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GORDON REES SCULLY MANSUKHANI
YOUR 50 STATE LAW FIRM™

Workplace Investigations: Practical Guidance, Best Practices & Litigation Impact



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Workplace Investigation – Who, What, When, Where, & Why

Who: Complainant, accused, investigator

What: Impartial

When: ASAP

Where: Virtual / in person

Why: Foster productive/supportive work environment; prevent risk; manage employees; follow the law (FEHA requires certain investigations)



Investigative Standard

Must conduct a good faith investigation with reasonable conclusion:

Preponderance of the evidence

- More likely than not
- Evidence on one side outweighs, or is more than, the evidence on the other side
- Greater than 50/50 chance proposition is true

What Should Be Accomplished In An Investigation?

Advise the decision-maker whether what is alleged happened, and if so, did it violate company policy?

Provide the decision-maker with enough information so that the decision-maker can determine the appropriate response

Have clear parameters around scope of the investigation and what conclusions should be made



What Should Not Be Accomplished In An Investigation?

Investigator should NOT be making legal determinations

Investigator should NOT make recommendations in the report

Example appropriate language:

The findings in this Investigation Report do not reach questions of law as to whether the alleged misconduct supports a violation of applicable laws, but instead address whether the employer's policies were violated

These policies are interpreted to be stricter than the law and therefore, a finding that the policies were violated does not equate to a finding that the law was violated

Complaint Received – Now What?



Is an investigation necessary?

Verbal/in writing complaint

Identify documentation needed

Identify who needs to be interviewed

Relevant Documentation

Written complaint

Teams/Slack messages (or whatever latest technology)

Emails

Text messages

Written statements

Policies



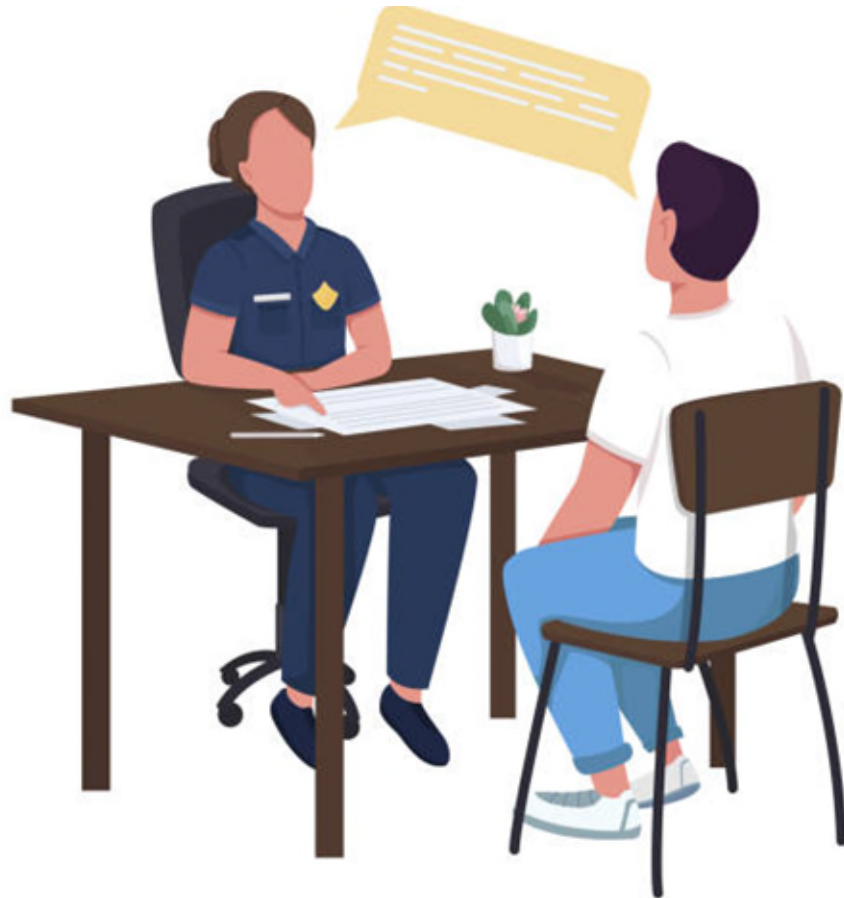
Witness Interviews

Primary People: Complainant or person raising the complaint; person(s) whose conduct is being investigated; individuals thought to have relevant information

Other Potential People:

- Coworkers
- Authors of relevant documents or communications
- Individuals who complainant identifies
- Individuals who respondent or witnesses identify

Witness Interviews - Introductions



Explain your role

Explain very broadly what is being investigated

Explain why this person is being interviewed

No conclusions have been reached

Importance of truthfulness

No guessing

Confidentiality limits

Retaliation prohibited

Witness Interview – Interviewee Questions

Questions witnesses may have for you?

When will the report be completed?

Who else are you interviewing?

What happens when the investigation is completed?

Will I be notified about the results?

Will I get a copy of the report?

Investigator Interview Conduct



Neutral

Professional

Start with broad, open-ended questions

Then get more specific

Try not to ask leading questions

Avoid compound questions (i.e. multiple questions in one)

Chronology can be important

Ask tougher questions at the end

Assessing Credibility Of Witnesses

Inherent Plausibility: Is the witness's statement believable on its face?

Motive to Falsify: Did the person have a reason to lie? Does the person have a bias, interest, or motive?

Corroboration: Do other witnesses or documentation corroborate the party's testimony? Or inconsistent?

Past Record: Accused received similar complaints previously?

Actual Knowledge: What is the basis for the person's knowledge?

Demeanor: Eye contact, body language*** (Be careful...)

Questions for Complainant

1. Who, what, when, where, and how?
2. How did you react? What response did you make when the incident occurred or afterwards?
3. Are there persons with relevant information? What information?
4. Was anyone else harassed/treated differently?
5. Documentation?
6. How did the harassment/actions affect you? Has your job been affected in any way?
7. How would you like the situation resolved?
8. Any other relevant information we didn't discuss?

Questions for Accused

1. **Background (their position, complainant, etc.)**
2. **What is your response to the allegations?**
3. **To the extent the person claims the employee is lying, why might complainant lie?**
4. **Are there any persons with relevant information?**
5. **Are there any notes, physical evidence, or other documentation relevant to the allegations?**
6. **Do you know of any other relevant information?**



Questions for Third Parties

- 1. Background (relationship with complainant, respondent, others)**
- 2. What did you see or hear? When did this occur? (Same who, what, why, when, how)**
- 3. Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.**
- 4. What did the complainant tell you? When?**
- 5. Do you know of any other relevant information? Documents?**
- 6. Are there any other relevant witnesses?**

The Report – Key Sections

Investigative process / methodology

- Witnesses interviewed & details
- Documents reviewed
- Scope

Factual Background

Allegations, response, evidence

Analysis

- Weighing the evidence
- Showing your work

Conclusions

- Findings of Fact
- Determinations of policy violations



The Report – Findings

Substantiated: An allegation is sustained when an investigation reveals a preponderance of the evidence in support of the allegation

Unsubstantiated: An allegation is unsubstantiated when an investigation reveals that there was not a preponderance of the evidence in support of the allegation.

Example: Claimant's allegations are substantiated. The investigator finds, by a preponderance of the evidence, that the acts alleged occurred. (And here's why...)

Report Completed – Now What?



Recommendations on how to proceed will be made by management and/or legal. For management, what to tell the parties

- Complainant
- Accused
- Witnesses

Hypothetical No. 1

Scenario: Current employee complains that coworkers at an event made uncomfortable comments about her body and outfit. She submits a complaint to you. When you write her to set up the interview, her lawyer responds, demanding to be present for the interview.

Do you let the lawyer attend?

Hypothetical No. 2

Scenario: Current employee complains that coworkers at an event made uncomfortable comments about her body and outfit. She submits a complaint to HR. HR investigates the complaint and finds it unsubstantiated. Employee makes a second complaint, this time claiming that HR was biased and did not complete a thorough investigation?

What do you do?

Hypothetical No. 3

Scenario: Employee complains that supervisor is unfairly treating him and provides a number of examples. HR starts the investigation. In the middle of the investigation, supervisor complains to HR that employee is not responding to supervisor, attending meetings, or generally making deadlines. Supervisor wants to issue discipline to employee.

What do you do?

What if employee asks for supervisory change?

Hypothetical No. 4

Scenario: Employee complains that supervisor is unfairly treating him and provides a number of examples. Employee then goes out on medical leave before HR can start investigating.

What do you do?



Hypothetical No. 5

Scenario: Employee complains that supervisor is unfairly treating him providing a number of examples. HR starts investigation and interviews employee. HR then interviews supervisor. The next day, employee makes another complaint about supervisor.

What do you do?

Hypothetical No. 6

Scenario: Employee complains that he is being racially targeted by supervisor, including increased scrutiny when those outside his protected class are not receiving the same scrutiny. HR starts the investigation. HR then receives complaints that the employee spoke inappropriately to a coworker.

What do you do with this new allegation?

Remember



No legal conclusions in your report

No recommendations in your report

Poorly executed investigations can be equally as problematic as those that don't get done at all

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