



BOWDITCH

BOWDITCH & DEWEY, LLP | FEBRUARY 16, 2023

# 14TH ANNUAL EMPLOYMENT LAW UPDATE: INVESTIGATIONS – THE GOOD, THE BAD AND THE UGLY

BRIGID HARRINGTON, AIMEE BIERMAN, TIM VAN DYCK



BRIGID  
HARRINGTON



AIMEE  
BIERMAN



TIM  
VAN DYCK

# WHEN DO I NEED TO INVESTIGATE?

## DO YOU HAVE NOTICE OF:

- Policy violation [harassment, discrimination, code of conduct (toxic workplace)]
- Violation of law
- Concerns about conduct
  - From co-workers
  - From customers

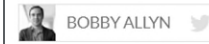


# WHAT DO I HAVE TO INVESTIGATE?

- When you learn of conduct that might violate a Policy
  - What do your employees know?  
What are they required to report?
- Complaints submitted by community members/other stakeholders/outsideers
  - Document your response!
- Off-site conduct?
- Websites, social media?

### 72 Philadelphia Police Officers Placed On Desk Duty Over Offensive Social Media Posts

June 19, 2019 · 10:16 PM ET  
Heard on Morning Edition



 2-Minute Listen

 + PLAYLIST   



## PRE-INVESTIGATION

### FOR THE PEOPLE INVOLVED

- What are supports/interim measures available?
- Are there immediate safety concerns?
  - Police involvement
  - Emergency removal

### FOR THE COMMUNITY

- Messaging about your response
- Who will be updated informed



## MESSAGING

### COMMUNICATE EARLY AND OFTEN ABOUT:

- Your role
- Retaliation
- Confidentiality expectations

BOWDITCH

## STEPS TO AN INVESTIGATION

# INTAKE

## WHAT IS BEING ALLEGED?

- May have to do some initial information gathering

## WHAT POLICIES APPLY?

- If organization has a policy regarding investigations, should be followed!

## WHO NEEDS TO BE INVOLVED IN THE INVESTIGATION?



## INTAKE (CONT'D)

### INITIAL ASSESSMENT – WHICH POLICY APPLIES

- If initially filed under incorrect policy, may refer out

### BEST PRACTICE: DOCUMENT AND COMMUNICATE INITIAL ASSESSMENT PROCESS

- Reasons for determination
- Communicate to stakeholder parties

### NOTIFY THE RESPONDENT

- What is being investigated (scope)
- Process/rights





## PLAN YOUR INVESTIGATION

- Identify reporter, subject, relevant witnesses
- Identify/request relevant documents and policies
- Plan interviews (questions, format, location, attendees)



## CONDUCT INTERVIEWS

- Disclose your role, expectations with witnesses
- Be prepared to handle emotional interviewees, reluctant witnesses
- Take notes
- Ask open-ended questions, listen, and follow-up
  - Request documents, info about other witnesses



# ASSESS THE INFORMATION GATHERED

## LOOK AT INTERVIEWS AND DOCUMENTS TOGETHER

- What is corroborated?  
Corroboration by extrinsic documents is best
  - Is something not corroborated that you would normally expect to be corroborated?
- Contemporaneous accounts to others
- Ask – “does this make sense” given other information
- Assessing credibility

# MAKE A DETERMINATION; DOCUMENT FINDINGS/RECOMMENDATIONS

- What are your conclusions?
  - Alleged conduct occurred
  - Alleged conduct did not occur
  - Inconclusive
- If you conclude that conduct occurred, did it violate policy?
- Review past practice with same/similar violations for consistency

## WRITTEN REPORT

- Considerations – will this be shared with the parties?
  - Does it need to be anonymized/redacted?
- Document your process
  - What information was reviewed
  - What information was not available
- Explain reasons for factual findings
  - Reference standard (usually preponderance of the evidence)
- Identify specific policy/code of conduct violations, not legal conclusions
- Recommend discipline
- Right to appeal?

# A WORD ABOUT TITLE IX HEARINGS

## SOME COMMON CONCERNS:

- How to determine who should appear at the hearing?
  - Investigator?
  - Can witnesses/parties decline?
- Issues with employees serving as hearing panelists
- Concerns for employee hearings
  - Union reps, discipline determination
- How does Title IX compare to other processes?



POLICIES

PROCEDURES

## STEP 6 – FOLLOW-UP

- Implement recommendations (i.e., discipline)
- Communicate findings, as appropriate
- Give all parties retaliation warnings/reminders
- Post-mortem (assess need for updated policies/procedures)





## TOP 10 COMMON MISTAKES!

1. Ignoring complaints
2. Delaying investigations even if “unavoidable”
3. Failing to plan
4. Losing objectivity
5. Using overly aggressive interview tactics/not establishing rapport
6. Letting witnesses drive the bus
7. Not conducting a thorough investigation, giving it short shrift
8. Failing to reach a conclusion
9. Failing to document interviews and failing to create a written report
10. Failing to follow up with those involved



QUESTIONS?



BRIGID  
HARRINGTON



[bharrington@bowditch.com](mailto:bharrington@bowditch.com)

617-757-3351



AIMEE  
BIERMAN



[abierman@bowditch.com](mailto:abierman@bowditch.com)

617-757-6543



TIM  
VAN DYCK



[tvandyck@bowditch.com](mailto:tvandyck@bowditch.com)

617-757-6536