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WORKPLACE COMPLAINTS: THE DO'S AND
DON'TS OF INTERNAL INVESTIGATIONS

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WHY ARE WE HERE?

Ucla[®]



REALLY ... WHY DO WE CARE?



IT IS THE LAW!

- It is an unlawful employment practice for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (Gov. Code § 12940(k).)
- “The FEHA mandates that the [employers], acting in good faith, conduct an investigation that is appropriate under the circumstances.” (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 102)

REALLY ... WHY DO WE CARE?

LEGAL DEFENSE TO DAMAGES

Doctrine of Avoidable Consequences:

This defense allows the employer to escape liability for those damages that the employee more likely than not could have prevented with reasonable effort by taking advantage of the employer's internal complaint procedures designed to prevent and eliminate harassment.



REALLY ... WHY DO WE CARE?

SAVE MONEY ON LITIGATION!



- **Private lawsuits up 456% since 1995**
- **Avoid Litigation with a Good Investigation**
- **Defense Costs Alone > \$100,000**

REALLY ... WHY DO WE CARE?



Workplace Benefits

- Improved Employee Morale
- Compliance with Policies, Rules and Regulations
- Improved Reputation
- “Best Practices” Workplace

INVESTIGATION PRINCIPLES

Be Thorough, but Concise

Timeliness

(NTK) Confidentiality

Fairness / Impartiality



ONE SIZE DOES NOT FIT ALL

Every investigation is different and must be tailored to the circumstances, which include:

- The **nature** of the complaint;
- The **severity** of the complaint;
- The **timing** of the complaint; and,
- The **persons** implicated by the complaint.

THE “COMPLAINT”

An employer’s obligation to conduct a workplace investigation is generally triggered by a workplace complaint (but knowledge may be sufficient). A “complaint” can take many forms:

- Written Complaint;
- Verbal Complaint;
- Demand Letter (Current or Post-Termination);
- Lawsuit; or,
- Offhand Comments.



PREPARE THE INVESTIGATIVE “ROADMAP”

- Understand the complaint
- Review the personnel files
- Review policies and procedures
- Review the evidence (footage, emails, documents, prior complaints, etc.)
- Identify the “key players” and witnesses
- Define the purpose of the investigation (truth vs. pretext)
- Create a new investigative file (note: discoverable)

CONSIDER APPROPRIATE INTERIM RELIEF

An investigator / management should consider implementing interim measures during the pendency of an investigation, including:

- Administrative Leave (paid vs. unpaid)
- Suspension (paid vs. unpaid)
- Transfer
- Schedule Change
- Staffing Reassignment

CAREFUL: Any action taken against the complainant and/or victim could be perceived as retaliatory. Emphasize protection.

PREPARE FOR THE INTERVIEWS

- Order (Complainant or “Other”)
- Script Your Open-Ended Questions - But Don't Forget to Listen!
 - WWWWH
- Objective for Each Interview
- Witnesses? TBD

SELECTING THE INTERVIEWER



- Impartiality
 - Supervisor / Manager
 - Human Resources
 - Owner
 - In-House / Outside Counsel (AC Shroud)
- BE TRAINED

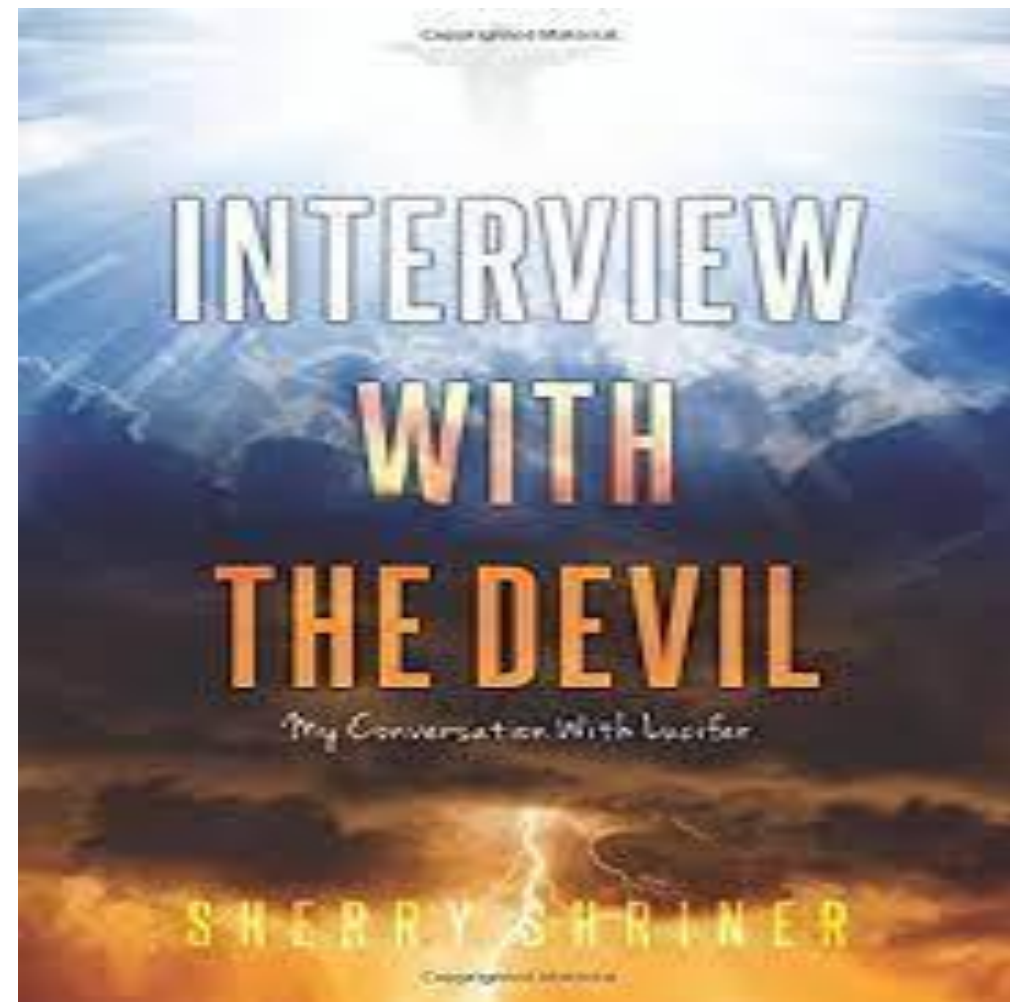
THE INTERVIEWS

- Emphasize Confidentiality / No Retaliation
- Don't Get Interviewed (Control)
- Note Taking: Be Precise (But Discoverable)
- Uncooperative Witness?
 - Policies / Cooperation
- Contain the Damage
- Credibility



INTERVIEWING THE ACCUSED

- Be Thorough; No Loose Threads
- Identify each complaint and obtain a response
- First (and only) Shot
- Written Statement
- Counsel = Counsel



YOU'RE NOT DONE YET!

- Investigations are fluid
- Reevaluate your “roadmap” as you go
- Identify new sources of evidence (repeat / new witnesses, outstanding documents, etc.)

CONCLUDE SOMETHING

- Detail Written Findings
 - Facts; Just the Facts
- Be Detailed
 - What happened / did not happen?
- Inconclusive is okay (he said; she said)
- Do not incorporate law (i.e., the conduct was sexual harassment); tie to policies and procedures (the conduct violated the company's harassment policies)

DOCUMENT THE AFTERMATH

- Notify the affected party(ies) of the findings, reasoning and conclusion (but not always the report)
- Identify any consequences (i.e., suspension, remedial training, termination, etc.)
- Detail expectations
- Signature
- **SAVE THE FILE!**

ARE YOU DONE?

- Reporting Obligations:
 - By law (“mandatory reporters” for minors or other entities in highly regulated industries)
 - By contract (business partners, investors, insurance)

GOVERNMENT INVESTIGATIONS





That's all Folks!



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Cheers! Questions?