined that no sexual harassment had occurred.

2. What sort of investigation should be conducted if the complaining party is clearly a troublesome employee and the nature of his or her complaint appears to be frivolous or petty?

Take each (internal or external) complaint of sexual harassment seriously, regardless of whether the claim appears to be frivolous on the surface. One of the biggest mistakes employers make with regard to harassment complaints is failing to fully investigate each complaint of harassment. Especially in the area of sexual harassment, the courts are identifying extremely subtle forms of discrimination. Do not put the Company in the uncomfortable position of having to respond to later claims of “no one listened to or cared about what I had to say.”
IV. The Investigation Commences

A. Who should conduct the investigation interviews?

1. The answer depends on the circumstances of each case. Typically, a Human Relations professional at a facility will be responsible for conducting the investigation, unless the level of the person accused of wrongdoing suggests that someone outside the facility or at a higher level should conduct the investigation.

2. You should always conduct the investigation interviews of an employee accused of misconduct with someone else present. In the case of harassment complaints, two people should be present during the interviews of both the harassed employee and the alleged harasser. This will reduce the chance that a later dispute will arise about what was said or not said during the interview. If there are critical witnesses or witnesses whose veracity is questionable, you should consider including a second person in these interviews as well.

3. The same individual(s) should normally be involved throughout the investigation. Consideration should be given to having an interviewer who belongs to the same racial, ethnic or gender classification as the complaining party.

B. What do I tell the employee accused of misconduct, a person complaining about harassment and any witnesses about the investigation?

1. You should tell the employees involved that the Company will take every reasonable precaution to ensure that the investigation is as confidential as possible given the circumstances presented. Explain to everyone that confidentiality is important, but do not promise confidentiality to anyone.

2. Tell every person who is interviewed that this is a confidential investigation, that they are not to discuss this matter with anyone, that their full cooperation is required, that the truth is required, that discipline will result if false information is provided, and that no adverse action will be taken against anyone as a result of truthful participation in this investigation. Make it clear that disciplinary action
will result if these directives are violated. If you are investigating a claim of harassment, always reference the Company’s policy on “Harassment and Sexual Harassment”.

C. What if the employee accused of misconduct refuses to participate in the investigation or to respond to questions asked?

An employee’s refusal to answer questions or to cooperate with an investigation of possible misconduct should be regarded as a form of insubordination and should subject the employee to discipline wholly apart from the discipline that may result from the misconduct that led to the investigation.

D. What if the employee accused of misconduct asks to have a representative present during the investigatory interview?

1. Weingarten Rights

For over 30 years, unionized employees have had the right to have a union representative present at any investigatory interview by an employer if the employee reasonably believes the interview might result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

2. The Epilepsy Foundation Case – A Short Term Extension of Weingarten Rights to Nonunion Employees

Several years ago, the National Labor Relations Board (NLRB) extended Weingarten rights to nonunion employees in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. No. 92 (2000), affirmed 268 F.3d 1095 (D.C. Cir 2001). Under the ruling in *Epilepsy Foundation*, nonunion employees were given the right to have a coworker present at investigatory interviews that may result in discipline.

There were, however, some important limitations on this right to representation. First, the nonunion employee being interviewed had to actually request representation. Second, the employer was not required to apprise the employee of his or her rights prior to conducting the interview. Third, the employee could only select a coworker who was currently at work as his or her representative. There was no requirement that the employee be permitted to bring in anyone from outside the Company as his or her
representative such as an attorney. Fourth, since the representative of the employee would be performing services for the employee during the interview, not the employer, the Company was not required to pay the employee representative for the time spent in the interview. This latter point was applicable only to non-exempt employees.

3. **Weingarten Rights of Nonunion Employees Rescinded by the IBM Corp. Case**

In *IBM Corp.*, 341 N.L.R.B. No. 148 (2004), the NLRB reversed the controversial ruling in the *Epilepsy Foundation* case that gave nonunion workers *Weingarten* rights. Under the *IBM Corp.* ruling, employees in nonunion companies are no longer entitled to have a coworker present when they are being interviewed as part of a disciplinary investigation. This decision, in which the NLRB overturned its own decision to the contrary only four years prior, is the Board’s latest flip-flop on the issue. In fact, this was the third time since 1982 that the Board has changed positions on the issue of whether *Weingarten* rights should be limited to those employees who are represented by a union.

**E. In the case of harassment-related misconduct, what if the complaining party tells you that he or she does not want an investigation conducted or does not want any adverse employment action taken against the alleged harasser?**

1. When you have notice of a potential sexual, racial or ethnic harassment claim, regardless of whether you learn of it through the complaining party or someone else, you must conduct a thorough investigation. This is true even if the employee involved does not want any adverse action taken against the alleged harasser.

2. You cannot agree to listen to concerns and then not act on the basis of what you have learned. Accordingly, if an employee asks you to promise up front that you will not share with anyone else the complaint or information he or she is about to give you, you must inform the complaining party or the witness that you cannot agree to keep the complaint or information confidential and that depending on the nature of what you are about to hear, an investigation may become necessary.
3. There may be occasions when a complaining party will refuse to cooperate with the investigation if you do not agree to keep the details of his/her complaint strictly confidential. If you are far enough into the investigation to know the basic elements of the complaining party’s claim, you should proceed with the investigation as best you can without the complaining party’s cooperation. If the complaining party not only refuses to cooperate but you also do not have enough information about the claim to investigate, set forth the circumstances surrounding the complaining party’s refusal to cooperate in a detailed memorandum that can serve, in effect, as a truncated “investigation.”

F. In the case of harassment-related misconduct, how should the interview of the complaining party be conducted?

1. Ask the complaining party to explain his or her concerns. In general, do not interrupt this explanation unless it is necessary to break it down into incidents or issues. Only use general questions that call for a narrative response, like “what happened next?”

2. After you have an overview of the concerns of the complaining party, go back to the beginning and review each incident or issue in detail, making sure that you fully understand each claim that is being made and the facts that underlie those claims. Move from general questions to specific questions that call for a yes or no answer as the interview proceeds. Be specific even if it is potentially embarrassing. For example, it is not sufficient to know that an alleged harasser touched the complaining party “in a private area” or made “absolutely lewd remarks.” You must know exactly what area was touched and how, and you must know the exact words that were used.

3. If general discrimination is being alleged, hone in on the issue of whether persons of the opposite race, ethnic group or sex were treated differently. Get the full names of alleged comparatives and the facts regarding any alleged differences in treatment. Determine who allegedly treated these employees differently.

4. If applicable, make sure that you find out whether the complaining party has sought or is seeking medical
consultation and, if so, in what form.

5. Make sure that you understand the chronology of events and determine the dates and times for each incident or issue to the extent possible. Also make sure that you understand the surrounding circumstances of the occurrence (did the alleged harassment occur at work, a bar, an employee’s home, while traveling, etc.).

6. Make sure that you distinguish between what the complaining party knows versus what the complaining party thinks he or she knows, i.e., hearsay and the like.

7. You should request and make copies of any documents or personal notes/calendars that relate to the complaint. If you can, obtain the originals.

8. Be sensitive to the timing between the occurrence of the alleged harassment and the alleged consequences. Did the harassment occur two weeks or two years before a promotion or a raise was denied or before the victim lodged a complaint? If there was any significant time lag between the incident and the complaint, find out why the complaining party waited so long to report the incident.

9. Get the full names, titles and involvement of any harassers, witnesses or other people mentioned by the complaining party.

10. Ask the complaining party to identify any individual whom he or she believes has been subjected to the same or similar conduct by the same alleged harasser and find out what he or she believes happened and when.

11. Ask the complaining party to identify any individual whom he or she believes has witnessed or has any knowledge of any of the allegations that have been made against the alleged harasser, and find out exactly what the witness is supposed to know. Be especially sure to find out if any supervisor or manager is alleged to have knowledge of this conduct.
12. Find out if the complaining party has previously made any prior complaint about this or similar conduct. If so, find out who was involved, when it occurred, what happened and how, and what was said or done as a result of the complaint.

13. Ask the complaining party exactly what he or she wants the Company to do. Do not suggest possible remedies. Make sure that you understand the effect of the conduct on the complaining party (was he or she denied a promotion, threatened with discharge, etc.) Depending on the circumstances, something as simple as an apology may resolve the situation.

14. Tell the complaining party to contact you if he or she thinks of something else that you should know after the interview is concluded.

15. Advise the complaining party of the procedures to be followed during the course of the investigation, the fact that all aspects of the investigation and the interview should be kept confidential, that he or she is not to discuss this matter with anyone, and that you will get back to him or her with the results of the investigation.

16. You should also advise the complaining party that no retaliation against him or her for asserting this complaint will be tolerated by the Company and that he or she is to immediately contact you if incidents occur that appear to be retaliatory.

G. In the case of harassment-related misconduct, what is the next step in the investigation?

1. After the interview of the complaining party, review your notes to make sure that they are complete and then decide whether they need to be rewritten. If so, do it immediately. Usually the notes should be rewritten and expanded to include statements that were made but not recorded initially. Make sure to include as many specifics as possible. Name and identify everyone and give exact details on statements made and improper conduct alleged. Consider asking the Company attorneys or outside counsel to assist you in the rewrite.
2. If questions arise as a result of this review of your notes, consider interviewing the complaining party again since you must have a complete picture of all of the claims being asserted before proceeding.

3. Decide whether the complaining party should be asked to prepare a written statement, sign a written statement prepared by the Company, or review and sign the interviewer’s notes. This step may be advisable when the complaining party makes some valuable admissions during the interview process. Always discuss the merits of obtaining written statements with Company counsel.

4. Decide whether it is necessary to take immediate action to put the alleged harasser or the complaining party on a paid leave or to take some other action to ensure that more incidents will not occur before the investigation is completed.

5. Do not let the complaining party’s reputation cloud your judgment concerning the validity of his or her claim. For example, the mere fact that a woman has a reputation for being flirtatious and a tease does not preclude a claim of sexual harassment if a male coworker engages in sexual conduct after the woman tells him to stop. Moreover, the mere fact that someone participates in sexual banter or accedes to a supervisor’s request for some form of sexual activity does not necessarily make the conduct welcome. Participation may appear voluntary, but the activity may still be unwelcome if the employee is engaging in the activity because he or she fears that something might happen to his or her job without participation.

H. How should the interview of an employee accused of possible misconduct, such as an employee who has allegedly engaged in sexual harassment, be conducted?

1. Decide who will interview the employee. As indicated above, such an interview should be conducted by two people, and at least one of these people should be involved in all aspects of the investigation.

2. Conduct an interview of the employee. Start by generally describing the purpose of the interview. If a claim of harassment is being investigated, tell the alleged harasser that a named individual has made a claim of sexual, racial
or ethnic harassment, but do not initially tell the alleged harasser all of the specifics of the allegation. Rather, ask the alleged harasser general questions about what conduct he or she has engaged in with the named individual who is complaining.

3. In the case of harassment-related misconduct, be sure to ask the alleged harasser to explain the exact nature of his or her relationship with the complaining party.

4. Once you have obtained a general statement from the employee about the misconduct in issue, go back to the beginning and tell the employee each of the specific issues or facts that have caused the Company to conduct the investigation. If the issue is harassment-related, tell the alleged harasser each of the specific incidents or issues raised by the complaining party. Get a specific response regarding each allegation from the employee accused of misconduct. Particularly in the case of sexual harassment, you must know the specific actions and exact words even if they are potentially embarrassing. Also, move from general questions that elicit a narrative response to more specific questions.

5. Find out if the employee accused of misconduct has any allegations to make against someone else who is involved in the incident. For example, if the investigation relates to alleged sexual harassment, determine whether the alleged harasser believes that the complaining party engaged in similar misconduct or initiated or welcomed the alleged misconduct. Also find out what the alleged harasser believes the motivation is of the complaining party. For other kinds of misconduct investigations, such as an investigation of insubordination, determine whether the employee believes that his or her supervisor engaged in some form of wrongdoing or whether he or she had some independent justification for failing to follow the directives of the supervisor.

6. Obtain the names and titles of any individual whom the employee believes has information about the allegations of misconduct and find out the specific nature of the alleged information.

7. Get copies, or better, originals of any relevant documents or notes, and get specific dates and times when possible.
8. Find out if the employee has ever been accused of any similar kind of misconduct before. In the case of alleged harassment, find out if the alleged harasser has ever been accused of discrimination before or involved in any employment or civil rights litigation. If so, get specifics regarding these issues.

9. Tell the employee to get back to you if he or she thinks of anything else that you should know after the interview is concluded.

10. In the case of harassment-related misconduct, warn the alleged harasser not to take any retaliatory action against the complaining party or any individual involved in the investigation. If the alleged harasser is a supervisor of the complaining party, any action to be taken by the alleged harasser involving the complaining party at any time during the investigation should be cleared through you ahead of time. For example, supervisors accused of sexual harassment should not be permitted to evaluate or discipline complaining employees during the investigation without the prior approval of you and/or another appropriate person.

11. Tell the employee accused of possible misconduct that you will get back to him/her at the conclusion of the investigation.

I. What is the next step in the investigation?

1. After the interview of the employee accused of misconduct, once again review your notes to make sure that they are complete, and then decide whether they need to be rewritten. If so, do it immediately. Again, most notes need to be rewritten to make them as coherent and complete as possible. Consider asking the Company attorneys or outside counsel to assist you in the rewrite. If questions arise as a result of this review, interview the employee again. In the case of a harassment investigation, make sure every point raised by the complaining party has been covered with the alleged harasser.

2. Decide whether the employee accused of misconduct should be asked to prepare a written statement, sign a written statement prepared by the Company, or review and
sign the interviewer’s notes.

3. In a harassment investigation, decide whether it is necessary to re-interview the complaining party to get his or her response to any new allegations made by the alleged harasser. If so, follow the same procedure as outlined above. The complaining party must have the opportunity to respond to any significant allegation or fact stated by the alleged harasser.

J. How should interviews of witnesses be conducted?

1. After the position of the employee accused of misconduct is clear, decide what witnesses need to be interviewed, the order of these interviews, who will conduct the interviews and how the interviews will be conducted.

2. These interviews, as well as what occurs following these interviews in terms of reviewing and rewriting notes, should follow the guidelines stated above.

3. Follow up with the employee accused of misconduct if any new facts are raised by witnesses.

V. The Conclusion of the Investigation

A. What Steps Need to be Taken in Formulating the Company’s Decision?

1. When all of the interviews are completed, the decision of the Company needs to be formulated, including any actions to be taken.

2. A report summarizing the results of the investigation and setting forth the conclusions reached as a result of the investigation should be prepared. The report should also discuss any credibility determinations, discipline to be imposed, and the reasons for the discipline.

3. In the case of a harassment complaint, if you determine, for example, that the complaining party has been sexually harassed, do not characterize the actions of the harasser as “sexual harassment” in your report or in any other documents associated with the investigation or conclusions. At most, simply state that the actions of the harasser are inappropriate and violate the Company’s sexual
harassment policy. In an effort to avoid even the hint of sexual harassment, company policies often impose somewhat stricter prohibitions than the law and regulations concerning sexual harassment. If you label conduct as “sexual harassment,” you are in effect acknowledging that a violation of the law has occurred even though that might not be the case.

4. The report summarizing the results of the investigation is a critical document and should be reviewed by counsel before it is finalized. Do not retain prior rough drafts of notes and the report. Only final versions of your rewritten notes and report should become part of the file on the investigation.

5. Any disciplinary action must be written. The decisions and discipline must then be implemented immediately. Remember that discipline can, and often should, include other actions beyond a written warning. For example, a salary increase can be cut or denied, current salary can be cut, and an upcoming evaluation possibly should address the discipline imposed.

6. In a harassment situation, carefully consider other options besides discipline that might be pursued for the victim of harassment. For example, depending on the circumstances, consider whether the victim should be transferred to a different department or supervisor, given a paid leave, or offered counseling services at the Company’s expense.

7. Also in a harassment situation, the complaining party must be informed of the results of the investigation before any action is taken. The complaining party should generally be provided with a written statement of the results of the investigation (not the report described above) and should be advised of the actions taken by the Company with as much specificity as is appropriate under the circumstances. The same steps should be taken regarding the alleged harasser. The witnesses are generally not advised of the results of the investigation or of the action taken.

8. Any documents obtained or any final versions of notes and reports prepared during the investigation should be kept and properly stored for a specific period of time. Consideration should be given as to who will store the documents and where.
B. **What Information should be Contained in a Disciplinary Notice?**

There is no single template for preparing disciplinary notices following investigations of employee misconduct. In general, disciplinary notices should contain the following elements:

1. Say what the discipline is – a written warning, a verbal warning, a suspension, etc.;

2. Provide a detailed description of the misconduct;

3. Provide a description of the policy, rule or guideline, if any, that has been violated;

4. Describe the scope of any investigation conducted of the misconduct and a description of the results of the investigation;

5. Give the employee suggestions or directives for how to correct the problem;

6. If appropriate, give the employee a specific time frame during which he or she will be expected to correct the problem;

7. Reference prior related problems or warnings;

8. Warn the employee that future misconduct will lead to more severe discipline and possibly termination;

9. The person who prepares the document should sign it;

10. Have the employee sign the document to verify that he or she received the document. If the employee refuses to sign the document, write on the document the date it was handed to the employee and by whom. Sign such a statement;

11. Edit your copy – there should be no spelling errors, incorrect grammar or erroneous facts; and

12. Consult with the legal staff and possibly outside counsel in potentially troublesome cases.
C. Conducting the Disciplinary or Discharge Meeting

1. Two employer representatives should be present.

2. If the employee is being terminated, decide whether the employee will be offered any form of severance benefit, and if so, whether a release will be sought, and whether the employee will be given the opportunity to resign.

3. Get to the purpose of the conference quickly. Do not beat around the bush.

4. Always tell the employee why he or she is being disciplined or terminated. Explain the decision briefly and clearly. Allow them to read the document reflecting the discipline. Do not argue with the employee in an effort to justify your decision. Do not apologize for your decision.

5. If the employee is being terminated, explain fully any benefits that the employee is entitled to receive. Tell the employee when the benefits will be received. If the employee is not going to receive certain benefits, explain why.

6. Do not say too much. What is said may become the basis for a subsequent lawsuit and sometimes troublesome statements can be made during the termination or discipline conference that will come back to haunt the employer. Do not say anything that relates to an employee’s protected class.

7. Be organized and prepared for the discipline or termination conference and give the distinct impression that you are confident that the right decision has been made.

8. Let the employee have an opportunity to have his or her say, and pay close attention to what is being said.

9. Take notes. If the employee acknowledges that performance has not been good or makes statements that support the discipline or termination decision, make sure you write these comments down so that you can remember exactly what the employee said.

10. Be as courteous to the employee as possible. Remember that you are not merely trying to be in a position to win a
lawsuit if one is filed -- you are trying to prevent a lawsuit in the first place.

11. The discipline or termination conference should be documented. Take your notes and convert them into a termination report that includes: (a) what the employee was told, (b) what the employee said, and (c) perhaps what the employee did not say (i.e., if the employee did not dispute the reason for discharge or discipline, this should be noted). The employer representatives who attended the conference should sign the document.