

# Conducting Lawful Investigations

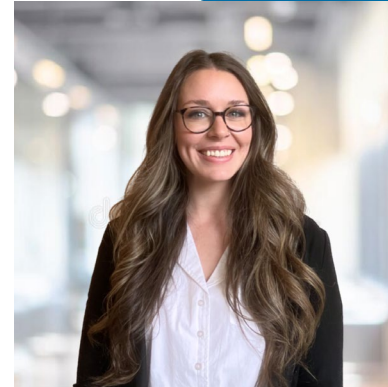
January 17, 2024

# Today's Webinar Host:

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# Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:  
Deliver expert guidance in a  
fraction of time and cost vs  
traditional methods

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

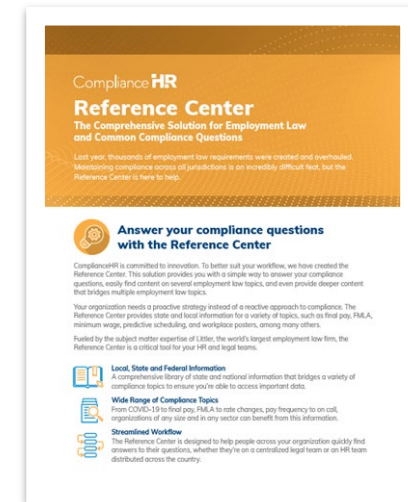
A Comprehensive Solution for Employment Law and Common HR Compliance Questions



### **The Document Center**

Efficiently generate state and federal compliant documents throughout the employee lifecycle

# Compliance Essentials



## PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

## The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
  - COVID-19, final pay, FMLA, rate changes, and more

**When coupled, these two solutions provide you with comprehensive compliance program support**

# Sign Up for a Demo

## Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

## Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

### ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

#### Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

# Presented By:

**Rocio Blanco Garcia**

Shareholder

Littler | Miami, FL



# Agenda

1. Understanding the Investigator's Role and the Importance of Investigations
2. Triggers to Start an Investigation and the Escalation Process
3. Planning the Investigation
4. Interviewing the Parties
5. Factual Findings, Final documentation, and Follow Up



# Effective Investigations

- Helps with mitigation with government agencies
- Reduces civil litigation/damages
- Increases morale
- Helps to keep complaints internal
- Helps to create a culture where employees feel comfortable bringing complaints or making reports



# The Investigator's Role



# Your Role As An Investigator

- Impartial fact-finder (no biases)
- Good listener
- Fairness, respect, and integrity
- Protect the record
- Appropriate investigation
- Attention to detail
- Take off your HR hat
- Properly document investigation
- Take out the emotion
- Reach FACTUAL findings



# A “Good” Investigation Defined



**Backed by policy with complaint procedure**



**Trained professional to receive complaint**



**Timely investigation**



**Interview witnesses**



**Speak with accused**



**Documented interviews**



**Documents collected and secured**



**Report and findings**



**Remedial measures**



**Closeout with complainant**

# Investigation Triggers



# It's All About Notice

- Does there need to be a formal complaint to trigger an investigation?

**No! It's All About Notice**



# How Is The Complaint Made

- Anonymous
- “Off the record”
- Through a hotline?
- Through social media post of a team member or third party



# Receiving the Complaint

- Get as much detailed information from the Complainant as possible.
- Listen impartially without committing yourself.
- Ask open-ended questions.
- Evaluate the complaint from the Complainant's perspective.



# Planning the Investigation



# Steps in Planning

**Identify  
The  
Allegations**

*The Specific Issues*

*Laws and Policies*

Then...

**Select  
The Means**

*Documents*

*Other*

*Interviews*

# The Plan

- An investigation plan should set the scope properly so you will have the right parameters to guide you.
- You always must be prepared to explain why you did what you did.
- Never put yourself in the position of explaining your plan by saying that you never considered any other course of action.



# Documents



- Personnel Files
- Timecards
- Medical Files
- Expense Files
- Project Files
- Meeting Agendas
- Email and Voicemail
- Photos and Videos
- Calendars
- Documents in Possession of the Claimant and Witnesses

# Electronic Data and Communications

- Electronic Storage Devices
- Email
- Cameras/Videos/Photos
- Recordings
- Internet Searches
- Voicemail

\*\*\*Know your company's retention period\*\*\*



# **Interviewing the Parties and Witnesses**

# Taking Notes

- **Be Prepared**
- Written outline of allegations.
- Written list of basic questions organized by allegation.
- Space for “parking lot” issues



# Opening the Interview

## Introduction

- ➔ Tell the interviewee your name and title.
- ➔ Explain your role at the Company.
- ➔ Give the interviewee a short statement about why the meeting is happening, which can be tailored depending on whether you are talking to a complainant, witness, or subject.

## Explain the Process

- ➔ This is a neutral review process.
- ➔ The goal of the meeting is to have an open and candid conversation; the interviewee should feel comfortable sharing what they know to help the company.

# Opening the Interview

## Non-Retaliation Policy

- ➔ The Company encourages employees to report when they witness something that does not appear consistent with our policies.
- ➔ Everyone interviewed needs to hear information about our non-retaliation policy.
- ➔ Tell the interviewee that the company does not tolerate retaliation against a person who raises good faith concerns or who speaks with us as part of our review, and the company takes the policy very seriously.
- ➔ Explain the non-retaliation policy so the interviewee feels comfortable sharing as much information as possible. Answer any questions they may have.

# Confidentiality

## Confidentiality of Investigation

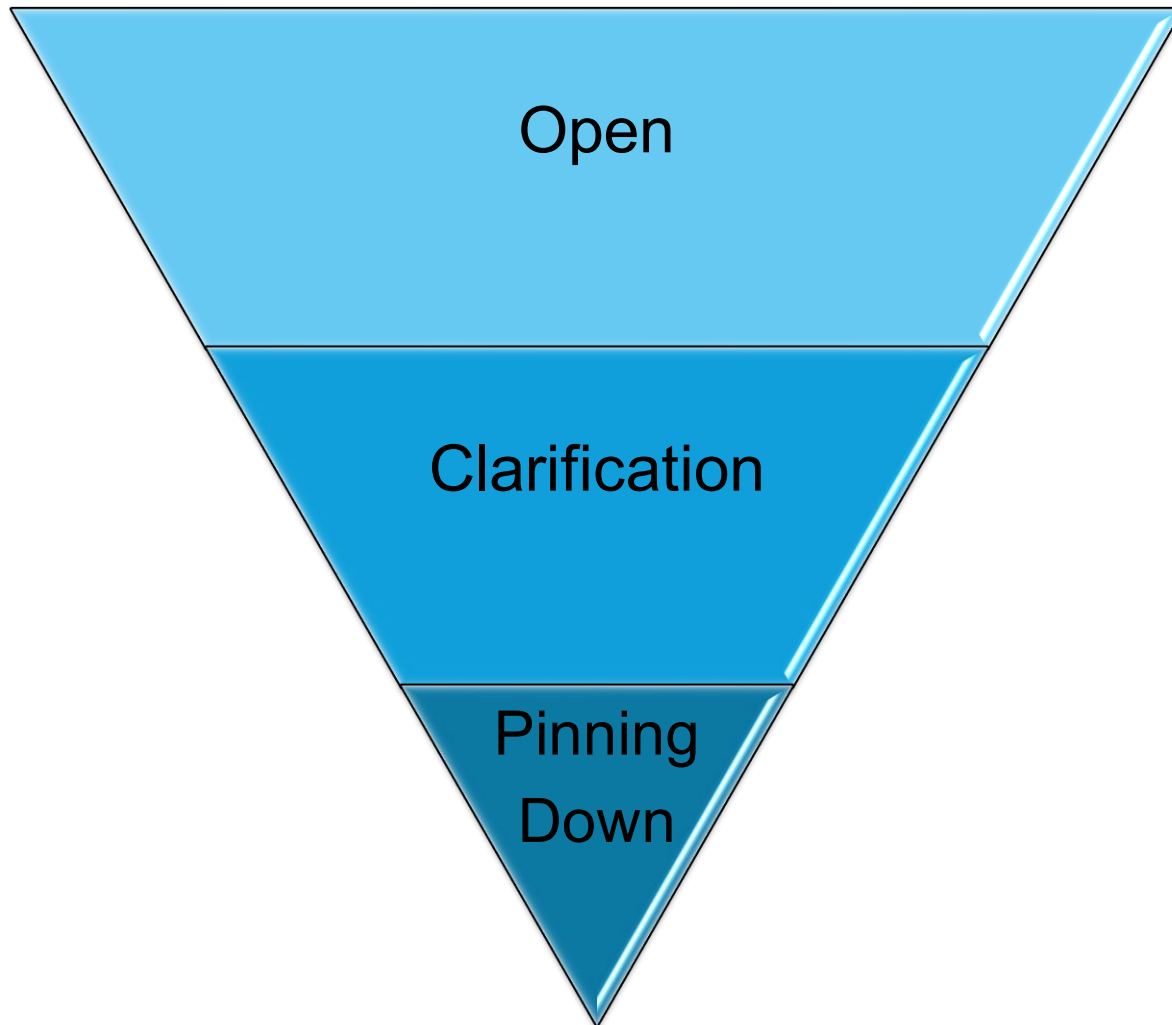
To have a fair investigation we take steps to maintain confidentiality of this matter, including complying with our privacy policies - but we cannot guarantee confidentiality.



# Opening the Interview: Answer Process Questions

- Clarity: Ask the interviewee to tell you when your question is not clear or when the interviewee does not understand the question; offer to clarify your question if needed.
- Questions: Ask if the interviewee has any questions and answer them before moving forward with the interview.
- Compliance: Confirm they will be truthful and complete and that they are not recording the interview.

# Use “Funneled” Questioning



## Ask the Right Questions

- ➔ Open-Ended Phase
- ➔ Clarification Phase
- ➔ Pinning Down Phase  
(i.e., closing the door)

# Interviews: What to Document

## Do

Write objectively

Summarize knowledge

Give specific responses to key questions and documents

Use quotes

Close the funnel

Use relevant facts regarding credibility

## Don't

Make conclusions as to the facts and credibility

Use shorthand for quotes

Stick unwaveringly to script

# Making Credibility Determinations



## Bias

What else is going on in the workplace?

Are there feuds, hate relationships,  
or sour grapes?

Any motivation to lie?

## Consistency of Account

Does the story remain the same over time with  
totally different people?

# In “He Said/She Said” Allegations, Credibility and Corroboration Are Key

## Memory

- Ask specific questions to assess the witness' memory.

## Corroboration/Lack of Corroboration

- Did you ask open-ended questions to find out if any corroboration exists?
- Did you ask for documentary evidence/other witnesses?

## Veracity

- Is this witness' version of events inherently plausible??
- What is their demeanor like?



**HE**  
Said



*SHE* Said

# Documenting Credibility Determinations

Do not document credibility conclusions:

- “Mary’s Lying” or “Mary’s biased”

Instead, present facts:

- “Mary gave inconsistent information as follows...”

or

- “Mary and Carl both admitted to having a relationship outside the office.”



**HE**  
Said



**SHE** Said

# Investigator Credibility Pitfalls

## Confirmation Bias

- ✓ Making a determination too soon
- ✓ Failing to make a determination
  - ✓ Conclusory determination

# Four Ps

Patience

Persistence

Power of  
Silence

Poker Face

# Closing the Interview

## Closing Questions

- Is there any other person whom I should be speaking with regarding this matter?
- Is there anything we didn't cover that would be helpful for me to understand about the topics we have discussed today? Sometimes I might not have asked the specific question, but is there anything else I should know?
- Keep asking the same question until they say there isn't anything else.
- Are there any documents, files, and emails/texts relating to the subject matters we have discussed today that we should be looking at or that might shed further light on these matters? Could you please provide copies to me?

# Closing the Interview

## Closing Comments and Instructions

- If you later remember anything that you couldn't remember here today, or you want to supplement or correct something you said to me, please call me at \_\_\_\_\_.
- Where documents are involved, tell the interviewee: You cannot destroy or alter any information or documents relevant to this matter and you must keep them until you are notified otherwise.
- Explain to the interviewee that "documents" includes emails, instant messages, and texts.
- A thorough and efficient review will be conducted, but it is not possible to predict timing of closure.
- Please call if anything comes up or if you have any questions.
- The company will decide fairly about proper action at the end of our review, including any needed remedial action.

# Closing the Interview

## Reminders

- Reminder about confidentiality.
- Reminder about the Non-Retaliation Policy.
- *Tell the interviewee if they feel they are being retaliated against or treated differently because they [participated in this review or came forward with concerns], they need to tell you right away.*

# Interviewing the Complainant

- ➔ Get as much detailed information from the Complainant as possible.
- ➔ Emphasize complaint will be taken seriously.
- ➔ Listen impartially without committing yourself.
- ➔ Ask open-ended questions.
- ➔ Evaluate the complaint from the Complainant's perspective.



# Allegations Are Not Facts

- ➔ Don't accept the Complainant's allegations at face value.
- ➔ Analyze the facts you are offered and make your own determination.
- ➔ The report from the person who made the allegation is just a report.
- ➔ Offer no opinions to the Reporter.



# Interviewing Witnesses

- ➔ Get their piece of the story
- ➔ Use the funnel
- ➔ Aim for corroboration
- ➔ Think about credibility questions



# Interviewing the Accused

A conceptual image showing a man in a dark suit standing on the left pan of a large balance scale and a woman in a dark business suit standing on the right pan. The scale is positioned in the center of the frame. Above the scale, the words "TWO GOALS" are written in large, bold, white capital letters with a black outline. The background is a blurred cityscape at night, overlaid with a network of glowing blue lines and dots, suggesting a digital or interconnected environment.

## TWO GOALS

***Fair Opportunity  
to Respond***

***Confidentiality***

## Plan For Confidentiality

Consider ways to give the targeted employee notice of the claims against him or her without compromising the identity of the Complainant



# Useful Questions

## Question

“Let me give you this information  
so that you can respond.”

“Is there anything else that you  
would like to add to this?”

## Purpose

Refreshes recollection and gives  
chance to respond.

After shock has worn off; gather  
full story and documentation.



# Useful Questions

## Question

“It’s been reported that you  
said X,Y, or Z”

“Why do you think someone would report  
you said/did this, with this specificity if  
you didn’t?”

“Others have reported you did  
say this, any reason for us to  
think you didn’t?”

## Purpose

Responding to denial;  
corroboration.

Responding to denial;  
corroboration; credibility.

Responding to “I don’t recall;  
corroboration: credibility.



# Useful Questions

## Question

“Whom should we speak with concerning this claim?”

“Is there any other evidence or fact that you believe would help us resolve this?”

## Purpose

Chance to respond;  
create witness list.

Chance to respond; seals off  
“universe of facts.”



# Post-Interview

Record employee's reactions



Document that the interview occurred



Maintain documentation control



Distribute notes and documents to  
investigation file



# Final Documentation



# Objectives

- ➔ Address all allegations raised.
- ➔ Identify and review the policies, procedures and business practices that pertain to the allegations.
- ➔ Make a record of your reasoning and steps taken.
- ➔ Avoid unnecessarily controversial comments.



# Know Your Audience

- Who?
- When?
- Where?



# Critical Tasks of an Investigation “Report”

- ➔ Can a 3rd Party understand it without having to reference other materials?
- ➔ Does it document findings objectively and accurately?
- ➔ Does it provide decision makers with enough information to determine whether they should take further action?
- ➔ Indicate whether the allegations were substantiated, unsubstantiated, or whether there's something missing that is needed to come to a conclusion.

# Report Writing Map

## Overview of issues

- General description of the assignment: “Employee came to me with a complaint about her supervisor, John Doe. Employee alleged Mr. Doe has violated the company policy against harassment by engaging in the following activities.”

**Include details regarding complainant, alleged wrongdoer, date of complaint/action, nature of complaint.**

# Report Writing Map

## Employees interviewed

- Date and location of interview.
- Include reason for involvement.

## Itemize each document reviewed

- Include applicable policies, electronic evidence and physical evidence relating to the allegations.
- Include reason for review.



# Witness Summaries

- Flow from the factual issues
- Distill the interview to the relevant information
- Should include only information, no opinions or conclusions
- Must not contradict your interview notes



# Report Writing Map

## Factual Findings:

- A short factual finding on each allegation with reasons
- Likely occurred as alleged.
- Likely did not occur as alleged

# Findings Considerations

## Are your factual findings objective and accurate?

- Are your findings based on reliable evidence that is relevant?
- Are they factual?
- Did you consider any evidence that doesn't support your conclusion?

# Avoid Editorializing!!

# After The Report



## Recommended Final Steps

- Follow up with witnesses as appropriate
- Implement any decisions Remedial and disciplinary
- Follow up with Complainant in reasonable time



# Follow Up with Complainant

## Do

Do it!

Thank them for raising their concerns

Let them know you conducted a thorough investigation

Let them know whether a policy violation was substantiated or not

If substantiated, let them know appropriate remedial action was taken

Reminder of no retaliation policy

## Don't

Provide specifics about the investigation

Get into a debate

Provide specifics about remedial measures

# Recommended Final Steps

## Maintain a separate investigative file, to include:

- Copy of the complaint (if written)
- Interview notes
- Relevant policies
- Documentation gathered during the investigation
- Physical Evidence
- Electronic Evidence
- Chain of Custody can be important if criminal allegations possible
- Written report, if one was created

**Keep Separate from  
personnel file**

Sole exception = record of  
discipline imposed

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# Questions?

Please add any additional questions to the Q&A box

**Thank you!**