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# How to Handle Employee Problems and Complaints – Workplace Investigations

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Presented by:



**Mike Bourgon**  
**Mike Conroy**



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## TOPICS INCLUDE:

- The Benefits of an Effective Investigation
- Ten Steps to a Successful Investigation
- Common Investigation Mistakes

# Introduction

You've become aware of a potentially serious problem at your company, and you're not quite sure how to handle it. Maybe you've heard a complaint or report of misconduct that sounds something like this:

# Introduction

“Every time I go into John’s office, he’s looking at porn on the Internet. It’s really starting to offend me and some of the other women in the office.”

“We’ve finished our internal audit, and the numbers just don’t add up. I think we may have a thief on our payroll.”

“Mark has been really angry lately. He keeps talking about his gun collection, and yesterday he told me that ‘management is about to get what’s coming to them.’ I’m afraid of what he might do.”



# Introduction

Now you're facing some tough decisions: Whom should you believe? What really happened and why? How serious is this problem? What should you do about it? And, can you handle this without creating legal problems for the company?

# Introduction

A complete, impartial, and timely investigation will help you answer these questions and figure out what to do. In fact, a proper investigation is one of the most important tools for maintaining a safe and productive workplace and keeping your company out of legal trouble.



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# The Benefits of an Effective Investigation



# The Benefits of an Effective Investigation

Although you might not be happy to learn that you have a workplace problem, investigating and resolving it in the right way can strengthen and protect your company. Among its many benefits, a proper investigation will help you:

# The Benefits of an Effective Investigation

**Figure out what happened.** The immediate aim of any investigation is to get to the bottom of a problem. You won't know how to handle a situation until you know what really happened. And, acting before you have all the facts could lead you to discipline the wrong employee or allow a workplace problem to continue.



# The Benefits of an Effective Investigation

**Deal with employee problems early.** An investigation will help you figure out who's behind a workplace problem, so you can take action before things get any worse. If you are dealing with a problem employee, he or she can be disciplined. An employee with a substance abuse problem can be identified and offered help. If employees are breaking the rules because they don't know what's expected from them, you can implement training programs, work harder to publicize and distribute company policies, and make sure managers are enforcing the rules.



# The Benefits of an Effective Investigation

**Enforce company policies.** If a company doesn't enforce its own policies, employees quickly realize that they don't have to follow the rules. Showing employees that there are consequences for misconduct will help deter future trouble and keep employees on the right track.



# The Benefits of an Effective Investigation

**Encourage reporting.** Investigating and dealing with problems quickly will encourage employees to come forward with their issues and concerns. This means that you'll hear about workplace trouble right away, before it has a chance to grow into a more serious problem.

# The Benefits of an Effective Investigation

**Avoid or counter bad publicity.** A company that ignores complaints and problems gives the impression that it doesn't care about its workers or the law. And if your company's failure to deal with a problem becomes public knowledge – through a lawsuit, for example – it could really hurt the company's reputation.

# The Benefits of an Effective Investigation

**Protect your company from lawsuits.** A solid investigation will help your company avoid or defend against legal challenges in the future. If someone who is injured by workplace misconduct – an employee who is sexually harassed, for example – sues your company, you can show that you took action right away, which will protect your company from liability in many cases. If an employee who was disciplined or fired as a result of your investigation files a lawsuit, you will be able to show that you acted reasonably and in good faith, which will undermine the employee's claims.



# The Benefits of an Effective Investigation

By the same token, however, a slipshod investigation can lead to employee lawsuits, by giving employees the ammunition they need to demonstrate that your company was careless, discriminated, spread false information, or treated employees poorly, among other things. And failing to investigate at all is even worse: If an employee can show that company management knew about a problem and didn't do anything about it, the company will be legally responsible for any harm that employee suffered.



# The Benefits of an Effective Investigation

So how do you conduct the right kind of investigation? By being fair and thorough and making good-faith efforts to get to the truth. Even if you come to the wrong conclusion, your company should be able to show that it was legally entitled to take action (for example, to discipline or fire an employee) based on the results of your investigation, as long as you investigated properly and your decisions were reasonable based on the information available to you.

# The Benefits of an Effective Investigation

## EXAMPLE:

Ralph was accused of sexually harassing two female coworkers. The company immediately performed a complete investigation, interviewing the women, Ralph, and a number of witnesses, including five Ralph suggested. Based on these interviews, the company concluded that Ralph had in fact harassed his coworkers and fired him.

(continued)



# The Benefits of an Effective Investigation

Ralph later sued the company, claiming that he had a consensual affair with both women, no harassment had occurred, and the women were angry with him for two-timing them. (Ralph did not tell any of this to the company's investigator.) The jury found in Ralph's favor. However, an appeals court decided that it didn't matter what really happened. As long as the company conducted a fair and thorough investigation and reached a good-faith conclusion based on the information available to it at the time, it was not liable for firing Ralph based on the investigation's results.



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# Ten Steps to a Successful Investigation

# Ten Steps to a Successful Investigation

The best way to tackle an investigation – like any other project – is to divide it up into management tasks. Fortunately, most workplace investigations follow a similar pattern, although the details can vary considerably. Once you become aware of a problem or complaint, you'll have to follow these ten steps:

# Ten Steps to a Successful Investigation

## **1. Decide whether to investigate.**

Although there are some situations that don't warrant an investigation, you should generally err on the side of investigating. Sometimes, you won't know how serious a problem really is until you start asking questions.



# Ten Steps to a Successful Investigation

## **2. Take immediate action, if necessary.**

You might have to act right away, before you begin to investigate, to protect employees or the company itself. For example, an employee accused of serious sexual harassment or stealing company trade secrets should be suspended, with pay, until the investigation is complete.

# Ten Steps to a Successful Investigation

## **3. Choose an investigator.**

If you won't handle the investigation yourself, you'll need to pick someone else to do it. The right investigator is experienced, impartial, and perceived as impartial by the employees involved, and capable of acting – and if necessary, testifying – professionally about the investigation.



# Ten Steps to a Successful Investigation

## **4. Plan the investigation.**

Start by organizing your thoughts and information: What do you know? What do you need to find out to decide what happened? Who might have relevant information? What's the best way to get it? A little careful thought up front can help you avoid wasting time or overlooking important facts as you investigate.



# Ten Steps to a Successful Investigation

## **5. Interview.**

The heart of any investigation is gathering information; and, the most basic way to do that is by asking people questions. Typically, you'll have to interview the employee accused of wrongdoing, the employee who complained or was the victim, and any witnesses to the incident(s). You'll learn the most by asking open-ended questions that encourage disclosure without giving too much away.

# Ten Steps to a Successful Investigation

## **6. Gather documents and other evidence.**

Documents play a role in many investigations, and decide the outcome in more than a few. You might have to review personnel files, email messages, personal notes, performance reviews, and other documents to figure out what really happened. You might also have to gather physical evidence, such as a weapon, photographs, drug paraphernalia, or pornographic magazines.



# Ten Steps to a Successful Investigation

## **7. Evaluate the evidence.**

The most challenging part of an investigation – especially if witnesses disagree or contradict each other – is figuring out what actually happened. There are some proven methods of figuring out where the truth lies, methods all of us use in our everyday lives.



# Ten Steps to a Successful Investigation

## **8. Take action.**

If you conclude that an employee committed serious misconduct, you'll have to act quickly to avoid legal liability for that employee's behavior and to protect other employees from harm.



# Ten Steps to a Successful Investigation

## **9. Document the investigation.**

Once your investigation is complete, you should write an investigation report that explains what you did and why. This will not only give the company some protection from lawsuits relating to the investigation, but also provide a written record in case of future misconduct by the same employee.

# Ten Steps to a Successful Investigation

## **10. Follow up.**

Your last step is to make sure the problem that led to the investigation has been solved. You'll need to follow through with the complaining employee and the accused employee, and you might have to take other steps – such as training employees or developing new workplace policies – to deal with systemic workplace problems.





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# Common Investigation Mistakes

# Common Investigation Mistakes

There are a number of legal traps waiting for companies that conduct an improper investigation or fail to investigate at all. Generally, these traps come in the form of lawsuits brought either by an employee who was a victim of inappropriate behavior in the workplace or by an employee who was disciplined or fired after being accused of misconduct. In either situation, a company that performed an incomplete, biased, or late investigation – or that never investigated at all – begins the lawsuit in a fairly deep hole.



# Common Investigation Mistakes

Not only has the company ignored its workers' legal rights, but it has also shown a lack of concern for its workers' well-being, a quality that many jurors (most of whom are or were employees themselves, not employers) find offensive.



# Common Investigation Mistakes

In addition to these legal issues, companies that don't investigate problems or that conduct halfhearted investigations will face practical problems. These employers are sending precisely the wrong signals to employees, managers, and customers: that they don't want to hear about workplace problems, they don't really care what's going on in their company, and they won't enforce their own workplace rules.



# Common Investigation Mistakes

Finally, failing to investigate or doing a poor job will exact an emotional cost as well. Wrongly accusing an employee of serious misconduct not only invites a lawsuit, but also ruins that employee's reputation and relationships with coworkers. As if the legal and practical traps described above aren't bad enough, imagine how bad you'll feel if you make the wrong call and cause hurt feelings – or worse – for a blameless employee.

# Common Investigation Mistakes – Failing to Investigate

If company management is aware of serious misconduct or dangerous activity in the workplace and doesn't do anything about it, the company could have significant legal exposure. Generally any harm that comes to a company's employees – and sometimes, to people who aren't on the payroll, such as customers, clients, or bystanders – after the company has notice of a problem will be the company's legal responsibility. This means, for example, that an employee who suffers sexual harassment after a manager learned about the problem will be able to sue the company for damages.



# Common Investigation Mistakes – Failing to Investigate

Your company might also face a lawsuit if it fires an employee for workplace wrongdoing without first conducting an investigation. If that employee has an employment contract – whether written, oral, or implied – limiting the company’s right to fire, that employee might sue for breach of contract if you don’t investigate before terminating his or her employment. The lawsuit would claim that (1) the employee didn’t commit the misconduct for which he or she was fired; (2) your company didn’t bother to investigate to figure out what really happened; and, therefore, (3) your company didn’t have good cause to fire the employee.



# Common Investigation Mistakes – Failing to Investigate

Usually, this won't be an issue because most employees don't have employment contracts. Instead, they are "at-will" employees, which means that they can quit at any time, and you can fire them at any time, for any reason that is not illegal (illegal reasons for firing include discrimination and retaliation). However, some employees have employment contracts that limit the employer's right to fire at will.

# Common Investigation Mistakes – Failing to Investigate

For example, the contract might state that the employee can be fired only for “good cause” – a common provision – or for specified reasons (such as “gross misconduct” or “financial malfeasance”). If you fire the employee for reasons other than those stated in the contract, the employee can sue your company for breaching the contract.



# Common Investigation Mistakes – Failing to Investigate

To avoid the legal problems that can result from failing to investigate, take workplace problems seriously. Never ignore complaints of wrongdoing. Even if a situation seems simple or straightforward, always do some initial research before deciding that an investigation isn't warranted. And make sure you know all the facts before taking disciplinary action against an employee.

# Common Investigation Mistakes – Delay

Even if you eventually decide to investigate and do a good job, your company can get into legal trouble if you wait too long to get started. If an employee suffers harm – from harassment or workplace violence, for example – after you learned about the problem but before you took action, your company will usually be legally responsible to the employee. The longer you postpone the investigation, the more serious that legal liability could be.



# Common Investigation Mistakes – Delay

## EXAMPLE:

Kristen worked as a checker at a grocery store. She complained that a coworker harassed her by calling her names, propositioning her, commenting on her appearance, and touching her. Kristen complained to the store's assistant manager several times; each time, the manager confronted the coworker, who denied the allegations. After Kristen's fourth complaint – two months after her first complaint – the accused harasser was transferred to a different shift, where he had no further contact with Kristen.

(continued)



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# Common Investigation Mistakes – Delay

Kristen filed a lawsuit against the grocery store for sexual harassment. The employer tried to have her case thrown out, arguing that it stopped the harassment by transferring the alleged harasser. However, the court found that the store's two-month delay before taking action was too long, even if it eventually did the right thing by moving the alleged harasser to another shift. The court allowed Kristen's lawsuit to go forward.



# Common Investigation Mistakes – Delay

Postponing the investigation could also lead the complaining employee to claim that he or she was retaliated against: disciplined or otherwise treated badly for making the complaint. (For more on this issue, see “Retaliation,” below.) If the employee is threatened by the wrongdoer, given the cold shoulder by other employees, or even disciplined by a supervisor for coming forward, that could well constitute illegal retaliation for which your company would be legally liable.

# Common Investigation Mistakes – Delay

Of course, there's a simple solution: Don't delay your investigation. Once you learn of a serious problem or complaint, get moving right away. If you absolutely have to wait a bit before getting started (because the victim is on vacation, for example), document the reasons for the delay.



# Common Investigation Mistakes - Inconsistency

Some companies get into trouble by acting inconsistently. In the employment arena, inconsistent treatment – handling similar situations differently – can lead to claims of discrimination. An employee who feels that he or she was treated differently because of a protected characteristic – an inherent quality, such as race or gender, that cannot legally form the basis for an employment decision – might bring a discrimination lawsuit.



# Common Investigation Mistakes - Inconsistency

Federal laws prohibit employers from making workplace decisions based on an employee's or applicant's race, color, national origin, sex, religion, age (if the employee is at least 40 years old), genetic information, or disability.



# Common Investigation Mistakes - Inconsistency

If you aren't evenhanded in your investigations, you could risk a discrimination claim. For example, if you decide not to investigate a complaint against a white man for sexual harassment but you do investigate a harassment complaint against an African American man, you and your company might be accused of race discrimination. Similarly, if you don't investigate a claim of discrimination brought by a Muslim employee, that employee might argue that your decision was based on hostility to his or her religion.



# Common Investigation Mistakes - Inconsistency

Avoid discrimination claims by treating similar problems similarly. If you decide to investigate one claim but not another, make sure you have a valid, business-related reason for doing so. If you punish one employee more harshly than another, be prepared to justify the difference. And always check your motives: Most of us don't want to admit to any prejudice, but we all have preconceptions that can affect our decisions. Inconsistency is sometimes justified, but it can also be a sign of unconscious bias at work.



# Common Investigation Mistakes - Retaliation

Your company may not take any negative action against an employee for coming forward with a complaint or participating in an investigation. As the U.S. Supreme Court has held (in the context of discrimination and harassment complaints), any action that could deter a reasonable worker from coming forward with a complaint might constitute retaliation.

*(Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006).)* An employee need not show that he or she was fired or demoted to bring a retaliation claim: Lesser forms of mistreatment might also qualify as retaliation, if they could discourage employees from bringing complaints.



# Common Investigation Mistakes - Retaliation

Most conscientious employers realize that punishing an employee for bringing a workplace problem to their attention is a bad idea, for legal and practical reasons. However, even savvy employers sometimes retaliate against an employee without intending to. This comes up most often when employees have to be separated for some reason. For example, if one employee is harassing another, your first instinct might be to move one of the workers to another position, so they won't have to work together. However, if you move the worker who complained, that worker might feel that he or she is being punished for complaining, especially if the new position, workspace, or shift is less prestigious or desirable.



# Common Investigation Mistakes - Retaliation

An employee need not bring a formal complaint to be protected from retaliation. Title VII, the law that prohibits retaliation in harassment and discrimination cases, says that those who “oppose” an illegal practice are protected from retaliation. The U.S. Supreme Court recently held that this language protects not only employees who complain, but also witnesses and others who speak out against an illegal practice during a workplace investigation. (*Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009).)



# Common Investigation Mistakes - Retaliation

In this case, Ms. Crawford was interviewed as part of an internal investigation into sexual harassment allegations, and told the investigator that the accused employee had acted inappropriately toward her, as well. Following the investigation, Ms. Crawford was fired along with others who were interviewed; the alleged harasser was not. The Court found that Ms. Crawford could bring a retaliation claim even though she wasn't the employee who initially complained of harassment.

# Common Investigation Mistakes - Retaliation

To protect against retaliation claims, warn everyone involved in an investigation that retaliation won't be tolerated. Ask the complaining employee – and perhaps his or her manager – to bring any instances of retaliation to your attention immediately. And if you must separate workers, either move the worker accused of misconduct or make very sure that the worker who complained is in favor of the change you propose.

# Common Investigation Mistakes – Failing to Be Thorough

Performing an incomplete or sloppy investigation – by failing to interview key witnesses, neglecting to review important documents, or ignoring issues that come up during the investigation, for example – can have many of the same negative consequences as failing to investigate at all.



# Common Investigation Mistakes – Failing to Be Thorough

The employee who complained or suffered mistreatment will feel that his or her concerns weren't taken seriously and might sue for retaliation or for harm that continued during and after the investigation. An employee accused of misconduct might believe that your company wasn't interested in his or her side of the story or in finding out what really happened, which could lead to a lawsuit for wrongful termination or discrimination.



# Common Investigation Mistakes – Compromising Confidentiality

Loose lips do more than sink ships: They can also torpedo a workplace investigation. From a practical standpoint, talking too much during the investigation – telling a witness what another witness said, revealing your personal opinion to one of the employees involved, or publicizing the complaint in the workplace, for example – can lead others to doubt your objectivity.



# Common Investigation Mistakes – Compromising Confidentiality

They might believe you have already made up your mind and therefore aren't going to investigate fairly.

Employees involved in the investigation might change their statements, either subconsciously or intentionally, based on what you say. And you can bet that if you're talking about the investigation, the entire workplace is talking, too, which will lead to a lot of gossip and lost productivity.



# Common Investigation Mistakes – Compromising Confidentiality

As a legal matter, an employee who believes you have maligned his or her reputation by spreading false information can sue for defamation. These claims are sometimes made by the target of the investigation, who argues that the employer falsely accused him or her of wrongdoing, resulting in unfair discipline and a damaged reputation, and perhaps even preventing him or her from getting another job.

# Common Investigation Mistakes – Compromising Confidentiality

A defamation claim can also be brought by an employee who makes a workplace complaint, if you conclude that the complaint is false and make this belief public. In this situation, the employee's claim is that he or she was falsely labeled a liar. Even a witness who participated in a workplace investigation could accuse the employer of lying about what he or she said, if the employer's statements damaged the employee's reputation.



# Common Investigation Mistakes – Losing Objectivity

You've probably developed some personal opinions about most of the people you work with. It's human nature to like some people more than others. But you have to put these opinions aside and look objectively at the evidence when you conduct a workplace investigation. If you let your personal feelings and opinions hold sway, you might be accused of discrimination, and the results of your investigation could be called into question.



# Common Investigation Mistakes – Losing Objectivity

It can also be tough to stay objective if you have to investigate – and recommend discipline against – people who outrank you on the corporate ladder. But, if you let the offending employee's position in the company dictate the outcome of the investigation, you aren't doing your job properly.

# Common Investigation Mistakes – Losing Objectivity

The best antidote for this problem is to remember your role. When you investigate, you are acting on behalf of the company. If you feel unable to put your personal feelings aside, get some help. Ask someone else within the workplace (or hire an outside investigator) to conduct the investigation or get some advice from a lawyer.



# Common Investigation Mistakes – Strong-Arm Interview Tactics

Some investigators are so intent on getting straight answers from the workers they interview that they restrain workers against their will. For example, an investigator might lock the door to the interview room, physically prevent the employee from leaving, or tell the employee something like “nobody’s leaving this room until I find out what really happened.” Using physical means to restrain an employee, or taking actions that lead the employee to believe that he or she is not free to go, can lead to a legal claim of false imprisonment.

# Common Investigation Mistakes – Strong-Arm Interview Tactics

You can avoid false imprisonment lawsuits by avoiding coercive tactics. If an employee indicates that he or she wants to leave the room or stop an interview, let him or her go. Your company is free to take disciplinary action against an employee who refuses to answer legitimate questions or participate in a workplace investigation. However, you can't use physical means or threats to prevent the employee from leaving.



# Common Investigation Mistakes – Invading Employee Privacy

Don't become so zealous in your search for the truth that you invade employee's privacy rights. This can be a tough call; after all, conducting an investigation involves a certain amount of poking around, usually into things that someone doesn't want you to know about.

However, if you cross the line from legitimate workplace concerns into private employee property or behavior, you could be inviting a lawsuit for invasion of privacy.



# Common Investigation Mistakes – Invading Employee Privacy

If an employee files a lawsuit for invasion of privacy, a judge will look at why both sides acted as they did: why the employee expected privacy and why the employer searched, monitored, or otherwise got into an area the employee felt was private. Then, the judge decides whose side of the argument seems most reasonable, in what is aptly called a “balancing test.”



# Common Investigation Mistakes – Invading Employee Privacy

## **Searches**

When investigating certain types of wrongdoing, you may need to search an employee's work area. For example, if an employee is accused of theft or drug use, you may want to look in the employee's desk or locker for the stolen items or the employee's stash. You will be on safest legal ground if your company has a policy that reserves the right to search employee workspaces. This type of policy shows that employees should not have expected the contents of their desks or lockers to be private.



# Common Investigation Mistakes – Invading Employee Privacy

## **Searches (cont.)**

The more intrusive the search, the more compelling your reasons for searching must be. For example, if you want to search something an employee brings on company property, such as a lunch pail or backpack, you must have a fairly strong reason to search. And you probably should not undertake this kind of search unless your company has clearly warned employees, in a written policy, that these items are subject to search. If you want to conduct a really intrusive search – for example, turning out a worker's pockets or searching an employee physically – you are asking for trouble. If your investigation reaches a point where this type of search seems necessary, talk to a lawyer.



# Common Investigation Mistakes – Invading Employee Privacy

## **Electronic Monitoring**

As long as your company has a written policy letting workers know that it might monitor their email or use of the Internet, the company generally has the right to read employee email sent on company equipment or monitor which websites employees visit using the company's computer network. During an investigation, email messages often provide crucial proof of misconduct, such as harassment, discrimination, or threats.



# Common Investigation Mistakes – Invading Employee Privacy

## **Electronic Monitoring (cont.)**

EXAMPLE: Isaac complains that someone is sending him racist cartoons and jokes anonymously, using the office email system. The company has a written policy permitting email monitoring. The investigator reads the email messages and asks for the tech department's help in figuring out where they originated. The employee who sent the offensive messages would have a hard time arguing that the company shouldn't have read the messages or traced them back to their sender.



# Common Investigation Mistakes – Invading Employee Privacy

## **Electronic Monitoring (cont.)**

Monitoring phone calls is another story. An employer is legally allowed to monitor employee conversations with customers or clients for quality control (although some state laws require the employer to inform the parties to the call – either by announcement or by signal – that someone is listening in). However, different rules apply to personal calls. Once the person monitoring realizes that a particular call is personal, the monitoring must stop immediately.



# Common Investigation Mistakes – Invading Employee Privacy

## **Avoiding Privacy Lawsuits**

The best way to avoid violating an employee's privacy rights is to ask – or search for – only what you need to know. Exercise restraint: Don't search or monitor employees without good reason. The further you stray from the complaint or alleged misconduct, the more likely you are to invade someone's privacy.



# Common Investigation Mistakes – Invading Employee Privacy

## **Avoiding Privacy Lawsuits (cont.)**

You can minimize legal exposure by making sure your company adopts written policies warning employees that it reserves the right to search desks, lockers, and email. If your company has a written policy warning that it might search, employees will have a tough time arguing that they reasonably expected those areas to be private.



# Exhibit A

## What a Good Investigation Looks Like

Here's how one California employer won a lawsuit by conducting a timely, thorough and fair investigation:

Lucky Stores (a supermarket chain) received two complaints from female employees that John Silva had sexually harassed them. After conducting a monthlong investigation, Lucky concluded that Silva had committed sexual harassment and fired him. Silva filed a lawsuit against Lucky, claiming that he didn't harass the women and, therefore, should not have been fired.



# Exhibit A

## What a Good Investigation Looks Like

The court found in Lucky's favor because it had good reason to believe, based on its investigation, that Silva committed the harassment. The court detailed the qualities that made Lucky's investigation so reliable:

- Lucky chose Jeff Szczesny, a human resources representative who had been trained on how to conduct an investigation, to investigate the complaint. Szczesny was not involved in the underlying incident.
- Szczesny began investigating immediately.



# Exhibit A

## What a Good Investigation Looks Like

- Szczesny interviewed 15 Lucky employees and documented the interviews. He asked open-ended questions and tried to elicit facts, not opinions. He encouraged the witnesses to contact him if they wanted to talk to him again.
- Szczesny told Silva of the charges against him and gave him a chance to tell his side of the story.



# Exhibit A

## What a Good Investigation Looks Like

- Szczesny met again with important witnesses, including Silva, to give them a chance to hear new information and to clarify or correct their own statements.
- Szczesny memorialized the investigation in a written report, detailing the conclusions he reached and why.



## Exhibit B – From the Horse’s Mouth: How an Employee Attorney Evaluates Company Investigations

In the best case scenario, no plaintiff’s attorney will ever review your investigation. If you act promptly, investigate thoroughly, and take effective action to deal with any problems you find, hopefully the employees involved will be satisfied (or at least you won’t give them grounds for a lawsuit).

# Exhibit B – From the Horse’s Mouth: How an Employee Attorney Evaluates Company Investigations

But you can’t please all of the people all of the time. An employee who believes that the company didn’t take effective action to stop harassment or discrimination, or an employee who is disciplined or fired for wrongdoing uncovered by your investigation, might seek out legal counsel. When they do, how will your investigation stand up?

# Exhibit B – From the Horse’s Mouth: How an Employee Attorney Evaluates Company Investigations

According to a recent SHRM article, plaintiff’s attorney Nina Pirotti looks first to the company’s investigation in evaluating the strength of a potential client’s claims. She explained that she looks for five red flags signaling a possible botched investigation:

- **Incompleteness.** If the investigator doesn’t interview all of the relevant witnesses or try to dig deeper than the alleged perpetrator’s denial, a plaintiff’s lawyer will want to find out what should have been discovered.



# Exhibit B – From the Horse’s Mouth: How an Employee Attorney Evaluates Company Investigations

- **Refusing to judge credibility.** Just because no one else witnessed a “he said, she said” incident, doesn’t mean the investigator can’t draw reasonable conclusions about what happened based on, for example, plausibility and circumstantial evidence.
- **Poor questioning techniques.** If the investigator puts words in the witness’s mouth, asks leading questions, or tries to intimidate the witness into giving a certain response, that could taint the investigation.



# Exhibit B – From the Horse’s Mouth: How an Employee Attorney Evaluates Company Investigations

- **Failure to document or keep records.** It’s not enough to investigate; your company will have to show that your investigation was thorough and sound, using your notes and investigation report as evidence.
- **Investigator bias.** If the investigator has a personal relationship with a witness or otherwise has a stake in the outcome of an investigation, expect that fact to come up repeatedly at trial.



# Questions?

# Synergy Contact Information

**Mike Bourgon**

**651-270-2281**

**mike@synhr.com**



**SYNERGY**  
**HUMAN RESOURCES**

[www.SynHR.com](http://www.SynHR.com)

1-888-603-7872

**Michael Conroy**

**651-325-5395**

**mconroy@synhr.com**



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