

# Elements of Effective Workplace Investigations

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# Investigation Overview

Whether an employee, student, or third party makes a formal written complaint or an informal verbal complaint, arguably the most critical aspect of responding is the ability to conduct a **prompt, thorough, and impartial** investigation which leads to an **effective response**.

# EMERGING TRENDS

# Overview of Emerging Trends

- Complaints going “viral” and #metoo
- Sexual misconduct complaints
- Bullying claims and tort claims
- Verbal, late, renewed complaints accepted
- Professional Standards, “Grooming” & Human Trafficking
- More CDE & OCR involvement and use of UCP for complaints involving students

# LEGAL REQUIREMENTS FOR A SUFFICIENT INVESTIGATION

# Legal Requirements for Investigations

## Prompt and Timely

- Liability may hinge on **promptness** of employer's response
  - Complaints must be handled with high **priority**
    - “I’m too busy to investigate” is not an excuse to delay
    - “I relied on the immediate supervisor to investigate” is not an excuse to delay
    - “The witnesses won’t get back to me” is not an excuse to delay



# Legal Requirements for Investigations

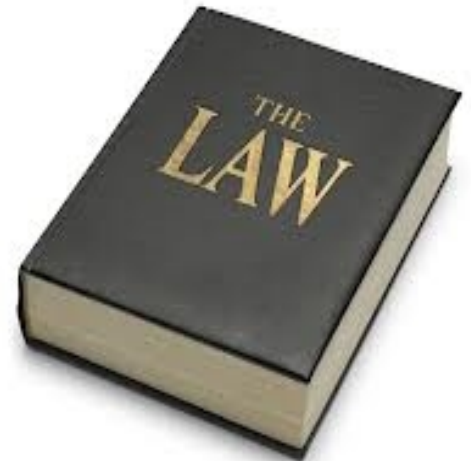
## Thorough

- Liability may hinge on **thoroughness** of employer's response
  - Investigations must be complete
    - Interview Respondent, Complainant, and all relevant witnesses
    - Respondent has notice and opportunity to respond
    - Adequate interview questions
    - Continued follow-up



# Legal Requirements for Investigations

- Employer must support action taken in response to an investigation:
  - Demonstrate it conducted an appropriate investigation under the circumstances; and
  - Show it reasonably believed the alleged misconduct took place and otherwise acted fairly.
    - *Silva v. Lucky Stores, Inc.*  
(1998) 65 Cal.App.4th 256



# Investigation Guidelines

# Investigation Guidelines

## Promptly Review the Complaint

- **Investigator**: Who is an appropriate investigator?
- **Identify/Review Policies**: What policies apply to this complaint? Do I understand those policies?
- **Agreements**: Are collective bargaining agreements relevant?
- **Guidelines**: What complaint policies, regulations, and/or procedures apply to the investigation?

# Investigation Guidelines

## Promptly Review the Complaint

- **Paid Administrative Leave**: Are there issues that warrant paid administrative leave for the Respondent pending the investigation?
- **Interim Measures**: Do the parties need interim protective measures /directions to keep the work or education environment safe pending investigation?
- **Prepare Questions**: What subjects need to be covered in the interview?

# Promptly Review the Complaint

- Review **Hypothetical**

- Who is the **Complainant?** **Respondent?**
- Who are potential **Witnesses?**
- What general **Policies** or laws are implicated?  
What is being claimed here?
- What **Specific Allegations** should you ask questions about?

# Promptly Review the Complaint

## **Hypothetical** - List of Specific Allegations:

- Yelling
- Belittling Remarks
- “Big Butt” Comment
- Rude/Unprofessional
- Gets Close
- Spits
- Finger in Face
- Lays Hands On
- Talk Behind Back

# More Preparation and Planning

- Who is present during the interview?
- Introductory Comments and **Instructions**
  - Your role, tell truth, no tampering, confidentiality, retaliation
- How will you **document** the interview?
  - Typing, writing, tape recording, other

# Investigation Guidelines

## Gathering the EVIDENCE

Prompt, Thorough, and *Impartial*

- Open mind
- Respectful
- Avoid bias
- Avoid drawing conclusions until all evidence is gathered and considered
- Avoid re-traumatizing

# Investigation Guidelines

## Gathering the EVIDENCE

### **Prompt**, Thorough, and Impartial

- Initiate and complete the gathering of evidence in a timely manner
- Reasonable under the circumstances
- 30-90 calendar day timelines and expectations
- Be transparent with parties related to timelines
- Seek and/or inform parties of any delays or extensions of timelines

# Investigation Guidelines

## Gathering the EVIDENCE

Prompt, **Thorough**, and Impartial

- Review allegations and ask open ended questions about who, what, where, when, why & how
- Provide opportunity to expand and gather specifics
- Identify other witnesses

# Investigation Guidelines

## Gathering the EVIDENCE

### Thorough, continued

- Identify documentary or electronic evidence
  - How to handle allegations of nude images of minors and child pornography laws
  - How to gather cyberbullying evidence
- Opportunity for complainant and respondent to present position and correct or challenge contrary evidence
- Opportunity to respond and be heard

# Get the Most Out of the Interviews

Be a good, impartial listener and keen observer	Ask the right questions	Ask witness to demonstrate	Document	Be prepared to assess credibility
<ul style="list-style-type: none"><li>• Ask open ended questions</li><li>• Ask follow up questions</li><li>• Repeat the questions if witness fails to answer</li><li>• Observe non-verbal reactions</li></ul>	<ul style="list-style-type: none"><li>• Begin with non-threatening questions</li><li>• Focus questions</li><li>• Ask who, what, where, why, when, and how</li></ul>	<ul style="list-style-type: none"><li>• Have witness demonstrate the behavior</li><li>• Tour the scene of the incident or have witness draw a diagram</li></ul>	<ul style="list-style-type: none"><li>• Take thorough notes</li><li>• Written statements from witnesses (signed and dated)</li></ul>	<ul style="list-style-type: none"><li>• Recognize bias, motive to falsify</li><li>• Inherent plausibility</li><li>• Corroborate</li><li>• Conduct second interview if needed</li></ul>

# Investigation Guidelines

## Factual Findings

### Weighing the Evidences

- For each allegation
- Apply “preponderance of evidence” standard
- Identify undisputed evidence
- Analyze disputed evidence
  - Make credibility determinations
  - Be prepared to explain

# Investigation Guidelines

## Factual Findings

### Credibility Analysis

- If conflicting version of relevant events, weigh credibility to reach a conclusion
- Credibility – The person inspires belief; offers reasonable grounds for being believed

# Investigation Guidelines

## Factual Findings

### Credibility Factors

- Inherent Plausibility
- Actual Knowledge/Opportunity to Perceive
- Corroboration (Direct and Indirect)
- Consistency/Inconsistency
- Bias/Interest/Motive to Falsify
- Past Record

# Credibility Factors—Inherent Plausibility

- **Inherent Plausibility**

- **Definition**: whether what the witness has described makes sense, given the surrounding circumstances
- **Examples**:
  - Complainant states that supervisor grabbed her breast while supervisor was driving, and complainant was in backseat behind front-seat passenger
  - Complainant states that supervisor pinched her buttocks while he was driving and she was in the front seat of his car

# Credibility Factors—Ability to Perceive

- **Ability to Accurately Perceive, Recollect, or Communicate**

- **Definition:** witness' ability to notice & understand something, remember it, and express observations

- **Examples:**

- Intoxicated witness
- Failure to wear corrective lenses
- Recent traumatic event
- Communication not in witness' native language
- Delayed time

# Credibility Factors—Opportunity to Perceive

- **Opportunity to Perceive**

- Definition: Extent of a person's opportunity to observe

- Examples:

- Witness had face to face conversation with subject
    - Witness overhears conversation, in a noisy restaurant, 20 feet away
    - Witness heard comment from third party
    - Witness was “texting” when “overheard” comment
    - Performance evaluation prepared without input from actual supervisor

# Credibility Factors—Existence or Non-Existence of Corroboration

- **Existence or Non-Existence of Corroboration**
  - **Definition:** whether there is other evidence that verifies the witness's testimony (e.g., testimony by eyewitnesses, people who saw the person soon after the alleged incident, or people who discussed the incident with him at around the time that it occurred; or written documentation)
  - **Examples:**
    - Witness who claims to have not been at work on a particular day is corroborated by his timecard
    - Witness states has no disciplinary history. Personnel file reveals multiple disciplinary action

# Credibility Factors—Consistent or Inconsistent Statements

- **Consistent or Inconsistent Statements**

- **Definition:** whether a witness provides the same answers to questions throughout the interview(s) and whether these answers contradict other statements made by that person or other witnesses
- **Examples:**
  - Witness states not present at work on a particular date, but later comments on a conversation she had during break on that date
  - Witness states he needs accommodation of sedentary work—no standing, twisting, or lifting—but later mentions his continued participation in his bowling team
  - Witness states that supervisor yelled at her, which supervisor denies. Other employees report hearing supervisor yell at witness

# Credibility Factors—Bias, interest, or Motive

- **Bias, Interest, or Other Motive**

- **Definition:** when relationships or other circumstances could cause witness to be less than objective
- **Examples:**
  - Witness is Godmother of the accused's daughter
  - Witness and complainant are members of the same small book club
  - Witness and accused are members of the same Bible study
  - Witness and complainant are lunch walking buddies
  - Witness and accused used to date

# Make a Factual Finding for Each Allegation

- Factual Findings Are Conclusions About What Happened Based on the Preponderance of the Evidence
  - Does each allegation have a finding?
  - Look at each allegation separately before reaching a conclusion about the entire complaint.

# Investigation Guidelines

## Policy Determinations

- **Violation of Policy or Other Misconduct**
  - Look at the totality of the circumstance.
  - Look at all the factual findings which essentially “sustain” the complainant’s allegations.
  - Review the policy to determine if the factual findings demonstrate a violation of the policy.
  - Explain how the factual findings demonstrate a violation of the policy; rely on the policy language.
  - Consider contacting legal counsel regarding any “legal” conclusions.

# Investigation Guidelines

## Decision

- Document your decision and notify all parties
  - Summary report, letter, other methods
  - Report includes allegations, factual findings, and policy determinations
  - Explain appeal rights and other legal rights
  - Remind no retaliation

# Investigation Guidelines

## Decision

- Determine how to address any problems discovered during the investigation & reveal information according to law
  - Correction/Discipline for **respondent**
  - Remedies/resources for **complainant**
  - **Systemic** issues addressed in **culture/climate** of workplace or school
- Record Keeping

# Practical Tips for Successful Outcome

- How well do you approach and engage in the intake **interview** and respondent's interview?
- How well do you **stay in contact** with the relevant parties during the process?
- How well do you **follow-up** after the implementation of the decision or corrective plan, if any?

# Thank You

For questions or comments, please contact:

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