



# **ACC: INTERNAL INVESTIGATIONS AND CRISES MANAGEMENT**

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# Overview

Investigations are an opportunity for the Company:

- To address a dispute before it develops into a major problem
- To advise and correct problem behavior
- To improve employee morale by demonstrating Company responsiveness and fairness
- To demonstrate Company lawfulness and compliance with policies
- To collect documents, evidence, and testimony regarding a contested issue
- To lock witnesses and complainant into a version of the facts that they cannot later change

# WHAT ARE THE TYPES OF WORKPLACE ISSUES THAT CAN REQUIRE AN INVESTIGATION

- DISCRIMINATION CLAIMS
- HARASSMENT CLAIMS (SEXUAL AND OTHER)
  - RETALIATION/WHISTLEBLOWER
  - HEALTH AND SAFETY
- WORKPLACE VIOLENCE OR THREATS
- WORKPLACE DRUGS OR ALCOHOL USE
  - VIOLATION OF EMPLOYER RULES
- THEFT OR FRAUD (TRADE SECRETS OR PROPRIETARY INFORMATION)
  - OTHER CRIMINAL ACTIVITY

# WHAT ARE YOUR GOALS?

- Is everyone safe?
- Did someone violate a policy?
- Be thorough
- Be impartial

# What Aren't Your Goals

- To Catch Someone in a Lie
- Trick or Embarrass a Witness
- Succeed in Getting Someone Terminated

# WHY SHOULD WE CONDUCT WORKPLACE INVESTIGATIONS?

There are two basic reasons:

- 1.) Legal Requirements
- 2.) The Expectations of Corporate Culture

# LEGAL OBLIGATION

- **COTRAN V. ROLLINS HUDIG HALL INT'L INC., 17 Cal. 4th 93 (1998)**
  - What happened in this case?
  - What the Supreme Court decided
  - The proper role for the jury is to determine whether, in making its determination, the employer conducted an appropriate investigation and reached reasonable conclusions.
  - Did the employer act in “good faith?”
  - The employer does not have to prove that the alleged misconduct occurred.
- **SILVA V. LUCKY STORES, INC., 65 CAL. App. 4th 256 (1998)**
  - What happened in this case?
  - What did the Silva court tell us?
    - Was the investigation timely?
    - Was it conducted by a competent investigator?
      - One who is trained and well-versed in how to conduct investigations.
      - One who uses an established system
      - Was the investigation reasonable under the circumstances?



# LEGAL OBLIGATION (CONT'D)

- THE EEOC'S VIEW OF WHAT CONSTITUTES A PROPER HARASSMENT INVESTIGATION:
  - PROMPT
  - FAIR
  - IMPARTIAL
  - CONFIDENTIAL
  - TRAINING
  - THOROUGHNESS
  - PROPER QUESTIONING
  - DETERMINING CREDIBILITY
  - MAKING A DETERMINATION

# LEGAL OBLIGATIONS (CONT'D)

- BURLINGTON INDUSTRIES/FARAGHER AFFIRMATIVE DEFENSE
  - What is this all about?
  - Your “Foundation”
    - Have a valid, practical and viable complaint procedure in place that employees can use to submit, pursue and effectively resolve workplace claims
    - Why?
      - To limit your potential damage in California;
      - As a complete defense to a federal law claim (e.g., Title VII)

# What is a Good Investigation?

- Backed by a policy with a complaint procedure
- A trained professional is assigned to address the Complaint and the Accused;
- Relevant witnesses are interviewed;
- Interviews are documented
- Documents are collected and secured;
- Appropriate corrective action is taken, if appropriate;
- The results of the investigation are communicated to the Complainant.

# PLANNING THE INVESTIGATION: STEP-BY-STEP

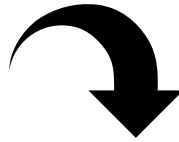
**STAGE 1:**  
Taking  
Complaint



**STAGE 2:**  
Planning  
Investigation



**STAGE 3:**  
Conducting the  
Investigation



**STAGE 4:**  
Making  
a decision



**STAGE 5:**  
Documenting the Investigation

# Planning the Investigation: Step-by-Step

## THE STEPS IN A STANDARD INVESTIGATION

- STEP 1: DOCUMENT THE COMPLAINT
- STEP 2: EVALUATE WHETHER THERE ARE PRELIMINARY ISSUES THAT NEED TO BE CONSIDERED
- STEP 3: DETERMINE WHETHER THERE ARE DOCUMENTS THAT NEED TO BE REVIEWED AND PRESERVED
- STEP 4: DETERMINE WHETHER TO CONDUCT THE INVESTIGATION IN HOUSE OR HIRE AN OUTSIDE INVESTIGATOR
- STEP 5: DEVELOP AN INVESTIGATION PLAN
- STEP 6: CONDUCT WITNESS INTERVIEWS
- STEP 7: PROPERLY DOCUMENT THE INVESTIGATION
- STEP 8: RECOMMEND FINAL STEPS

# STEP 1: DOCUMENT THE COMPLAINT

- Receive the Complaint (written or oral)
- Ask the Complainant to describe “What happened?”
- Take notes as the Complainant describes the issue.
- Ask the “basic” questions: who, what, where, when, how?
- Ask for identification of possible witnesses.
- Ask for relevant documents:
  - Emails, Texts, Notes to File
- Important: Ask the Complainant to Commit the Complaint to Writing!!
  - A Chronological review of the facts;
  - The names of witnesses who were present or who were not present;
  - A copy of any relevant documents

## Step 2: Evaluate Whether There are Preliminary Issues That Need to be Considered

- Should law enforcement be involved?
  - Workplace violence?
  - Theft?
  - Fraud?
- Should the accused employee be suspended or transferred pending the investigation?
- Should the complainant be offered a paid LOA or other accommodation?
- Should supervisory or reporting relationships be modified?
- Should supervisors or others be informed of the complaint and investigation and advised about the non-retaliation policy?
- Should you have a law firm retain the investigator so the investigation is privilege?

# Steph 3: Are There Documents That Need to be Reviewed and Preserved?

- Personnel files
- Timecards/Other time records
- Medical Files
- Expense Files
- Project Files
- Documents in possession of others
- E-data
  - Email
  - Voicemail
  - Videotapes
  - Internet searches
  - Social media (if available and provided)
  - Is a Litigation Hold appropriate?



# Step 4: Determine Whether to Conduct an Investigation In-House or Hire and Outside Investigator



- It is Important that the Investigator:
  - Have expertise in conducting investigations;
  - Impartial and Unbiased;
  - Be knowledgeable about employment laws;
  - Be discrete & committed to maintain privacy;
  - Be available!
  - Have experience in testifying

# What are the Advantages of using an internal investigator?

- They are familiar with your corporate culture; corporate history; policies and personalities
- Credibility with employees;
- Cost Effectiveness

## Step 4: Continued

- The advantages of using an outside investigator:
  - Increased objectivity
  - Likelihood of greater experience and expertise as an investigator
  - If an attorney is used, the attorney-client privilege may apply.
  - If not an attorney, investigator must be licensed

# Step 5: Develop and Investigation Plan

- Who should be interviewed;
- Is the order of witness interviews important;
- What documents are relevant;
- Which Company policies apply and should be reviewed?
- Prepare an outline of topics to cover and specific questions that should be asked;
- Choose an appropriate environment for interviews.

# Step 6: Conduct Witness Interviews

- Have a second company representative present;
- Review the purpose of the interview with the witness;
- Address retaliation;
- Ask non-leading, non-judgmental and open ended questions to promote information gathering;
- Who, What, When, Where, How?
- Ask, is there anything else?

# Issues that May Arise When Conducting Witness Interviews & How to Address Them

- What if the witness refuses to cooperate, or says “I want my attorney here”?
  - Initially explain the importance of the process and your policies that require participation.
  - Know that California law is on your side:
    - *McGory v. Applied Signal Tech.*, 212 Cal. App.4<sup>th</sup> 1510 (2013) (employee may be terminated for being uncooperative or deceptive in an employer’s internal investigation)
    - *Paratransit v. UIAB*, 59 Cal. 4<sup>th</sup> 551 (2014) (employee’s refusal to sign disciplinary notice constitutes insubordination.)

## **Issues that May Arise (Continued)**

**Remind or Inform the employee that he/she has a  
Statutory Duty to Cooperate with their Employer  
(Labor Code Section 2856):**

“An employee shall substantially comply with all directions of his employer concerning the service on which he is engaged except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee.”

# Issues That May Arise...

(Continued)

## Can we Require Confidentiality from our Witnesses?

The integrity of your investigation requires that witnesses not reveal their discussions with the investigator.

But, can you spell N.L.R.B.?

- *Banner Estrella Medical Center*, 350 NLRB No. 93 (2012)
- Imposing confidentiality may only be appropriate when there is a legitimate need to:
  - Protect witnesses
  - Avoid spoliation of evidence
  - Avoid fabrication testimony
  - Prevent a cover-up



# Step 7: Properly Document the Investigation

- The Objectives in Documenting the Investigation
  - Identify and review the:
    - Allegations made
    - Scope of the Investigation
    - Policies and procedures at play
    - Relevant facts
    - Documents received and reviewed
    - Witnesses interviewed

# Step 7: (Continued)

## Documentation Basics

### State Facts, not conclusions of law

- Avoid opinions, rumors or hearsay
- Give concrete examples when possible to document the incorrect behavior or performance
- Refer to the documents
- Include dates, times and witnesses as applicable

# Step 7: (Continued)

## What Not to Include

- Subjective information
- Personal opinions
- Legal conclusions
- Unnecessarily controversial comments
- Information about a medical condition
- EEO status
- Matters or issues that are not relevant

# Findings Example

## Allegation No. 1: \_\_\_\_\_

- [A short conclusion with reasons: “We conclude that this allegation occurred essentially as employee Smith alleged. Supervisor Doe admits he made physical contact, including an attempted kiss, with employee Smith in the hallway while attending a company function on the evening of February 1, 2022. Supervisor Doe also acknowledged referencing employee Smith on numerous occasions by the nickname “\_\_\_\_\_.”
- Co-employees Richards and Sedwick each provided separate and consistent accounts that they had observed Supervisor Doe using the nickname “\_\_\_\_\_” in reference to employee Smith on multiple occasions in February 2022.]

# Findings Example

## (For Summary Review Only)

**Allegation No. 1:** \_\_\_\_\_

[e.g. “We conclude that this incident probably did not occur. We base this on the fact that there was no other person in the department who observed the allegation, even though many were there at the time. Supervisor Doe credibly denied the allegation. Mr. Doe’s documentation of the event, submitted at the time, appears to be a reliable description of what occurred, and there is no evidence, other than employee Smith’s, that conflict with it.”]

# Findings Example

## (For Summary Review Only)

**Allegation No. 1:** \_\_\_\_\_

[e.g. “We are unable to determine with reasonable certainty that this event occurred as alleged. There were no witnesses except for the parties themselves and no corroborating evidence of any kind. Both witnesses seemed sincere and credible. No documents or other evidence exist to corroborate either party’s claims. There is no record in the past to suggest that any event like this had occurred at any other time.”]

## Step 8: Recommended Final Steps

- Recommend discipline, if appropriate
- Communicate the outcome to the complaining party and the accused
- Consider whether you need to implement stronger controls or revise Company policies
- Monitor the situation
- Report the matter to the government, if appropriate<sup>30</sup>

# OOPS!!

## The Ten Common Mistakes That Investigator's Make



# 10 Common Investigation Mistakes

- Failing to prepare & plan
- Ignoring complaints
- Delaying investigations
- Losing objectivity
- Being distracted during interviews
- Using overly aggressive interview tactics
- Not conducting a thorough investigation
- Failing to reach a conclusion
- Failing to create a written report
- Failing to follow-up with those involved

# Ensuring Your Corporate Culture Is Maintained

- **Following an investigation:**
  - Take steps to heal wounds and restore egos
  - Follow-up periodically with the accused, the complaining employee and witnesses.
  - Inform them that the complaint has been fully investigated and the matter has been remedied
  - Promptness is important
  - Encourage employees to use the internal complaint procedure (“Keep it in-house”)
  - Encourage use of your EAP
  - Self-audit: do our policies need to be revised as a result of what we learned from this investigation.
  - Check-in and report to the “C” Suite.
- **You are continuing to “take the pulse” of our organization.**

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# Whistleblowers

# Preparing for and Responding to Whistleblowers

- Best way to avoid **external** whistleblowers = address concerns **internally**
- >75% of successful whistleblowers first report internally
  - SEC Whistleblower Program, 2021 Annual Report to Congress
- **More** internal reporting: **fewer** lawsuits, **smaller** settlements and fines
  - Harvard Business Review, November 2018

# Effective Internal Reporting Programs

- Encourage reporting
  - Process
  - Culture
- Thoroughly investigate claims
- Explain decisions, even if no action taken
- Demonstrate willingness to change
- Strictly prohibit retaliation

# Qui Tam Litigation

- False Claims Act
- Whistleblower voices concerns internally
  - Concerns not addressed adequately
    - Terminated or quits
    - Files *qui tam* lawsuit
- Effective internal reporting program might have led to different outcome



Office of Public Affairs  
U.S. Department of Justice

## PRESS RELEASE

**GlaxoSmithKline to Plead Guilty and  
Pay \$3 Billion to Resolve Fraud  
Allegations and Failure to Report Safety  
Data**

# DoJ Corporate Whistleblower Awards Program

- Focus:
  - Financial institutions
  - Foreign corruption
  - Domestic corruption
  - Health care fraud schemes
- Award based on percentage of net proceeds forfeited

# DoJ Corporate Enforcement and Voluntary Self-Disclosure Program

- May receive presumption of prosecutorial declination if voluntarily self-report issue identified by internal whistleblower
  - Report within 120 days
  - Before DoJ learns from source other than whistleblower
  - Before DoJ contacts company...but
    - May 2025 update: if whistleblower reports to company **and** DoJ, company may receive presumption if otherwise meets requirements



# Minimizing External Whistleblower Risk

- Effective internal reporting program!
- Consider:
  - Manager training
  - Rewarding good-faith reporting
  - Ways to demonstrate commitment to taking reports seriously

# Government Inquiries

# Responding to Government Inquiries

- Nature of the inquiry?
  - What is the Government really looking for?
  - Implications?
- Outside counsel?
- Record production
  - Litigation hold
  - Suspend automatic deletion
- Document everything, but...

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# Thank you!



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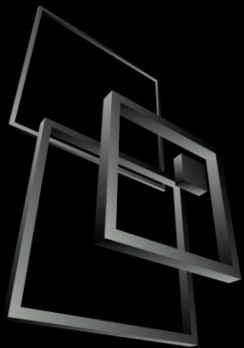


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**The End!!!**