

# Conducting Effective and Defensible Workplace Investigations

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# Introduction

- Pre-Investigation Considerations
- Planning the Investigation
- Interviewing Witnesses
- Weighing Evidence
- Preparing an Investigation Report
- Closing the Investigation

# What warrants an internal investigation?

- **Broad array of workplace issues may trigger an internal investigation**
  - Not just unlawful discrimination, harassment, or retaliation
  - Bullying, unfair treatment, toxic work environments, other inappropriate conduct
  - Whistleblower complaints
  - Workplace safety complaints
  - Wage-and-hour practices
- **Not every complaint or concern warrants a full internal investigation**
  - Some complaints may be objectively dismissed as frivolous
  - Some minor complaints can be addressed without the need to gather additional factual information
  - More informal methods of investigation are permissible in some circumstances so long as they are properly documented

# What warrants an internal investigation?

- **In many situations, the Company is obligated by law to perform an investigation**
  - *Example* – a supervisor is accused of sexual harassment
  - *Example* – whistleblower complaint alleging financial wrongdoing
  - If not fully investigated and addressed by the Company pursuant to the Company's policies and procedures, the Company could be found liable for the conduct
- **To determine if a full investigation is warranted, ask:**
  - How serious are the allegations?
  - Are the allegations detailed and specific so that they could be meaningfully investigated?
  - Are the allegations credible at first glance?
  - Have these or similar allegations been raised before?

# What makes for an effective and defensible investigation?

- **Prompt, objective, and fair**
- **Follows Company Policy**
- **Gathers specific facts to determine whether the allegations are substantiated or not**
- **Gives accused employees the opportunity to respond to allegations**
- **Provides concrete evidence that can be used to make decisions about next steps**
- **Creates a paper trail:**
  - **Should similar allegations be made later on;**
  - **Should a Complainant choose to take legal action against the Company**

# Pre-Investigation Decisions: Scope of Investigation

- **Will investigation be *privileged* or *non-privileged*?**
  - Purpose of investigation is key: Is the purpose to seek legal advice?
  - Or is it being conducted in ordinary course of business, required by Company policy or regulation?
- **If for legal advice:**
  - Purpose of investigation should be documented
  - Corporate or outside counsel must direct or be involved for investigation to be privileged
  - To preserve privilege, investigatory team members should not share privileged materials with non-necessary third parties and appropriately mark materials as “Privileged”
- **Attorney investigators should give Upjohn warnings to anyone interviewed**

# Pre-Investigation Decisions: Planning the Investigation

- **Preliminary review of allegations and scope**
  - Timeline can be helpful to organize chronology
- **Are interim measures appropriate?**
  - Suspension pending investigation? With pay (adverse action)?
  - Safety first!
- **What issue are you investigating?**
  - If a policy violation, what does the policy say? Were the employees trained on it? Is there a conflicting practice?
  - What evidence do you need to make a recommendation on this issue and how will you get it?
- **Plan, but plans change – be flexible!**

# Initial Assessment: Planning the Investigation

- **Gather and review documents before any interviews:**
  - **Written complaint? Doesn't hurt to ask!**
  - **Rules, policies, procedures**
  - **Memoranda or notes about incident**
  - **Expense reports and receipts**
  - **Prior complaints**
  - **Employees' personnel files**
  - **Managers' notes and files**
  - **Security videos/searches/emails**
  - **Social media (*user controlled content*)**
- **What additional documents may be relevant?**
- **What documents will you need to request from witnesses?**

# Initial Assessment: Determining Witnesses to Interview

## Preliminary Witness List:

- **Who should be interviewed? And in what order?**
  - Usually, the person who complained is first
  - Fact witnesses
  - Usually, the accused employee is second or last (or both if interviewed twice)
  - Witnesses with knowledge of policies or practices at issue (e.g. author of relevant documents)
- **Follow-up interviews?**
- **What time and place are best for interviews?**
- **What about anonymous complaints?**
- **Unscheduled/surprise interviews?**

# How to Investigate: Table Setting the Interviews

- Company's obligation to conduct investigation
- Who you are and what your role is
- Brief nature of the investigation
- Brief summary of the investigative process
- Do not promise confidentiality
- Prohibition against retaliation
- Want truth and only the truth
- Upjohn Notice (Weingarten if unionized)

# How to Investigate: Conducting the Interviews

- Interviewer should not do most of the talking
- Listen to the answers and follow-up. Don't be too reliant on your outline.
- “Why” often elicits opinion, speculation or the witness just “knows.” Follow up with the factual basis of opinion/belief. If none, write it down.
- Identify other witnesses that can corroborate or refute.
- Identify documents, emails, texts, etc. See if they will send them to you.
- Document refusals to answer or participate.

# Interviews: Best Practices

- Consider standardized questions
- Identify all incidents relating to each witness
- Use documentation where appropriate
- Select an appropriate location
  - Zoom vs. in-person
- Give employee an opportunity to explain
  - Ask follow-up questions
  - Understand allegations and perspective
- Get the who, what, where, when, why and how
- Take notes. Use quotes.
- Tape recording vs. note taking
  - Confirm the employee is not recording

# Documentation

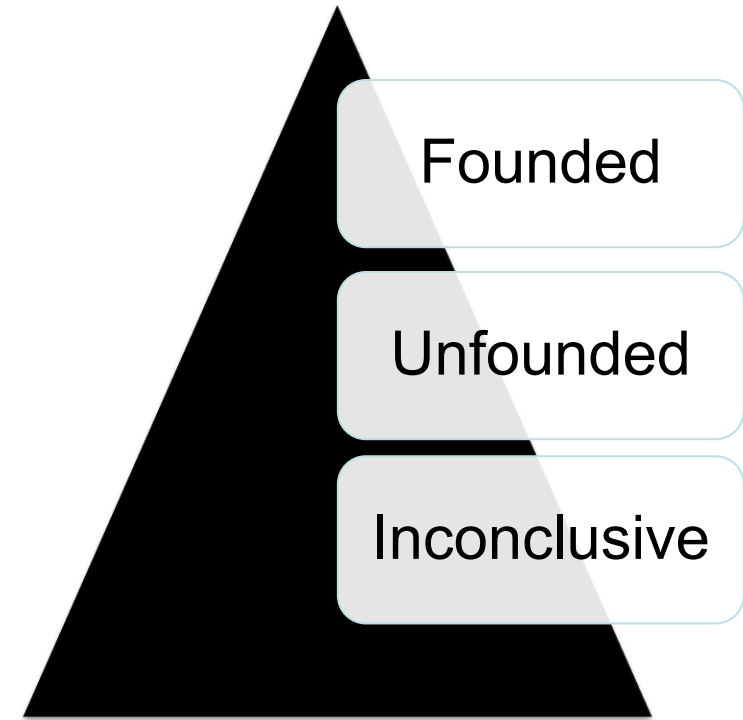
- **Investigation Recordkeeping:**
  - Document all investigative steps and findings
  - Retain all collected evidence
  - Objective facts > subjective opinions
  - Keep factual, dated interview notes with time and location
  - DO NOT save multiple versions of your report
- **Keep privilege designations in mind when keeping notes or collecting documents**
  - Consider including inside or outside counsel
  - Mark documents and communications as “Confidential” and/or “Privileged”
- **Keep a separate investigation file and limit access**
- **Discuss whether a final report (and form of report) is appropriate**

# Analyzing Evidence

- **Credibility Factors to Consider:**
  - Corroborating or conflicting documents
  - Corroborating or conflicting statements from other witnesses
  - Internal contradictions by witness
  - Direct v. circumstantial evidence
  - Pattern of conduct
  - Memory – strong or faded?
  - Bias or impartiality of witnesses
  - Evasiveness
  - Plausibility – Does the story make sense?

# Reaching a Determination

- **Has there been a violation of Company policy, including but not limited to rules of conduct, ethics code, discrimination, harassment, or other misconduct?**
- **You are expected to reach reasonable conclusions based on the evidence collected.**
- **“Inconclusive” should be the exception, not the rule.**



# The Report

- **Organized in a manner that is easily understandable:**
  - Include an Executive Summary up front.
  - Assume the reader knows nothing about the client, its policies, its people, or client/industry specific jargon.
  - Your audience may be a court or jury who should be able to read the report as a stand-alone document – Exhibit A.
- **Frame the issue you are investigating.**
- **Describe the complaint.**
- **Be factual, objective and chronological.**

**Your Investigation Report May Be Discoverable and Scrutinized.**

# The Report

- **Include steps taken in the investigative process (individuals interviewed, documents collected/reviewed, special challenges etc.)**
- **Note any Upjohn or other warnings.**
- **Note retaliation admonishments.**
- **Summarize the evidence and attach relevant policies and exhibits.**
- **Use quotes where possible, especially for critical admissions or facts.**

**Your Investigation Report May Be Discoverable and Scrutinized.**

# Best Practices

- **Follow up with decision-maker to ensure action taken**
- **Inform parties of remedial action, but usually not appropriate to tell complainant what disciplinary action has been taken**
- **Secure investigation file**
- **Be prepared to testify months/years later**

# Maintaining and Protecting Privilege

- **Primary Purpose:**
  - Investigation must primarily aim to provide legal advice to the company
- **Counsel Direction:**
  - Privilege can extend to non-lawyers working at counsel's direction
- **Ordinary Course Exception:**
  - No privilege for investigations done in the ordinary course of business or required by regulation (e.g., OSHA post-incident reviews)
- **Documentation:**
  - Clearly document the investigation's scope and purpose at the outset

# Maintaining and Protecting Privilege

- **Avoid Waiver:**
  - Do not share privileged materials with unnecessary third parties
- **Attorney-Client vs. Work Product:**
  - **Attorney-Client:** Covers direct communications between attorney and client
  - **Work Product:** Broader—includes materials prepared in anticipation of litigation, even by non-lawyers
    - Examples of Work Product: Work plans, interview outlines, witness memos, investigative reports
- **Employee Communications:**
  - Not privileged if shared among employees—even if involved or represented
- **Need-to-Know Rule:**
  - Sharing attorney advice beyond those who “need to know” risks destroying privilege

# Panel Discussion & Hypothetical

# Pregnancy Accommodation Request

**Employee:** Sally Sales

**Position:** Sales Associate

**Employer:** Big Box Retail

**Date of Accommodation Request:** 2025-08-20

## Accommodation Request:

Sally Sales, a Sales Associate at Big Box Retail, is in her third trimester of pregnancy. On August 20, 2025, she formally requests a temporary reassignment to a less physically demanding role due to medical advice related to her high-risk pregnancy. Sally received a doctor's note stating that Sally needs an accommodation and cannot lift more than 10 lbs during the remainder of her pregnancy. Sally presents the doctor's note to her manager, Tom

## Manager's Reaction:

Tom expressed skepticism about the necessity of the accommodation and delayed forwarding the request to Human Resources. Sally had a history of coming up with excuses to avoid certain duties and didn't make any requests during her last pregnancy. Tom tells Sally to continue her current duties with minor adjustments, such as taking more frequent breaks.

# Pregnancy Accommodation Request

## **Alleged Harassment:**

Other sales associates hear that Sally can no longer lift heavy objects and begin making comments that Sally is not a team player and that she is using her pregnancy as an excuse. Sally finds a note in her locker telling her she “needs to pull her own weight.” Distraught, Sally informs Tom about the note. However, Tom refuses to take Sally’s complaints seriously.

## **Sally’s Subsequent Accommodation Request:**

Fed up with Tom’s lack of a formal response, Sally contacts HR directly and claims that Tom said to her: “My wife had 3 pregnancies and never tried to avoid her work duties during her pregnancy.” Sally claims that 2 other sales associates, Jack and Jill, heard Tom’s comments.

HR was unaware of Sally’s request and immediately began the process to evaluate Sally’s accommodation request. HR reaches out to legal for advice on what to do next.

Questions?

Thank You!