

CAUGHT IN THE ACT: A Practical Guide to Conducting In-House Workplace Investigations

Margaret E. Long
David A. Prentice

Prentice, Long & Epperson PC

April 2, 2018

Presentation Agenda

- Introduction
- Taking the Complaint
- Determining the Need/Legal Duty to Investigate
- Selecting the Investigator
- Preserving Evidence
- Ensuring Confidentiality
- Investigation – Plan, Questions, Interviews
- Summarize Investigation Results
- Close Investigation

Introduction

- The purpose of this training is to provide public agency counsel with the tools to conduct and supervise in-house employee investigations that will stand up in a court of law, if necessary
- Immediate response to a complaint and the initiation of an investigation will yield the best results.
 - NOTE: Due to time constraints of this program we will not address POBAR and FOBOR specific issues.

Taking the Complaint

- Receive Complaint (written or oral)
 - Ask for complaint in writing - Sample Complaint Form
 - Initial Meeting – “What happened?”
 - Lead Complainant to “who, what, where and when?”
 - ID possible witnesses
 - Ask for relevant documents/evidence (e-mails, texts, etc.)
 - Make sure they feel safe.
- Provide Interim Protection
 - Consider immediate measures for protection of accuser or alleged victim.
 - Work with alleged victim and accused to determine amenable solution regarding schedule changes, transfers, leave of absence.

Determining the Need/Legal Duty to Investigate

- *Coltran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal.4th 93
- *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256

Selecting the Investigator

- The appropriate investigator should possess all of the following:
 - An ability to investigate objectively without bias.
 - No stake in the outcome.
 - Skills that include prior investigative knowledge and working knowledge of employment laws.
 - Strong interpersonal skills to build a rapport with the parties involved Attention to detail.
 - The right temperament to conduct interviews.
- OPTIONS – HR Staff, 3rd-Party Investigators, Legal Counsel Investigations, both In-House and Outside, Team Approach

Legal Counsel Investigations In-House and Outside

- Conflicts of Interest
 - It is inappropriate for one person to simultaneously perform both advisory and prosecutorial functions and that an attorney may occupy only one position at a time and not switch roles from one meeting to the next.
- Attorney-Client Privilege
 - “Dominant purpose” of workplace investigation must be to obtain legal advice or legal services.
 - *Upjohn v. United States* (1981) 449 U.S. 383
 - *See Upjohn Letter and Warning*

Preserving Evidence

- First issue the investigator should consider is whether there is a need to secure evidence.
- Keep track of evidence using Evidence Log.
- Don't forget to preserve:
 - Emails
 - Voicemails
 - Keycard
 - Social Media
 - Physical Evidence
 - Internet Searches

Ensuring Confidentiality

- Information should only be revealed on a “need to know” basis.
- Best practices in protecting privacy/confidentiality rights include:
 - Avoiding the use of unsecured e-mail;
 - Ensuring that the confidentiality of documents; and
 - Avoiding discussion of the allegations except as necessary to solicit information from parties and witnesses.
- Employer’s ability to limit communications regarding ongoing investigation.
- Never promise complete confidentiality

Investigation - Plan, Questions, Interviews

- Create a plan for the investigation
- Develop interview questions
- Conduct interviews
 - Lybarger Admonishment
 - Requests for Representation
 - Recording Interview

Interview Approach

Do	Don't
Have a second representative present.	Record the interviews secretly, fail to take notes, or go in without a plan.
Review the purpose of the interview with the witness.	Reveal information that should be kept confidential.
Ask non-leading, non-judgmental and open-ended questions to promote information gathering [who, what, where, when, how?].	Get aggressive or judgmental.
Ask, "Is there anything else?"	Prevent witness from talking freely.
Make a credibility determination regarding employees and witnesses	Fail to consider plausibility, demeanor, motive, corroboration and past records in making credibility determinations.

Summarize Investigation Results

- The following are the required elements of an investigative report:
 - Scope and manner of investigation;
 - Summary of the allegations;
 - The response to the allegations;
 - Summary of the evidence, including witness interviews;
 - Credibility determinations;
 - Findings of fact; and
 - Legal conclusions (but only if called for under the applicable procedures).

Close Investigation

- After a decision is made, the employer should:
 - Notify both the complainant and respondent of the outcome.
 - Ensure the complainant agrees that he/she has been properly heard and understood (even if they don't agree with the results).
 - Set a timeframe to follow up with complainant to ensure there are no new issues and settling back into work;
 - Remind all parties to preserve confidentiality, as appropriate.

Close Investigation – Cont.

- When necessary, employers must take corrective action that is appropriate to the situation, such as discipline, up to and including termination. The employer should:
 - Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
 - Determine if education, such as sexual harassment training or anger management training, would be beneficial to the individual(s) involved, or all employees.
 - Consider if the need exists to review, modify or redistribute workplace policies.
 - Determine whether a review of the investigation and complaint resolution processes is necessary.
- Who gets the report?
- What do you do with investigative notes?

Final Matters

- In summary, a good investigation should contain the following elements:
 - An Impartial Investigator;
 - Is Prompt and Thorough;
 - Ensures All Witnesses Interviewed, Documents Gathered and Reviewed and Relevant Facts Uncovered;
 - Is Well Documented;
 - Its Findings are Well-Reasoned and Supported by Evidence and Appropriate Credibility Determinations;
 - Confidentiality and Privacy Rights are protected;
 - Results are Communicated in Appropriate Manner to Complainant and Respondent;
 - Appropriate Action is Taken to End the Inappropriate Conduct, if applicable; and
 - Policy/Procedure Improvements and Training Opportunities are Identified and Shared with Appropriate Officials, and Action is Taken to Rectify Processes or Other Shortcomings

QUESTIONS?



THANK YOU!

David A. Prentice

5242 N. Palm Ave., Suite 108

Fresno, CA 93704

(559) 500-1600

david@plelawfirm.com

Margaret E. Long

2240 Court Street

Redding, CA 96003

(530) 691-0800

margaret@plelawfirm.com