



HEFFERNAN CONSULTING



## Guidelines for: Conducting Effective Workplace Investigations


**Presented by:**  
Ann Marie Malino, SPHR  
**Heffernan Consulting**



 Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Your Facilitator: Ann Marie Malino, SPHR

- National Certification through the Human Resources Certification Institute (HRCI) as a Senior Professional in Human Resources (SPHR)
- **25 years of practical HR management and corporate training experience**
- Former President of Society of Human Resource Management (SHRM) – San Diego Chapter
- **Expert witness for legal proceedings related to harassment and discrimination**
- Instructor for HR and management courses
- **Investigator for harassment and discrimination complaints**

 Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Agenda

- ▶ Benefits of an effective investigation
- ▶ Types of complaints
- ▶ **Ten steps to conducting a successful investigation**



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

?????



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Benefits of an effective investigation

- ▶ Determine what happened
- ▶ Deal with problems early
- ▶ Enforce Company policies
- ▶ Protect your Company from lawsuits
- ▶ Encourage reporting
- ▶ Avoid or counter bad publicity
- ▶ Build employee trust



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Types of complaints

- ▶ **Formal complaints**
  - What is your complaint procedure?
  - Use a complaint form...but
- ▶ Some employees will feel intimidated by having to commit their complaint to writing and will balk at this requirement. And you'll be at the mercy of the complaining employee's writing skills (and ability to pinpoint the problem). Consider having the person who takes the complaint fill in the complaint form and then have the complaining employee read/sign it.



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Types of complaints

- ▶ **Off the record:**
  - Still required to investigate
- ▶ **Anonymous:**
  - Unsigned notes
  - Phone calls
    - By victims, and those concerned
- ▶ **Reports by managers & supervisors:**
  - Company's eyes and ears
  - Rumors, gossip



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Types of complaints

- ▶ **Indirect complaints:**
  - During disciplinary discussions
- ▶ **Departing employees:**
  - During exit interviews
- ▶ **Workplace observation:**
  - Cannot be overlooked
- ▶ **Third party reports:**
  - Friend, family member, customer, vendor



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Sample Case:

- ▶ James Castelluccio, a former IBM vice president, was awarded \$3.7 million in July 2014 by a federal judge after a jury in Connecticut found that the then-61-year-old employee was wrongly terminated because of his age.
- ▶ Before the trial and afterward, U.S. Magistrate Judge Thomas P. Smith harshly criticized IBM's internal handling of an age-discrimination complaint that Castelluccio had taken to HR before he was let go.
- ▶ While the HR investigator had concluded that the executive was treated fairly, the judge said the HR report was one-sided and blocked IBM from submitting it as evidence at trial. Specifically, he noted that the HR report failed to include evidence favorable to Castelluccio, including his performance reviews.
- ▶ The judge wrote that he suspected "the purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly."

*As this case demonstrates, the promptness, thoroughness and impartiality of an employer's internal workplace investigation can make an enormous difference in the outcome of a case.*



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 1. Determine the issues to investigate:

- ▶ What is the seriousness of the misconduct?
- ▶ Illegal/Potential lawsuit?
- ▶ Whistleblower?
- ▶ Violation of company policy?
  - Non-harassment policy
  - Code of business and ethics
  - Non-retaliation policy
- ▶ Is there is a dispute over what happened?
- ▶ How have similar complaints been handled?



*HINT: Scale the investigation to the size of the problem!*



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 2. Take immediate action if necessary:

- ▶ Protect employees
- ▶ Protect the Company
  - Paid suspension (subject of complaint)
  - Paid time off for complaining employee
  - Transfer (complaining employee or subject of complaint)

**HINT: BEWARE OF PERCEIVED RETALIATION**



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 3. Appoint the right investigator:

- ▶ Experienced, impartial/perceived as impartial
- ▶ Subject matter expert (*Ex: discrimination vs. fraud*)
- ▶ Capable of taking action
- ▶ Interviewing skills
- ▶ Gender
- ▶ Capable of testifying
- ▶ Team approach...
  - Someone to ask questions
  - Someone to take notes
  - Can be more intimidating



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## A fair and thorough investigation:

Use impartial party whenever possible such as:

- ✓ Labor attorney
- ✓ HR professional
- ✓ Investigator
- ✓ Trained management personnel

*Hint: Ask yourself how others will perceive it.*



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 3. Choose an investigator:

- ▶ Under the *California Business and Professions Code Section 7520-7539*, an external consultant hired to conduct a workplace investigation must be a state-licensed private investigator or state-licensed attorney. Human resource consultants who are not licensed attorneys or private investigators cannot legally conduct such investigations.



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 4. Plan the investigation:

- ▶ What do you know? (Review available information)
- ▶ What do you need to find out?
- ▶ Who has the information?
- ▶ What is the best way to get it?
  - Whom to question
  - What order to follow
  - What questions to ask
  - Inform employees' manager



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 4. Plan the investigation

- ▶ Decide where/when to conduct the interviews
- ▶ Set-up the meeting
- ▶ Anticipate worse case scenarios
- ▶ Avoid tendency to make assurances
- ▶ Formulate questions
- ▶ Be prepared for emotional responses such as fear and anger
  - Remain calm, objective, sensitive

**Hint: *Get advice!!***

- Upper management
- Attorney
- Consultant
- Public relations



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com



## Ten steps to a successful investigation:

### 4. Plan the investigation

- ▶ Keep an open mind
  - Avoid making assumptions
  - Remain objective
  - Don't judge



**HINT: Avoid leading questions**

- ▶ **Don't ask:**  
*Did Maria falsify her time card?*
- ▶ **Ask:**  
*Did you and Maria discuss her time card last week?  
What did each of you say?*



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Conduct Fair Interviews:

- ▶ Victim
- ▶ Accused
- ▶ Witnesses



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

**5. Conduct Fair Interviews:**

- ▶ Provide a brief explanation as to the situation (*explain allegations only as needed*)
- ▶ Thank the person for time/cooperation
- ▶ Explain why the person is being interviewed
- ▶ Emphasize need for truthfulness
- ▶ Explain that the investigator will not come to any conclusions until the investigation is complete
- ▶ Explain the investigation process



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

**5. Conduct Fair Interviews:**

**Sample opening statement:**

*“I have been asked to investigate a complaint that involves you. The company is required by law to investigate all such complaints. These are simply allegations and no one has made any judgments about the allegation or your conduct. As part of the company’s confidential investigation, I want to obtain your responses before the company makes any judgments. Your truthfulness and cooperation are imperative.”*



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Conduct Fair Interviews:

- ▶ Assure employees there will be no retaliation
  - Violates Company policy (*and the law*)
  - Advise all those who are interviewed:
    - *they must not retaliate*
    - *they must immediately report any retaliation they experience*



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Conduct Fair Interviews:

- ▶ Keep as confidential as possible:
  - Tell each witness only necessary facts
  - Caution everyone you interview that the investigation is confidential
  - Have them review/sign your Company's Confidentiality Agreement
  - Let them know that revealing details about the investigation can be cause for disciplinary action
  - Name those they are authorized to talk to regarding the investigation
  - Set a good example
  - Hold interviews in a private place
- ▶ **Broad Confidentiality Requirements Might Violate the National Labor Relations Act**
  - Because the rules in this area are still evolving, it's a good idea to talk to a lawyer before you discipline an employee for violating the confidentiality of an investigation.



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Interview

- ▶ Start with easy questions
  - Put the employee at ease
  - Assess demeanor and body language
- ▶ Dig a little deeper if an employee's reaction seems odd. If an employee seems much more upset (or much less so) than you would expect, ask more questions.



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Conduct Fair Interviews:

- ▶ Keep your opinions to yourself
  - Watch the tone of your voice
- ▶ **Don't ask:**  
*Can you confirm that Darrell hit Jeff on the loading dock yesterday?*
- ▶ **Ask:**  
*Where did you work yesterday? Did you see anything unusual? Tell me what happened. (If the witness claims not to have seen anything unusual, you might ask, "Did you see an incident between Darrell and Jeff?")*



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 5. Conduct Fair Interviews:

- ▶ Keep an open mind
- ▶ Ask for any tangible corroborating evidence
- ▶ Verify timelines and dates
- ▶ Consider potential bias of witnesses



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful invest

### 5. Conduct Fair Interviews:

- ▶ Focus on the facts
  - Objective vs. subjective
  - Where/when did the incident occur?
  - Where were you?
  - Who was present?
  - What happened?
  - Who had similar experiences?



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

**5. Conduct Fair Interviews:**

- ▶ Find out about other witnesses or evidence
  - Ask every person you interview
    - Did anyone else see or hear?
    - Did you tell anyone?
    - Did you take any notes?
    - Was there any written communication?
    - Do you have any concerns about continuing to work during the investigation?



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

**5. Interview**

- ▶ Ask about contradictions:
  - Ask why the other person would say something different *Ask: Why do you think would Sarah say that if it weren't true?*
  - Ask about the motivations behind the allegations *Ask: Why do you think Sarah is bringing up this issue now?*



Heffernan Consulting | 1350 Carlsback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

**5. Conduct Fair Interviews:**

▶ **At the end of the interview ask:**

- *Is there anything else you'd like to tell me?*
- *Is there anything else I should have asked about?*



Ten steps to a successful investigation:

**5. Conduct Fair Interviews:**

▶ **At the end of the interview :**

- **Ask the complaining employee for their input on possible discipline/remedy**
- **Hint:** *Be careful to emphasize that the company will take appropriate action (not necessarily the action the employee prefers)*
- **Explain follow-up procedures**



Ten steps to a successful investigation:

## 5. Conduct Fair Interviews:

- ▶ Ask interviewees to contact you:
  - With new or additional information
  - If they feel retaliated against
  - With questions about the investigation
  - If they hear anyone talking about the investigation



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Ten steps to a successful investigation:

## 6. Gather documents and evidence

- ▶ Relevant policies
- ▶ Work history
- ▶ Prior incidents
- ▶ E-mails
- ▶ Notes
- ▶ Text messages
- ▶ Social media postings
- ▶ Surveillance tapes



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com



## Ten steps to a successful investigation:

### 7. Evaluate the evidence:

- ▶ What really happened?
  - Plausibility
  - Corroboration
  - Consistency
- ▶ Assess credibility

**Hint:** *Conduct follow-up interview(s) if needed*



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 8. Take action:

- ▶ Appropriate discipline
- ▶ Termination
- ▶ Criminal prosecution
- ▶ Counseling
- ▶ End the problematic behavior
- ▶ Right the wrong
- ▶ Protect employee(s)
  - Safety first
  - Further harassment
  - Uncomfortable situations
- ▶ Communicate with:
  - Management
  - The victim
  - The accused
  - The supervisor



Heffernan Consulting | 1350 Carlbach Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 9. Document the investigation:

- ▶ Write an investigative report

**Hint: *Be objective and specific. Describe reactions.***



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Ten steps to a successful investigation:

### 10. Follow up:

- ▶ With the complaining employee and the accused
- ▶ Monitor the workplace
  - Be on the look out for retaliation
- ▶ Deal with systemic workplace problems
  - Training
  - Develop new policies



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

## Review questions

- ▶ Multiple choice



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com

Thank you!



Heffernan Consulting | 1350 Carlback Ave, Ste. 200 | Walnut Creek, CA 94596 | Ph: 800-234-6787 | www.heffins.com