ABA SECTION OF LABOR AND EMPLOYMENT ANNUAL CLE CONFERENCE

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Workplace Investigations: The Initial Investigation Planning

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[1] The information in parentheses refers to the section and page of the following paper at which this item of the checklist is discussed.

ABA SECTION OF LABOR AND EMPLOYMENT ANNUAL CLE CONFERENCE

Workplace Investigations: The Initial Investigation Planning

I. Identify the Issues

A. Examine the information that is initially available, *e.g.*, a written complaint, the information the complainant reported to Human Resources or via another company complaint procedure, or information confided in a co-worker by an individual who has not officially complained.

B. Determine what issues could be investigated, *i.e.*, issues that involve potential legal liability or otherwise raise legal questions and issues that do not have legal ramifications but are concerning from a Human Resources or safety perspective. Discuss with appropriate personnel which issues will be investigated and agree on the scope of the investigation. This initial determination should be subject to further consideration based on information learned in the course of the investigation.

II. Determine Who Should Be Advised of the Complaint/Need To Investigate

A. Discuss with your contact at the employer who needs to be advised of the investigation prior to its commencement. Persons who might be appropriate, depending on the facts of the particular case, include the supervisor and second level supervisor of both the complainant and the alleged wrongdoer, individuals in the Human Resources organization, in-house employment counsel, outside employment counsel, the individual who reported the matter requiring investigation (if not the complainant), and the employer's diversity officer. The number of persons advised should be limited, consistent with the goal of keeping the investigation as confidential as possible.

III. Consider the Implications of Union Involvement

A. If the alleged wrongdoer or other witnesses are union employees, consider whether any union officials should be advised of the investigation.

B. If the alleged wrongdoer is a union member, consider whether in view of Weingarten rights (*See infra*, p. 12) he or she should receive advance notice of the subject matter of the interview.

C. Knowledge of the investigation will also raise questions for union counsel: Does the alleged conduct violate the collective bargaining agreement? If so, has it become a grievance by one union member against another? Can the union represent the alleged wrongdoer in any subsequent disciplinary proceeding initiated by the employer, or should it secure independent counsel? Does the union have an obligation under its by-laws to take some sort of disciplinary action against the alleged wrongdoer? Is the alleged wrongdoer a union official or

officer? Is the International Union aware of the alleged wrongdoing and, if so, what action should it take?

IV. Determine Whether the Investigation Should Be Privileged and Take the Steps Required to Maintain Applicable Legal Privileges[2]

A. If an attorney is conducting the investigation, the employer will likely want to have the investigation protected by the attorney-client privilege, even though, in the event of litigation, it may need to waive the privilege in order to show that it conducted an adequate investigation. It thus is important both to take steps that help ensure that the investigation is covered by the attorney-client privilege and to create a record that the employer will be comfortable disclosing in litigation should it decide to waive the privilege.

B. Steps To Be Taken to Create and Maintain the Attorney-Client Privilege and Attorney Work-Product

1. The attorney-client privilege will apply if all of the following elements are present and asserted:

   a. a communication;

   b. made in confidence;

   c. to an attorney;

   d. by a client;

   e. for the purpose of seeking or obtaining legal advice.

   This privilege is absolute and protects from disclosure the content of the communication, but not necessarily the fact the communication was made.

2. Even when all of the specific steps required to create a privileged communication have been followed, and the parties have communicated with the expectation of confidentiality, special care still must be taken with the content of such communication so that, if the privilege is to be waived, the communication will not compromise any perception about the investigator's ability to be even-handed and thorough. Be cautious in making statements to the witness because they could be discovered, and avoid discussing theories, strategy, assessment, or other evidence with anyone who lacks a need to know.

3. An investigator who desires to preserve the privilege should consider these actions:

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[2] This section on maintaining legal privileges has been taken, with permission, from N.L. Abell "Conducting A Defensible Investigation." © 2000 Paul, Hastings, Janofksy & Walker, LLP.

a. Before commencing an investigation, discuss the attorney-client privilege and the necessity of formulating consistent procedures to ensure communications are maintained in confidence.

b. Request legal advice in writing prior to commencing an in-house investigation where practicable.

c. Confirm in writing that the investigation is for the purpose of providing legal advice to the client.

d. Have a superior at the employer direct that any communication by a middle- or lower-level employee be made with counsel.

e. Arrange for management to instruct the interviewed employee that he or she should cooperate with counsel or his/her designee, that the purpose of the communication is to allow counsel to formulate legal advice for the employer and that the attorney/investigator is representing the employer – not the employee – in the investigation. Any attorney or designee should indicate that he or she is conducting the investigatory interview as an attorney/designee representing the employer and is not acting as an attorney/representative for the interviewee.

f. Have management inform the interviewed employee and investigative counsel in writing that the communication is confidential, that confidentiality must be maintained, and that no disclosure may be made unless counsel has approved the content and manner of disclosure in writing.

g. Have present during the investigatory interview only those individuals "necessary to further the interest of the client in the communication."

h. Make a separate report for each witness.

i. Separate discoverable records, files, or documents of the employer from the privileged investigation reports.

j. Label all privileged documents as "privileged attorney-client communication" and/or "attorney work-product."

k. Have counsel maintain privileged files.

l. Carefully limit circulation of privileged materials so that their confidential nature is maintained. Access to such materials should be limited to those people who have a need to know the information. No unauthorized reproduction should occur.

m. Integrate legal advice with the facts discovered during the investigation in any letters of memoranda. If the documents contain business advice, the legal rationale for such advice should be articulated.

n. Document instructions for the preparation of any material so that a litigation purpose is apparent (*e.g.*, "The complainant has threatened to file litigation as a result of the alleged incidents.").

o. Note documents not prepared by counsel as prepared by representatives of the client acting for counsel in a litigation-anticipation capacity.

p. Label documents prepared in anticipation of litigation.

q. Refer all charges, complaints, or threatened actions to in-house or outside counsel for directions before any investigation is commenced or documents generated. All investigations of such charges or complaints should be conducted under the direction of counsel. The human resources or line manager who receives a charge or complaint should prepare a transmittal letter to the counsel indicating its receipt. Counsel then should prepare a letter requesting the appropriate employee to undertake the investigation for the purpose of providing information for the legal defense of the matter and information for counsel to make a legal analysis of the claims.

r. Employ experts or outside consultants only under the direction of counsel. All expert reports should be directed to counsel.

s. Instruct non-legal personnel who will be responsible for conducting investigatory tasks and preparing reports to report objective facts and refrain from including subjective personal conclusions in their reports because they may be discoverable.

4. Key reminders

a. The attorney-client privilege must be created *ab initio* and properly maintained, or it is lost.

b. The privilege must be asserted before disclosure of the communication, or it will be lost. Once the privilege is lost, it generally may not be effectively reasserted.

c. When the privilege is challenged, the party asserting the privilege has the burden of proving the existence of the privilege.

d. The privilege only protects the specific communication and does not protect facts therein from discovery from another source.

e. Pre-existing documents, books, records, reports, etc. are not subject to the privilege simply by placing them in the possession of the attorney.

f. The circumstances of the communication must demonstrate that it was made "in confidence" and there must be an expectation that such information will be held in confidence by counsel. If the information is revealed to third parties (not working under the direction of counsel), the privilege generally is lost.

g. Legal assistants, investigators, legal secretaries, agents and subordinates working under the direct supervision and control of the attorney are included within the scope of the attorney-client privilege.

V. Determine Who Should Investigate

A. Possibilities may include: internal Human Resources personnel, in house counsel, regular outside counsel, specifically appointed outside counsel, a member of management, a member of the employer's audit/ethics/security department, an outside investigator.

B. Factors to consider in selecting the investigator may include: integrity and objectivity (both actual and perceived), diplomacy and ability to maintain confidentiality, prior experience, cost, skill set (*e.g.* focus, flexibility, ability to take comprehensive notes while both absorbing what the witness is saying and formulating appropriate follow up questions, ability to engender trust in interviewees, attention to detail, ability to assess credibility, ability to overcome concerns of recalcitrant witnesses, presentation as a witness at trial), familiarity with applicable company policies and practices, participation in investigation of any prior complaint involving the complainant or alleged wrongdoer.

VI. Consider the Timetable for the Investigation

A. Factors to consider include: the need to start and complete the investigation as expeditiously as possible without compromising the need to do an adequate investigation and whether any milestone dates are approaching (*e.g.*, dates the complainant and the alleged wrongdoer are expected to be together, date by which the complainant says an EEOC charge will be filed, date a witness is to be advised of a negative job action).

B. Do not create unreasonable expectations. If possible, provide a goal and explain that it is not possible to make guarantees, as you do not know where the investigation will lead.

C. Consider measures to expedite the investigation, *e.g.*, interview persons at same site on same day and/or have a second person who can take notes participate in the investigation, thus enabling the primary questioner to question more expeditiously. (Including a second person in the interviews can also be helpful in assessing credibility.)

VII. Consider How the Investigation Should Be Documented

A. Possible Methods:

1. Tape recording/transcript of court reporter/videotaped: Provides a verbatim record but may have a negative impact on the candor of witnesses; creates potential for problems caused by mechanical failure; discoverable (which may be a pro or a con) if the investigation is not privileged or if the privilege is waived.

2. Computer-generated notes: Promotes ability to take comprehensive notes, but creates physical barrier between the interviewer and witness and thus may have negative impact on the candor of witnesses.

3. Handwritten notes: Enables the interviewer to remain more engaged with the witness and enhances the witness's comfort level, but this can be at expense of comprehensive notes.

4. Handwritten statement of witness: In the witness's own hand, making it more difficult for the witness to deny the content later, but at the expense of comprehensiveness. May also intimidate witnesses.

5. Written report: Provides a comprehensive record to support the decision and creates an institutional record for future matters that may be related to the current investigation or arise from the investigation.

VIII. Identify the Sources of Information and Documents To Be Reviewed[3]

A. Depending on the case, these may include:

1. Complainant's written complaint and/or any notes regarding an oral complaint.

2. Relevant rules, policies, procedures, and instructions.

3. Managers' notes and files.

4. Prior investigation files.

5. Memoranda or notes about the incident(s).

[3] Significant portions of Sections 8-11 were taken, with permission, from N.L. Abell "Conducting A Defensible Investigation." ©2000 Paul, Hastings, Janofsky & Walker, LLP.

6. Records of prior complaints against the alleged wrongdoer.

7. Records of prior complaints by the complainant.

8. Personnel files of individuals involved.

9. Statements written by or obtained from witnesses.

10. Relevant business records (such as time cards, calendars, diaries, tape recordings, photographs or logs).

11. Physical evidence, such as samples.

12. Documents from third-party sources.

13. Union complaints.

14. Information from background checks.

15. Police Reports.

16. Agency charges and documents.

17. Previous litigation documents.

IX. Determine the Order in Which Information Should Be Sought

A. Strategic Concerns

1. Avoid compromising the availability of information by delay.

2. Avoid giving witnesses the opportunity to collaborate on their stories.

B. Decide the order of the interviews.

1. Consider if there is any reason not to interview the complainant(s) first.

2. Consider whether the alleged wrongdoer(s) should be interviewed second, last, or in some other order.

C. Consider when third party witnesses should be interviewed.

1. Remain flexible and change the sequence as appropriate.

2. Add witnesses as identified.

3. Research additional sources of information as identified.

4. Ask each witness to list all individuals who may have knowledge of the event and to identify any other sources of information or documents.

X. Determine Which Witnesses To Interview and the Topics To Be Covered

A. Identify potential interviewees and their relationship to the matter under investigation.

1. Person(s) who raised the issue(s).

2. Persons identified by person(s) who raised the issue(s).

3. Persons identified by person(s) being investigated.

4. Supervisors of persons involved.

5. Observers of the incident(s).

6. Others with relevant information.

7. Authors of relevant documents.

8. Co-workers of persons involved.

9. If appropriate, other persons who reportedly have been subjected to similar activity.

B. Prepare thoroughly in advance of the witness interviews.

1. Determine the issues that should be explored with the witness.

2. Have a full understanding of the law, policy or guideline that will be critical in reaching a resolution of the issue when the facts are ascertained.

3. Understand what facts are necessary to reach a conclusion.

4. Determine what written documents will assist in reaching a conclusion or in determining certain facts, and have copies available to review with the witness.

C. Prepare a detailed outline of key questions.

1. All incident(s) or matters the witness should be asked about and all details regarding each.

2. Information the witness is believed to have.

3. Information from others the witness may be able to corroborate or refute.

D. With witnesses, cover all events that occurred during the relevant time frame in chronological blocks of time. Do not leave the time block until all details necessary to recreate the events have been established. For each block of time cover:

1. Exactly what occurred?

2. When did it happen?

3. Where did it happen?

4. Who was involved or otherwise present?

5. Who else may know of relevant information?

6. How did it happen?

7. Who did or said what?

8. In what order?

9. Why did it happen?

10. Who is to blame?

11. Could it have been avoided?

12. Was this an isolated event or part of a pattern? If there has been a pattern, cover each prior incident.

13. What impact, if any, has the event had?

14. With whom has the event been discussed?

15. Are there any notes, recordings, photographs, physical evidence, or other documentation?

XI. Determine What Disclosures Must Be Made to the Interviewee and Whether the Interviewee's Counsel Must or Should Be Permitted To Be Present at the Interview

A. Make appropriate disclosures at the commencement of the interview and perhaps retain a written record indicating they were made (*e.g.*, a signed memorandum from the interviewee acknowledging the disclosures were made or from two witnesses indicating the disclosures were made).

B. State what is being investigated, *e.g.*, why the interview is taking place.

C. Advise what role the interviewee may play in the investigation.

D. Tell how the information received may be used.

E. Explain that information obtained during the interview will be reported to those within and possibly outside the employer who have a need to know of it.

F. Explain the seriousness of the investigation.

G. Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.

H. Caution that attempting to influence the investigation, for example, by pressuring others to support a particular viewpoint or implying retribution for failing to do so, is improper and may be cause for disciplinary action.

I. State that the counsel/representative is conducting this investigatory interview as an attorney/representative for the employer and is not acting as an attorney representative for the interviewee.

J. If applicable, indicate that the purpose of the communication is to allow counsel to formulate legal advice for the employer, the interview is privileged and confidential, and the witness may not disclose any portion of it to anyone else. Also specify steps the individual must take to protect the privilege.

K. Caution that discipline and possibly criminal prosecution (if applicable) could result. If an attorney is conducting the interview, consider whether it is necessary or advisable to tell the alleged wrongdoer that he or she may or should have private counsel present.

L. If the interviewee refuses to participate in the interview or answer questions without his or her counsel, explain the consequences.

1. Indicate to the alleged wrongdoer that the interview is designed to give the individual an opportunity to relate his/her version of the events and to advise management of any information it should consider before it finalizes its investigation. If the alleged wrongdoer refuses to participate, management should tell the interviewee that the company will base its decision on the other information gathered during the investigation, the inferences drawn from that evidence, and the alleged wrongdoer's unwillingness to cooperate in the interview.

2. If the interviewee is represented by counsel, counsel for the employer must consider the ethical ramifications of communicating either directly or indirectly with the interviewee during the investigation. For example, if the investigation occurs after an EEOC charge is filed and the interviewee is represented by counsel, then the employer's counsel should not communicate directly with the interviewee. In such cases, if the employer does not want the interviewee's counsel present at the interview, then the

employer should consider having someone other than counsel conduct the interview.

3. In some instances, it may be necessary or desirable to interview the witness in the presence of his or her counsel. If so, set up ground rules to ensure the interview does not become an adversarial proceeding, *e.g.*, interviewee's counsel may observe, but not participate in the process.

M. If a union employee requests union representation and has a reasonable belief that the interview may result in disciplinary action, do not proceed without a union representative. *See infra,* p. 12.

N. If a collective bargaining agreement covering the interviewee requires that the interviewee be offered union representation, offer it.

XII. Determine Who Should Attend the Interviews

A. Company Representatives

1. The presence of too many people at an interview may have an intimidating or chilling effect on a witness and may limit the effectiveness of the interview. Thus, in general, it is best to limit attendance at interviews only to those individuals who have a role in the interview, *i.e.*:

a. The investigator(s)

b. The witness

c. Where applicable, an individual (such as a paralegal) who may be assisting the investigator by taking notes or recording the interview.

B. Employee Representatives

1. Attorneys:

a. In general, an employee does not have a right to have counsel present at the interview.

b. However, as discussed above, there may be a number of reasons to consider permitting an employee to have his or her counsel present. *See supra*, Section XI.

2. Friends, Family, or Other Outside Representatives.

a. In general, employees do not have a right to have such non-employees present, and such requests should generally be denied unless company policy or rules permit it.

b. In cases where severe sexual or physical misconduct is alleged, a complainant may find it difficult to discuss the details of the allegations and may request the presence of a non-employee to provide support to her or to him. Depending on the facts of the situation, it may be worth considering granting such a request.

3. Co-workers.

a. Unionized Employees.

i. If it is reasonable to believe that an interview of a unionized employee may lead to discipline of that employee, then the employee can request to have a union representative present as a condition of participating in the interview. *National Labor Relations Board v. J. Weingarten, Inc.,* 420 U.S. 251 (1975).

ii. The employer does not have to grant the request and may choose to forgo the interview rather than permit a union representative to be present. *Id.* at 258.

iii. Employers are not required to advise or inform unionized employees of their Weingarten rights before interviewing them. However, as a best practice, it may be advisable to do so to avoid claims that the employee was coerced into participating, without representation, in an interview that led to discipline.

iv. If the employer grants the Weingarten request, then the union representative may not disrupt the interview, but can clarify facts or suggest other employees who may have knowledge of facts. *Id.* at 259.

b. Non-Unionized Employees.

i. The National Labor Relations Board had previously held that the Weingarten rule also extended to non-unionized employees and, consequently, that non-unionized employees had a right to request the presence of a co-worker at an interview that might reasonably be believed to lead to discipline. *See Epilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000), *enf'd in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001).

ii. However, the Board has since overruled *Epilepsy Foundation* and has held that Weingarten rights do not extend to the non-unionized workplace. *IBM Corp. and Kenneth Paul Schult*, 341 NLRB 1288 (2004). As a result,

non-union employees do not have a right to condition their participation in an interview on the presence of a co-worker.

C. Multiple Witnesses at Interviews

1. It is best to interview witnesses one at a time to avoid undue influence on an employee's testimony by the presence or testimony of other employees.

XIII. Prepare a Statement To Be Given at the Beginning of the Interviews

A. To protect the employer against claims that witnesses were misled or not advised about key procedural elements of the investigation, consider preparing a written statement to be provided to witnesses at the start of an interview. Such a statement should:

1. Explain the allegations that the employer is investigating and indicate that the investigator is conducting the interview to gather information about the allegations.

2. State the employer's policy against retaliation and advise the employee that discipline may be imposed for retaliation. *See EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, ("[W]hen management investigates a complaint of harassment, the official who interviews the parties or witnesses should remind these individuals about the prohibition against retaliation.").

3. State the employer's expectation that the employee will provide truthful and complete information in the course of the interview and investigation.

4. State the employer's expectation that the employee will treat information discussed in the interview confidentially and will not disclose it to, or discuss it with, other employees.

5. If counsel is conducting the interview, advise the employee that counsel represents the employer and that there is no attorney-client relationship between counsel and the employee.

6. Avoid statements or suggestions indicating that the employer has prejudged the truth of the allegations or the outcome of the investigation, and affirmatively state that the employer will decide upon appropriate action after the investigation is completed.

7. For unionized employees, if the employer decides to advise employees of their Weingarten rights (see above), state that the employee has a right to request the presence of a union representative at the interview if it is reasonable to believe that the interview may result in discipline.

B. If possible, a copy of the written statement should be signed by employees and maintained as a record of the disclosures.

XIV. Prepare To Deal with the Employee Who Fails to Cooperate

A. At times, employers may encounter situations where employees fail or refuse to cooperate with the employer's investigation.

B. Failure to cooperate in an investigation may take a number of forms, including:

1. Refusing to participate in interviews.

2. Refusing to provide documents or information requested in the course of the investigation.

3. Providing misleading or untruthful information either in interviews or otherwise during the investigation.

4. Interfering with an investigation by disclosing confidential information about the allegations or the investigation.

5. Interfering with an investigation by attempting to influence testimony or statements from other witnesses.

6. Refusing to comply with temporary measures that are put into place while the investigation is pending and that are designed to avoid inappropriate conduct or minimize damages from it.

C. Special Considerations for the Reluctant Complainant

1. An employer may sometimes learn of inappropriate conduct from someone other than the aggrieved employee, such as:

a. a witness to the conduct

b. a confidant of the aggrieved employee

c. an anonymous source who submits information to the employer's hotline, to a manager, or to Human Resources.

2. At times, when approached by the employer for information about the inappropriate conduct, an aggrieved employee in those situations may be reluctant to complain formally, to provide information about the allegations, or to otherwise participate in the investigation.

3. Such reluctance may be viewed as a refusal to cooperate in the investigation. *See EEOC Guidance* ("[A]n employee can be expected to cooperate in the employer's investigation by providing relevant information.") It may also be viewed as a failure under *Faragher-Ellerth*

to "take advantage of . . . preventive or corrective opportunities provided by the employer" to "avoid or minimize the damages that result" from harassment. *See EEOC Guidance*, quoting *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292, 2293 (1998).

4. However, the EEOC counsels employers to consider whether there are reasonable explanations for an aggrieved employee's failure to utilize the complaint process. The EEOC cites three examples of explanations:

   a. Where the aggrieved employee reasonably feared retaliation based on the facts known to the employee at the time.

   b. Where the complaint process imposed "unnecessary obstacles to complaints," such as:

      i. intimidating or burdensome requirements for participating in the process

      ii. inaccessible points of contact for making complaints (*e.g.*, company official who would take a complaint is inaccessible during hours of work or is at a different location)

      iii. undue expense to the employee in the process, and

      iv. requiring an employee to waive procedural or substantive rights as a condition of participating in the process.

   c. Where the employee has a reasonable belief that the process was ineffective. Such belief may exist, for example, if the process required the employee to complain first to the harassing supervisor or if the employee knew of prior complaints from co-workers where the company did not stop the harassment.

XV. Determine the Consequences of an Employee's Failure to Cooperate

A. If a complainant, accused or witness refuses to cooperate in an investigation, consider the following course of action:

   1. Communicate with the employee in an attempt to obtain cooperation

      a. Ask the employee for his or her reasons for not cooperating and try to ascertain whether those reasons (*e.g.*, fear of retaliation) can be addressed.

      b. Explain to the employee that:

i. the employer has a duty to investigate the allegations thoroughly

ii. the employer is attempting to handle the matter fairly by gathering information from all concerned

iii. if the employee refuses to participate, the employer will have to reach its conclusions without the benefit of the employee's input.

c. Give the employee another chance to cooperate and, consistent with the employer's investigation plan and objectives, consider providing another avenue for the employee to cooperate.

d. If the employee persists in not cooperating, document the failure to cooperate in a statement signed by the employee.

B. Discipline for Failure to Cooperate

1. Employees can be disciplined for refusing to cooperate with an employer's investigation. *See Lattimore v. Initial Security Inc.,* 2005 Lexis 16162 (S.D.N.Y. Aug. 3, 2005) (Both insubordinate behavior and refusing to cooperate with an internal investigation constitute legitimate grounds for discharge.) (citing other cases in support of the proposition).

2. As a best practice, the level of discipline should generally be proportionate to the level of conduct involved in an employee's refusal to cooperate. For example, while it may be appropriate to terminate an employee who provides false information about a material issue in an investigation, it may be viewed as unreasonable to terminate an employee who, contrary to the employer's admonition, discusses minor details of an investigation with co-workers.

3. Any discipline that is imposed should be done so in accordance with:

a. company policies and rules regarding discipline

b. any individual employment agreements

c. applicable procedures in collective bargaining agreements, and

d. state and local law concerning discharge of employees.

C. Caution Against Discipline of the Complainant for Failure to Cooperate

1. It is usually not advisable to discipline a complainant for failure to cooperate in an investigation. Doing so creates a risk that the action will

be perceived as retaliation against the complainant for engaging in protected activity.

2. Discipline of a complainant should be considered only in cases where it is plainly demonstrable that the complainant acted in bad faith and without a good faith belief that she or he was engaging in protected activity.

XVI. Consider Implementing Temporary Remedial Measures While the Investigation Is Pending

A. As the EEOC advises, "it may be necessary to undertake immediate measures before completing the investigation to ensure that further harassment does not occur." *See EEOC Guidance;* s*ee also Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001) (explaining that an employer's obligation to take corrective action reasonably calculated to end harassment first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified and second consists of the permanent remedial steps the employer takes once it has completed its investigation).

1. Determining the form of the temporary measures.

a. The form of the temporary measures will depend on the nature and severity of the allegations of harassment. Where there are allegations of severe misconduct (*e.g.*, cases involving touching or actual or threatened violence), employers should be careful to implement measures to protect the safety of the complainant, as well as other employees.

b. In all cases, employers should immediately advise the complainant and the accused of the employer's policy against retaliation and should further advise the complainant of avenues for reporting any additional harassment or perceived retaliation that might occur while the investigation is pending.

c. Employers should also immediately remove and preserve any sexually explicit or otherwise objectionable material that may have been displayed during the incidents at issue.

d. Depending on the facts involved, the following are examples of additional temporary measures that may be appropriate for an employer to take:

i. advising the complainant and accused not to have any contact with each other while the investigation is pending

ii. changing schedules or shifts to minimize contact between the complainant and the accused

iii. transferring the accused to a different department or location

iv. allowing (but not requiring) the complainant to work from home or at a different location

v. placing the accused on "non-disciplinary leave with pay pending the conclusion of the investigation." *EEOC Guidance*.

B. Temporary Measures Should Not Burden the Complainant.

1. Employers should avoid taking any temporary measures that make the complainant worse off. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation. *EEOC Guidance; see also Hostetler v. Quality Dining Inc.*, 218 F.3d 798, 811 (7th Cir. 2000) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim's wages or other remuneration, increases the disamenities of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.") (citations omitted).

C. Temporary Measures Should Not Be Punitive in Nature for the Alleged Wrongdoer

1. While the alleged wrongdoer may necessarily have to be burdened by some of the temporary measures an employer may implement, employers should avoid temporary measures that are intended to be punitive. Implementing such measures may lead to claims from the accused that the employer prejudged the outcome of the investigation and that the accused was unfairly deprived of employment benefits or opportunities.