

**WORKPLACE INVESTIGATIONS:
(Summary)**

When, Who, and How

I. INTRODUCTION

Employers are required to conduct investigations in a number of instances in the workplace. The quality of an investigation can significantly impact an employer's ability to defend and potential exposure for legal claims. Employers, for example, use workplace investigations as part of their defense to discrimination and harassment claims. *See, e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998). Likewise, employers may use an effective workplace investigation as a defense to wrongful termination claims. *See Cotran v. Rollins Hudig Hall Intl.*, 17 Cal. 4th 93 (1998). Finally, in this age of increased scrutiny of corporations and their financial conduct, the Sarbanes-Oxley Act of 2002 further illustrates the need for employers to have effective procedures to investigate employee claims. *See* 15 U.S.C. Section 7201 *et seq.* While the exact procedures to be followed may differ based on the company, employees, or alleged conduct involved, there are certain principles about which those requesting and conducting workplace investigations should be aware. This memorandum is not intended to be an exclusive treatment of the topic of workplace investigations. Rather, it is intended to highlight these key principles and issues, and provide readers with a practical framework from which to begin the investigation process.

II. WHEN TO CONDUCT AN INVESTIGATION

A ASAP after receiving a complaint.

1. Prompt and thorough interviews of the complainant, the accused, and all witnesses are essential elements of a sufficient response. *See, e.g., Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action to remedy situation); *Daugherty v. Henderson*, 155 F. Supp. 2d 269 (E.D.PA 2001) (investigation was prompt and thorough where company learned of complaint and, a week later, initiated a thorough investigation which determined the accusation could not be corroborated); *Schmansk v. California Pizza Kitchen, Inc.* 1122 F. Supp. 2d 761 (E.D. MI 2000) (where managers responded within days each time the plaintiff complained about co-workers by interviewing employees, counseling and, where appropriate, suspending culpable parties and re-educating the staff about the company's sexual harassment policies, response was sufficient).
2. *But see, Sorlucco v. New York City Police Dept*, 971 F.2d 864, 867-69 (2d Cir. 1992) (interview of complainant and witnesses four months after complaint and interview of alleged harasser eight months after complaint insufficient).

B Actual versus Constructive Notice

1. An employer may be obligated to conduct investigations in the absence of an employee complaint or request if the employer otherwise has notice of the wrongdoing such that the employer "knows or should have known" of the conduct. *See* 29 CFR § 1604.11(d) (2003).

C Interim relief to the complainant until the investigation is completed should be considered.

III. WHO SHOULD CONDUCT THE INVESTIGATION

- A Someone who is objective, skilled, experienced, and with sufficient authority to be credible. Typically, human resources not line management. *See, Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (if ultimate decision maker influenced by others who had retaliatory motives, investigation is not "independent").
1. Attorney involvement. Tension between value and need for competent legal counsel and turning counsel into a witness. While preferable, as general rule, inclusion of lawyers in an internal investigation does not automatically insulate an investigation from disclosure.
 2. On the general principles for assessing the privilege status of attorney-client communications, *see United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (privilege belongs to client, not counsel; communication must be between client and counsel acting in capacity as lawyer, outside presence of third parties, for purpose of obtaining legal opinion or other legal services; mixed legal and business or policy advice may be privileged, but primarily business advice not protected).
 3. Regarding general principles governing assertion of attorney-client privilege by corporate clients, *see Upjohn Co. v. United States*, 449 U.S. 383, 391-95 (1981) (privilege protects both legal advice and information collected by attorney to facilitate informed advice, whether information comes from members of company's "control group," or other employees whose actions could embroil corporation in legal difficulties, but privilege does not shield underlying facts from production).

IV. HOW TO CONDUCT AN EFFECTIVE INVESTIGATION

A CONFIDENTIALITY AND DISCRETION

1. Confidentiality is essential to protect an investigation from disclosure. Counsel must keep all investigation records separate from other corporate materials.
2. Handle the investigation of a complaint on a "need to know" basis; make sure that facts and opinions are discussed only with individuals who must be involved in the investigation or in deciding the outcome.
3. Do not promise absolute confidentiality when interviewing witnesses or the complaining employee.
4. Where possible, avoid using the accused party's name. For example, in questioning a witness about Mary's complaint that Bill sexually harassed her, instead of asking, "Did you see Bill touch Mary?" you might ask, "Have you seen anyone at work touch Mary in a way that made her feel uncomfortable?"
5. Assume that everything said or written in investigation may be discoverable.

B VIGILANTLY ABIDE BY ALL LEGAL RESTRICTIONS IMPOSED ON THE METHODS OF WORKPLACE INVESTIGATION

1. Employee Polygraph Protection Act - The Federal Employee Polygraph Protection Act ("EPPA"), 29 U.S.C.A. 2001 *et seq.*
2. The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520
3. Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

C BEWARE OF POSSIBLE TORT CLAIMS

1. Defamation is the communication to a third person of a false statement that tends to harm the reputation of another. An investigation of an accusation that an employee has engaged in wrongdoing, implying that the employee engaged in wrongdoing as accused, may give rise to a claim for defamation if the claim is later proved false.
2. In the context of an employer's investigation of an employee, surveillance of many varieties may give rise to tort liability for invasion of privacy.
3. False imprisonment involves non-consensual, intentional confinement, however short. *Molko v. Holy Spirit Assn.*, 762 P.2d 46 (Cal. 1988).
4. Intentional Infliction of Emotional Distress

D FIVE PHASES OF AN EFFECTIVE INVESTIGATION

1. Phase 1: Intake.
2. Phase 2: Draft investigation plan.
3. Phase 3: Interviews
4. Phase 4: Evaluate evidence, determine and implement remedy.
5. Phase 5: Close the loop.

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