



## Effective Workplace Investigations

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# Types of Workplace Investigations

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- Harassment and discrimination
- Policy violations (e.g. Social Media)
- Theft/fraud/assault
- Workplace safety
- Code of ethics
- Compliance and industry practices
- Whistleblower complaint
- Unlawful business conduct (e.g., False Claims Act, Dodd-Frank, FCPA)

# Should the Company Investigate?

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- Is a company policy implicated?
- Risk-managing potential claims (charges, lawsuits, government agency investigations)
- Quality and materiality of the allegation
- Benefits and risks of pursuing the investigation

# Fundamental Steps: Planning the Investigation

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- Develop investigation **strategy** at outset
- Scope and footprint (time period, location)
- Goals and objectives of the investigation
- Policies and subject matter
- Witnesses and need to know individuals
- Scope is subject to change
- Who is conducting the investigation? Consider need for counsel
- Desired deliverables (oral or written report, facts, recommendations, or legal advice, publishable findings, written witness statements)

# Fundamental Steps: Preparing for Interviews

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- Get the complaint in writing (if you can)
- Gather preliminary documents and information
- Collect and preserve any physical and electronic evidence

# Fundamental Steps: Conducting Interviews

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- Interview the complaining employee
- Inform those who need to know
- Interview the complaining employee's witnesses
- Interview the alleged **perpetrator**
- Interview the alleged **perpetrator's witnesses**
- Conduct any necessary **follow-up**
- **Document, document, document**

# What Constitutes a Complaint?





# Obvious Examples

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- Written or verbal communication from employee “specifically” complaining of discrimination, harassment or other objectionable conduct
- Employee verbally states he/she has “generally” been treated badly or unfairly
- Supervisor/manager reports that inappropriate acts or misconduct have occurred
- Complaints submitted through published policy
- EEOC/Charge of Discrimination/Lawsuit

# Less Obvious Examples

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- Subtle statements about workplace or supervisor
- Offhand comment from employee directly to or overheard by supervisor about inappropriate conduct that has occurred in workplace
- Comments made outside of workplace between “friends” (“just between us”, “off the record”)
- Anonymous complaints

# How to respond?

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- Do not immediately go into defense mode
- Be friendly and open to talk
- If not a good time, offer specific time and place to meet (or time within 24 hours you will get back to person to schedule meeting)
- Treat every complaint seriously
- Be sincere



# How to respond?



- First communication from you needs to be a concise and consistent message about your company practice:
  - Open door
  - No retaliation – strictly prohibited (emphasize)
  - This is a safe place to share
  - You will maintain confidentiality **to the extent reasonably possible**
  - At any time person can go to next higher authority (specifically identify who and give contact number for that person)

# Selecting the Investigator



# Selecting the Investigator

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- Ability to understand **business** purpose of investigation and potential issues it may raise
- Knowledge of policies and practices
- Knowledge of applicable legal issues
- Ability to take thorough, accurate notes which can be used as evidence
- “Communication fit” with personalities and backgrounds of potential witnesses

# Selecting the Investigator

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- Interviewing skills, including the ability to identify follow-up questions when new facts or issues arise during interviews
- Ability to determine when and when not to maintain confidentiality
- Ability to determine credibility of witness

# Selecting the Investigator

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- Manager or supervisor
- HR professional
- Private investigator or outside consultant
- In-house counsel
- Outside counsel



# Developing An Investigation Strategy

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1. Consider need for **preliminary action** “pending investigation”
2. Identify the **need** for an investigation
3. Determine the **goals** of the investigation
4. Assess the potential **disadvantages**
5. Confirm have chosen the appropriate **investigator** (analyze potential conflicts of interest)

# Developing An Investigation Strategy

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1. Identify potential **witnesses**
2. Identify/gather **evidence and documents**
3. Prepare an investigation **roadmap**
4. Consider **confidentiality and security**
5. Consider **legal privileges**



# Preparing to Conduct the Interviews



# Outline Areas of Inquiry and Issues

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- Prepare an outline of critical issues:
  - Ensures all issues regarding each witness will be addressed
  - Ensures a thorough and consistent line of questioning
  - Allows investigator to compare similarly situated witnesses from a standardized approach

# Consider Confidentiality and Security

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- Determine how much you're going to tell witnesses
- Determine who should be “in the loop” on progress and decisions
- Secure files should be maintained for the investigator's records and evidence uncovered during the investigation

# Maintaining Legal Privilege

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- Generally, limited to investigations/reports undertaken
  - For the purpose of obtaining legal advice
  - At direction of counsel or a superior seeking legal advice
  - Within the scope of the individual's corporate duties
  - For limited review by those with legitimate need to know
- Mark all investigatory documents ***Privileged and Confidential, Done at Request of Counsel*** (unless emailing investigation witnesses)
- Include legal counsel in all strategy meetings and copied on all written communications regarding the investigation and its results
- Keep all investigative materials in private, secure file

# Location and Logistics

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- Select location that is private and will not distract from normal business operations
- Allot sufficient time between interviews to try to avoid witnesses overlapping or otherwise being able to discern the identify of other witnesses (if possible)
- Schedule interviews/meetings at time least disruptive to business operations and with least amount of inconvenience to witnesses
- Have someone with you (if practical)
- Consider remote interview logistics

# Dealing with Represented Employees

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- Read CBAs
- Does the employee have a right to:
  - Have a representative present?
  - A written complaint
- Union participation may facilitate and lend trustworthiness to the investigatory process
- Can union representatives be present?



# Conducting the Interviews



# Review Documents Before Interview

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- Rules, policies, and procedures (at issue and implicated)
- Personnel files (named individuals and “comparators”)
- Memoranda or notes about incident
- Complaints (internal or external)
- Camera footage (security)
- E-mails, texts, IMs
- Other potential information sources

# Interviews – Introductory Comments

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- Disclose nature and purpose of investigation at beginning
  - Be candid when interviewing person who is focus of investigation
  - Explain to witness that company takes complaints seriously and expects truth and candor
- Make appropriate disclosures (e.g., who you are, who you represent, why you are there, etc.)
- Explain no fear of retaliation
- **Do not promise confidentiality!**

# Conducting the Investigation - Interviews

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- Stress voluntary nature of participation
- Advise that no judgments have been made about any aspect of investigation, including validity of complaint
- Take every complaint seriously and need all the facts- full candor and honesty needed and expected from those being interviewed

# Conducting the Investigation - Interviews

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- Begin with open-ended questions (“Funnel Approach”)
- Transition to specific situation at issue
- Give witness opportunity to provide additional information
- Probe responses with follow-up questions

# Conducting the Investigation - Interviews

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- Be an active listener and critical thinker
  - “Does this make sense?”
  - “Do I understand exactly what happened?”
  - “Will the person reading my report understand exactly what happened?”
- Use your timeline to identify discrepancies between witness’ own story and that of others - challenge facts

# Conducting the Investigation - Interviews

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- Take notes:
  - Assume will be read to jury one day
  - Avoid notes that can be taken out of context
  - Records of consistent questions
  - Notes should reflect complete thoughts
  - Review after the interview
  - Type-up at the time (especially if handwriting an issue)

# Conducting the Investigation - Interviews

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- Clarify basis for witness' knowledge of a "fact"
  - How do they know?
    - Saw it? Heard it? Touched it? Smelled it? Tasted it? Was involved in it?
- Distinguish between "no" and "I cannot recall"
- Document carefully for later review - generally don't tape record interviews (witnesses are less forthcoming)



# Conducting the Investigation - Interviews

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- Conclude interview
  - Repeat significant points and ask interviewee to confirm information is complete and accurate
  - Give witness opportunity to disclose anything else he/she thinks might be important
  - Counsel witness to keep matters discussed confidential (NLRB?)
  - Invite witness to contact you if he/she recalls or discovers any additional helpful information after interview concludes

# Conducting the Investigation - Interviews (Credibility)

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- Demeanor - Body language
  - How did witness react to allegations?
  - Did witness appear credible overall?
- Logic/consistency
  - How much detail did witness offer?
  - Did events differ from others interviewed?
  - Did witness' version make sense?
- Is there corroborating evidence?

# Conducting the Investigation -- Interview Problems

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- Remind them of policy requiring cooperation
- Assure them of obligations of confidentiality/non-retaliation
- Confirm that company can take action based only on information it is able to obtain during investigation
- Interviewer's notes should confirm refusal to cooperate and that disclosures were made to confirm consequences of refusal to cooperate ("delicate issue")

# Preparing the Investigative Report



# Preparing the Investigative Report

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- Were policies, guidelines, practices violated? If so, was violation serious or minor?
- What has been done in the past with regard to similar violations (consistency)?
- Are there mitigating or aggravating circumstances?

# Preparing the Investigative Report

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- May want to consult with legal counsel before you start drafting
- Write as though every word will be second-guessed (opposing counsel, judge, and jury)
  - Re-read report from other side's perspective
- Prepare summary of facts
  - Include facts, not speculation or hearsay
  - Where there are discrepancies, give all versions

# Preparing the Investigative Report

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- Include relevant background on complaint
- Note factual findings
- Reach a conclusion (even if “inconclusive”)
  - Who do you believe and why
  - Facts driving to conclusion
- Possible recommendations for next steps (if appropriate/tasked with providing)

# Post-Investigation Measures

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- Inform participants of conclusion or resolution
- Encourage complaining employee to bring all issues forward in future
- Take steps to ensure that no retaliation is taken
- Continue monitoring situation
- Train managers/employees as needed



# Common Investigation Mistakes to Avoid



# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Taking sides
  - Investigator must remain neutral and conduct unbiased, objective investigation
  - Applies equally whether empathizing with complaining employee or defending conduct of alleged wrong-doer
  - Avoid appearance of bias or favoritism that taints process and conclusions

# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Promising confidentiality
  - Must be sure to explain confidentiality is qualified/limited
  - Treat as sensitive information - share only with legitimate need-to-know

# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Failing to Document
  - “Minor” complaints often not documented
  - Relevant documents must be properly dated and signed
  - Update notes and report before finalizing

# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Failure to Actually Investigate
  - Do not simply ask witnesses 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 process

# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Failure to Make Conclusions
  - “He said - she said” type case, easy to simply state that no conclusion can be reached
  - Important to reach a conclusion based on best information available, credibility of witnesses, a determination of who is more likely to be telling the truth, etc.
  - Okay to determine “inappropriate conduct” or policy violation without concluding “unlawful harassment” occurred

# Common Mistakes to Avoid While Conducting a Workplace Investigation

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- Not following up after conclude investigation
  - Take time to sit down with employee and communicate findings and results
  - Even if answer is not what employee wants to hear, they will appreciate the effort
  - Follow-up periodically with complainant for at least six months, possibly longer

**THANK YOU!**  
**Questions?**



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