

LOCAL GOVERNMENT INDUSTRY GUIDELINES ON WORKPLACE INVESTIGATIONS

These Guidelines (the “**Guidelines**”) are made pursuant to Clause 36C(i) of the *Local Government (State) Award 2017* (the “Award”).

Purpose

These Guidelines are a practical guide on how to properly conduct and speedily conclude workplace investigations concerning possible unsatisfactory work performance or conduct by an employee.

Failure to comply with these guidelines may be used as evidence that a person or employer has failed to properly conduct or speedily conclude a workplace investigation. However, a person or employer cannot be prosecuted only because of a failure to comply with these guidelines.

These Guidelines should be followed when conducting a workplace investigation into possible unsatisfactory work performance or conduct by an employee unless compliance with the Guidelines could reasonably be expected to have one or more of the following effects:

- expose a person to a risk of harm, serious harassment, serious intimidation or a workers’ compensable injury under the *Work, Health and Safety Act 2011*;
- result in the disclosure of information for which there is an overriding public interest consideration against disclosure under the *Government Information (Public Access) Act 2009*;
- found an action against the employer for breach of confidence; or
- Result in the contravention of any Act or law.

STEP 1: UNDERTAKE A PRELIMINARY ASSESSMENT

Not every complaint or allegation requires investigation. Upon becoming aware of possible unsatisfactory work performance or conduct by an employee the employer may decide to investigate.

Some workplace investigations are subject to particular legislative requirements. The assessment of the possible unsatisfactory work performance or conduct and the determination of the nature of the investigation must be undertaken within the relevant framework and having regard to the particular requirements. Examples include complaints or allegations arising under:

- the *Model Code of Conduct* and the *Procedures for the Administration of the Model Code of Conduct*, made pursuant to Chapter 14, Part 1, Division 1, of the *Local Government Act 1993* (NSW);
- the *Public Interest Disclosures Act 1994* (NSW); and
- the *Independent Commission Against Corruption Act 1988* (NSW).

When deciding whether to investigate possible unsatisfactory work performance or conduct, factors that the employer should consider include:

- The seriousness of the possible unsatisfactory work performance or conduct;
- How recent the possible unsatisfactory work performance or conduct occurred;
- Potential implications in not undertaking an investigation; and
- Whether there are any mitigating factors (for example drug/alcohol dependency, health issues including mental health issues, or family/domestic violence issues).

Following the preliminary assessment, the employer should decide whether to:

- resolve the possible unsatisfactory work performance or conduct by use of alternative means and/or appropriate strategies (e.g. informal discussion, counselling, mediation and/or training);
- commence an investigation;
- suspend an employee (with or without pay) during an investigation, in accordance with subclause 36B(i) of the Award;
- refer the possible unsatisfactory work performance or conduct to another investigative agency (e.g. OLG, ICAC);
- take no action.

Factors to consider when deciding whether to suspend an employee during an investigation include:

- the seriousness of the possible unsatisfactory work performance or conduct;
- whether the suspected unsatisfactory work performance or conduct, if substantiated, is likely to constitute a serious breach of the employer's code of conduct, policies, procedures, contract of employment and/or other legal obligations;
- potential impacts on the employee (e.g. financial, reputation);
- potential impacts on the employer (e.g. financial, security of property, reputation, WHS, and the potential for evidence to be disturbed).

STEP 2: DETERMINE WHETHER THE INVESTIGATION WILL BE DONE INTERNALLY OR REFERRED TO AN EXTERNAL INVESTIGATOR

Where the employer decides to undertake an investigation into possible unsatisfactory work performance or conduct, the employer needs to decide whether the investigation will be done internally or referred to an external investigator. Factors to consider include:

- the time and other resources needed to properly conduct and speedily conclude the investigation;
- the availability of staff with the necessary skills and/or experience to properly conduct and speedily conclude the investigation;
- whether the person(s) conducting the investigation has a conflict of interest in the matter being investigated.

STEP 3: DEVELOP AN INVESTIGATION FRAMEWORK

Sufficient resources should be provided by the employer with the objective that the investigation should take no longer than is reasonably necessary to conduct a proper investigation. The time taken to conclude an investigation will depend on the nature of the investigation and the issues to be investigated. There are some investigations which can be concluded within one month.

The framework for the investigation should include:

- the appropriate authorisation to conduct the investigation; and
- the scope and timing of the investigation (including an estimated timeframe).

STEP 4: GATHERING INFORMATION

The task of an investigator is to gather information to assist the employer to make an informed decision. Workplace investigations typically involve enquiring, collecting information and ascertaining facts.

Gather potential sources of information

Lawfully gather potential sources of information which may assist with ascertaining the fact(s) in issue (e.g. documents, video footage, and witness statements).

Legislation which may be relevant includes, for example:

- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Workplace Surveillance Act 2005* (NSW)
- *Public Interest Disclosures Act 1994* (NSW)
- *Independent Commission Against Corruption Act 1988* (NSW)

Who should be interviewed, and in what order?

Determine who should be interviewed and the order in which witnesses are to be interviewed.

It is often preferable to interview the person(s) who made the complaint or allegation first as this can assist with obtaining further and better details which may need to be put to other witnesses at a later stage.

Meet with witnesses face-to-face, unless it is not practicable to do so

Witnesses should be interviewed during a face-to-face meeting. Where it is not reasonably practicable to interview witnesses during a face-to-face meeting it may be necessary for the investigator to explore other options, such as conducting an interview by telephone, videoconference (e.g. Skype) and/or by obtaining a written statement from the witness.

Provide reasonable notice to witnesses who are required for an interview

Employers can require their own employees to cooperate with workplace investigations into possible unsatisfactory work performance or conduct by an employee, which may include requiring employees to attend interviews with the investigator(s).

When informing an employee that they are required to attend an interview:

- Advise the employee that the employer has commenced a workplace investigation and provide a summary of the issue(s) under investigation.
- Advise the employee of the person(s) conducting the investigation.
- Advise the employee of any applicable requirements in relation to confidentiality; and
- Provide reasonable notice of the requirement to attend an interview (date, time and location).

Employees may request the presence of a union representative and/or a support person during the interview.

In addition to the above, where the employee to be interviewed is alleged to have engaged in unsatisfactory work performance or conduct:

- inform the employee of the substance of the alleged unsatisfactory work performance or conduct in sufficient detail so as to enable the employee to properly understand the allegation(s); and
- remind the employee that the employer has an Employee Assistance Program (EAP) and how it may be accessed.

Commencement of interviews

At the commencement of each interview the investigator should:

- Provide an introduction
- Explain the purpose of the interview
- Explain the role of the union representative or support person
- Explain the investigation process (in general terms).

Special requirements when interviewing an employee who is alleged to have engaged in unsatisfactory work performance or conduct

When interviewing an employee who is alleged to have engaged in unsatisfactory work performance or conduct, before concluding the investigation (how and when this is done is up to the investigator, depending on the circumstances):

- Inform the employee of the main points of the allegation(s) in sufficient detail so as to enable the employee to properly understand the allegation(s).
- Provide the employee with a reasonable opportunity to respond to the allegation(s).
- Subject to applicable legal requirements, show the employee relevant evidence, if any, which contradicts the employee's version of the facts (e.g. documents, emails and/or video footage).

Role of the union representative or support person during interviews

Subclause 36A(iv) of the Award provides that an employee shall:

“Be entitled to request the presence of a union representative and/or the involvement of their union at any stage.”

During fact finding interviews, union representatives and support persons should not:

- Advocate on behalf of the interviewee;
- Answer questions on behalf of the interviewee;
- Investigate;
- Interfere with or obstruct the investigation process.

Where a person assisting an employee is a union representative, they may have skills and/or experience that can assist in ensuring an effective investigation. In such instances, the industrial parties to the Award recommend that investigators extend professional courtesies to the union representative, which may include, for example, allowing the union representative to suggest that particular questions be asked which may have been overlooked, provided that they do not interfere with or obstruct the investigation process.

Review

After the initial round of information gathering, consider whether it is necessary, in order to ascertain a fact in issue, to re-interview a witness, interview further witnesses or gather additional information from other sources.

If the anticipated length of the investigation needs to be extended the employer should notify the employee and explain the reason(s) for the extension, and where the employee has requested the involvement of a union representative, such notice should also be provided to the union representative.

STEP 5: APPLY THE APPROPRIATE STANDARD OF PROOF

In workplace investigations concerning alleged unsatisfactory work performance or conduct the appropriate standard of proof is “the balance of probabilities”. This means it must be more probable than not that the allegation(s) are made out.

STEP 6: PREPARE AN INVESTIGATION REPORT

Once the investigator(s) has concluded the investigation they should prepare an investigation report.

The decision on what, if any, disciplinary action should be taken against an employee is a matter for the employer and not the investigator as it often involves consideration of information that is not available to external investigators, such as an employee’s previous work performance, length of service, and whether the employee has received prior warnings or commendations.

AFTER THE INVESTIGATION

Whilst an investigation report produced following a properly conducted investigation may contain useful information to assist the employer to make an informed decision on whether possible unsatisfactory work performance has occurred, other information may need to be considered before a final decision is made on what, if any, disciplinary action should be taken. For example, are there any mitigating circumstances?

- (i) Before deciding whether an employee's work performance or conduct is unsatisfactory the employer shall:
 - (a) provide the employee with the relevant findings of the investigation and any other relevant information (evidence and/or relevant extracts from the report) upon which the employer may seek to rely to demonstrate that the employee's work performance or conduct is unsatisfactory;
 - (c) provide the employee with a reasonable opportunity to respond;
 - (d) consider any response by the employee, including mitigating factors.

CONFIDENTIALITY

Workplace investigations should remain confidential. This includes information related to the investigation including the nature and details of allegations of unsatisfactory work performance or conduct, correspondence, witness statements/interviews, and investigation reports.

FURTHER INFORMATION

For further information:

- Employees should contact their union, and
- Employers should contact the Industrial Relations Unit, LGNSW