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Investigation Pitfalls and How to Avoid Them

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Agenda



- Addressing privacy and confidentiality concerns
- Dealing with represented employees
- Common situations investigators encounter
- Practice exercise
- Questions and answers

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Addressing Privacy & Confidentiality

- Respect privacy concerns for all individuals involved
- Treat all with respect and dignity
- Limit information to others on a need-to-know basis
- Provide confidentiality to the best extent practical
 - Implied versus expressed confidentiality
 - Legal or regulatory requirements to disclose facts of the investigation
- Don't make promises you may not be able to keep

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Assuring Investigator Objectivity & Independence

- Consider using outside investigators for
 - Allegations of misconduct that could result in criminal prosecution or civil litigation
 - Allegations that have been publicized
 - Allegations of misconduct by senior employees
- Consider using internal investigators for
 - Allegations of minor errors in reporting or violations of company procedures
 - Allegations of routine misconduct in the workplace

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Assuring Investigator Objectivity & Independence

- Failure to establish independence
 - May result in the appearance of a “white wash” investigation
 - To what extent is senior management involved in the alleged misconduct?
 - Did they, could they, should they have known?
- Will results of the investigation be provided to regulators or law enforcement?
- Questions of independence, no matter how well the investigation was performed, could still result in a new investigation by a third party.

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Assuring Investigator Objectivity & Independence

“Independence is the complete freedom to go where your must in order to find the truth.”

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Dealing with Represented Employees

- Employees are not entitled to have legal representation in response to a company internal investigation;
 - However, you may allow it in order to obtain cooperation
- Employees should be required by company code to cooperate and be honest in disclosing known or suspected misconduct, even if they may be implicated in the misconduct
- Bargained unit employees may be entitled to union representation by virtue of a bargaining unit contract
- Address Code of Conduct, condition of employment to cooperate with internal investigations, employee acknowledgment of code
- Failure to cooperate with an internal investigation may result in disciplinary action including termination - “Talk or Walk”
- Be understanding and firm with witnesses and implicated persons.

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Dealing with Uncooperative Witnesses

- How would you respond to a witness who says,
 - “Am I in trouble?”
 - “I want to invoke my Fifth Amendment Rights!”
 - “Do I need a lawyer?”
 - “I will answer your questions only if you promise not to fire me.”
 - “I want to have a co-worker or family member present during the interview.”
 - “What will happen to me if I refuse to answer your questions?”
 - “I’m not the only one, everybody does it!”

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Common Situations Investigators Encounter

- Lack of management support
 - Management personnel impatient with investigation and apply pressure to wrap it up quickly
 - Management personnel hostile to investigator
 - Interference by management personnel
- Inability to access documents or potential witnesses
- Witness or implicated employee resigns before being interviewed
- Witness collaboration

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Other Pitfalls Investigators May Encounter

- Improper handling of evidence
 - Take care when acquiring evidence stored on employees' electronic devices
 - Consider utilizing a professional forensic service
 - Preserve all evidence to assure it remains tamper free
- Avoid one on one confrontations with witnesses and subjects
 - The last thing you need is an allegation against you for unprofessional conduct
 - Have a company attorney or HR professional by your side
- Avoid premature conclusions by remaining impartial to the end
 - Presume the implicated person is "innocent until proven guilty"
- Take the time necessary to reach your conclusion

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Common Situations Investigators Encounter



Take care when investigating “up the food chain”.

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Exercise 1 - Investigation Scenario

The E&C Hotline received an anonymous report that two employees, Alex and Donnie, were fighting on the company shipping dock a few days ago. The reporter said he intentionally waited to call the Hotline to give the supervisor of the employees, who also witnessed and broke up the fight, some time to adequately address the matter. The reporter said he heard the supervisor, Ed Boxer, tell Alex and Donnie to “knock if off” and “get cleaned up and back to work as they were in a lot of trouble”. The reporter stated, “Alex and Donnie were really going at it, throwing some serious punches to each others face and body.” “Alex has a nasty black eye and Donnie was bleeding from his nose”, added the reporter. The reporter emphasized, “nothing was done by the supervisor to deal with Alex and Donnie as they are still working and creating a lot of tension for the rest of the employees in the Shipping Department. They continue to give each other mean looks and refuse to talk to each other.” “Ed Boxer handled this situation very badly and now everyone in the group is very uncomfortable because of it” said the reporter who also noted that, “Ed was very friendly with Alex and Donnie before he was promoted to supervisor a few months ago.” The reporter ended his call by saying, “This bad blood between Alex and Donnie has got everyone on edge and needs to be resolved before it explodes out of control.”

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Exercise 1 - Investigation Scenario

Some Additional Information: The company has a zero tolerance policy prohibiting violence in the workplace. In the past, employees have been terminated for any form of physical harassment or threatening behavior by employees.

Working in small groups:

- Identify potential pitfalls in handling this investigation.
- What, if any, are the possible root causes for supervisor Ed Boxer's apparent mishandling of the situation?
- Who would you involve in any determination to investigate the matter further?
- Who would you want to interview and in what order?

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Other Pitfalls

Are there other pitfalls or challenges that you or your colleagues may have experienced that you wish to present and discuss with the group?

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Session Takeaways

- Maintain confidentiality to the best of your ability.
- Develop a strategy to address most investigation pitfalls.
- Take care investigating alleged misconduct of persons above your pay grade.
- Remain calm, focused and professional throughout the process.
- Don't make it personal, It's not about you!

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Questions?

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