Workplace Investigations

Presented by
Renea I. Saade, Partner
Labor & Employment Group

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When To Investigate

- *Should* vs. *Must*
- Vicarious liability for harassment
- Terminations
- Formal complaint
- Information to substantiate complaint

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When to Investigate

- Written policy or past practice requires
- Desire to improve productivity/relations
- Public employee vs. private employee
- Good cause vs. at-will employee
- Implied covenant good faith/fair dealing

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Why Investigations Matter

- Affirmative defense (*Ellerth/Faragher)*
- Implied covenant of good faith/fair dealing
- Breach of contract/written policy
- Other issues are usually uncovered

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Why Investigations Matter

- Receive feedback from personnel & learn of opportunities for improvement
- Improve employee relations
- Workplace culture & expectations

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Key Alaska Cases

Historical cases:

-*Ramsey v. City of Sand Point*, 936 P.2d 126 (1997)

-*Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751 (2008)

-*Willard v. Khotol Services*, 171 P.3d 108 (2007)

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Key Alaska Cases

Recent Alaska cases:

-*Crowley v. State*, 253 P.3d 1226 (2011)

-*Smith v. State,* 253 P.3d 1233 (2011)

-*Lentine v. State*, 282 P.3d 369 (2012)

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Take Away From Cases

Investigation must:

-May be required for union/public workforces

-Must be done in good faith (reasonable person would regard as fair)

-Not be biased or pretextual

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Who Should Investigate

- HR personnel
- In-house counsel
- External consultant
- Outside counsel

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Who Should Investigate

Factors to consider:

-one or more

-fresh perspective vs. familiarity

-level of individuals involved

-complexity of investigation/issues

-will investigator become witness

-workplace relations issues

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Who Should Investigate

-gender/race/age/cultural considerations

-personable

-credible

-listener vs. talker

-efficient but thorough

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Who Should Be Involved

- As few as possible
- Depends on reason/scope of investigation
- Who is the client (legal, HR, CEO, BOD)
- Source of institutional knowledge
- Access to people/data

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Scope of Investigation

- What allegations should be investigated?
- What other issues should be noted?
- What other issues should be investigated?
- Who are the key witnesses or departments?
- How will obstacles be addressed?

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Investigation Plan

- Who will be interviewed?
- What questions will be asked?
- What data/documents will be reviewed?
- What collection efforts are needed?
- What order should interviews follow?
- What is the timeline for completion?

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Preservation of Documents

- What documents/data may exist? (external drives, backups, desk files, etc.)
- Should any preservation steps be taken before witnesses contacted?
- Suspend normal document destruction or archiving policies?
- Formal litigation hold notice necessary?

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Notice to Witnesses

- Who will initially deliver it
  (if not investigator, investigator should repeat)
- Generic statement that does not implicate or create bias
- Reality = people may figure it out

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Notice to Witnesses

Samples:

1. *The company would like to learn more about the workplace dynamics and relationships in your department. HR has asked me to come in and learn what I can about the same and report back to HR what I learn.*

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Notice to Witnesses

2. *A workplace concern has been raised and you have been identified as someone who may have either relevant background information or information specific to the concern raised.*

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Anti-Retaliation Statement

- Should *always* be given
- Use company's written policy
- Go through it orally
- Either give a copy or advise them where to find copy

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Anti-Retaliation Statement

- Be clear on what retaliation means
- Notify them where to report it
- Written acknowledgement – see samples

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Confidentiality Instruction

- *Banner Health* - NLRB rules against blanket instruction
- Only acceptable if:
  - Protection of witnesses
  - Avoiding destruction of evidence
  - Testimony is in danger of being fabricated
  - Preventing a cover-up

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Things To Keep In Mind

- People want dignity, honesty & respect
- Most behavior is unintentional
- While people don't want arbitrary decisions, no one wants to be investigated
- Investigation will have an impact on work environment & working relationships

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Questions From Witnesses

- Do I need a lawyer?
- Is what I say confidential?
- Will I get to see your notes?
- Why are you investigating us?
- How will this information be used?
- What happens after your investigation?

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Use of Technology

- Impact on building rapport vs. accuracy
- Pros & cons of creating record
- Audio or video recording
- Contemporaneously typed notes
- Written statements from witnesses

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Working With Unions

- Representation during interview
- Conflict issues w/coworker complaints
- Confidentiality issues
- Scheduling
- CBA requirements/*Weingarten* rights
- *Peterson v. State of Alaska,* S-14233 (July 20, 2012) = "union relations" privilege

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Working With Unions

Union Relations Privilege:

1. In confidence;
2. In connection w/representative services related to anticipated or ongoing disciplinary or grievance proceedings;
3. Btw employee (or attorney) and rep; and
4. Rep acting in official capacity

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Investigation Notes

- Date/time & location
- Representative(s) present
- Contact info
- Questions asked & answers
- If appropriate - physical appearance, demeanor, body language
- Documents/data identified
- Follow up needed

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Credibility

- Conflicting explanations/facts
- Motive
- Bias
- Impacts on memory
- Facts make it more likely than not

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Privilege & Work Product Doctrine

- Alaska Rule Evidence 503
- Upjohn *Co. v. U.S.*, 449 U.S. 383 (1981)
- *Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005)
- *Jones v. Scientific Colors, Inc.*, 2001 U.S. Dist. LEXIS 1-753 (N.D. Ill. July 9, 2001)
- *McIntyre v. Main St. & Main, Inc.*, 200 U.S. Dist. LEXIS 19617 (N.D. Cal. Sept. 29, 2000)

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Investigation Report

- Oral vs. Written
- Letter vs. Memo
- Various formats used
- Key components:
  - -Summary of who interviewed/what reviewed
  - -Analysis of the allegations or claims against Evidence
  - -Recommendations if requested

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Close Out

- Close out meetings with complainant
- Close out meetings with witnesses
- Prepare talking points in advance
- Follow up as necessary
- Return of documents/deliver file

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Questions?

Renea I. Saade
Partner, Labor & Employment Group
Stoel Rives LLP
risaade@stoel.com
907.263.8412
www.stoel.com

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