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Conducting Effective Workplace Investigations: Key Employment Considerations

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The image features a central white rectangular area containing the text "United States". This central area is flanked by two horizontal bands of an abstract, layered blue pattern. The pattern consists of various shades of blue, from light to dark, creating a sense of depth and movement through overlapping geometric shapes.

United States

Sources of Protected Activity

Title VII

State Anti-Discrimination/Retaliation Acts

State Leave Acts

Securities Laws (SOX, Dodd Frank, Etc.)

Americans with Disabilities Act

OSHA/State Equivalents

Workers' Compensation Laws

Typical Complaints

Discrimination

Harassment

Retaliation

Failure to
Accommodate
Disability

Failure to
Provide Leave
of Absence

Unsafe Work
Environment/
COVID-19

Pay Equity

Wage Hour

Drug/Alcohol
Use

Theft or Fraud

Violation of
Company
Policies

Bullying

Purpose of Investigations

- Whether allegations of misconduct have merit
- Who was involved in misconduct
- Discipline or other responses
- Preventative steps
- Improve morale
- Comply with legal requirements
- Establish an affirmative defense
- Reduce/avoid regulatory, civil, or criminal liability



Improperly Conducted Investigations

Harm morale/culture

Waste time/legal fees

Subject to attack by opposing counsel

Potentially discoverable

Additional claims from accused or others

Who Should Conduct the Investigation?



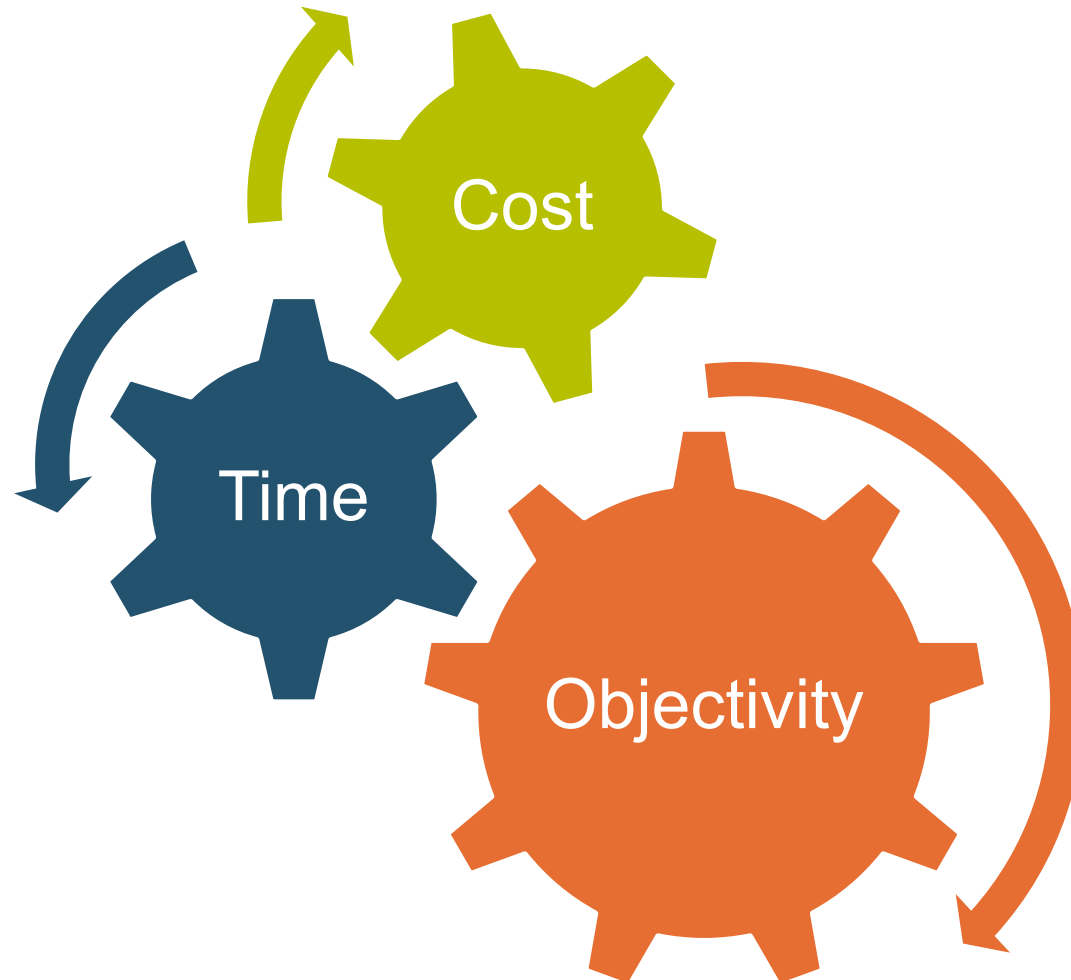
Human resources or
other internal

In-house counsel

Outside investigator

Outside counsel

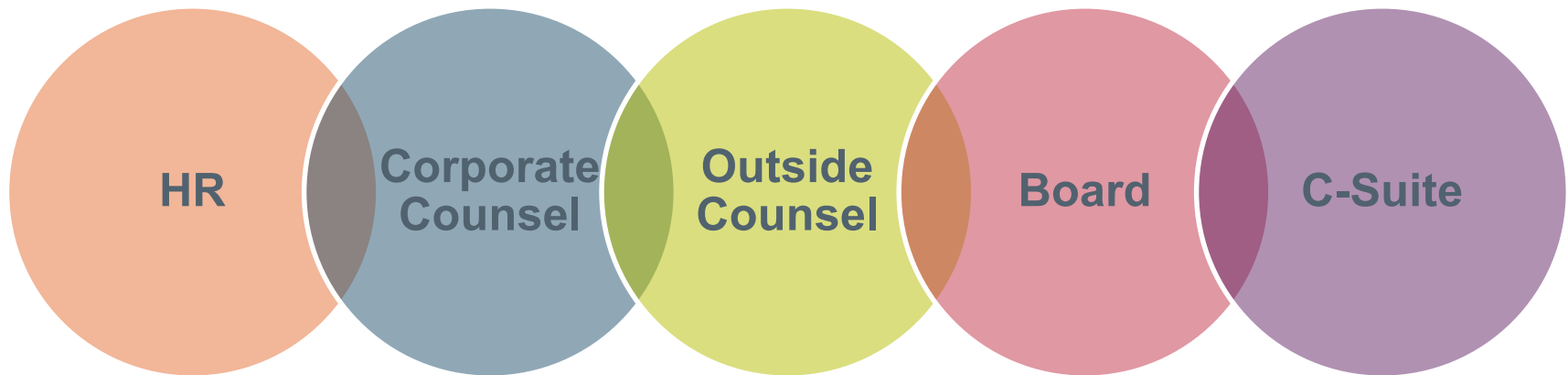
Considerations



Defining the Scope



Who Supervises Investigation



Considerations: Qualified Investigator

Expertise

Unbiased

Legal framework

Discreet

Efficient

Thorough

Bandwidth

Expense

In many states, including CA, OR, WA, TX, and PA:

- External Investigator must be:
 - Attorney or Supervised by an Attorney
 - Licensed Private Investigator (not permitted in Pennsylvania)

Privilege Issues

**Either:
Privileged**

**Or:
Affirmative
Defense**

**BUT NOT
BOTH**

Initial Steps



Potential Evidence

Personnel Files

Employer Policies
and Procedures

Emails

Texts

Cellphones

Audio/Video

Social Media

Timecards/Logins

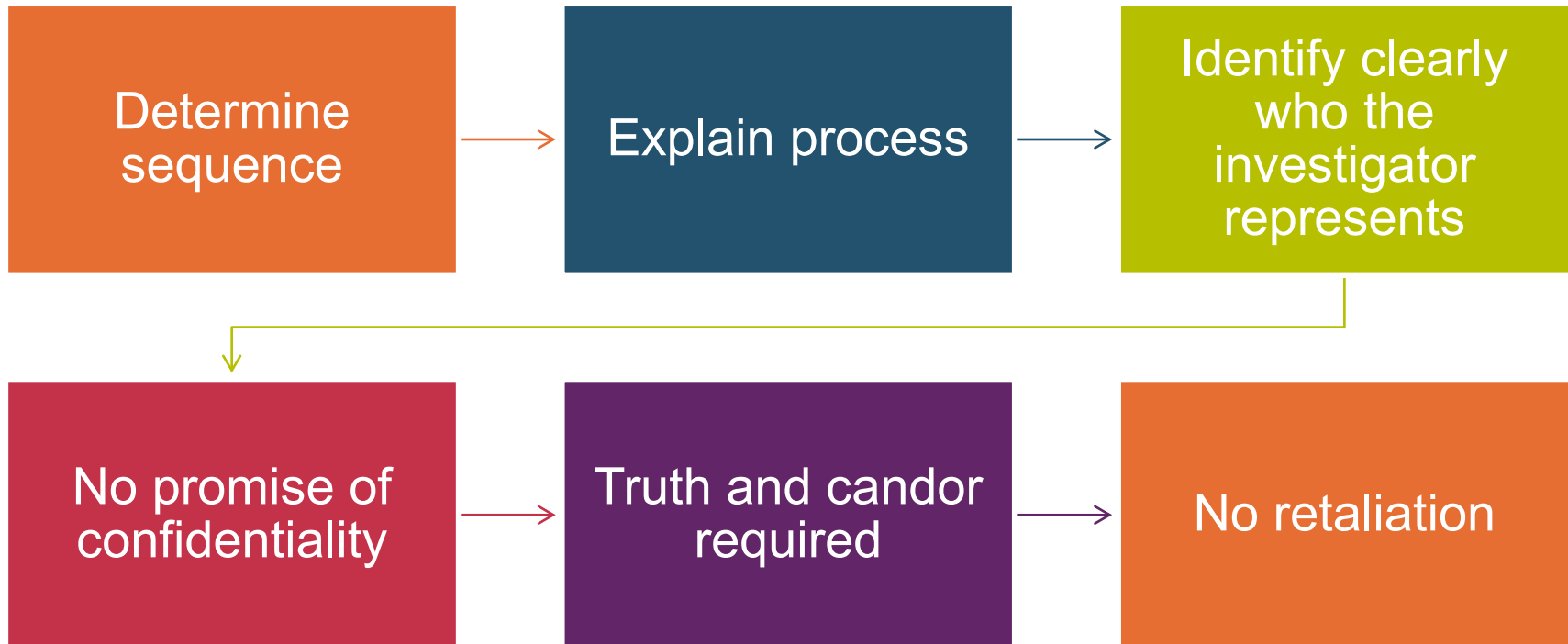
Journals



Calendars



Procedural Issues: Interviews



Interview Questions

Questions Should be Open-Ended:



Interview Topics



Don'ts

Accusations

Arguments/Emotion

Legal terms (“discrimination,” “harassment”)

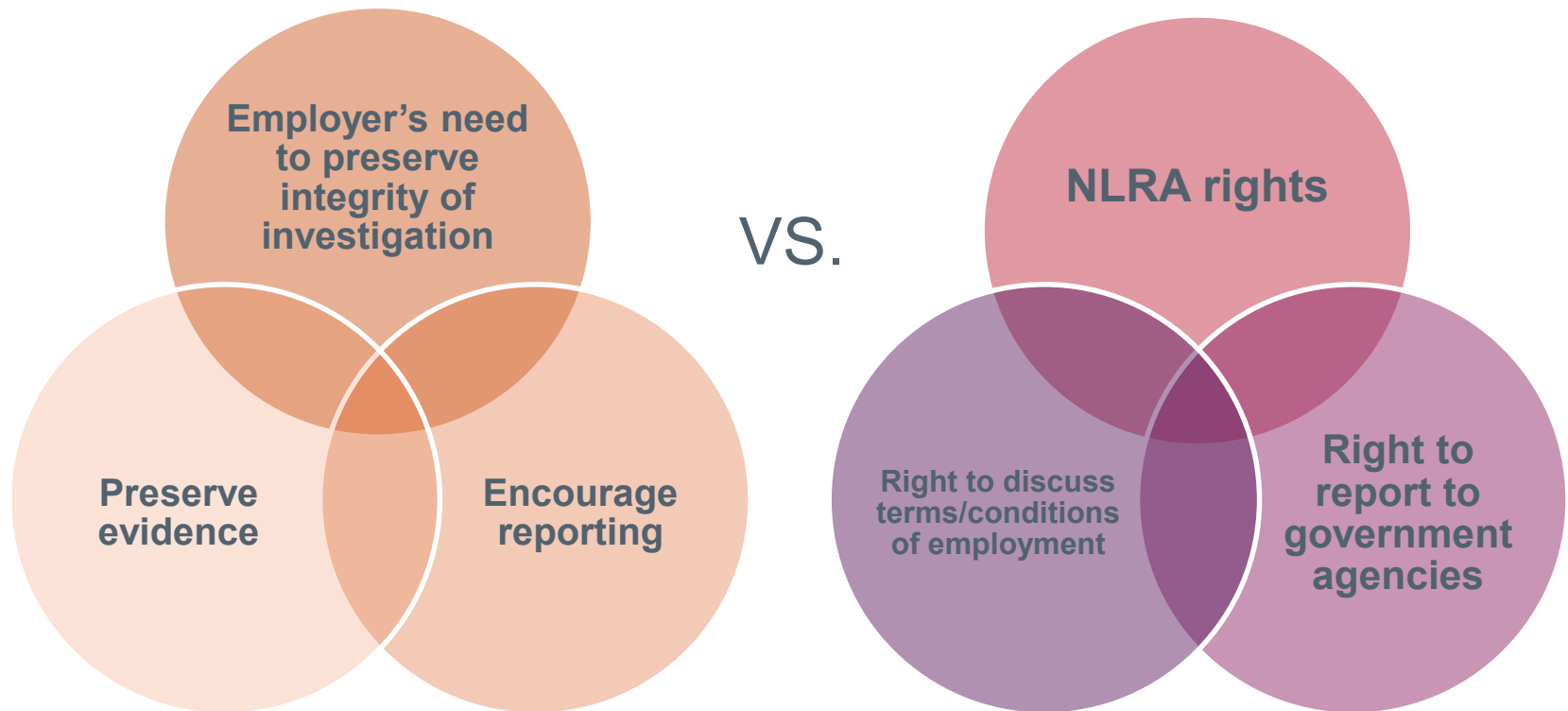
Leading questions

Revealing sources unnecessarily

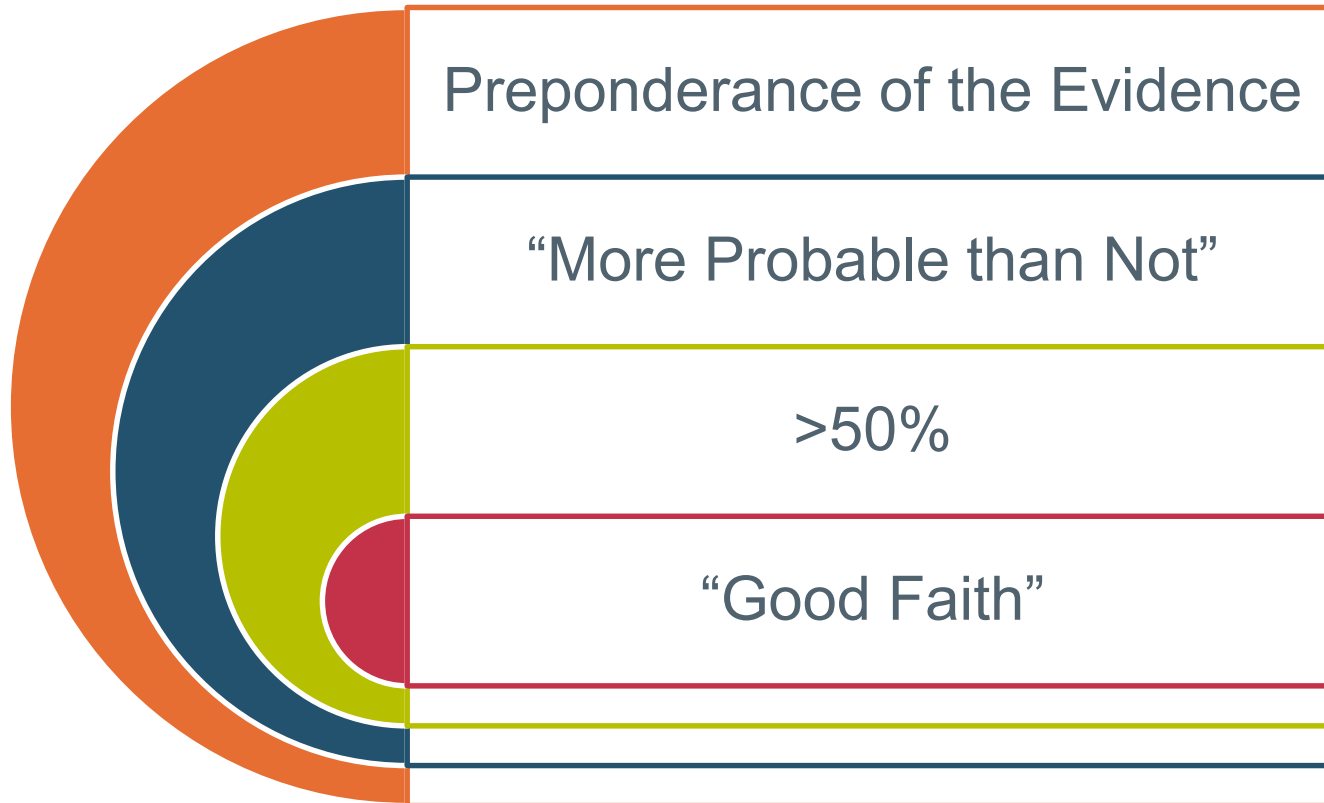
Making predictions on outcome, promises, speculation

Expressing agreement or disagreement

Confidentiality: Competing Considerations



Investigation Findings: Standard



Final Steps

Oral Report

Written Report

Facts

Facts and Conclusions

Facts, Conclusions, and Recommendations

Privileged or Non-Privileged

Executive Summary or “Kitchen Sink”

Post-Investigation Activities

Discipline

Termination



Update Policies

Employee/Manager
Training

Preserve Evidence

Communicate
Results

Australia

Benefits of an Investigation

Evidence and fair process

Decisions re: disciplinary action

Evidences reasonable management action

- Workers' compensation
- Anti-bullying claims

Evidences all reasonably practicable steps taken

- Anti-discrimination laws
- Work health and safety



A Privileged or Open Investigation?

What is the dominant purpose of the investigation report?

- Management action
- Compliance
- Legal advice
- Litigation



Privilege

- Question as to (dominant) purpose of investigation report and materials prepared
- *Sydney Airways Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47:
 - investigation into safety incident;
 - commissioned by SAC in-house counsel;
 - report addressed a number of purposes – e.g. getting aerobridge back into operation;
 - not privileged.



What We Would Like to See In an Investigation

Prompt and timely investigation

Targeted investigation (and not a fishing expedition)

Complies with workplace policies or procedures

Accused is given proper notice of the allegations and a proper opportunity to respond

All reasonable inquiries are made

Internal communications are managed

The investigation is independent and free from bias

Proper findings of fact are made and recorded

Disciplinary action is dealt with separately

Reputations are protected

Retaliation is avoided



You will be criticized, but you are not a Court.

- *Brewer v St Columba College Munno Para Inc* [2018] FWC 7620:
 - A workplace investigation “*is not a court of law or a quasi-judicial proceeding. It is an internal disciplinary process guided by the principle of fairness.*”



Investigation Sources

Formal

- Letter/email of complaint
- “I want to formally complain...”
- “Under the X policy I want to raise a concern”
- Identifying a breach of policy/legal issue

Informal

- Off-the-record discussion
- “I want to let you know ... but I don’t want you to do anything”
- Being informed about an incident / concern

Other

- Comes to the Company’s attention by other means

THERE MAY BE NO SUCH THING AS AN INFORMAL COMPLAINT



What If Employee Does Not Want an Investigation?

- *Swan v Monash Law Book Co-operative* [2013] VSC 326
 - Retail sales assistant subjected to sarcasm, hostility, rudeness, violent behavior, and threat of termination by manager who even threw books and calculators at the employee
 - Employee informally raised issues with senior management but claimed she could cope with the behavior, and instructed employer to just “sit on it at this stage and take the comments on notice”
 - Failure by employer to properly investigate
 - Delay in any formal response to complaints
 - Ordered to pay almost \$300,000 for psychological injuries later suffered by employee

To Investigate or Not

Is there a dispute on the facts?

Can the matter be dealt with informally?

- Is it a serious issue? Are there reputational issues at stake?
- Is there a threat or likelihood of litigation?
- Have previous informal attempts to deal with the issue failed?
- Are a number of employees involved?
- What does the employee want?


What would be the impact of a full blown investigation?

What do your policies say?


Do you want a report on the record?

First Contact

DO NOT

- Commit to a process, but explain next steps and the likely timing of your next meeting
 - Take a side or buy into the employee's complaint
 - Cast judgment on the conduct
 - Give legal advice
 - Disclose other complaints and how they were dealt with
 - Send off any email which suggests you have made a finding or decision
- 

DO

- Acknowledge feelings
 - Engage EAP if necessary
- 

Role of the Investigator

The Investigator is responsible for:

- Understanding the scope and purpose of the investigation
- Having an investigation plan which facilitates the investigation being completed in accordance with company principles and otherwise efficiently and fairly
- Investigating the complaint in a timely manner, with sufficient evidence to support key factual findings which is reflected in the investigator's report
- Keeping relevant stakeholders updated, as agreed and appropriate
- Ensuring that parties involved, including the Respondent, witnesses and Complainant have access to appropriate care and support services
- Where appropriate, identifying an appropriate decision maker for the complaint
- Engaging with legal if legal advice is required to be sought
- Adhering to investigation principles when appropriate to do so

Procedural Fairness

Investigations must be carried out in a procedurally fair manner, being specifically mindful of the investigator's dealings with the Respondent.



Investigators should:

- Provide a clear overview to the Respondent prior to the interview
- Provide the Respondent with advance notice of an interview or submission
- Make any person involved aware of their involvement (and the reasons)
- Provide material or evidence when necessary
- Enable the person (Respondent or Witness) to make a full response to the questions or issues
- Provide all parties to the investigation with an opportunity for a support person
- Comply with the FW Act to ensure the Respondent has a support person, opportunity to respond and clear information about allegations
- Avoid bias
- Avoid conflicts of interest
- Avoid pre-judgement

Scope of the Investigation

Separate:

- Findings of fact; and
- Disciplinary action

Determine:

- Which policies or instruments or laws are relevant?
- What is in dispute?
- What findings of fact need to be made?
- Which documents are relevant?
- Who are the key witnesses?
- What is a realistic timeframe?
- Who is available?
- Who will make decision(s)?

Notifying the Respondent

- Support persons?
- Tell the accused:
 - A complaint has been made
 - Level of seriousness and potential range of disciplinary action
 - The Company is considering investigating the matter
 - Before taking the matter any further, the Company wants to get the accused's initial response to determine if there is a dispute
 - Warnings:
 - full and frank response
 - confidentiality
 - no retaliation
 - Written outline



Fair Opportunity to Respond

- Time to consider response
 - Legal advice
 - Access to documents
- Access to emails
 - Set time limits



Work Arrangements During Investigations

- Risk of interference
- Risk of adverse interactions
- Suspension
- Availability
- Shutting system access
- Contractual rights
- Reputation
- EAP



Work Arrangements During Investigations

- *Camilleri v IBM Australia Limited* [2014] FWC 5894
 - Employee made inaccurate expense claims over 3 years
 - May 2013: internal audit began
 - 8 November 2013: employee admitted expense claims were wrong
 - 23 December 2013: investigation report recommended termination of employee
 - 21 January 2014: employee finally terminated
 - Unfair dismissal – *‘difficult to reconcile the IBM position that it had lost trust and confidence in Mr. Camilleri as an employee and proposed to dismiss him with its requirement for him to work until 21 January 2014.’*

Investigation Interview

Make person feel comfortable

- *Who are they; what do they do; how long have they been with the Company, etc.*

Start with open questions

- *“Can you tell me about the incident of 2 September 2022?”*

Follow with closed questions

- *“Did you tell him that you do not like working with parents?”*

Confirm your understanding

- *“So, you told him that you find it difficult working with parents?”*

If inconsistencies, test them

- *“Earlier, you said to me that you did not say to him ‘you do not like working with parents’, but that you ‘find it difficult’. Which is correct?”*

Repeat important questions

- *“Did you tell him that you do not like working with parents?”*

Interview Recording

- At least two people should attend on behalf of a Company
- One person should take notes
 - the notes should contain direct quotes (especially important for admissions)
 - two sets of notes may create inconsistencies
- Interviews can be taped, only with consent
- Summaries of evidence can be prepared and signed
- Keep comments, notes and legal advice separate from the notes of interview



Checking Emails and Mobile Phone

- NSW (*Workplace Surveillance Act 2005*):
 - No surveillance without prior notice of 14 days or shorter period if agreed (can be by email);
 - Notice must indicate:
 - kind of surveillance carried out (e.g. computer);
 - how it will be carried out;
 - when it will start;
 - whether continuous or intermittent;
 - whether for a specified limited period or ongoing;
 - Computer surveillance must also be carried out in accordance with applicable policies; and
 - Employees must be notified in advance of the policy *“in such a way that it is reasonable to assume that the employee is aware of and understands the policy.”*

Secret Recordings

- **“seriously wrong and inexcusable ... and a valid reason for dismissal.”**
 - *Thompson v John Holland Group Pty Ltd* [2012] FWA 10363
- **“deceptive and purposely misleading”**
 - *Schwenke v Silcar Pty Ltd T/A Silcar Energy Solutions* [2013] FWC 4513
- **“quite properly described as sneaky [and] ... abhorrent to ordinary persons dealing with each other in a proper fashion”**
 - *Ron Lever v Australian Nuclear Science and Technology Organization* [2019] AIRC 784

The Right to Silence?

- An employee must provide information “such as is ***within the scope of his employment*** and which relates to the ***mutual interest of employer and employee***”;
- So long as the employee is requested “at a **proper time and in a reasonable manner** ... provided these relate to the [employer’s] business, the employee is bound, generally speaking, to make such disclosure.”
 - *Associated Dominions Assurance Society Pty Ltd v Andrew & Haraldson* (1949) 49 SR (NSW) 351 at 357 per Herron J

Keep the Parties Informed

- Consult with both the Complainant and Respondent:
 - scope of the investigation;
 - witnesses;
 - timing;
 - process;
 - changes in scope; and
 - new evidence.



Standard of Evidence – “on the balance of probabilities”



“He Said, She Said”

- You can prefer the evidence of one over the other but give reasons why, e.g.:
 - X had a more detailed recollection than Y
 - X’s evidence was corroborated by another witness
 - Y’s evidence contained inconsistencies
 - X’s version of events was more probable
 - Y kept on changing their answers and did not seem confident in their response



Outcomes of Investigation

- Where complaint substantiated, remedial actions may include:
 - counselling employee(s)
 - training sessions
 - conciliation/mediation between employees
 - inviting employee(s) to apologize
 - disciplinary action (including for false allegations, victimization and/or untruthful responses during investigation)
 - ongoing monitoring of workgroup
 - separating employees or changing reporting lines
 - reviewing workplace procedures

Disciplinary Hearing

- Shift to disciplinary action
- Do not prejudge [NO EMAILS!]
- Arrange a meeting with Respondent in advance
- Support persons
- Provide the Respondent with your key findings
- Face the Respondent with potential range of disciplinary action
- Give further opportunity to respond to the potential disciplinary action
- Assess the response
- Proceed with decisions



Notifying the Police

- If a person has committed a serious indictable offence and another person:
 - knows or believes that the offence has been committed; and
 - that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender; or
 - fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority,**that other person is liable to imprisonment for 2 years.**
(s 316, *Crimes Act* (NSW))
- Serious indictable offence – punishable by a prison term of 5 years or more

Key Trauma Informed Principles

A Reporter Centered Approach



Safety

Empowerment

Choice

Trustworthiness

Collaboration

Taking a Trauma Informed Approach

- Ensure that **support** is present
- Remain neutral, but be supportive, and ensure that they know that your job is to **find out facts, not make judgments**
- Be conscious of your phrasing of questions – use neutral language
- Be **patient**
- Be **transparent**

Trauma Informed Questioning



- Ask one question at a time
- Use open questions to elicit information
- Explain the rationale for your questions
- Use closed questions to clarify and test your understanding
- Plan key questions
- Maintain a neutral tone or demeanor
- Empathy, not sympathy
- Follow their lead – may not recall events chronologically

Whistleblowing Complaints

- **Key Elements**

- A disclosure must be made relating to “Misconduct” or an “Improper State of Affairs” but not be a “personal work-related grievance”
- The disclosure must be made by an “Eligible Whistleblower”
- The disclosure must be made to an “Eligible Recipient”



Reasonable Grounds to Suspect

- **Misconduct**
(including fraud, negligence, default or breach of duty)
- **Improper State of Affairs or Circumstances**
 - in relation to the regulated entity; or
 - related body corporate
- Including:
 - Contravention of Corporations Act, ASIC Act, Banking Act 1959, Insurance Act 1973, Life Insurance Act 1995, National Consumer Credit Protection Act 2009, Superannuation Industry (Supervision) Act 1993
 - Offence against any Cth law punishable by imprisonment of 12 months or more
 - Danger to the public or financial system

‘Personal Work-Related Grievances’

- The information disclosed concerns a personal work-related grievance of the discloser if:
 - the information concerns a grievance about any matter in relation to the discloser’s employment, or former employment, having (or tending to have) implications for the discloser personally; and
 - the information:
 - does not have significant implications for the regulated entity to which it relates, or another regulated entity, that do not relate to the discloser; and
 - does not concern conduct, or alleged conduct, referred to in paragraph 1317AA(5)(c), (d), (e) or (f) – that is:
 - constitutes an offence punishable by at least 12 months’ imprisonment;
 - represents a danger to the public or financial system; or
 - constitutes a breach of a certain specified law; or
 - concerns the victimisation of the discloser

Eligible Whistleblowers

- Officer
- Employee
- Supplier of goods/services
- Employees of suppliers
- Associate, e.g. director of related body corporate
- For superannuation entities: trustee, custodian, investment manager
- Spouse or dependent of above
- Relative of above
- A person who was previously one of the above, e.g. ex-employee



Eligible Recipients

- ASIC
- APRA
- Prescribed Commonwealth authority
- Lawyer for purpose of obtaining advice
- Officer
- Auditor
- A person authorized by company
- “Senior Managers” (as defined in the Corps Act)

Whistleblower Protections – Confidentiality

- **CANNOT REVEAL IDENTITY or INFORMATION THAT IS LIKELY TO LEAD TO IDENTIFICATION OF THE DISCLOSER EXCEPT:**
 - to regulators (ASIC, APRA) or AFP; or
 - to legal practitioner for legal advice or legal representation; or
 - with consent of the discloser; or
 - disclosure of information is **not of the identity of the discloser and is reasonably necessary for the purpose of investigating and all reasonable steps taken to reduce risk of identification** (onus on defendant to prove)
- Don't just assume you can pass the letter straight onto legal

Whistleblower Protections – Confidentiality

- Must protect the discloser's identity (even if consent is given to disclose name) by:
 - **restricting** the number of people handling the investigation disclosure
 - use a **pseudonym**
 - consider which details will give away identity and redact these
 - **remind** all people involved of confidentiality requirements
 - store any documents/records **securely**



The image features a central white rectangular area containing the word "Germany" in a bold, dark blue sans-serif font. This central area is flanked by two horizontal bands of a vibrant blue abstract pattern. The pattern consists of overlapping, semi-transparent geometric shapes, primarily triangles and polygons, in various shades of blue, creating a sense of depth and movement. The overall composition is clean and modern.

Germany

Selected Investigation Issues in Germany

- Strict deadline to issue for cause termination
- Potential works council co-determination rights
- Important obligations under data privacy laws
- New German Whistleblower Protection Act



Strict For Cause Termination Deadline

- **Why does it matter?**
 - Termination for cause (without notice) only permissible within two weeks of knowledge about relevant facts
 - Once two weeks' deadline has passed, only ordinary termination (with notice) remains possible
 - Relevant not only for (lack of) remaining notice pay, but also for good/bad leaver triggers (e.g. stock option vesting and other special benefits)

Strict For Cause Termination Deadline

- Knowledge by person(s) authorized to sign termination relevant for trigger of two week period
- Reasonably required investigations can prevent the deadline from running / expiring
- Key considerations:
 - People to be involved in investigation process
 - Who to update when about investigation progress
 - Content of (interim / draft) investigation reports

Works Council Co-Determination Rights

- **Why does it matter?**
 - Works council can obtain interim injunction to halt investigation if co-determination rights are violated
 - Employees do not need to follow instructions that are based on breach of co-determination rights
 - Severe violations can result in need to delete findings and/or being inadmissible in court

VIOLATION

Works Council Co-Determination Rights

- Key examples for co-determination rights:
 - Interviews concerning employee-conduct that go beyond work activities
 - Use of standardized questionnaires (even if not used in writing)
 - Implementation of software/IT that *could* be used to monitor employees' conduct or performance
- Consider implementing framework agreement on investigations with works council upfront

Data Privacy Law Obligations

- **Why does it matter?**
 - Violation of data privacy obligations can result in material administrative fines and bad PR
 - Severe violations can result in need to delete findings and/or being inadmissible in court
 - Generally applies throughout Europe, not only in Germany (European GDPR)



Data Privacy Law Obligations

- Notification obligations:
 - Individuals who are the subject of an investigation
 - Individuals who provide personal data due to an investigation
- Notifications can be delayed especially where notification would jeopardize the investigation
- Invitations to interviews are a good opportunity to also send across required notifications

Data Privacy Law Obligations

- Scope for review may need to be narrowed down to align with sufficient legal justification
- Generally balance of interest test with a need for documented factual indications
- Typical issues:
 - Personal use of company email accounts or other company IT systems permitted
 - Possible involvement of individual(s) not yet sufficiently clear
 - Mere suspicion triggers desire to search for more

German Whistleblower Protection Act

- **Why does it matter?**
 - Non-compliance may result in measures taken as part of or after investigation to be deemed void
 - Damage claims and/or administrative fines for non-compliance
 - Practical risk of increased external reporting (statutory reporting channels) if internal reporting process is non-compliant

German Whistleblower Protection Act

- Act is based on EU Directive
 - Just entered into force July 2023 in Germany
 - Similar standards throughout the European Union
- Provides protection for whistleblowers and others
- Requires compliance with specific processes, e.g.
 - strict deadlines for investigating reports
 - additional confidentiality obligations
 - allowing reports to external (statutory) channels
- Verify compliance of your processes with the Act!

United Arab Emirates

Investigations and Disciplinary Sanctions

- A new Labor Law came into effect on 2 February 2022 (Federal Law No. 33 of 2021) that governs employment relationships onshore in the UAE
- Disciplinary sanctions and workplace investigations are now governed by Article 39 of the new Labor Law and Article 24 of its executive regulations
- Employers must follow the mandatory process and timelines before imposing any of the disciplinary penalties specified in Article 39 (e.g. written notice, written warning, deduction of up to 5 days' salary, unpaid suspension from work for up to 14 days, termination)

Mandatory Notice Requirements

- In all cases, the employee must be notified in writing of the allegation against them and granted an opportunity to explain their conduct and defend themselves
- No penalty may be imposed without the employer having investigated the matter. Following the conclusion of the investigation, a written report must be prepared, containing the outcome of the investigation and the disciplinary action to be taken, and placed in the employee's personnel file
- The employee must be notified in writing of any penalties imposed against him/her, the reasons for imposing them and the penalty the employee will face in the event of a repeat offence



Strict Time Limits

- An employee may not be accused of a disciplinary offence more than 30 days after it was discovered
- A disciplinary penalty must not be imposed more than 60 days after the date on which the investigation into the violation was concluded and the violation established



Defamation

- Defamation is a criminal offence in the UAE, so employers should take care to limit the risk of a claim of defamation being made as a result of an investigation
- As a general rule, a workplace investigation and its outcome should be confidential and employers should refrain from making statements that may be construed as defamatory or insulting to the employee in question
- Any employees who are contacted as part of the investigation should also be advised to keep the investigation confidential, not only to limit the risk of any defamation claim, but also to avoid any prejudice to the investigation

Right To Review Electronic Communications

- Specific consent is required for an employer to review personal communications (emails, WhatsApp messages, etc.) even if stored on employer-issued technology, such as laptops or cell phones
- Employers should pre-emptively take steps to limit potential issues regarding its entitlement to search and rely upon electronic communications sent by an employee during an investigation
 - For example, employment contracts, internal policies and handbooks should clearly state that: (i) all computer systems are owned by the employer; (ii) that they should be used exclusively for business-related communications; and (iii) that the employee consents to the company accessing them at any time without prior notification

The image features a central white horizontal band. Above and below this band is a blue background with a complex, abstract pattern of overlapping, semi-transparent geometric shapes, creating a sense of depth and movement. The colors range from a bright cyan to a deep navy blue.

Questions?

K&L GATES