



**Beyond the Basics:
Tackling Complicated Issues That Arise
During Internal Investigations**

Ben Eckhart and Beth Tuschner | Attorneys

© 2023. Archbright. All rights reserved

1

Objectives

- Managing the scope of an investigation as new reports and complaints arise.
- Best practices in preparing for and conducting investigation interviews.
- Responding to interviewee questions and requests during an investigation.
- Confidentiality during workplace investigations in light of new NLRB case law and Washington's Silenced No More Act.



© 2023. Archbright. All rights reserved

2



Why Perform an Investigation?

© 2023. Archbright. All rights reserved

3

Why Perform an Investigation?

- **Gather accurate facts**
- **Treat employees in equitable & consistent manner**
- **Legal Duty to Investigate**
- **Avoid employer and personal liability**



4

What Triggers an Investigation?

-  A formal or *informal* complaint to HR, supervisor, or co-worker
-  **Management observes conduct or hears rumors**
-  **Anonymous letter**
-  Administrative Agency Inquiry (EEOC, OSHA, DOL)
-  **Receipt of attorney demand letter or lawsuit**
-  Theft, violence, or accident

5



Archbright™
WORKPLACE PERFORMANCE EXPERTS

**Laying the groundwork
for an effective and
compliant investigation**

© 2023. Archbright. All rights reserved

6

Starting the Investigation

- Scope/Investigation Plan
 - Investigating conduct that may or may not violate a handbook policy. (i.e. bullying).
 - Not concerned with establishing legal liability for conduct
- Factfinding
- Take interim measures as necessary to protect the person that was reported to be the target of the alleged conduct
 - Consider paid or unpaid leave for accused
 - Do not force complainant to transfer or take leave



© 2023. Archbright. All rights reserved

7

Diversity, Equity, and Inclusion

- Investigations are taking on greater importance in light of DEI efforts



© 2023. Archbright. All rights reserved

8



Selecting an Investigator

© 2023. Archbright. All rights reserved

9

Who Conducts the Investigation?

Investigator should:

- Have knowledge about state and federal employment laws and company policies
- Be able to uphold privacy rights of employees and others
- Be objective
- Have the time to do it
- Have no "skeletons" in the closet
- Have "clout" and "authority"
- Be aware of DEI concepts
- Prior Experience




© 2023. Archbright. All rights reserved

10

Choosing an Internal Investigator



- **PROS to Internal Investigator:**

- Knows parties
- Less cost
- Knows business and practices

- **CONS to Internal Investigator:**

- Bias
- Perception by workforce
- Timing
- Drain on company resources
- Greater risk of retaliation



© 2023. Archbright. All rights reserved

11

Choosing an Outside Investigator

- Attorney or independent individual
- Consider if there likely will be litigation
- Appropriate where allegations are against high level executives
- **PROS:** Neutral, expertise, attorney client privilege, no retaliation
- **CONS:** Cost and disruption to business



© 2023. Archbright. All rights reserved

12



Archbright™
WORKPLACE PERFORMANCE EXPERTS

**Attorney-Client Privilege
and Confidentiality**

© 2023. Archbright. All rights reserved

13

**Attorney-Client
Privileged Investigation**

- Consider if litigation is threatened or imminent
 - Protects the investigation report from subpoena
- Would have to use an outside investigator and be consulting with an attorney in order to have an attorney-client privileged investigation
- Public sector and union employers should consider the impact that an investigation under privilege may have on the public and/or union relations



14

Confidentiality

Stericycle, Inc., 372 NLRB No. 113
(8/2/2023) Overrules prior holding
from *Boeing*.

- A blanket request of confidentiality in every single employer conducted investigations is likely unlawful.
- A valid request must be narrowly tailored to and applied on a case-by-case basis.

CONFIDENTIAL



© 2023. Archbright. All rights reserved

15

Washington's Silenced No More Act RCW 49.44.211

- Effective June 9, 2022
- Employers prohibited from **requiring or requesting** any **employee or independent contractor** to agree to nondisclosure of workplace conduct that individual reasonably believes to be illegal discrimination, harassment, retaliation, sexual assault, wage hour violations, or other conduct against a clear mandate of public policy
- Anti-retaliation language



© 2023. Archbright. All rights reserved

16



Archbright™

WORKPLACE PERFORMANCE EXPERTS

Public Sector and Union Employers

© 2023. Archbright. All rights reserved

17

Union

- **Weingarten Rights:** Union-represented employees have a right to a representative during an interview which could lead to discipline
 - Employee must request union representation
 - Employee cannot request a Union Rep who is not available
 - Employee and Union Rep must be given time to confer about subject of investigation
 - Company cannot prevent Union Rep from speaking or advising employee, but Rep cannot be disruptive




© 2023. Archbright. All rights reserved

18

Public Sector



- **Public Disclosure Act (Public Records Act), RCW 42.56**
 - Public record requests of investigation files
 - Decline when the investigation is pending
 - "Active & ongoing" exception
 - When the investigation is closed, then likely must produce but may be able to redact - RCW 42.56.250(6)
 - Exceptions:
 - Attorney Work Product
 - Attorney-Client Privilege



© 2023. Archbright. All rights reserved

19



Interview Process

© 2023. Archbright. All rights reserved

20

Interviewing Issues



- Cooperation
- Complainant requests attorney or representative be present
- Witness requests to record the interview
- Remote considerations
- Language barriers
- Keep an open mind



© 2023. Archbright. All rights reserved

21

Refusal to Cooperate Witness

- Remind witness of obligation to cooperate—failure to do so may result in potential discipline
- Refusal to cooperate may create inference of wrongdoing
- Confirm no retaliation policy
- Document refusal to cooperate and that you disclosed consequences



© 2023. Archbright. All rights reserved

22

Who Should Attend an Interview?

- Complainant refuses to be interviewed without an attorney:
 - Advise employee that an attorney may become a witness and cannot interfere with investigation
 - Refusing to allow attorney may affect perception of “reasonable investigation”
 - Reassess who should do interview if attorney is present



© 2023. Archbright. All rights reserved

23

Other Interviewing Issues

- Remote vs. In-person
 - Both are acceptable and reasonable
- Language Barriers
- Witness Questions to the Investigator



© 2023. Archbright. All rights reserved

24

Dos and Don'ts of Interviewing: Your Conduct

- Be accurate and careful with comments.
- Remain respectful.
- Determine if person's knowledge is first-hand or second-hand.
- Do not imply or state that interviewee is not free to leave at any time.
- Do not express emotion, disgust, relief, etc.



© 2023. Archbright. All rights reserved

25

Dos and Don'ts of Interviewing: Your Conduct

- Do not make threats.
- Do not promise to get back to people with information unless it's appropriate.
- Do use silence after a question to encourage reticent witnesses.
- Do ask for demonstrations of physical behavior.
- Do repeat important questions with different wording to see if witness sticks with same answer.



© 2023. Archbright. All rights reserved

26

How to Document the Interviews

- Do take notes as closely as possible to actual words spoken, but not a verbatim transcript.
- Do write down the FACTS.
- Use quotes properly.
- Do not include unrelated history.
- Do not write notes regarding follow up, etc. within the interview notes. Personal reminders go on a separate sheet.



© 2023. Archbright. All rights reserved

27

Note Taking Best Practices

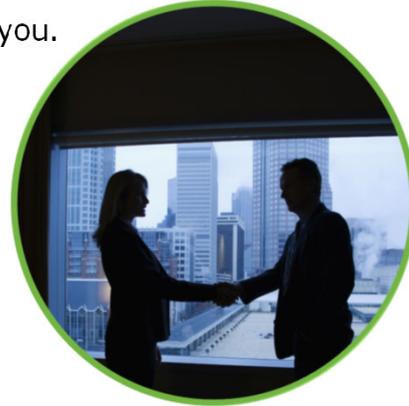
- Avoid opinions, rumors, or hearsay.
- Include dates and times as applicable.
- Do review and finalize notes soon after the interview.
- Do include comments on all witnesses' demeanor and behavior.
- Write with (the jury) in mind.



28

Concluding an Interview

- Before you conclude—Is there anything else that you would like to add?
- Thank each for meeting with you.
- Remind them to report any retaliation and to whom.
- Ask if they remember any other information to contact you.



© 2023. Archbright. All rights reserved

29

Gather Additional Evidence

- **Other sources of information may include:**
 - Swipe cards 
 - Security cameras/recordings 
 - Expense reports 
 - Cards, letters, photos, screen shots, emails 
 - Handwriting expert 
 - Internet searches 
 - Facebook or other social media 
 - Text messages 
 - Timecards 

30



Archbright™

WORKPLACE PERFORMANCE EXPERTS

Concluding the Investigation

© 2023. Archbright. All rights reserved

31

Assessing Credibility

- **Credibility of accused, complainant, and witnesses may be KEY, consider:**
 - Whose story has most detail?
 - Who has motive to lie?
 - Is the story internally consistent?
 - Is there documentation?
 - Whose perceptions seem most accurate?
 - What did demeanor show?
 - Was there any corroboration?
 - What is past record of complainant and accused?

32

Determinations: Summary Report

Possible conclusions are:

1. There is sufficient evidence to support the allegations.
2. There is insufficient evidence to support the allegations.
3. Additional information is needed in the following areas.
4. The evidence is inconclusive.



© 2023. Archbright. All rights reserved

33

Taking Action

- If investigation reveals discrimination or harassment occurred, employer must take action to end it.
- What if the conduct occurred by it did not violate the policy based on protected status?
 - You may still need to do something.



© 2023. Archbright. All rights reserved

34

Sharing Results

- Determine decision makers—limit to those who have a need to know:
 - HR
 - CEO
 - Attorney
- Provide written report of findings to decision makers.
- Provide a summary of findings to the complainant and accused.
- Thank witnesses and inform them the investigation is complete.



© 2023. Archbright. All rights reserved

35

Next Steps

- Remind everyone involved of no retaliation policy and who they should report retaliation to.
- If necessary, communicate to **general employee population** the company policy prohibiting harassment and discrimination.
- Assess need for training or re-training.
- Do not provide details of investigation to general population.
- Check in with complainant with periodically.



36

Concluding Tips

Employer should be able to say "yes" to all:

- Have the complainant and accused been given an opportunity to tell their stories?
- Were all appropriate people interviewed?
- Does documentation support the final determination?
- Is it consistent with other investigation documentation?
- Is discipline consistent with similar violations?
- Have you followed up to ensure the behavior has stopped and documented these meetings?



37



Questions?

© 2023. Archbright. All rights reserved

38

Thank you!



Ben Eckhart
Attorney
beckhart@archbright.com



Beth Touschner
Attorney
btouschner@archbright.com

Archbright.com | [LinkedIn](#), [Facebook](#), and [Instagram](#)

