

FROM ALLEGATION TO ACTION:

Strategies for Workplace Investigations

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FROM ALLEGATION TO ACTION

TODAY'S SPEAKERS



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AGENDA

- Why Good Investigations Matter
- When to Investigate
- Conducting an Investigation
- Investigation Reports
- Actions Based on Results

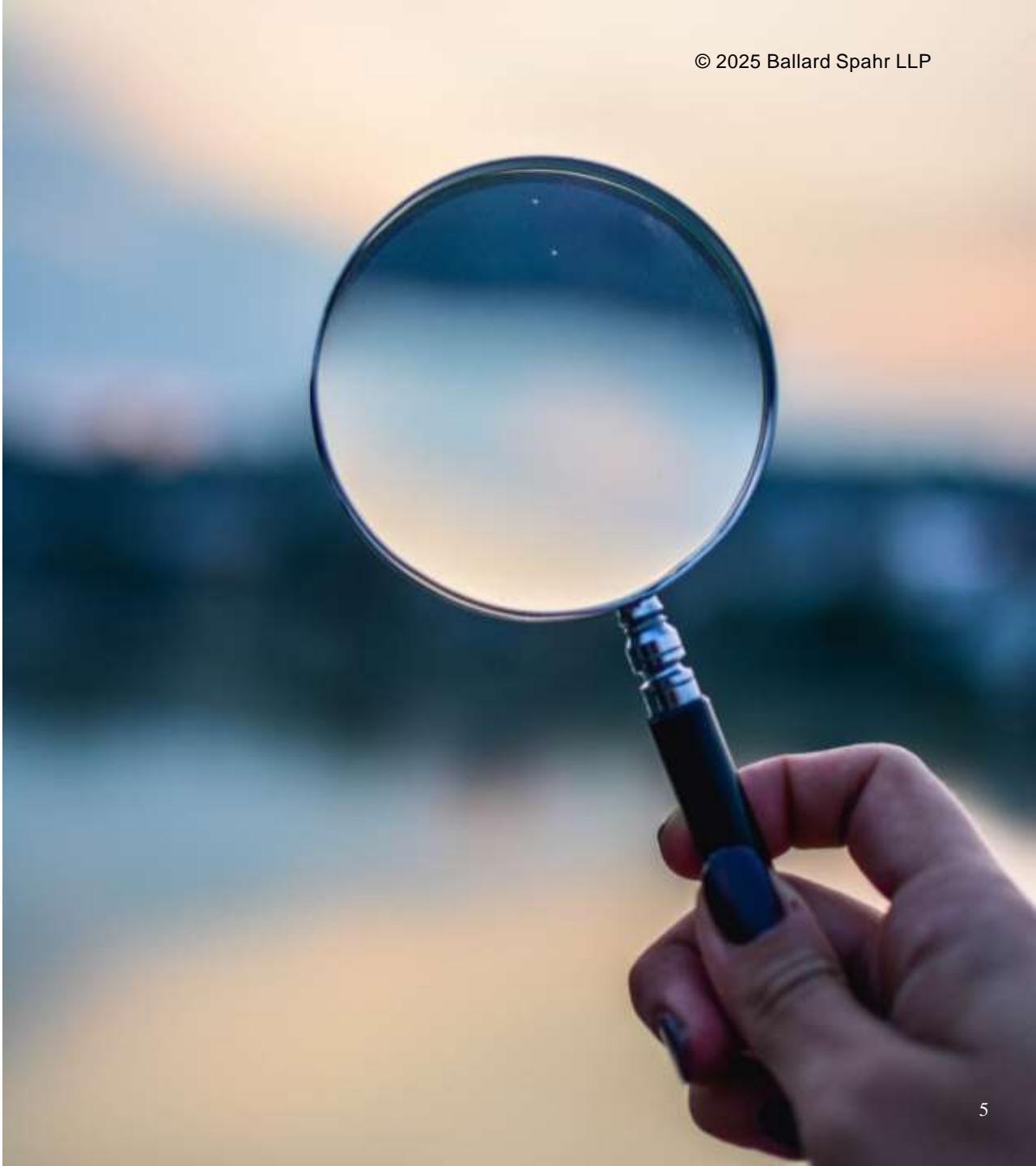
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WHY GOOD INVESTIGATIONS MATTER

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IMPORTANCE OF EFFECTIVE INVESTIGATIONS

1. Greater Scrutiny
 - More awareness
 - Empowered to speak out
2. Manage Perceptions
3. Reduce Legal Risk
 - Eliminate liability
 - Reduce damages





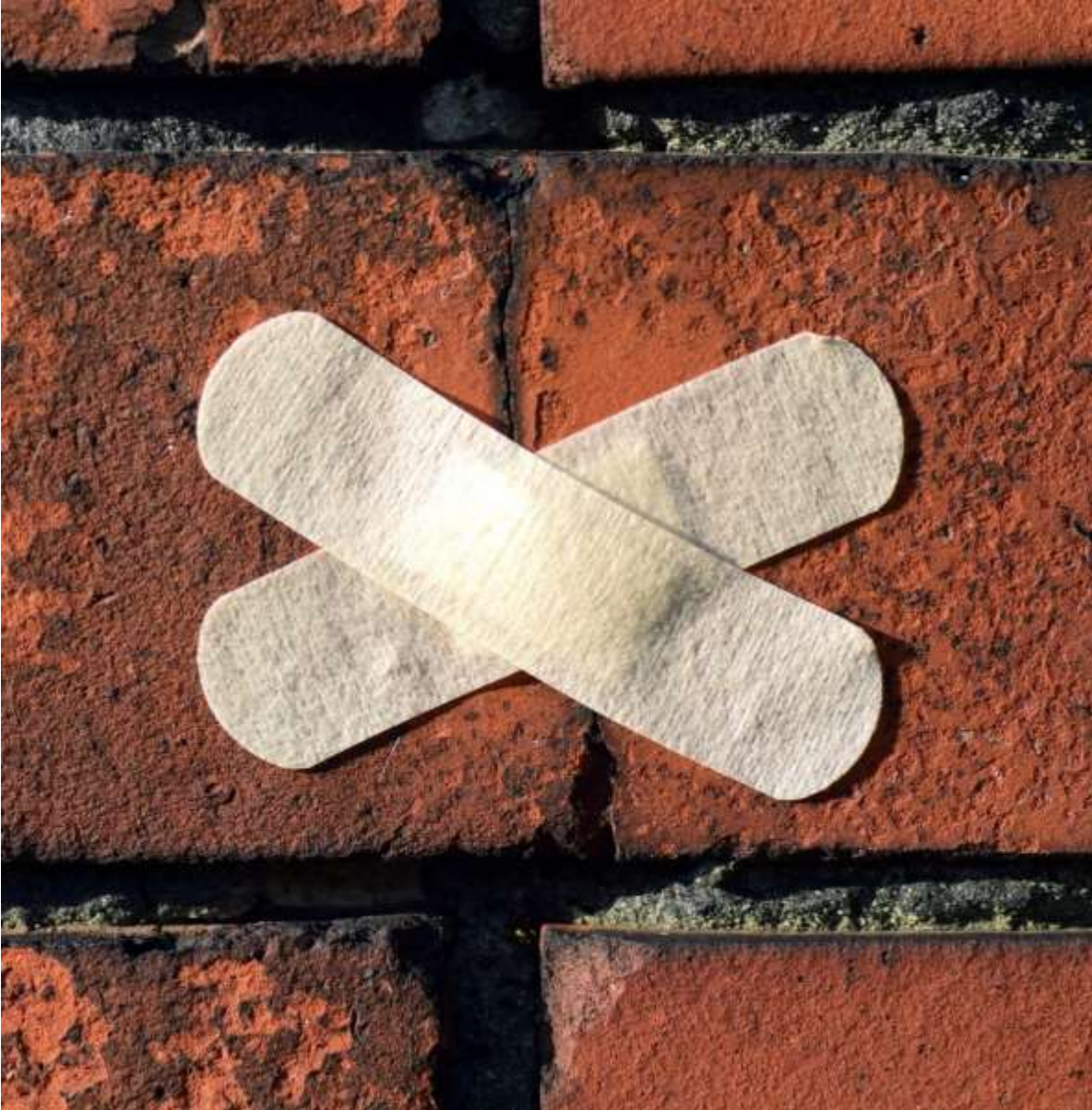
BAD RESULTS WHEN INVESTIGATIONS AREN'T PROMPT OR FAIR

- Proof company failed to prevent bad acts, or condoned them
- Might establish independent cause of action
- Creates inference of malice = punitive damages
- Might lose “good faith belief” defense

HALLMARKS OF AN EFFECTIVE INVESTIGATION

- Prompt
- Thorough
- Tailored to circumstances
- Fair and impartial
- Accurate, presentable record
- Reasonable and supported findings





WORST INVESTIGATORY PRACTICES

- Failure to interview witnesses identified by complainant or alleged wrongdoer without reasonable explanation
- Joint meetings with complainant and alleged wrongdoer to “work things out”
- Discouraging reporting to EEOC or other governmental agency
- Not taking remedial measures because results are inconclusive

WHEN TO INVESTIGATE

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WHAT TRIGGERS INVESTIGATION?

MANAGEMENT LEARNS ABOUT FACTS THAT WOULD PROMPT REASONABLE EMPLOYER TO INQUIRE

- Complaint to HR
- EEOC charge
- Attorney demand letter
- Former employee complaint
- “I don’t want anything done, just wanted to tell you.”
- Workers’ comp claim alleging “stress” from harassment
- Informal information about potential misconduct
 - Discrimination, harassment, retaliation
- Alleged conduct that could result in a disciplinary action
 - Cash losses, violation of company policies



WHAT IS PROMPT?



Too Long

- **19 days** *without explanation*
- *Lawrence v. Schuylkill Medical Center East, 2012*

Ok

- **2 months** *with explanation in report*
- *Welford v. Caterpillar Inc., 2011*

48-Hour Target for Initial Response

CONDUCTING AN INVESTIGATION

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■ TAILOR THE APPROACH TO THE SITUATION





CONFIDENTIALITY OF HR INVESTIGATIONS

- Document why confidentiality is needed for the investigation
 - Protected activity under the law?

STEP #1: CONSIDER INTERIM MEASURES

- Respond promptly to complaint
- Document initial steps
- Insulate complainant from accused
 - Beware of *perceived* retaliation
- Preserve evidence



STEP #2: SELECTING THE COMPLAINT RESPONSE TEAM

- Investigator
- Point(s) of contact
- Decision maker(s)

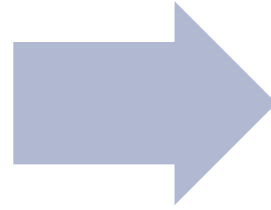




STEP #3: IDENTIFY AND OUTLINE INITIAL ALLEGATIONS

Identify

- Allegations of specific bad conduct
- Any conclusory allegation regarding violation of policy or law



Outline

- Group facts related conclusory allegations
- Group facts related to common themes

STEP #4: PLAN SCOPE AND PROCESS

- Confirm methods to investigate each of the allegations
 - Identify potential witnesses
 - Identify relevant documents/evidence
- Identify relevant policies
- Consider logistics/communications
 - How to approach those involved
 - Where to conduct the interview
 - What to send via e-mail
- Meet the employee where they are at



STEP #5: COLLECTING RELEVANT DOCUMENTS

Personnel files

Performance
evaluations

Relevant emails
and text
messages

Surveillance video
and attendance
records

Employee
handbook

Training records

Phone records
and expense
records

Anonymous calls
to complaint lines

Prior
investigation files

Go online?

Other similar
complaints

STEP #6: PREPARE FOR INTERVIEWS

- Order of interviews
- Opening and closing statement
 - Why they are being interviewed
 - What to expect
 - Confidentiality
 - Retaliation
- Tailor approach and questions
- Goal - Get employees to relax and engage freely



STEP #7: INTERVIEW COMPLAINANT

- Open ended questions; use neutral tone
- Questions targeted to initial complaint
- Exhaustive list of concerns/allegations
- Details
 - Witnesses or evidence
 - Who did you tell
 - Company response
 - Desired outcome
- Next steps
- Finalize notes from interview



STEP #8: INTERVIEW WITNESSES & REVIEW DOCUMENTS

- Open ended questions; neutral tone
- Review prior interviews to ensure you address all relevant information
- Maintain confidentiality
- Finalize notes from interview



STEP #9: INTERVIEW ACCUSED

- Use objective tone; build trust
 - Due process and fair opportunity to tell story
- Start with open ended questions, drill down to allegations
- Witnesses or evidence
- Next steps
- Finalize notes from interview





TECHNIQUES FOR DOCUMENTING INTERVIEWS

- Date, time, length, and who is present
- Confirm opening and closing statements
- Information learned
- Observations about witnesses
- Observations impacting credibility
- Assume notes will be taken out of context: make it clear — a jury may see it

BAD PRACTICES FOR DOCUMENTING INTERVIEWS

- Speculative statements
- Generalizations
- Irrelevant information
- Editorial comments that are not neutral
- Legal conclusions



INVESTIGATION REPORTS

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PREPARE REPORT

- Determine if allegation is substantiated
 - Focus on facts and policy violations, not legal conclusions
 - Credibility assessment
- Prepare written report
 - Assume your file will be taken out of context
 - Make the rationale clear—the judge and jury will analyze it



REPORT CONTENTS

Allegations Summary

Investigation Summary – Witnesses/ Documents

- Reasons for delay of investigation*

Fact and Policy Violation Findings

- Founded,
Unfounded,
Inconclusive

Generic conclusions

- As necessary

PITFALLS

- Poor documentation — unclear context
- Notes with conclusory or irrelevant information
- Ignoring damaging information
- Making legal conclusions
- Editorial comments indicating not neutral
- Speculative statements
- Generalizations



ACTION BASED ON RESULTS

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TAKE APPROPRIATE REMEDIAL ACTION

- Prompt
- Adequately remedies the problem
- Proportionate to the seriousness and frequency of the misconduct
- Consider comparators, context, and past practices
- Avoid perception of retaliation



POTENTIAL PITFALLS

- Protecting superstar performer
- Ignoring damaging information
- No remedial measures because results are inconclusive
- Mediations or joint meetings between complainant and accused





WRAPPING UP THE INVESTIGATION

- Identify and implement remedial action
- Communicate outcome and restate anti-retaliation policy
 - Complainant
 - Alleged wrongdoer
- Create complete investigation file

INVESTIGATION FILES

- Keep separate from personnel files
- Limit disclosure about investigation to “need to know” basis only
- Identify all documents and notes as “Confidential” (and keep in confidential file)
- Follow retention policy = consider destroying draft notes
- Beware: likely still discoverable

