

POMS

CONDUCTING PROPER HR INTERNAL INVESTIGATIONS:

A Two-Part Webinar

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1

TODAY'S PRESENTER

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His experience in HR management is in the public, private for-profit, and private non-profit sectors, having served in executive and other management positions. He received his BA in English Literature and Education at Bucknell University, and his EMBA & Ph.D. from the University of New Mexico. He is also a Lecturer on the faculty of the UNM graduate School of Public Administration, teaching in the areas of human resource management, leadership, organizational behavior, strategy and change, and NPO management.

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2

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NOTE: This presentation does NOT address the requirements for conducting a Title IX investigation. Contact Poms & Associates for training for Title IX investigators.

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3

TODAY'S TOPICS AND AGENDA

BACKGROUND – CONDUCTING INTERNAL INVESTIGATIONS

BEST PRACTICES IN INTERNAL INVESTIGATIONS

KEY ELEMENTS IN CONDUCTING AN INTERNAL INVESTIGATION

THE INVESTIGATORY PROCESS

QUESTIONS AND FOLLOW-UP

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4



5

WHAT IS AN INVESTIGATION ... AND WHAT ISN'T?

- People tend to speak very loosely about investigations, maybe because the word has such an air of importance about it, or maybe because they want to give more importance to a small complaint than it might otherwise have.
- The Oxford Dictionary, Dorling-Kindersley Illustrated 1998 Edition, states:
 - **investigate** / *invéstigayt* / v. 1 tr. a inquire into; examine, study carefully. b make an official inquiry into. 2 intr. make a systematic inquiry or search.
 - **investigation** / *invéstigayshyn* / n. 1 the process or an instance of investigating. 2 a formal investigation or study.
- That somber tone carries over to the legal and human resources fields, so we try to use the term “investigation” for rather important events. Try referring to less weighty matters as just the simple process of checking on things, okay?

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6

WHAT IS AN INVESTIGATION?

• Our definition:

- A **workplace investigation** is a formal fact finding process through which
 - parties and witnesses are interviewed;
 - documents and real evidence are reviewed and assessed; and
 - concludes with a written report outlining the allegations and makes findings of fact based on a balance of probabilities.
 - Usually carried out by a third party.



• Question:

- Is there ever a situation where an organization should not carry out an investigation?

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7

WHEN IS AN INVESTIGATION REQUIRED?

- “[I]f the employer has an adequate policy and complaint procedure,
- ... but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint,
- ... the employer has not discharged its duty to exercise reasonable care.”
 - **U.S. Dept of Labor EEOC Enforcement Guidance**



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8

WORKPLACE INVESTIGATIONS ARE AN ESSENTIAL TOOL IN RESPONDING TO COMPLAINTS

- **Investigations Assist in Determining:**
 - Whether allegations of misconduct have merit.
 - Who was involved in the misconduct.
 - Disciplinary or other measures that should be taken to prevent recurrence and limit employer liability.
 - Preventative steps to avoid future similar incidents.



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WORKPLACE INVESTIGATIONS ARE AN ESSENTIAL TOOL IN RESPONDING TO COMPLAINTS

- **Investigations Provide Practical Benefits:**
 - Affirmative defense to charge of harassment or hostile environment
 - Limit Liability for discrimination or quid pro quo sexual harassment
 - Safe harbor defense for improper deductions from an employee's pay
 - Limit claims relating to negligent retention
 - Create a less litigious workforce
 - Provides a good source of information about the complaint
 - Improve employee morale.
 - Increase productivity (when coupled with appropriate disciplinary action).
 - Reduce turnover rates.
 - End inappropriate conduct on a company-wide level.

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POTENTIAL RISKS CONDUCTING WORKPLACE INVESTIGATIONS

- **Privacy** – unlawful searches
- **Defamation** - avoid making defamatory statements about any participant, including the accuser and accused, during the investigation that could expose the employer to liability. Avoid conclusory and unsupportable statements.
- **Retaliation** – avoid retaliatory conduct toward the employee who made the accusations or an employee who participates in the investigation.
- **False Imprisonment** – employees should not be questioned against their will or confined to a room by their employer and prevented from leaving.
- **Tort claims** - poorly conducted investigations may result in other tort claims, such as intentional or negligent infliction of emotional distress and assault and battery.
- **Prohibited Practice Complaints** - Weingarten violations (NLRB)

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REASONS FOR CONDUCTING INTERNAL INVESTIGATIONS

- Employers may be legally obligated to conduct an internal investigation following the receipt of an employee complaint or becoming aware of certain workplace conditions like a hostile work environment or unlawful activity.
 - Both federal and state anti-discrimination laws require employers to take action to address and correct the discrimination promptly.
 - Health and safety laws like the Occupational Safety and Health Act (OSHA) require employers to address allegations of unsafe or unlawful practices in the workplace.
 - Employers in the transportation industry face requirements to drug test drivers in compliance with the Drug-Free Workplace Act of 1988 and Department of Transportation Testing Regulations.
 - Employers in the financial industry are required to conduct background screening of certain employees, to comply with the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act
 - Employers are also required to conduct investigations when employees "blow the whistle" on illegal or wasteful practices that could affect the stock market, investor accounts or shareholders.

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REASONS FOR CONDUCTING INTERNAL INVESTIGATIONS

- An internal investigation can also be an effective tool for employers to proactively address allegations of mismanagement, misconduct, discrimination, harassment, or other prohibited activities ultimately reducing exposure to litigation and enforcement activity.
- A workplace investigation is conducted when there is credible information there may have been significant wrongdoing, misconduct or ethical lapses.
- The results of an internal investigation **are only useful if the investigation was organized and conducted properly.**
 - Selecting the right person to investigate, determining what questions to ask and what questions not to ask, documentation of the investigation, cooperation with in-house or external counsel and guidance as to how to act on the results of investigations once they are complete, are all essential considerations.

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REASONS FOR CONDUCTING INTERNAL INVESTIGATIONS

- A workplace investigation may also be appropriate even if there have not been specific allegations against an employee or department, but there have been allegations against others.
 - The investigation is intended to exclude the possibility that wrongdoing occurred within the company.
- An effective investigation process protects the interests of the Company and its shareholders by
 - 1) preventing and detecting misconduct and violations;
 - 2) ensuring that corporate activities comply with applicable laws and regulations; and
 - 3) identifying areas of improvement for internal business operations.
- Therefore, an investigation is not conducted simply to uncover sufficient facts to justify a result or to just record somewhere that the incident occurred.

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14

TRIGGERS FOR CONDUCTING INTERNAL INVESTIGATIONS

- Employer receives a complaints of workplace misconduct by employees, including:
 - Discrimination.
 - Harassment (sexual and otherwise).
 - Health and safety violations.
 - Workplace violence or threats.
 - Workplace drug and alcohol use.
 - Violations of employer rules.
 - Theft or fraud.
 - Media reports
 - Audit findings
 - SOX – Whistleblowing complaints or reported acts
 - Lawsuits or administrative claims
 - Other criminal activity.
- “Constructive Notice:” Employer has reason to believe that there is a problem



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WHAT CONSTITUTES A COMPLAINT?

- **Easy to recognize:**
 - Written or verbal communication from employee specifically complaining of harassment or other objectionable conduct
 - Employee verbally states he/she has been treated badly or unfairly
 - Supervisor reports that inappropriate acts or misconduct have occurred
- **Harder to recognize:**
 - Statement in exit interview that the employee is “fed up” with the “crap” he/she has had to put up with while working there
 - Offhand comment from employee directly to or overheard by a supervisor about inappropriate conduct that has occurred in workplace, but no specific “complaint”
 - Employee mentions to supervisor that “Sally and Joe have really been going at each other lately”

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WHAT CONSTITUTES A COMPLAINT?

- **No magic words are required to constitute a valid complaint**
 - There are no buzz words the complainant must use to qualify the statement as a complaint
 - Complaints need not come through “formal” channels (such as through an established complaint process or directly to HR)
 - Complaints need not be in writing
 - Often, mere knowledge of problematic facts or events with no formal or specific complaint is sufficient to require the employer to take the initiative to investigate, or at least inquire further.

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17

CONSTRUCTIVE NOTICE

An investigation may be warranted even if “nobody has made a complaint.”

- **“Constructive Notice”** is knowledge which a person or entity
 - is presumed (or duty bound) to acquire by making normal and reasonable inquiries; or
 - Should have known, as a reasonable person would have, even if they have no direct or actual knowledge of it.
- **“Constructive notice”** generally means that **the employer has “reason to believe” that there may be a problem.**
- **Employers with constructive notice may have an affirmative duty to conduct an internal investigation.**

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18

THE DUTY TO INVESTIGATE

- A valid complaint triggers the employer’s “affirmative duty” to conduct an internal investigation.
- Federal and state harassment/discrimination laws impose legal duty on employer to investigate employee-related complaints
 - Employer has no discretion to decide not to investigate, regardless of feelings of reluctant complainants/witnesses
 - The fact that an employee may be a “chronic complainer” or a malcontent does not absolve Employer of duty to investigate
- Tougher question when conduct occurs off premises/off-duty or at social function
 - If conduct has implications at the workplace, investigation may be appropriate or necessary

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THE DUTY TO INVESTIGATE

- Federal and state safety laws impose duty on employer to investigate accidents, safety violations
- Various whistleblower laws impose duty on companies to investigate allegations of wrong-doing or misconduct
 - **NOTE:** Whistleblower investigations require that the investigator find out what happened, AND apply the legal provisions of the applicable whistleblower law.
- Provisions in written employment agreement may impose contractual duty to investigate “good cause” or “just cause” to terminate
- Obligations to shareholders may impose duty to investigate claims to determine or limit potential liability
- **Failure to conduct an investigation may result in liability for the employer**

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20

THE DUTY TO INVESTIGATE

- Failure to investigate promptly and fairly may be used as a basis to show that company failed to prevent harassment or discrimination from occurring ... or that the employer condoned/ratified unlawful conduct
- May be used by aggrieved employee as an independent cause of action if the underlying harassment/discrimination actually occurred
 - *Trujillo v. N. County Transit Dist.*, 63 Cal. App. 4th 280 (1998)
- May create an inference of malice, which could be the basis to award punitive damages
 - *Bowles v. Osmose Utility Services*, 443 F. 3d. 671 (8th Cir. 2006) at p. 675

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21

PROMPT AND EFFECTIVE INVESTIGATION

- Under Title VII of the Civil Rights Act of 1964 (EEOC), the investigation can be used by the Employer to limit or avoid liability with respect to claims for hostile work environment harassment when the complainant has suffered no adverse employment action
 - *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998)
 - *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- Under FEHA, (California) the Employer is still liable for harassment by a supervisor, but it can rely on a valid investigation to limit the damages that can be recovered
 - *State Dept. Health Services v. Sup. Ct. (McGinnis)*, 31 Cal.4th 1026 (2003)

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22

PROMPT AND EFFECTIVE INVESTIGATION

- **BEST PRACTICE**
 - Regardless of whether there is a specific law imposing a duty to investigate, it is good practice to investigate when issues or facts arise that might be problematic
 - Properly investigating can help the company identify and prevent a problem from becoming a bigger liability
 - Proper investigation and appropriate and prompt remedial action can cut off damages and sometimes eliminate liability altogether

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23

IMPORTANCE OF CONDUCTING A PROPER AND THOROUGH INVESTIGATION

- May be legally required
- Will help establish that Company acted reasonably and objectively
- May yield admissions from wrong-doer
- Should establish extent of conduct being complained of by employee to limit later "expansion"
- Will enable Company to take appropriate corrective action
- Should help limit claims and potential liability

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ELEMENTS OF AN APPROPRIATE INVESTIGATION

- Conducted by impartial, trained investigator
- Designed to ensure all appropriate witnesses are interviewed and all relevant facts are uncovered
- Is prompt and thorough
- Must be well documented
- Enables the company to draw reasonable conclusions
- Confidentiality is properly protected to extent possible
- Results and conclusions communicated to the complainant or victim, the alleged perpetrator, and other interviewees
 - Limits on what the complainant can know re: discipline
- Action taken that is effective to end inappropriate conduct and deter future similar conduct

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25

THE "HONEST BELIEF" DOCTRINE

- Employers are not required to get the "right" answer in an investigation. Rather, they simply must have demonstrated an "honest belief" that the decision made was the right one.
- The law demands that you act in good faith, and try your best to determine the facts – The courts want you to “try your best”
- CA Supreme Court found in one case that the investigator had tried their best and reversed the lower court decision, even though the conclusion of the investigator was incorrect.
- You need to demonstrate that you have conducted a thorough, complete investigation
- You have to demonstrate that the employer's reliance on the facts before it at the conclusion of an investigation was reasonable.

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26

WHO SHOULD INVESTIGATE?

- Use an investigator who is trained in the skills that are required for interviewing witnesses and evaluating credibility.
- Person complained of should not have supervisory authority over the investigator.
- Investigator should be familiar with and follow employer's investigation policies.
- Does not need to be an attorney
- Investigator should be comfortable with their role:
 - Be a good listener
 - Be able to deal with potentially uncomfortable subject
 - Be discreet
 - Be capable of making findings in the face of conflicting evidence
 - Be able to write a concise and coherent report

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27

PICKING THE RIGHT INVESTIGATOR

A number of different individuals may potentially serve as the investigator. They include:

- a member of the human resources department;
- an in-house attorney;
- a member of line management;
- a member of the internal audit or ethics department;
- a private investigator or outside consultant;
- a regular outside counsel; or
- a special outside counsel.



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28

PICKING THE RIGHT INVESTIGATOR

The most important factor in determining who to select is to find someone who has the qualities needed to conduct a proper investigation, including:

- impartiality;
- legal knowledge;
- experience in gathering evidence, interviewing witnesses, taking statements, and analyzing facts;
- the ability to be an effective witness;
- the ability to ask tough questions; and
- credibility.
- In sexual harassment cases, consider choosing an investigator who is the same sex as the employee making the complaint.

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29

PICKING THE RIGHT INVESTIGATOR

If you're going to choose someone from inside the organization, select someone who:

- is neither the manager nor has any personal or working relationship with the employee making the complaint;
- is from a different department from the one in which the person making the complaint and the target work;
- is relatively high up in the organization; and
- has had training on how to conduct an investigation.



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PICKING THE RIGHT INVESTIGATOR

There can be advantages to using an outside investigator:

- An outsider is far less likely to have any connection to the individual involved, so he may be (or at least is perceived to be) more unbiased.
- An outsider may have greater credibility with the complaining employee, the target, and other company employees.
- Choosing an outsider gives you the ability to make sure that you're retaining someone with the necessary qualifications.
- It may be easier for an outsider to elicit information from employees.
- It's more likely that the information will be kept confidential.

There are disadvantages, too, of using an outside investigator:

- costs; and
- the outsider will presumably be less familiar with policies and procedures.

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31

PICKING THE RIGHT INVESTIGATOR

There are some advantages to using an attorney as an investigator:

- attorneys generally make good investigators; and
- having an attorney conduct the investigation may create a privilege protecting the information conveyed from disclosure.
- **Attorney-Client Privilege**
 - If you know you want to be careful, engage an attorney as long as they do something tangible in the investigation process.
 - Check with your attorney on what is the correct process to maintain attorney-client privilege
 - Usually, only the final document can be unprivileged (discoverable), not previous draft versions.
 - You can most likely get rid of the drafts and notes

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32

PICKING THE RIGHT INVESTIGATOR

More on Written Statements and Taking Notes

- Often, if you ask for written statements from complainant, accused, or witnesses, what you get from them does not meet your needs.
- Rather than require people to provide you with written statements:
 - Best practice can be for investigator to take a verbal statement from the individual and take good notes.
 - Type up your notes to reflect what the individual said.
 - Then have the person review your typed up notes to confirm accuracy or indicate any changes or additions that should be made.
 - Make changes if needed, get signature, or write that they verbally agreed that it is accurate
- Use the same process when you are taking notes in other interviews.
- What do you do with your hand-written notes? You can destroy the notes EXCEPT in California.
 - *"I didn't need to keep my notes, everything is in the report you have in your hands."*

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33

WHO IS THE INVESTIGATOR'S "CLIENT" . . . AND WHO ISN'T?

- Lines of authority and responsibility must be clearly understood and honored.
- Remember, the company is the client of the company's human resources department and the company's attorney/law firm. The investigator works in the interest of the employer, not of a specific individual.
- Almost never are those professionals the representatives of any employee, officer, director, manager, supervisor or any other individual person in the company.
- That means advice can be given only to the company, and only the company is protected by any legal privileges such as attorney-client confidentiality and work-product privilege
 - (certain information gathered in anticipation of litigation, but not investigative material normally required in response to a legal claim).
- And that also means the company probably will not be providing attorneys for individuals.

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34

ENCOURAGING EMPLOYEES TO REPORT MISCONDUCT

- Employers often need to encourage employees to report misconduct.
 - Policies, training, and "walking the talk."
- Employers should establish several safe, reliable, and even anonymous outlets through which employees can report misconduct, such as to HR representative, a telephone hotline, or even an e-mail address.
 - **DO NOT REQUIRE EMPLOYEES TO REPORT TO THEIR SUPERVISOR!**
- Employers should assure employees that there will be no consequences for reporting misconduct
 - Taking the time to remind employees that reporting misconduct will not result in retaliation or disclosure of the employee's identity may enable employers to collect valuable, otherwise unattainable information about the workplace.

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35

ENCOURAGING EMPLOYEES TO REPORT MISCONDUCT

- Make it easy for employees to report misconduct.
 - The employer should have a written policy that informs employees of their obligation to report employee misconduct.
 - The employer should set up several avenues for reporting.
 - At minimum, the employer should set up a telephone hotline which employees can use to call in.
 - Employees should be permitted to remain anonymous.
 - An unclear, confusing reporting scheme may not shield employers from liability, no matter how good its intentions were in setting up the program.

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36

HANDLING ANONYMOUS REPORTS OF MISCONDUCT

- Under no circumstances should employers ever ignore or disregard an anonymous report of misconduct.
- Even if the complaining employee did not follow rules or proper procedure, the employer should still take the initiative to investigate the claim.
- Further, if the complaining employee is willing to make a report, the employer should never hesitate to investigate, even if the employee prefers no investigation.
- Once the employer learns of the misconduct, it is obligated to investigate.

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37

HANDLING ANONYMOUS REPORTS OF MISCONDUCT

- While employers may prefer that an employee disclose his or her identity in connection with a complaint of misconduct, employers should not discourage employees from seeking to make anonymous complaints.
- At best, employers can advise the complaining employee that remaining anonymous may hamper the investigation.
- Employers should never refuse to accept an anonymous report of misconduct, however. Instead, they should offer anonymous complainants the opportunity to make a full and complete report and should summarily conduct an investigation with the information provided.

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38



BEST PRACTICES IN CONDUCTING INTERNAL INVESTIGATIONS

39

HOW DO INTERNAL INVESTIGATIONS WORK?

Determine Whether a Complaint Has Been Made

- An employee makes a complaint of harassment or discrimination anytime he/she or someone on the employee's behalf makes an allegation to anyone in HR or to any manager or supervisor
- Managers must be trained to immediately report any harassment or discrimination complaint or retaliation no matter how minor
- Managers should not investigate on their own
- ER should have a complaint procedure in their policies that provides a means for filing a complaint
- ER should have a written policy that prohibits retaliation

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40

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint

- Instruct the complainant regarding the investigation
- Tell complainant his/her complaint will be treated seriously and investigated
- Tell complainant he/she will not be subject to any adverse action
- Tell complainant to contact investigator if they feel they are being retaliated
- Tell complainant not to discuss the matter with others
- Tell complainant the investigator will discuss the matter with those necessary to the investigation or any action taken as a result of the investigation

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41

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint *(Continued)*

- Have the complainant write out a signed, dated complaint indicating –Who, What, Where and when, How, Witnesses
- Take detailed notes of the conversation with the complainant. Include –
 - Name of interviewer
 - Date, time , location
 - Who was present, length of interview
 - Document only facts
- At this point, do not ask the complainant what he or she wants

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42

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint *(Continued)*

- Do not make promises or offer opinions
 - Do not promise complete confidentiality
 - Do not promise the alleged wrongdoer will not know of the complaint
 - Do not promise to keep the complainant's identity a secret from the alleged wrongdoer
 - Do not tell the complainant whether you believe him or her
 - Do not promise the alleged wrongdoer will be disciplined
- Do not discipline or retaliate against the complainant for reporting the complaint or witnesses for participating in the investigation

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43

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

- There is no perfect recipe for performing an employment investigation; the investigator's actions will depend largely on the facts and circumstances of each case.
- When developing a course of action, employers should consider the issues most likely to be challenged in litigation:
 1. **Is the investigator properly trained?**
 - It is increasingly common for plaintiffs in employment litigation to challenge the education and training of the persons performing the investigation.
 - Proper training not only helps to avoid missteps, but also prepares the investigator to meet questions during litigation about her qualifications to perform the task.

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44

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

2. Was the investigation biased?

- Ideally, investigators should have nothing at stake in the result of the investigation. Investigators must be free to reach conclusions appropriate to the facts.

3. Was the investigation appropriate under the circumstances?

- Few investigations can uncover every conceivable fact that might pertain to an alleged misconduct. Nevertheless, an investigator who fails to uncover a fact that might have been discovered before litigation was commenced may be called upon to explain why this fact was not considered earlier.
- For this reason, it is critical for the investigator to plan at the outset the resources to be employed.
 - Who will be interviewed?
 - What records should be obtained and reviewed?
 - What other steps should be considered?
- These decisions will be reviewed continuously until the final conclusions are recorded.

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45

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4. Was the employee under investigation given all reasonable opportunities to be heard?

- The investigator must employ procedures which afford a fair opportunity for the complainant and the accused to present their position.

5. Has the investigator reached a reasonable conclusion concerning the facts?

- The investigator must do more than simply collect facts. There is an obligation to evaluate them and come to a reasonable factual conclusion.
- A defective investigation includes the failure to differentiate between attributed hearsay and “mere gossip and rumor” and failure to evaluate the credibility of persons interviewed.

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46

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6. Has the investigator properly documented the investigation?

- One of the central goals of an employment investigation is to develop a clear and complete documentary record.
- All documents in an investigation should be prepared with the expectation that the document will be at issue in subsequent litigation.
- Every effort must be made to avoid inflammatory, incorrect, or other inappropriate comments that may detract from the serious professional purpose of the investigation.

7. Was the investigator prepared to recommend prompt, effective action to remedy misconduct?

- Although it may not be possible to determine in every detail what occurred, the investigation must evaluate the evidence, and, if appropriate, recommend “prompt remedial action” for past misconduct and ensure that no misconduct or retaliation occurs in the future.
- **NOTE** – the investigator should only recommend; not carry out the remedial action.

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47

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

8. Was appropriate action taken by the employer as a result of the investigation?

- If suspected criminal activity, report to law enforcement
- If any policy prohibiting discrimination, harassment, or retaliation has been possibly violated, report to appropriate individual
- If employee misconduct is substantiated, implement consequences as appropriate
- Disciplinary meeting to discuss expectations and potential consequences
- Disciplinary memo/document in employee’s permanent file
- Address at next evaluation opportunity
- Provide additional training
- Reassignment of responsibilities/duties
- Termination of employment if necessary
- **DOCUMENT, DOCUMENT, DOCUMENT!**

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48

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

9. Were complaints screened promptly?

- In most organizations, it isn't practical to have one employee responsible for all investigations. Multiple types of claims of wrongdoing may need to be investigated, and each case may need to be handled differently.
- For that reason, it may be beneficial to establish a committee to screen complaints and make at least initial decisions about how they should be handled. The committee might be composed of the compliance officer or corporate ethics manager, the chief financial officer, the general counsel, and the human resources manager.
- As soon as possible after a complaint has been made, the screening committee should meet to analyze the nature of the complaint and determine where it should go.
 - For example, if the committee receives a complaint about how a performance evaluation was completed, it might determine that no probe is warranted. Instead, the matter should be reviewed by the employee's manager or the HR department.

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49

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

9. Were complaints screened promptly? (Continued)

- If an investigation is needed, the screening committee should decide who will be responsible for conducting it. Perhaps a sexual harassment complaint should be investigated by the HR director and/or a relatively high management employee from a department other than the department in which the alleged problem occurred.
- A complaint about safety and health violations might be investigated by the individual responsible for those functions or perhaps the general counsel. If a workplace violence situation is present, perhaps someone from the security department should be responsible for the probe.
- Next, the screening committee should decide whether outside counsel or other experts should be retained in conducting the investigation.

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50

BEST PRACTICES IN CONDUCTING INVESTIGATIONS

10. Were Immediate Action Measures Taken After Complaint Received?

- The committee should decide whether any immediate actions are necessary before the actual investigation starts. Examples include:
 - suspending the target of the investigation
 - *(this should be a non-disciplinary suspension, which might be converted to a disciplinary one if it's determined that the target engaged in wrongdoing);*
 - separating the target from the alleged victim, such as in a case involving alleged sexual harassment;
 - blocking the target's access to facilities, files and technology;
 - in the case of a potential workplace violence situation, contacting the police, taking other security measures, or going to court to seek a restraining order;
 - communicating with employees about the nature of the matter on a confidential and "need to know" basis.
- Note that those immediate action measures should be thought of as preventive actions, not discipline. At this point, you shouldn't make any judgment about the allegations.

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51



KEY ELEMENTS IN CONDUCTING AN INTERNAL INVESTIGATION

52

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 1: TAKE ACTION TO STOP THE SUSPECT CONDUCT

- This is the first thing an employer must do when it receives allegations of misconduct or improper activity in the workplace.
- Without reaching a conclusion as to fault or validity of an accuser's claims, employers must first take action to prevent the alleged activity from recurring.
 - For example, if the accuser has alleged sexual harassment against a co-worker, the employer must separate those individuals during the period of investigation.
- This does not equate to a premature conclusion that allegations are true but instead protects the employer from liability for having failed to take action while the investigation played out.

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53

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 2: DETERMINE WHETHER TO CONDUCT A FORMAL INVESTIGATION

- In some situations, employers are legally obligated to conduct an investigation.
 - Specifically, when employers receive allegations of discrimination, both federal and state law requires employers to take action and address the discrimination promptly.
 - Other legislation like the Occupational Safety and Health Act (OSHA) and the Drug-Free Workplace Act require investigations when allegations of unsafe conditions or employee drug use surface.
 - For employers in the financial industry, the Sarbanes Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act require employer action when they receive allegations of insider trading, fraud or other activities that could affect the stock market or investor portfolios.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 2: DETERMINE WHETHER TO CONDUCT A FORMAL INVESTIGATION

- Beyond any legal obligation to investigate, conducting thorough and unbiased investigations can go a long way toward identifying and fixing the problem.
- And, if an allegation ultimately results in a claim or litigation, the employer can point to its investigation as evidence of its prompt response and willingness to take corrective action.
- Through the process of investigation, employers are also afforded an opportunity to formulate a defense to possible charges or further allegations, confer with in-house or outside counsel in advance of any such action or evaluate the accuracy of its disclosures to government entities like the IRS or the SEC.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 3: CHOOSE THE RIGHT PERSON TO CONDUCT THE INVESTIGATION

- The key to selecting an investigator is to understand the concept of bias. Employers should always strive to select the most unbiased employee possible, far removed from the allegations and unaffected by any close relationships with the subject(s) of the investigation.
 - The more unbiased the lead investigator is, the more valid and effective the investigation will be.
- For example, if an employee complains of sexual harassment, the employer should never nominate the employee against whom the allegations were made to conduct the investigation. That would be an example of obvious bias in favor of the accused.
- More commonly, employers should strive to avoid nominating employees who have close personal relationships with the subject(s) of the investigation. If the lead investigator is a "friend" of the accused, the validity of the investigation will be similarly questioned by a plaintiff's attorney.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 3: CHOOSE THE RIGHT PERSON TO CONDUCT THE INVESTIGATION

- In some cases, you may have no choice but to hire an outside investigator, completely removed from the company and any personal ties to the subject(s).
 - Common situations in which an outside investigator would be appropriate include potential criminal activity, accusations against a high-level company official, widespread misconduct or unlawful activity, no qualified in-house investigators and no available in-house counsel.
- Ensure that the individual selected to lead the investigation is trained and experienced in investigations, including interviewing witnesses, documentation, company protocols and the ability to work with both HR employees and employment counsel.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 3: CHOOSE THE RIGHT PERSON TO CONDUCT THE INVESTIGATION

- Once the investigator has been selected, the HR professional should take a step back and assess the individual's credibility.
 - Is the person selected to lead the investigation truly unbiased and wholly credible?
 - How would an outside individual, with no prior knowledge of the company or its practices, view this individual and his/her ability to be completely unbiased?



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58

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 4: DETERMINE WHETHER OR HOW, TO INVOLVE IN-HOUSE OR OUTSIDE LEGAL COUNSEL

- Generally speaking, an in-house attorney will be less expensive for the company, familiar with the company and its industry and subject to greater control and/or guidance by HR or other management regarding the scope of the investigation.
 - However, that "control" may not be a good thing for your investigation if your principle goal is establishing unbiased credibility.
- Outside counsel is generally considered to be more objective, less biased, and generally without any personal connections to the employees. This beneficial perception may extend to third parties who may otherwise question the validity of the investigation, including government or law enforcement agencies.
- Finally, outside counsel may have access to more resources, enabling a more thorough and more detailed investigation.

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59

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 5: DETERMINE WHETHER TO IMPOSE RESTRICTIONS ON EMPLOYEE ACTIVITY

- Employers may need to restrict, forbid or otherwise change employee activities during an internal investigation to protect company property and/or the accuracy of information collected during the investigation.
- They also may preserve their right to restrict employee discussion of ongoing workplace investigations by including certain language in their workplace investigation policies, alerting employees in advance that they may be called upon to participate in investigations and that their confidentiality may be required in some cases, under penalty of discipline or termination.
- The National Labor Relations Board (NLRB) has previously recommended that employers use the language on the next slide in their policies to reserve their right to restrict employee discussion of ongoing investigations: *(See next slide)*

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60

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 5: DETERMINE WHETHER TO IMPOSE RESTRICTIONS ON EMPLOYEE ACTIVITY

- The National Labor Relations Board (NLRB) recommended policy language:

"[Employer] may decide in some circumstances that in order to achieve [the objective of lawful and effective workplace investigations], we must maintain the investigation and our role in it in strict confidence. If [Employer] reasonably imposes such a requirement and we [the employees] do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination."

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61

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 6: PLAN AND CRAFT THE INVESTIGATION TO ADDRESS A SPECIFIC TARGET AUDIENCE

- An investigation to address a potential civil lawsuit and an investigation to prevent an SEC investigation and criminal charges are two very, very different things.
- HR should play a role in determining what audience the investigation is targeting and help craft the focus and protocols of the investigation accordingly.
- If the employer has in-house counsel or outside counsel on retainer, this is a good time for the attorney to become involved, set some parameters regarding the investigation, and create some objectives to achieve.
- HR should also consider whether the allegations or pending investigation will result in any unwanted press for the organization.
 - If so, it should encourage any public relations resources available to the organization to get involved and offer opinions.
 - Similarly, if the employer plans to disclose the results of its investigation to any private investors or customers, it should take steps to ensure that the scope of the investigation will address investor and/or customer concerns.

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62

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 7: INTERVIEW THE COMPLAINANT

- The complainant should be the first person interviewed in connection with the investigation.
- The investigator should review the complainant's personnel file, together with those of the accused. Records of prior complaints made by the complainant or against the accused are of particular interest.
 - Any information concerning the relationship between the complaining witness and the accused (personal relationships or vendettas) is relevant.
- To manage expectations, the lead investigator should inform the complainant that "absolute confidentiality" may not be possible.
 - The employer should inform the complainant that every measure will be taken to protect his or her identity but where confidentiality is not possible the employer will monitor workplace activities for retaliation and address any retaliatory actions swiftly and effectively.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 7: INTERVIEW THE COMPLAINANT

- Prior to the interview, the lead interviewer should ask the complainant to provide all written complaints or reports previously made to the employer.
- The lead interviewer should draft the questions for the interview ahead of time but should be flexible at the time of interview.
- He or she should also be familiar with conflict resolution techniques.
- Being personable and accommodating to the complainant, may go a long way in obtaining necessary information.
- Generally, it is best if the complainant be interviewed in the presence of at least two people: the lead investigator and a neutral witness.
 - Only the lead investigator should record answers to questions as well as other observational data regarding attitude or appearance.
 - There should never be two separate records of a single interview, as that could only cause conflict and undermine the validity of the investigation.
- It is not advisable to tape or video record interviews. The presence of such a device may make the witness uncomfortable or otherwise less candid.
 - Instead, the lead investigator should record the answers by hand or on a computer.
 - Under no circumstances should the interview be secretly recorded, as that could be in violation of state and federal law.

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64

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 8: INTERVIEW THE ACCUSED EMPLOYEE AGAINST WHOM ALLEGATIONS HAVE BEEN MADE

- The alleged wrongdoer should typically be interviewed after the accuser. However, there may be witnesses with firsthand knowledge of the allegations or misconduct. In those cases, the lead investigator may consider interviewing them first to gain a fuller picture of the allegations.
- If the accused is a public employee, he or she should be given notice of the allegations prior to the interview. This provides the employee with opportunity to retain counsel. Similarly, if the employee is unionized, the employee may be entitled to have a union representative present during interviews. This is referred to as the employee's Weingarten rights, stemming from a U.S. Supreme Court case, NLRB v. Weingarten, 420 U.S. 251 (1975).
- If a unionized employee does not exercise his or her Weingarten rights, however, an employer may be able to withhold that employee's statement from the union.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 8: INTERVIEW THE ACCUSED EMPLOYEE AGAINST WHOM ALLEGATIONS HAVE BEEN MADE *(Continued)*

- Before the interview begins, the accused should be informed as to the allegations and purpose of the interview.
- He or she should be informed that the lead investigator and the employer have not reached any conclusions and the interview is intended as a fact-gathering exercise.
- The tone of the conversation should not be accusatory but cordial and fair.
- Should the employee refuse to cooperate with the investigation, he or she should be informed that this could be grounds for dismissal even if all allegations leading to the investigation are proven false.
 - Policy Statement re: Cooperation with investigations

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 8: INTERVIEW THE ACCUSED EMPLOYEE AGAINST WHOM ALLEGATIONS HAVE BEEN MADE *(Continued)*

- In the public sector, federal employees and contractors must be advised of their right to remain silent and/or assert their 5th Amendment right against self-incrimination.
 - The advisement of rights in this context is called a Garrity warning, also after a Supreme Court case.
- In some extreme circumstances, the employer may need to furlough or suspend the accused while the investigation is pending.
 - The employer should still strive to conduct the interview with the accused in person.
 - In-person interviews are crucial toward gauging an employee's credibility as mannerisms and attitude toward questioning can be observed.

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67

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 9: CONSIDER USING OTHER INVESTIGATION TECHNIQUES

- Direct interviews of witnesses are merely one of many investigation techniques available to employers.
- Employers are within their rights to observe employees in certain situations, using closed-circuit video cameras, monitoring internet, email and social media activity, even monitoring phone calls placed in the ordinary course of business.
- Many states have laws that require the consent of either one or both of parties when surveillance measures are employed.
 - Privacy Rights – informed consent via employment policies
- It is crucial that both HR and the lead investigator understand any state and federal law restrictions on investigation techniques.
- Compliance with the Federal Wiretap Act, for example, is essential to conducting a valid, legal investigation should the employer plan to monitor electronic or telephone activity.
- Employers should also familiarize themselves with the Stored Communications Act to ensure they do not violate employee rights when examining electronic materials during an internal investigation.

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HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 10: ENSURE THE DATA COLLECTED IS PROPERLY DOCUMENTED, STORED, AND PROTECTED

- This is perhaps the most crucial aspect of the investigation. Without proper documentation, the results of an investigation can easily be questioned or undermined.
- A good first step in preserving the integrity of investigations, is the adoption and implementation of a document retention policy.
- If the employer has a long-standing document retention policy with a lengthy record to demonstrate its compliance with that policy, it is more likely to benefit from it.
- Where there is a newly-implemented document retention policy, it is beneficial to consider the involvement of an outside investigator who can comment on the quality of the document retention program.

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69

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 10: ENSURE THE DATA COLLECTED IS PROPERLY DOCUMENTED, STORED, AND PROTECTED

- The employer may want to shield some of that information from becoming available or "discoverable" in litigation – such as "proprietary," or "privileged."
- Employers can establish privilege over certain information and documents, to have them fully protected from discovery – work with your attorney for advice.
 - To protect as much information as possible, have an attorney conduct the investigation so the work of attorneys may be protected by the attorney-client privilege or by the attorney "work product" doctrine.
 - The discoverability of information may turn on the motivation for the investigation. If it was conducted as a mere fact-finding exercise, the information is more likely to be privileged. If it was conducted with an eye toward litigation, the information is more likely to be discoverable.

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70

HOW TO CONDUCT AN INTERNAL INVESTIGATION

STEP 11: TAKE APPROPRIATE ACTION BASED ON THE RESULTS OF THE INVESTIGATION

- If the information you've gathered is clear-cut and suggests an obvious, effective solution like suspension or termination, the employer should take action swiftly and decisively.
- More likely, you have at least two different stories from at least two different employees. When presented with the classic "he said/she said" dilemma, the employer is not off the hook. Rather, you must decide which employee(s) and which evidence it considers most credible and act accordingly.
 - So long as the employer acts in good faith on the information it has collected, it will likely be shielded from liability for any resulting grievances.
 - The key is to act in good faith and substantiate any decisions with evidence.

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71

HOW TO CONDUCT AN INTERNAL INVESTIGATION

EXAMPLE: Investigation Results in No Action Letter

- This letter may be used to let an employee know that no discipline will take place, but to reiterate that the employee must still display proper conduct.

[insert organization's logo, name and address]

[insert date]
[insert recipient's name]
[insert recipient's physical address (and/or email address if applicable)]
 Subject: **[Disciplinary Investigation Results in No Action]**
 Dear **[insert recipient's name]**:

This letter serves to update you on the status of our disciplinary investigation into possible misconduct. On **[insert date]**, I initiated an investigation of allegations that you **[insert description of the nature of conduct]**. After considering all of the relevant facts, I have decided not to pursue a disciplinary proceeding.

As a result of this decision, your suspension has been lifted and you may return to your normal work shift tomorrow **[insert date]**. No reference to this issue will be included in

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72

HOW TO CONDUCT AN INTERNAL INVESTIGATION

EXAMPLE: Investigation Results in No Action Letter

... your personnel file. Additionally, any references currently in your personnel file related to this situation will be removed immediately.

Please be advised that this decision does not exempt you from discipline in the future. Please ensure that you continue to follow company policies and work rules.

If you have any questions, or would like to discuss this letter, please feel free to contact me.

[insert closing (e.g., Sincerely, Very truly yours)],

[insert handwritten signature (for a mailed letter) and typed signature]

[insert sender's title]

[insert enclosure line as applicable (e.g., Enclosure or Enclosures)]

Warnings

Even though no discipline will take place, you should be sure to maintain all documents and information received or created during the investigation phase. If the employee engages in future misconduct, the evidence of prior issues may provide support for the decision to take formal discipline.

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73



HOW DO INTERNAL INVESTIGATIONS WORK?

74

HOW DO INTERNAL INVESTIGATIONS WORK?

Determine Whether a Complaint Has Been Made

- An employee makes a complaint of harassment or discrimination anytime he/she or someone on the employee's behalf makes an allegation to anyone in HR or to any manager or supervisor
- Managers must be trained to immediately report any harassment or discrimination complaint or retaliation no matter how minor
- Managers should not investigate on their own
- ER should have a complaint procedure in their policies that provides a means for filing a complaint
- ER should have a written policy that prohibits retaliation

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75

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint

- Instruct the complainant regarding the investigation
- Tell complainant his/her complaint will be treated seriously and investigated
- Tell complainant he/she will not be subject to any adverse action
- Tell complainant to contact investigator if they feel they are being retaliated
- Tell complainant not to discuss the matter with others
- Tell complainant the investigator will discuss the matter with those necessary to the investigation or any action taken as a result of the investigation

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76

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint *(Continued)*

- Have the complainant write out a signed, dated complaint indicating –Who, What, Where and when, How, Witnesses
- Take detailed notes of the conversation with the complainant. Include –
 - Name of interviewer
 - Date, time , location
 - Who was present, length of interview
 - Document only facts
- At this point, do not ask the complainant what he or she wants

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77

HOW DO INTERNAL INVESTIGATIONS WORK?

Receiving a Complaint *(Continued)*

- Do not make promises or offer opinions
 - Do not promise complete confidentiality
 - Do not promise the alleged wrongdoer will not know of the complaint
 - Do not promise to keep the complainant's identity a secret from the alleged wrongdoer
 - Do not tell the complainant whether you believe him or her
 - Do not promise the alleged wrongdoer will be disciplined
- Do not discipline or retaliate against the complainant for reporting the complaint or witnesses for participating in the investigation

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78

HOW DO INTERNAL INVESTIGATIONS WORK?

Planning Issues

- When Should the Investigation Commence?
- Should the Employee be Suspended or Transferred Pending Completion of the Investigation?
- Should the Complainant be Offered Paid Leave or Other Accommodation Pending Completion of the Investigation?
- Should Supervisory or Reporting Relationships be Modified Pending Completion of the Investigation?
- How Should Evidence be handled ?
- Who Should be Interviewed?
- What Should be the Sequence of the Interviews?
- Which Materials Should be Reviewed Before the Interviews Commence?

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79

HOW DO INTERNAL INVESTIGATIONS WORK?

Planning Issues

- Identify and review applicable policies, rules and documents; become familiar with the issue(s) to be investigated
- Determine which witnesses should be interviewed and in what order
 - All witnesses identified by the complainant and the alleged wrongdoer should be interviewed; follow up as needed and as new witnesses are identified in course of the investigation
- Prepare an investigation checklist
 - List of individuals to be interviewed
 - Items/points to be addressed with each witness
- [Optional] Prepare/review Confidentiality Acknowledgement to be signed by witnesses (other than complainant)
- [Optional] Request and review personnel files of complainant, alleged wrong-doer(s), and possibly key witnesses

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80

HOW DO INTERNAL INVESTIGATIONS WORK?

Identify Witnesses and Relevant Documents

- Interview all individuals involved with the complaint, including all witnesses identified by the complaining employee
- Consider interviewing all employees who worked closely with the accused
- Be careful interviewing non-employees –less likely to keep the matter private and may be less reliable
- Schedule meetings at a time and place they do not attract attention
- Explain the need for confidentiality to witnesses
- Ask questions to discover the who, what, where and how of the situation
- Document all interviews.
- Remember interview notes will likely be admissible in any future proceeding?

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81

HOW DO INTERNAL INVESTIGATIONS WORK?

Identify Witnesses and Relevant Documents *(Continued)*

- Collect all relevant files, documents, statistics
- Review any notes, calendars, diary entries, correspondence
- Acquire personnel file of the accused, desk file maintained by the accused's supervisor
- Investigation or discipline files of others accused of similar conduct
- For discrimination claims –obtain and review files or records of employees similarly situated
- Complainant will likely have identified individuals outside the “protected classification” who he/she believes were treated better
- Files of individuals complainant has identified and files of employees the supervisor identifies as being similarly situated should be reviewed
- Files to be reviewed include personnel; payroll; records of hiring, promotion transfer; evaluation forms
- Employer rules, policies, procedures and instructions
- CBA?

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82

HOW DO INTERNAL INVESTIGATIONS WORK?

Take Immediate, Temporary Steps to Stop Any Wrongdoing

- If the investigation will take more than one day, take immediate steps to deal with the alleged wrongdoing –particularly any harassment.
- Consider:
 - Giving the complainant the option of taking paid leave from work
 - Giving the complainant the option of moving to a different work location on a temporary basis
 - Instructing the alleged wrongdoer not to talk to the complainant
 - Change the supervisory reporting structure
- Avoid the appearance that the alleged wrongdoer has already been deemed guilty of the offense
- Avoid the appearance that the complainant is being punished in any way

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83

HOW DO INTERNAL INVESTIGATIONS WORK?

Initial Discussion With the Alleged Wrongdoer

- Have two people interview the alleged wrongdoer to ensure there is a witness to the discussion and statements made
- Inform the alleged wrongdoer that the ER takes the allegations seriously by investigating them consistent with its policy
- Inform the alleged wrongdoer of the allegations
- Communicate the possibility of discipline if the allegations are found to be true
- If a member of a union -remember Weingarten Rights
- Advise that he/she will be provided a full and complete opportunity to provide a meaningful response to all allegations
- Advise that the ER has not yet made any determination regarding the allegation
- Advise them to minimize contact with the complainant
- A strict warning not to retaliate should be given and consequences explained
- Request that employees be discrete and not interfere with the investigation to protect the integrity of the investigation, protect his/her privacy and prevent rumors

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84

HOW DO INTERNAL INVESTIGATIONS WORK?

Prepare the Investigation File and Log

- The investigation file should be complete accurate and thorough. It should include:
 - A chronology of events
 - List of people involve or contacted
 - List of documents reviewed
 - All communications with those involved
 - Witness statements
 - Documents that establish or refute the issue investigated
 - Physical evidence
 - Investigator's report
 - Documentation of results or remedial action taken
 - Summary of the allegation and responses
 - Complete record showing the employer's prompt and appropriate action
 - Do not include conclusions about credibility or the merits of the complaint
 - File should only include objective, fact-finding information

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85



THE INVESTIGATORY PROCESS

86

SUMMARY OF THE INVESTIGATORY PROCESS

- Recognize and Receive the Complaint
 - Take Action to Stop the Suspect Conduct if needed
- The Planning Process
- Collecting Possible Evidence
- Conduct Interviews
 - Interview the Complainant
 - Interview the Alleged Wrongdoer
 - Interview Other Witnesses or "Key" Individuals
 - Follow-up interviews as needed
- Closing Loose Ends
- Collect and Organize Data and Findings
- Document, Document, Document
- Reach Conclusion and Prepare Investigation Report
- Communicate Results to Complainant, Wrongdoer
 - Acknowledge and Thank Witnesses
- Employer (not the Investigator) Take Appropriate Corrective Measures
- Follow up Afterwards as Necessary



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87

THE PROPER ROLE FOR THE INVESTIGATOR

- Gather and document facts about alleged workplace misconduct by interviews or other means.
- Evaluate and reach conclusions about any competing versions of the facts.
 - Note, investigators should rarely, if ever, make conclusions concerning whether the law has been violated.
- Make recommendations, if appropriate
 - Provide sample draft communication memos for management
 - Do **not** administer corrective action
- Document the investigation and management's response.



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88

CREATE A PLAN FOR THE INVESTIGATION

- An investigation must be planned to be effective and properly executed.
- A complete plan should include:
 - An outline of the issue,
 - who should conduct the investigation,
 - the development of a preliminary list of witnesses to be interviewed,
 - sources for information and evidence,
 - interview questions targeted to elicit crucial information and details, and
 - a process for retention of documentation (e.g., interview notes and e-mails that could be treated as evidence).
- The use of all available resources will assist the investigator in developing a proper plan.
 - The Equal Employment Opportunity Commission (EEOC) provides guidelines and definitions to employers on specific topics such as sexual harassment and discrimination.
 - Additionally, numerous online and print sources are available to assist and even provide a step-by-step guide.

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89

PREPARING FOR THE INVESTIGATION

- Review any relevant facts and outline questions to be asked prior to interviewing witnesses.
- Interview the reporting supervisor and obtain any documentation.
- Review the personnel files of the complaining employee and the alleged harasser.
- Review all relevant rules, policies and procedures, prior investigation notes, records of other complaints against alleged harasser and other complaints by the complainant.
- Collect any relevant business records (tapes, calendars) or physical evidence (samples).
- If appropriate under the circumstances, pull and review e-mails and internet history of the complainant and the accused.
 - Ensure that the employment policy manual contains a disclosure and acknowledgement of the Company's right to view an employee's e-mails and internet usage.
- Consider having two people on the investigatory team.



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90

PRESERVING EVIDENCE

- Usually the evidence will be in the form of documents that need to be identified and reviewed in a timely fashion.
- Retain all reports, investigative summaries, written statements, and any other evidence relating to the investigation. Once any document has been discovered and reviewed, its retention and control becomes critical.
- An investigative file should be kept in a secure place to maintain confidentiality.
- Do not forget to consider nontraditional forms of documents such as computer disks and e-mail.

EVIDENCE

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91

PRESERVING EVIDENCE

- Investigation files should be kept separate from general personnel files.
 - The one exception to this is any disciplinary memorandum that is issued at the conclusion of the investigation.
- Be aware that the documentary evidence created and maintained in the investigation file will presumably be disclosed and analyzed in any litigation concerning the investigation.
 - Accordingly, every comment or document in the file should be carefully considered.
 - Consider using attorney-client privilege

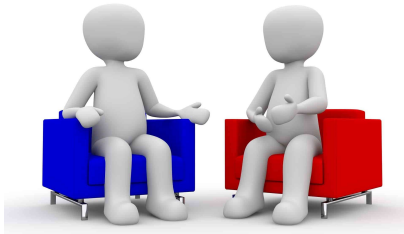
EVIDENCE

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92

INTERVIEWS: THE HEART OF THE INVESTIGATION

- Most investigations require interviews.
- In rare situations where documents supply most of the information, interviews may not be necessary.
- You should decide early in **the planning process** whether interviewing will be part of the investigation process.



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93

WHO SHOULD BE INTERVIEWED?

- Before you start interviewing anyone, consider whom you will want to interview.
 - It's vital to interview the employee making the complaint (complainant) and the accused — the employee accused of wrongdoing.
 - Consider interviewing witnesses identified by both employees, other co-workers who may have suffered wrongdoing by the accused, and the supervisors of the complainant and the accused.
- Sometimes it may be impossible to interview everyone who conceivably has relevant information. Although it's important to be thorough, it's also critical that your thoroughness be balanced against the need to conclude your investigation quickly.
 - You might ask the employee who has lodged the complaint to try to identify people who might have more specific information about the conduct at issue or about recent events.
- To ensure that your investigation is fair and thorough, you should try to interview every witness the target has identified as having information that would help his case.

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94

WHAT ORDER SHOULD YOU FOLLOW?

- Generally speaking, you should start by interviewing the complaining employee. Before you're able to confront the alleged wrongdoer with the accusation, you need to know exactly what he's being accused of.
- Typically, you should interview the alleged wrongdoer after you interview the accuser. It's helpful to know what each employee agrees about or disputes before you interview other people.
- Then you're ready to interview other witnesses. Be prepared to do follow-up interviews for clarification or as additional information comes to light.
- Once you start interviewing, you should conduct all your interviews one right after the other if possible. That may help prevent witnesses from learning the nature of your questions and then sharing information and "shaping" their stories.

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95

PLAN FOR THE INDIVIDUALS YOU WANT TO INTERVIEW

- **The Complaining Employee.**
 - When a workplace investigation is the result of an employee complaint about treatment he or she received at the company, the first person to be interviewed will normally be the complaining employee.
 - You will want to get complete details from the employee, along with names of witnesses or others who may have information.
- **The Potential Victim.**
 - If the potential victim is not also the complaining employee, interview him or her next.
 - Discuss the information you received in the complaint and seek verification of the facts and additional details.

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96

PLAN FOR THE INDIVIDUALS YOU WANT TO INTERVIEW

- **The Accused/Wrongdoer.**
 - The investigator must in almost every instance interview the accused/wrongdoer as part of the investigation to obtain his/her side of the story.
 - Courts require that the “accused” be given a “reasonable opportunity to respond” to the charges against him/her.
 - The timing of the interview will depend upon the nature of the particular investigation.
 - If you are investigating charges of theft you may want to wait until you have solid evidence, and the investigation is close to completion before you interview the accused.
 - When you interview the accused, get complete details from him/her as well as the names of others who may have information about the charges.

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97

PLAN FOR THE INDIVIDUALS YOU WANT TO INTERVIEW

- **Collateral Witnesses and Other Key Individuals**
 - Interview all individuals whom you suspect have knowledge or information about the subject incident(s).
 - Do not limit your investigation to interviewing only those whom the complainant or accused have identified.
 - Also, think about the order in which these interviews should be conducted.
 - Do not rush ahead when it is necessary to wait to talk to an important witness.
 - Remember to ask the witnesses if they know of anyone else who you should speak with about the alleged incident.

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98

BRINGING A CO-WORKER INTO INTERVIEWS

- In a nonunion workplace, you do not have to allow employees to bring a co-worker or other representative into investigative meetings.
- A union-represented employee who reasonably believes that an investigatory interview with their employer may lead to discipline has the right to:
 - Ask for representation by a union agent.
 - Ask for representation by a fellow employee.
 - Forego representation and proceed with the interview without a union representative or co-worker present.
- The statutory rights of employees to get assistance from a union representative for an expected are called **Weingarten rights** and exercising them is considered protected concerted activity under the NLRA.
- The employer does not have to offer representation unless it is requested.
 - **NLRB v. J. Weingarten, Inc., 420 U.S. 251(1975).**

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BRINGING A WEINGARTEN REPRESENTATIVE INTO INTERVIEWS

Employers must permit the selected Weingarten representative to provide "advice and active assistance" to the employee who is being interviewed.

- An employer cannot require that the representative act merely as an observer (Washoe Med. Ctr., 348 N.L.R.B. at 361).
- If the employee or the selected representative requests, an employer must:
- Inform the representative of the subject matter of the interview if the representative requests it (Pacific Tel. & Tel. Co., 262 N.L.R.B. 1048 (1982)).
- Permit the representative to:
 - have a private meeting with the employee before questioning begins (U.S. Postal Serv., 303 N.L.R.B. 463 (1991));
 - speak during the investigatory interview (Sw. Bell Tel. Co., 251 N.L.R.B. 612 (1980));
 - object to a confusing question or request that the question be clarified so that the employee understands what is being asked (Weingarten, 420 U.S. at 260);
 - suggest other employees who may have knowledge of the incident or incidents in question (Weingarten, 420 U.S. at 260);
 - advise the employee not to answer questions that are abusive, misleading, badgering or harassing (New Jersey Bell Tel. 308 N.L.R.B. 277); and
 - when the questioning ends, provide information to justify the employee's conduct (Weingarten, 420 U.S. at 257).

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100

BRINGING A WEINGARTEN REPRESENTATIVE INTO INTERVIEWS

Weingarten representatives cannot:

- Turn an investigatory meeting into an adversarial proceeding. Weingarten, 420 U.S. at 263 and Yellow Freight Sys., Inc., 317 N.L.R.B. 115(1995).
- Prevent the employer from questioning the employee, even repetitiously. New Jersey Bell Tel., 308 N.L.R.B. at 279.
- Interfere with legitimate employer prerogatives, such as requesting that the employee attend an investigatory interview away from the employee's working area (Weingarten, 420 U.S. at 258 and Roadway Express, 246 N.L.R.B. at 1128).
- Obstruct a legitimate investigation into employee misconduct by:
 - instructing employees not to answer the employers' questions (Manville Forest Prods. Corp., 269 N.L.R.B. 390 (1984));
 - insisting that the interview be ended (New Jersey Bell Tel., 308 N.L.R.B. at 279); or
 - repeatedly interrupting the interview, using profanity and pounding on a manager's desk (Yellow Freight Sys, 317 N.L.R.B. 115.).

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101

CONFIDENTIALITY

- In a change from its previous position, the National Labor Relations Board (NLRB) recently held that **employers can instruct employees to keep an open internal investigation confidential**.
 - In December 2019, the NLRB held that **confidentiality mandates** during the course of workplace investigations are presumptively lawful, and that they can implement confidentiality rules for open investigations.
 - Such confidentiality instructions are typically given during internal investigations in order to encourage employees to come forward with complaints and to limit interference with such investigations.
 - However, NLRA ruling may also limit an employer's ability to require confidentiality *after the investigation is concluded*.
 - As such, employers should exercise caution when drafting and implementing confidentiality protocols.

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102

INTERVIEW PREMINARIES

Before you start the actual questioning, you should consider the following pointers.

- Don't do group interviews.
- Have two managers present at the interview, one to ask questions and the other to take notes.
- Explain to the person being interviewed the purpose of the investigation and how his information may be used.
- Explain to the target that this is his chance to relate his version of events and tell management about any information that should be considered.
- If any employee refuses to attend an interview or otherwise cooperate, explain that the company will base its decision on the other information gathered, draw appropriate inferences from his failure to participate or cooperate, and impose any necessary discipline – *reference applicable policies*
- Don't promise confidentiality, but state that you will limit disclosure on a strict "need-to-know" basis.

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103

WHAT TO COMMUNICATE TO INTERVIEWEES

- Identify yourself, and the purpose of the interview
 - Company's legal obligation to conduct investigation
 - Brief summary of the investigation process
- Confidentiality v. Anonymity
 - No promise of confidentiality
- Remind employees that they are required to cooperate fully with the investigation - *reference applicable policies*
- Instruct employees to keep all information from an open internal investigation strictly confidential – *reference applicable policies*
- Instruct interviewees to use their best judgment and discretion when discussing the investigation with others following its conclusion.
- Employee's legal duty and obligation to cooperate - truth and candor required – *reference applicable policies*
- Prohibition against retaliation – *reference applicable policies*
 - Right to complain and/or participate in the investigation

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104

BASIC RULES FOR INTERVIEWING

Interviewing witnesses is an art. Your style and the specific questions you ask will of course depend on the nature of the alleged wrongdoing and the circumstances. Here are some generally effective interview techniques.

- Prepare an outline of the questions you want to cover, but don't follow an exact script. It's important to be flexible in your questioning, based on the answers you receive.
- Be thorough. Obtain all the details about the alleged misconduct. Focus on who, what, when, where, and how.
- Seek facts; ask open-ended questions
- Do not ask questions that suggest a particular answer
- Maintain neutrality and professional tone
- Remain open minded; do not argue or express opinion, or suggest foregone conclusion
- Ask for supporting evidence (photos, emails, notes, calendar entries, etc.)
- Follow up on answers and inquire further, where facts do not "gel" or are confusing – ask "Anything else?"

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105

BASIC RULES FOR INTERVIEWING

- Conduct interviews in appropriate private office
 - Certain circumstances may require off-site location
- Best to have two people present for Company during interviews
 - One should be primary questioner and other primary note taker
- Interview one employee at a time – not in a group
- If Union workforce, be aware of "Weingarten" rights
 - Employee has right to Union Rep if questioning could lead to discipline of that employee
- Ask each witness for names of other witnesses and to identify any documents relevant to any of their answers.
- Don't make accusatory or judgmental statements. Focus on asking the questions and getting the facts.

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106

INTERVIEW TECHNIQUES

- Don't use loaded words in your questions.
 - For example, if you ask a witness whether he saw any "harassment," his interpretation of what constitutes harassment may differ from yours.
 - It would be better to ask specific questions like, "Did you see Jones make any physical contact or flirt with Smith or make any comments about her appearance?"
- Start with open-ended questions and work toward more specific ones.
- Avoid leading questions.
- Ask each witness to explain any inconsistencies either in what she tells you or between what she tells you and what someone else has told you.
- Conclude the interview by giving the witness an opportunity to disclose anything else.

Conducting interviews in an orderly fashion, focusing on the facts, and being thorough will likely yield the most detailed and relevant information.

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107

GENERAL INTERVIEW PROCEDURES

- Make appropriate disclosures at the beginning of an interview and retain a written record indicating they were made.
- State what is being investigated, i.e., why the interview is taking place.
- Advise what role the interviewee may play in the specific incident.
- Explain how the information received may be used (to evaluate the complaint, to access what actions may be taken, as a record if litigation arises).
- Explain that, while absolute confidentiality is not possible, information obtained during the interview will be reported to those within and possibly outside the Company on a "need to know" basis only.

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108

GENERAL INTERVIEW PROCEDURES

- Explain that the Company is taking the investigation very seriously and that the employee should too.
- Explain the importance of accurate information and the person's obligation to provide truthful, thorough information.
- If appropriate, caution that discipline and possibly criminal prosecution (*if applicable – reference policy*) could result from refusing to cooperate or providing untruthful or incomplete answers.
- If the interviewee refuses to participate in the interview or answer questions, explain the consequences.
- Advise the interviewee that there will be no retaliation for participating in the investigation.

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109

GENERAL INTERVIEW PROCEDURES

- Take detailed and thorough notes. The notes should indicate the name of the person interviewed, date, time and location of the interview, who was present, the length of the interview, and the identity of the interviewer.
- Typically start with open-ended questions and eventually move to narrower, more focused questions.
- End with, "Is there anything else, no matter how remote, that you would like to share with me" to provide witnesses with an opportunity to share any information that was not addressed during the course of the interview.
- Generally, do not use a tape recorder. Recordings often scare witnesses and are vulnerable to attack in court. Instead, take notes by hand or with a laptop.
- Stress that the interview and investigation are confidential, and that the person must maintain confidentiality until the investigation is concluded.

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110

INTERVIEWING THE COMPLAINANT

- Conduct the interview as soon as possible after receipt of the complaint.
- Learn as much as possible about the alleged wrongdoing, such as an act of discrimination or harassment:
 - when did it occur,
 - where did it occur,
 - who was involved,
 - whether similar incidents have occurred in the past,
 - who else may have witnessed the incident,
 - others who may have mentioned similar treatment, etc.
- If the complaining employee is not too distraught or emotional, request that the employee put the complaint in writing.



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111

INTERVIEWING THE COMPLAINANT

- If the complaining employee is emotional, document what you perceive the complaint to be and have the complaining employee review it the next day to verify that the document adequately reflects the complaint.
 - In doing so, try to avoid making assumptions, conclusions or interpretations.
- Request that the employee sign the complaint. If the employee declines to sign, note that the signature was requested and refused.
- Assure the complainant that the Company will conduct an immediate and thorough investigation, while maintaining confidentiality as appropriate.
- Inform the employee that if it is determined that any employee engaged in inappropriate conduct, the Company will take appropriate corrective action.

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112

INTERVIEWING THE COMPLAINANT

- Advise the employee that there will be no retaliation for coming forward with the complaint.
- Advise the employee to immediately report any perceived retaliation or difficulties with the alleged harasser.
- Stress confidentiality and the need for the employee to refrain from discussing the incident or the investigation in the workplace.



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113

DOCUMENT THE COMPLAINANT INTERVIEW

- Take detailed notes of the complainant's statements.
 - Some like to ask the complainant to provide a written statement of the facts and details of the complaint, list of witnesses and other relevant info, etc., but do not use this as a substitute for an interactive interview
- Read your notes back to the Complainant and seek confirmation that they are accurate
 - And/or prepare typed summary/notes and ask Complainant to review and sign them to verify that they are accurate
- Make sure that you record only the facts of complaint;
 - not speculation or "spin," or your opinion or subjective comments, regarding the complainant's statement.

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114

DOCUMENT THE COMPLAINANT INTERVIEW

- Assess credibility of the employee
 - On separate document may want to record your thoughts, impressions, and objective observations and beliefs based on the interview
 - Keep it separate from the factual statement of the complaint from the employee
- Sign and date all documents and notes, note location of interview
- Place your name on all documents/notes you prepare
- Keep written record of when you receive from or provide documents to the employee

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115

FOLLOWING THE COMPLAINANT INTERVIEW

- After speaking with and assessing complainant's issues, demeanor, and likely dynamics, assess and implement short-term resolution during investigation.
 - Paid leave for employee?
 - Paid/unpaid suspension for wrong-doer?
 - Separate job location?
 - Possible temp. transfer (for whom)?
 - Work from home?
- **Caution:** Taking interim measures towards complainant may be perceived as retaliation, particularly in harassment cases.
 - However, immediate action may be required to prevent further harassment from occurring.
 - Consult legal counsel for options and it may be necessary to discuss options with complainant before determining most appropriate interim measures.

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116

INTERVIEWING COLLATERAL THIRD-PARTY WITNESSES

- Interview such person(s)
 - who raised the issue(s),
 - persons identified by person(s) who raised the issue(s),
 - persons identified by person(s) being investigated,
 - supervisors of persons involved,
 - observers of the incident(s),
 - others with relevant information,
 - authors of relevant documents,
 - co-workers of persons involved, and, if appropriate,
 - other persons who reportedly have been subjected to similar activity.
- Interview witnesses thoroughly, following the general interview procedures described in the next section.
- Stress that all witnesses should keep the investigation and any discussions involved confidential until the investigation is completed.

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117

INTERVIEWING COLLATERAL THIRD-PARTY WITNESSES

- Inform the witness that the purpose of the interview is to obtain the witness's knowledge of the incident
- Confirm witness's obligation to cooperate
- Impress upon the witness the importance of truthfulness and confidentiality
- Persons interviewed should be assured that the information they provide, including their identity, will be shared only with those who have a legitimate business "need to know"
 - (including the complainant and alleged wrong-doer)
- Reaffirm that any form of retaliation is prohibited.
- Begin with open-ended questions
- Transition to the specific situation at issue
- Give witness an opportunity to provide any additional information
- Probe witness with follow-up questions, and ask about knowledge of any relationships between complainant and alleged wrong-doer or possible motivations for complaint or conduct at issue

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118

INTERVIEWING COLLATERAL THIRD-PARTY WITNESSES

- Inquire if the witness is hostile/friendly to either the complainant or the alleged wrong-doer
- Ask witness if he/she is aware of any others who might have relevant information or evidence
- Ask witness for additional information and evidence (photos, emails, calendar entries, and other evidence)
- Prepare formal witness statements or take notes, as close to verbatim as possible, of the facts recounted to the investigation
 - Provide witness with written statement of his/her interview to verify its accuracy and make any necessary changes
- Witness should sign and date the statement
- If this is not possible or practical, confirm accuracy of notes and obtain initials

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119

INTERVIEWING COLLATERAL THIRD-PARTY WITNESSES

RISK FACTOR:

- Failure to interview relevant witnesses may lead to the conclusion that the investigation was unfair
 - *Taybron v. City & County of San Francisco, 341 F. 3d 957 (9th Cir. 2003)*



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120

INTERVIEWING THE ALLEGED WRONGDOER

- If the employee is a member of a union, they have the right to have a union representative present at any meeting from which disciplinary action may result, if requested. (Weingarten Rights)
- Learn as much as you can from the alleged wrongdoer about the events as they view them (i.e., their version of the facts, what possible motive the complainant would have to fabricate, etc.).
- Explain the Company's policy against harassment. Find out whether the alleged wrongdoer knew about and understood the policy at the time of the alleged incident.
 - Provide an additional copy of the policy to the accused.
- Remind the alleged wrongdoer that no conclusions have been reached as to whether they are guilty of the conduct charged.

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121

INTERVIEWING THE ALLEGED WRONGDOER

- Remind the accused that it is unlawful and a violation of policy to take any retaliatory action against the complaining employee or any witnesses.
- Prepare a written account of the alleged harasser's statement.
- Ask the alleged harasser to review, correct, and sign the statement.
- If the accused declines to sign, note the refusal on the statement, sign and date.
- Collect any documentation or evidence that may be in the alleged harasser's possession.

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122

INTERVIEWING THE ALLEGED WRONGDOER

- Do not anticipate the outcome of the investigation or provide projections of likely outcome
- Do not engage in argument with employee
- Do not encourage speculation about the outcome or merits of the complaint
- Remind the employee that the purpose of an investigation is to uncover facts
- Ask the employee broad, open-ended questions first;
 - follow with more detailed/specific questions based on responses, and
 - drill down to the core facts
- Ask for any mitigating circumstances or explanations

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123

INTERVIEWING THE ALLEGED WRONGDOER

- Ask the employee if he/she believes there is any other reason the employee may have made the complaint against him/her
 - What is relationship between the victim and the alleged wrongdoer?
- Ask for any witnesses or other knowledgeable persons
- As with complainant, verify the accuracy of notes taken during the interview with the alleged wrongdoer
- Ensure notes record facts, not interviewer's opinions or conclusions about credibility
- Confirm alleged wrong-doer does not have any other useful facts or information that may shed light on complaint or assist in its resolution

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124

INTERVIEW POINTERS

- Conduct interviews in private so no one can overhear.
- Begin with general open-ended questions, such as
 - “How long have you worked for the Company?”,
 - “How long have you known...?”,
 - “Who do you report to?”,
 - “Tell me a little about the general environment of your department”.
- If appropriate and if possible, have another person present to be a witness and to take notes.
 - You can explain the other investigator’s presence is to assist you and to take notes so you can concentrate on the interview.
 - However, normally only one investigator should conduct the actual interview. You do not want the witness to feel “ganged up on.”

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125

INTERVIEW POINTERS

- Do not prevent the witness from leaving. Do not lock the door of the room where the interview is conducted or prevent the witness from leaving the room.
 - If a witness wants to leave, explain that it is important for you to get all the facts so that you can make the best decision possible.
 - However, if the witness still wants to leave, let them go immediately.
- If a witness is unwilling to talk to you, ask why.
- Do not tell the witness what other witnesses have said, unless you need to clarify a discrepancy or in some cases refresh the memory of a witness.
- Find out who else may have information that could shed light on the investigation.
- Listen objectively and do not pre-judge the witness’s story.
- Interview each person the suspected wrongdoer names. The wrongdoer must have the opportunity to exonerate himself.

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126

INTERVIEW POINTERS – Expected and Unexpected Issues

Complainant refuses to submit to interview without presence of legal counsel

- Confirm to employee that counsel may become a witness and cannot interfere with investigation
- Refusal to permit presence of counsel could affect reasonableness of investigation
- In the end – better to allow attorney present than to refuse
- Reconsider who should conduct interview if counsel will be present

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127

INTERVIEW POINTERS – Expected and Unexpected Issues

The recalcitrant complainant, wrong-doer, or witness

- Remind them of obligation to cooperate (in some instances, remind them of potential for discipline for failure to cooperate)
- Assure them of obligations of confidentiality/non-retaliation
- Confirm that company can take action based only on the information it is able to obtain during the investigation; if information is withheld, the company cannot consider it
- Refusal by complainant to cooperate may cause company to doubt credibility of the complaint, question motives
- Refusal by alleged wrong-doer to cooperate may lead to inference that he/she engaged in wrong-doing
- Interviewer’s notes should confirm refusal to cooperate and that disclosures were made to confirm consequences of refusal to cooperate

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128

INTERVIEW POINTERS – Expected and Unexpected Issues

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129

EVALUATING THE COMPLAINT

Factors to Consider in Evaluating a Complaint

- In some investigations, the investigator may need to resolve conflicts in information by making determinations about the credibility of witnesses.
- Factors such as evasiveness, contradictions in statements, blushing, other facial expressions, potential signs of anxiety such as shaking or perspiration, defensiveness and other demeanor at specific points in the interview may be important.
- However, **record observations**, not conclusions about observations.

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130

THE INVESTIGATOR'S ROLE IN EVALUATING A COMPLAINT

Factors to Consider in Evaluating a Complaint

- The investigator's job is not to simply collect evidence. Instead, after collecting as much evidence as is reasonable and feasible, the investigator must analyze the evidence to determine what it suggests actually occurred.
- It is the rarest investigation in which all of the evidence points solely in one direction. More commonly, there is some inconsistency/conflict between different pieces of evidence.
- When there is conflicting evidence, the investigator must carefully review and determine which evidence is most reliable—and thus persuasive—in helping determine what actually happened.
- This is true for documents and records just as much as it is for witness statements.

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131

ANALYZING EVIDENCE

A Typical Scenario

- Imagine that you are investigating an allegation that a particular employee accessed a database of highly confidential information without authorization.
- You have clear evidence from the IT department showing that the computer assigned to the accused employee, and to which only he was given the logon and password, was used to gain the unauthorized access.
- The employee, however, denies that he was even at work on the day the unauthorized access occurred.
- When you check the records of which employees entered the building on the day in question, the records confirm that the accused employee did not enter the premises, just as he claimed.

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132

ANALYZING EVIDENCE

Evaluating Conflicting Evidence:

- When confronted with conflicting evidence like this, examine the evidence to determine if there are potential weaknesses in it.
 - Seek additional evidence (corroboration) that will help clarify which report—the IT logs or the entry/exit records—is more reliable.
 - For example, is it possible for employees to follow someone else into the building after that person uses his or her badge to open the door?
 - Did the accused employee give his logon and password to anyone else, or could someone have discovered them?
- Ultimately, the investigator analyzes the degree to which each of the original documents is reliable and then weighs that them, along with all other evidence gathered in the investigation, to determine what the evidence collectively indicates most likely occurred.
- Remember, without perfect, air-tight evidence, we are always dealing with probabilities regarding what occurred.

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133

ANALYZING EVIDENCE

Assessing Witness Credibility

- When one witness contradicts another, the process is the same—the investigator analyzes the degree to which each witness is reliable. To do this, we recommend that investigators use five “credibility assessment factors” to help structure their analysis:
 - Plausibility of the witness’s statement
 - Witness demeanor
 - Corroboration
 - Past record
 - Motive
- No single factor proves that a given witness is truthful or lying, but—collectively—the factors help the investigator assess the degree to which a witness’s statement should be relied upon in reaching a conclusion.

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134

ANALYZING EVIDENCE: Witness Credibility

Generally, the standard of proof used in workplace investigations is the “preponderance of the evidence.”

- Under this standard, the investigator determines what “more likely than not” occurred.
- Under the preponderance of the evidence standard, 50% weight “plus a feather” tips the scales of credibility one way or the other.
- Weight is assigned by applying nine well-established credibility factors:
 1. the existence and degree of corroboration;
 2. opportunity of the witness to observe events;
 3. ability of the witness to remember;
 4. possible corruption of memory due to scientifically-recognized psychological phenomena;
 5. reputation for truthfulness;
 6. plausibility;
 7. motive of the witness to lie;
 8. possible witness bias; and
 9. demeanor when answering questions.



135

ANALYZING EVIDENCE

Assessing Witness Credibility

- In the same way that the investigator examines documentary or electronic evidence for weaknesses/reliability, you must examine information gathered from witnesses and determines the degree to which that evidence is reliable.
 - In other words, the credibility assessment is not subjective opinion but, instead, reasoned analysis based on the evidence.
- Finally, for those who doubt the validity of assessing witness credibility, consider this:
 - Witness credibility assessments are a standard, essential part of what judges, juries, and other fact finders do as they assess what actually happened in the case before them.

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136

PREPARING YOUR FINDINGS

When a workplace investigation is coming to an end, one task can seem deceptively simple – making findings, and determine what happened.

- Quality outcomes require great effort and thoughtful consideration of relevant material.
- Before findings can be made, a thorough analysis of the evidence needs to occur. Findings will need to link clearly with this analysis – and all evidence must be considered.
- Issues around organizational policies, plus the correct weight to be given to particular pieces of evidence, are further pieces in the puzzle of investigative findings that need to be addressed.

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137

PREPARING YOUR FINDINGS

- To determine the appropriate conclusion for a workplace investigation, consider several factors such as the following:
 - Does the Company have a policy against the behavior?
 - Did the accused/wrongdoer know about the policy?
 - Does the accused/wrongdoer admit or deny the misconduct?
 - Was any law violated?
 - How strong is the evidence? Is it more likely than not the misconduct occurred?
 - Has the investigation been thorough? Are there any gaps that need to be investigated before a decision is reached?
 - Have you made any assumptions that need to be verified?
 - Has the accused/wrongdoer committed violations in the past?
 - How long has the employee been employed?

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138

PREPARING YOUR FINDINGS

When preparing your written findings:

- Do not use terms that are legal conclusions; i.e., “Based on the evidence, the manager committed sexual harassment”
- Generally, the conclusion will either be that the complaint was unfounded, and the misconduct did not occur, or the complaint was truthful and at least some misconduct occurred.
- Sometimes at the conclusion of an investigation, although the facts in the complaint may have been true, there may also be mitigating circumstances.
- And in some situations, you may just have to throw up your hands and acknowledge that you don't have enough information to decide what really happened.

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139

MAKE RECOMMENDATIONS FOR ACTION TO BE TAKEN

- Through the investigation, the investigator must be careful not to jump to any conclusions before all the facts are available.
- Once the interviews are conducted, other necessary procedures, such as evidence collection, should be completed.
- Once any credibility issues have been resolved, the investigator will evaluate all the information for a formal recommendation to management.
- The investigator or member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigative report.
- The employer must consider all the parties involved as well as organizational processes, not just whether the accused is guilty, in the final determination.

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140

MEETING TO ANALYZE REPORT & MAKE CONCLUSIONS

- “Committee” meeting limited to those who need to be involved:
 - HR Director
 - Legal counsel
 - Appropriate manager(s) and/or supervisor(s)
- Investigator should be brought in to present report and recommendations, but not involved in making final employment decision
 - Attorney-client privilege issues
 - Keeps outcome separate from investigator
- Conclusions drawn based on facts and information from report, with appropriate advice and guidance of counsel, as appropriate

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141

TAKE CORRECTIVE AND/OR DISCIPLINARY ACTION

- Once you decide what happened, you'll have to figure out what to do about it
 - Make recommendations to appropriate management.
- If you conclude that serious wrongdoing occurred, corrective and/or disciplinary action must be taken by the employer quickly to avoid legal liability for that employee's behavior and to protect your company and other workers from harm.
- In deciding how to handle these situations, you should consider a number of factors, including how serious the actions were and how the company has handled similar problems in the past.

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142

TAKE CORRECTIVE AND/OR DISCIPLINARY ACTION

- When necessary, the employer reviews the investigator's findings and recommendations, and must make the final decision about taking corrective or disciplinary action that is appropriate to the situation, including possible termination.
- The employer should:
 - Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
 - Determine if education, such as sexual harassment training or anger management training, would be beneficial to the individual or all employees.
 - Consider if the need exists to review, modify or redistribute workplace policies.
 - Determine whether a review of the investigation and complaint resolution processes is necessary.

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143

TAKE CORRECTIVE AND/OR DISCIPLINARY ACTION

In developing recommendations for what discipline:

- Review disciplinary action awarded in past situations involving similar conduct. If it was effective in ending prior instances of misconduct, give preference to using the same method.
- If no historical precedent exists, or if prior precedent was not effective, determine the seriousness of the action to make recommendations for corrective or disciplinary action.
- Possible corrective or disciplinary action you can recommend:
 - Warning and reaffirmation of policy.
 - Transfer of wrongdoer.
 - Verbal/Written warning.
 - Termination.
- Communicate disciplinary action to accused if imposed.
- Follow up to ensure no retaliation.

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144

CLOSE OUT THE INVESTIGATION

- Once a decision is made, the employer should notify both the complaining employee and the accused of the outcome.
- It is important to let the complainant know that the organization took the complaint seriously and took appropriate action.
- The organization must ensure the complainant agrees that he or she has been properly heard and understood, even if he or she is not in agreement with the results.
- The investigator should set a time frame to follow up with the complainant to ensure there are no other issues and that he or she is settling back into the work environment.
- The employer should encourage communication and follow-up until the complainant is comfortable again.
- Finally, the investigator should remind all parties to preserve confidentiality as appropriate.

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145

CLOSE OUT THE INVESTIGATION – Communicate Results

- Memos should be prepared to complainant, accused, and cooperating witness reporting the conclusions
 - e.g., company could/could not conclude that wrongdoing occurred, or
 - Confirming what, if any, action will be taken (appropriate level of confidentiality for the parties)
- Memos all should confirm prohibition against retaliation and encourage immediate reporting of retaliation
- Memos should remind employees of open-door policy or other process if employees are dissatisfied with results and action taken
- **NOTES:**
 - Under California law, complainant must be informed of conclusions reached and action to be taken
 - Public sector employers should follow Loudermill Hearing rights
 - Union employers must follow the CBA requirements
 - All employers – be sure to follow your policies

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146

CLOSE OUT THE INVESTIGATION – Communicate Results

To the Accused/Wrongdoer

- You will always communicate the results to the accused employee.
- Give the employee the specific factual basis for the determination and, where necessary, impose discipline.
- In determining the appropriate recommended discipline, consider:
 - The seriousness of the misconduct
 - The employee's position (supervisors and managers can be held to a higher standard of conduct)
 - The employee's employment history and length of service
 - Whether the employee has been disciplined for similar behavior before
 - How the company has treated other employees who have committed similar offenses

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147

CLOSE OUT THE INVESTIGATION – Communicate Results

To the Accused/Wrongdoer

HINT #1:

- It is best to avoid using legal terms to describe the employee's misconduct.
- For example, be careful before you state that the employee committed "theft." The legal standard for finding someone guilty of theft is "beyond a reasonable doubt," which only a jury or court can do.
- Therefore, it is always better to describe the behavior as "a violation of company policy" and specify the policy.

HINT #2:

- Doing a good job of communicating to the employee why the decision to discipline or terminate him/her was made, including the evidence that was considered in doing so, might convince the employee not to bring a claim against the company.
- If the person sees that the evidence you have is solid, they may feel it is better to just accept the decision.

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148

CLOSE OUT THE INVESTIGATION – Communicate Results

To the Complainant

- The nature of the complaint or misconduct, along with local laws and company policy, will dictate what and how much you tell the complaining employee.
 - At a minimum you should let the complaining employee know that his/her complaint was not ignored.
 - HR or your legal counsel should drive this level of communication.
- You must be careful not to give too much information to the complaining employee.
- The accused/wrongdoer, as well as the witnesses in the investigation, have certain privacy rights.
 - It is sufficient that if you are required to or decide to report information to the complaining employee to let them know the ultimate result only.
 - The complaining employee does not need the details.

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149

CLOSE OUT THE INVESTIGATION – Communicate Results

To Witnesses

- At a minimum you should thank the witnesses for their cooperation in the investigation and acknowledge their contribution to getting the situation resolved.
- Again, to protect privacy rights of the other parties, you must be careful not to give too much information to the witnesses.

To Government Agencies

- Depending on the offense, the company may want to (or may be required to) report its findings and results to a government agency.
- In addition, if the company decides to seek prosecution for the misconduct because it is illegal and considered a crime, the information from the investigation should be given to the appropriate authorities.

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150

DOCUMENT THE INVESTIGATION IN YOUR FINAL REPORT

- Once your investigation is complete, you should write an investigation report that explains what you did and why.
- This will not only give the company some protection from lawsuits relating to the investigation but will also provide a written record in case of future misconduct by the same employee(s).
- Among other things, your report should explain
 - how and when the problem came to the company's attention,
 - what interviews you conducted,
 - what evidence you considered,
 - what conclusions you reached, and
 - what you did about the problem.

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151

DOCUMENT THE INVESTIGATION IN YOUR FINAL REPORT

- If operating on the premise that every investigation of a serious nature could potentially be heard and reviewed by a court, the investigator must prepare a final investigative report.
- The organization should keep a clear paper trail of the evidence, such as examining documentation of previous employee behavior and incidents.
- The investigator should have a clear record of everything done and any findings as well as other steps taken during the investigation.
- You should also document interviews with the accused, the accuser and witnesses.
- Investigators should ensure their notes from interviews are as factual as possible, contain as much relevant information as possible, are dated and indicate the duration and time of the interviews.

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152

DOCUMENT THE INVESTIGATION IN YOUR FINAL REPORT

The final report should summarize the following:

- The incident or issues investigated, including dates.
- Parties involved.
- Key factual and credibility findings, including sources referenced.
- Employer policies or guidelines & their applicability to the investigation.
- Specific conclusions.
- Party (or parties) responsible for making the final determination.
- Issues that could not be resolved and reasons for lack of resolution.
- Employer actions taken.

The goal of the document is to ensure that if a court, jury or government agency were to review it, the reviewers would conclude that the employer took the situation seriously, responded immediately and appropriately, and had a documented good-faith basis for any actions taken during or as a result of the investigation.

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153

MAINTAINING DOCUMENTATION – Investigation Files

- Keep all investigative materials, including interview notes, witness statements, correspondence, and documents gathered in the course of the investigation, in a separate file—not in personnel file.
 - Documentation of corrective or disciplinary action should be kept in the employee’s personnel file.
- Keep all investigation materials confidential
- All investigation documents should be marked as confidential
- Limit access to the investigation materials

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154



COMMON MISTAKES AND HOW TO AVOID THEM

COMMON INVESTIGATION MISTAKES – How to Avoid Them

Taking the side of one of the parties involved in the investigation

- Common mistake (and easy to understand why this may occur), but it is important for investigator to remain neutral and conduct an unbiased, objective investigation
- Applies equally whether empathizing with complaining employee or defending conduct of alleged wrong-doer

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155

156

COMMON INVESTIGATION MISTAKES – How to Avoid Them

Promising complete confidentiality to parties or witnesses involved in the investigation

- Must be sure to explain that confidentiality is qualified/limited
- While every effort will be made to conduct a discreet investigation and disclose information only on a “need to know” basis, nature of investigation will require facts disclosed to come out to various people as necessary

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COMMON INVESTIGATION MISTAKES – How to Avoid Them

Failing to properly document the investigation

- Many times, “minor” complaints or issues are not fully or properly documented
- While it may not be necessary to document to the same full extent as a more serious complaint, it is still very important to at least properly document the investigation to avoid potential claims later on
- Also, be sure that all relevant documents are properly dated and can later be identified with respect to who gave the witness statement and who prepared it

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COMMON INVESTIGATION MISTAKES – How to Avoid Them

Do Not Become a “Lazy” Investigator

- Do not simply ask the witnesses, complainant, or alleged wrong-doer to provide you with a written account of what happened
- Important to have interactive interviews to assess credibility and immediately follow-up on issues raised
- Prevents employees from improperly inserting their own subjective opinions and potentially biased beliefs into the process
- Otherwise, may not be viewed as a fair, thorough, and objective investigation

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159

COMMON INVESTIGATION MISTAKES – How to Avoid Them

Failing to Come to a Conclusion

- In the “he said – she said” type of case, easy to simply state that no conclusion can be reached
- However, it is important to reach a conclusion based on the best information available, credibility of the witnesses, a determination of who is more likely to be telling the truth, etc.
- It is OK to determine “inappropriate conduct” without concluding “unlawful sexual harassment” occurred
- But California law on harassment requires some conclusion to be reached, and failure to do so could lead to later liability

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160

COMMON INVESTIGATION MISTAKES – How to Avoid Them

Failing to Talk to the Accused Prior to Reaching a Conclusion

- Not uncommon for Employer to reach conclusion based on strong facts against employee that employee “did it” and purpose of meeting is to impose discipline rather than investigating or questioning employee
- No matter how implausible an explanation might be, you should still meet with the employee to get their “side of the story” prior to imposing discipline
- Employee may “admit guilt” or give false statements during interview that can then be used as further basis to terminate or discipline employee

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161

QUESTIONS

This is the chance to address issues that may not have been covered to your satisfaction; or

- To expand a point; or
- To clarify a point.
- If there are any further questions which we were not able to get to today, please feel free to contact me by email:



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162