

# A ROADMAP TO HANDLING WORKPLACE INVESTIGATIONS:

PRACTICAL TIPS FOR RESPONDING TO A COMPLAINT AND AVOIDING SPEEDBUMPS ALONG THE WAY

PRESENTED BY SUSAN ARDUENGO, AWI-CH  
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Susan is an Association of Workplace Investigators (AWI) Certificate Holder and the Convener for the AWI Los Angeles Mentoring Circle. Susan conducts workplace investigations as a neutral fact-finder.

Additionally, Susan is experienced in management training on workforce matters. Susan also provides her clients preventative employment counseling focused on litigation avoidance.

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# SESSION OVERVIEW

- ▶ (1) Why Conduct Workplace Investigations
- ▶ (2) How to Respond to a Complaint
- ▶ (3) Defining the Investigation
- ▶ (4) How to Conduct an Investigation
- ▶ (5) Post-Investigation Considerations

A close-up photograph of a person's hands writing in a notebook. The person is wearing a blue sweater and a patterned blue and green headscarf. The notebook is open on a table, and there are other papers and a pen nearby. The background is blurred, showing other people in a meeting setting.

# **WHY CONDUCT WORKPLACE INVESTIGATIONS**

# DUTY

## A LEGAL DUTY TO INVESTIGATE

FEHA:

“Take all reasonable steps to prevent discrimination and harassment from occurring.”  
Gov. Code § 12940(j)(1) and (k)

Title VII:

“Take all steps necessary to prevent harassment from occurring.” 29 C.F.R. § 1604.11(f)



## WHY ELSE SHOULD EMPLOYERS INVESTIGATE?

Aside from the legal requirement, it is a best practice to investigate employee complaints because an employer may avoid or limit liability if it can prove that it took reasonable steps to prevent and correct workplace harassment.

- ▶ *State Dep't of Health Servs. v. Superior Court*, 31 Cal.4th 1026, 1041 (2003)
- ▶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)
- ▶ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (Employer may avoid or limit liability if it can prove that it took reasonable steps to prevent and correct workplace harassment.)

# CONSEQUENCES

## OF FAILING TO INVESTIGATE

- Violates employer policy and state and federal law
- Employer policies will be perceived as meaningless among employees
- Discourages complaints
- Denies employer opportunity to resolve issues before litigation





**RESPONDING TO THE COMPLAINT**



# WHAT

## IS A COMPLAINT

- Oral or written communication alleging complaint
- General statement about poor or unfair treatment
- No “magic words” required
- Anonymous is sufficient



# RECEIVING A COMPLAINT

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**LET THE EMPLOYEE  
TELL THEIR STORY**

1

- Listen actively

- Do not guarantee confidentiality or make other promises

2

**DO NOT MAKE PROMISES**

## PROVIDE REASSURANCE

- Do not discourage the employee from making the complaint

3

- Reassure the employee that they did the right thing in bringing the complaint forward

4

## KEEP YOUR OPINION TO YOURSELF

## UNDERSTAND THE PROCEDURE

5

- Do not attempt to mediate the problem yourself
- Keep the parties separate

- Advise the employee what may happen next

6

## **EXPLAIN PROCESS TO EMPLOYEE**

## **CALL FOR REINFORCEMENTS**

7

- Immediately report the matter to appropriate department or person

## AFTER A COMPLAINT IS RECEIVED

- ▶ All complaints should be *immediately* referred to Human Resources (or other appropriate office under employer policy)
- ▶ Supervisors need to be made aware of the proper reporting procedures



A diverse group of office workers is gathered around a desk in a modern office setting. A man in a white shirt and orange scarf is pointing at a tablet. A woman in a black and white patterned top is looking at a computer monitor. A man in a blue sweater is gesturing with his hands while talking to the group. A woman in a light blue shirt is smiling and holding a document. A woman in a dark blue top is standing and holding a document. A man in a red and black plaid shirt is looking at a document. A woman with red hair and a yellow scarf is smiling. The desk has a computer monitor, keyboard, mouse, and some snacks. The background shows office shelves and a window. The text "DEFINING THE INVESTIGATION" is overlaid in green on the image.

# DEFINING THE INVESTIGATION

# WHO

## SHOULD INVESTIGATE

- Supervisor or manager
- Designated compliance officer/coordinator
- HR Department
- Outside counsel
- Licensed P.I. specializing in investigations
- California Private Investigator Act (*Bus. & Prof. Code §§ 7520-7539*)



## SIX ESSENTIAL INVESTIGATOR QUALITIES

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- **Neutrality**
- **Experience**
- **Professionalism**
- **Availability**
- **Excellent Writing Skills**
- **Knowledge of the Relevant Laws**

A portrait of a man with dark hair, wearing a light grey suit jacket over a white collared shirt. The image is partially obscured by a white diagonal shape that also covers the top-left corner of the slide.

## ADVANTAGES OF USING AN EXTERNAL INVESTIGATOR

- (1) Perception of impartiality is paramount.
- (2) Scope of an investigation, i.e., number of complainants, respondents, or issues, are so large that it would be unduly burdensome for an internal investigator to take it on.
- (3) Internal investigators may become overwhelmed by the number of ongoing investigations that they are handling.



A portrait of a man with dark hair, wearing a light grey suit jacket over a white collared shirt. The image is partially obscured by a grey geometric shape on the left side of the slide.

## ADVANTAGES OF USING AN EXTERNAL INVESTIGATOR

(4) Investigations conducted by external attorney investigators are protected by the attorney-client privilege and attorney work product doctrine.



# RECORDING THE DATA

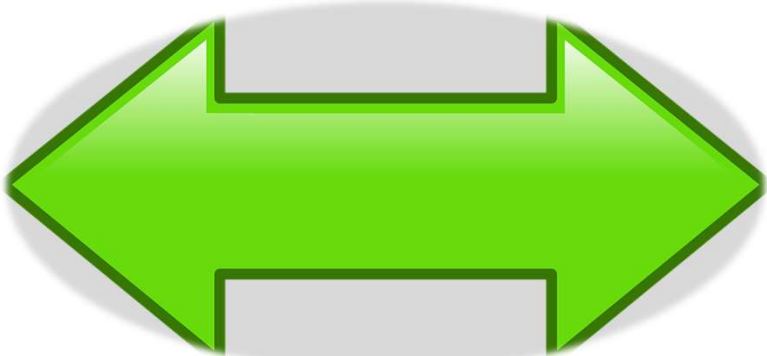
## Recording

- ▶ Best record
- ▶ Can intimidate witnesses
- ▶ Interviewer needs to be trained in how to record interviews

## Report or No Report?

- ▶ There should always be a written report at the conclusion of the investigation
- ▶ The style can vary depending on the circumstances and the investigator

# SCOPE



- ❖ Once an investigator is selected, it is important to adequately define the scope of the investigation
- ❖ Decide on the allegations to be investigated
- ❖ Who makes the decision as to scope of allegations?



# HOW TO CONDUCT AN INVESTIGATION



## INVESTIGATION PROCESS

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- Investigator reviews the complaint and any other supporting documents
- Interview witnesses
- Gather additional evidence
- Completion of an investigation report summarizing the investigator's findings

# TYPES OF EVIDENCE TO REVIEW

- ▶ Written complaints & other statements
- ▶ Emails / text messages
- ▶ Written policies, procedures, rules
- ▶ Personnel records
- ▶ Evaluations and prior discipline
- ▶ Attendance records / timesheets
- ▶ Surveillance footage



# INTERVIEWS

- ▶ In most investigations, witness testimony is not obtained under oath.
- ▶ Witnesses should be afforded a full opportunity to provide information relevant to the issues in the investigation and to follow up with the Investigator after the initial interview. *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 260-261

# ADMONITIONS

- ▶ Explain investigator's role
- ▶ Notify that interview is being recorded
- ▶ Brief description of the investigation process
- ▶ Request confidentiality
- ▶ Employee witness required to cooperate and tell the truth under threat of insubordination
- ▶ Prohibition against retaliation for making a complaint or participating in the investigation; How to report retaliation
- ▶ *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827

# POBR/FFBOR

## PUBLIC SAFETY OFFICERS

- Public employees enjoy greater rights in terms of their involvement in interviews than private employees.
- Public safety officers are protected by the Public Safety Officers Procedural Bill of Rights Act (“POBR”) *Gov. Code*, §§ 3300-3313.
- Firefighter’s Procedural Bill of Rights (“FFBOR”). *Gov. Code*, §§ 3250-3262.

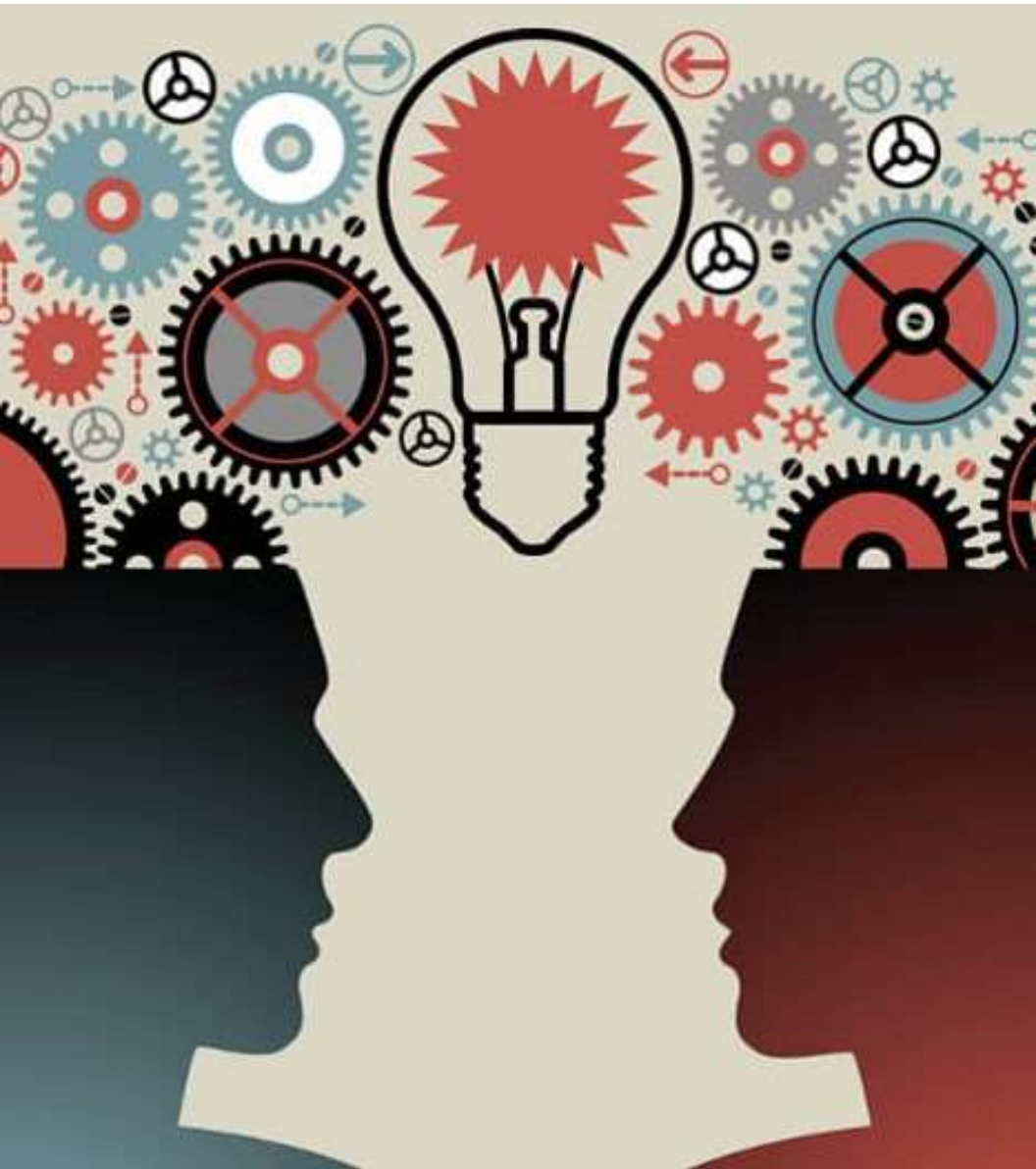




# CONFIDENTIALITY

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- ❖ Public employers are not permitted to interfere with employee associational rights in furtherance of maintaining confidentiality
- ❖ *Meyers-Milias-Brown Act*, Gov. Code, § 3500 (Employees have a right to freely participate in activities of employee organizations, including open discussion regarding working conditions)
- ❖ *Perez v. Los Angeles Community College Dist.* (2014) PERB Decision No. 2014 (No-contact instruction issued pursuant to standard policy interfered with employee's associational rights as there was no specific showing of a risk that the employee would taint evidence)



# CREDIBILITY

## MAKING DETERMINATIONS

- Investigators have an obligation to be deliberate, systematic, and objective when determining witness credibility
- Accepted credibility factors include the following:
  - inherent plausibility
  - motive to lie
  - corroboration
  - ability to perceive
  - reputation for honesty/dishonesty
  - habit/consistency
  - inconsistent statements
  - indirect answers

# WRITING THE REPORT

- ▶ Investigation process
- ▶ Scope of the investigation
- ▶ Documents reviewed
- ▶ Summary of relevant background
- ▶ Complainant's allegations
- ▶ Respondent's response
- ▶ Witness statements
- ▶ Findings
- ▶ Credibility determinations



# WRITING THE REPORT

- ▶ In making investigation findings, the preponderance of the evidence standard is typically used.
- ▶ Preponderance of the evidence, for the purposes of workplace investigations, means that the evidence on one side outweighs, or is more than, the evidence on the other side.



The image features a stylized illustration of a hand holding a magnifying glass over documents. The background is light blue with faint icons of various documents and symbols. A large green arrow points from left to right across the bottom of the image. The text 'Post-Investigation Matters' is written in white on a green rectangular background that is part of the arrow.

# Post-Investigation Matters



# CONCLUDING THE INVESTIGATION

If the investigator sustained findings of wrongdoing, it may be appropriate for the employer to take remedial action against the respondent.

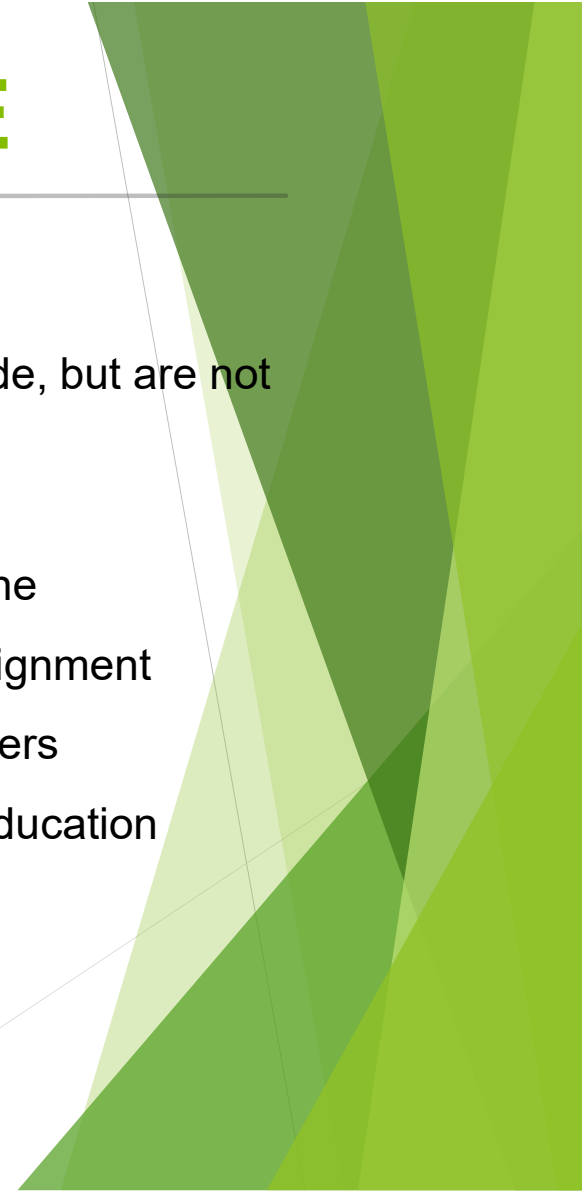




# AVAILABLE REMEDIES

Remedies can include, but are not limited to:

- Termination
- Lesser discipline
- Transfer/reassignment
- No contact orders
- Training and education



# CONCLUDING THE INVESTIGATION

## Review the Report

- ▶ The decision-maker reviews the report and supporting documentation
  - Is it ever appropriate to request that the investigator change the report?
  - Is it appropriate to request that the investigator conduct additional follow-up?

# DISCLOSURE OF REPORT

- ▶ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206 (Public employer must provide a copy of the materials upon which an adverse employment action is based).
- ▶ “Adverse Comment” Rule, a respondent must be provided notice and an opportunity to respond to “adverse comments” in their personnel file. Gov. Code § 3305; § 3255.
- ▶ In *City of Redding*, the City was ordered to produce an investigation report and witness statements, subject to redaction of all employee names and identifying information, where the union asserted that access to the report was necessary in order to represent its members in being free from a hostile work environment and to work in a safe workplace. (2011) PERB Decision No. 2190-M.

# DISCLOSURE OF REPORT

## Public Records Act

When faced with a request for an investigation report under the Public Records Act, courts engage in a balancing act that weighs the individual's right to privacy against the public's interest in disclosure of a report. *Chronicle Pub. Co. v. Superior Ct.*, (1960) 54 Cal.2d 548, 569.

# DISCLOSURE OF REPORT

## Union Rights to Investigation Reports

- ▶ *Stockton Unified School Dist.* (1980) PERB Decision No. 143.
- ▶ *Sacramento City Unified School Dist.* (2018) PERB Decision No. 2597.
- ▶ City & Co. of San Francisco (2020) PERB Decision No. 2698-M.





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ANY QUESTIONS?

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