to be included in future contracts and narrowed areas of disagreement violated Sections 8(a)(2) and 8(b)(1)(A) of the Act pursuant to *Majestic Weaving*, 147 NLRB 859 (1964).

Although issues regarding neutrality/voluntary recognition procedures are being litigated before the Board and in the courts, Congress is considering the Employee Free Choice Act. Under this so-called "card-check bill," if a majority of employees sign valid union authorization cards, the Board will certify the union as their exclusive collective bargaining representative. The bill in the House has 234 co-sponsors, and the House Education and Labor Committee recently approved it.

IV. The Top 10 Employer Mistakes When Investigating Employee Complaints: How To Avoid Putting Your Company at Risk

Jane Kow*

1. ***Not conducting an investigation unless the complainant submits a signed written complaint or demanding that all witnesses provide their statements in writing.*** This remains one of the most common employer mistakes that typically flow from misguided company complaint procedures. However, the employer is obligated to conduct an investigation when it knows or has reason to know that an employee is being subjected to discrimination, harassment, or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements.
2. ***Not starting or concluding an investigation promptly.*** Waiting too long to kick off an investigation or postponing the conclusion of the investigation could lead to a claim that the company ignored the complaint or failed to take the concerns seriously.

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3. ***Not proceeding with the investigation when the complainant or the employee accused of harassment refuses to participate.*** Although an employer may avoid liability under Title VII of the 1964 Civil Rights Act for failure to investigate a harassment complaint, this may not be true under various state anti-discrimination laws. For example, the Ninth Circuit in *Hardage v. CBS*[1] affirmed the dismissal of a plaintiff's sexual harassment and retaliation claims under Title VII where the employer did not fully investigate his claims or take any corrective action at the request of the complainant. However, the California Supreme Court in *Department of Health Services v. McGinnis*[2] rejected the applicability of such an affirmative defense to claims brought under the California Fair Employment & Housing Act, holding that under California state law, an employer can only limit its damages but not avoid liability altogether.
4. ***Not conducting an investigation in good faith without the appearance of bias or subjectivity.*** Cross-examining witnesses, even those whom you suspect to be withholding information, could result in a claim that the investigator was biased and therefore the investigation was not objective. Even where the investigator suspects the complainant, witness, or employee accused of misconduct is lying or hiding information, the investigator should ask the individual to explain contradictory statements or evidence that refute his or her statements in a respectful manner that allows the individual a full opportunity to respond to questions without feeling like he or she is being subjected to cross-examination.
5. ***Failing to keep the investigation, and all information gathered during the course of the investigation, confidential.*** Failing to safeguard witness identities or the confidentiality of the information could result in a claim of retaliation by any witnesses who later suffer any adverse consequences following the investigation.
6. ***Allowing/inviting other third parties (complainant's friend or lawyer) to participate in the investigative interview in a non-union context.*** In *IBM Corp.*,[3] the NLRB ruled that a non-union employee does *not* have the right to have a co-worker

[1] 436 F.3d 1050 (9th Cir. 2006).
[2] 31 Cal. 4th 1026 (2003).
[3] 341 NLRB No. 148 (2004).

present at an investigatory interview that the employee reasonably believes might result in disciplinary action. It stands to reason that the complainant (who is not under investigation) should not be accompanied by his or her attorney or a friend, who could impede the investigator's effort to obtain candid responses to questions aimed at uncovering the basis for the complaint.

7. ***Not assuring the complainant and witnesses, and reminding the employee accused of misconduct, that the company has a policy against retaliation.*** The Equal Employment Opportunity Commission (EEOC) reports that retaliation claims have more than doubled since 1992 and now account for nearly a third of all claims filed with the agency. With this staggering rise in retaliation claims that typically follow a complaint of harassment or discrimination and result in punitive damages, employers should assure all individuals who are interviewed as part of an investigation that the company has a no-retaliation policy, which means that it will not tolerate any adverse action taken against anyone who makes a complaint in good faith or participates in an investigation of such a complaint, and that the company will take disciplinary action against anyone who violates this policy.
8. ***Not interviewing all witnesses with knowledge of the relevant events, even if they did not directly witness the incident that gave rise to the investigation.*** Witnesses to whom the complainant contemporaneously complained when he or she was allegedly being subjected to harassment should be interviewed to see whether what the complainant disclosed to them is consistent with what he or she shares with the investigator in the course of the investigation. If these accounts are consistent, it can help bolster a credibility determination.
9. ***Not reviewing all relevant records and tangible evidence.*** Too often, company investigators overlook documents that lie at the heart of an investigation (e.g., cell phone and telephone records of the complainant and the alleged harasser that can confirm the time and date of harassing phone calls).
10. ***Making inconclusive findings when faced with the classic "he said, she said" scenario.*** Not making findings after conducting an investigation is equivalent to not conducting an investigation at all. Even when the evidence is disputed by both sides, the investigator must nonetheless make find-

ings of fact based on a preponderance of the evidence. The investigator must make credibility determinations in the absence of direct evidence of wrongdoing (e.g., consider whether the alleged harasser has ever made the same comments to other women in the workplace, ever uses such expressions to address women, etc.).