Internal Investigations of Employee Complaints and Misconduct: Avoiding Costly Missteps

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Avoiding Costly Missteps in Internal Workplace Investigations

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Legal compliance - avoid/reduce exposure to liability

- Faragher and Ellerth cases – U.S. Supreme Court – 1998 – investigation as affirmative defense to Title VII hostile work environment claims

- *Cotran v Rollins Hudig Hall Intl, Inc.*, 17 Cal. 4th 93 (1998) – investigation as affirmative defense to liability for wrongful termination
Why Conduct Investigations?

- Employee/Community relations
- Good corporate citizen/eliminate unwanted behavior
- Improve efficiency/workplace environment
- Respond to a workplace incident
Compliance Agencies & AWI Guidance

New DFEH Guide for California Employers (May 2017)
[Coming soon – new EEOC Guidelines have been proposed]
Association of Workplace Investigators (AWI) – Guiding Principles for Conducting Workplace Investigations – last revised 2014
Investigation Practices Addressed

- **Due Process**
  - DFEH: Interview relevant witnesses and collect relevant documents – don’t need to interview every potential witness [EEOC/EEOC/AWI silent on this]
  - Come to a reasonable and fair conclusion
  - AWI – …strive in good faith to make reasoned findings.

- **Confidentiality**

- **Timeliness**
Impartiality

- DFEH - “The investigation should be impartial” speaks to assessing biases. [EEOC/EEOC – “objective”]
  - EEOC – “conducted by an impartial party”
  - AWI uses term impartial and provides details
- Should also look to whether there will be perception of bias. [AWI includes this]
- Generally bad idea to have investigator have less authority that the complainant or respondent.
Investigator Qualifications and Training

- **DFEH**
  - Knowledge of laws, policies, investigative techniques, documentations.
  - Good communication skills.
  - Training from professional organization (like AWI)

- **EEOC** – “well-trained in the skills required for interviewing witnesses and evaluating credibility.”]
Types of Questioning

- **DFEH** - Open-ended questions – not an interrogation
- **EEOC** – Information with examples of questions but silent on types of questions (open-ended).
- **AWI** – Discusses open-ended questions and other information about interviews.
Credibility Determinations

- **DFEH** - Should make credibility findings when necessary, such as “he said/she said” situations - Don’t need an independent witness. [Exercise caution with demeanor as the basis for a credibility determination]
  - **EEOC** – If conflicting versions may be necessary to make credibility assessment; “use guidelines to weigh the credibility of all the relevant parties.”
  - **AWI** – Credibility is mentioned under witness interview section but nothing about the necessity of making them or how to do so.
Findings should be based on a “preponderance of the evidence” standard.

Also called “more likely than not” – investigator finds that it is more likely than not that the conduct alleged did or did not occur.

Standard is not “clear and convincing evidence” or “beyond a reasonable doubt.”
Not Reaching a Legal Conclusion

- DFEH - Recommended practice to make factual findings not legal conclusions.
  - Sometimes internal investigators will reach conclusions regarding violation of a policy.

- EEOC/EEOC silent on this.

- AWI – Legal conclusions…only if they are requested.
Anonymous Complaints

- DFEH –
  - Should be investigated.
  - Method will vary based on information provided.
  - Possible to do an environmental assessment/survey.
  - Not specifically addressed by EEOC/EEOC/AWI
Which Complaints to Investigate

- Allegations of violations of law
- Allegations of violations of significant policies, ethics, values
- Anything that would require action should the allegations be true if you do not yet know if they are true
- Diagnostics – action prior to knowledge can be a dangerous thing!
How Are Investigations Initiated?

- Employee/Third Party Complaint
  - Face-to-face
  - Written – letter, memo, email
  - Anonymous

- Lawsuit

- Government investigation

- Discovery of deficiency/anomaly

- Periodic review/update/audit

- Internet blog/social media/news article
What written policies exist regarding investigations?
- Unlawful harassment/discrimination
- Wage/hour violations
- Illegal conduct
- Whistleblower
- Violation of corporate policy
- Open door
- Others

What tone/message is communicated by management?
- How are investigations conducted/resolved?
- Is commitment expressed outside of written policies?
Structuring the Investigation

- Intake process
- Conducting the investigation
- Resolution
Methods of reporting

- Face-to-face
- Telephone
  - Direct to designated individual(s)
  - Designated hotline (often for anonymous complaints)
- Written
  - Letter, memo, or email to designated individual(s)
  - Designated “inbox” or web link

Goals

- Ease of use – do not make burdensome/complicated
- Sufficiently communicated
Structuring the Investigation – Intake Process

- Not every investigation necessarily involves “intake”
- Company initiated investigations
  - Develop procedure for audits/reviews of policies/practices
  - Develop procedure to initiate investigation in response to blog/article/news story/incident
For company initiated investigations

- Schedule regular, periodic reviews of policies/practices
  - *E.g.*, Annual or bi-annual review of exempt/non-exempt designations

- Designate, where possible, employees to initiate investigations on the schedule provided

- Where not practical to designate particular employee, understand potential need to initiate and respond quickly
  - *E.g.*, Crisis management
Who should investigate?

- HR
- Supervisor/manager
- Third-party
  - Consultant
  - Investigator
  - Attorney
- Other
Structuring the Investigation – Selecting an Investigator

- Pros and Cons of Internal vs. External
  - Bias or perceived bias
  - Level of expertise
  - Licensing issues
Qualifications to Investigate

- Depends on state
- Most states have a Business & Professions Code
- In California – if external, must be a licensed private investigator or an attorney acting as an attorney (with an attorney/client relationship)
Investigator Skill Sets

- Know how to ask questions
- Know how to gather facts and documents
- Gain trust of witnesses
- Know how to put witnesses at ease
- Know how to handle emotional witnesses
- Keep large volumes of material organized
- Use good judgment to avoid inappropriate comments that could undermine credibility of investigation or expose company to liability
- Articulate speaker
- Capable of providing clear, convincing, and credible testimony
- Excellent writing skills
- Excellent analytical skills
- Knowledge of relevant law
Other Considerations

- Job titles or positions of employees involved in alleged incident(s)
- Type of conduct at issue
- Potential liability
- Likelihood of enforcement action, litigation, and/or publicity
Potential Pitfalls With Selecting An Internal Investigator

- Actual or perceived preconceived ideas, biases, or personal agendas that interfere with ability to investigate the complaint effectively

*Quela v. Payco-Gen. Am. Credits, Inc.*, 99 C 1904, 2000 WL 656681 (N.D. Ill. May 18, 2000) (granting default judgment against employer where investigation of sexual harassment allegations was tainted by personal bias and self-interest, investigator held high managerial position, and a person who aided the investigation was a business partner of the accused)
Potential Pitfalls With Selecting An Internal Investigator (cont.)

- Inadequate investigation due to inexperience of investigator

*Smith v. First Union Nat. Bank*, 202 F.3d 234, 239, 245 (4th Cir. 2000) (criticizing employer’s investigation where human resource representative and investigator “never investigated a sexual harassment claim when he investigated [the victim]'s complaints” and investigation questions focused on victim’s complaints about supervisor’s management style while ignoring her sexual harassment allegations)
Potential Pitfalls With Maintaining the Attorney/Client Privilege

- Communications and notes may not be protected by attorney-client privilege

*Jackson v. Deen*, CV412-139, 2013 WL 3863889, at *5-6 (S.D. Ga. July 25, 2013) (finding attorney’s consistent role in “investigating harassment complaints and formulating human resources procedures [. . . ] renders his involvement in these activities discoverable” and, thus, waives any privilege for investigation documents)

*Wellpoint Health Networks, Inc. v. Superior Ct.*, 59 Cal. App. 4th 110, 127 (1997) (finding that attorney’s communications with employee while investigating the employee’s Title VII complaints were not privileged because company’s attorney acted as a fact investigator, not a legal advisor)
The majority position is that “when a Title VII defendant affirmatively invokes a Faragher–Ellerth defense that is premised, in whole in or part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.” Angelone v. Xerox Corp., 09-CV-6019, 2011 WL 4473534 (W.D.N.Y. Sept. 26, 2011), reconsideration denied, 09-CV-6019-CJS, 2012 WL 537492 (W.D.N.Y. Feb. 17, 2012)
California case involving investigation conducted by an attorney (Oppenheimer) for public entity after plaintiff quit. Attorney had retainer agreement stating the investigation was legal work done under the attorney-client privilege. Court holds privilege can be maintained if the investigation was not part of the defense and attorney conducted investigation with understanding it the privilege would hold.

City of Petaluma v Superior Court (2016) 248 Cal. App. 4th 1023
Potential Pitfalls With the Attorney-Client Privilege (cont.)

- Attorney may be disqualified as trial counsel if attorney must testify

- *Harding v. Dana Transport Inc.*, 914 F. Supp. 1084, 1103 (D.N.J. 1996) (finding employer waived privilege by asserting affirmative defense of good faith investigation and, by combining role of attorney and investigator, its attorney had to be deposed regarding the nature and scope of the investigation)
Potential Pitfalls With the Attorney-Client Privilege (cont.)

- But materials may remain privileged in certain instances.
- Investigation in anticipation of litigation (i.e., work product protection) See Fed. R. Civ. P. 26 (b)(3)
- Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010) (denying plaintiffs’ request for interview notes and memoranda of attorney hired to conduct an internal investigation and defend school district, noting plaintiffs failed to show a substantial need for these documents and courts are “extremely reluctant to allow discovery of attorney work product simply as impeachment evidence”)
- Prince v. Madison Square Garden, L.P., 240 F.R.D. 126, 127-28 (S.D.N.Y. 2007) (ordering employer to produce all internal investigation materials, including an investigating attorney’s handwritten interview notes, leading up to employer’s second investigation, explaining that the employer’s investigation shifted from an internal investigation to mounting a legal defense)
Potential Pitfalls With the Attorney-Client Privilege (cont.)

- Legal advice in connection with investigation
- *In re: Kellogg Brown & Root, Inc.*, No.14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014) (finding that attorney-client privilege protected investigation conducted by in-house counsel upon receiving notice of alleged misconduct, as investigation was to ensure compliance with applicable law)
- *Walker v. Cnty. of Contra Costa*, 227 F.R.D. 529, 535, 537 (N.D. Cal. 2005) (finding waiver of attorney-client privilege and work product protection, and requiring production of the employer’s internal pre-litigation investigation report and the investigative report of employer’s attorney, but permitting employer to redact the finding and conclusion portion of the report, which contained attorney’s legal analysis regarding of the adequacy of defendants' investigation)
Retaining Third Party Investigator To Collaborate With Attorney

- Company may preserve the attorney-client privilege and work product doctrine if an outside consultant conducts the investigation.
- Attorney could review material and provide direction and legal advice based on the information collected.
- Individuals involved in the investigation may be available to testify about steps taken without waiving privileges.
- Beware of the necessity to comply with the Business & Professions Code in California or similar statutory schemes – that is, the outside consultant needs to comply with the code.
Stoner v. New York City Ballet Co., 99 CIV. 0196 BSJMHD, 2003 WL 749893, at *2 (S.D.N.Y. Mar. 5, 2003) (finding that employer preserved attorney-client privilege and work product protections by not asserting advice of counsel as a defense and by utilizing an independent investigator, which employer made available for deposition along with other employees)
Do Communications Between Counsel And Third Party Investigator Remain Privileged?

- Is third party investigator “the functional equivalent of an employee”?

*In re Bieter Co.*, 16 F.3d 929, 937-38 (8th Cir. 1994) (explaining that “too narrow a definition of ‘representative of the client’ will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely”)
• Limited scope of retention agreement with an attorney retained for the purpose of doing an investigation

• Agreement is for attorney services and states will be privileged

• There is an understanding that if the investigation is used as a defense in litigation the privilege will be waived (possibly with redactions)
What should guide the investigation

- Legal requirements (timeliness, thorough, objective)
- Workplace Policies
- The scope of the investigation- The employer and investigator should develop a mutual understanding concerning the scope of the investigation.
- The “scope” refers to the issues being investigated.
- Principles of Fairness.
Communications During Investigation

- Investigator should communicate with employer at outset as to:
  - a) scope
  - b) logistics
  - c) background
  - d) Identify potential witnesses

- Avoid communicating with anyone (outside of interviews) who is or may be directly involved with matters being investigated.

- If feasible, employer representative should not be a witness or participant in the matter being investigated.

- Investigator should avoid communicating conclusions before investigation is complete.
Introduce Yourself
Clarify Your Role: Fact-finder, etc.
Clarify your Role: Independence
Set Respectful Tone Upfront: Maximize chance of obtaining relevant information
Document interviews in a reliable and consistent manner (through note-taking, recording, or some other method).
Confidentiality Instruction…
Confidentiality Instruction: NLRB Decisions have made an impact in non-union workplaces

**Banner Health System v. NLRB, No. 15-1245 (D.C. Cir. 2017)**

- Blanket Confidentiality Instruction violates Section 8 (a) (1) of the NLRA.
- Employer must show a legitimate business justification that outweighs employees’ Section 7 rights. Concern must be more than a generalized concern with protecting the integrity of the investigation.
- Employer’s burden to establish whether in any given investigation witnesses need protection or evidence is in danger of being fabricated or there is a need to protect a cover-up. Document!
American Baptist Homes of the West d/b/a Piedmont Gardens (NLRB 2012), D.C. Cir., No. 15-1445 (June 6, 2017).

- NLRB overruled long standing rule (1978) (Anheuser-Busch) protecting witness statements obtained during investigation.

- Holding: NLRB applied balancing test to be used if an employer refuses to turn over witness statements alleging a confidentiality interest in protecting witness statements from disclosure.

- The party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists based on the specific facts in the case and that it outweighs the requesting party’s need for the information.
Statements To Witnesses/Confidentiality

- Tension between Banner, Piedmont, and need to know and protect integrity of the investigation process and objective to learn the truth. Recognized by EEOC in 2016 Task Force Report.

- Document concerns regarding witness tampering, spoilation, etc. If so, determine whether investigation warrants confidentiality instruction.

- Confidentiality to extent possible, but executives and attorneys will have access to information.
Witnesses may be less forthcoming because of a fear of retaliation by employer, supervisor, accused, or co-workers. The investigator should advise the employee that the policy/law prohibits retaliation.
Employee representative present during investigatory interview

Employees in a unionized environment have a right to have a union representative present during an investigatory interview where the employee reasonably believes disciplinary action may result. See N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 256, 266-67 (1975) (finding that Section 7 of the NLRA “creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline)

At present, a non-union employer may, but is not required, to provide such Weingarten rights to employees.
In one recent case, NLRB panel found that an employer unlawfully threatened a union steward with discipline for using notes while representing an employee during an interview.

*Howard Industries, Inc., Transformer Division* (15-CA-018637; 362 NLRB No. 35)
Special Circumstances…

- Do not interfere with other investigations (DOL, Police, etc) by coaching witnesses.

- Do not retaliate against the employee who complained to the regulatory agency.
  - Perez v. Lear Corporation Eeds & Interiors [http://ELD/PerezLear051115.pdf](http://ELD/PerezLear051115.pdf)

- Continue to conduct your independent investigation even if the claimant reaches a settlement or suit is dismissed by EEOC.
Information the investigator should gather from witnesses:

Facts relevant to issue(s) being investigated.

Ask open-ended questions:

- Who
- What
- Where
- Why
- When
- How

Ask witnesses who else has knowledge.

Ask about motive to fabricate when no admission.
Other “facts” to discover…
- Where documents are located
- *Social media* posts and text messages
- Look at the photographs and other evidence.
- Whether documents once existed and now do not-
  - How destroyed/lost, when and why?
    Keep prodding.
“Thorough” investigation

- Take investigation seriously
- Hear all Sides- The objective is to determine the truth, not to justify decision already made, and not to justify discrimination or retaliation.
- Can be a fatal flaw not to give the accused the opportunity to fully respond to the complainant’s version of the event.
- Take and maintain interview notes and other evidence acquired.
- Follow up when new information is learned.
AVOID BIAS

- No interest in outcome
- Make sure that your process or manner of investigation does not suggest bias. Keep your process consistent.
- Be aware of implicit bias
- Avoid “rush to judgment”

REMEMBER: Goal is to determine the truth.
Judgment for plaintiff in part due to testimony by plaintiff’s expert witness’ testimony concerning numerous shortcomings in the investigations:
- Complainant and alleged harasser were interviewed together.
- Supervisor conducted the investigation and was not a trained investigator or in HR.
- No other witnesses were interviewed.
- An inadequate investigation can be evidence of pretext.
Federal Statute – proposed but little traction

State Statutes -- expanding

- More than half of the country has laws that limit access to personal accounts (25 states)
- 23 states considered/adopted laws in 2015 alone:

- Limitations:
  - Requiring employer access (passwords, usernames)
  - Requesting access
  - Fines??
State statutes

- What about when employee information is NEEDED for an investigation
  - harassment occurred over social media
  - alleged financial misconduct involves insider information provided via social media
- Investigation Exceptions:
  - Securities/financial law issues or proprietary data sharing – many have this exception
  - General employee misconduct/violation of the law – few, but some have this exception
Structuring the Investigation – Fact Gathering (Social Media Issues)

State statutes – Practical Strategies:

- Ask witnesses for ALL sources of information, including electronic sources (they may grant social media access independently)
- Review publicly available social media
- If “private” social media appears to have relevant information explain (1) right not to disclose and (2) potential impact on investigation (akin to witness refusing to meet)
Preserving evidence – refresher:

Duty to preserve evidence, including electronically stored information (ESI), arises

“When the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”


“The duty to preserve evidence includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation.”

Structuring the Investigation – Litigation Issues (Litigation Holds)
This duty to preserve could extend to social media and other personal accounts and devices – fact specific

*Painter v. Atwood*, 2:12-CV-01215-JCM, 2014 WL 1089694 (D. Nev. Mar. 18, 2014) (imposing an adverse inference instruction with respect to plaintiff’s deleted Facebook comments, which stated that she enjoyed working for defendant, despite the fact that “[p]laintiff's counsel may have failed to advise [p]laintiff that she needed to save her Facebook posts and of the possible consequences for failing to do so [because] the deletion of a Facebook comment is an intentional act, not an accident,” and the court inferred that the comments were deleted after she initiated her suit)

*Stream Companies, Inc. v. Windward Advertising*, Civil Action No. 12-cv-4549, 2013 WL 3761281 (E.D. Pa. July 17, 2013) (awarding sanctions for not only failing to produce emails from individual defendants’ personal accounts, but also actively deleting them; and further awarding sanctions for failing to produce employees’ personal electronic devices, such as iPad and iPhone, when previously ordered to “produce images for all electronic devices including ‘portable devices’ and ‘personal and work phones’”) (emphasis in original)
Preserving evidence

- Gather documents and electronic files during investigation – particularly anything obviously relevant – AND instruct witnesses to preserve

- Construe scope of subjects about which files should be preserved expansively – just preserving, not collecting or deciding they are relevant

- Reassess scope of necessary litigation hold as investigation proceeds – often expands

- Duty to preserve evidence, including electronically stored information (ESI), probably arises when investigation starts
Preserving evidence

- Destroy or keep notes from the investigation?
  - Usually just keep them and avoid any concerns about spoliation
  - *Hill v. Phillips 66 Co.*, No. 14-CV-102-JED-FHM (N.D. Okla. 2014) -- even though notes were shredded, incorporating them into investigation summary prevented employee from suffering any prejudice and allowed employer to avoid sanctions
Self-Critical Analysis Privilege

- Decision to initiate investigation often fraught with concern that results are uncertain – particularly pattern or practice issues

- Yet, employer wants to improve situation

- Is it possible to investigate without exposing company to risk of increased liability?
Self-Critical Analysis Privilege


“protect from disclosure documents that contain candid and potentially damaging self-criticism, where disclosure of those documents would harm a significant public interest” – Harris v. One Hope United, Inc.

Varied treatment from jurisdiction to jurisdiction

Self-Critical Analysis Privilege

Qualified Privilege

- Balancing Test

- Weighing public interest in the underlying investigative analysis versus presumption favoring full disclosure and avoiding expanding “privilege” against production
Self-Critical Analysis Privilege

The following criteria are considered:

1) Information sought must be the result of a critical self-analysis undertaken by the party seeking protection.
2) There must be a strong public interest in preserving the free flow of the type of information sought.
3) Information sought must be of the type whose flow would be curtailed if discovery were permitted.
4) Information sought must have been prepared with the expectation that it would be kept confidential.
5) Information sought must be subjective analysis designed to have a positive societal effect.

Self-Critical Analysis Privilege (cont.)

Some courts have recognized the self-critical analysis privilege in employment cases

*Scott v. City of Peoria*, 280 F.R.D. 419, 424 (C.D. Ill. 2011) (stating that “in the employment context, courts have extended the privilege to protect documents created by private employers legally mandated to critically evaluate their hiring and personnel policies”)

*Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 386 (N.D. Ga. 2001) (extending privilege to company’s diversity council reports regarding company’s attempts to create diverse workplace and “improve the company's performance in equalizing employment opportunities” but declining to extend the critical self-analysis privilege to company’s “affirmative action plans and attachments thereto; yearly and monthly reports concerning utilization goals by branch; job area acceptance range reports; back-up data reports concerning job impact; reconciliation reports; worksheets for determining OFCCP eight-factor analyses; and materials concerning progress toward goals”)
Many courts have not applied the self-critical analysis privilege in employment cases:

Self-Critical Analysis Privilege – Practical Approach

- Very difficult to rely on ability to avoid producing investigation records in potentially ensuing litigation
  - Presumption against, case-by-case approach unreliable
  - Waiver – often need to affirmatively use the investigation documents and thus expect all materials to be disclosed

- Yet, worth considering making the argument against production
  - Some support
  - Could prevent or limit disclosure, or at least delay
Structuring the Investigation – Litigation Issues

Multiple Potential Litigants

- Complaining Employee
- Accused Employee
- Witnesses (retaliation, whistleblowers)
- Future Complaining Employees
- Agencies – pattern or practice??
Multiple Potential Litigants

- “Stick to your guns” – but very deliberately
- Carefully evaluate findings and limit conclusions to specific issues and role of your investigation (if not asked to provide recommendations, do not do so in any of your documents, even your notes)
- Separately, repeatedly review any written report from perspective of each potential litigant
Concluding the Investigation – Reporting Back

- Communicating back to parties
- Communicating back to supervisors/managers
- Communicating back to witnesses
- Weighing privacy rights with the functioning of the workplace
Concluding the Investigation – Reporting Back

- Written vs. Oral Report
- Full Report vs. Executive Summary
- Who has access to the report?
Final reports of workplace and other investigations may be discoverable


In the harassment context, if a company concludes that misconduct did occur, it should take remedial measures that are “reasonably calculated” to end the unlawful conduct.

*Andreoli v. Gates*, 482 F.3d 641, 644 (3d Cir. 2007) (explaining that “[e]ven if the remedial action does not stop the alleged harassment, it is “adequate” if it is “reasonably calculated” to end the harassment”)

*Smith v. First Union Nat. Bank*, 202 F.3d 234, 240, 245, 249 (4th Cir. 2000) (holding that employer failed to adequately address harassing behavior by failing to reprimand harassing supervisor or even discuss the topic of sexual harassment with him, and employer simply put supervisor on ninety-day probation)

*Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131-32 (4th Cir. 1995) (finding employer’s response to allegation of harassment was not “reasonably calculated to end the harassment,” explaining that employer did not warn, reprimand, or counsel harasser)
Concluding the Investigation – Resolution

- Company action
  - Reasonably calculated to end misconduct
  - What is public/confidential – special issues for public employers
  - Identify improvements/changes that should be implemented
  - Monitor and follow-up as appropriate
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Stephen Stern is a partner in the firm’s employment, insurance, and commercial litigation practices.

In connection with his employment practice, Mr. Stern helps employers minimize exposure to liability by developing and implementing effective employment policies and practices. In this regard, he advises employers on strategic matters, such as trade secret protection programs, non-compete, non-solicitation, and confidentiality agreements, wage and hour practices, privacy issues, independent contractor arrangements, employee handbooks, and document retention practices. In addition, he advises employers on issues that arise on a day-to-day basis, such as leave requests, employee discipline, accommodations for individuals with disabilities, and termination decisions. Mr. Stern also has been retained to conduct highly sensitive and complicated investigations. When litigation has been required, Mr. Stern has successfully represented clients in federal and state courts and before federal, state, and local administrative agencies, including the EEOC, Department of Labor, and Department of Justice. His cases have involved claims under Title VII, ADEA, ADA, FLSA, FMLA, SOX, NDAA, IRCA, and similar state statutes. In addition, he has litigated numerous trade secret claims and cases involving non-compete, non-solicitation, and confidentiality agreements, and related tort claims.

Mr. Stern also litigates a variety of other contract, tort, and statutory claims. In this regard, Mr. Stern has litigated matters involving consumer protection claims, bank loans, real estate, ownership interests in privately-held companies, unfair competition, civil RICO and other fraud claims, commercial contracts, mass torts, professional discipline, false imprisonment, and civil rights violations.

In addition to his law practice, Mr. Stern is involved in community activities, such as B’nai B’rith International, for which he serves on the Executive Committee and Board of Governors. Through B’nai B’rith, Mr. Stern attends embassy events and policy conferences, and meets with leaders of foreign governments and members of various communities, among other things.
Presentations and Speaking Engagements

“Drafting Employee Handbooks: Techniques For Avoiding Liability,”
myLawCLE Internet Video Broadcast (November 5, 2015)


“Legal And Other Considerations For Conducting Effective Investigations,”
AAAED National Conference and Annual Meeting (June 4, 2015)

“Including Individuals With Disabilities – Understanding The ADA,”
Montgomery County SHRM (April 30, 2015)

“Top 4 Employer Hot Spots – Off Duty Conduct, Background Checks, Social Media, and Wage and Hour,”
myLawCLE Internet Video Broadcast (March 11, 2015)

“Legal Issues with Social Media,” MACPA Technology Conference (December 11, 2014)

“Considerations When Analyzing and Defending Discrimination and Retaliation Claims,”
myLawCLE Internet Video Broadcast (December 10, 2014)

“Legal and Other Considerations for Conducting Effective Workplace Investigations,”
myLawCLE Internet Video Broadcast (October 23, 2014)

“Legal Aspects of Social Media,” Maryland SHRM State Conference (October 6, 2014)

“Conducting Effective Investigations,”

“Risk with Social Media: HR’s Role in Protecting the Company,”
Virginia SHRM State Conference (April 30, 2014)

“How to Protect Trade Secrets and Other Confidential Information,”
Anne Arundel Community College Cybersecurity Symposium (February 15, 2013)

“Strategies and Legal Considerations When Conducting Investigations,”
Northern Virginia SHRM (February 15, 2011)

“Strategies for Wage & Hour Compliance: How to Avoid the Wave of Wage & Hour Litigation,”
Northern Virginia SHRM (June 15, 2010)

“Navigating Compliance with the ADA,” 6th Annual Maryland SHRM State Conference (December 7, 2009)

“How to Protect Your Company in an Economic Downturn,”
Montgomery County SHRM Professional Development Seminar (May 13, 2009)

“Summary of Intellectual Property Law Basics” and Expanded Seminar,
Motorcycle Industry Council’s Annual Meeting (February 15, 2008)

“Harassment Prevention,” American Correctional Association Winter Conference (January 16, 2008)
Elizabeth Gramigna
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Elizabeth Gramigna has 25 years of experience practicing employment law. She has conducted over 100 investigations involving conduct of executives, board members, political officials, police officers, teachers, and employees of private and public sector organizations. See more details concerning her experience below.

**Education/Certifications:**
Juris Doctor, Rutgers University
Bachelor of Science in Commerce, Dual major in Industrial Relations and Management, concentration in Industrial Psychology; Rider University
Senior Professional in Human Resources (SPHR)
Association of Workplace Investigators (AWI) National Training Institute: Certificate of Completion of Program
Certificate of Completion of program in Human Resources Professional Development, Farleigh Dickinson University
SHRM Certificate of Achievement for successfully demonstrating skill and knowledge required of professionals in the Human Resources field as measured by the Society for Human Resource Management’s Learning System
Federal Mediation Conciliation Services (FMCS), Mediation Skills for the Workplace: Certificate of Training
Certificate of Basic Mediation Training (ICLE)

**Bar Admissions**
1988, New Jersey; Pennsylvania; U.S District Court, Districts of New Jersey and Eastern District of Pennsylvania; and the United States Court of Appeals, Third Circuit

**Publications**
“2013 Report of the Workplace Investigations Subcommittee of the Employment Rights & Responsibilities Committee Section of Labor and Employment Law, American Bar Association” (contributed Third Circuit Case and NLRB Summaries).
Amy Oppenheimer has over 30 years of experience in employment law, as an attorney, investigator, arbitrator, mediator, and trainer. She is also a retired administrative law judge. Her areas of expertise include preventing workplace harassment and responding to allegations of harassment, discrimination, retaliation, whistleblower claims, and other forms of workplace misconduct. She does public speaking frequently on these issues.

Amy has trained employees and employers throughout the country in how to prevent harassment; in how to investigate workplace harassment, discrimination, and retaliation; in diversity in the workplace; and in how unconscious bias impacts decision-making. She has investigated EEO complaints since 1986. She has performed impartial investigations for a large range of employers – public and private, large and small.

A trial qualified expert in State and Federal court, Amy has testified for both the plaintiff and the defense about employment practices in preventing, responding to and investigating workplace harassment.

Amy is the author of numerous articles about harassment and discrimination, and is co-author of one of the few books about the practice of investigations: Investigating Workplace Harassment, How to be Fair, Thorough and Legal (Society of Human Resource Management, 2003).

Amy is the founder and past President of the Board of the Association of Workplace Investigators, Inc. (AWI), and is Vice-Chair of the Executive Committee of the Labor and Employment Section of the State Bar of California. She is past President of the Board of the Berkeley Dispute Resolution Services.
Peter G. Land is a partner in the Higher Education and Labor & Employment Practice Groups at Franczek Radelet P.C. Pete represents private and public sector higher education, academic medical center, and business clients in a wide array of litigation and counseling matters. Pete regularly advocates on behalf of institutions in court and agency proceedings, mediations, and arbitrations, as well as counseling on employment and student disputes, policy drafting, and training.

Pete also has extensive experience with sensitive internal investigations regarding senior administrators, preparing confidential and privileged reports, and assisting decision-makers in addressing investigative findings in a variety of contexts, including board-mandated, government, and athletic-department investigations.

Pete has served as lead counsel in a variety of litigation, including employment discrimination and harassment cases, faculty terminations and tenure disputes, institutional governance issues, First Amendment disputes, student matters, school and program closings, non-compete agreement and trade secret disputes, and defamation and privacy issues. He has also counseled institutions on accommodation and leave requests pursuant to the ADA and FMLA, privacy issues and compliance with FERPA, academic program closures and institutional affiliations, reductions in force, compliance with Title IX student-discipline and gender-equity standards, accreditation issues, and investigations by the DOE’s Office for Civil Rights, the EEOC, and state and municipal administrative agencies. Pete has published and structured training programs on Title IX issues.

Prior to joining the firm, Pete was a partner in the firm of Babbitt, Land & Warner LLP (1998-2011), a Chicago firm that concentrated in representing colleges and universities. Pete also practiced as an associate at the Chicago firm of Butler, Rubin, Saltarelli & Boyd, and he worked on an interim basis in the general counsel's office at two major Chicago universities and at a Fortune 1000 company.

Pete is a member of the National Association of College and University Attorneys (NACUA). Pete has served on NACUA committees and has spoken at seminars addressing a variety of liability issues, including internal investigations, supervisory best practices, faculty speech, sexual assault protocols, and other institutional compliance matters.
Representative Experience
Led investigation for a Big Ten University into student-athlete allegations of overly aggressive injury management and scholarship withdrawal discrepancies with respect to the Football Program and Women’s Basketball Program. Counseled clients and conducted confidential, privileged internal investigations of sensitive allegations against senior administrators, executives, staff, or faculty members for variety of alleged misconduct; prepared reports and assisted decision-makers in addressing investigative findings.
Served as lead counsel for several private institutions of higher education in litigation by tenured faculty, medical school faculty, students, administrators, and staff seeking injunctions or damages for contract, whistleblower, discrimination, retaliation, and defamation claims.
Served as lead counsel for several public universities, senior officials, and board members in litigation initiated by tenured faculty members and senior administrators regarding discrimination, retaliation, due process, and state ethics law claims.
Defended online marketing company against unpaid commissions claims and asserted counterclaims for violations of trade secret statute, non-compete agreement, and electronic spoliation against former employee that resulted in payment by plaintiff-employee to defendant-employer
Represented publicly-traded banking institution with respect to reductions in force, employment litigation, and successor liability issues following acquisition.
Advised for-profit education client regarding Title IX gender-equity issues relating to athletic program adjustments and developments.
Designed and delivered training to national for-profit education client’s employee relations staff regarding conducting and documenting internal investigations including “hot line” inquiries.

Publications
“Applying the Affordable Care Act’s Employer Mandate Rules in the College and University Setting,” NACUANOTES, Vol. 12, No. 5, May 2014 (co-author)
“The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin,” The Federal Lawyer, August 2013 (co-author)
“Anticipating and Managing the Legal Risks of Academic Program Closures;” NACUANOTES, Vol 9 No. 2; Nov. 3, 2010 (co-author)
“The OCR Encourages Use of Student Interest and Abilities Survey,” Council on Law in Higher Education Regulatory Advisor; August 2005