

EMPLOYMENT,  
LABOR &  
WORKERS'  
COMPENSATION

ADVICE  
SOLUTIONS  
LITIGATION

Alfred J. Landegger  
Larry C. Baron  
Michael S. Lavenant  
Corey A. Ingber\*

\*A Professional Law Corporation

Roxana E. Verano  
Laura S. Withrow  
Christopher L. Moriarty  
Oscar E. Rivas  
Marie D. Davis  
Brian E. Ewing  
Jennifer R. Komsky  
Clifford J. Weinberg  
Jody L. Downey

LANDEGGER | BARON | LAVENANT | INGBER

A L A W C O R P O R A T I O N

## INVESTIGATION BOOTCAMP

### How to Conduct a Workplace Investigation

### Employment Law Workshop

By

**Alfred J. Landegger, Esq.**

**Michael S. Lavenant, Esq.**

Main Office  
15760 Ventura Blvd.  
Suite 1200  
Encino, CA 91436  
(818) 986-7561  
Fax (818) 986-5147

Ventura Office  
751 Daily Drive  
Suite 325  
Camarillo, CA 93010  
(805) 987-7128  
Fax (805) 987-7148

The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies to avoid potential liability.

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## **I. Why are workplace Investigations Necessary?**

To appreciate the mind-boggling number of laws and regulations that apply to the workplace, employers can simply count the posters and pamphlets about employee rights that are displayed and distributed at most companies doing business in California. New lawsuits arising out of workplace conduct are constantly emerging, and competent workplace investigations must reflect this changing reality.

For example, the California Supreme Court recently recognized that a manager need not have contact with or even know a subordinate to be potentially liable for sexual harassment against that employee. In the case of *Miller v. Department of Corrections* (2005), the plaintiffs were employed at a prison where the warden granted favorable treatment and promotions to several other employees with whom he was having sexual relations. The court in *Miller* held that when sexual favoritism in the workplace is sufficiently widespread, it may create a hostile work environment and constitute sexual harassment to those who are denied favorable treatment.

In another recent case, the United States Court of Appeals for the Ninth Circuit held that a male supervisor's severe "bullying" of primarily female employees constituted a sex-based hostile work environment under Title VII, even though there was no evidence that the behavior was motivated by any specific sexual animus or that the behavior included any sexual content.

Staying current on the laws applicable to the workplace is a challenge for even the best of HR departments. But knowing the law - and even being "right" when resolving workplace allegations of harassment, discrimination and other misconduct - may no longer be good enough, as most employers have learned over the past several years. Because workplace rules are so numerous, complex, and at times inconsistent, an effective investigation by the employer at the outset can lay the most solid groundwork for an effective resolution.

## **II. What Problems Should Be Investigated?**

The modern workplace poses a nearly infinite number of situations that expose an employer to potential liability. In addition to sexual harassment claims, claims involving discrimination based on other protected categories such as race, age, gender, sexual orientation, and others all may merit investigation.

In addition, the need for an investigation may arise in "whistle-blower" situations, in security and workplace violence situations, and in situations involving corporate governance and potential breaches of fiduciary duty. These are but a representative sample of the many circumstances in the workplace that might require investigation.

## **III. Some Guiding Principles for Investigations**

Despite the complexity of the law, there are several guiding principles that an employer should follow. As most HR professionals know, the most common scenario in which the need

for a workplace investigation arises is when the employer receives notice that an employee has engaged in alleged misconduct. Such an employee may eventually be terminated if the employer has a “good cause” to discharge or demote for misconduct. An employer has “good cause” if, acting in good faith, it conducted an appropriate investigation giving it reasonable grounds to believe the employee engaged in misconduct. (See, *Cotran v. Rollins Hudig Int’l* (1998) 17 Cal.4th 93, 69 Cal.Rptr.2d 900)

What are the hallmarks of an appropriate investigation? While the answer to that question depends on the facts of each situation, here are some principles common to nearly all scenarios:

***Prompt response.***

As we know, the law requires prompt and remedial action. Companies who wait too long to begin an investigation may expose themselves to liability, despite the ultimate correctness of their findings.

***No guarantee of confidentiality.***

A good investigator will explain that while the investigation is confidential in many respects, she cannot guarantee complete confidentiality. A good investigator warns witnesses not to speak with others about the facts and advises the parties against influencing or tampering with witnesses.

***Appropriate questions and answers.***

A good investigator asks open-ended non-leading questions and is thorough in eliciting and memorializing all relevant facts as opposed to opinions or suppositions.

***Credible determination.***

A good investigation results in a determination of what occurred. In cases of conflicting versions of relevant events, a good investigator will make determinations of credibility. If an ultimate determination cannot be made, a clear explication of what findings can be made, short of ultimate findings, should be included.

***Prompt notification.***

Finally, a prompt notification to the parties, with an opportunity for them to respond, should be clearly documented.

#### **IV. Who Should Conduct the Investigation?**

Employers have a range of options for conducting workplace investigations, including their own HR departments, in-house counsel, outside counsel, private investigation firms, or others. Each option has certain advantages. While internal personnel might be perceived as having the most intimate understanding of the people and circumstances involved, outside counsel who specialize in workplace investigations have become one of the preferred methods of handling workplace claims and allegations. Working with outside counsel has several benefits:

1. ***Avoiding conflicts.***  
Retaining outside counsel helps to assure that the company's in-house lawyers (or the law firm that normally litigates its employment claims) will not be placed in a potential conflict situation. Investigative counsel may be required to be a witness regarding the conduct of the investigation with the attendant possibility of being disqualified from representing the employer in the litigation.
2. ***Protecting privilege information.***  
Retaining workplace investigation counsel can also reduce the chance that privileged communications and attorney work-product will be ordered revealed, since defense counsel advising the employer can be separate from those conducting the investigation.
3. ***High quality results.***  
Most important, having counsel with special expertise in workplace investigations ensures a high quality investigation and outcome. Equally important, knowledgeable and experienced counsel can provide compelling testimony regarding the investigation at trial and directly impact the outcome.

## **V. What Makes an Investigator Qualified?**

Selecting the right workplace investigation law firm is critical. As is true of other areas of the law, admission to the bar does not necessarily qualify one as a competent and qualified workplace investigator. Conducting an investigation that will satisfy the need for promptness, thoroughness, impartiality and integrity, as well as withstand judicial scrutiny, requires substantial trial and investigative experience and expertise.

There are many disincentives for employees to cooperate in workplace investigations. Friendships, fear, retaliation, a desire to avoid involvement, and a "them versus us" attitude all affect the quality and quantity of information flowing to the investigator.

Conducting good interviews, in any situation, is an art. A more than basic understanding of human nature is essential, as well as an ability to put people at ease and to communicate that the process is governed by fairness and integrity. These are simple concepts, but the reality is that most people do not possess the skill to be an effective interviewer.

## **VI. Advantages of Law Enforcement Experience**

Law firms who regularly counsel business on all forms of employment matters, including TRO's and abuse, generally excel in the area of workplace investigations. Lawyers with this experience are sensitive to the need for employers, in appropriate situations, to contact the police early in the investigation.

Many workplace incidents are also crimes. For example, what might be viewed as an unwanted touching may also be sexual battery. Stalking, which takes many forms and frequently occurs at the workplace, is a serious crime. Annoying phone calls can also be a criminal violation.

It is not unusual for a subsequent criminal investigation and/or prosecution to be frustrated because of an employer's inadequate workplace investigation. Law enforcement authorities are becoming more vocal about the need to contact the police early in such situations. Failure to timely notify law enforcement can reduce the practicality and effectiveness of standard law enforcement investigative tools and techniques, such as search warrants, surprise interviews and surveillance. This failure to notify can create not only prosecution problems but liability for the company.

Often the workplace victim has no idea that the conduct complained of is anything other than a workplace problem and is unaware of other available resources, including those in the criminal justice system (such as prosecution, protection, restraining orders, portable alarm systems, 911 cell phones, temporary gun permits, and the like).

In the last decade, over 50 laws have been enacted giving the courts broad powers to protect victims' families and witnesses in matters that include workplace conduct. The courts have the power to fashion protective orders that can save lives, but this safety can be illusory if the workplace investigator fails to recognize the danger signs.

## **VII. Private Employers vs. Public Employers**

Lawyers need to have experience in navigating the many nuances of public-entity investigations. For example, while general investigative techniques do not typically change, public employers are subject to an overlay of due process protections that stem from both statutory and bargained-for rights.

## **VIII. Are Investigation Products Privileged?**

When an attorney conducts a workplace investigation on behalf of an employer, a common assumption might be that the attorney-client privilege will apply to communications between the attorney and the employer and to the related work products. But recent California cases have made clear that, if the employer intends to rely on the adequacy of its investigation as a defense to a lawsuit, the factual portions of the investigation work products will be subject to discovery, regardless of who conducts the investigation.

In the case of *Wellpoint Health Networks v. Superior Court* (1997), the court held that privilege for investigation work products should be determined on the basis of why each particular document was prepared. If a document involves fact-finding related to the investigation, it could be subject to discovery. If the document furnishes legal advice, it could be protected as privileged. The *Wellpoint* court also held that, when the employer intends to rely on the sufficiency of its investigation and its consultation with outside counsel to defend itself from a harassment or discrimination claim, the adequacy of that investigation is placed at issue. Thus,

communications and work products that might otherwise have been privileged could be subject to discovery.

The subsequent case of *Kaiser Foundation Hospitals v. Superior Court* (1998) held to clarify what portions of an investigation file might be subject to discovery if an employer raises the adequacy of its investigation as a defense. The court held that, as long as the employer provides the substance of its investigation in discovery, the confidential communications between the employer and its attorneys can remain privileged if their disclosure is not essential for a thorough examination of the investigation's adequacy.

I. Process for Conducting and Documenting An Investigation

A. Reasons to Conduct Investigation – Investigations should be conducted by Human Resources anytime there is reason to believe that conduct has occurred that could lead to discipline of an employee or impose liability on the company.

B. Interviews

1. Complaining Employee: Define the employee's complaint by interviewing the employee who is complaining.

- a. Interview should include a description of the conduct in question and any similar conduct engaged in by the accused that previously occurred.
- b. The complaining employee should be requested to provide the names of any witnesses who can support their claims. In all cases, obtain dates, times, places and persons present to any incidents.
- c. Capture the employee's complaint in writing using the HR Intake form **(to be completed by HR Generalist in all cases)**. Other options:
  - (1) This can either be accomplished by requesting the employee prepare a complaint in writing or by preparing a statement for the employee, which summarizes the points of the interview.
  - (2) If possible, obtain the complaining employee's signature on the statement.
  - (3) If the employee refuses to sign or subsequently withdraws the complaint, do not simply abandon an investigation.
- d. Ask the employee what action does he/she believe would be necessary to alleviate his/her concerns.
- e. Do not guarantee confidentiality to any party involved.

2. **Please ensure that you have done the following before conducting the interviews:**
  - **Review all applicable policies**
  - **Determine the scope of the investigation**
    - i. **Limit to specific instance or broader**
    - ii. **Consider possible witnesses and relationships with other employees.**
  - **Review personnel records**
  - **Outline questions for witnesses.**
  
3. Accused: Interview the accused employee concerning each and every incident that is alleged to have occurred.
  - a. Obtain dates, times, places and witnesses from the accused employee.
  - b. The accused employee should be requested to sign a statement, which summarizes their side of the story and should be advised that any retaliation will result in disciplinary action up to and including termination of employment.
  - c. Interview witnesses that the accused has identified unless the accused employee admits to every allegation.
  
4. Witnesses: Interview the witnesses that have been identified by the complaining employee concerning the incident in questions. All interviews should be conducted the same procedure as set out in the “Complaining Employee” section above.
  - a. Each employee should be advised that if any retaliation occurs, they should notify management immediately.
  - b. They should also be advised that the information that they provide and receive from the interview should be kept confidential, and that they should not discuss it with other employees.
  - c. Each employee should be requested to sign a statement, which summarizes the results of the interview.
  - d. Take specific notes – quote exact wording.
  - e. Note emotions, body language, and facial expressions.
  - f. Re-interview whenever necessary.

5. Report: Prepare a confidential summary report, which identifies each witness and the relevant facts elicited from each witness and recommended disposition or discipline.
6. Conclusion: Before deciding what discipline or remedy to take, request the complaining employee's input, and discuss any discipline or remedy with upper management or legal counsel.
7. Corrective Action: Document any discipline in a separate discipline report, which states the basic facts, the policies, violated and the discipline imposed.

**PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

**DISCRIMINATION ALLEGATION/EVENT REPORTING FORM**

**TO:** \_\_\_\_\_

**COMPANY:** \_\_\_\_\_

**FAX NO.** \_\_\_\_\_

**FROM:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

**CC:** Director of Human Resource

This form must be completed by the Regional Human Resource Supervisor or by the corporate Human Resource Director no later than the next business day after any allegation of harassment or discrimination in the workplace.

1. Please complete the attached First Report of Event or Circumstance. When interviewing the employee, do not feel compelled to ask the questions in the same order. Feel free to ask additional questions. Always be a good listener and take accurate notes. Never label the behavior, statement or allegation as “sexual harassment” or “discrimination.” Document the words used by employee. No further investigation is to take place until instructed to do so by the Director of Human Resource and Landegger, Baron & Lavenant;
2. Attach a copy of the personnel file of the employee making the allegation of harassment or discrimination; and
3. Attach the personnel file of the employee(s) against whom the allegation of harassment or discrimination has been made.

If you have any questions concerning this Discrimination Allegation/Event Reporting Form, or the attached First Report of Event or Circumstance, please contact \_\_\_\_\_.

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

Date: \_\_\_\_\_

1. Name of Employee Being Interviewed: \_\_\_\_\_

2. Name of Interviewer: \_\_\_\_\_

3. Name Facility or Location: \_\_\_\_\_

4. Tell Me What Happened: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

5. Who was involved, or who was a witness? \_\_\_\_\_

\_\_\_\_\_

6. When did the incident(s) happen? \_\_\_\_\_

7. Where did the incident(s) happen? \_\_\_\_\_

8. Were there any other incident(s)? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

Page 3

9. How did this incident make you feel? \_\_\_\_\_

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10. Was your work affected? \_\_\_\_\_

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11. Was this the first time this had happened? \_\_\_\_\_

12. Were there any previous incidents of similar behavior or other behavior of that you consider to be inappropriate? \_\_\_\_\_

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13. Have you kept any records, such as written notes, tape recordings or anything else? \_\_\_\_\_

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**(If so, please attach.)**

14. Do you know of any other employee(s) who had similar experiences? \_\_\_\_\_

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15. Have you discussed this with anyone at work? \_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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16. Who: \_\_\_\_\_

17. When: \_\_\_\_\_

18. Have you discussed this with anyone outside of work? \_\_\_\_\_

19. Who: \_\_\_\_\_

20. When: \_\_\_\_\_

21. Did you participate in the incident? \_\_\_\_\_

22. If yes, tell me how you participated: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

23. How would you describe your relationship with the employee about whom you are complaining? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

24. Are there any other issues we should discuss? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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25. Are there any other facts or other information that you think I should know? \_\_\_\_\_

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26. Who do you think I should talk to? \_\_\_\_\_

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27. Do you have any suggestions as to how best to resolve the situation? \_\_\_\_\_

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\_\_\_\_\_  
Type/Print Name of Person  
Conducting Interview

\_\_\_\_\_  
Signature of Person Conducting Interview

Date: \_\_\_\_\_

We have conducted the investigation into your allegations of sexual harassment, which you initially reported on \_\_\_\_\_.

Our investigation included interviews with the alleged harasser as well as all witnesses identified by you as having relevant information regarding the allegations. We have kept the investigation confidential and objective. After reviewing the facts, we conclude your allegations were not substantiated.

We will close our discussion with and remind him that the Company is committed to creating and maintaining a hostile-free work environment.

We want to thank you for bringing your allegations forward. Should other incidents occur in the future please contact us immediately. Please remember that you cannot be retaliated against for bringing your allegations forward. If you believe you are being retaliated against let me know immediately. It is important that you continue to treat this matter with the utmost confidentiality. We will do the same.

At this time, I would also like to address your recent request that you made during the investigation that you would like to receive an early release request pursuant to the Closing Agreement. You made the request on the basis that if the Company were to agree to this early request, you would consider this matter fully and finally resolved. The Company will agree to provide you the severance benefits under this early request in exchange for your agreement to release the Company from any and all claims of harassment, retaliation or discrimination.

Sincerely,

Dear \_\_\_\_\_:

On \_\_\_\_\_, you reported to [your supervisor] [the Director of Human Resources], that you believe that you were being [use employee's words: for example - "feeling bother" "feeling harassed" "touched inappropriate" "subjected to inappropriate language"]. Based on your report, the Club launched an immediate investigation into the allegations. The Club is committed to providing a work environment that ensures that every employee is treated with dignity and respect and afforded equitable treatment.

At this time, we are continuing to conduct the investigation into the allegations. We anticipate concluding the investigation shortly. At the time that we conclude our investigation, we will meet with you to communicate to you the results of our investigation. If at any time you have addition information to contribute to the investigation please do not hesitate to contact me. In addition, please be advised that we will keep your allegations and the investigation as confidential as possible. However, we cannot guarantee complete confidentiality. In order to ensure that our investigation is as thorough and unbiased as possible, in your best interest, we urge you to keep this matter as confidential as possible as well.

[closing]

---end of sample letter--