

# Taking Workplace Investigations Seriously

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# Scope of Work for the Investigation

- What is the purpose and the scope of the investigation?
  - Should there even be an *investigation*?
  - What other means are available to address the questions at hand? (Should we call it something other than “an investigation”?)
- Who is sponsoring the investigation?
- What peripheral issues might come up or need to be addressed?
- Other issues:
  - FMLA
  - New complaints of potentially unlawful conduct
  - Examples of other similar behavior that was known, but not disciplined

# Internal v. External Investigator

- Consider who and what is to be investigated
- Criteria for selecting an investigator
  - Objectivity
  - Not in the same chain of command
  - Gender/race/other considerations
- Internal v. external investigators
  - Advantages
  - Disadvantages
- Lawyer?

# Confidentiality

- Attorney-client privilege
  - Confidential communications between a client and attorney for purpose of securing legal advice
  - Work product privilege
  - Loss of privilege
  - In-house counsel
    - Decision maker v. lawyer
- Advantages and Disadvantages
  - Cannot invoke privilege after the fact
    - Decide early – before the investigation begins
  - Privilege can be waived later if you choose
  - Designate documents properly and include legal counsel on memos, etc.

# Investigation Reports

- Do you want a final written report?
  - Advantages and Disadvantages
- Consider before starting the investigation
  - May revisit this decision after the fact-finding is completed
- What other alternatives are there in place of a written report?

# Planning the Investigation

- Plan the sequence of persons interviewed
  - You may need to balance accessibility and efficiency (e.g., when conducting an investigation that extends to multiple locales or when key persons are unavailable)
- Review pertinent documents before the interview
- Consider identifying a resource witness
  - Relationships
  - History
- Telephone or In-Person

# Factual Findings

- Investigation vs. Decision
- Stick with the FACTS
  - No legal conclusions
  - No opinions, judgments, or assumptions
- Ask: “How do you know?”
  - Continually test what you know and what you are learning to ensure you are dealing with verifiable facts

# Conducting the Interview

- Introduction
- Admonitions
- Questions about general areas
- Specific Questions
- Next steps
- Admonitions



# Admonitions to Investigation Participants

- Confidentiality
  - What about the complainant? Do they have to keep it confidential too?
- Expected to avoid retaliation
- Obligated to tell the truth
- Expected to cooperate: request that they provide information they believe to be relevant
- Expected to adhere to conduct guidelines throughout and after the investigation

# Asking the Tough Questions

- Plan ahead
  - You may only get one chance to ask!
- What do you most need to know?
- Is there anything you do *not* want to know (and would not want to ask about)?
- Who is best in position to know?
- Who else might know or corroborate
- How do you ask for “sensitive” information?

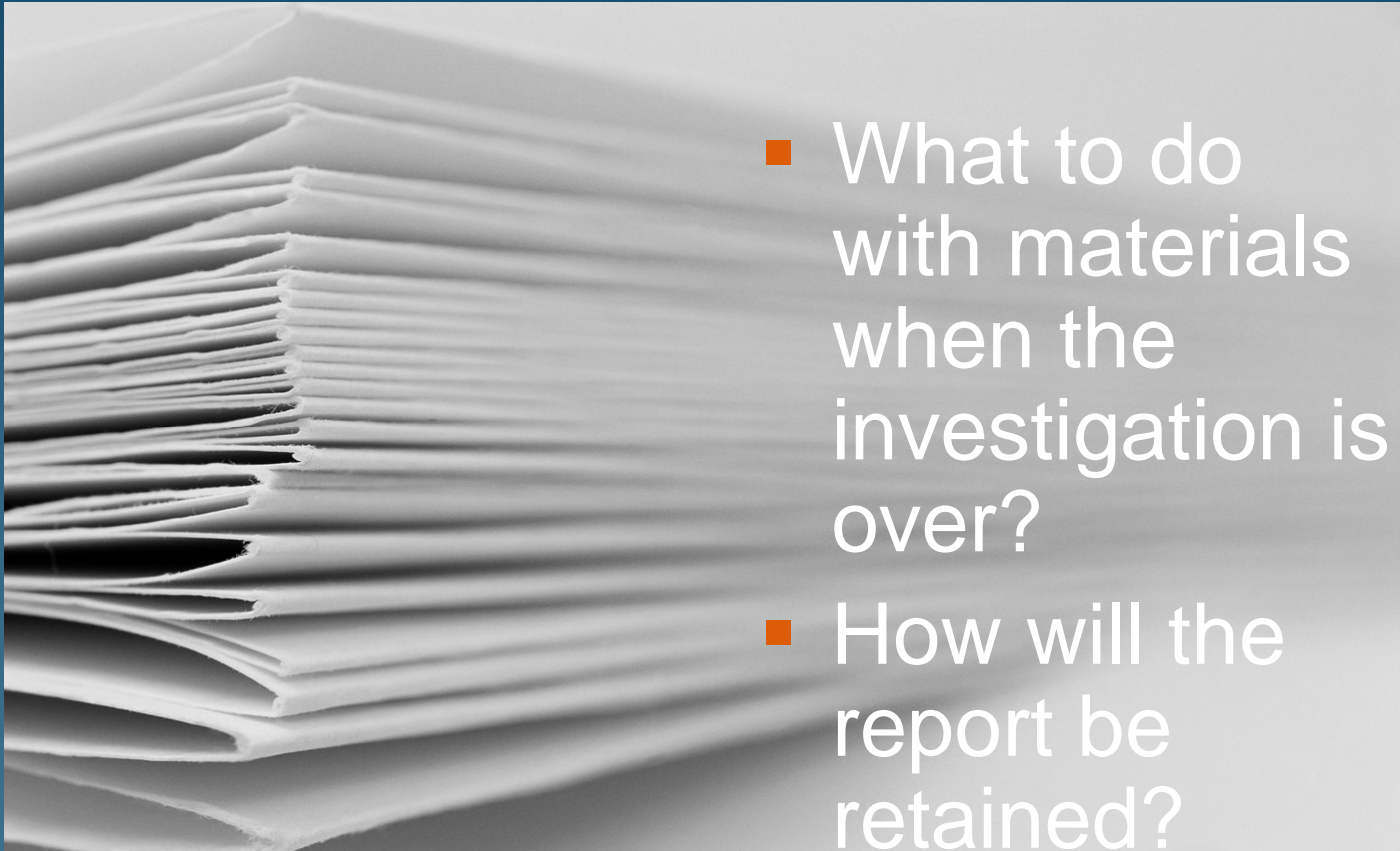
# (Really) Listening

- Reflexive questions
  - Follow-up based on what you heard
- Understand the difference between:
  - I don't remember
  - I don't know
  - It didn't happen
- Evaluating credibility

# Documents

- Use selectively and sequenced in your interviews
  - Ask for memory before showing the document
- Preserve documents
  - Litigation hold or "freeze"
- Emails, text messages, IM
- Originals – get them
  - Computer documents evolve

# Investigation Materials and Interviews Notes



- What to do with materials when the investigation is over?
- How will the report be retained?

# Written Statements

- Advantages and disadvantages to requesting written statements
- When would you want signed, written statements?
- Should the investigator write the statement or request that it be written by the person being interviewed?

# Taped Interviews

*(including video and other forms of recording)*

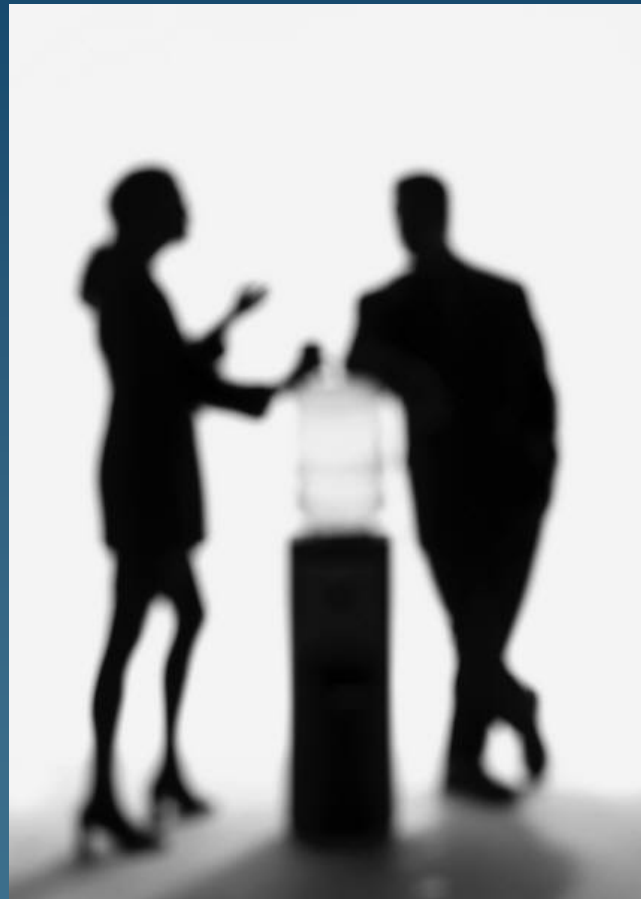
- Do you want to tape interviews?
- What steps do you need to take to ensure compliance with legal requirements when taping interviews?
- What if the person being interviewed wants to tape it?

# Alleged Offenders

- Remember to interview the alleged offender – no matter how much evidence you have!
- When do you interview the alleged offender?
  - Advantages and disadvantages
  - If the alleged offender is interviewed at the outset and makes certain admissions, you may not need to interview anyone else.
  - May be reasons to postpone interviewing the alleged offender until other witnesses are interviewed first.
- When to consider *simultaneous* interviews.



# He Said v. She Said



# Removing People From the Workplace

- Consider whether people need to be sent home in order to maintain a safe and productive workplace
- Treat people respectfully to avoid escalating behavior
- Avoid retaliation – do *not* automatically send the complainant home
- Changes in pay/compensation should be made consistent with policies & procedures

# Employment Policies

- Consider updating your policy to include requirement to cooperate in an investigation
- Ensure your harassment prevention policy considers other protected class harassment
  - E.g., sexual orientation/gender identity
- Training

# FOLLOW UP!

- Communicate to complainant that action was taken in response to the complaint
- Thank people for coming forward with their concerns

# Bottom Line – every time

- Prompt investigation
- Appropriate action based on findings
- Effective action
  - Reasonably calculated to deter future behavior