

Conducting Investigations

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Presenters

Tracey Diamond, Partner Labor + Employment Philadelphia

Employers trust Tracey, a former director of human resources and top-ranked employment litigator, to advise them on best practices related to employment law and other workplace matters.

She counsels clients on workplace issues; conducts internal investigations; drafts policies and procedures; negotiates employment and severance agreements; advises on independent contractor, FMLA, and ADA compliance issues; and provides harassment training. She partners with clients to structure their workforce in the most efficient and effective way possible to help them achieve their business goals.



Presenters

Christen Tuttle, Partner White Collar + Investigations Philadelphia

Christen provides clients with clear, pragmatic advice in matters including white collar investigations, white collar defense, and compliance. She handles challenging investigations and regulatory actions, drawing upon her experience as an assistant district attorney to develop effective, informed strategies.

She focuses her work on internal and government investigations, as well as the development and implementation of compliance programs. In addition to her experience interfacing with the Department of Justice, Christen has experience handling False Claims Act, Anti-Kickback Statute, FCPA and related matters.



When to Conduct an Internal Investigation

Considerations Before Starting the Investigation

How to Conduct the Investigation

Putting It All Together

When to Conduct an Internal Investigation

When to Investigate?



How Does an Employer Become Aware of Complaints?



Purpose of Internal Investigations

There are many purposes for internal investigations:

Determine if misconduct took place

Determine if corrective action is necessary

Determine if workplace policies need to be updated or other remediation

Demonstrate effective response to complaints

Curtail whistleblowers

Considerations Before Starting the Investigation

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If the Allegations are True . . . What Does This Mean for the Business?

- Disruption to business
- Possible litigation
- Potential reporting obligations to third parties
- Possible monetary sanctions from government entities
- Reputation may be impacted

Considerations Before Starting the Investigation

Who should conduct the investigation?

- **Internal Investigators?**
 - Familiarity with the culture of the workplace
 - Can provide uniformity during the investigative process
 - Credible with employees
- **Third-party Investigators?**
 - Increased objectivity
 - Better perception of fairness to the complaining employee
 - Expertise in investigations
- **Attorneys?**
 - Can assert attorney-client privilege over the investigation
 - Can advise re potential legal issues and considerations

Considerations Before Starting the Investigation

Notes on Using an Attorney:

- **Attorney-client privilege**
 - If using an in-house attorney who plays a business and legal role, privilege may not apply if a court determines the investigation was conducted for a business purpose, not legal purpose
 - Attorney-client privilege can be waived if the client chooses to use the investigation's findings as a defense in later litigation
- **Using an attorney may disqualify that attorney and his or her firm from representing the company in ensuing litigation should the attorney be deemed a fact witness**

Considerations Before Starting the Investigation

You've Chosen an Investigator . . . Who Should the Investigator Report To?

Determining who an investigator reports to can depend on many topics:

- Does the complaint involve an executive of the company?
- Does the complaint involve an individual in HR?
- Does the complaint implicate in-house counsel?

Considerations Before Starting the Investigation

Should a Document Hold be Used?

- **Consider need to preserve and safeguard key potential evidence, such as:**
 - Email communications
 - Financial records
 - Memos
 - Videotapes
 - Anything else that may be deemed relevant to the current investigation's claims
- **If the company uses a program that automatically deletes data on company devices after a certain period of time, that program should be suspended**

Considerations Before Starting the Investigation

Do Devices Need to Be Collected?

In some instances, evidence may be located on an employee's personal cell phone or computer

- Review your company's BYOD policy if applicable
- Consider when and how to collect
- If an uncooperative employee refuses, document as there may ultimately be a burden on the company to produce data from employee devices in litigation or a government investigation

Considerations Before Starting the Investigation

Should interviews be remote or in person?

Determine if some or all interviews should be conducted in person

What if interviewees request a lawyer?

Consider in advance if interviewees will be permitted a lawyer

- Will permitting a lawyer obstruct or delay the investigation?
- What is the impact of a potential self-disclosure to the government?

What if interviewees are members of unions?

Determine if additional steps are required, such as:

- Presence of union representative during interview
- Due process or a hearing before disciplinary action

Considerations Before Starting the Investigation

Does Immediate Action Need to Be Taken?

- **Depending on the allegation, it may be necessary to take immediate measures to stop the alleged wrongful conduct by removing the employee from the workplace pending the completion of the investigation.**
- **These situations may occur with allegations of:**
 - Criminal activity
 - Ongoing and continual harassment
 - Workplace violence
 - Fraud
 - Disclosing confidential information or trade secrets

How to Conduct the Investigation

CLE Code: Internal123

Elements of an Investigation Plan

- **Identify the policy, procedure, or law alleged to have been violated**
 - TIP: Having policies already in place can assist an investigator in determining how to best approach the investigation! One size does not fit all when it comes to internal investigations.
- **Lay out investigative steps, considering:**
 - Document review
 - Other data analysis (i.e., financial records)
 - Physical evidence (i.e., photographs, surveillance video)
 - Witness interviews/question outline
- **Investigative plan is subject to change as the investigation develops**

What documents should be reviewed?

- Personnel files of the accused individuals, those making the complaints, and witnesses
- Employer policies and procedures
- Email communications
- Complaint forms
- Videos
- Relevant computer data
- Memos
- Journals
- Other relevant documentary evidence

Depending on what the complaint is about, or what is ultimately uncovered in the document review, consider hiring an expert.

For Example:

- Forensic accountants for fraud investigations
- Billing experts for Medicare fraud investigations

Typical Order of the Interviews

Complaining Party:

- Get the who, what, when, and where
- Ask if there were witnesses
- Obtain relevant documents

Third-Party Witnesses:

- Who, what, when, and where
- Determine if they have any documentation
- Determine if there are other witnesses

The Accused:

- Get their side of the story

Practical Considerations for Conducting an Interview:

- **Length of the interviews**
 - Ensure an adequate amount of time is arranged
 - Interviews should not be rushed or cut off
- **Location of the interviews**
 - Generally, interviews should occur at the employer's site to minimize disruptions
 - Interviews should be held in a discreet location, where no one can see or overhear
- **Timing of the interviews**
 - If possible, conduct interviews back-to-back particularly where there are multiple subjects of the investigation
- **Determining which documents should be used during the interview and how to use them**

Conducting the Interview:

- **The investigator must clearly identify who it represents**
 - Called an “Upjohn warning”
 - The investigator must tell the witness that he or she was hired by their employer to investigate the issue
 - If the investigator is an attorney, the attorney must tell the witness that it represents the employer, NOT the employee
 - An employee cannot mistakenly believe the attorney represents them, or that their conversation will be protected by attorney-client privilege

Conducting the Interview:

- **Explain the investigation and interview process to the witnesses**
- **Do NOT promise confidentiality**
 - Some issues may require the investigator to disclose the name of the complaining party
- **Request that the witness cooperate fully, and to use their best judgment and discretion when discussing the investigation with others**
- **Note that honesty and candor are required**
- **Inform interviewee of non-retaliation policy**
- **Anticipate the unexpected**
 - Witnesses may be uncooperative
 - Witnesses may want to bring an attorney
 - A witness may raise new claims in their interview
 - Witnesses may threaten the investigator

Interviews

Questions & Comments to Avoid:

Accusatory questions likely to make a witness defensive

Questions asked in an emotional or angry manner

Questions involving legal terms

“constructive discharge”

“sexually harassed”

Conclusory questions

“When X sexually harassed you, what did you do?”

Questions that reveal the source of the information

“Ms. Y told me you stole trade secrets and sold them, is this true?”

Predictive comments

“The employee will be fired for sure.”

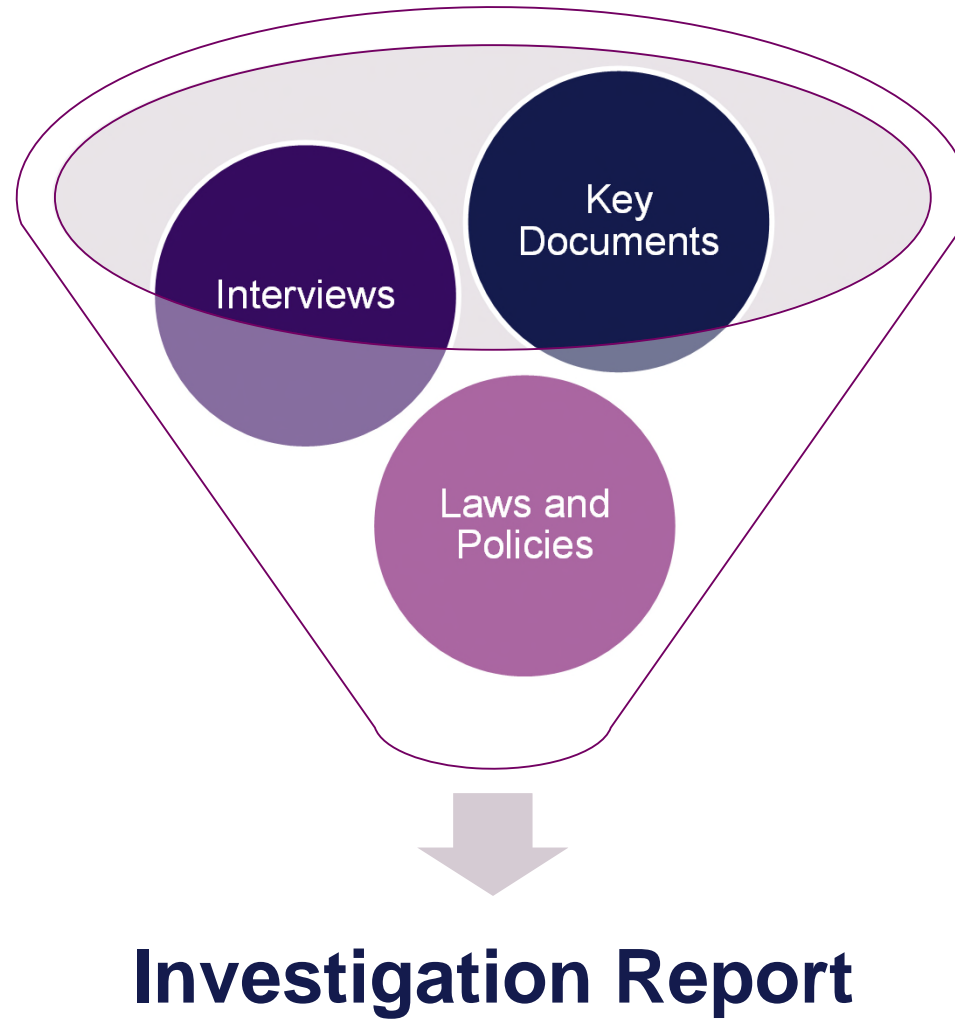
Any comment expressing agreement or disagreement with a witness’s statement

Putting It All Together



Investigation Report

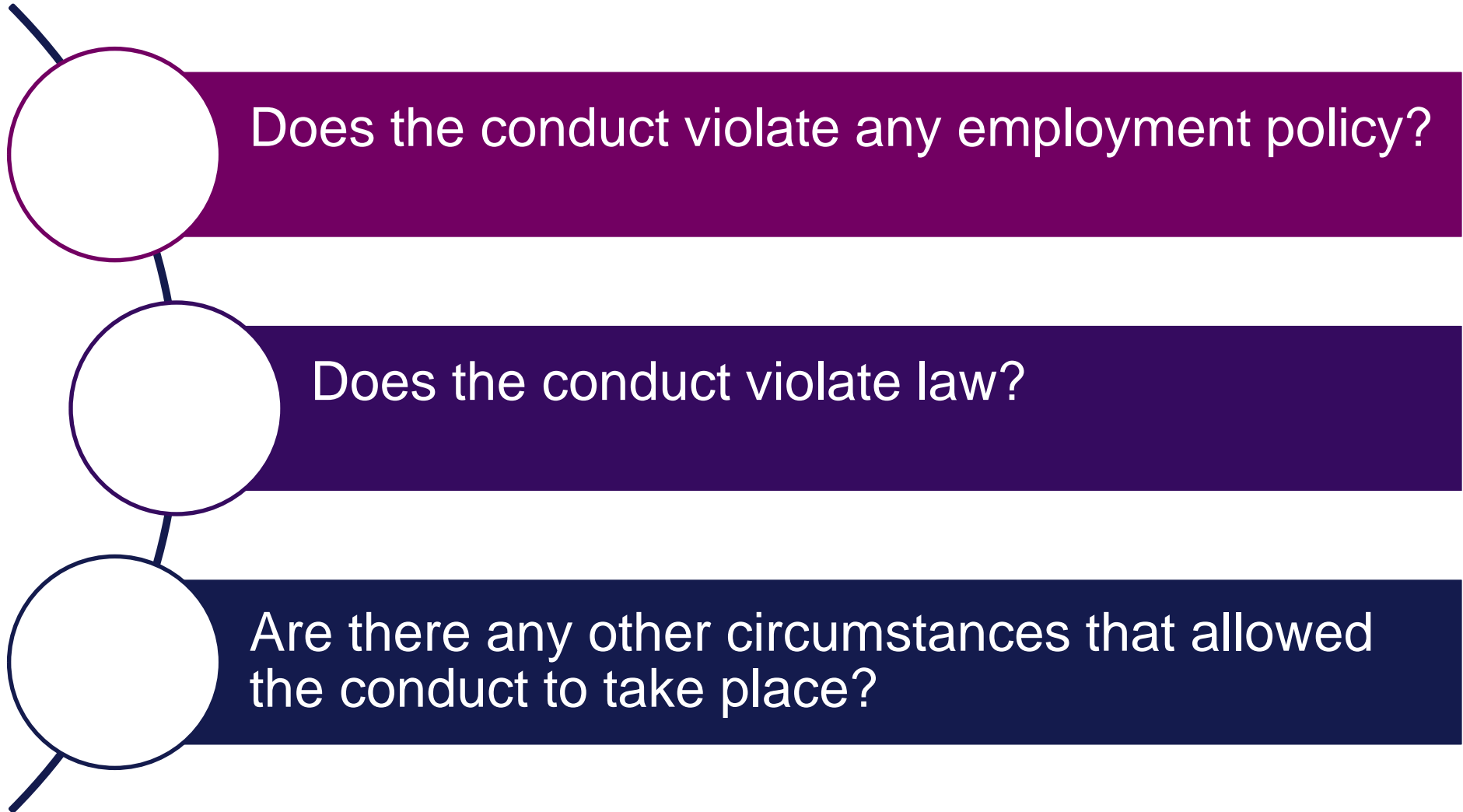
The investigation report funnels all key information into one place.



The final investigation report should include the following:

- **A description of:**
 - The issue that prompted investigation
 - The witnesses interviewed and a summary of the information collected from such witness
 - All relevant evidence reviewed and a summary of such evidence
 - Any known evidence not reviewed and why
- **An assessment of the credibility as to each witness and piece of evidence**
- **Findings of fact and how they relate to the issue being investigated**

Analysis and Conclusions



Recommendations

Employee Discipline

- Suspension
- Demotion
- Termination
 - Keep in mind:
 - Union membership
 - At-will employment
 - Possible employment agreement termination clauses

Policy Changes

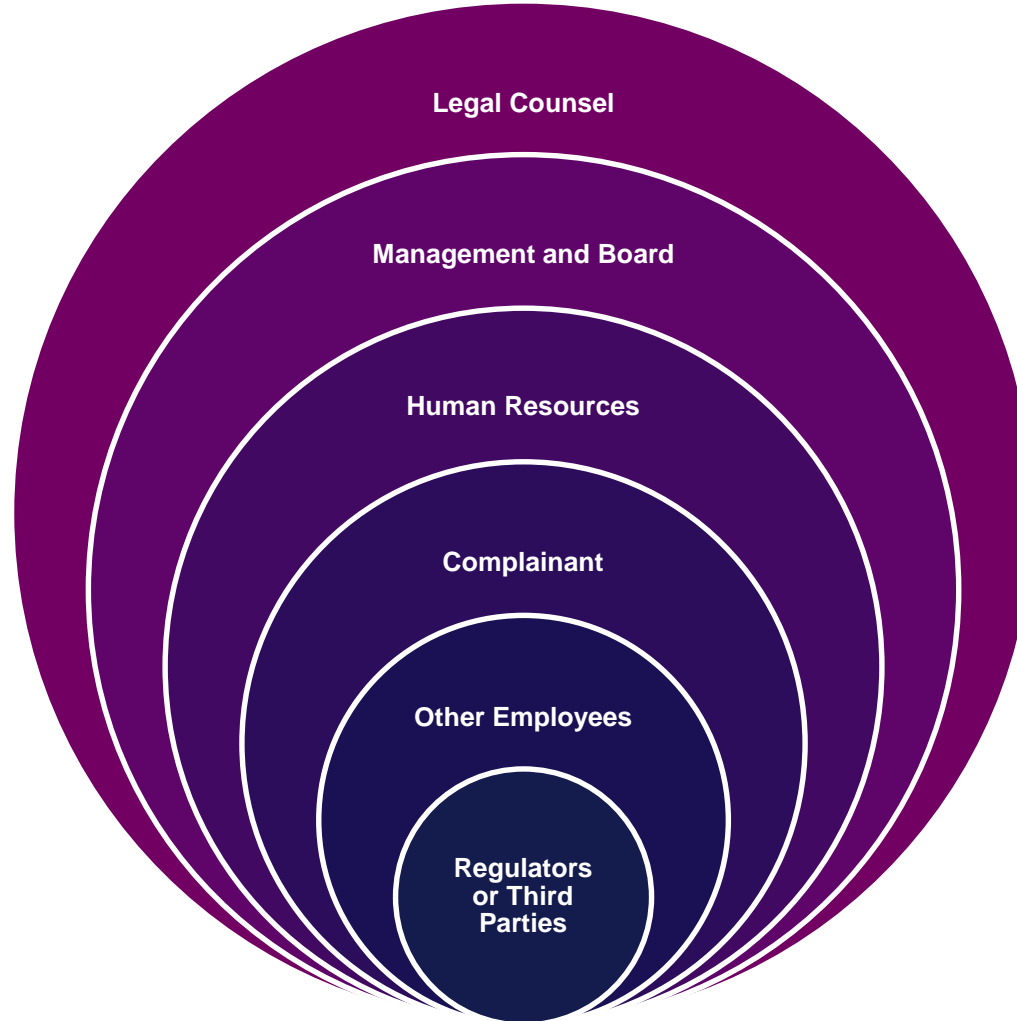
- Update employment policies to better protect the company “next time”
- If there were issues in reporting, update reporting policies

Other Remediation

- Additional employee training on policies
- Requiring employees to re-read the employee handbook and verify understanding

Investigation Findings

Investigation findings should be disclosed to those who need to know.



Track Investigations and Results

- All complaints received
- General subject matter of complaints
- How complaints resolved
- Time period from complaint to resolution
- Any corrective action or remediation taken

Questions?

CLE Code: Investigations456

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