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# 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



# What CBOs need to know About Effective and Defensible Workplace Investigations


Association of Chief Business Officials (ACBO) Fall Conference | October 24, 2016

Presented by: *Pilar Morin*

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What CBOs need to know about Effective and Defensible Workplace Investigations  
Association of Chief Business Officials (ACBO)  
Fall Conference | October 24, 2016

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## 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



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## 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

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# What CBOs need to know About Effective and Defensible Workplace Investigations

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**When To Investigate**

Examples:

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



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**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

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**Selecting an Investigator**

- Who Should Investigate?



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# What CBOs need to know About Effective and Defensible Workplace Investigations

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**Who Investigates**

- You
- Other Internal Personnel
- Outside Investigator
- Attorney

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**Who Investigates**

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

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**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)

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**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

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**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

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**How to Investigate**

**STEP ONE: PREPARE A BINDER**

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



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**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

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**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

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**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

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**How To Investigate**

**STEP FIVE: PREPARE WITNESS INTERVIEW OUTLINES**

**Options for Drafting Witness Outlines:**

- Write out List of Questions
- Write out Areas to Cover
- Write out Areas to Cover/Some Specific Questions

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**How To Investigate**

**STEP SIX: INTERVIEW THE WITNESSES**

**Order of Witness Interviews:**

- Interview The Complainant/Alleged Victim
- Interview Witnesses
- Interview The Alleged Wrongdoer
- Possible Supplemental Interviews
- Required (and best practice) Under Certain Circumstances

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**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.

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**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?

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**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

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**How To Investigate**

**STEP SIX: INTERVIEW THE WITNESSES**

<b><u>Allegations</u></b>	<b><u>Facts That Would Counter The Allegation</u></b>	<b><u>Facts That Would Qualify as a Defense To the Allegation</u></b>
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- 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?"

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**How To Investigate**

**STEP SIX: INTERVIEW THE WITNESSES**

**ALWAYS ASK FOR TEXTS**  
**ALWAYS ASK FOR TEXTS**  
**ALWAYS ASK FOR TEXTS**

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**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

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**How To Investigate**

**STEP SIX: INTERVIEW THE WITNESSES**

**The Difficult Witness:**

- Reluctant
- Combative
- Demands to Tape
- Will Not Directly Answer Questions
- Obviously Untruthful

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# What CBOs need to know About Effective and Defensible Workplace Investigations

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**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



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**How To Write the Report**

**STEP ONE: EVALUATING THE EVIDENCE**

What is NOT Evidence:

- General Statements that Cannot Be Supported
- Rumors, Gossip
- Opinions, Speculation, Impressions

- But do follow up to determine facts

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**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?

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**How To Write The Report**

**STEP TWO: ASSESSING CREDIBILITY**

- Bias
- Motive
- Evasiveness/Vague Answers
- Defensiveness
- Recollection of Details
- No Eye Contact
- "I Don't Recall"
- Inconsistencies
- Inconsistent with Documents
- Implausibility
- Sequence of Events

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**How To Write The Report**

**STEP THREE: COMPONENTS OF THE REPORT**

- Introduction
- Investigative Process: Methodology
- Who: Persons interviewed
- What: Documents reviewed
- When: Interviews occurred
- Where: Documents obtained, interviews conducted
- Executive Summary
  - Allegations
  - Findings



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**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

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**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

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**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

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**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

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**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

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**Questions?**

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**Thank You**

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36 | LCW LIEBERT CASSIDY WHITMORE

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