

CONDUCTING INTERNAL EMPLOYMENT INVESTIGATIONS

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YOUR PRESENTERS



Jay A. Zweig
Labor and Employment
602.798.5500
zweigj@ballardspahr.com



Marjorie Peerce
White Collar Defense/
Internal Investigations
646.346.8039
peercem@ballardspahr.com



Melissa R. Costello
Labor and Employment
602.798.5451
costellomr@ballardspahr.com



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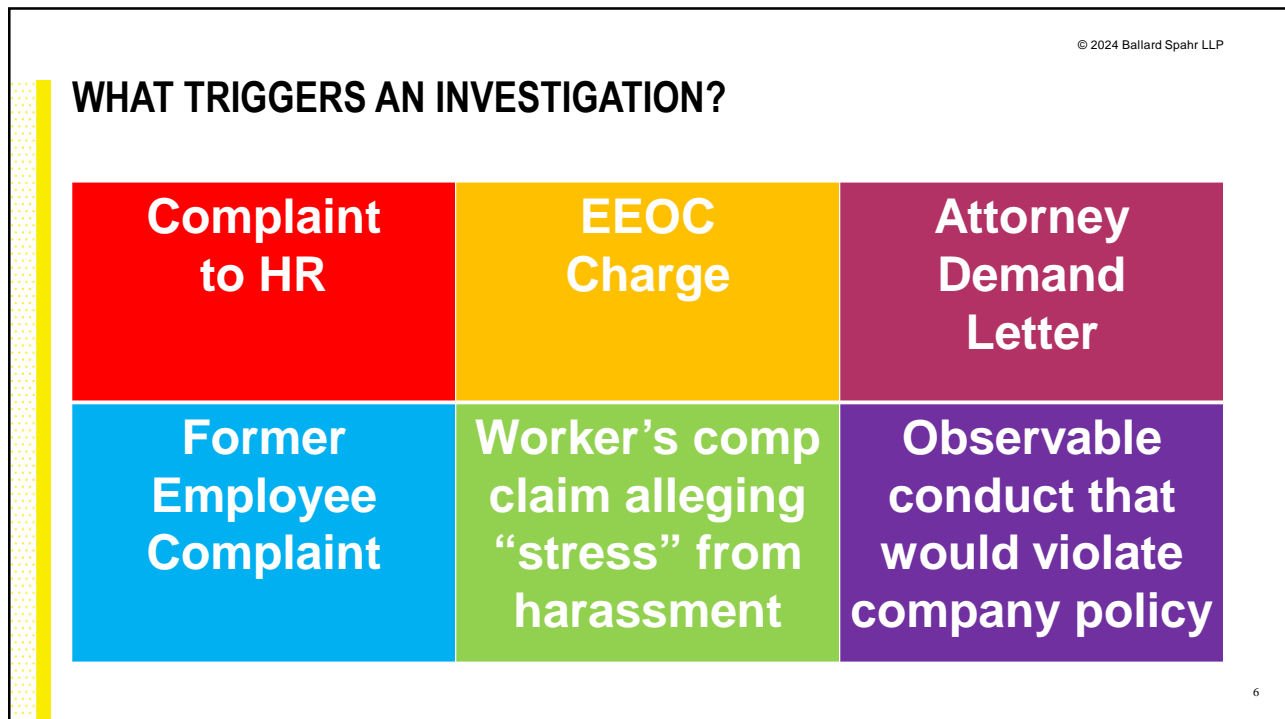
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AGENDA

- What triggers an investigation?
- Navigating the interplay between governmental investigations and employment issues
- Effective investigation fundamentals and considerations.

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WHY INVESTIGATE?

- Enforces EEO and safety policies.
- Demonstrates commitment to maintaining a safe and productive workplace.
- Failure to address concerns and complaints leads to disruption and discontent.
- Provides legal defense.
- Legal duty to investigate in some cases.

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NAVIGATING THE INTERPLAY BETWEEN GOVERNMENTAL INVESTIGATIONS AND EMPLOYMENT ISSUES

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Just as with civil matters, it is critical to send a litigation hold notice immediately upon learning about a government investigation.

- Subpoena
- CID
- Contact from an agent

Letter should be from counsel, either in house or outside counsel.

Consider engaging outside counsel promptly, lots of moving parts at the beginning of an investigation.

You may decide down the road to handle it entirely in-house, but getting outside counsel involved at the outset is prudent.

IT must be involved to ensure complete collection.

Risk is not doing so is possible obstruction charges.

Government takes preservation of documents very seriously.

Many times the underlying conduct was not violative, but how material was collected and preserved was problematic.

Hold must include any business communications on personal devices.

- Consider policies that no business communications can be on personal devices.
- Consider giving employees work phones.

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Provide Upjohn warnings when talking with employees.

- You represent the company, you do not represent them, anything they say is subject to the Company's privilege.

Otherwise, if you want to disclose what you were told, you could be precluded from doing so due to a/c privilege.

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FUNDAMENTALS OF AN INTERNAL INVESTIGATION

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KEY COMPONENTS OF A QUALITY INVESTIGATION



1. Planning and Scoping. Relevant issues are identified.
2. Relevant documents are gathered.
3. Relevant witnesses are interviewed.
4. Accurate, complete record is created.
5. Findings are made or sufficient information is provided in the report so that findings can be made.
6. Legal conclusions are avoided.
7. Remedial measures are recommended if appropriate.

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PLANNING AND SCOPING

WHAT SHOULD BE INVESTIGATED?

- Consider the scope of the complaint and implications.
- Focus on information provided, but be cognizant that more may come to light.
- All information is useful.



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PLANNING AND SCOPING

WHO SHOULD CONDUCT THE INVESTIGATION?



CONSIDERATIONS:

- Severity of the issues
- Likelihood of litigation
- Privilege issues
- Qualification / experience of people in the organization to investigate
- Whether there is a conflict of interest with in-house investigators
- Cost

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CONSIDERATIONS SURROUNDING PRIVILEGE

SHOULD THE INVESTIGATION BE PRIVILEGED?

- Is the investigation being conducted in response to an alleged policy violation?
- Will the investigation form the basis of a *Farragher-Ellerth* defense?
- Is there pending or threatened litigation?
- Who is conducting the investigation?
 - Attorney or someone acting under an attorney's direction?
 - Who retained the investigator?
 - What does the engagement letter say?

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COLLECTING DOCUMENTARY EVIDENCE

WHAT DOCUMENTS CAN THE INVESTIGATOR SEEK?

Personnel files	Performance Evaluations	Relevant emails and text messages
Employee handbook	Training records	Phone records and expense records
Prior investigation files	Go online?	Surveillance video and attendance records
Anonymous calls to complaint lines	Other similar complaints	

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INTERVIEWING WITNESSES

MANY THINGS TO CONSIDER

- Determine who needs to be interviewed.
 - Current employees should be required to participate.
 - Invite former employees to participate; follow up in writing.
 - Are there any possible witnesses outside the company, or former employees?
 - Consider if you need to coordinate with another entity (e.g. vendor). Will they allow you to interview their employee?
- Prepare an outline of questions, and update throughout the investigation with new information learned
- Consider the order and location of interviews.
- In-person vs. remote interviews
 - Remote considerations:
 - Videoconference platform security
 - Internet/Wi-Fi security
 - Document sharing online
 - Anyone else present or devices listening?
 - Audio/video recording concerns

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INTERVIEWING WITNESSES

OPENING STATEMENT AND DISCLAIMERS

- Identify yourself, your role and the purpose of the investigation
 - You work for the company as its attorney, not as an attorney for the employee.
 - The purpose of the interview is to learn information so that you can provide the company with legal advice.
- Address confidentiality
 - Where practicable, preserve the anonymity of the alleged victim(s) and witness(es)
- Remind employee witnesses that failure to cooperate or dishonesty could be a basis for discipline
- Emphasize prohibition against retaliation

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INTERVIEWING WITNESSES

DOCUMENTATION BEST PRACTICES

- Date / Time
- People present
- Confirm opening and closing statements
 - Disclaimer and prohibition against retaliation
 - Instructions re: process
 - Reason for interview
- Consider supportable observations about witnesses:
 - Demeanor (appearance, non-verbal)
- Video or tape recorded?
 - Consider state consent laws



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CONFIDENTIALITY OF INVESTIGATION FILES

- Keep separate from personnel files
- Limit disclosure about investigation to “need to know” basis only
- Identify all documents and notes as “Confidential”
- Assume the jury will see your file and that it will be taken out of context



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WEIGHING THE FACTS AND DECIDING THE OUTCOME

FINDINGS OF FACT

- Address all claims made by the complaining party.
- Consider all witness perspectives and note any discrepancies among witnesses.
- Consider all facts that bear on credibility assessments.
- Avoid speculation.



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INVESTIGATION REPORT

TO WRITE A REPORT OR NOT?

Reasons to write an investigation report:

- Suggests seriousness of purpose and comprehensiveness of effort
- May be expected by policy or regulations
- Findings memorialized are less susceptible to mischaracterization / misinterpretation
- Transparency

Reasons not to write an investigation report:

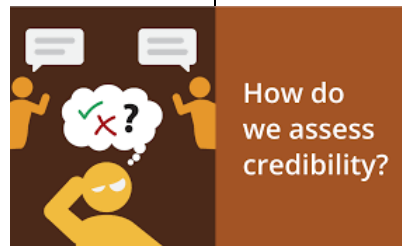
- Nothing to disclose or produce.
- Avoids admissions.
- Easier to control dissemination.
- No investigation roadmap.

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CREDIBILITY ASSESSMENTS

SHOULD THE INVESTIGATOR MAKE CONCLUSIONS REGARDING WITNESS CREDIBILITY?

- May or may not want to.
- Investigation report should provide sufficient information to help a reader make credibility assessments to the extent possible.
- Factors that impact credibility:
 - Inherent plausibility
 - Demeanor
 - Corroboration



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USING THE REPORT

CONCLUSIONS AND ACTIONS

- Prepare a brief email or letter to:
 - Complainant
 - Alleged wrongdoer
- Report general conclusions and actions
- Reiterate no retaliation policy
- Provide information about available resources if necessary (e.g. EAP)

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TAKING APPROPRIATE REMEDIAL ACTION

WHAT REMEDIAL ACTION IS APPROPRIATE?

- Promptly and adequately remedies the problem.
- Proportionate to the seriousness and frequency of the harassment or misconduct.
- Training.
- Counseling.
- Dissemination of policy.
- Apology.
- Permanent changes in schedule or transfers to separate complainant and alleged wrongdoer.
- Oral or written reprimands/warnings.
- Demotion of alleged wrongdoer.
- Discharge.
- Consider discipline/remedial measures for those other than the alleged wrongdoer

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CONCLUDING THOUGHTS

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ELEMENTS OF AN EFFECTIVE INVESTIGATION

Prompt

Fair

Objective

Thorough

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GOTCHA MOMENTS

- Employee complained but nothing was done.
- Investigation wasn't thorough enough.
- Employer didn't take prompt or sufficient remedial action.
- Employer did not take sufficient steps to protect against retaliation.



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QUESTIONS



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