




Conducting Lawful Investigations in the Workplace

Investigations Under the Microscope

- What has changed?
- What are the dangers?
- What are the opportunities?




Effective Investigations – The ROI

- Helps mitigate with government agencies
- Reduces civil litigation/damages
- Increases morale
- Helps to keep complaints internal
- Helps create a culture where employees feel comfortable bringing complaints forward
- Keeps you out of the press



Understanding the Investigator's Role

Gather & Evaluate Information



Your Role as an Investigator

- Impartial fact-finder (no biases)
- Good listener
- Appropriate investigation
- Attention to detail
- Protect the record
- Properly document investigation
- Fairness
- Take off your HR/ Security/Manager hat
- Take out the emotion



Understanding the Investigator's Role



- Has the investigator been respectful and fair?
- Followed protocol?
- Has the investigator reached reasonable findings concerning the facts?
- Properly documented the investigation?



In Sum: Goals of an Investigation

- **Determine the facts:** no personal opinions or conclusions
- Treat all involved with respect
- Comply with legal requirements
- Provide defense to legal claims
- Support good workplace climate
- Protect the record


 A graphic where the word "FACTS" is written vertically in green and white blocks, and "RESULT S" is written horizontally in white and green blocks.

Proactive Strategies

 Icons for "CONFIDENTIAL" (a red stamp and a silver container) and "EVIDENCE" (an orange box).

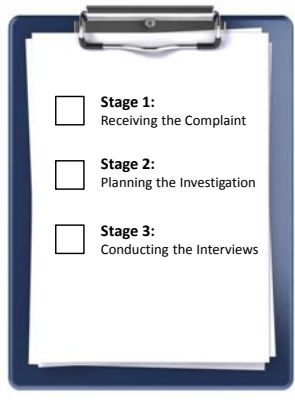
- **Safety:** Is the health or safety of anyone in jeopardy?
- **Communication:** Who needs to know about this allegation or any part thereof?
- **Impact:** Potential serious repercussions?
- **Evidence:** Is there any evidence that needs immediate attention or would otherwise be in danger of spoliation?
 - Do not destroy evidence
 - Do not improperly create evidence

Proactive Strategies



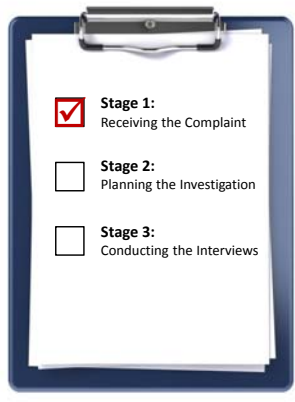
- **Confidentiality:** What steps can be taken now to best limit the universe of people involved to those who need to know?
- **Promptness:** All investigations should be conducted as soon as reasonably possible, and may mitigate liability.

Planning the Investigation



- Stage 1:**
Receiving the Complaint
- Stage 2:**
Planning the Investigation
- Stage 3:**
Conducting the Interviews

Receiving the Complaint



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Receiving the Complaint

- Get as much detailed information from the Complainant as possible
- Listen impartially without committing yourself
- Ask open-ended questions
- Evaluate the complaint from the Complainant's perspective




Receiving the Complaint

- Emphasize complaint will be taken seriously
- Advise the Complainant appropriately about what you intend to do
- Address confidentiality and retaliation issues



Understanding the Allegation

- Meeting the Reporter
 - Determine who, what, where, when, why and how
 - Ask the Complainant with whom do they think you should talk to
 - Ask whom the Reporter has spoken to about the issue
 - Ask whether the issue has affected the Reporter's job
 - Get as much detailed information as possible to prepare a good, efficient investigation plan



Understanding the Allegation

Meeting the Complainant/ Reporter

- Do not express opinions about the alleged conduct and avoid opinions or comments about the character or ability of the others involved
- Advise the Reporter not to discuss the matter with others within the company except those with a need to know
- Reassure the Reporter that the company takes these complaints seriously and will determine whether an investigation is needed. Emphasize that no final conclusion will be reached until the investigation has been completed



Allegations Are Not Facts



- Listen carefully and respectfully, don't display skepticism, ("I find that hard to believe, Bob would never do that") but do not accept the Complainant allegation at face value
- You must analyze the facts you are offered and make your own determination regarding the category in which it fits
- The report from the person who made the allegation is just a report
- Offer no opinions to the Reporter, other than you take the report seriously.
 - You probably don't know the motives, personalities or histories of the people involved, and even if you do know some, the situation may be different than you suspect.

Anonymous Reports




- Consider the form of the report
- Was it anonymous, or did it come from an identified party? Anonymous reports, however, should not be discounted unfairly. An anonymous report maybe malicious, or may be valid and accurate
- Most employees do not trust management to keep their names confidential. Most people do not want to be identified as the person responsible for bringing the matter to the attention of the management. The detail provided in the anonymous report may either validate or invalidate the report
- Keep an open mind and don't jump to conclusions

Anonymous Reports

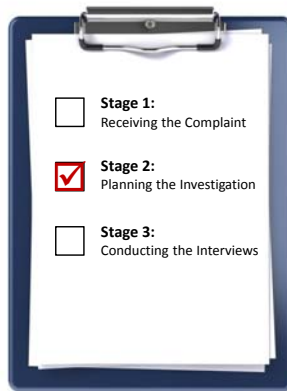


- You need to remain attentive if someone tells you, even anonymously, that one of your employees could be engaging in misconduct

Scenario – *The Complaint – Hotline call*

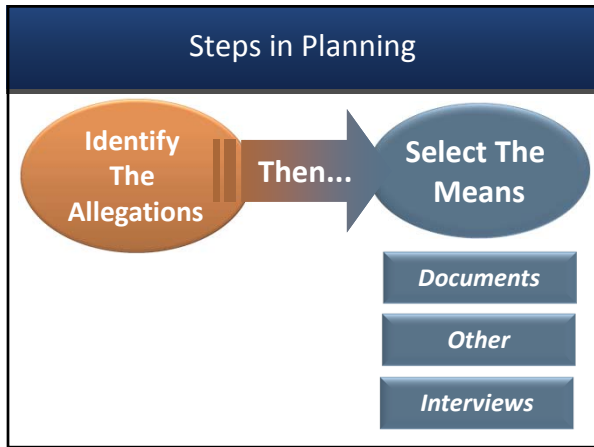


Planning the Investigation



- Stage 1: Receiving the Complaint
- Stage 2: Planning the Investigation
- Stage 3: Conducting the Interviews





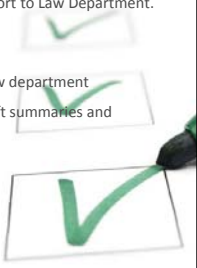
Planning the Investigation?

- What are the allegations?
- What are the legal issues?
- What are the ethical issues?
- What is the best strategy to proceed?
- Any potential liability? For whom?
- PR and communication issues?
- Whistleblower concerns




The *Investigative Plan*

- **Attorney Client Privilege? Work Product?**
- **Who is covered by the privilege?**
 - Deputizing memo to everyone providing support to Law Department. Memo should instruct to:
 - Mark documents and e-mails as privileged
 - Only generate work product at direction of law department
 - Establish protocol for producing/handling draft summaries and reports
 - Maintain confidentiality – “need to know”



Other Issues to Consider

- **Who is the victim?**
- **Conflicts of Interest?**
- **Privacy Rights?**
- **How to minimize business disruption?**



The *Investigative Plan*

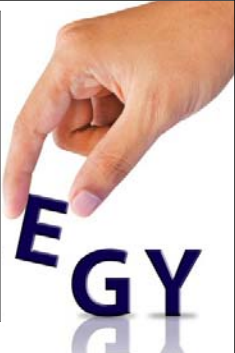
- **Develop a written investigation plan**
 - Summarize allegations and relevant issues (legal and factual)
 - Describe the scope of the investigation
 - List business/management contacts
 - Evaluate need for assistance (internal or external)
 - Identify those who will be assisting
 - Evaluate actions necessary to secure relevant files
 - Propose schedule/timeline for investigation
 - Determine if any prelim disclosures are needed



The Strategy

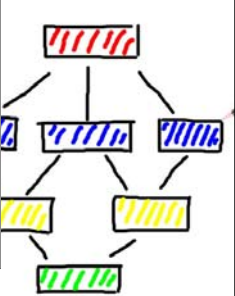
Once the scope has been determined, make your plan

- This is more than just a blueprint. It should incorporate a proposed strategy
- The strategy of the investigation should move from the general to the specific, gradually zeroing in on the subject by carefully acquiring and analyzing information
- As information is gathered, your theory should be refined to focus the investigation on the most logical source of misconduct and/or business process failure




The Plan

- An investigation plan should set the scope properly so you will have the right parameters to guide you
- You always must be prepared to explain why you did what you did
- Never put yourself in the position of explaining your plan by saying that you never considered any other course of action



Documents – What Can You/Should You Look At?

- Personnel files
- Time cards
- Other electronic files
- Medical files
- Expense files
- Project files
- Documents in possession of the Claimant and witnesses




Electronic Data & Communications – Issues



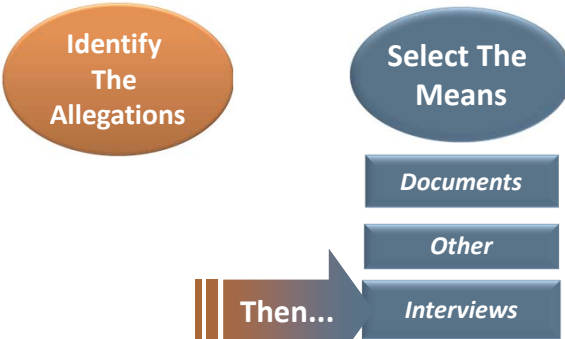
- Computer disks
- E-mail on the system /personal e-mail?
- Cameras/videos
- Recordings
- Internet searches
- Voice mail
- Social Media
- Text messages

Conducting the Interviews



- Stage 1: Receiving the Complaint
- Stage 2: Planning the Investigation
- Stage 3: Conducting the Interviews

Steps in Planning



Identify The Allegations

Select The Means

- Documents
- Other
- Interviews

Then... Interviews



The Interview



- Conduct the interview in private
- Conduct the interview with at least two interviewers present (if possible)

Conducting the Interview



Investigator's Introduction

- Explain who you are and the purpose of the meeting
- Discuss anti-retaliation policy
- Confidentiality
- Use standard Investigator's Introduction & Closing whenever possible

Planning for Confidentiality

- **On a case by case basis, discuss why interviews or other data should be kept confidential**
 - The complaint will be handled confidentially, except:
 - The needs of the employer or the law may require that information be disclosed on a need-to-know basis
 - be aware of NLRB caselaw



Conducting Effective Interviews

*Prepare a list of questions that must be answered -- What they saw, when they saw it, who else was there, why something happened (if known), what happened next, and so on. Be prepared to customize with certain people.

- Interviewee name/title/position
- Date, time and location of interview
- Date and location of incident
- Physical proximity of interviewee to the incident
- Persons Involved in incident
- Background of interviewee with the parties
- Names/relationships of other essential witnesses
- Understanding as to complainant's concerns/allegations
- Awareness of facts, documents or persons related to allegations



Effective Interview Technique

- **Active listening**
- **Funneling**
- **Closing the door**
- **Assessing credibility**

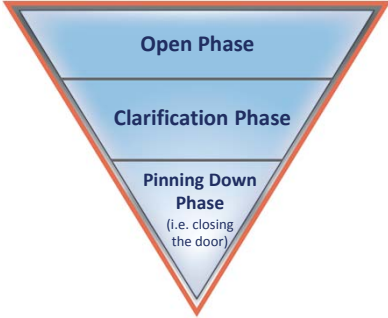


Active Listening

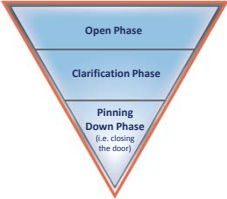


- Listen to the witness
- Don't be wedded to your outline
- Hearing is different than listening
- Don't miss obvious or subtle cues
- Take accurate notes

Funnel Approach (The Pyramid)



1. Open Phase



- Open-ended questions
- Objective
- Aim to learn all relevant evidence the witness has
- Encourage the witness to talk

1. Open Phase




- **What?**
- **Who?**
- **Where?**
- **When?**
- **Why?**
- **Explain?**
- **Describe?**
- **Give me a list**

2. Clarification Phase



- **Now get clarification for details**
 - Who?
 - What?
 - Where?
 - Why?
 - Tell me in detail

3. Closing Off



- **Close the door**
- **Get the final answer**
 - Anyone else present?
 - Anyone else know about the details?
- **Listen to the witness**
- **Exhaust the subject**
- **Recap and ask, "Is there anything else?"**

Follow-Up

- Do new facts or allegations require follow-up interviews?
- Any new places to look for documents or other evidence?
- Are there new or omitted questions?



Sensitive Matters

- What about “demand” for attorney?
- Remove subject of investigation from workplace?
- What about taping?
- What if someone refuses an interview?
- Privacy of subject of investigation/others

Post-Interview

- Document employee reactions
- Document that the interview occurred, including employee’s signature (if appropriate)
- Ask each individual to review the information s/he provided for additions or corrections, then have the document signed or initialed by the person who gave the information. (if appropriate)
- Maintain documentation control
- File notes & documents in investigation file

Documentation

- **Documenting Do's and Don'ts**
- **Reaching a Conclusion**



Documenting: Objectives

- Clearly identify all allegations raised
- Clearly identify the policies, procedures, business practices, law, regulations, and ethics standards that pertain to the allegations
- Clearly record facts gathered from witnesses and evidence
- Make a record of your reasoning and steps taken.
- Avoid unnecessarily controversial comments.




Documenting: Basics

- **State facts, not conclusions of law**
 - Avoid opinions, rumors, or hearsay
 - Include dates, times, and witnesses as applicable
 - Use quotes properly
- **Write for posterity (or the jury)**



What not to Include

- Subjective information
 - Back up with specifics
- Personal opinions
- Legal conclusions
- Hearsay, gossip, rumors
- Information about a medical condition
- EEO status
- References to prior irrelevant matters or unrelated history



How To Document

Bad: Pat excluded Maria based on gender.	Good: <ul style="list-style-type: none"> -Maria applied for the position on (date). -Four others applied for that same position (names and genders) . -Maria was not offered the position (reason if documented). -Maria was informed she had not received the position on (date). -On (date) Maria left a message on the hotline stating the following: "(quote)".
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How To Document

Bad: Don said Maria was upset by Pat's rude behavior.	Good: <ul style="list-style-type: none"> -Don heard Pat tell Maria in a loud voice, "you don't belong in a man's job and should be home with your kids." -Within a few minutes of hearing this comment, Don saw Maria begin to cry and leave the room.
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How To Document

=NO:
Pat did not engage in discrimination

- =YES:**
- Pat's decision to hire Oscar was based on the following qualifications of Oscar : [list]
 - These qualifications were essential to the position in question and exceeded the job related qualifications of other candidates including Maria.

Collect The Best Evidence Possible

- Seek written documents such as reports, memos, notes, and letters
- Meeting agendas
- E-mail and voice mail
- Photos and videos
- Calendars



A Final Note About Your Notes

- Drafts & final?
- Handwritten or typed?
- Create a single, definitive and legible draft of notes.
- Name and date.



Conclusion

- **Reaching a Conclusion**




Making Credibility Determinations

Memory

- How vague or detailed were the answers?
- How much time has passed between incident and interviews?
- Have employees discussed the incident?
- Does his or her story remain the same?

Demeanor

- What non-verbal signals were communicated? e.g., posture, sweating, tone of voice, eye contact, etc.



Making Credibility Determinations

Corroboration/Lack of Corroboration -

- Was the information provided corroborated by witnesses, documents or other records?

Bias


- What else is going on in the workplace?
- Are there any axes to grind - motivation?

"Pretaliation"

- What is complainant's motivation?

Documenting Credibility Determinations

- Do not document credibility conclusions
 - *"Mary's Lying" or "Mary's biased..."*
- Instead, present facts (i.e., "Mary gave inconsistent information as follows ... " or "Mary and Carl both admitted to having a relationship outside the office...")




Documenting Factual Findings

▪ **Factual Findings:**

▪ **A short factual finding on each allegation with reasons the conduct:**

- Likely occurred as alleged.
- Likely did not occur as alleged.
- Unable to determine if likely to have occurred as alleged.



**Sample Findings:
Allegations Substantiated**

Allegation No. 1: _____

"We conclude that this allegation occurred essentially as employee Smith alleged. Supervisor Doe admits he made physical contact, including an attempted kiss, with Smith in the hallway during a company function on February 1, 2014. Mr. Doe also acknowledged referencing Smith on numerous occasions by the nickname "____." Employees Richards and Sedwick each provided separate and consistent accounts that they had observed Mr. Doe using the nickname "____" in reference to Smith on multiple occasions in February 2014.

**Sample Findings:
Allegations Unsubstantiated**

Allegation No. 1: _____

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

Sample Findings: Inconclusive

Allegation No. 1: _____

“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 exists to corroborate either party’s claims. There is no record to suggest that any event like this had occurred at any other time.”

**After The Fact:
Preserving Your Documentation**

- **Keep all documentation used in a separate file that is maintained and readily accessible for responding to any action that the employee may take as a result of the discipline issued.**
- **Preserve relevant work-related documents, e-mails, business records, and personnel files.**
- **This file should be preserved. How long?**

