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The Law and Practice of Workplace Investigations

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Why do investigations?

- The Fair Employment and Housing Act:

  Employers are to take all reasonable steps to prevent harassment and discrimination from occurring.

- California Government Code Section 12940(k):

  Prohibits an employer from failing to "take all reasonable steps necessary to prevent discrimination and harassment from occurring."

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- Title VII

Also requires employers to take all steps necessary to prevent harassment from occurring. 29 CFR Section 1604.11(f)

– EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at: www.eeoc.gov/policy/docs/currentissues

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An employer can avoid or reduce liability by taking appropriate preventative measures.

- *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v Ellerth* – 1998 US Supreme Court cases
  - If the employer has good policies and procedures, there is no liability for a victim who unreasonably fails to complain.
- State Department of Health Services v. Superior Court (*McGinnis*) – California Supreme Court 2003
  - In California there is strict liability for supervisor harassment but damages are cut off if to the time the victim complained if the employer had good policies and procedures including an adequate complaint mechanism.

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A fair and thorough investigation can prevent liability.

- *Cotran v. Rollins Hudig Hall*, 17 Cal. 4th 93 (1998) and *Silva v. Lucky Stores, Inc*. 65 Cal. App. 4th 256 (1998)
  - A reasonable and fair investigation of a sexual harassment complaint that led to plaintiff's termination for violating the sexual harassment policy gives the employer a qualified immunity for liability for wrongful termination.

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A biased/unfair investigation can make things worse.

- *Mendoza v. Western Medical Center of Santa Ana*, __ Cal App. 4th __ (2014)
  - Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcoming in the investigation conducted by defendants following plaintiff's complaint. An inadequate investigation is evidence of pretext.

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NOT taking preventative measures can lead to punitive damages.

- *Weeks v. Baker & McKenzie* – California Appellate court case – 1998
  - $225K compensatory damages and $6.9 million punitive damage award against employer law firm that failed to act despite prior complaints/notice about partner who harassed women.

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Best practices in doing investigations

- Association of Workplace Investigators (AWI) Guiding Principles
  - www.aowi.org

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1. DECISION TO CONDUCT AN INVESTIGATION

A workplace investigation should occur when indicated by law or policy as determined by the employer



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KEY FACTORS TO CONSIDER

- Key facts in conflict?
- Does the employer need to determine the number of alleged victims or the extent of harm?
- Is a policy violation or a violation of law alleged?
- Is there a legal obligation to investigate?
- Where discrimination is alleged, is the complainant in a protected category? If not, would the conduct nevertheless violate the employer's rules, ethics or expectations?
- An "organizational assessment" vs. an investigation.

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Important Cases and Statutes

- *Cotran v. Rollins Hudig Hall* (1998) 17 Cal 4th 93
- *Silva v. Lucky Stores* (1998) 65 Cal App 4th 256
- *Faragher & Ellerth* (1998) 524 U.S. 742 and 775
- *McInnis* (2003) 31 Cal. 4th 1026
- EEOC Guidelines (1999) Notice 915.002
- FEHA – Gov't Code 12940 (j) (1) and (k) – take all reasonable steps to prevent harassment from occurring.
- Title VII – 29 C.F.R. 1604.11 (f)

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2. CHOICE OF INVESTIGATOR

The investigator should be impartial and objective and have the necessary skills and adequate time to conduct the investigation

- **EEOC Guidance; *Nazir v. United Airlines*, 178 Cal. App. 4th 243 (2009)**

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KEY FACTORS TO CONSIDER

- Perceived and actual impartiality.
- If internal, is the investigator higher in rank in the organizational hierarchy than the participants?
- Licensure requirements.
- An outside attorney investigator should appreciate the distinction between their role and that of an advocate.
- Employers should guard against exerting undue influence on the investigation.
- Consider whether specialized expertise is necessary or desirable and how to obtain that expertise.

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Who Should Conduct the Investigation?

- Impartiality
  - Actual knowledge of parties or particulars
  - Perceived bias
- Experience level
  - Seriousness of allegations
  - Relationship in organizational chart to parties involved

Consider – partnering to do the investigation.

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Licensure Requirements

- Business & Professions Code section 7520
  - Licensed Private Investigator
  - Or come under exemption in Section 7522(e)
- Exemptions
  - Attorney “performing his or her duties as an attorney at law”
    - Limited scope retention agreements
    - Ethical duties apply (no ex parte contact with represented party)
  - In house employee of the employer.

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Should the Attorney Who Might Represent the Employer in Litigation Do the Investigation?

Pros

- Perceived Convenience
- Perceived Speed
- Possible Cost Savings
- Familiarity
- In Non-EEO Matters

Cons

- Lack of Impartiality
- Potential Witness
- Conflict of Interest
- Attorney-Client Privilege
- Bias
- Scope of Representation

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Decision Making and Biases

- Whoever does the investigation will need to look at and understand their own biases.
- If you know you are going to be impacted by biases in a given situation – avoid it.
- If you are an appropriate person to conduct the investigation and there is no particular reason for you to be biased – go forward – BUT EVERY INVESTIGATOR SHOULD UNDERSTAND HOW BIAS AND DECISION MAKING WORK!

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Confirmation Bias

I will look at any additional evidence to confirm the opinion to which I have already come.

—Lord Molson, British politician (1903 – 1991)

- Tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence
- Done unconsciously
- Impacts how we interpret information



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3. DEFINING INVESTIGATION SCOPE

The employer and the investigator should develop a mutual understanding concerning the scope of the investigation. In this context, the "scope" of the investigation refers to the issues to be investigated.

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KEY FACTORS TO CONSIDER

- During the investigation, the investigator may become aware of issues beyond the initial scope.
  If this occurs, the investigator should provide notice to the employer, so that the employer may decide the appropriate course of action.
- The investigator may include the additional issues with the original investigation, or may conduct a separate investigation.
- If the employer changes the scope of the investigation, or limits interviews or restricts the investigation, the investigator might document this.

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SCOPE CREEP . . . A Dangerous Condition!

- Pros and cons of a narrow vs. wide scope.
- How to avoid scope creep (AKA the investigation that never ends).
- Tip: Draft a set of questions that you intend to answer in the findings portion of the report and get agreement with the employer that those are the questions that need to be answered. Then stick to what you need in order to answer those questions.

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4. INVESTIGATION PLANNING

The investigator should

engage in planning for an effective investigation.



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KEY FACTORS TO CONSIDER

- Determine what documents are needed and who will be able to provide them.
- Secure electronic and other data and ensure documentation will not be destroyed.
- Prepare verbal and/or written advisements that will be provided to witnesses.
- Plan for who will be interviewed, in what order, and for what purpose.
- Determine who will schedule interviews and where they will take place.

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Before You Begin, Consider…

- **Where** will the interviews take place?
  - Neutrality
  - Privacy
  - Comfort of the witness and ability to leave the room
    (You don't want that claim of "false imprisonment"!)
- **In what order** will you interview the witnesses?
  - Start with the Complainant
  - Respondent next or witnesses next?
  - Pros and cons

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5. COMMUNICATING WITH REPRESENTATIVES OF THE EMPLOYER

A determination should be made with whom the investigator will be communicating about what matters, taking into consideration issues of privilege.

- ***Wellpoint Health Networks, Inc., v. Superior Court,*** **59 Cal. App. 4th 110 (1997) (privilege)**
- ***Coito v. Superior Court,*** **54 Cal. 4th 480 (2012) (privilege and work product)**

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KEY FACTORS TO CONSIDER

- Whenever feasible, the employer representative should not be a witness or participant in the matters being investigated. Investigators should avoid communicating with anyone who is or may be directly involved.
- The employer representative is generally the most appropriate person to handle logistics and scheduling and to provide initial advisories.
- The investigator should clarify union involvement, if any.
- The investigator should avoid communicating conclusions before the investigation is complete.

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6. CONFIDENTIALITY AND PRIVACY

The investigator should take steps to safeguard the confidentiality of the investigation without guaranteeing anonymity or complete confidentiality.

- **EEOC Guidance**
- ***Banner Health System*, 358 NLRB No. 93 (2012)**

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KEY FACTORS TO CONSIDER

- The investigator should maintain the investigation file in a manner that will protect confidentiality.
- The investigator should consider the extent to which the investigator needs to reveal information in order to conduct an effective interview.

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Banner Decision and Confidentiality

- NLRB decisions (*Banner*, *Hyundai* and others)
  - Applies to private sector employers
  - Does not bar employer from asking for confidentiality
- Weighing test as to whether confidentiality is required
  - Necessary to protect witnesses?
  - To avoid spoliation of evidence?
  - To avoid fabrication of testimony?
  - To prevent a cover-up?
- Practical tip: have employer make initial analysis and determination

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7. EVIDENCE GATHERING AND RETENTION

The investigator should gather relevant evidence.

- ***Casiano v. AT&T Corporation*, 213 F.3d 278 (5th Cir. 2000)**
- ***Reeves v. Safeway Stores*, 121 Cal. App. 4th 95 (2004)**
- ***Payton v. New Jersey Turnpike Authority,* 148 N.J. 524 (1997)**

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KEY FACTORS TO CONSIDER

- In determining the evidence to gather, consider:
  - The nature of the allegations;
  - Laws and policies;
  - The probative value of the evidence, weighed against the costs of gathering the evidence, in terms of money, time and potential disruption to the workplace;
  - Whether outside expertise is needed.

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Examples of documents that frequently come up in workplace investigations:

- Personnel files
- Write-ups (including comparative data)
- Accounts of similar incidents/complaints
- Workplace rules or policies
- Meeting notes

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Documents relating to the issues under investigation, such as:

- Records related to promotions/reclassifications
- Invoices
- Emails
- Directives/instructions

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8. WITNESS INTERVIEWS

There are many effective ways to handle witness interviews. The investigator should create an environment that maximizes the chances of obtaining reliable information and should document (either through note taking, recording or some other method) the witnesses' testimony in a reliable and consistent fashion

- ***Dominic v. DeVilbiss Air Power Co., 493 F.3d 968 (8th Cir. 2007)***
- ***Silva*, 65 Cal. App. 4th at 272**

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KEY FACTORS TO CONSIDER

The investigator should:

- Explain his/her role, purpose of the investigation, and give admonishments concerning confidentiality and retaliation.
- Use open-ended questions, giving the interviewee an opportunity to expand on the requested information.
- Ask the complaining party for specifics of the incidents, identities of any witnesses, and documentation.
- Provide the respondent with a full opportunity to respond to the allegations; seek specific admissions or denials.
- Permit witnesses to take breaks & leave the room.
- When feasible, interview parties and critical witnesses in person.

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Using the Right Mix of Personality and Professionalism During the Initial Meeting

- Personal Connection
- Warm and Welcoming
- Transparent
- Attentive
- Organized
- Professional

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Open-ended Questions

- Who
- What
- Where
- When
- How
- WHY?? Why not ask why?
- Studies show open-ended questions lead to the gathering of more accurate information.

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The Funnel Method

- Start broad and keep narrowing
- Circle back for details
- Keep going over it, looking for consistencies and contradictions
- Not as interesting as “Gotcha” but much more successful!

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Participant Focused

- Follow the witnesses' lead
- Make sure they are comfortable
- Set the tone – respectful, open, listening
- Ask one question at a time
- Keep it simple

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Standard Admonitions

- Purpose of investigation - without details
  - E.g., "I am investigating a confidential HR complaint relating to your work area" BUT
    - how much info do you give the respondent and when do you give it?
- Role of investigator
  - Attorney? *Upjohn* warning? PI? Impartial fact-finder?
- Expectations regarding confidentiality
  - Witnesses' obligations
  - To whom investigator's report will go
  - Beware of *Banner*
- Rules against retaliation and where to bring concerns
- Method of recording/note taking

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The Role of Representatives

- When does a party have a right to a representative?
  - Represented by attorney and you are an attorney
  - Union rep if could result in disciplinary action (*Weingarten* rights)
  - Rule, policies, practice
- When should a rep be allowed even if there is no right?
- If there is a rep, who should that rep be? Co-worker, friend, relative?

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9. DOCUMENTING THE INVESTIGATION

The investigator should document the steps taken during the investigation, and the investigator's decision-making process, so that there will be a reliable record of the evidence the investigator relied upon in reaching findings.

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KEY FACTORS TO CONSIDER

- There are many different ways to document. Whichever method is used the investigator should take steps to ensure the reliability of the documentation.
- The investigator should consider documenting:
  - –Instances where road blocks were experienced;
  - –The process used to verify the accuracy of information considered.

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Documenting the interview

- Know your client's practice and rules
- Advantages and disadvantages of:
  - Tape recording vs.
  - Handwritten and typed notes vs.
  - Signed statements/ Signed notes

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10. INVESTIGATION FINDINGS

An investigator's findings should be consistent with the scope of the investigation as defined by the employer.

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KEY FACTORS TO CONSIDER

- In many cases, the employer determines that the scope of the investigation be restricted to determinations of fact. Legal conclusions and recommended personnel actions should be communicated only if they are requested.
- When evaluating the evidence, the investigator generally considers use of an evidentiary standard similar to the "preponderance of evidence" standard used in civil courts: after weighing all evidence, is it more likely than not that the alleged incident occurred?

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Analyzing and Weighing Evidence

- Legal standards
  - Beyond reasonable doubt
  - Preponderance of the evidence

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Credibility Assessments and Adequacy of Investigations

According to EEOC Guidance,

> "If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred."

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Credibility Assessments and Adequacy of Investigations

EEOC Guidance also states that the Commission may "make a finding of harassment solely on the credibility of the victim's allegations."

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Credibility Assessments and Adequacy of Investigations

It also references the need for the investigator “to search thoroughly for corroborating evidence of any nature.”

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11. REPORTS

A written report should be prepared if requested by the employer.



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KEY FACTORS TO CONSIDER

A written report often contains the following:

- A statement of the scope and the issues as identified by the employer;
- An explanation of the investigation process;
- A discussion of the evidence upon which the investigator relied;
- An identification of the specific policies involved, if any;
- An identification of any evidentiary standard used; and
- A statement of the investigator's findings and conclusion.

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The Investigative Report

- Written or verbal?
- Set forth what was complained about and when (allegations);
- List what was done – witnesses questioned, documents reviewed;
- Statement of facts as reported (including conflicting facts);
- Findings;
- Depending on policy – recommend remedial action.

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The Investigative Report

- Consider a chronology;
- Have some boilerplate language;
- Organize by issue or witness;
- Include witness information in report or append summaries;
- Use of exhibits.

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Findings

- It is more likely than not that . . .
  - Occurred
  - Did not occur - or
  - Cannot find by preponderance of the evidence that it occurred.
- Do for each allegation/question to be answered.
- Some use:
  - Sustained
  - Not sustained
  - Unfounded.

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Findings

- Explain the reasoning for each finding, including evidence considered and credibility findings.
- Show that you considered both sides.
- When unsure, try writing both ways and see which is more persuasive.

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Thank You for Participating in this Seminar!

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