

**CSI MOVES INTO YOUR HR OFFICE:
HOW TO CONDUCT AN INTERNAL
INVESTIGATION**

**Human Resource Leadership Association of
Eastern CT**

Sarah R. Skubas

Jackson Lewis P.C. | Hartford

sarah.skubas@jacksonlewis.com | 860.522.0404

©2016 Jackson Lewis P.C.

About the Firm

Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation

800 attorneys in **57 locations** nationwide

Current caseload of **over 6,500 litigations**
approximately **650 class actions**

Founding member of L&E Global

A leader in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves

©2016 Jackson Lewis P.C.

jackson|lewis.

About the Firm



Ranked in the **First Tier** nationally in the category of Labor and Employment Litigation, as well as in both Employment Law and Labor Law on behalf of Management, in the *U.S. News - Best Lawyers® "Best Law Firms"*

Recommended in *U.S. Legal 500* for Labor and Employment Litigation, Labor-Management Relations and Workplace and Employment Counseling

Designated as a **Powerhouse** in both Complex and Routine Litigation in the *BTI Litigation Outlook 2016: Changes, Trends and Opportunities for Law Firms*

62 Jackson Lewis attorneys were named Leaders in Their Field by Chambers USA for 2015; **137** Jackson Lewis attorneys were selected for inclusion in the 2016 edition of *Best Lawyers in America*

©2016 Jackson Lewis P.C.

jacksonlewis.

Practice Areas



**Affirmative Action Compliance
and OFCCP Defense**



**Class Actions and
Complex Litigation**



**Collegiate and
Professional Sports**



Corporate Diversity Counseling



**Corporate Governance and
Internal Investigations**



**Disability, Leave and
Health Management**



Employee Benefits



General Employment Litigation
• e-Discovery



Government Relations



Immigration



International Employment Issues



Labor and Preventive Practices



**Non-Competes and Protection
Against Unfair Competition**



**Privacy, e-Communication and
Data Security**



Wage and Hour



**White Collar and Government
Enforcements**



Workplace Safety and Health



Workplace Training

Industries Represented

Jackson Lewis represents a wide range of companies in various industries, including:



Airline & Airline Service Providers



Automotive



Construction



Education



Energy & Utilities



Financial Services



Food Processing & Manufacturing



Gaming & Hospitality



Government Contractors



Health Care



Mining



Pharmaceuticals



Professional Services



Public Sector



Real Estate



Retail



Sports & Entertainment



Technology & Telecom



Transportation & Warehousing

Agenda

- ◆ Why do we conduct internal investigations?
- ◆ Who should conduct the investigation?
- ◆ Investigation Key Steps
- ◆ Conducting Interviews
- ◆ Corrective Action
- ◆ Documentation & Reports
- ◆ Post-investigation Issues
- ◆ Key Trends

©2016 Jackson Lewis P.C.

jackson|lewis.

Why Investigate?

◆ Practical Reasons:

- To ensure fairness in the administration of the employer's policies
- To confirm compliance with contract requirements
- To obtain a full, objective understanding of the facts
- To address & stop problems before they escalate
- To continuously improve

Why Investigate?

◆ Legal Obligation:

- To meet the employer's burden to take appropriate measures to prevent inappropriate conduct in the workplace (such as discrimination and harassment);
- To fulfill the organization's legal requirements and compliance program; and/or
- To develop a defense to claims by third-parties

External Parties

◆ Federal and State Government Agencies

- Contract Administrator
- Office of Inspector General
- Office of State Ethics

◆ Administrative Agencies

- The Equal Employment Opportunities Commission
- The CT Commission on Human Rights and Opportunities

◆ Employee's Counsel

◆ Courts and Juries

©2016 Jackson Lewis P.C.

jackson|lewis.

Notice of Complaint

- ◆ May arrive in various forms:
 - Internal complaints (written or verbal)
 - Anonymous letters/e-mail messages
 - Observation
 - Exit interview
 - External agencies
 - External/Formal complaints

©2016 Jackson Lewis P.C.

jackson|lewis.

Notice of Complaint

- ◆ OR – via: a Whistleblower
 - Internal Hotline
 - Qui Tam litigation
 - Anonymous reporting to a federal/state agency

©2016 Jackson Lewis P.C.

jackson|lewis.

Notice is Notice

"Off the Record" & "Just making you aware"

- There is no such thing as an "off the record" complaint.
- Don't fail to act because the employee "will take care of it myself."
- Don't fail to act because the employee says "it wasn't a big deal."
- Don't fail to act because it took place off-site.
- Don't fail to act because you have an uncooperative "victim."

©2016 Jackson Lewis P.C.

jackson|lewis.

Complaint Intake is Critical

- ◆ Key information to obtain at time of complaint:
 - Who and/or what is the employee reporting about?
 - Exactly what occurred?
 - When and where did it occur?
 - Were there any witnesses?
 - Anyone else experienced similar treatment?
 - Did you or others report this to anyone?
 - Any relevant notes, e-mails, texts, etc.?
 - Is there anything else I should know?

©2016 Jackson Lewis P.C.

jackson|lewis.

Who Should Investigate?



14

Who Investigates

- ◆ Attorney
 - Attorney-client privilege
 - Pros/cons
 - Upjohn Warnings
- ◆ Human Resources
- ◆ Compliance professional
- ◆ Supervisor

©2016 Jackson Lewis P.C.

jackson|lewis.

Preparing to Investigate

- ◆ Before the investigation:
 - Determine the scope of the investigation
 - Gather all relevant policies and documents
 - Confirm contractual requirements
 - Assess attorney-client privilege
- ◆ Analyze:
 - Complainant & the complaint
 - Policies, procedures, instructions
 - Contract documentation (bidding, audits, etc.)
 - Prior relevant complaints
 - Other relevant business records, e-mails, cameras, etc.
 - Personnel files of the individuals involved

Preparing to Investigate

- ◆ A good investigation plan accounts for:
 - An understanding of the purpose of the investigation
 - Knowledge of the issues to be addressed
 - Knowledge of employer policies, procedures, and rules
 - Knowledge of the contract requirements
 - Objectivity and impartiality
 - Consideration of past precedent and equity
 - The preparation of an accurate and complete record
 - Fact-based decision-making
 - Confidentiality (need-to-know basis)

Conducting the Investigation

◆ Goals of an Investigation

- To obtain a full, objective understanding of the facts
- To prevent the issue from becoming an external one
- To facilitate fact based decision-making
- To take prompt corrective action & confirm disclosure requirements
- To preserve all evidence and develop a complete record

Who Should be Interviewed?

- ◆ Complainant – the reporter of the event
- ◆ Accused – the person who committed the act
- ◆ Witnesses – those who saw something
- ◆ Co-workers of complainant and accused
- ◆ Managers/Supervisors of complainant and accused
- ◆ Persons with other key knowledge

The *Art* of Interviewing

- ◆ The goal is to obtain as much detail as possible
- ◆ Select an appropriate location for the interview
- ◆ Phase the interview session between an open-ended question section, and a pointed, specific question session
- ◆ Ask the five Ws: who, what, where, when, and witnesses
- ◆ Elicit facts, not rumor, opinion, or supposition
- ◆ Do not promise confidentiality but state that information will be distributed only on a need-to-know basis
- ◆ Take careful notes
- ◆ Limit disclosure of information by way of your questions
- ◆ Ask the witness to identify others witnesses and evidence

Uncooperative Witnesses

- ◆ Attempt to establish rapport and explain the investigative process in some detail
- ◆ Communicate the employer's policy regarding participation in internal investigations
- ◆ Document the witness' refusal to cooperate
- ◆ Consult with others to determine next steps with uncooperative witness

Re-Interview as Necessary

- ◆ Attempt to verify information obtained in other interviews or documents
- ◆ Try to keep the source of contradictory information confidential

Conclude the Investigation

- ◆ Carefully analyze the information obtained and draw reasoned and logical conclusions
 - Be fact based
 - Determine if facts reasonably confirm violation of policy, compliance with contract requirements, etc.
 - Watch for your own investigator's agenda/bias

Corrective Action

- ◆ Determine magnitude of variance from compliance and/or the severity of the policy breach
- ◆ Determine discipline recommendation
- ◆ Determine other corrective action
- ◆ Develop a plan for internal control corrections
- ◆ Assess reporting requirements

The Investigative Report

- ◆ Investigative report should include:
 - **Summary of allegations**
 - Be as specific as possible
 - Include chronology of events
 - **The evidence or information gathered in the investigation**
 - Summary of witness interviews, description of relevant documents, and summary of relevant policies and procedures
 - **The conclusions**
 - Was the allegation substantiated?
 - Did the substantiated conduct violate policy?
 - What is the requested remedy?

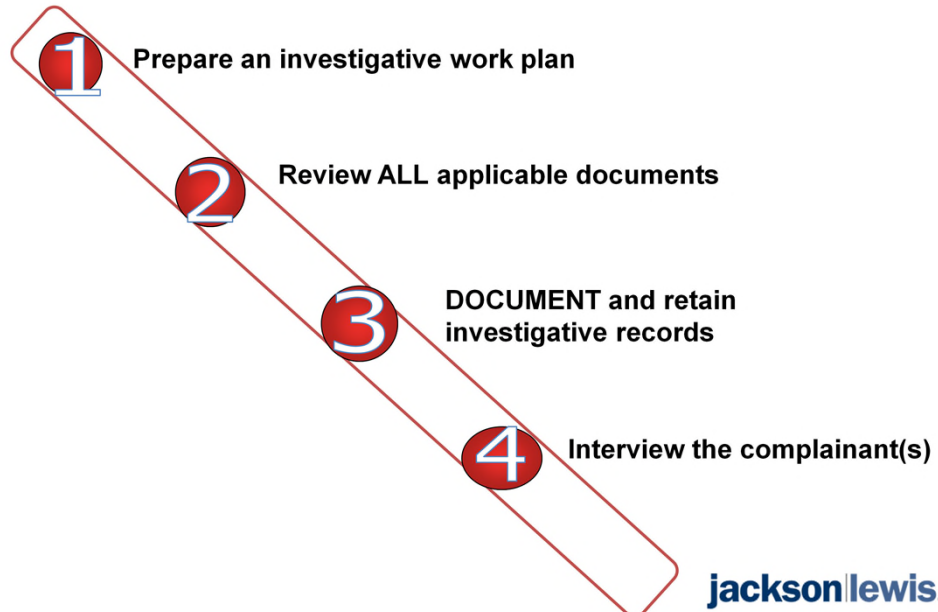
Prepare the Investigative File

- ◆ Supporting Documents are Essential
- ◆ Include in the investigative file:
 - Complaint
 - Log of investigator's actions, including dates
 - Witness statements and/or witness interview notes
 - Documents related to the complaint and other relevant physical evidence
 - Investigative report
 - Documents regarding follow-up meetings with the complainant and the accused (i.e. training provided as part of corrective action, etc.)
 - Establish record retention

After the Investigation

- ◆ Do not discuss any information obtained during the investigation except on a need-to-know basis
- ◆ Confirm corrective action is complete
- ◆ Follow-up with complainant
- ◆ Monitor situation to prevent reoccurrence and/or retaliation
- ◆ Re-open investigation if you later learn relevant facts

RECAP: Conducting the Investigation



RECAP: Conducting the Investigation



Key Trends

- ◆ DOJ is increasingly focused on prosecuting individual employees.
- ◆ There is more scrutiny of corporate compliance programs by the law enforcement community.
- ◆ The cost of conducting investigations are increasing due to higher expectations of work product.
- ◆ The Company may realize a reward for cooperation.

Thank You!

Sarah R. Skubas, ESQ.

sarah.skubas@jacksonlewis.com | (860) 522-0404



All we do is
work

Workplace law. In five time zones and 57 major locations coast to coast.

jackson | lewis
Preventive Strategies and
Positive Solutions for the Workplace®