

HRPA's New Practice Standard: Conducting Workplace Investigations Q&A

October 12, 2022

Please note that the following answers below do not constitute legal advice.

- 1. If I am the only HR professional at my organization and I feel like I do not have the skills to do a workplace investigation, what would you recommend, especially if there is no budget available to outsource the investigation?**

One option is hiring an investigation coach, budget permitting. There are often third-party investigation organizations that offer this service for those who cannot afford hiring a third-party investigator to lead the entire investigation. An investigation coach would work with you and serve as a guide for you, advising and guiding you at certain key points, such as developing an investigation plan, report, etc.

It would also make sense to take the time to upskill in this area to improve your expertise. The HRPA regularly offers webinars and certificates in workplace investigations which can help you gain appropriate competencies. There are other programs and course offerings outside of the HRPA too.

- 2. How do we best manage a situation where HR is brought into an investigation only after a non-HR professional has already started the process? Do we even get involved? Can we be held liable if a subsequent complaint is launched with HRPA, Human Rights, etc. although the HR professional was not the one to cause the issue for the complaint is based on?**

If you are a registered HRPA member or student and were not part of or aware of any of the misconduct that may have occurred before getting involved in the investigation, this would not constitute a breach of HRPA's Code of Ethics and Rules of Professional Conduct should a complaint be filed with HRPA. While we would

assume that the same applies to any other legal proceeding, we can only speak directly to HRPAs processes.

To avoid any potential issues, when taking over the investigation, it makes sense to assess what has been done, whether or not appropriate protocols have been followed, and if not, potentially start the investigation over. It's important that the investigation is done properly.

Preventing this issue from happening in the first place is also important. Ensuring everyone in the workplace is aware of what the proper protocols are for launching an investigation, who should be notified, and who will take the lead can be helpful.

3. In your opinion, in workplace investigations should the burden of proof be to prove 'beyond a reasonable doubt' or 'on a balance of probabilities'? Especially if the outcome of an investigation may involve terminating an employee?

It must always be on a balance of probabilities and this is also stipulated in the [Practice Standard](#) (section 6. e, page 16). Beyond a reasonable doubt is generally limited to criminal proceedings. If considering terminating an employee, ensure the evidence is strong enough to support this result.

4. You talked about acknowledging your biases. If you think you may have some but believe that you will be able to proceed in a fair manner, should you inform the parties involved in the investigation about the potential biases but why you think you will be able to complete a fair investigation regardless?

This can vary on context, but generally, we would suggest not doing so. This could cause people to question your capabilities. If you are confident you can proceed without biases and are in compliance with the Practice Standard's requirements around biases and fairness, then you should proceed accordingly.

5. What if a person involved in the investigation refuses to have their interview recorded?

When asking for permission to record, you can explain why it is being recorded, how it will be safeguarded, and who will have access to the recording. This can help the person better understand the purposes of recording.

If the person still refuses to be recorded, you cannot force them and should respect their wishes.

6. If an interview is recorded (with permission), can sign off of the interview notes be waived – assuming that the recording worked?

Even if there is a recording, notes could be taken that don't align with what was said in the recording and those notes could still be used to inform the investigation report and outcomes. For that reason, we believe that it is important that notes are still reviewed and signed off on. That being said, this is definitely something that the HRP A will look into again when reviewing the Standard during its next review cycle.

7. I have recently conducted an internal investigation for alleged workplace harassment. The investigation concluded and the outcome was communicated to the complainant. A few weeks after the investigation closed, a witness came forward indicating that they have not been contacted. The complainant was copied on the email. Any advice on how to navigate this situation? Have you ever come across a case where the outcome changed as a result of new information coming to light?

When new information related to an investigation does come to light, you should assess it against all other information you've already gathered and ask yourself – if this new information is true, would it change the outcome of the investigation? If not, then there is no need to revisit the investigation. If yes, then the case may need to be reopened. This may need to be a team-based decision and context can impact things, including how much later the new information comes to light. New information changing the outcome of an investigation should be rare – in fact, in all the cases investigated by Bernard & Associates over the years, new information that

came to light after an investigation has yet to change the outcome, though of course it could happen in the future.

8. If you have an allegation that is definitively refuted by the witnesses, would you still put it to the respondent?

Yes, you should always allow the respondent to respond to all allegations, even if the allegations have been refuted by a witness. New information can always come to light and respondents must always have a fair opportunity to respond.

9. Is it illegal to record an interview without permission? If you started the interview by stating that you will be recording rather than explicitly asking for permission, can you proceed with the recording?

It is not illegal in Canada as long as you are part of the conversation in the recording, but in an interviewing situation it would be unethical to record the interview without consent of all parties participating in the interview. HRPAs members and students should always ask for permission before recording.

10. Can you lean more into the idea of not trying to prove the allegations are true but rather getting information that exists on both sides of the argument?

When conducting a workplace investigation, you must always be neutral and gather all relevant information and/or records you can access from both sides. You should never be going into an investigation biased and trying to prove one side of the argument over another. Your goal is to get to the truth and let the evidence tell the story – therefore you need information and evidence on both sides. Upon completing your investigation, you will use a balance of probabilities to determine the outcome. This is referred to as keeping an open mind and investigators should always stay open minded to all possibilities in an investigation.

11. If an employee has already signed a confidentiality agreement with the organization, is it best practice to have them also sign a separate confidentiality agreement for the investigation?

Yes. HRPAs members and students are expected to follow the confidentiality and privacy standards put in place in the [Conducting Workplace Investigations Practice Standard](#). This includes always instructing complainants, respondents, and witnesses to maintain confidentiality regarding the fact and nature of the workplace investigation itself and in the investigation process, and to refrain from sharing information about the investigation or complaint with other employees or witnesses both during and after the investigation.

These instructions should be provided in writing, including specific examples of things to avoid- such as discussing particulars of the situation, adding one's own commentary or workplace gossip. Consequences of confidentiality breaches should be clearly explained and outlined in writing. One exception is that complainants and respondents may share information with their respective advisors (union representative, lawyer, etc.) so long as those representatives agree in turn to maintain confidentiality of the investigation and process.

12. Do the complainants and respondents have the right to know if the claims have been substantiated or not?

Both complainants and respondents have the right to know of the outcome and conclusions of the investigation and any actions being taken, in writing once the investigation has concluded. For more details on communicating outcomes of the investigation and addressing retaliation that HRPAs members and students are expected to comply with, see section 7 (page 17) of the [Practice Standard](#).

13. If an employee is involved in a harassment investigation and has been interviewed by the employer and advised to keep it confidential, but the employer finds out that the employee has breached confidentiality, can the employer discipline the employee?

The importance of maintaining confidentiality and the consequences of not doing so should be clearly explained to all parties of an investigation before beginning and be provided in writing. This should also be part of the employer's policy around workplace investigations. The employer should then follow the protocols in place in

the policy around breaking confidentiality, which would likely include some sort of disciplinary action(s).

14. What is Dean Benard's contact information?

Dean Benard can be reached at dbenard@benardinc.com or by telephone at: 519-880-1917 ext. 701. His website is: www.benardinc.com.

15. Should your plan identify all the names of employees at the organization that hired you?

Deciding on witnesses can depend on the context and varies on a case-by-case basis. Every investigation should start with an investigation plan that is prepared by the investigator and captures the mandate of the investigation, and an initial list of appropriate witnesses (which may change/expand over the course of the investigation).

16. I understand the importance of confidentiality. In my experience, asking people to sign confidentiality agreements sometimes comes in tension with a trauma -informed approach. i.e. asking a complainant not to talk to people was perceived badly, as some current or former colleagues might be their close friends/support people, and that it's unfair to expect them not to talk to their closest friends. Do you have any guidance on how to approach this kind of situation?

This can be a very challenging situation. However, in order to maintain the integrity of the investigation and ensure that it is fair, it is important that confidentiality is not breached. While this would need to be assessed on a case-by-case basis, workplaces may wish to offer to the complainant and respondent a designated, external support person who is not at all involved in the investigation or part of the workplace. This support person would be expected to sign and follow the same confidentiality agreements.

It may also be helpful to refer the parties involved in the investigation to mental health supports to help them through the process.

17. What are the timelines for submitting a complaint for investigation?

This is a difficult question, as some circumstances would alter the answer. For example, if a person wanted to complain about issues from 5 years past with no recent repeat of those issues, it might be unreasonable to investigate. However, if the issue in question was a particularly egregious behaviour such as sexual harassment one would need to consider the possibility of investigating.

Many policies written about investigations in the workplace put limits on timelines but this is not a question that can be simply a time limit to complain. It is important to consider that some issues might lead to legitimate delays in making a complaint.

Another issue in very old matters is how viable the investigation is in terms of available evidence (witnesses & documentation). If alleged behaviour is ongoing and dates back months or years, the older issues are appropriate to investigate as they tie into the more recent issues as a pattern of ongoing behaviour. The question will be about how far is it necessary to go back to look at incidents when more recent ones might be all that require in depth investigation. So unfortunately, there is no simple answer to this question.

18. Does HRP A have a confidentiality template we can use as part of an investigation?

HRPA does not currently have a confidentiality form template.

19. In our organization, we have seen an increase of investigations related to microaggressions. In your opinion, do you think HR professionals need to be trained specifically in investigations related to racial discrimination?

It is expected and stated in [HRPA's Practice Standard on Conducting Workplace Investigations](#) that HRP A members and students must be trained and competent to conduct a workplace investigation in a neutral and objective manner. For matters related to racism and discrimination, having competencies and knowledge in these areas would be important in order to conduct a fair investigation.

HRPA members and students should consult our [Practice Guideline on Addressing Racism and Racial Discrimination](#) to assist with this as a starting point.

20. Can you speak a bit more about obligations to communicate outcomes to complainants – to what extent is it appropriate / inappropriate?

Full details on the expectations around this can be found in section 7 (page 17) of the [Practice Standard](#). To summarize, the outcome and conclusions of the investigation and any actions being taken must be promptly reported to both the complainant and respondent in writing once the investigation has concluded. All parties involved in the investigation should also be reminded that confidentiality must be maintained and retaliation/reprisal must not occur.

21. What types of situations require an investigation?

Complaints, allegations, or incidents the workplace is aware of or ought to be reasonably aware of occurring in the workplace, including but not limited to harassment, discrimination, bullying, privacy breaches, substance use at work, theft, vandalism, retaliation, threats of violence, and assault should prompt an investigation.

Employers should also assess and follow what is written in their own policies around what will not be tolerated in the workplace and/or what can constitute a workplace investigation (as long as the policies comply with all applicable laws).

22. What if the investigation is inconclusive such as in a 'they said/they said' investigation? Can your investigation conclude there is no way to reach a conclusion?

No, an investigation should not lead to a tie. This is where the work of investigations can be very nuanced and require expertise in assessing credibility. There are many techniques to look at credibility and through that lens and based on a balance of probabilities, an investigator must always decide one way or another. This decision does however require a careful consideration of credibility and not simply a “gut feeling” one person is more believable.

23. In a workplace harassment investigation, can we disclose the name of the accuser if it was asked by the accused? Are they entitled to that information?

Natural justice (procedural fairness) requires that the respondent is provided with the allegations, or at least the substance of the allegations, prior to being interviewed- which can include the name of the accuser. This may also be required by the applicable legislation and the employer's policies.

Respondents should be given a full and fair opportunity to respond to the allegations, including providing evidence and/or names of witnesses to support their response/defence. In addition, both the complainant and respondent must be provided with any evidence received in the course of the investigation that is probative and potentially adverse to their interests. Each must be granted the opportunity to respond to that information.

24. Any advice on what to do if an employee doesn't want to be a complainant because the respondent is their manager and the issue is not too egregious, and they don't want to create tension with their manager?

These circumstances are always challenging and, in these cases, it is first important to advise the person that once you are aware of the situation you must take some action to investigate. In these circumstances it is sometimes possible to conduct a management-initiated investigation, where there is no specific Complainant. The approach to this type of process is different and through it all it is imperative the Respondent be treated fairly and know all the details required to prepare an appropriate response.

Having a conversation with the person raising the concerns and reassuring them that the company will not tolerate reprisal can sometimes help them come around to participating as a Complainant. In the end the investigation has to happen and the best you can do is provide a safe environment for all involved through reassurance, administrative paid leave, in some cases, and a clear and fair process that allows for the gathering of all relevant information. Also in these cases it is sometimes better to have an external investigator as this will often create a sense of safety for the parties as the external person will be viewed as neutral.

25. What are your thoughts on the timeline of placing an employee on Paid Leave pending investigation? We will do this upon receiving the complaint and then complete a thorough investigation so that we can provide a better opportunity for that employee to respond, but is that best practice?

Paid leaves are often the best approach. The first question to ask is whether there is a safety issue, either physical or psychological. For example, if the person being investigated is the direct manager of the Complainant, it is likely the Complainant will not feel safe and it is likely the Respondent won't either. If they can be separated and if you have confidence there will be no witness tampering then there might be alternatives to leave, such as having one party work from home, or a temporary assignment elsewhere. However, these are often not viable options and for the safety of all and the integrity of the investigation, a paid administrative leave is often best practice. Another consideration is the severity of the alleged conduct and the safety of others in the workplace. Putting someone on paid leave will add to the urgency to complete the investigation and it is important not to allow this urgency to affect the quality of the investigation.

26. Is it OK if the respondent wishes to make their own recording of the interview?

It is important to not allow this. Part of any investigation is the integrity of the process. As soon as something like a recording is available to be shared and out of your control it allows for others to listen in on an interview and possibly collude with others, or at a minimum be tainted by the information contained in the recording. This is why investigation processes take confidentiality so seriously and advise everyone, on possible penalty of disciplinary action, not to discuss any aspect of the investigation with others.