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Investigating Workplace Misconduct in Christian Ministries

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1. Introduction

- a. Types of Misconduct - sexual misconduct, including abuse of a child, financial impropriety, abuse of power, harassment, and violation of ministry policies or code of conduct.

2. Why Conduct an Investigation?

a. Legal Requirements or Best Practices

- i. Title VII requires employers to take “all steps necessary” [29 CFR Section 1604.11(f)] to prevent harassment (particularly sexual harassment) in the workplace. While many of our clients may fall under a Title VII exemption, these best practices are helpful. Even where exempt, we want to see employees in Christian ministries treated as image-bearers of God and protected from harassing conduct.

- ii. EEOC guidance

b. Risk Management

c. Manage Reputational Risk

d. Minimize Harm

3. Steps to Consider

- a. Should there be an investigation? Is there a conflict? Uncertainty? Possibility of additional victims or occurrences? Damage to morale?

- b. What's the scope of the inquiry? Have to consider the question you're going to answer. Investigations should be fair, timely, and thorough.
 - i. Timeliness is key - EEOC v. Management Hospitality of Racine - two month delay before starting an investigation was not the type of response that was "reasonably likely to prevent harassment from recurring." One day's response time between complaint and the first interview has been held to be timely, but there's a large gap in between.
 - ii. Want to educate the organization's Board and manage their expectations. Many faith-based organizations will not have gone through an investigation before. Set parameters for how you will conduct the inquiry and what result they will receive. Are you giving factual findings only, or recommendations for next steps as well?
 - 1. Query - how do you respond to objections that they want to observe a Matthew 18 process?
 - 2. Particular warning against retaliation - made up 56% of charges filed with the EEOC in 2023. Again, while church employees may be exempted, retaliation against those bringing complaints will have a chilling effect on future complaints.
- c. Bias
 - i. Guard against confirmation bias - beware the tendency to bolster a hypothesis by seeking consistent evidence while ignoring contrary biases. So helpful to work in a team when possible; to really poke holes in the evidence. If investigating a senior leader, there will be a confirmation bias of wanting to disprove the allegation.
- d. Requirements for the Investigator
 - i. Internal or External investigator.
 - ii. EEOC says investigators must be skilled, impartial, and objective. If there is any reason you could be perceived as unbiased, choose another investigator.
 - 1. Query - how do we address concerns that an investigator is biased because it's the board or the denomination that is paying the bill?
- e. Consider the privilege of the investigation.
 - i. If conducted for the purpose of providing legal advice, at the direction of

legal counsel, we can maintain privilege. If the inquiry is a routine HR function or compliance audit, privilege will be more difficult. “Fact-finding which pertains to legal advice counts as ‘professional legal services’” United States v. Rowe (9th Cir.1996) 96 F.3d 1294

- ii. Attorney work product - If you’re investigating in anticipation of litigation, privilege will attach, but there must be a real and substantial threat of litigation, and the investigation must be created because of that threat. Ordinary business investigations of harassment complaints will not qualify.

f. Order of Interviews

- i. Complainant first. Respondent last? Can vary, especially if you have access to the respondent more than once.
- ii. Document Review - don’t ignore the risk of knowing too much as you go in. If you know that the complainant has already made a few complaints and they were all unsubstantiated, then could that create bias against the claim you’re investigating?

4. Considerations for Interviews

- a. Interviews are neither a cross-examination nor a therapy session. Your role is to uncover the facts.
- b. Location of interviews - on-site can impact confidentiality. Consider a neutral third space, especially if the organization’s offices are the site of the action that prompted the complaint. In-person is preferred, especially with the main complainant and respondent, but video calls are acceptable.
- c. Introduce yourself - most people being interviewed have not participated in an investigation before. Explain your role as a third-party fact finder. If you’re in-house, you must give an Upjohn warning that you represent the organization and not the employee, and that the company controls the attorney-client privilege.
- d. Address Confidentiality - we want to honor confidentiality but cannot guarantee confidentiality. I always say that I won’t name people specifically in the report, but the relevant details may identify them to those who know.
 - i. Query - What if someone asks to remain anonymous, or to only share background information?
- e. Closing Questions - always ask “is there anything else you think I should know?” reiterate confidentiality, and invitation to reach back out. May help to identify another person in-house who they can contact if they lose your information.

- f. Prompt Documentation - how you document the interview matters. Whether handwritten notes or an AI transcript, you must document the interview. Fill in the notes immediately after the interview. I do not allow witnesses to record their own interviews.
 - g. Credibility factors - The investigator must consider the inherent plausibility of the allegations, motive to lie, corroboration, the witness's ability to perceive or recall history of honesty, dishonesty, habit, consistency, inconsistent statements, manner of testimony, and demeanor.
 - h. Evidentiary standard - preponderance of the evidence unless otherwise specified.
 - i. Findings - Investigators have to show their work; you have to explain how you reached the conclusion. Don't require the reader to make any assumptions along the way. On the one hand, X, on the other hand, Y. X outweighed Y, therefore...
5. Closing the Inquiry.
- a. Written report versus verbal summary?
 - b. When giving recommendations to the Board, the last one I always make is how widely the report should be shared. Some investigators will release the full report, many a summary. I typically have a full report for the Board or governing entity, a summary for the complainant and respondent, and talking points for those who were interviewed.