

# Avoiding Common Pitfalls of Workplace Investigations

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**Littler**<sup>®</sup>

Compliance **HR**

# Today's Webinar Host:

**Stephanie Zielinski**

Marketing Director | ComplianceHR



# Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:  
Deliver expert guidance in a fraction of time and cost vs traditional methods

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

A Comprehensive Solution for Employment Law and Common HR Compliance Questions

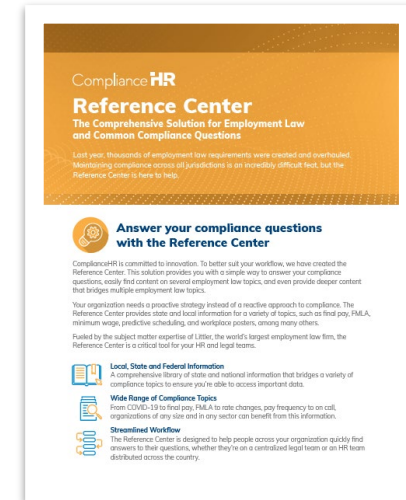


### **The Document Center**

Efficiently generate state and federal compliant documents throughout the employee lifecycle



# Compliance Essentials



## PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

## The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
  - Leave, final pay, FMLA, minimum wage, and more

When coupled, these two solutions provide you with comprehensive compliance program support

# Sign Up for a Demo

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## Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
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### ComplianceHR Demo & Free Trial:

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#### Resources

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[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

## Presented by:



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# Noah Garber

- National Labor Relations Board – Region 32
- Kaiser Permanente
- Littler Mendelson, P.C.
  
- Practice Areas:
  - Traditional Labor Law
  - Workplace Investigations and Trainings



# Topics To Cover

- Why we conduct workplace investigations
- Developing an investigative plan
- Witness interview and information-gathering techniques
- Evidentiary Standard
- Report and documentation strategies
- Concluding the investigation
- Speed Bumps
- Common mistakes
- The NLRA
- Social Media Concerns
- Cross-Complaints



# Why do we conduct workplace investigations?

- Workplace investigations create and promote a safe work environment.
- Workplace investigations limit a potential “snowball effect.”
- Control the situation.
- Prevent reputational harm.



# Developing an Investigative Plan



- Identify the actors and chain of command.
- If applicable, research the history of the individuals involved (e.g., past practice, previous problems, similar conduct, etc.).
- Contact the complainant to schedule a confidential interview.
- Identify all issues raised, including those that you see, but may not be raised by the complainant.
- Interview the complainant and move past the legalese.

## Developing an Investigative Plan (cont.)

- Ensure that you cover all allegations with complainant and obtain their documentary evidence.
- Contact accused party for a confidential interview and obtain their documentary evidence.
- Other witnesses?
- Follow-up interviews (if needed).
- Draft report outlining your findings.





# Interviewing Witnesses

- Admonitions regarding neutrality and the investigative process.
  - Try to build rapport.
  - Be Ted Lasso.
- Utilize the “funnel” technique when questioning witnesses.
  - Start with easy questions on background.
  - Move on to open-ended questions.
  - Directed questions regarding the issues at hand.
  - Cross-exam style questions if necessary.
- If documents are mentioned, obtain copies.
- Be an active and engaged listener.
- Assess credibility.



# Credibility Factors

- Inherent plausibility
- Motive to lie
- Corroboration
- Witness' ability to perceive and recall facts
- History of honesty/dishonesty (be careful)
- Inconsistent statements
- Manner of testimony (hesitations, indirect answers)
- Demeanor (use with caution and consider cultural differences)



# Evidentiary Standard



- A “preponderance of the evidence.”
- Also called the “more likely than not” test
  - The investigator finds that it is more likely than not that the conduct alleged did or did not occur.
- 50% plus 1

# Report and Documentation Strategies

- Know your audience.
- Address all allegations raised.
- Make a record of your reasoning and steps taken.
- Connect the best possible evidence.
- Reach a factual finding for each issue.
- Remain neutral and objective.





# The investigation is done, but your work is not

- Closing out with complainant and respondent
- Handing off for remedial action, as appropriate
  - Alternatives to discipline (i.e., training)
- File maintenance



# Speed Bumps

## Anonymous Complaints





# Speed Bumps

Complainant is Unresponsive



# Speed Bumps

Complainant Changes Their Mind





# Speed Bumps



**THROW SPAGHETTI AT A WALL.  
SEE WHAT STICKS.**



# Speed Bumps





# Speed Bumps

## Asserting New Claims



## Other Common Mistakes

- Delay
- Providing updates when possible
- All complaints go through the hotline (false)
- There needs to be a formal complaint (false)
- Attorney client privilege



# Even More Common Mistakes

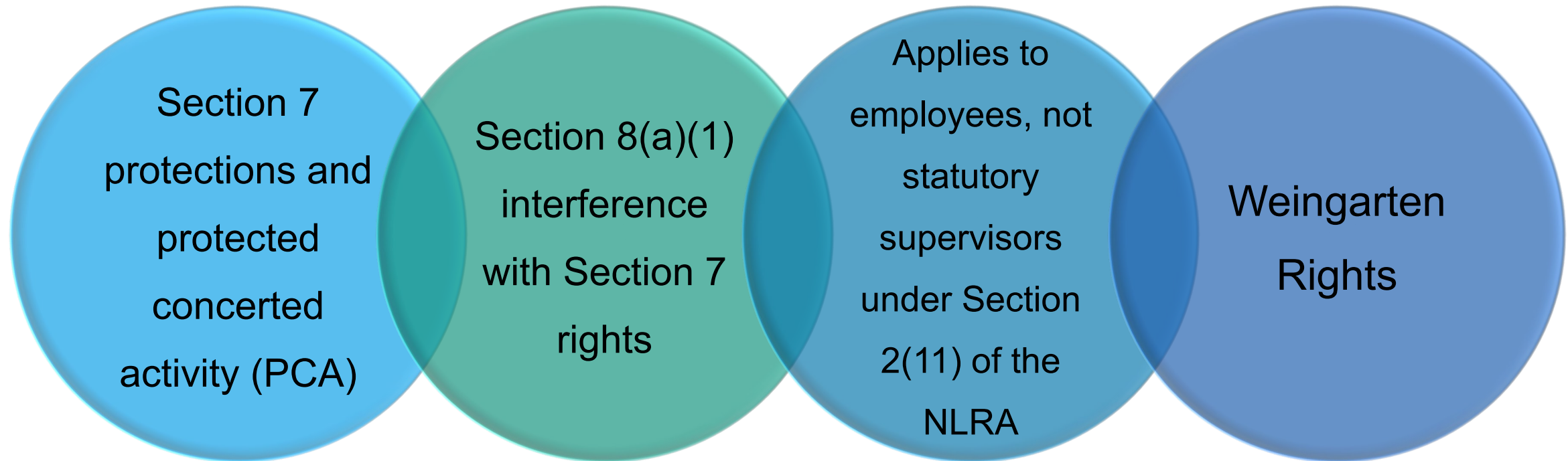
- Don't become part of the case
- Anonymity (when possible)
- Complaint is unfounded, but are there other issues
  - Short staffing, cultural, etc.
  - EAP and mediation





# A Crash Course On The National Labor Relations Act

Yes, this applies to your non-union employees...



# Social Media Concerns

- Triage
- Don't litigate in public
- Watch out for protected concerted activity (PCA)
- Keep an eye on the social media post



# Cross-Complaints

- Start where it makes sense.
- Be upfront with your complainants.
- Have multiple interviews.





# How to Conduct Ethics and Compliance Investigations

Every organization should encourage employees and stakeholders to report compliance concerns and strive to ensure appropriate investigation of all reported issues. Without compromising independence or objectivity, a well-designed investigation system escalates significant matters for oversight, notifies appropriate leadership who have a legitimate 'need to know', and provides key feedback to business stakeholders to improve the organization's operations.

## 1 INVESTIGATION TRIGGERS

Notice of an ethics or compliance issue can come from anywhere. At the outset, thoughtfully consider all potential sources, communicate that the organization welcomes concerns and prohibits retaliation, educate the organization to promptly escalate ethics and compliance concerns for review, and develop a uniform process to evaluate, investigate and address reported concerns.



## 2 COLLECT, SORT, ESCALATE, NOTIFY

Establish a single point of contact to collect all concerns, quickly assess and sort based on potential significance, escalate for proper oversight, notify key stakeholders, and initiate the initial investigation response.

## 3 TRIAGE

Use a uniform process, that considers privilege, severity, sufficiency, complexity, materiality, and urgency. Develop an initial response plan based on those factors.

### SEVERITY

Are high-level employees involved?  
How widespread is the alleged conduct?

### SUFFICIENCY

Is the source known? Can any facts be easily verified? Are further details needed? Is credibility an issue?

### URGENCY

Is safety of employees or witnesses a concern? Should interviews be conducted offsite? Should we involve the police or consider other safeguards for possible victims?

Who's involved outside our company? Customers, vendors, agents?

### COMPLEXITY & MATERIALITY

Analyze number and type of issues. Are there complex areas of law and jurisdictions involved?

### Identify Key Stakeholders for Oversight

COULD INCLUDE:  
Chief Compliance Officer  
General Counsel  
Board

## 4 PLAN AND ASSIGN

With the initial assessment, establish the investigation team, determine any need for outside counsel, and take necessary steps to discover, locate and preserve evidence. Ensure appropriate oversight and disclosure as the process continues.

### Determine Investigation Team

Potential members include: HR Staff, Compliance Officer, Lawyers, Security, Computer or Finance Experts

### Address Technical and Logistical Issues

Engage experts to navigate foreign language documents, distant witnesses and evidence, legal and cultural issues and different data formats.

### Identify and Preserve Evidence

Consider data privacy and employee rights issues. Find locations of key electronic data and take proper steps to obtain and preserve it. Identify key witnesses, decide if a litigation hold is necessary and plan for third party interviews and evidence if needed.

### Potential Initial Disclosures

Employee Representatives  
Audit Committee & Senior Management

## 5 INVESTIGATION

Each investigation is unique. The facts and circumstances will dictate further review steps, risk mitigation measures, internal and external reporting requirements as well as how to approach ongoing business operations and employment issues.

### Follow the Facts

### Conduct Data and Document Review

Depending on the facts, look at personnel records, supervisor files, emails, texts, project files, expense reports, voicemails. **CAUTION: THIS SHOULD BE SUBJECT TO LOCAL LEGAL REVIEW.**

### Start to Develop Fact Patterns and Timelines

Determine who is involved. Create chronology that tells the story of who, what, when, where and how.

### Prepare for & Conduct Interviews

Be prepared: Develop and use an interview strategy. Know which evidence to ask about. Have a plan to encourage cooperation and to address non-cooperation. Let witnesses know retaliation will not be tolerated. Address importance of and limitations on confidentiality. Probe to obtain complete answers, facts and tangible evidence. Leave the door open for follow-up.

### Understand Fact Pattern

Have you confirmed the allegations? Have you discovered other possible problems? Who else do you need to speak with? What additional evidence needs to be reviewed? Execute additional investigative steps as needed.

### Finalize Written Report

Develop fact pattern and only report factual findings. Gauge conduct against organization's ethics and compliance standards. Do not draw legal conclusions in report. Separate disciplinary recommendations from factual findings.

## 6 REMEDIATION

Develop a factual report and recommendations using established review, finalization, reporting and disclosure processes. Apply consistent approach to remedial measures, discipline and compliance control enhancements. Address problematic business and employment relationships after legal review.

### Program or Process Improvement Recommendations and Follow Up

**Discipline and Corrective Action**  
Verbal or written warning  
Suspension  
Demotion  
Termination  
Reassignment  
Training  
No action finding

### Inform Appropriate Parties

Follow up with Complainant and Accused. Take steps to close off properly and to avoid retaliation.

## COMMON PITFALLS

### THE FIRST 72 HOURS

Mistakes in the first 72 hours can cause an investigation to fail. Evidence can be lost, legal hotspots may be missed, poor documentation can send you down the wrong track.

### MISSING THE FOREST FOR THE TREES

Carefully parse through different strands and dig deeply so you don't overlook any important issues or settle for a conclusory review. Stay on the lookout for items that may need to be revisited or separately investigated.

### COMMUNICATE BACK

Individuals who report concerns expect that something will happen. Don't leave them hanging or they will assume you are doing nothing. Provide appropriate updates that you are actively investigating without sharing details.

### LOSING, CORRUPTING, OR CREATING EVIDENCE

Inexperienced investigators or others in the organization can inadvertently destroy, corrupt or fail to adequately secure critical evidence and can even create evidence with new and larger issues.

### ACCEPTING FACE VALUE

Investigators may have to assess credibility where evidence or accounts conflict. Be careful to focus on fact, not preconceptions or assumptions.

### CULTURE CLASH

If you don't understand the culture you may miss what witnesses are trying to tell you and bypass the very information you need.

### RETALIATION

Retaliation against those who raise concerns or cooperate in an investigation opens you up to additional legal risk and erodes the needed culture of compliance that encourages internal reporting.

### EMPLOYEE RIGHTS

Be alert to the need to protect the rights, privacy and reputations of investigation subjects and others, balanced by the need to conduct an effective investigation.

### DRAWING LEGAL CONCLUSIONS

The investigation report should never contain legal conclusions or speculation. Remediation decisions are appropriate only when based on objective and fair factual findings.



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# Questions?

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# Thank you!



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