

PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

End Game

Surviving the Labyrinth of Workplace Investigations

Presented by
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Today's Speaker

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Reasons to Conduct Investigations

- They are encouraged by laws.
- They may minimize or even prevent liability.
- They memorialize the facts.
- They benefit the work environment.

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Applicable Laws When Dealing with Complaints

- **ELCRA** - state law which prohibits discrimination on the basis of sex, race, color, age, religion, national origin, height, weight or marital status
- **Title VII** - federal law that prohibits discrimination on the basis of sex, race, color, religion or national origin

Continued



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Applicable Laws When Dealing with Complaints

- **ADEA** - federal law which prohibits discrimination on the basis of age
- **PDCRA** - state law which prohibits discrimination on the basis of a mental or physical disability
- **ADA** - federal law which prohibits discrimination on the basis of a mental or physical disability



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Set Your Company up for Success

- Under federal law, employers can take steps to make sure that the employer will have built-in defenses in the event that an employee complains about a hostile work environment.
 - Referred to as the *Ellerth/Faragher* defense
 - *Burlington Industries v Ellerth*, 524 U.S. 742 (1998) and *Faragher v City of Boca Raton*, 524 U.S. 775 (1998)



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Ellerth/Faragher Defense

- Employer exercised reasonable care to prevent and promptly correct any harassing or hostile behavior.
- Employee unreasonably failed to take advantage of preventive or corrective opportunities offered by the employer.

Continued



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Ellerth/Faragher Defense

- What does this mean?
 - Must have iron-clad policies prohibiting harassing or hostile behavior *and*
 - Must have a detailed and specific policy for employees to report any issues
 - Then, if any complaint is made, must conduct a prompt and thorough investigation
 - Must take action to address any findings of policy violation



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Reporting: Policy Language

- Individuals who believe they have experienced conduct that they believe is contrary to the company's policy, or who have concerns about such matters, should file their complaints with their regional manager, the office manager or a company executive as soon as possible.
- Employees are not obligated to bring their complaints to their immediate supervisor before bringing the matter to the attention of the office manager or their regional manager.

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Take All Complaints Seriously

- Some employers give short shrift to complaints that they believe are minor or which come from “serial complainers.”
- Be careful – even minor complaints can be evidence of a much bigger problem that, if you ignore, could snowball.

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Take All Complaints Seriously

- What to do in the situation where an employee complains, but states:

“I don’t want to make a formal complaint.”
- Should you do an investigation?

Continued




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Take All Complaints Seriously

YES!!

- If an employee brings a situation to the attention of management that could be considered a violation of internal policy or other legal issue, the employee cannot turn a blind eye and fail to do an investigation just because the employee does not want to pursue a complaint through a formal process.




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Who Should Conduct the Investigation?

- Whoever is tasked with the investigation should have some formal training.
- It does not have to be an external person, but **internal investigators** can pose a number of problems:
 - If the subject of the investigation is a senior person or a high-profile person within the organization, there could be a “power imbalance” between the subject and the investigator.

Continued



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Who Should Conduct the Investigation?

- An investigation can lose credibility if it is carried out by someone who has had past dealings with the involved employees.
- An internal investigator, especially in a small organization, could be unwilling to make tough decisions or “calls” regarding the credibility of witnesses because of personal relationships or daily contact.
- The investigator should not be in a supervisory position or a position of authority over the employees involved in the investigation.

Continued



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Who Should Conduct the Investigation?

- WHY? Because the power of the investigator could affect the honesty of the employees.
- In addition, a supervisor might need to make discipline decisions following the investigation, so should not be investigator and “discipliner.”



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Investigators

- Considerations when selecting:
 - Experience, training
 - Expertise on subject matter
 - Seriousness of complaint
 - Time and resources
 - Internal vs. external considerations
- Courts have reversed investigation findings where investigators were inexperienced or untrained.

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Investigators

- As stated by one court:

“[The investigators] were inexperienced at dealing with the issues raised in this action and they also lacked the necessary training to do so. I readily acknowledge that the management team should not be required to match the standards or practices of criminal investigators. However, basic fundamental of fair play must be but were not observed and for that reason, the results of the investigation are tainted.”

Continued




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Investigators

- Investigators (sexual harassment complaint):
 - Did not reveal the names of the complaining employees to the accused
 - Did not disclose particular allegations
 - Did not document the interviews




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Comprehensive Investigation Nuts & Bolts

- Gather preliminary facts.
- Review your handbook and other policies.
- Decide who will conduct the investigation.
- Determine what documents and records need to be reviewed.

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Comprehensive Investigation Nuts & Bolts

- Determine if any pre-interview investigation work needs to be done, including gathering all relevant documents and policies.
- Before the interview, prepare a script.
In the script include admonitions about retaliation.
- Decide on an order of interviews.

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Comprehensive Investigation Nuts & Bolts

- Interview the accuser (Aside: should you ask the "accuser" what he/she wants to happen at the conclusion of the investigation?)
- Interview the accused
- Interview any witnesses
- Potentially re-interview the accuser, depending on what you learned from witnesses and accused

Continued



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Comprehensive Investigation Nuts & Bolts

- Avoid missing key information.
- Cover the following issues:
 - Did it happen?
 - When did it happen?
 - Was the conduct intentional?
 - Was the conduct condoned?
 - Who witnessed it?
 - Is there an explanation?

Continued



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Comprehensive Investigation Nuts & Bolts

- Document, document, document.
- Implement the next steps
- Put all relevant documents into an investigation file *to be kept separate from employee/personnel files.*



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Detailed Notes are Required

- **WHY?**
 - Refresh memory
 - A record of what was said
 - Provides evidence of a proper investigation
 - Provides context for making a decision
 - Fairness, transparency and internal integrity



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What Information Should Notes Contain?

- Who was interviewed, who was present
(An aside: Should witnesses review/sign statements?)
- Where and when all meetings occurred
- What exactly was discussed



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Final Report

- What should the final report contain?
 - All allegations made by the complainant
 - All responses by the accused
 - A brief summary of relevant evidence
 - A discussion of any relevant credibility issues
 - A summary of all documentation and policies reviewed
 - A list of all witnesses interviewed

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Final Report

- Presentation of conclusions on all allegations. Based upon the evidence, there should be a conclusion for each allegation and the conclusion should be described, including the reasons for reaching the conclusion, ending with a determination of whether every allegation was substantiated, unsubstantiated or partially substantiated.

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Final Report

- The report should make recommendations for the resolution of the complaint.
- Factors affecting the severity of discipline should be addressed, such as the attitude of the accused, his or her length of service and prior disciplinary record, if any.
- Broader systemic issues should be addressed if applicable.

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Final Report

- At least initially, the final investigation report should be provided only to the ultimate decision maker and should be considered confidential.
- DILEMMA: Going forward, should report be kept confidential or should copies be disclosed. (This is different from simply informing the parties of the conclusions of the investigation.)




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What if you Want to Keep the Report Confidential?

- In certain situations, the employer may want to keep the results of the report confidential. For instance, if the documented situation is particularly embarrassing for the organization, where the types of findings could jeopardize funding, where executives would be subject to public scrutiny, etc.




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What if you Want to Keep the Report Confidential?

- If you have a particularly sensitive situation, you must act from day one to protect the results of the investigation. HOW??
 - Hire outside counsel
 - Communications with outside counsel should make clear that the attorneys are providing legal advice, as opposed to advise regarding operations or day-to-day business issues.
 - The attorney(s) should communicate only with one or two select members of management who are directing the investigation and should not have conversations or emails that include a large number of management personnel.

Continued



END GAME



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What if you Want to Keep the Report Confidential?

- Remember, you can always decide at a later date that it would be best to disclose the report. For instance, if there is subsequent litigation and the employer wants to demonstrate that it conducted a prompt and thorough investigation. It is easy to decide at a later time to disclose the report. It is NOT easy to try to “claw back” a report that you have not adequately protected from disclosure.

Continued



END GAME



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What if you Want to Keep the Report Confidential?

- Special considerations for governmental entities: public records laws
- Governmental entities have a much more difficult time keeping such reports confidential
- The only potential way is to hire legal counsel to “run” the investigation; legal counsel then hires an outside investigator and the investigator only communicates with legal counsel.
- Written communications to be kept to a minimum



END GAME



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One Last Thing...

- A final, very important item is a reminder to the subject(s) of the investigation regarding retaliation. When delivering the results of the report, remind the subjects that they are strictly prohibited from engaging in retaliation.



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Several Considerations: Retaliation

- Retaliation can be exhibited by employees and management. You, as a human resources professional, need to keep your eye out for either and both.
- Special issues with respect to retaliation:
 - Retaliation is defined as a materially adverse action “such that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination, [harassment, etc].”

Continued



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Several Considerations: Retaliation

- Retaliation does not require adverse employment action such as suspension, transfer, termination, etc. The conduct may be much less severe to be actionable.
- An employer must address retaliation complaints with as much vigor as the complaint that led to the original investigation.
- Not just the complaining employees, witnesses may be subject to retaliation, as well.



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Retaliation or not?

- Employee complains about her supervisor. Investigation ensues and supervisor is reprimanded. Now supervisor fails to respond to the employee's written requests, avoids her in the office and has discussed her with other managers.
- No overt employment action, but these actions may be enough to constitute retaliation.



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One Additional Last Thing...

- What if the complaining employee filed a complaint the day before you were going to terminate his employment?
- Two questions:
 - Can I still terminate him or is that prohibited retaliation?
 - Do I still have to do an investigation if I go through with his termination?

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One Additional Last Thing

- Answers: Yes, you can still terminate and, generally, yes you should still conduct the investigation.
- The law is clear that you do not have to discontinue personnel decisions just because the employee engages in protected conduct. However, your "pre-complaint" decision for termination better be well documented so that you can demonstrate later that the decision to terminate was made *before* the complaint.



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One Additional Last Thing...

- You should still investigate because the persons about whom the employee complained will still be employed even after he is terminated. So, the behaviors could affect other employees.
- Should you still investigate if the *subject* of the complaint is subject to termination or resigns when she learns of the allegations/investigation?
- Depends. If the resignation fully addresses the issue, then might not need an investigation.



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DRAT! A Department of Labor Audit

- What usually starts an investigation?
 - EMPLOYEE COMPLAINT
 - DOL random audit
- Overwhelming majority of DOL investigations start with an employee complaint. (Although we are seeing fewer wage and hour investigations because of the proliferation of class action wage lawsuits).



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DOL Audit

- Procedures:
 - Initial conference
 - Examination of records to determine which laws apply or the application of any exemptions. (i.e., dollar value of revenue, interstate commerce)
 - Examination of records subject to record-keeping requirements
 - Employee interviews (usually neither employer or attorney may attend)
 - Final conference to discuss findings and potential penalties



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DOL Investigatory Options

- Limited investigation: focuses on particular employee, group of employees, department or division within employer.
- Office audit: employer produces requested information to DOL, no on-site visit from DOL investigator.
- Self-Audit: employer reviews records and reports any underpayments to employees.
- Conciliation: employer and DOL consent to quick resolution usually via payments to certain employees or groups of employees without a formal investigation.

Continued



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Your DOL Audit Defense

- Consider having an attorney review your policies, practices and any employee complaints.
 - For example, you might want to have an attorney calculate potential liability in the audit and/or calculate the cost of fix. At the very least, an attorney should review any agreements, settlements or binding documents.
- Educate yourself by being familiar with your policies and the general contours of what is required by the law. Many payroll companies (and law firms) offer training on topics such as overtime and minimum wage laws.

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Your DOL Audit Defense

- Clarify the scope of the investigation by confirming in writing what the investigator tells you about the range or scope of the investigation and/or if it is limited in any way.
- Conduct a “defensive” compliance audit. Sometimes, if the employer begins “fixing things” immediately, the DOL will could overlook earlier violations. Most back pay suits have a look-back period of either two or three years, depending on the nature of the violation.
- Gather and preserve documents. Not maintaining proper payroll records is a violation separate from any non-payment or under payment issue.



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DOL Rules of Engagement

- DOL does not have to disclose the nature of any complaint, does not have to reveal the name(s) of any complaining or effected employees, does not even have to disclose if a complaint exists.
- DOL investigators do not have to allow anyone to attend employee interviews. DOL can reach out privately to any current or former employee. DOL considers all employee interviews to be "private."
- DOL may provide the applicable rules/law and ask employers to calculate overtime or minimum wage payments due to each employee.

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DOL Rules of Engagement

- Remedies:
 - DOL can collect back pay PLUS liquidated damages (usually double the amount owed for wages) that is paid directly to aggrieved employees.
 - DOL can collect fines for violations which are paid to the government.
 - DOL can collect pay and fines and enter into a settlement agreement with the employer OR DOL can institute its on litigation against the employer which may include injunctive relief, such as a restraining order to prohibit any future pay violations by the employer.
 - DOL can give the employee permission to pursue a private case.



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Questions?



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Thank You!



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