



# CONDUCTING INTERNAL INVESTIGATIONS

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# LEGAL REQUIREMENTS

## ■ Weingarten Rights

- NLRB v J. Weingarten, Inc., 420 US 251 (1975)
  - Employee's Responsibility to Ask
  - Witness vs. Subject
  - Investigation vs. Issuance of Discipline
  - Discussions that will not lead to discipline
  - Union Representative's Role

# LEGAL REQUIREMENTS

## ■ Garrity Rights

- Garrity v New Jersey, 385 US 493 (1967)
  - Public employee testimony in employment hearing cannot be used in criminal court case
  - Garrity notice for signature before interview

# LEGAL REQUIREMENTS

## ■ Loudermill Rights

- Cleveland Bd. Of Educ. v Loudermill, 470 US 532 (1985)
  - Public employees have a property right in their jobs
  - Due process requires pre-termination opportunity to respond
  - Post-termination process

# IS AN INVESTIGATION WARRANTED?

## ■ Violations?

- Employer Policies
- Federal law
- State law
- Local law
- Collective Bargaining Provisions

# PURPOSE OF AN INVESTIGATION

To gather relevant evidence to determine:

- Whether misconduct occurred
- If the misconduct warrants disciplinary action
- What disciplinary action is most appropriate

# REPORT/DISCOVERY OF INCIDENT

- Reporting could be by an employee, co-worker, client, contractor, citizen, etc.
- Reporting or discovery may start contractual timelines
- Request that the incident be formalized in writing–don't wait for written account
- Immediate considerations:
  - Is there a threat to self or others?
  - Is a drug/alcohol test warranted?
  - Is paid or unpaid suspension necessary during investigation?

# EMPLOYEE IS A THREAT ACT IMMEDIATELY

- Request that the employee leave the area (do not physically remove or restrain an employee)
- If necessary, call 911
- Inform Management /Human Resources
- Follow building procedure for emergency situations
- Notify the Union



# IS A DRUG/ALCOHOL TEST IS WARRANTED?

- Dependent on your policies
- If you have reasonable suspicion, proceed with testing: validity of the request (i.e., was there reasonable suspicion or not) can be dealt with in grievance process
- Have a reasonable suspicion form to document observations
- If possible, have at least two management personnel observe the situation

# HARASSMENT / DISCRIMINATION

- Does the incident relate to any Federal or State Laws?
- Is there a claim of harassment, discrimination or hostile work environment?
- If possible, have Human Resources/Legal conduct such investigations

# CONFIDENTIALITY

- You have an obligation to keep files and statements safe
- Do not discuss the investigation outside of those who have a need to know
- Witnesses should not discuss investigation with others
- You cannot promise confidentiality or anonymity to witnesses
- Conducting simultaneous interviews

# PLANNING THE INVESTIGATION

- Planning helps you define the parameters of an investigation and keeps you focused on what is important and relevant
- Start with the end in mind – how is this going to look to an arbitrator or jury?
- Stay aware of any contractual timelines for investigations/notifications and ensure you are in compliance

# GATHERING INFORMATION OR EVIDENCE

- Get as much information as possible before the interviews. You can then ask the employee involved about the documentation
- Employee's personal items - desk or locker
- Requests for computer records

# EXAMPLES OF INFORMATION TO BE GATHERED

Email records	Internet Usage Reports
Photos/Videos from Security Cameras	Personnel Files
Telephone Records	Applicable MOU's or Contract Provisions
Policies/Procedures	Sign-offs for Policies/Procedures
Calendars	Timecards
Job Descriptions	Entrance/Exit Records
Work Summaries	Vehicle Records/GPS

# RECORDING OF INTERVIEWS

- Notes
- Tape recording
- Court reporter

# Union Involvement

- Notifying the Union – Employee or Employer
- Employees do not have the right to delay the investigation in order to select a specific steward/union representative
- Employees who do not want union representation – consider signing a waiver form before the meeting can start
- Union reps can represent, not interact; they can request a caucus, but they should not be:
  - interjecting their opinion
  - interfering with the meeting
  - answering the questions for the employee
- Witnesses do not need union representation.



# CONDUCTING THE INTERVIEW

## ■ INTRODUCTION

- The purpose of this investigatory meeting is to review the following incident: (insert brief description of incident)
- You are expected to cooperate with this investigation and provide truthful and factual responses. Not doing so may lead to discipline up to and including termination.
- Disclosure of information limited to those having a need-to-know.
- The employee must maintain confidentiality. Disclosing information regarding this investigation to anyone other than those in this room or your union representative may lead to discipline up to and including termination.
- Employee should report immediately if he/she feels retaliation as a result of participating in investigation.

# CONDUCTING THE INVESTIGATION

## ■ INTERVIEW

- How long have you been with the employer?
- How long have you been in your current role?
- Review of applicable policies
- Responsibilities in current role?
- Did you talk with your manager/supervisor about this incident?
- Did you talk with anyone else about this incident?
- Details of incident

# CONDUCTING THE INTERVIEW

## ■ CLOSING/WRAP UP

- Ask the witnesses if there is any other information they want to share about this incident.
- Any other documents
- Any other witnesses
- Give an estimate of how long you expect the investigation to take and indicate that no decisions will be made until the investigation is complete.
- Tell interviewees that you may need to meet again to follow-up. Tell subject that you will meet again once the investigation is complete to summarize the action taken.
- Thank the employee again and express your commitment to resolving the matter promptly.

# INVESTIGATION MEETING TIPS

- Establish rapport
- Narrow the facts to only those that are relevant
- Clarify the facts
- Push for specificity
- Be as objective as possible; don't be accusatory
- Silence is okay...it may elicit a response from the employee
- Don't interrupt the interviewee
- Don't be afraid to ask a "hard" question

# ASSESSING CREDIBILITY

- What was the “body language” of the interviewee? Obvious nervousness? Sweating? Tone of voice?
- How did the interviewee react to the allegations? Argumentative? Defensive? Hostile?
- Logic/consistency of story. Did the person’s version of events seem logical and consistent all the way through?
- Was the person forthcoming, or did you have to “pull information” from him or her?
- Corroborating evidence. Did the person’s version of the facts differ from anyone else’s? Did witnesses corroborate the person’s version?
- Circumstantial evidence. Are there things that the accused said or did in other situations that make it more likely than not that the facts in dispute happened?

# CONCLUSIONS

- Consult with Management/Legal
- Consider Policy, Practice and Circumstances
  - Factors to consider:
    - Were policies or work instructions violated?
    - What has been done in the past with similar incidents
    - What is the tenure and history of the employee involved?
    - Are there any mitigating or aggravating circumstances?
- Reach a conclusion/complete Investigation Report

# ACTIONS

- Consider doing standard closure memos to notify the person who reported the incident and witnesses that you have completed investigation. Tell the complainant whether you have or have not substantiated the claim. Do not share actions taken, such as discipline, etc.
- Notify the employee that you have concluded your investigation and schedule a follow-up meeting (Loudermill).
- Close the investigation. Consider doing a summary memo for filing

# IDENTIFYING WITNESSES

- In Reports – Consider Whether To Identify Witnesses
- PERA Considerations
- FOIA Considerations



# OUTCOMES

- Training/re-training
- Relocation
- Counseling
- Discipline
- Termination
- EAP referral
- Nothing