Conducting Lawful Investigations

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Today’s Webinar Host:

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Who We Are

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods
Simplify the complexity of employment law

**PolicySmart™**
Create and maintain an up-to-date and legally compliant employee handbook

**Navigator Independent Contractor**
Remove risk in determining Independent Contractor status

**Navigator Overtime**
Determine if an employee is exempt or non-exempt

**The Reference Center**
A Comprehensive Solution for Employment Law and Common HR Compliance Questions

**The Document Center**
Efficiently generate state and federal compliant documents throughout the employee lifecycle
PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
  - COVID-19, final pay, FMLA, rate changes, and more

When coupled, these two solutions provide you with comprehensive compliance program support.
Sign Up for a Demo

Three ways to sign up for a demo:
1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

Benefits of a custom demonstration:
• Discuss your organization’s requirements/challenges
• Review Navigator Suite Solutions
• Share compliance methodologies

ComplianceHR Demo & Free Trial:
https://compliancehr.com/webinar-demo/
Agenda

1. Understanding the Investigator’s Role and the Importance of Investigations
2. Triggers to Start an Investigation and the Escalation Process
3. Planning the Investigation
4. Interviewing the Parties
5. Factual Findings, Final documentation, and Follow Up
Effective Investigations

• Helps with mitigation with government agencies
• Reduces civil litigation/damages
• Increases morale
• Helps to keep complaints internal
• Helps to create a culture where employees feel comfortable bringing complaints or making reports
The Investigator’s Role
Your Role As An Investigator

• Impartial fact-finder (no biases)
• Good listener
• Fairness, respect, and integrity
• Protect the record
• Appropriate investigation
• Attention to detail
• Take off your HR hat
• Properly document investigation
• Take out the emotion
• Reach FACTUAL findings
A “Good” Investigation Defined

- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected and secured
- Report and findings
- Remedial measures
- Closeout with complainant
It’s All About Notice

• Does there need to be a formal complaint to trigger an investigation?

No! It’s All About Notice
How Is The Complaint Made

• Anonymous
• “Off the record”
• Through a hotline?
• Through social media post of a team member or third party
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.
Planning the Investigation
Steps in Planning

Identify The Allegations

Then...

Select The Means

The Specific Issues

Laws and Policies

Documents

Other

Interviews
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

- Personnel Files
- Timecards
- Medical Files
- Expense Files
- Project Files
- Meeting Agendas
- Email and Voicemail
- Photos and Videos
- Calendars
- Documents in Possession of the Claimant and Witnesses
Electronic Data and Communications

• Electronic Storage Devices
• Email
• Cameras/Videos/Photos
• Recordings
• Internet Searches
• Voicemail

***Know your company’s retention period***
Interviewing the Parties and Witnesses
Taking Notes

• Be Prepared
  • Written outline of allegations.
  • Written list of basic questions organized by allegation.
  • Space for “parking lot” issues
Opening the Interview

Introduction

⇒ Tell the interviewee your name and title.

⇒ Explain your role at the Company.

⇒ Give the interviewee a short statement about why the meeting is happening, which can be tailored depending on whether you are talking to a complainant, witness, or subject.

Explain the Process

⇒ This is a neutral review process.

⇒ The goal of the meeting is to have an open and candid conversation; the interviewee should feel comfortable sharing what they know to help the company.
Opening the Interview

Non-Retaliation Policy

➤ The Company encourages employees to report when they witness something that does not appear consistent with our policies.

➤ Everyone interviewed needs to hear information about our non-retaliation policy.

➤ Tell the interviewee that the company does not tolerate retaliation against a person who raises good faith concerns or who speaks with us as part of our review, and the company takes the policy very seriously.

➤ Explain the non-retaliation policy so the interviewee feels comfortable sharing as much information as possible. Answer any questions they may have.
Confidentiality

Confidentiality of Investigation

To have a fair investigation we take steps to maintain confidentiality of this matter, including complying with our privacy policies - but we cannot guarantee confidentiality.
Opening the Interview: Answer Process Questions

• **Clarity:** Ask the interviewee to tell you when your question is not clear or when the interviewee does not understand the question; offer to clarify your question if needed.

• **Questions:** Ask if the interviewee has any questions and answer them before moving forward with the interview.

• **Compliance:** Confirm they will be truthful and complete and that they are not recording the interview.
Use “Funneled” Questioning

- Open
- Clarification
- Pinning Down

Ask the Right Questions

- Open-Ended Phase
- Clarification Phase
- Pinning Down Phase (i.e., closing the door)
**Interviews: What to Document**

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<tr>
<th><strong>Do</strong></th>
<th><strong>Don’t</strong></th>
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<tbody>
<tr>
<td>Write objectively</td>
<td>Make conclusions as to the facts and credibility</td>
</tr>
<tr>
<td>Summarize knowledge</td>
<td>Use shorthand for quotes</td>
</tr>
<tr>
<td>Give specific responses to key questions and documents</td>
<td>Stick unwaveringly to script</td>
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<tr>
<td>Use quotes</td>
<td></td>
</tr>
<tr>
<td>Close the funnel</td>
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<tr>
<td>Use relevant facts regarding credibility</td>
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Making Credibility Determinations

Bias
What else is going on in the workplace?
Are there feuds, hate relationships, or sour grapes?
Any motivation to lie?

Consistency of Account
Does the story remain the same over time with totally different people?
In “He Said/She Said” Allegations, Credibility and Corroboration Are Key

Memory
• Ask specific questions to assess the witness’ memory.

Corroboration/Lack of Corroboration
• Did you ask open-ended questions to find out if any corroboration exists?
• Did you ask for documentary evidence/other witnesses?

Veracity
• Is this witness’ version of events inherently plausible??
• What is their demeanor like?
Documenting Credibility Determinations

Do not document credibility conclusions:

- “Mary’s Lying” or “Mary’s biased”

Instead, present facts:

- “Mary gave inconsistent information as follows…”

  or

- “Mary and Carl both admitted to having a relationship outside the office.”
Investigator Credibility Pitfalls

Confirmation Bias

- Making a determination too soon
- Failing to make a determination
- Conclusory determination
Four Ps

- Patience
- Persistence
- Power of Silence
- Poker Face
Closing the Interview

Closing Questions

• Is there any other person whom I should be speaking with regarding this matter?

• Is there anything we didn’t cover that would be helpful for me to understand about the topics we have discussed today? Sometimes I might not have asked the specific question, but is there anything else I should know?

• Keep asking the same question until they say there isn’t anything else.

• Are there any documents, files, and emails/texts relating to the subject matters we have discussed today that we should be looking at or that might shed further light on these matters? Could you please provide copies to me?
Closing the Interview

Closing Comments and Instructions

• If you later remember anything that you couldn’t remember here today, or you want to supplement or correct something you said to me, please call me at __________.

• Where documents are involved, tell the interviewee: You cannot destroy or alter any information or documents relevant to this matter and you must keep them until you are notified otherwise.

• Explain to the interviewee that “documents” includes emails, instant messages, and texts.

• A thorough and efficient review will be conducted, but it is not possible to predict timing of closure.

• Please call if anything comes up or if you have any questions.

• The company will decide fairly about proper action at the end of our review, including any needed remedial action.
Closing the Interview

Reminders

• Reminder about confidentiality.

• Reminder about the Non-Retaliation Policy.

• Tell the interviewee if they feel they are being retaliated against or treated differently because they [participated in this review or came forward with concerns], they need to tell you right away.
Interviewing the Complainant

- Get as much detailed information from the Complainant as possible.
- Emphasize complaint will be taken seriously.
- Listen impartially without committing yourself.
- Ask open-ended questions.
- Evaluate the complaint from the Complainant’s perspective.
Allegations Are Not Facts

➤ Don’t accept the Complainant’s allegations at face value.

➤ Analyze the facts you are offered and make your own determination.

➤ The report from the person who made the allegation is just a report.

➤ Offer no opinions to the Reporter.
Interviewing Witnesses

- Get their piece of the story
- Use the funnel
- Aim for corroboration
- Think about credibility questions
Interviewing the Accused

Two Goals

Fair Opportunity to Respond

Confidentiality
Plan For Confidentiality

Consider ways to give the targeted employee notice of the claims against him or her without compromising the identity of the Complainant
Useful Questions

**Question**

“Let me give you this information so that you can respond.”

“Is there anything else that you would like to add to this?”

**Purpose**

Refreshes recollection and gives chance to respond.

After shock has worn off; gather full story and documentation.
<table>
<thead>
<tr>
<th>Question</th>
<th>Purpose</th>
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<tr>
<td>“It’s been reported that you said X, Y, or Z”</td>
<td>Responding to denial; corroboration.</td>
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<tr>
<td>“Why do you think someone would report you said/did this, with this specificity if you didn’t?”</td>
<td>Responding to denial; corroboration; credibility.</td>
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<td>&quot;Others have reported you did say this, any reason for us to think you didn’t?”</td>
<td>Responding to “I don’t recall; corroboration: credibility.&quot;</td>
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Useful Questions

**Question**

“Whom should we speak with concerning this claim?”

“Is there any other evidence or fact that you believe would help us resolve this?”

**Purpose**

Chance to respond; create witness list.

Chance to respond; seals off “universe of facts.”
Post-Interview

Record employee’s reactions
↓
Document that the interview occurred
↓
Maintain documentation control
↓
Distribute notes and documents to investigation file
Final Documentation
Objectives

- Address all allegations raised.
- Identify and review the policies, procedures and business practices that pertain to the allegations.
- Make a record of your reasoning and steps taken.
- Avoid unnecessarily controversial comments.
Know Your Audience

• Who?
• When?
• Where?
Critical Tasks of an Investigation “Report”

- Can a 3rd Party understand it without having to reference other materials?
- Does it document findings objectively and accurately?
- Does it provide decision makers with enough information to determine whether they should take further action?
- Indicate whether the allegations were substantiated, unsubstantiated, or whether there’s something missing that is needed to come to a conclusion.
Overview of issues

- General description of the assignment: “Employee came to me with a complaint about her supervisor, John Doe. Employee alleged Mr. Doe has violated the company policy against harassment by engaging in the following activities.”

Include details regarding complainant, alleged wrongdoer, date of complaint/action, nature of complaint.
Report Writing Map

Employees interviewed

• Date and location of interview.
• Include reason for involvement.

Itemize each document reviewed

• Include applicable policies, electronic evidence and physical evidence relating to the allegations.
• Include reason for review.
Witness Summaries

- Flow from the factual issues
- Distill the interview to the relevant information
- Should include only information, no opinions or conclusions
- Must not contradict your interview notes
Factual Findings:

• A short factual finding on each allegation with reasons
• Likely occurred as alleged.
• Likely did not occur as alleged
Findings Considerations

Are your factual findings objective and accurate?

• Are your findings based on reliable evidence that is relevant?
• Are they factual?
• Did you consider any evidence that doesn’t support your conclusion?
Avoid Editorializing!!
After The Report
Recommended Final Steps

• Follow up with witnesses as appropriate
• Implement any decisions Remedial and disciplinary
• Follow up with Complainant in reasonable time
## Follow Up with Complainant

### Do

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<th>Do it!</th>
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<tr>
<td>Thank them for raising their concerns</td>
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<tr>
<td>Let them know you conducted a thorough investigation</td>
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<tr>
<td>Let them know whether a policy violation was substantiated or not</td>
</tr>
<tr>
<td>If substantiated, let them know appropriate remedial action was taken</td>
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<tr>
<td>Reminder of no retaliation policy</td>
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### Don’t

<table>
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<tr>
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<tbody>
<tr>
<td>Provide specifics about the investigation</td>
</tr>
<tr>
<td>Get into a debate</td>
</tr>
<tr>
<td>Provide specifics about remedial measures</td>
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Recommended Final Steps

Maintain a separate investigative file, to include:

• Copy of the complaint (if written)
• Interview notes
• Relevant policies
• Documentation gathered during the investigation
• Physical Evidence
• Electronic Evidence
• Chain of Custody can be important if criminal allegations possible
• Written report, if one was created

Keep Separate from personnel file
Sole exception = record of discipline imposed
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Questions?
Please add any additional questions to the Q&A box
Thank you!