

6033 WEST CENTURY BOULEVARD,
5⁷¹¹ FLOOR
LOS ANGELES, CALIFORNIA 90045
T: (310) 981-2000
F: (310) 337-0837

135 Main Street,

7" Floor

San Francisco, California 94105

T: (415) 512-3000

F: (415) 856-0306

5250 NORTH PALM AVENUE, SUITE 310 FRESNO, CALIFORNIA 93704 T: (559) 256-7800 F: (559) 449-4535 550 WEST "C" STREET, SUITE 620 SAN DIEGO, CALIFORNIA 92101 T: (619) 481-5900 F: (619) 446-0015 400 CAPITOL MALL SUITE 1260 SACRAMENTO, CALIFORNIA 95814 T: (916) 584-7000 F: (916) 584-7083

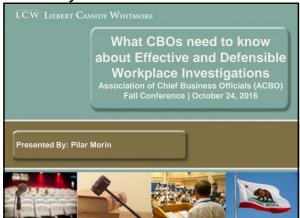
ASSOCIATION OF CHIEF BUSINESS OFFICIALS (ACBO) FALL CONFERENCE

What CBOs need to know About Effective and Defensible Workplace Investigations

10/24/2016 Presented by:

Pilar Morin

Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin



Agenda



- When To Investigate
- · Who Should Investigate
- · How To Investigate
- · How To Draft The Report
- Importance of a Solid Investigation & Report
- · Pitfalls & Mistakes To Avoid

2 LCW LIEBERT CASSIDY WHITMO

When To Investigate

Duty arises when there is:

- Formal or informal complaint
- Actual or constructive notice of possible misconduct
 - Even when the complainant/victim does not want to participate
 - Notice by third party

LCW LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

When To Investigate

Examples:

- Harassment/discrimination/retaliation
- Fraud
- Unauthorized outside employment
- Ethics
- · Abusive or excessive absenteeism/leave
- · Influence of alcohol/drugs
- · Neglect of duty

4

ICW LIEBERT CASSIDY WHITMO

When To Investigate

Examples con't:

- · Discourteous treatment of the public
- Misuse of public property/resources
- Dishonesty
- Conduct unbecoming/discrediting the district
- · Improper political activity
- · Assault/stalking/threats/bullying

5

LCW LIEBERT CASSIDY WHITMO

Selecting an Investigator • Who Should Investigate? • LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE

Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

V	Who Investigates
• Oı	bu her Internal Personnel utside Investigator torney

W/b o	nvestigates
	nvesmones
	II V O O LI MULO O

In-house vs. Outside

- Pros
 - · Familiar with agency and parties involved
 - Familiar with district policies and procedures to be followed
 - Ability to commence right away
 - Onsite access to witnesses/documents
- Cons
 - Reporting relationships, biases and personal relationships must be examined
 - Must possess training and experience to investigate
 - Availability if the investigation will be extensive

ICW LIEBERT CASSIDY WHITMOR

Select an Investigator Guidelines

- · Employment level of investigator
- · Credibility of investigator
- · Training experience
- · Time constraints
- · Political concerns (e.g. public visibility of accused)
- · Personality/strengths of investigator
- Impartiality
- · Report-writing ability
- · Location and hourly rates (if outside)

9	LCW LIEBERT CASSIDY WHITMOR	Ĭ

	1		
LCW	LIEBERT	Cassidy	WHITMORE

Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

Who Should Investigate

When To Use Outside Investigator

- · Real or Perceived Conflict
- · Multiple Complaints By Individual
- · Multiple Complaints Against Individual
- · Campus Investigator Not Available
- · Highly Complex Investigation
- · Highly Political Investigation
- Specific Expertise Needed

10

LCW LIEBERT CASSIDY WHITMO

Who Should Investigate

With outside counsel clearly determine who makes conclusions of law/policy

- · Clearly delegate this responsibility
- · Outside investigators: generally should not
- In-house investigators: may if trained/knowledgeable and specifically directed (but there are risks!)
- · Report is discoverable
- · Better practice: delegate to legal counsel

11

LCW LIEBERT CASSIDY WHITMO

How to Investigate

STEP ONE: PREPARE A BINDER

- Complaints
- Rules
- Documents
- · Witness Statements
- Research
- · Witness Questions
- · Notes of Witness Interviews
- Report

12

LCW LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How to Investigate

STEP TWO: READ & FOLLOW THE APPLICABLE RULES, POLICIES AND PROCEDURES

STEP THREE: GATHER, REVIEW & RESEARCH

- · Gather & Review:
 - All Written Complaints
 - All Relevant Documents
 - All Witness Statements
- · Research:
 - Verifiable Relevant Information
 - Verifiable Factual Assertions

13

LCW LIEBERT CASSIDY WHITMO

How To Investigate

STEP FOUR: IDENTIFY THE SCOPE OF THE INVESTIGATION

- Identify & List The Allegations
- Identify & List Facts That Would Support The Allegations
- Identify & List Facts That Would Counter The Allegations
- Identify & List Facts That Would Qualify As A Defense To The Allegations

14

LCW LIEBERT CASSIDY WHITMO

How To Investigate

STEP FIVE: PREPARE WITNESS INTERVIEW OUTLINES

Substance of Witness Outlines

Basic Background

Who is Who

Context

Allegations

Facts That Would Counter the Allegation

Facts That Would Qualify as a Defense to the Allegations

[LCW] LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

	How To Investigate
	TEP FIVE: PREPARE WITNESS INTERVIEW UTLINES
	5.E., 12.0
	ptions for Drafting Witness Outlines:
	rite out List of Questions
Wı	rite out Areas to Cover/Some Specific Questions
16	LCW LIEBERT CASSIDY WHITMOR
	How To Investigate
SI	TEP SIX: INTERVIEW THE WITNESSES
<u>Oı</u>	rder of Witness Interviews:
	Interview The Complainant/Alleged Victim Interview Witnesses
•	Interview The Alleged Wrongdoer
•	Possible Supplemental Interviews Required (and best practice) Under Certain Circumstances
17	LCW LIEBERT CASSIDY WHITMOR

How To Investigate

STEP SIX: INTERVIEW THE WITNESSES

Employee Rights in Interviews

- · "Gag" Orders
- Los Angeles CCD, PERB Dec. 2404
- Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012)
- Weingarten Revisited
- SEIU v. Sonoma Co. Superior Court, PERB Dec. 2409-C.

LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE

Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How To Investigate STEP SIX: INTERVIEW THE WITNESSES Lybarger Admonition Do you understand you are being questioned re: performance? May have criminal implications Right to remain silent Silence may be insubordination and cause for discipline Statements may be basis for discipline but not criminal prosecution Do you understand? Will you answer?

How To Investigate

STEP SIX: INTERVIEW THE WITNESSES

- Set the Right Tone Welcoming, Respectful and Professional
- · Focus, Connect & Listen
- · Give Introduction "Admonitions"
- · Ask if Questions
- · Use Outlines As Question Guide
- Listen Very Carefully to Ask Follow Up & Drill Down
- · Take Detailed Notes or Have Note Taker

20

LCW LIEBERT CASSIDY WHITMOR

LCW LIEBERT CASSIDY WHITMORE

How To Investigate **STEP SIX: INTERVIEW THE WITNESSES Allegations** Facts That Would **Facts That Would** Qualify as a **Counter The** Defense To the <u>Allegation</u> **Allegation** • Stick to Facts - e.g., Who, What, When, Where, Why · Ask Open-Ended Questions Avoid Leading Questions • Don't Forget - the Wrap Up Questions "Have you told me everything?" "Is there anything else you wish to add?" "Is there a question you were expecting which I haven't asked?"

LCW LIEBERT CASSIDY WHITMORE

Statewide Experts | Customized Solutions

7

Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How To Investigate	
STEP SIX: INTERVIEW THE WITNESSES	
ALWAYS ASK FOR TEXTS ALWAYS ASK FOR TEXTS	
ALWAYS ASK FOR TEXTS	
22 LIEBERT CASSIDY WHITMORE	

How to Investigate

What Ground Rules Can You Set for Union Reps?

- · Can't object to questions
- · Can't obstruct
- Can't demand information/conduct "discovery"
- · May clarify

23

LCW LIEBERT CASSIDY WHITMO

How To Investigate STEP SIX: INTERVIEW THE WITNESSES The Difficult Witness: Reluctant Combative Demands to Tape Will Not Directly Answer Questions Obviously Untruthful



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How To Write The Report
STEP ONE: EVALUATING THE EVIDENCE What is Evidence • Documents - E-Mails, Social Media Posts, Notes, Texts, Timesheets, Letters, Personnel & Student Records • Eyewitness Testimony • Physical Evidence
ECW LIEBERT CASSIDY WHITMORE
How To Write the Report
STEP ONE: EVALUATING THE EVIDENCE What is NOT Evidence: General Statements that Cannot Be Supported

LCW LIEBERT CASSIDY WHITE

Relevance Guidelines

Does the Document:

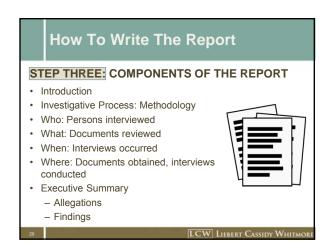
- · Indicate bias on the part of a witness?
- Corroborate an allegation?
- · Provide motive/justification for an allegation?
- Provide witness leads?
- Provide evidence that might exonerate accused?

LCW LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How To Write The Report STEP TWO: ASSESSING CREDIBILITY Bias · No Eye Contact Motive · "I Don't Recall" • Evasiveness/Vague Inconsistencies Answers · Inconsistent with Defensiveness Documents · Recollection of · Implausibility Details Sequence of Events



How To Write The Report STEP THREE: COMPONENTS OF THE REPORT • Detailed Description of the Evidence Considered - Background Facts - Chronology • Allegations • Preponderance of the Evidence Standard • Findings of Fact

LCW LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

How To Write The Report STEP THREE: COMPONENTS OF THE REPORT For Each Allegation: · Determine Whether the Respondent Commit the Alleged Act · Set Forth the Factual Basis Supporting the Finding • Determine Whether Respondent's Conduct Violated the Executive Order or Rule of Conduct? · Conclusions If Executive Order or Conduct Rule Violated (If so Directed) · Attachments: Exhibits and Documents Pitfalls & Mistakes To Avoid Avoid Procedural Errors in Documentation · Make Sure Factual Statements in Investigation are 100% Consistent with Investigation Notes, Statements, & **Documents** Follow Timelines Communicate With Complainant · Advise investigation is completed · Summarize factual findings & conclusions · Inform re: internal appeal rights & external complaint procedures · Advise protected from retaliation

- · Comply with Title 5/Title IX notice where applicable
- If charges are sustained:
 - That appropriate remedial action will be taken
 - Balance remedial action v. privacy
- · If not sustained/unfounded:
 - Matter closed

LCW LIEBERT CASSIDY WHITMORE



Association of Chief Business Officials (ABCO) Fall Conference | October 24, 2016 Presented by: Pilar Morin

Communicate With Accused · Advise investigation is completed · Summarize factual findings & conclusions · No retaliation admonition · If charges are sustained: - That District is determining appropriate remedial action - Employee will receive separate notice - Employee will receive all procedural due process rights to which entitled. · If not sustained/unfounded: - Matter closed - Nothing will appear in personnel file, including closure letter **Questions?** Thank You **Pilar Morin** Partner | Los Angeles Office 310.981.2000 | pmorin@lcwlegal.com www.lcwlegal.com/Pilar-Morin



LCW LIEBERT CASSIDY WHITMORE