The Orange County Bar Association
Labor & Employment Section Presents

2020 Labor & Employment Law Symposium

Friday, September 18, 2020

Live Webinar

Program Chair
Shirin Forootan, Esq.
Workplace Justice Advocates, PLC
OCBA Labor & Employment Section Chair

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CONDUCTING WORKPLACE INVESTIGATIONS DURING A PANDEMIC-
It's Not Business As Usual

10:45 a.m. – 11:45 a.m.
1.0 General CLE Credit

Amy Oppenheimer, Esq., AWI-CH
Law Offices of Amy Oppenheimer

Sue Ann Van Dermyden, Esq., AWI-CH
Van Dermyden Maddux

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AMY OPPENHEIMER

Investigations in the Wake of a Pandemic
Form and Substance
SUBSTANCE
Orange County Bar Association - 2020

By Amy Oppenheimer, Attorney at Law

www.amyopp.com

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Law Offices of Amy Oppenheimer – Who we are

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Post #MeToo Landscape

- Investigations
  - Stale and non-actionable claims
  - Conduct in a prior workplace
  - Social media harassment
  - Defamation claims by accused
  - Off-duty conduct

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Increased Scrutiny

- Investigator credentials
- Investigator bias
- Who chooses the investigator?
- Who will see the report?
- Should the investigation be privileged?
- Who can remain anonymous?
  - Complainant? Respondent? Witnesses?

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Does **everything** get investigated?

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Then came the Kavanaugh Hearings

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- Public misconceptions
  - Those accused of harassment are “innocent until proven guilty” – not our burden of proof
  - Harassment allegations must be “corroborated” – the target’s statement is not enough

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Headlines

Time Off for Parenting Angers Childless in the Tech Industry

By DAISUKE WAKABAYASHI and SHEERA FRENKEL

OAKLAND, Calif. — When the coronavirus closed schools and child care centers and turned American parenthood into a multitasking nightmare, many tech companies rushed to help their employees. They used their comfortable profit margins to extend workers new benefits, including extra time off for parents to help them care for their children.

It wasn't long before employees

ployees applauded. But one Salesforce manager, who is not permitted to talk publicly about interna matters and therefore asked no to be identified, said two childles

When the Fight Came to the 11-Worth Cafe

A Furor in Omaha Over Facebook Posts and Biscuits and Gravy

By DIONNE SEARCEY

maha's 11-Worth Cafe served standard erican breakfast fare of omelets, hash wns, bacon and eggs and, without much ce until June, a dish called the Robert E. two sausage patties smooshed be- n biscuits and smothered in gravy. at was before the summer. Before e Floyd was killed and Jacob Blake ot, and thousands of people marched police brutality down city streets merica. Before protesters were fa- t in Kenosha, Wis., Austin, Texas, t there in Omaha. Before people de- change in one of the largest cities lidwest set their sights on the bis- d gravy on the menu at the 11-Worth

The 11-Worth Cafe, which first opened in 1979, closed its doors in June.

the name of a biscuits

few months, they say their city, with its cul- friendliness, and claim to creating cream, seems unrecog-

nething Omaha is used to seeing and feeling," said

Hal Daub, a former Republican mayor a ex-congressman who is still active in p tics. "In Omaha, we are a little more elheaded than lots of places."

To others, especially Black residen biscuit name was another reminder city's history includes the 1919 lynch Black man that drew thousands o tors and a Ku Klux Klan attack on X's North Omaha family home. H was never something they coul

"There's so much hate behin hurt," said Precious McKesson, ty activist in Omaha and the cha the state Democratic Party's Bla "We have to stop normalizing ha ing people a platform to normaliz

Across the country, statues and coming down. But America's histo ism is also woven into the street drive on, the schools they send thei and, in Omaha, the biscuits and gra like to order at a downtown breakf

Continued on Page 24

A New Phase of America's Pandemic: College Towns as Hot Spots

This article is by Sarah Watson, Shawn Hubler, Danielle Ivory and Robert Gebeloff.

IOWA CITY — Last month, facing a budget shortfall of at least $75 million because of the pandemic, the University of Iowa welcomed thousands of students back to its campus — and into the surrounding community.

Iowa City braced, cautious optimism mixing with rising panic. The university had taken precautions, and only about a quarter of classes would be delivered in person. But each fresh face in town could also carry the virus, and more than 26,000 area residents were university employees.

"Covid has a way of coming in," said Bruce Teague, the city's mayor, "even when you're doing all the right things."

Within days, students were complaining that they couldn't get coronavirus tests or were bumping into people who were supposed to be in isolation. Undergraduates were jamming sidewalks and downtown bars, masks hanging below their chins, never mind the city's mask mandate.

NICK ROHLMAN, VIA THE CEDAR RAPIDS GAZETTE

Lining up outside a bar in Iowa City, where coronavirus cases have spiked since early August.

pandemic hot spot — one of about 100 college communities around the country where infections have spiked in recent weeks as students have returned for the fall semester. Though the rate of infection has bent downward in the Northeast, where the virus first peaked in the U.S., it continues to remain high across many states in the Midwest and South — and evidence suggests that students returning to big campuses are a major factor.

In a New York Times review of 203 counties in the country where students comprise at least 10 percent of the population, about half experienced their worst weeks of the pandemic since August 1. In about half of those, figures showed the number of new infections is peaking right now.

Continued on Page 9

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COVID's New Claims

- Blurred line between home life and work life exposes new vulnerabilities
- Who gets to stay home and who must come to work
- ADA accommodations
- Wage and hour

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OSHA: Employers Must Investigate Whether Coronavirus Infections are Work-Related

- May 26, 2020 OSHA Guidance
- Reversed April 10 guidance that only certain (essential) employers had to do so
- If so, employer must record illness on OSHA Form 300
- Query: What is a “mini-investigation?”

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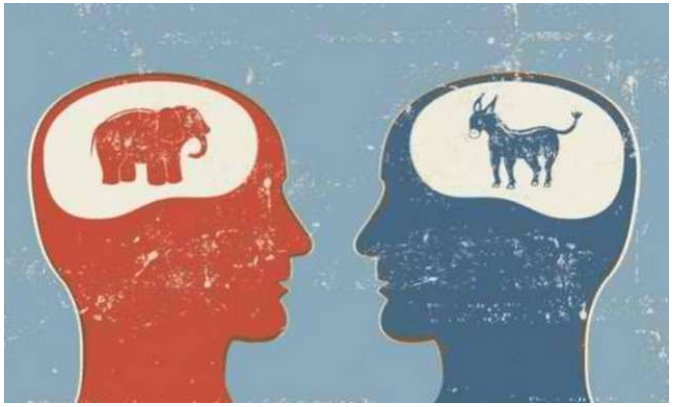
Uptick in These Claims

Domestic Violence

Age

Politics



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A Racial Reckoning

May 25, 2020 – George Floyd is Killed

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The #MeToo Moment for Race

- Stale and non-actionable claims
- Conduct in a prior workplace
- Social media harassment
- Social media scrutiny
- Off-duty conduct

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What is a Microaggression?

- Oxford Dictionary: *A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority.*

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Examples of Microaggressions

- Calling women “honey,” “sweetheart,” or “dear.”
- Telling an African American: “You’re so articulate.”
- Complimenting someone of Asian descent: “You speak such good English” even though English is their first language.
- Telling a transgender colleague they don’t “look” transgender.
- Dismissing an upset female employee as “being hormonal.”
- Over-explaining technology to an an older employee.
- Speaking more slowly to an older person.
- Men constantly talking over/interrupt women in a meeting.

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Why do we care about microaggressions?

- ”A Thousand Papercuts”
- Each microaggression, by itself, inflicts little pain.
- But daily microaggressions over the life of a career, can have a very painful effect.
- Why?
  - Because it is an aggression based on gender, race, etc., the recipient knows it is wrong. Because it is “micro,” the recipient may feel pressured to dismiss it, or risk being labeled “hyper-sensitive.”
  - Because these daily injuries are never addressed or resolved, their cumulative effect is magnified.

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Baby Boomers Meet Generation Z

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Hard Questions

- Should investigators be assigned based on race? Gender? Other identity?
- How do we develop “cultural competence?”
- What is the impact and value of “lived experience?”

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QUESTIONS

VAN DERMYDEN MADDUX

Investigations Law Firm

Investigations During a Pandemic: Form and Substance
FORM

Prepared for:

Orange County Bar Association

Presented by:

Sue Ann Van Dermyden

Where are We?
How Did We Get Here?

Current State of Affairs

- COVID-19: reeling, responding and rebuilding
- Social tension
- Uncertainty

By David Robson *1st April 2020*

The threat of contagion can twist our psychological responses to ordinary interactions, leading us to behave in unexpected ways.

Rarely has the threat of disease occupied so much of our thinking. For weeks, almost every newspaper has stories about the coronavirus pandemic on its front page; radio and TV programmes have back-to-back coverage on the latest death tolls; and depending on who you follow, social media platforms are filled with frightening statistics, practical advice or gallows humour.

As others have already reported, this constant bombardment can result in **heightened anxiety, with immediate effects on our mental health**. But the constant feeling of threat may have other, more insidious, effects on our psychology. Due to some deeply evolved responses to disease, fears of contagion lead us to become more conformist and tribalistic, and less accepting of eccentricity. Our moral judgements become harsher and our social attitudes more

Work Colliding With Home

Remote or In-Person Interviews? Now, or Later?

Tension Between Industry Standards….

Conduct a Prompt Investigation:

- The investigation must be initiated and conducted in a timely manner, reasonable under the circumstances.

Conduct In-Person Interviews:

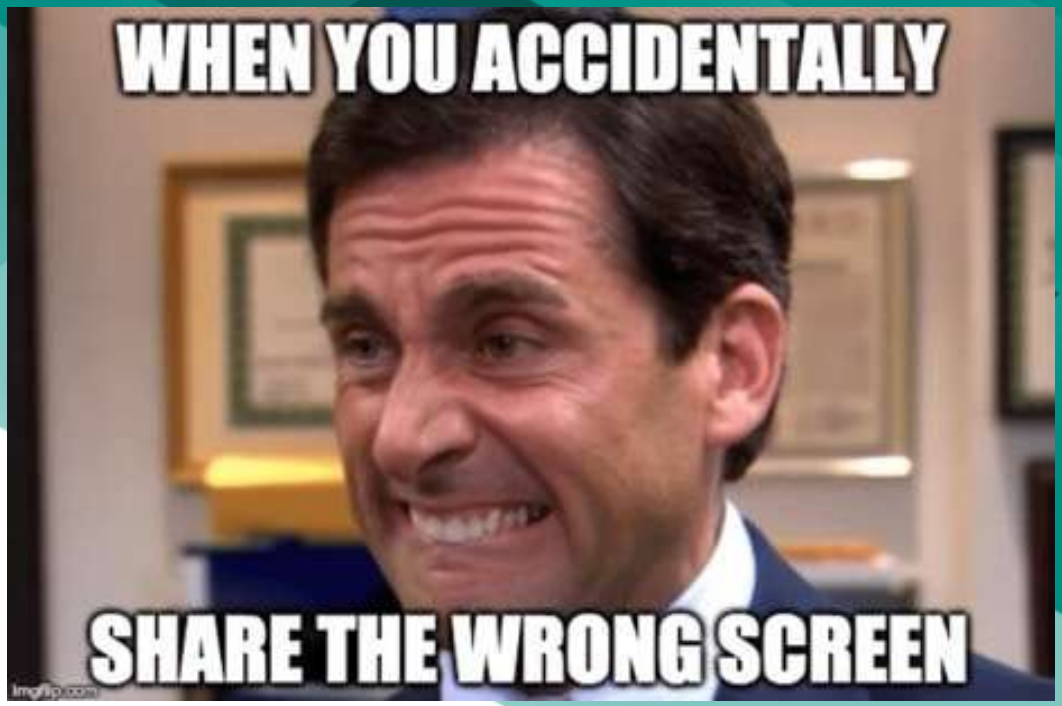
- **EEOC:** Silent on issue
- **DFEH:** Conduct thorough interview with complaining party "preferably in person"
- **AWI Guiding Principles:** "Whenever feasible, the parties and witnesses should be interviewed in person."

NEW NORMAL FOR INVESTIGATIONS

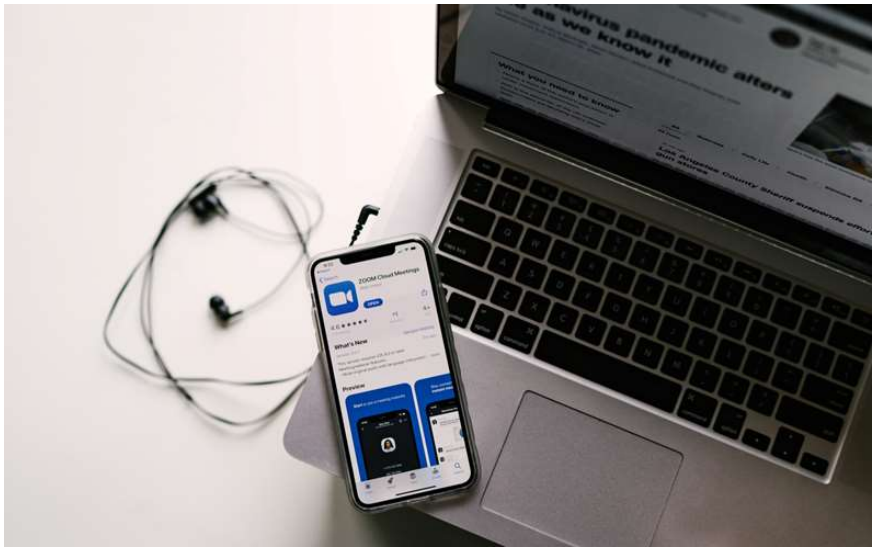
Internal and External investigators use new methods

"Take all reasonable steps to prevent discrimination and harassment" (EEOC)

U.S. Equal Employment Opportunity Commission



Choice of Technology



Confidentiality and Privacy

- Set expectations
- Calendar invites for videoconferences
- Privacy on videoconference platform
- Recording

Build Rapport with Ice Breakers

Credibility in Workplace Investigations: What It Is Not

- Determining someone is a big fat liar
- Gut instinct
- Assessing micro expressions or stereotypical "lying" behavior
  - Eye contact or lack of eye contact
  - Facial expression
  - Body language
  - Attitude toward investigation
  - Fidgeting
  - Tone of voice
  - Nervousness
  - Laughing, coughing, becoming angry
  - Pauses
- What to do with demeanor evidence?

Credibility Factors

- Inherent Plausibility
- Direct Corroboration
- Indirect Corroboration
- Lack of Corroboration
- Material Omission
- Motive to Falsify
- Past Record
- Consistent Statements
- Inconsistent Statements
- Reputation
- Demeanor
- Comparators, Statistics

How Are Remote Credibility Determinations Different?

- In some ways, no affect
  - Objective credibility factors
  - No reliance on micro-expressions
- Remote:
  - Less rapport, less information (vs in-person masks, 6 feet?)
  - Confidentiality, environment, witnesses, representative
  - Informal, background, environment
  - Technology frustrations not impact credibility, but maybe memory

Hypothetical

Karen is concerned about her health and safety after returning to the workplace. She warns her colleagues to stay away from John, a Chinese-American coworker, because he might have the virus. John is not acting sick and has not traveled to an infected area in recent weeks. Despite following all of the necessary precautions, everyone stays away from John because of Karen's comments.

VAN DERMYDEN MADDUX

Investigations Law Firm

Amy Oppenheimer is an attorney and retired administrative law judge whose law firm focuses on workplace investigations. She has written a book about investigations, and testifies as an expert witness on employer practices in responding to, and investigating, harassment. She is also the founder and past-president of the board of the Association of Workplace Investigators (AWI), and served on the DFEH's Task Force on the Prevention of Sexual Harassment in the Workplace. Alezah Trigueros is an attorney who has been conducting impartial workplace investigations with the Law Offices of Amy Oppenheimer since 2014.

MCLE Self-Study:

Guidelines for Responding to Sexual Harassment in the Workplace: An Update

By Amy Oppenheimer and Alezah Trigueros

New Guidelines

Sexual harassment has never been in the spotlight so much as it has over the last few months. One issue that has been under scrutiny is how institutions respond to harassment complaints. A place to turn when determining an appropriate institutional response are guidelines provided by enforcement agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH). Many practitioners are unaware that DFEH recently published new guidelines that are of great assistance in determining an appropriate response to claims of discrimination and harassment (DFEH, *Workplace Harassment Guide for California Employers* (2017)). Other government guidelines to consider are the EEOC *Enforcement Guidance on Vicarious Employer Liability for Harassment by Supervisors*, which was published in 1999 in the wake of the Supreme Court decisions in the *Ellerth* and *Faragher* cases.[1]

Until recently, the 1999 EEOC guidelines were the only government guidelines available that addressed appropriate employer responses. These guidelines were very helpful; however, EEOC is updating them. Last year, the EEOC held hearings evaluating the effectiveness of prevention measures, including training and investigations, and published a paper based on its findings.[2] The EEOC has now proposed new guidelines, which are awaiting finalization and publication. In addition to government guidelines, practitioners can look to guides published by law firms and professional organizations such as the Society for Human Resource Management (SHRM) (*see, e.g.*, Amy Oppenheimer and Craig Pratt, Investigating Workplace Harassment (2003)), and publications such as the Guiding Principles for Investigators Conducting Impartial Workplace Investigations, published by the Association of Workplace Investigators (AWI) in 2012.

The EEOC has now proposed new guidelines, which are awaiting finalization and publication.

The DFEH guidelines, which were published in May of 2017, are the most up-to-date and complete guidelines that discuss an employer's investigative response. The DFEH developed them through its Task Force on the Prevention of Sexual Harassment in the Workplace, which was formed in 2016 to study the problem of sexual harassment, the effects of ten years of harassment prevention training in the state of California, and best practices to prevent harassment. The DFEH guidelines include some big-picture information, such as designing and implementing effective harassment programs, but also zero in on how to conduct a prompt, thorough, and fair investigation.

This article compares and contrasts the new DFEH guidelines with the 1999 EEOC guidelines, the proposed EEOC guidelines, and the AWI guiding principles.

The DFEH guidelines utilize frequently asked questions (FAQs), which address a broad range of topics, including how to respond to complaints, credibility factors, the burden of proof, and other issues. Rather than being a treatise on the law similar to the 1999 EEOC guidelines, the DFEH guidelines have a more practical application. They also provide more practical information than the proposed EEOC guidelines, which are also a treatise on the law, albeit updated from 1999, and address what the EEOC calls "promising practices" that emphasize resourcing, prevention, and investigations.

Due Process

The DFEH guidelines specifically use the term "due process" in relation to providing a fair investigation. Although

The DFEH guidelines, which were published in May of 2017, are the most up-to-date and complete guidelines that discuss an employer's investigative response.

the EEOC and AWI have not used this term specifically, the concept exists in all of the guidelines. Each set agrees that those accused of harassment should have an opportunity to tell their side of the story. The DFEH guidelines specifically state that the investigation should start with a thorough interview of the complainant and also specify that while the investigation should afford the alleged harasser due process and an opportunity to to be heard, it is not necessary to give the accused the allegations prior to the interview or to provide a copy of a written complaint. Rather, the DFEH guidelines state that it is acceptable practice to reveal allegations during the interview, so long as the accused has an opportunity to fully respond. The DFEH guidelines further specify the need to interview relevant witnesses and collect relevant documents, but state that the investigator need not interview every potential witness. Lastly, the DFEH guidelines, in addressing due process, emphasize that the investigator should come to a "reasonable and fair conclusion." The proposed EEOC guidelines refer to this concept as arriving at a "reasonably fair estimate of truth," and AWI articulates this concept as striving "in good faith to make reasoned findings."

Confidentiality

One issue that has become more complicated over recent years is how to handle confidentiality. On one hand, the employer (and thus the investigator) is expected to keep the matter as confidential as reasonably possible. On the other hand, decisions such as *Banner* from the National Labor Relations Board (NLRB)[3] state that employers cannot require employees to keep matters confidential, because doing so could interfere with employees' rights to unionize under Section 7 of the National Labor Relations Act. Since *Banner* was decided after the 1999 EEOC guidelines were issued, it is not addressed; the EEOC guidelines simply identify the need for confidentiality. Nor do the proposed EEOC guidelines or the AWI guiding principles address *Banner*. The DFEH guidelines acknowledge that mandating employees to keep an investigation confidential is complicated and could be inappropriate under current law. This is an evolving area of the law about which employers and investigators need to be aware and evaluate on a case-by-case basis.

Timeliness

Another issue both the EEOC and DFEH guidelines address, though not AWI's, is timeliness. The 1999 EEOC guidelines state that the investigation "should be launched immediately," and the proposed EEOC guidelines say that the investigation is "prompt if it is conducted reasonably soon after the complaint is filed." The proposed EEOC guidelines also give examples and cite case law. The DFEH guidelines give parameters, including contacting the complainant within a day or two to launch an investigation, unless the matter is urgent, and striving to finish the investigation in a few weeks, depending on factors such as witness availability.

Impartiality

All of the guidelines address impartiality, also called objectivity. The EEOC's discusses an "objective" investigation conducted by an "impartial" party. The AWI guiding principles also use the term "impartial." The DFEH uses the term "impartial" and speaks directly to investigators addressing whether they have biases and assessing those biases. The AWI and DFEH guidelines state that the employer should also consider whether there could be a perception of bias based on the chosen investigator. The DFEH posits that it is generally a bad idea for the investigator to have less authority than either the complainant or respondent. The 1999 EEOC guidelines state that the alleged harasser should not have supervisory authority over the individual who conducts the investigation, or direct or indirect control over the investigation. The proposed EEOC guidelines discuss this in terms of the "authority, independence, and resources required to receive, investigate, and resolve complaints appropriately."

Investigator Qualifications

The DFEH and EEOC guidelines also address investigator qualifications and training. The 1999 EEOC guidelines recommend an investigator who is "well-trained in the skills that are required for interviewing witnesses and evaluating credibility." The proposed guidelines also use the term "well-trained." The DFEH guidelines reflect that the investigator should have knowledge of the laws, policies, investigative techniques, and documentation skills needed; have good communication skills; and have received training from a professional organization (such as the SHRM or AWI, for example).

The guidelines also address the types of questions that investigators should ask. The 1999 EEOC guidelines provide sample questions. The AWI guiding principles encourage the use of open-ended questions. The DFEH guidelines state that investigators

should use open-ended questions and that the investigative interview is not an interrogation.

Credibility Determinations

The 2017 DFEH guidelines also provide considerably improved guidance on making credibility determinations. The EEOC addressed this in 1999, stating that the investigator should make a credibility finding when necessary, including a "he said/she said" situation, noting that an independent witness is not needed. This is an important concept, as many employers erroneously believe some independent evidence is necessary and therefore will not find that harassment occurred when the evidence is simply one employee's word against another's. Often, there are no witnesses to harassment, especially sexual harassment. It is important for employers to understand that the credibility of one individual's statement can be weighed against another's in order to make a finding.

The proposed EEOC guidelines also state that they can be used to assist in weighing the credibility of all relevant parties. The DFEH guidelines set forth credibility factors that can be used for this purpose. Some of these credibility factors the EEOC included in its 1999 guidelines; however, the EEOC mentions five, as opposed to the nine that the DFEH identifies. The DFEH's factors also are nearer to those the evidence code identifies, at least to some extent.[4] The credibility factors DFEH identifies include: inherent plausibility or implausibility; motive to lie; corroboration; the witness's ability to perceive and recall; history of honesty or dishonesty; habit or consistency; inconsistent statements; the manner of the testimony, including hesitation and indirect answers; and demeanor. While the EEOC guidelines encourage the use of demeanor evidence, the DFEH encourages caution in relying on demeanor. New empirical evidence shows that relying on demeanor can lead to erroneous findings. Most people are not particularly good at determining truthfulness based on demeanor.

One issue that has become more complicated over recent years is how to handle confidentiality.

Burden of Proof

Burden of proof has become controversial in the Title IX setting. Under President Obama, the U.S. Department of Education published "Dear Colleague" letters, stating that Title IX investigators should use a "preponderance of the evidence" burden of proof.[5] The Trump administration changed that in a September 22, 2017 directive, stating that a "clear and convincing" standard may be used, and leaving the issue somewhat ambiguous.

When it comes to workplace investigations under Title VII or the California Fair Employment and Housing Act (FEHA), there appears to be general agreement that the burden of proof is a preponderance of the evidence. Although the EEOC guidelines do not address burden of proof, the AWI guiding principles state that many workplace investigations should utilize the preponderance of the evidence standard. The 2017 DFEH guidelines specifically articulate that findings should be based on a preponderance of the evidence, which the DFEH explains means "more likely than not." The DFEH guidelines clarify that the standard is not "clear and convincing" or "beyond a reasonable doubt," as employers sometimes mistakenly insist when the allegations are serious. The DFEH guidelines should help California employers understand they must not apply a burden of proof any greater than a preponderance of the evidence.

Findings

The DFEH guidelines also address an important topic that the EEOC guidelines do not cover: the type of findings investigators should make. The DFEH recommends making factual findings rather than legal conclusions, and acknowledges that investigators might also make findings regarding policy violations. These distinctions are significant, and it is helpful that DFEH has clearly articulated the types of findings employers should make in workplace investigations.

The DFEH guidelines also specify that there should be careful and objective documentation of interviews, findings, and steps taken to complete the investigation. The guidelines acknowledge that there are different documentation methods that are acceptable, but warn that documentation should be consistent throughout an investigation and that employers should retain all original documentation. This addresses the sometimes problematic practice of investigators who destroy original notes and rely on summaries of those notes. The 1999 EEOC guidelines do not address documentation; however, the proposed EEOC guidelines suggest appropriately documenting every complaint, from the initial intake through the investigation and resolution. The AWI guiding principles are similar to the DFEH's guidelines.

Retaliation and Other Issues

By utilizing an FAQ format, the DFEH was able to address some issues that arise in workplace investigations that neither the EEOC nor AWI have addressed. For example, what should an employer do if it learns of harassment, but the target of that harassment asks

the employer to not take action? The DFEH suggests that if the issue is a minor one, it is possible to coach the complainant about how to handle the situation, assuming the employer adequately follows up. Regarding more serious allegations, however, DFEH emphasizes the employer must take action, regardless of the fact that the target requests no action be taken.

The DFEH guidelines, but not the EEOC's or AWI's, also address anonymous complaints. The DFEH recommends investigating anonymous complaints using methods that will vary based on the information known to the employer, and also suggests that an environmental assessment may be useful to determine whether harassment exists in the workplace, in the wake of an anonymous complaint.

Lastly, EEOC, DFEH, and AWI guidelines all address retaliation. Retaliation complaints have grown over the last 20 years. In 2016, retaliation complaints accounted for 21 percent of DFEH complaints, and 45.9 percent of EEOC filings. DFEH states that complainants and witnesses must be protected from retaliation, and urges employers to inform employees that retaliation violates both the law and the employer's policies. Moreover, the DFEH guidelines recommend that employers monitor the work environment to prevent retaliation after receiving a complaint. The EEOC addresses retaliation in separate sections both in the 1999 guidelines and in the proposed guidelines. AWI discusses retaliation under the guiding principle regarding witness interviews. Regardless of where in the respective guidelines retaliation is covered, clearly, addressing retaliation is an important component of an effective employer response. Indeed, the fear of retaliation is a strong driver in preventing employees from complaining, and thus an effective employer program to prevent and respond to harassment must include safeguards against retaliation.

The DFEH guidelines are an important tool for employers to use in complying with the law, preventing workplace harassment, and responding to complaints. Although the department's sexual harassment taskforce developed them, the DFEH guidelines apply to all forms of workplace harassment and complaint investigations. As employers become more knowledgeable and, hopefully, more savvy about the critical need to conduct fair and thorough investigations, these guidelines will become increasingly important.

ENDNOTES

1. *Burlington Indus. v. Ellerth,* 524 U.S. 742 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).
2. Select Task Force on the Study of Harassment in the Workplace, EEOC, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016).
3. *Banner Health Sys.*, 362 NLRB No. 137 (June 26, 2015).
4. *See* Cal. Evid. Code § 780 (2015).
5. *See* Office for Civil Rights, U.S. Department of Education, *Dear Colleague Letter on Sexual Violence* (2011).

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CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
WORKPLACE HARASSMENT GUIDE FOR CALIFORNIA EMPLOYERS

California law (called the Fair Employment and Housing Act or FEHA) prohibits discrimination, harassment and retaliation. The law also requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)). The Department of Fair Employment and Housing (DFEH) is the state's enforcement agency related to the obligations under the FEHA.

California's Fair Employment and Housing Council (FEHC) enacted regulations in 2016 to clarify this obligation to prevent and correct wrongful behavior. This document was produced by the DFEH to provide further guidance to California employers.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

- A clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months). The regulations list the required components of an anti-harassment policy at 2 CCR §11023.

- Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.

- Training for supervisors and managers (two-hour training is mandated under two laws commonly referred to as AB 1825 and AB 2053, for more information on this see DFEH training FAQs).

- Specialized training for complaint handlers (more information on this below).

- Policies and procedures for responding to and investigating complaints (more information on this below).

- Prompt, thorough and fair investigations of complaints (see below).

- Prompt and fair remedial action (see below).

IF I RECEIVE A REPORT OF HARASSMENT OR OTHER WRONGFUL BEHAVIOR, WHAT SHOULD I DO?

You should give it top priority and determine whether the report involves behavior that is serious enough that you need to conduct a formal investigation. If it is not so serious (for example, an employee's discomfort with an offhand compliment), then you might be able to resolve the issue by counseling the individual. However, if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate the matter to make a factual determination about what happened. Once your investigation is complete, you should act based on your factual findings.

An investigation involves several steps and you need to consider a variety of issues before you begin your work. The following section will address many of those issues.

WHAT ARE THE BASIC STEPS REQUIRED TO CONDUCT A FAIR INVESTIGATION?

A phrase that you might see related to investigations is "due process." Due process is simply a formal way of saying "fairness" – employers should be fair to all parties during an investigation. From a practical perspective, this means:

- Conduct a thorough interview with the complaining party, preferably in person. Whenever possible, the investigation should start with this step.

- Give the accused party a chance to tell his/her side of the story, preferably in person. The accused party is entitled to know the allegations being made against him/her, however it is good investigatory process to reveal the allegations during the interview rather than before the interview takes place. It may not be necessary to disclose the identity of the complaining party in some cases. Due process does not require showing the accused party a written complaint. Rather, it means making the allegations clear and getting a clear response.

- Relevant witnesses should be interviewed and relevant documents should be reviewed. This does not mean an investigator must interview every witness or document suggested by the complainant or accused party. Rather, the investigator should exercise discretion but interview any witness whose information could impact the findings of the investigation and attempt to gather any documents that could reasonably confirm or undermine the allegations or the response to the allegations.

- Do other work that might be necessary for you to get all the facts (perhaps you need to visit the work site, view videotapes, take pictures, etc.).

- You should reach a reasonable and fair conclusion based on the information you collected, reviewed and analyzed during the investigation.

DO I HAVE TO KEEP ALL INFORMATION FROM AN INVESTIGATION CONFIDENTIAL?

You need to look at confidentiality from two sides – the investigator's and the employees'. The first question is how confidential the investigator (internal or external) will keep the information obtained; the second is whether an employer can require that employees keep information confidential.

- **Can the investigator keep the complaint confidential?**

The short answer is no. Employers can only promise *limited* confidentiality – that the information will be limited to those who "need to know." An investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation in order to complete the investigation and take appropriate action. It is not possible to promise that a complaint can be kept entirely "confidential" for several reasons:

1. If the complaint is of potential violation of law or policy, the employer will need to investigate, and in the process of investigating it is likely that people will know or assume details about the allegations, including the identity of the person who complained. This is true even when the name of the complainant is kept confidential since allegations are often clear enough for people to figure out who complained about what.
2. The individual receiving the complaint will usually have to consult with someone else at the company about what steps to take and to collect information about whether there have been past complaints involving the same employee, etc. That means the complaint will be discussed with others within the organization.
3. The company may need to take disciplinary action. Again, while the identity of the person who brought the complaint may in some cases be kept confidential, the complaint itself cannot be.

- **Can I tell employees not to talk about the investigation?**

This is a complicated issue. Managers can, and should, be told to keep the investigation confidential. However there have been court rulings that say it is inappropriate for an employer to require that employees keep the information secret, since employees have the right to talk about their work conditions. There are exceptions to this. If you want to require confidentiality, you might want to check with an attorney about when it is appropriate and how to do so.

HOW QUICKLY DO I NEED TO BEGIN AND FINISH MY INVESTIGATION?

The investigation should be started and conducted promptly, as soon as is feasible. Once begun, it should proceed and conclude quickly. However, investigators also must take the time to make sure the investigation is fair to all parties and is thorough. Some companies set up specific timelines for responding to complaints depending on how serious the allegations are (for example, if they involve claims of physical harassment or a threat of violence, act the same day as the complaint is received). If the allegation is not urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation in a few weeks (although that depends on several factors, including the availability of witnesses).

A prompt investigation assists in stopping harassing behavior, sends a message that the employer takes the complaint seriously, helps ensure the preservation of evidence (including physical evidence such as emails and videos, and witnesses' memories), and allows the employer to fairly address the issues in a manner that will minimize disruption to the workplace and individuals involved.

WHAT ARE SOME RECOMMENDED PRACTICES FOR CONDUCTING WORKPLACE INVESTIGATIONS?

IMPARTIALITY

The investigation should be impartial. Findings should be based on objective weighing of the evidence collected. It is important for the person conducting the investigation to assess whether they have any biases that would interfere with coming to a fair and impartial finding and, if the investigator cannot be neutral, to find someone else to conduct the investigation.

Even if investigators determine they can be neutral and impartial, they must evaluate whether their involvement will create the perception of bias. A perception of bias by the investigator will discourage open dialogue with all involved parties. For example, in a case in which the investigator has a personal friendship with the complainant or accused, either actual or perceived, the investigator may need to recuse him- or herself to avoid the appearance of impropriety. It is generally a bad idea to have someone investigate a situation where either the complainant or accused party has more authority in the organization than the investigator.

INVESTIGATOR QUALIFICATIONS AND TRAINING

Qualifications:

The investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to harassment, investigative technique relating to questioning witnesses, documenting interviews and analyzing information. He or she should have sufficient communication skills to conduct the interviews and deliver the findings in the written or verbal form. For more complex and serious allegations it is also important for the investigator to have prior experience conducting such investigations.

For workplace investigations, employers may utilize an employee as an investigator or hire an external investigator. In instances of harassment allegations, the employee investigator is often someone from human resources. In California, external investigators (those who are not employed by the employer) must be licensed private investigators or attorneys acting in their capacity as an attorney (See Business and Professions Code Section 7520 et seq.)

Training:

There is no one standard training program for workplace investigators. Internal investigators usually obtain training by professional organizations for HR professionals (such as The Society for Human Resource Management (SHRM), Northern California Human Resource Association (NCHRA), Professionals in Human Resource Association (PIHRA), professional

organizations for workplace investigators (such as the Association of Workplace Investigators - AWI) and enforcement agencies (such as DFEH or EEOC). Many law offices and vendors that provide harassment prevention training also provide training for investigators. At a minimum, training should cover information about the law shaping investigation recommended practices, how to determine scope (what to investigate), effective interviewing of witnesses, weighing credibility, analyzing information and writing a report. An introductory training program typically lasts a full day (some training is longer) and includes skill-building exercises.

TYPE OF QUESTIONING

Investigations should not be interrogations. Neither the complainant nor the accused party should feel they are being cross-examined. Studies have shown that open-ended questions are better at eliciting information while not causing people to feel attacked. Investigators should ask open-ended questions on all areas relevant to the complaint to get complete information from the parties and witnesses.

MAKING CREDIBILITY DETERMINATIONS

Making a determination:

If there is no substantial disagreement about the factual allegations it may not be necessary to make a credibility determination. However, many investigations require a credibility determination, including the classic "he said/she said" situation, and it is up to the investigator to make this determination. An investigator can still reach a reasonable conclusion even if there is no independent witness to an event. In most cases, if the investigator gathers and analyzes all relevant information, it is possible to come to a sensible conclusion.

He said/she said situations:

It is not uncommon for there to be no direct witnesses to harassment. Yet there may be other evidence that would tend to support or detract from the claim. For example, a complainant who complains about harassment may have been seen to be upset shortly after the event, or may have told someone right after the event. This would tend to bolster his or her credibility. On the other hand, it would tend to bolster the accused party's credibility if the investigator learned that the complainant complained many months after sexual joking with a supervisor, was just given a negative performance review, and told a co-worker that he or she could use the joking against the supervisor in the future. In other cases documents such as emails or texts might bolster or reduce a witness's credibility.

Even if there is no evidence other than the complainant's and accused party's respective statements, the investigator should weigh the credibility of those statements and make a finding as to who is more credible. The investigator can utilize the credibility factors stated below.

Credibility factors:

Credibility factors include the following (these are also referred to in statutes and enforcement agency guidance):

1. Inherent plausibility – this refers to whether the facts put forward by the party are reasonable: whether the story holds together. In other words, ask yourself whether it is plausible that events occurred in the manner alleged.
2. Motive to lie (based on the existence of a bias, interest or other motive) – this refers to whether a party has a motive to be untruthful.
3. Corroboration – this refers to whether a direct or indirect witness corroborates some or all of the allegations or response to allegations.
4. Extent a witness was able to perceive, recollect or communicate about the matter – this refers to whether the witness could reasonably perceive the information reported (in terms of where they were, what else was happening, etc.)
5. History of honesty/dishonesty. Although investigations are not meant to make character judgments about the parties (whether they are a "good person"), if an individual is known to have been dishonest, this can weigh against his/her credibility.
6. Habit/consistency – this refers to allegations of a behavior that someone is known to do on a regular basis (such as hugging all female employees in greeting).
7. Inconsistent statements – this refers to one individual giving statements that are inconsistent in a way that is not easily explained.
8. Manner of testimony – such as hesitations of speech and indirect answers (especially when the witness has given direct answers to foundational questions.)
9. Demeanor – experts caution against using demeanor evidence as most people cannot effectively evaluate truthfulness from an individual's demeanor. Demeanor can be used as a credibility factor, but investigators should apply it with caution and understand the pitfalls of relying on demeanor when making a finding. To the extent possible, your conclusions should be based on an analysis of the objective evidence.

BURDEN OF PROOF

Investigators should make findings based on a "preponderance of the evidence" standard. This is the standard that civil courts use in discrimination and harassment cases. This standard is also called "more likely than not" – the investigator is making a finding that it more likely than not that the conduct alleged occurred, or more likely than not that it did not occur. Some workplace investigators make the mistake of applying a higher burden of proof, such as a "clear and convincing" standard or a "beyond a reasonable doubt" standard. Beyond a reasonable doubt is the standard used in criminal law, where a defendant is considered innocent until proven guilty and the consequence of guilt is a loss of freedom. Applying such a standard in a workplace investigation creates an unrealistic expectation about the level of proof needed to make a decision. Even a "clear and convincing" standard is a higher standard than should be expected since it is a higher standard than a civil court would use to determine liability. Some people describe a preponderance of the evidence standard as "fifty percent plus a feather."

DO NOT REACH LEGAL CONCLUSIONS

It is considered a recommended practice for investigators to reach factual conclusions, ***not*** legal conclusions. Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy. Note that violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.

Conclusions should state, for example:

> *Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.*

Some investigators (typically internal investigators) are also expected to decide whether a policy was violated. External investigators are usually not asked to make this determination since the employer is often in a better position to interpret its own rules. In the above example, if the investigator were to make a policy violation determination the findings would also include:

> *It is further found that Mr. Foster violated the company's anti-harassment policy which prohibits telling sexually-explicit jokes in the workplace.*

In the event the investigation does not uncover evidence to support the allegations, the conclusion should state that fact, such as:

> *Mr. Jones's allegations against Mr. Foster are not supported by a preponderance of the evidence. This is because no witness recalls hearing the jokes described by Mr. Jones, even though they were present for the meetings in question. These witnesses appeared credible. They provided consistent information and appeared to have no bias for or against either party.*

DOCUMENTATION

Investigators should carefully and objectively document witness interviews, the findings made and the steps taken to investigate the matter. Investigators have different methods of documenting interviews, including taking notes (handwritten or on a computer), drafting statements for witnesses to sign, obtaining witness statements (written by the witness), or audio recording. There are pros and cons to each method and any can be acceptable so long as the information gathered is reliable and thoroughly documented and the documentation is not altered. It is also advisable to be consistent in the way you decide to document your interviews (unless there is a good reason to change your usual practice). It is considered a recommended

practice to retain all documentation. Some investigators type up handwritten notes so they are legible. However, the handwritten notes should also be retained.

SPECIAL ISSUES

What to do if the target of harassment asks the employer not to do anything.

It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential or says that he/she will "solve the problem" with no involvement by the company. Indeed, this is one of the primary reasons why employers should not promise "complete" confidentiality. If the complaint involves relatively minor allegations and the complainant wants to handle the situation him/herself, the complainant can be coached as to how to do so, however the employer should follow up and assure this has occurred and the harassment has stopped. If the allegations are more serious the employer will need to know if they occurred so that appropriate action can be taken. In those cases it is not acceptable to have the complainant handle the matter alone.

Investigating Anonymous Complaints

Anonymous complaints should be investigated in the same manner as those with a complainant who identifies him/herself. The method will depend on the details provided in the anonymous complaint. If the complaint is sufficiently detailed the investigation may be able to proceed in the same manner as any other complaint. If the information is more general, the employer may need to do an environmental assessment* or survey to try to determine where there may be issues. However, the fact that the complaint is anonymous is not a reason to ignore the complaint.

* An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual. For example, it might mean interviewing all the employees in a work group about how they interact, if they have experienced or witnessed any behavior that has made them uncomfortable, etc.

Retaliation

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Employers should tell complainants and witnesses that retaliation violates the law and their policies, should counsel all parties and witnesses not to retaliate, and should be alert to signs of retaliation. Retaliation can take many forms. In addition to the obvious, such as terminations or demotions, retaliation could take the form of changes in assignments, failing to communicate, being ostracized or the subject of gossip, etc.

Retaliation can occur at any time, not only right after an incident is reported or an investigation is started. It is good practice to check back with a complainant after an investigation is completed to ensure that the employee is not experiencing retaliation, no matter whether the allegations were determined to be correct.

IMPLEMENTING EFFECTIVE REMEDIAL MEASURES

The FEHC regulations make it clear that an employer must take appropriate remedial steps when there is proof of *misconduct* – the behavior does not need to rise to the level of a policy violation or the law to warrant a remedy. Remember, an employer's legal obligation is to take reasonable steps to **prevent and correct** unlawful behavior. In order to meet this obligation, an employer should:

- Stop behavior before it rises to the level of unlawful conduct, which is why steps should be taken even when the behavior is not yet serious enough to violate the law;
- Impose remedial action commensurate with the level of misconduct and that discourages or eliminates recurrence; and
- Look at what the company has done in the past in similar situations, to avoid claims of unfair (possibly discriminatory) remedial measures.

Remedial measures can include training, verbal counseling, one-on-one counseling/executive training, "last chance" agreements, demotions, salary reductions, rescinding of a bonus, terminations, or anything else that will put a stop to wrongful behavior.

The Meaning of "Due Process" in Harassment Investigations

By Amy Oppenheimer and Alezah Trigueros

I. Introduction

The #MeToo movement shone a light on the pervasiveness of sexual harassment, bringing into the public consciousness the breadth and scale of harassment faced by women in the workplace, in educational institutions, and in their private lives. The movement has also placed increased pressure on employers and educational institutions to address harassment occurring in those settings and to take action against individuals found to have engaged in prohibited conduct. This in turn has led to concerns regarding the rights of those accused of engaging in sexual harassment and questions of whether the investigations and adjudications of harassment complaints in employment and educational settings afford due process to the accused.

There are two different standards of due process in the context of the investigation and adjudication of harassment complaints in the workplace. In the private sector, where employees are generally at will, the accused does not have formalized due process protections. However, case law, discussed below, sets forth some basic due process rights under these circumstances. In the public sector, there are greater due process protections because public employees have a property interest in their jobs and the government is constrained in its ability to deprive an individual of a property interest. A third, more stringent standard of due process is evolving in educational institutions that receive federal funding. Recent cases have also imposed more stringent procedures in sexual assault cases that have not been applied in an employment setting but are nevertheless instructive of how these issues are viewed.

It is noteworthy that harassment differs from other types of misconduct due to the significant impact on the individual being targeted. Other terminable conduct, such as poor attendance or poor performance, does not impact other employees in the manner that harassment does. And, importantly, employers have legal duties to protect other employees from harassment. Because of this, when it comes to harassment cases, a heightened level of due process may conflict with an employer's affirmative duty to prevent and respond to workplace harassment. If heightened due process rights lead the target of harassment to feel unprotected, it could result in fewer targets of harassment bringing forward complaints, and result in these employees either suffering the harassment or leaving the employment.

This article examines the processes that afford fundamental fairness to employees who are accused of harassment and argues that an evidentiary hearing is not necessary to provide fundamental fairness to the accused. Rather, a thoroughly conducted workplace investigation provides a process that is fair to both the targets of harassment and the accused.

II. Procedural Due Process

Due process represents the broad concept that our laws and how they are enforced must be fundamentally fair. The right to due process is referenced twice in the U.S. Constitution in the context of government actions. The Fifth Amendment states that no person "shall be deprived of life, liberty, or

property, without due process of law." The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law."[1]

There are two types of due process: procedural due process and substantive due process. Procedural due process, the focus of this article, refers to the fair procedures that the government must adhere to before it can deprive a person of life, liberty, or property. Substantive due process, on the other hand, protects against the deprivation of a fundamental right.

III. Due Process Rights of Public Employees

In the workplace, it has long been established that public employees have a property interest in their jobs and, therefore, for a government actor to deprive an employee of that property interest (for example by terminating the employee or suspending the employee without pay), due process must be afforded. For example, in *Arnett v. Kennedy*[2], the Court held that due process protected the right of a non-probationary federal civil service employee to continue his position absent just cause for dismissal. This also holds in public education. In *Goss v. Lopez*[3], the Court found that "[h]aving chosen to extend the right to an education," the State could not "withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."

Having established that the government cannot deprive individuals of their protected interests without affording a fundamentally fair process, the question is what that due process entails. The Constitution does not outline a mechanism for due process. Rather, legislation and judicial precedents have, over time, fleshed out what specific protections are required to ensure procedural fairness, and these specifics have varied depending on the type of action being taken. That is, a criminal case is subject to more stringent due process requirements than a civil case, which is subject to more stringent requirements than an administrative case, and so forth.

In his 1975 article, *Some Kind of Hearing*, U.S. Circuit Judge Henry J. Friendly questioned how closely due process hearings concerning executive and administrative actions must conform to the judicial model applied in criminal and civil contexts. Friendly explained that while early Supreme Court decisions set forth that "some kind of hearing is required at some time before a person is finally deprived of his property interests" given the "number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings," when mere executive or administrative actions are involved.[4]

That same year, in *Skelly v. State Personnel Board*[5], the California Supreme Court established a due process framework for disciplinary action taken against public sector employees. In *Skelly*, an employee was given written notice of termination, which set forth the basis for the termination, and was permitted to submit a written response and request a hearing.[6] The employee asserted that terminating him *prior to* an evidentiary hearing, and without any prior procedural safeguards, was a violation of his due process rights.[7]

The *Skelly* court concluded: "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However . . . due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."[8]

The *Skelly* case thus established a basic procedural framework for due process protections in the context of employee discipline in the public sector.

While *Skelly* rights help protect employees from being unfairly terminated, they can also serve to make it difficult to terminate employees, even those who have harassed others at work. In the employment setting, additional sources of due process requirements can include individual employment contracts, collective bargaining agreements, and employee handbooks, codes of conduct, personnel policies and grievance procedures, and regulations and guidance issued by government agencies.

IV. Due Process Rights of Private Employees Accused of Harassment

Although private employees do not have a property interest in their jobs, principles of fundamental fairness still apply to actions taken against private employees. In the context of an employee terminated for sexual harassment, California courts have set forth that a fair investigation of the accusations of sexual harassment provides a qualified immunity to the employer for liability for wrongful termination.

In *Cotran v. Rollins Hudig Hall International, Inc.*[9], the California Supreme Court looked at a case involving a male supervisor who was an at-will employee and was accused of sexual harassment by two female employees. The male employee was terminated following a two-week investigation that ultimately substantiated the allegations based on the credibility of the two complainants. The court found that an employee is terminated for "just cause" when "the factual basis on which the employer concluded a dischargeable act had been committed [was] reached honestly, after an appropriate investigation and for reasons that [were] not arbitrary or pretextual."[10] Expanding upon the *Cotran* decision, *Silva v. Lucky Stores, Inc.* further established that "investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial."[11] The *Silva* court found that the employer in that case had "listened to both sides, advised Silva of the charges and provided him with ample opportunity to present his position and to correct or contradict relevant statements prejudicial to his case," and had therefore met *Cotran*'s "fairness requirements."[12]

V. Governmental Guidance on Due Process in the Investigation of Sexual Harassment

Governmental agencies enforcing laws against sexual harassment have also discussed what a fair investigation consists of. While the focus of this guidance is how to protect employees who are harassed, it also discusses the rights of the accused. In 1999, the U.S. Equal Employment Opportunity Commission (EEOC) issued its first *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*.[13] This guidance included information concerning the duty of employers to conduct timely, fair, and thorough investigations of sexual harassment allegations. While the guidance did not specifically reference due process, the guidance expressly states that the employer must "ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts," that the accused should have an opportunity to tell his or her side of the story, and that any "disciplinary measures should be proportional to the seriousness of the offense."[14]

In 2017, the California Department of Fair Employment and Housing (DFEH) issued a *Workplace Harassment Guide for California Employers*.[15] The DFEH guide specifically uses the term "due process" in relation to providing a fair investigation, and expands on the investigative principles set forth by the EEOC. The DFEH guide states that the investigator should give the accused party "a chance to tell his/her

side of the story, preferably in person," and further states that the accused party "is entitled to know the allegations being made against him/her."[16] The guide notes that due process does not necessarily require that the accused party be informed of the allegations against them prior to their investigative interview or that the allegations be provided in writing, but rather due process entails "making the allegations clear and getting a clear response" and reaching a "reasonable and fair conclusion based on the information . . . collected, reviewed and analyzed during the investigation."[17]

This guidance sets the framework for the procedural fairness an employee accused of engaging in harassment is entitled to in the context of a workplace investigation. Whether the employee would then be entitled to any further procedural protections, such as a hearing, should the investigative findings lead to termination or lesser discipline, depends on whether the employer is a public or private employer, and/or whether some other source of due process applies, as discussed above. In the private employment setting, the timely, fair, and thorough investigation itself is the extent of the due process to which the employee is entitled.

VI. Due Process in Educational Institutions

Although historically Title IX cases, which address discrimination and harassment in educational settings, have followed generally the same model of investigating and adjudicating allegations of misconduct as in the employment setting,[18] recent California cases have demonstrated a shift in approach that favors enhanced protections for those accused of sexual misconduct. Pre-2017 decisions, such as the 2016 *Doe v. Regents of University of California* case, emphasized that a "fair hearing," in the context of a university student conduct review panel, "need not include all the safeguards and formalities of a criminal trial."[19] The court went on: "A university's primary purpose is to educate students: '[a] school is an academic institution, not a courtroom or administrative hearing room.' A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms."[20]

Thus, in *Doe v. Regents*, the court found that the due process rights of a male student—found by the university's student conduct review panel to have sexually assaulted a female student—were not violated when the accused's attorney was prevented from actively participating in the hearing, when the accused was prevented from cross-examining the female student (though he was permitted to submit written questions to the female student, who did testify before the panel), or when the panel relied on the findings contained in the Title IX investigator's report without directly questioning the investigator or providing to the investigator's interview notes to the accused.[21]

However, post-2017 cases, such as the 2019's *Doe v. Allee*,[22] have seemingly tempered universities' freedom to deviate from the type of "safeguards and formalities" referenced in the 2016 *Doe v. Regents* case. In *Doe v. Allee*, the California Court of Appeal cited the 2017 decision in *Doe v. University of Cincinnati*,[23] which found that the due process rights of a male student were violated because the female student did not testify in person before the review panel and the panel relied on the Title IX investigator's report in reaching its finding; as well as the 2018 *Doe v. Claremont McKenna College*[24] case, which likewise found that the due process rights of a male student were violated because the university permitted the female student and witnesses to submit written statements to the review panel, rather than appear personally before the panel and be cross-examined. The court then found that when a student "faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least

permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts."[25]

Thus, the trend, at least in educational settings, is for more formalized trial-like proceedings that go beyond the safeguards provided for public employees under *Skelly*.

VII. What Does This Mean for Employers Enforcing Laws and Policies Regarding Harassment?

The above authorities are illustrative of the gap between the due process afforded an employee of a private employer who is terminated for violation of a sexual harassment policy (that is, a fair and thorough investigation as articulated by *Cotran* and *Silva*), as opposed to a public employee (who has additional rights under *Skelly*), as opposed to a student at an educational institution (who has enhanced due process rights under *Allee*). But should there be different levels of due process for what is essentially the same type of conduct? What level of due process is appropriate in employment settings? And how might these different levels of due process impact the prevention of harassment?

Employees who are accused of harassment will no doubt argue for heightened due process procedures. However, those who are targets point to the fact that being subjected to cross-examination may have a chilling effect on bringing claims forward. Sexual harassment is already under-reported. More formalized processes protecting the rights of the accused may have the (presumably unwanted) effect of discouraging claims and making it harder to terminate wrongdoers. Public employers often already have the difficult decision of whether they should protect the complainant and witnesses by failing to disclose information that would expose employees to embarrassment or ridicule when it could mean risking having sufficient evidence for a termination to survive a *Skelly* hearing.

Employers are increasingly in a no-win position, trying to provide heightened due process for the accused (or being criticized if they do not) while effectively addressing sexual harassment and also being subject to criticism if they do not swiftly terminate the individual accused. In the meantime, the sort of mini-trials that courts have determined are impractical and detrimental to educational institutions' primary purpose—to educate students—could equally be said to divert resources and attention from the employers' primary purpose—whether the organization is a public entity, serving the public good, a non-profit with a charitable purpose, or a private entity. The unintended victims of increasing due process rights could be the rest of the employees in the workplace, who often cannot help but be impacted by what is going on.

Treating employees fairly—not terminating without a reasonable basis to do so and not making findings about harassment without a fair and thorough process—should be an essential element of any workplace culture. But that doesn't necessarily require enhanced due process rights for the accused such as those that have come to prevail in the educational setting. In private workplaces (and arguably in public workplaces as well), the *Cotran* and *Silva* standards have worked successfully for many years. A thorough and fair investigation in conformity with those standards strikes the proper balance. Both employers and employees should think twice before advocating for something different.

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[1] *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Garfinkle v. Superior Court*, 21 Cal.3d 268, 281-82 (1978); *Coleman v. Department of Personnel Admin.*, 52 Cal.3d 1102, 1112 (1991).

[2] 416 U.S. 134 (1974).

[3] 418 U.S. 565, 573-74 (1975).
[4] Henry J. Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1268 (1975).
[5] 15 Cal. 3d 194 (1975).
[6] *Id.* at 197-98.
[7] *Id.* at 205.
[8] *Id.* at 215.
[9] 17 Cal. 4th 93 (1998).
[10] *Id.* at 107.
[11] 65 Cal. App. 4th 256, 264 (1998) (*citing Cotran*, *supra* n.9 at 108).
[12] *Id*. at 273.
[13] Available at: https://www.eeoc.gov/policy/docs/harassment.html (last visited Oct. 16, 2019).
[14] *Id*.
[15] Available at: https://dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf (last visited Oct. 16, 2019).
[16] *Id*.
[17] *Id*.
[18] Although these cases do not currently apply in employment settings, this trend could be applied in the employment arena and thus is instructive to a discussion of due process in the context of the investigation and adjudication of sexual harassment complaints.
[19] 5 Cal. App. 5th 1055, 1078 (2016).
[20] *Id*. (*quoting Murakowski v. University of Delaware*, 575 F. Supp. 2d 571, 585-86 (D. Del. 2008)).
[21] *Id*. at 1082-98.
[22] 30 Cal. App. 5th 1036 (2019).
[23] 872 F.3d 393, 400 (6th Cir. 2017).
[24] 25 Cal. App. 5th 1055 (2018).
[25] *Id*.

The Psychology of Bias:
Understanding and Eliminating Bias in Investigations

By Amy Oppenheimer, Attorney at Law[1]

Our experiences instantly become part of the lens through which we view our entire past, present, and future, and like any lens, they shape and distort what we see.

—Daniel Gilbert, *Stumbling on Happiness*

Actors do not always have conscious, intentional control over the processes of social perception, impression formation and judgment that motivate their actions.

—Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*

Bias – Some Basics

Bias may be defined as: a strong inclination of the mind; a preconceived opinion or irrational preference or prejudice; an inclination, especially one that prevents an unprejudiced consideration of a question; prejudice.

Although we may associate the term "bias" with prejudice against a disadvantaged group, the term is broader and applies to all types of preferences and prejudices. Some of these are idiosyncratic and reflect personal tastes or experiences. Others are impacted by societal images and norms. The types of biases about which an investigator should be concerned are those that may lead the investigator to faulty conclusions.

Cognitive bias may be defined as: the human tendency to make systematic errors in certain circumstances based on cognitive factors rather than evidence. Such biases can result from information-processing shortcuts called heuristics.[2] They include errors in judgment, social attribution, and memory. Cognitive biases are

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[1] Information about the author is available on her website, www.amyopp.com. The author gratefully acknowledges the assistance of Stephen P. Angelides in the analysis and editing process.

[2] Heuristic is a term for experience-based techniques that help in problem solving, learning and discovery. A heuristic method is used to come to a solution rapidly that is hoped to be close to the best possible answer, or "optimal solution". A heuristic is a "rule of thumb", an educated guess, an intuitive judgment or simply common sense. A heuristic is a general way of solving a problem.

a common outcome of human thought, and often drastically skew the reliability of anecdotal and legal evidence. It is a phenomenon studied in cognitive science and social psychology.

As employment investigators we promise to come to an "unbiased" conclusion of what occurred in the workplace. But if we ourselves are impacted by biases of which we are unaware, how can we be sure that we are delivering on this? This paper, which is provided to augment the author's presentation at the first annual conference of the California Association of Workplace Investigators, Inc., is intended to educate investigators about different types of bias and provide information on various studies that have shown the impact of bias on investigators and others.[3]

Bias Against Disadvantaged Groups

Although individuals may have an "implicit" bias about many different types of things, researchers have developed a test called the Implicit Association Test (IAT) that focuses on discovering unconscious bias towards or against certain groups of people. These biases may be based on social stereotypes that have led to an association between a group and a trait. The test measures relative speeds in key stroking when responding to four categories – images of members of groups that have been traditionally disadvantaged (e.g. African Americans, overweight people, gays and lesbians, older people), images of members of groups that have been traditionally advantaged (European Americans, thin people, straight people, young people), images or words with positive associations (happiness, goodness) and images or words with negative associations (depression, war). A longer delay in key stroking when asked to associate positive words with a disadvantaged group, as compared with an advantaged group, shows a bias against that group. Individuals can take the test on a computer and the tests are available online.[4]

Prior to taking the test, individuals are asked to rate themselves on bias, and that rating is compared with their scores on implicit bias tests. There is a significant difference between the ratings. The test has been taken by thousands of individuals. Scoring shows that across 12 topics, 42% of respondents rated themselves as at or near neutral, yet only 18% of respondents demonstrated sufficiently small implicit bias to be judged as implicitly neutral. About 70% showed an implicit bias in favor of the advantaged group (European Americans) whereas 12% showed a bias in favor of the disadvantaged group (African

[3] This is a draft of a paper that is not yet final.

[4] More information about the IAT, along with the tests themselves, is at https://implicit.harvard.edu

Americans). Further, IAT results consistently revealed greater bias in favor of the advantaged group than did the explicit measures.[5]

Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment. No doubt many (if not most) of the people treating others differently are unaware of doing so. This is unconscious bias playing itself out in everyday life. A summary of some of these studies follows.

In a study involving tipping cab drivers, the following findings were made:

- White cab drivers were tipped 61% more than black drivers and 64% more than other non-white drivers in the sample.
- Black passengers tipped white drivers 48% more than black drivers.
- White passengers tipped white drivers 49% more than black drivers.
- Latino passengers tipped white drivers 146% more than black drivers.
- Black drivers were 88% more likely to be stiffed than white drivers and white passengers were nearly twice as likely to stiff black drivers than white drivers.
- Passengers of all races tended to round up for white drivers and round down for black drivers.[6]

A study of restaurant tipping showed that customers of both races discriminated against black service providers by tipping them less than white service providers.[7]

In another study with implications in the employment arena, identical resumes were submitted in response to help wanted ads. The only differences were the names on the resumes. Some were submitted with traditionally African American names (e.g. Tamika Jones) while others were sent with traditionally white names (e.g. Emily Ryan). The white names received 50 percent more responses across the board.[8]

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[5] For further discussion, see Greenwald, Anthony G. & Krieger, Linda Hamilton, *Implicit Bias: Scientific Foundations,* 94 California Law Review 945 (2006).

[6] Ayres, Ian, Vars, Frederick E., and Zakariya, Nasser, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, The Yale Law Journal, Vol. 114, no. 7 (May), pp. 1613-1674 (2005).

[7] Lynn, Michael, *Consumer Racial Discrimination in Tipping: A Replication and Extension*, Journal of Applied Social Psychology, Volume 38, Issue 4, pgs 1045–1060, April 2008.

[8] Bertrand, M. and Mullainathan, Sendhil, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* The American Economic Review, 94(4), 1-31 (2004).

In a study examining gender bias identical scripts were rated, some with the name of a female playwright and others with the name of a male playwright. The twist in these results was that it was the female reviewers that revealed a bias. The female reviewers rated the script with the female name significantly lower than the script with the male name whereas male raters rated them the same.[9]

Two studies conducted in the 1970s examined how nonverbal behavior impacts interracial interactions. In the first study interviewers who did not know the purpose of the study were videotaped while interviewing both black and white job applicants. The applicants were aware of the study and had been trained to interact a set way, so that there would be consistency in the manner in which the applicants presented themselves. The results showed that interviewers demonstrated greater indications of nonverbal discomfort when interviewing the black applicants. For example, there was less nonverbal immediacy,[10] less time spent in the interview, and higher rates of speech errors.

In the second, follow up study, white interviewers were trained to conduct interviews of whites applicants in the manner that the previous white interviewers had with the black applicants. That is, they were trained to interact with less immediacy, spend less time, and make more speech errors. In this study the white interviewees did not know the purpose of the study. The result was that the white interviewees performed worse in the interview and were more nervous and distant in their interaction style. The interviewees also judged the interviewer to be less friendly.[11]

In a more recent study, white undergraduates were videotaped while being interviewed separately by white and black experimenters. The subjects also completed a race attitude IAT. Those subjects whose race IAT scores indicated strong implicit preference for whites relative to blacks hesitated less and made fewer speech errors when speaking to the white experimenter than to the black

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[9] Glassberg Sands, Emily unpublished thesis available at: http://graphics8.nytimes.com/packages/pdf/theater/Openingthecurtain.pdf and *Rethinking Gender Bias in Theater,* New York Times, June 23, 2009.

[10] Nonverbal Immediacy is a term used among communication researchers to describe nonverbal behaviors that communicate liking, a positive evaluation of others, or positive affect to others. These behaviors typically include looking toward someone, leaning toward someone, touching someone in a non-threatening manner, sitting near someone, smiling, and speaking in an animated way. Research demonstrates that the more a communicator employs immediate behavior, the more others will like, evaluate highly, and prefer that communicator. Nonverbal immediacy is also positively correlated with perceptions of communicator competence, goodwill, and trustworthiness (all components of credibility).

[11] Word, Carl O., Zanna, Mark P. and Cooper, Joel, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974).

experimenter. They also spoke to and smiled more at the white experimenter than the black experimenter. These subtle and spontaneous behaviors suggested a higher level of comfort interacting with the white experimenter.[12]

These studies have significant implications for investigators. If an investigator is less comfortable with an individual of a different race or background, and therefore less able to establish rapport, the ability of the investigator to obtain information and assess credibility may be compromised.

The studies above focus on bias regarding characteristics that are protected under the law. However many biases go beyond these categories. In *Blink*, Malcolm Gladwell discusses his own research on the impact of height. In an interview about this, Gladwell states:

> *I have a chapter where I talk a lot about what it means for a man to be tall. I called up several hundred of the Fortune 500 companies in the U.S. and asked them how tall their CEOs were. And the answer is that they are almost all tall. Now that's weird. There is no correlation between height and intelligence, or height and judgment, or height and the ability to motivate and lead people. But for some reason corporations overwhelmingly choose tall people for leadership roles. I think that's an example of bad rapid cognition: there is something going on in the first few seconds of meeting a tall person which makes us predisposed toward thinking of that person as an effective leader.*

Bias in the Legal System

Studies have also shown the impact on bias in civil rights cases and in criminal sentencing. One study found that African American judges, as a group, and white judges, as a group, perceive racial harassment differently (regardless of political affiliation). The statistics showed:

- Racial harassment plaintiffs are successful, on average, 22% of the time.
- With an African American judge presiding, they were successful 45.8% of the time.
- With a judge appointed by a Democratic 29.3%; Republican 17%.
- Female judges found for the plaintiff 25.6%; male 21.3%.[13]

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[12] McConnell, A. R., & Leibold, J. M. (2001). *Relations Between the Implicit Association Test, Explicit Racial Attitudes, and Discriminatory Behavior*, Journal of Experimental Social Psychology, 37, 435–442.

[13] Chew, Pat K. and Kelley, Robert E., *The Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, Washington University Law Review, 2009.

Another study that involved violent felons in Detroit found that both black and white judges imposed harsher sentences on black defendants than white ones.[14]

Other studies have revealed that judges set bail 25% higher for black defendants than similarly situated white defendants and gave sentences that were 12% longer for blacks than comparable whites. Killers of white victims are more likely to be sentenced to death that killers of black victims.[15]

In a study that looked at whether the gender of the judge made any difference in outcome in Title VII sex discrimination and harassment cases, the researchers found that female judges were significantly more likely than male judges to find for plaintiffs (when their cases were appealed to the appellate level). Furthermore, panels with a female judge were significantly more likely to find for the plaintiff than panels with no female judge, implying that the female judge's perspective had an influence on her male colleagues.[16]

A recent study examined whether explicit and implicit biases in favor of whites and against Asian Americans would alter mock jurors' evaluations of a litigator's deposition. The authors found evidence of both explicit bias (as measured by self-reports), and implicit bias (as measured by two Implicit Association Tests.) In particular, explicit stereotypes that the ideal litigator was white predicted worse evaluation of the Asian American litigator. By contrast, implicit stereotypes predicted preferential evaluation of the white litigator. The study concluded that individuals were not "colorblind" towards even a "model minority," and that these biases produced racial discrimination.[17]

Bias in Educational Settings

Many studies have shown that when teachers are randomly given the expectation that some children will excel whereas others will not, it impacts how well those children perform. In one study, school teachers were asked to score exams of children tested for academic readiness. The test booklets included "background" information on the child, including IQ score. The scorers gave different grades to identical performances – the differences correlated with the

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[14] Spohn, Cassia, *How do Judges Decide? The Search for Fairness and Justice in Punishment* (2009) See also Spohn, Gruhl and Welch, *The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question*, 16 Law & Society Review 71 (1981-1982).

[15] Rachlinski, Jeffrey J., Johnson, Sheri Lynn, Wistrich, Andrew J. & Guthrie, Chris, *Does Unconscious Racial Bias Affect Trial Judges?* Notre Dame Law Review, March 2009.

[16] Peresie, Jennifer L., *Female Judges Matter: Gender and Collegial Decision-Making in the Federal Appellate Courts*, Yale Law Journal (2005).

[17] Kang, Jerry, Dasgupta, Nilanjana, Yogeeswaran, Kumar & Blasi, Gary, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. Empirical Leg. Studies (forthcoming Dec. 2010).

IQ scores. Thus the IQ scores gave the scorers expectations that influenced the results.[18]

Another study showed that if teachers were randomly told that some students were superstars and others were not going to make it, then that was how the students performed. Yet another study showed that racial differences in the outcome of a standardized test disappeared if the participants were told they were doing a puzzle, rather than a test.[19] One of the implications for this is that individuals who are members of a disadvantaged group perform worse in situations (like school) that invoke a stereotypical expectation of poor performance. This phenomenon is known as stereotype threat.[20]

Confirmation Bias, Observer Effects and Other Forms of Cognitive Bias

It is difficult to avoid the subconscious tendency to reject for good reason data which weaken a hypothesis while uncritically accepting those data which strengthen it.

—Seymour Kety

As discussed above, many of our biases are not based on race, sex or some other "protected" category, but are due to the manner in which we process information and other factors. It may be that a complainant reminds us of someone we know who tends to exaggerate. This may lead us to assume, without even realizing it, that this individual is exaggerating and then to look for evidence to support this theory while rejecting the evidence that does not. A number of these other types of biases are discussed here.

Confirmation Bias

Confirmation Bias is the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence. It involves unconscious information processing rather than deliberate case building.[21] As in the example above, once a hypothesis is formed, people tend to search for information that supports it. For investigators this means that by attending primarily to the favored hypotheses, investigators may fail to generate alternatives and thus do not see the relevance of information supporting another explanation.

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[18] Rosenthal, Robert and Jacobson, Lenore, *Teacher's Expectancies: Determinations of Pupils' IQ Gains,* Psychological Reports (1966).

[19] Cahen, L.S., *An Experimental Manipulation of the "Halo Effect": A Study of Teacher Bias,* unpublished (1965).

[20] Additional information about stereotype threat is available at the website www.reducingstereotypethreat.org

[21] O'Brien, Barbara, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy and Law, Vol. 15, No 4, 315-334, 2009.

Anything that causes one to accept the truth of a hypothesis, even temporarily, makes the hypothesis become a conditional reference frame. A decision maker evaluates and organizes relevant information within this frame, which affects how he or she perceives the problem, interprets relevant data, and searches for new information.[22] It is an unwitting selection and interpretation of evidence to support a previously held belief. To attain coherence between evidence and the hypothesis, data that are incompatible may need to be reconciled. An investigator may reconcile ambiguous or hypothesis-inconsistent evidence with his or her theory of the case and the hypothesis may also influence the search for new evidence. As investigators piece together information, what they perceive as missing depends on the picture already in mind. [23] People are often reluctant to revise initial expectations that arise from early perceptions of a situation.[24]

Studies have shown that people assigned to interrogate suspects in a mock theft pushed harder for confessions and interpreted suspects' behavior as more consistent with guilt when they approached the task with higher levels of suspicion.[25] Fingerprint experts were less likely to find a match when facts provided about the case made a match seem less probable.[26] Experienced investigators rated witnesses who exonerated a favored suspect as less credible than those who confirmed guilt.[27]

In a study conducted by Barbara O'Brien, college students were given facts of a criminal investigation. Some were asked after reviewing half the file for an initial hypothesis of who was guilty and some were not. Those asked to develop a hypothesis remembered facts as more consistent with guilt of and focused more on the initial suspect than those who were not. They interpreted ambiguous or inconsistent evidence as more consistent with guilt. There was a subtle shift of opinion in matters relevant to determining guilt in a way that supported initial suspicions. Thus, the simple act of naming a suspect and generating reasons for suspicion worsened bias on several measures.

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[22] Klayman & Ha, *Confirmation, Disconfirmation, and Information in Hypotheses Testing*, 94 Psychol. Review 211 (1987)

[23] Holyoak, K. S. & Simon, D., *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 Journal of Experimental Psychology: General 3 (1999)

[24] Darley J. M. & Gross, P. H., *A Hypothesis Confirming Bias in Labeling Effects*, 44 J. of Personality and Social Psychology 20 (1983)

[25] Kassin, S. M., Goldstein, C. C., & Savistsky, K. *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt,* Law and Human Behavior (2003).

[26] Dror, I. E., Charlton, D., & Person, A. E., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, Forensic Science International (2006).

[27] Ask, K., Rebelius, A., & Granhag, P. A., *The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias*, Applied Cognitive Psychology (2008).

The same study then tested two ways to reduce bias. Some participants were asked to explain why an initial hypothesis might be wrong and others were asked to generate additional suspects. Those who named a suspect and considered why he might be innocent showed no less bias than those not asked to name a suspect. Those asked to name two additional suspects showed about as much bias as those asked to name their primary suspect without considering the possibility of innocence. Those who were asked early in the case to name a suspect and state why he might be guilty showed a greater tendency to confirm that hypothesis. However this was counteracted by explaining why this might be wrong. Forming a hypothesis early made them adjust their opinions about evidentiary propositions and affected the course of action they advocated.[28]

O'Brien cautions that confirmation bias can occur in the absence of overconfidence. Investigators need not be especially sure that they have the right person to sway their investigation toward an early suspect. However, as demonstrated in the study above, making people consider alternatives reduces judgmental biases. Investigators cannot always delay focusing on a suspect, but taking the extra step of actively considering evidence that points away from that suspect shows promise as a simple way to counteract bias.

Observer Effects, Experimenter Effects, Priming

These terms refers to how a "neutral" observer is impacted by extraneous information and the attitudes of others. While confirmation bias is something formed internally, these biases are impacted by an outside influence. For example, studies show the impact of giving an investigator pre-interview reasons to believe or doubt the person interviewed. These expectations affect the interview structure, questions, and other aspects of the behavior of the investigator.[29] Researchers' expectancies change their behavior toward different research participants and the participants in turn pick up the cues and respond to them with their own changed behavior.

One study had observers record the head turns and body contractions of flatworms. Half the group was led to expect a high incidence of turning and contracting and the other half was led to expect a low incidence. The observers

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[28] O'Brien, Barbara, Prime Suspect: *An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy, and Law (2009).

[29] Risinger, Saks, Thompson & Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestions,* California Law Review, Vol. 90, 2002.

led to expect a high rate recorded almost five times as many head turns and twenty times as many body contractions.[30]

Malcolm Gladwell, in *Blink,* cites a classic priming study in which two groups of students were asked to read a long list of unrelated words. Laced through one list were words associated with politeness; laced through the others were words associated with rudeness. The students were then asked to return to an academic office down the hall to report they had completed the task. For both groups, a confederate was blocking the door to the office with instructions to continue a conversation with the secretary until asked to move. The rude-word students were more likely to interrupt (and even barge in on) the conversation; the polite-word students were more likely to wait patiently -- some for minutes on end.

In another priming study, students were told negative things about one of the teaching assistants involved in the study. In rating the teaching assistants, those not told the negative things rated the assistant as a mean score of 9.33 on a "niceness" scale. Those who heard the negative information gave her a mean score of 6.58. Those who were told the information and then told to disregard it, because it was actually someone else they were thinking about, gave the assistant a mean score of 8.09.[31] Thus the students could not completely "un-ring the bell". Once told the negative information they were influenced by it, even though they had been told it was false.

Belief Perseverance

Similar to priming, in a belief perseverance study students were asked to review ten suicide notes and determine which were "real". They were told 5 were real and 5 were created for the experiment (all were actually created.) Some subjects were told they performed well and others were told they performed poorly. Later they were told all the letters were fakes. Nonetheless, when asked how they would perform if they evaluated real letters, the group told they performed well thought they would do well and the group told they had performed poorly predicted a poor future performance.[32]

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[30] Lucien Cordaro and James R. Ison, *The Psychology of the Scientist: X. Observer Bias in Classical Conditioning of the Planarian*, 13 Psychol. Rep. 787 (1963).
[31] Golding & Hauselt, *When Instruction to Forget Become Instructions to Remember*, 20 Personality & Soc. Psychol. Bull. 178 (1994).
[32] Ross, Lepper & Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. Personality & Soc. Psychol. 880 (1975).

Anchoring

Anchoring refers to the fact that judgments are influenced by positions asserted by outside influences. In one study, test subjects were given a random percentage number and then asked whether the percentage of African nations in the U.N. was higher or lower than that number. Then they were asked to give their best estimate of the actual percentage of African nations in the U.N. Those given a higher random number gave substantially higher estimates than those given the lower number.[33]

In *Blinking on the Bench: How Judges Decide Cases*[34] the authors examine how judges decide case, postulating (and then showing evidence for) judges using a combination of intuition and deliberation. In another article these same authors discuss a series of studies they conducted with judges that demonstrate how judges are influenced by cognitive biases.[35]

One study focused on how anchoring can impact a judge's assessments of damages. Each group was given the same facts about damages and was then asked to determine the monetary award. The control group was told the plaintiff's lawyer "was intent upon collecting a significant monetary payment" whereas the anchor group of judges was told the plaintiff's lawyer demanded $10 million. The control group awarded a mean of 808K and median of 700K, whereas the anchor group awarded a mean of 2.2 million and median of 1 million. A second study used same information and also told the anchor group that the defendant moved for dismissal, arguing that the case didn't meet the jurisdictional limit of 75K. Judges who were told about the motion to dismiss awarded an average of 350K less than the judges not told about it. Thus judges were strongly influenced by anchoring.

Conformity Effects, Halo Effect and Role Effects

There are a number of other forms of unconscious bias that might impact investigators' work. For example conformity effects refer to the manner in which individuals are influenced by people with greater stature than those with a lower social ranking. Research studies of perceptions with people from differing social status or authority show that people's perceptions were influenced by the perceptions of others based on their relative social ranks (those of a lower rank were more influenced by those of perceived higher rank). Thus an investigator

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[33] Tversky, Amos & Kahneman, Daneil, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1128 (1974).

[34] Wistrich, Guthrie & Rachlinski, 93 Cornell L. Rev 101 (2007)

[35] Wistrich, Guthrie & Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, U. of Penn Law Review (2005).

might credit a witness with a higher rank over a witness with a lower rank without realizing that their relative ranks had an influence.

The halo effect, a documented social phenomenon, might also lead to unconscious bias. This refers to the tendency to assume that like goes with like and thus "beautiful people" are nice, smart and capable, while "ugly" and "short" people are mean, dumb and incapable.

Role effects refer to the fact that the perspective adopted by the viewer can affect the information sought as well as how the person perceives that information. In one study some participants assumed the role of a homebuyer and others of a burglar. They then read a description of a house and grounds. Later recollections of the details of the house differed, based on the assigned role.[36] Attorney investigators are certainly familiar with how representing the plaintiff or the defense impacts how the facts are viewed. Thus investigators should look at what impact their role has on how they view the information gathered in the course of the investigation. This question is especially germane to an investigator who is acting as an expert witness for the plaintiff or defense.

Suggestions to Counteract Bias

Some of the authors of the studies and articles cited above make suggestions about how investigators and judges can counteract their own biases. These include actively considering alternative hypothesis or why a favored hypothesis is wrong, expanding the time judges have to make decisions, issuing written opinions—because the process of writing might challenge the judge or investigator to assess a decision more carefully—and peer-review.

There is also some evidence that biases are malleable. Students who, prior to taking the IAT, viewed prominent African American leaders and artists showed a reduction in bias on a race IAT. Implicit gender stereotypes of feminine weakness were reduced by imagining examples of counter-stereotypic (i.e. "strong") women[37] and implicit anti-black bias was reduced by having an African American administer the research procedure.[38] Further, as an individual's life experience changes and expands, there is evidence that implicit biases change as well.

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[36] Pichert, James W. & Anderson, Richard C., *Taking Different Perspectives on a Story*, 69 J. Educ. Psychol. 309, 310 (1977).
[37] Blair, Irene V., et al, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. Personality & Soc. Psychol. 828 (2001).
[38] Lowery, Brian S. et al, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. Personality & Soc. Psychol 842 (2001).

The more we understand our own biases, and the vulnerability we all have to be influenced by cognitive biases, the more we can do to prevent these biases from impacting our decision making.

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A View From A Litigator and An Independent Investigator:

Permissible Layoff Or Discriminatory Behavior? – How To Recognize It And How To Investigate It

About The Authors

This blog post is jointly authored by attorney Christina Bucci Hamilton of Duggan Law Corporation and attorney Matthew Rose of Van Dermyden Maddux Law Corporation. Christina's practice focuses on representing employers in litigation as well as with employment law advice and counsel. Matthew's practice focuses on conducting workplace investigations for public and private employers.

Setting The Scene: Why is this topic important right now?

California was easing into the third stage of Governor Gavin Newson's four-stage plan to gradually reopen the state amid the COVID-19 pandemic. However, on Monday July 13, 2020, Governor Newsom issued directives requiring the re-closure of restaurants, movie theaters, family entertainment centers, wineries, zoos and bars for indoor service. Additional sectors were closed in 31 counties. For consumers, reopening was a step toward normalcy. Many employers, however, continue to reel from the economic impacts of COVID-19. To stay afloat in these turbulent times, businesses across the state have laid off workers in record numbers. The trend does not appear to be slowing. Some workers subjected to layoffs may accept losing their job as a natural and understandable consequence of the pandemic. Other laid off workers, however, may not be so accepting. They might feel like a target of illegal discrimination. The most recent directives may lead businesses who were on the brink to make further layoffs.

In part one of this blog post, Christina Bucci Hamilton discusses the differences between a legally permissible layoff and impermissible discriminatory behavior. In part two, Matthew Rose provides

practical tips for workplace investigators tasked with investigating complaints of discriminatory behavior as a result of a layoff necessitated by COVID-19.

Part One: What is a layoff and how can it be discriminatory?

There is no specific legal meaning of "layoff" under California law. However, it is commonly understood that an employee has been "laid off" when they are placed off work through no fault of their own. Typically, this occurs when an employer has closed, downsized, or no longer has enough work or funds to keep the employee. This makes a layoff distinct from retirement, quitting, or being terminated for cause. Some employers mistakenly believe that classifying an employee termination as a "layoff" reduces or eliminates the risk of litigation. However, even layoffs precipitated by the economic effects of a global pandemic can give rise to a claim of unlawful termination, as illustrated below.

Most employees in California work "at-will," which means they can be laid off at any time, with or without notice, so long as the reason is not an illegal reason. An example of an unlawful termination is one that is based in whole or in substantial part on an employee's membership in a protected class (for example, age, race, gender, or sex), or an employee's participation in protected activity (for example, making a health and safety complaint, or taking protected leave). Consider these real-world possibilities:

- Manny works in the sales department of a large construction team. The construction industry has remained open from the start of the pandemic because of its "essential" nature. During the last two months, Manny made two complaints to his supervisor about the lack of safety precautions taken by the company. Specifically, he complained because hand sanitizer was not provided at job sites. Then he complained because none of the office workers observed social distancing guidelines when they met in conference rooms. Manny believed both of these problems ran afoul of the County's public health order. Last week, the company's owner announced layoffs. Most of the layoffs applied to office support staff. However, Manny and his direct report were also laid off. The layoffs did not impact the company's other 15 sales representatives, however, Manny and his subordinate's sales numbers had been low in comparison to the rest of the team. Manny feels targeted for having lodged his two complaints.

- Abigail retired from teaching elementary school at age 50. Afterwards, she began working at a large brewpub located downtown near the town's university. During the last three months, the brewpub stayed afloat by offering curbside pickups for customers. In light of the re-closure order issued this week, the owner emailed all staff and announced she "had no choice" but to layoff some workers due to financial trouble. Abigail, as well as five other workers, all of whom are over 45 years old, were laid off. The employer stated that it chose who to layoff based on seniority, and Abigail is one of the brewpub's newest hires. Abigail thinks the owner used COVID-19 as an opportunity to eliminate older workers.

Part Two: How should workplace investigators investigate these kinds of discrimination claims?

In our current climate, workplace investigators should not be surprised to see an uptick in claims from employees asserting they were terminated for illegal purposes under the disguise of a layoff necessitated by COVID-19. Determining motive is not easy in these types of complaints, so investigators must know how to conduct thorough and probing inquiries.

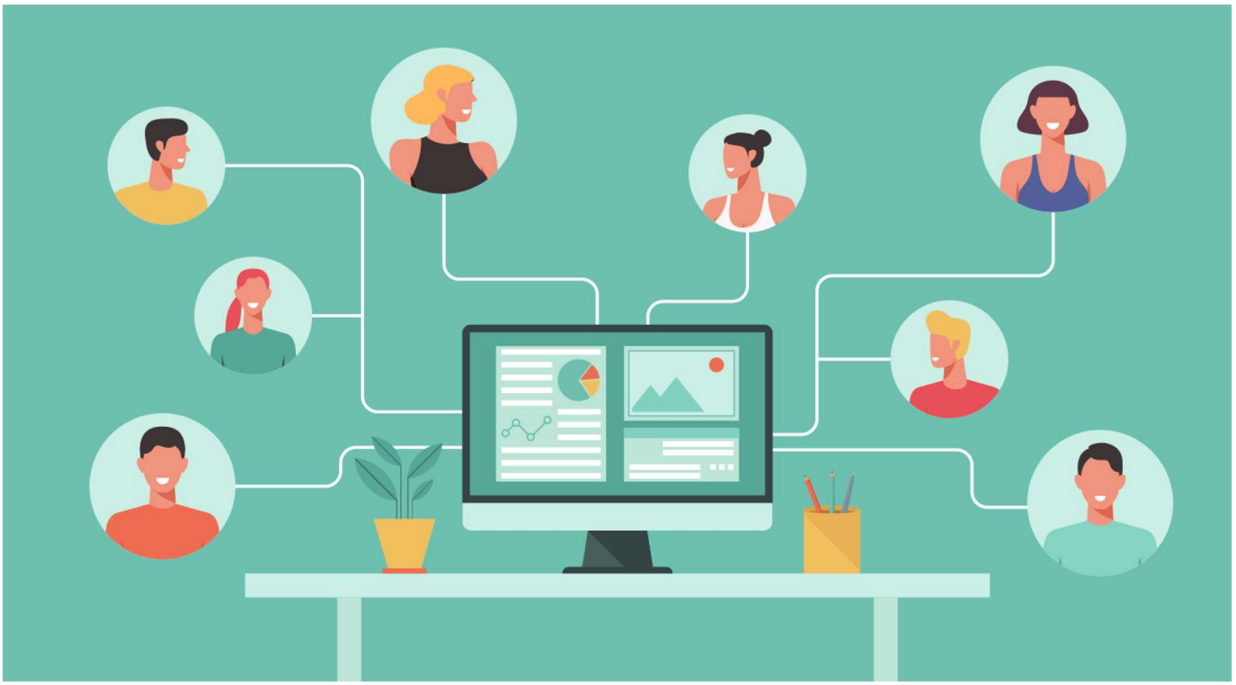
To do so, investigators must first fully understand the employer's stated rationale for its layoff decisions. The investigator's job, however, is not done there. The next critical step is to *test* that rationale to determine whether the stated reasons are the real reasons for the layoff. While it is the investigator's job to uncover this evidence, these same questions should be posed to the complainant – why does s/he believe the stated reasons were not the real reasons? To test the rationale, investigators must study the entire record and ask themselves whether the evidence suggests the employer acted with improper pretext, or whether the employer had legitimate, non-discriminatory reasons for the layoff decision.

For instance, were similarly-situated employees laid off, such as workers of similar racial or ethnic backgrounds or workers over the age of 45? Does the timing seem suspicious, such as layoffs being instituted soon after workers lodged COVID-related safety complaints or harassment complaints against management? Similarly, when notifying workers of the layoffs, did management provide false information meant to mislead workers? Did the complainant's supervisor make comments at the time of the layoff indicative of bias? Does the complainant have a history of performance issues– documented or not? Does the complainant, and perhaps others in the layoff group, have relatively low seniority status? When was the decision made relative to any protected activity by the complainant?

To address these questions adequately, investigators must gather an array of evidence. Seek out documentary evidence, including emails and text messages. If management asserts the layoffs were necessitated by funding, for instance, obtain financial records to verify. Interview a variety of witnesses, including those not impacted by the layoffs. Try to determine whether other witnesses share the complainant's suspicions. Only after the full picture comes into view can an investigator make sense of the allegations and determine whether to sustain the allegations.

Conclusion

Employment actions, including layoffs, will likely be subjected to increased scrutiny as California eases its way out of the lockdowns necessitated by COVID-19. Employers, employment lawyers, and workplace investigators must anticipate these changes to effectively do their jobs.



Bullying In The Remote Workplace

Matthew Rose

As of today, [INSERT DATE OF POSTING], stay-at-home orders continue and social distancing guidelines remain in effect. Face-to-face communications feel like a thing of the past. For businesses, this means telecommuting is the new norm. As a result, emerging claims may look different and workplace investigators need to adapt.

In this blog, we explore how COVID-19 is on pace to change one common workplace investigation – workplace bullying.

- ***What is workplace bullying?*** Workplace bullying is a broad term. It is characteristically defined as pervasive behavior that interrupts a person's ability to work and negatively impacts that person's health and wellbeing. This includes cyberbullying, which may take the form of intimidation, threats, harassment, and other inappropriate behavior through the use of computers, cellphones, or other electronic devices.

- ***What does bullying look like in the remote workplace?*** As more employees telecommute due to COVID-19, classic workplace bullying will decline. We will likely see a decrease in face-to-face conduct such as physical violence, yelling and shouting, and in-office pranks. Remote employees, however, still remain vulnerable to bullying. Workplace bullying is not specific to brick and mortar businesses. Consider these possibilities:

    - Don and Mary think the boss' son, Mike, does not deserve to work at the company. They frown upon nepotism. Due to COVID-19, the team is working from home and conducting videoconferencing meetings daily. Don and Mary, tasked with organizing the meetings, purposefully keep Mike in the dark about the meeting schedule. They

also schedule videoconferences at times when Mike is busy with other tasks. On rare occasions when Mike attends the videoconference meetings and tries to participate, Don interrupts him or Mary puts him on mute.

- Daniel and April were both slotted to promote to Senior Sales Associate before COVID-19 struck. Now, only one promotion will be given. Daniel knows April dislikes the majority of her coworkers – they text about it frequently. Daniel takes screenshots of April's meanest text messages and forwards them to the entire sales team. He strategically does so in a way that makes it seem he sent them by mistake. Daniel knows people will gossip and spread the damaging material about April throughout the office.

- Daryl manages five members of the Information Technology (I.T.) staff. The I.T. team works long hours helping the company transition to a fully remote workforce in response to COVID-19. Feeling the pressure, Daryl emails his staff with tasks at all hours of the day, including on weekends. Daryl keeps tabs on who responds to him immediately, and who does not. He gives the most difficult tasks to those with delayed responses. He always emails the staff as a group, so those assigned difficult tasks feel singled out.

- Melanie's personal assistant, Donna, was furloughed in response to COVID-19. Their company is now 100% remote. A part-time worker, Dan, replaced Donna. Melanie wants Dan to fail so that Donna will return to her team. Melanie begins to sabotage Dan's work. She deletes his electronic files, purposefully delays answering his emails, and provides him with misleading information when he asks for help with tasks.

- ***How should workplace investigators analyze remote workplace bullying claims?*** When tasked with investigating remote workplace bullying, investigators should focus on the type of conduct occurring and the impact the conduct had on the complainant. Seek out witnesses who can provide context to the alleged conduct. Have they seen this type of conduct before? Is the conduct reasonable or unreasonable in light of particular roles, duties, and assignments? Seek out documentary evidence, including emails and text messages. Given the remote landscape, documentary evidence is likely plentiful and easily accessible. Above all, evaluate the entire record to determine whether the alleged behavior injuriously interrupts a person's ability to work. Focus on the behavior and its impacts on the complainant. Do not get hung up on whether the conduct fits more traditional notions of "bullying." Only after the full picture comes into view can an investigator make heads or tails of the allegations.

Bullying may not look the same as it did prior to COVID-19. Workplace investigators must anticipate changes and continue to conduct investigations that are neutral, timely, and thorough.

location to conduct videoconference interviews? Are you comfortable using video conferencing technology? Do you know how to send, and receive, documents related to the investigation? Do you have the capability to electronically sign documents, such as contracts? Do you need to make any lifestyle adjustments to remain productive at home? Consider these factors now in order to make the transition smooth and seamless.

- **Prepare To Investigate A Remote Workforce:** Make sure you plan ahead for the inevitable changes remote investigations will bring. For instance, expect delays in initiating, conducting, and finalizing workplace investigations. Put an added emphasis on staying in touch with clients through email, phone calls, and teleconferencing. Document your efforts to keep the investigation moving along the way. Interviews may also be harder to schedule, since offices are closing and communities are grappling with shelter in place orders. Be flexible with solutions, and make sure your client is in line with those solutions. For instance, be prepared to conduct interviews outside normal business hours. Step up and be willing to take the laboring oar in gathering documents, contacting witnesses, and scheduling interviews. Finally, stay ahead of inevitable delays by beginning to draft the factual portion of your investigative report as the investigation proceeds, rather than waiting until the end. As the workplace continues to change in response to COVID-19, so too must the workplace investigator be willing and able to adapt.
- **Skillfully Conduct Remote Videoconference Interviews:** As social distancing and stay-at-home orders become commonplace, in-person interviews will cease. Implement streamlined measures to replace in-person interviews by conducting videoconferencing interviews. To do so, make sure to experiment, practice, and get accustomed to using platforms such as Zoom, BlueJeans, Skype, or FaceTime. Communicate early and often with witnesses to make sure they are also comfortable with the chosen technology. While videoconferencing requires more skill and practice than a phone call, it lends itself better to rapport building. In a videoconference, you can still make eye contact with a witness. Consider creatively building rapport at the start of your remote interview by discussing topics unrelated to the investigation. Pick neutral topics, such as the weather, adjusting to remote work, or make a lighthearted note about the uncertain times we are experiencing with this pandemic. Avoid commenting on loaded topics, such politics or the current death rate of COVID-19. Finally, videoconferencing helps avoid some of the pitfalls commonly posed by telephone interviews. For instance, unbeknownst to the investigator, interviewees might be audiotaping the interview, secretly have someone listening, or be in a public setting during the call.
- **Continue To Make Credibility Determinations:** How can an investigator determine the credibility of a witness without visually observing them in person? Investigators must remember that witness credibility is virtually never determined by a witness' demeanor, body language, tone, or micro-expressions. Instead, investigators should utilize industry-standard credibility factors, such as those set forth in jury instructions, rules of evidence, and materials from the Association of Workplace Investigators. These include corroborating evidence, motivation of parties and witnesses, consistent and inconsistent evidence, plausibility of events, material omissions, proximity in time, comparator factors, and articulated rationale for actions or decisions. Losing the ability to observe a witness

through use of video or telephone does not prevent the investigator from making credibility determinations.

- **Expect Changes In Types Of Complaints:** As remote work becomes the new norm, we can expect changes in the types of complaints filed. For example, we may see fewer sexual harassment or bullying cases, given the decrease in social interaction among coworkers and students. On the other hand, social distancing has the potential to cause misunderstandings, potentially leading to increased claims of discrimination. Remote work arrangements may also increase concerns regarding misuse of employee time. We also anticipate seeing an impact on reasonable accommodation complaints, given the disruption COVID-19 has had on the physical elements of the workplace. Finally, we expect more employers will request climate surveys, as the decrease in face-to-face interaction brings with it a decreased ability to monitor workplace culture. Investigators need to anticipate and be sensitive to the anticipated changes in the types of complaints.
- **Grasp The Opportunity:** This is an immense challenge none of us have dealt with. Every crisis, however, reveals a new opportunity. Stay positive and use this time to make yourself a better investigator. For example, become adept at using multiple platforms for teleconferencing interviews, find new ways to share documents through platforms like Dropbox or DocuSign, develop new ways to build rapport with remote interviewees, and challenge yourself to deliver top-notch reports even under these difficult circumstances. Above all, stay calm and confident. We will get through this, and we will be better for it.

Despite the challenges imposed upon us by COVID-19, it is still crucial to conduct investigations that are neutral, timely, and thorough. As you adjust to conducting remote investigations, make sure to balance the health and safety of all participants with the need to obtain relevant information. By understanding what lies ahead, you will remain productive, effective, and healthy.

Download our checklist: How to Conduct Workplace Investigations with a Remote Workforce

COVID-19: Adjusting To Remote Investigations – Our New Normal

Sue Ann Van Dermyden & Matthew Rose

March 24, 2020

The impact of COVID-19 continues to dominate headlines. On March 11, 2020, the World Health Organization officially declared the viral disease COVID-19 a pandemic. In California, as well as in other states, communities responded by issuing stay-at-home lockdown orders. Schools are closed, employees are furloughed or working at home, and public gatherings are a thing of the past.

This is our new normal.

What does this mean for workplace investigations? In this blog, we explore some of the adjustments workplace investigators need to make in order to successfully navigate this new normal. We know this landscape brings challenges and fears, but we also believe it brings opportunities. Even in this changing climate, workplace investigators should seek to be optimistic and resolutely dedicated to conducting high quality investigations.

- **Commit To Being A Remote Investigator:** Investigators must be willing to make adjustments to their personal work settings. Ask yourself whether you can engage in the investigative process and comply with stay-at-home lockdown orders necessitated by COVID-19. For example, do you have a home office setup? Do you have a quiet, private

COVID-19: Stealing Time or Time Well Spent?

Matthew Rose

The impact of COVID-19 continues to fundamentally alter the American workplace. Remote workers are the norm, furloughs are unavoidable in certain sectors, and employers considered "essential" are struggling to maintain productivity whilst preserving a positive workplace culture.

These changes will carry over and impact the way workplace investigators do their jobs, too.

In this blog post, we explore how COVID-19 is on pace to change one common workplace investigation – employee time theft investigations.

- ***What is employee time theft?*** Time theft occurs when an employee receives pay for time they did not work. Hourly workers are more prone to commit time theft, but it is not specific to any worker or industry.

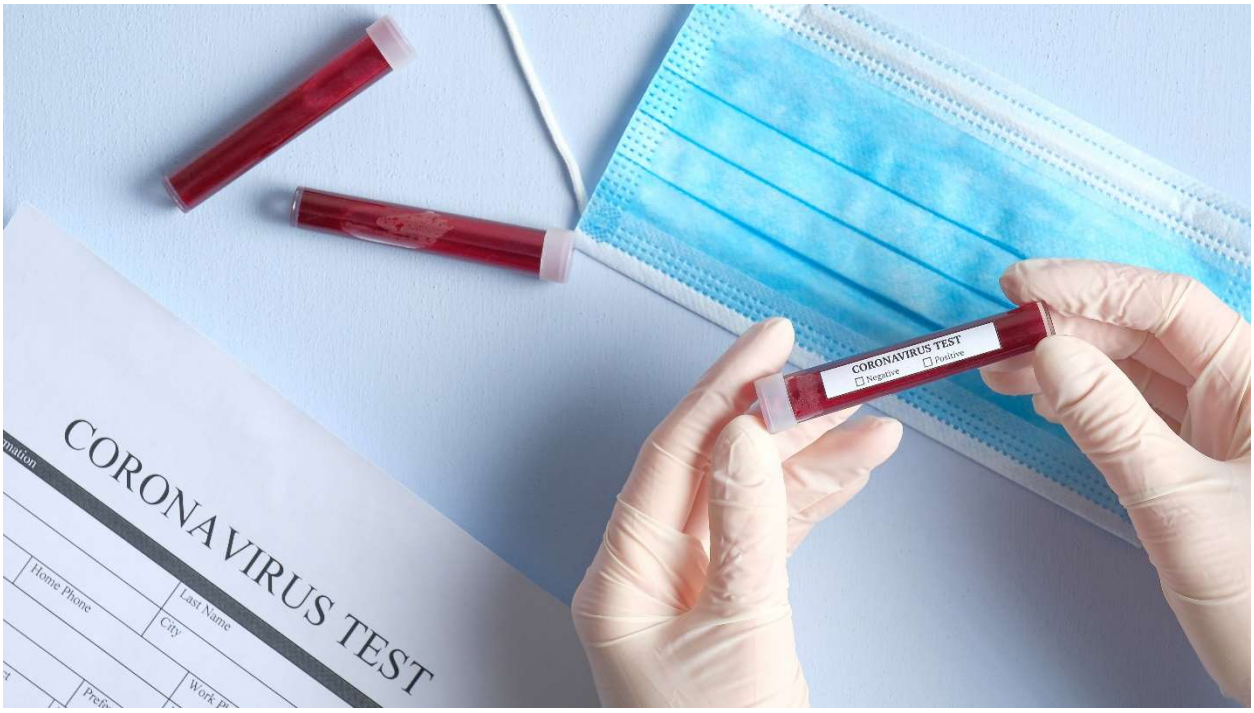
- ***Why are we likely to see an increase in employee time theft investigations?*** For some employers, shelter-in-place orders are to blame. Non-essential workers will be working from home, often for the very first time. Other businesses remain open. Those employers may be overwhelmed and struggling to respond to increased client demands. Consider these possibilities:

- Emily starts working for her local grocer as a part-time delivery driver. The grocery store is inundated with online orders and requests for delivery because of COVID-19. Emily makes most of her deliveries. However, she also wastes 1-10 hours per week listening to podcasts while the truck is parked in coffee shop parking lots.
- Andrew works as an hourly bookkeeper for a small CPA firm. Andrew, as well as the rest of the firm, is working from home due to COVID-19. Andrew's boss notices a decline in Andrew's efficiency. Andrew, nervous about the long-term viability of the firm, has been covertly developing his own business to launch once the pandemic ends. He is making calls, sending emails, and conducting videoconferencing meetings with potential clients – all while on the clock.
- Randy works at a warehouse packaging goods for online delivery. Demand is high due to COVID-19. Randy's supervisor is now too busy to monitor workers closely. Randy begins to fudge his time cards. He works less than he writes on his time cards. His favorite colleague, Jennifer, often clocks him in before he arrives to work.

- ***How do workplace investigators need to investigate?*** These kinds of claims are easy to allege, but difficult to navigate. To investigate these matters properly, investigators need to utilize tailored and creative techniques. Remember, the *key inquiry in these investigations is whether an employee misused his/her time and knew it.* To help answer that question, investigators should be prepared to do the following:

  - Before conducting interviews, develop a thorough understanding of how COVID-19 changed the workplace. Workers may be understandably confused with how to report and document their time. An investigator must differentiate between workers who unknowingly misused their time, and those who did so purposefully.
  - Ask yourself whether the employer should keep the suspected employee on the payroll and surveil him/her before the investigation begins. The wrongful conduct may be easier to investigate after targeted surveillance.
  - Consider working in conjunction with the employer's Information Technology staff to uncover time abuse in the form of improper internet usage, unauthorized use of employee email, and inappropriate use of company computers.
  - Audit the suspected worker's time sheets and work logs. Compare them to similarly situated workers and analyze any discrepancies or irregularities.
  - Before conducting interviews, work with the employer to identify witnesses who may be complicit with the time theft and those who are not complicit. Wait to interview the complicit workers at the end, when you will likely have gathered more relevant information with which to confront those witnesses.

Workplace investigations will continue to change as the workplace evolves in response to COVID-19. It is crucial workplace investigators anticipate these changes to effectively conduct investigations that are neutral, timely, and thorough.



COVID-19: What Lies Ahead for Workplace and Campus Investigators

By Matthew Rose and Lauren Becker

March 13, 2020

Seemingly overnight, the world has changed. Resist the friendly handshake. Forego the group gathering. Cancel travel plans. The new normal – social distancing. As the United States, and the world, reacts to COVID-19, so too must workplace investigators.

On March 11, 2020, the World Health Organization officially declared the viral disease COVID-19 a pandemic. In the United States, COVID-19 cases continue to rise, causing significant disruptions to day-to-day life. Schools are closing their doors, colleges and universities are choosing to teach online classes only, public events are being cancelled, and professional sporting teams are suspending their competitive seasons.

COVID-19's impact on the American workplace is also severe. Employers are requiring employees to stay home and work remotely. Seminars and trainings are being postponed or cancelled. Public transit and ride-share vendors are experiencing significant drops in ridership. At-risk industries like tourism, retail, and airlines are bracing for pending profit losses. In response to the growing concern, the U.S. Department of Labor authored guidance on preparing workplaces for COVID-19, and posted the guide online.[1]

What does this mean for the future of the workplace investigation? In this blog, we explore some of the impacts COVID-19 will likely have on workplace investigations. We also discuss potential solutions to the changing landscape.

[1] See: https://www.dol.gov/newsroom/releases/osha/osha20200309.

Before we dive into the nuts and bolts, we want to express that, above all else, the health and safety of those involved in workplace investigations is at the center of our discussion. It is of the utmost importance that employers and investigators make decisions with this in mind. With that said, consider these possible changes we are likely to see in workplace investigations and some practical solutions:

- **Increased Use of Technology for Witness Interviews.** As employers respond to COVID-19 by closing offices and instituting remote work protocols, the use of technology will become increasingly necessary. For some time, in-person witness interviews will likely decrease. This poses a challenge to investigators, since in-person witness interviews are the backbone to quality investigations. Be smart and flexible in response. Implement streamlined measures to replace in-person interviews by conducting videoconferencing interviews. There are several effective platforms to use, such as Zoom, BlueJeans, Skype, or FaceTime. Although it requires more creativity and people skills than in-person meetings, videoconferencing lends itself better to rapport building, given you can still observe facial cues and body language. Consider building up the ice breaker segment at the start of your interview and discuss topics unrelated to the investigation. Pick neutral topics, such as the weather or your respective commutes, or even the uncertain times we are experiencing with this pandemic. Videoconferencing helps avoid the pitfalls posed by telephone interviews. For instance, unbeknownst to the investigator, interviewees might be audiotaping the interview, or secretly have someone listening, or otherwise be in a public setting during a phone call. In some rare instances, telephone interviews may not be avoided in this current climate. They are not ideal and should be limited to those instances where videoconferencing is unavailable.

- **Adjustments to Rapport Building for In-Person Interviews.** Rapport building strategies, for in-person, video, or telephone interviews, will need to be adjusted as a result of the rising spread of COVID-19. If a determination has been made that it is safe to conduct an in-person interview, investigators will need to balance their need to remain healthy with their need to develop rapport. Traditional rapport building strategies such as shaking hands, handing documents to an interviewee, or handing a coffee cup may need to be curtailed. Think about ways to adjust these habits in ways that still develop rapport. Be creative – flash a friendly wave, the peace sign, foot shake, fist bump or a thumbs up. Similarly, replace the coffee cup with a bottle of hand sanitizer and politely explain you want to be cognizant of everyone's health during this time. Likewise, greet an interviewee and offer to sanitize the areas nearby, such as the chair or conference table.

- **Investigative Delays.** Increased delays in initiating, conducting, and finalizing workplace investigations seem imminent. Interviews will be harder to schedule as employees choose to work remotely and/or self-quarantine at home and employers try to limit close, personal contact. Manage client expectations by explaining why an investigation may take longer than necessary. If delays persist, document your efforts to keep the investigation moving. Be flexible with how you obtain evidence, such as by relying on documentation in lieu of interviews when appropriate, or conducting interviews with less-crucial witnesses remotely instead of in person.

- **Changes in Types of Complaints.** As social distancing and remote work becomes the new norm, we can expect changes in the types of complaints filed. For example, we may see fewer sexual harassment or bullying cases, given the decrease in social interaction among coworkers and students. On the other hand, social distancing has the potential to cause misunderstandings, potentially leading to increased claims of discrimination. The remote work arrangements may

also increase concerns regarding misuse of employee time. We anticipate also seeing an impact on reasonable accommodation complaints, given the disruption COVID-19 has had on the physical elements of the workplace. Investigators need to anticipate and be sensitive to the anticipated changes in the types of complaints.

- **Keep Calm.** The world is uncertain and unsettled as of Friday the 13th.[2] So much of what we thought was impenetrable has turned out to not be so. This creates anxiety for many. Investigators should already have skills to put a witness at ease, but these times call for greater efforts to do so. The investigator sets the tone for the interview. Present calm and confident, and listen harder than ever.

Despite the challenges facing workplace investigations, it is still crucial to maintain high standards and continue to conduct investigations that are neutral, timely, and thorough. Whatever strategies you implement, be sure to apply them in an impartial fashion. At the same time, avoid risky situations that put yourself or others in compromising positions. Be vigilant about balancing the health and safety of all participants with the need to obtain relevant information. By understanding what lies ahead, you can plan for the future, remain productive, and protect yourself and those around you.

[2] March 13, 2020

Don’t Wait, Investigate!

By Alexandra Zuidema

As California continues on its path to reopening under the state’s four-stage plan, the workplace faces change and opportunity. Should employers permit employees to return to the workplace and, if so, under what guidelines? When is the appropriate time to ask employees to return to the workplace? Will your workplace allow some employees to continue teleworking, if these measures were implemented during the shelter-in-place? How do you decide which employees can continue teleworking and which employees should return to the office? With these questions come a host of challenges and uncertainty. As the workplace shifts into unfamiliar territory, how should employers handle new complaints and allegations of misconduct?

Addressing employee complaints takes time, energy, and resources, which may be strained under our current circumstances. A negative environment can make employees feel undervalued, unimportant, or excluded during a time when we are already experiencing physical and emotional isolation. As an employer, it is important to address employee complaints head-on, in a prompt, thorough, and impartial fashion. Let’s talk about why.

- **The Law Requires It.** Under California and federal law, when an employer knows or should have known of a complaint of discrimination, harassment, or retaliation, it is required to conduct a prompt, thorough, and impartial investigation. It is important employers meet this moment with thoughtful consideration. An appropriate response can have significant benefits, including increased trust and productivity. A delay may leave an employer open to liability and negatively impact employee satisfaction.
- **Loss Of Crucial Evidence.** If you wait on an investigation, you can potentially lose access to critical witnesses or pieces of evidence. Over time, documentary evidence can get lost or forgotten. Electronic data may be deleted or inaccessible. People routinely acquire new phones or laptops and do not necessarily save everything to their new one. Additionally, the memories of witnesses and parties fade over time. Witness accounts may have less details as time passes. Further, you may lose access to personnel who have crucial information regarding the investigation because they leave their employment or are laid off. It can become difficult to

track down people who have left the workplace, and perhaps even more difficult to get them to participate in an investigation.

- **It Shows You Take Misconduct Seriously.** Part of maintaining a safe work environment is ensuring misconduct does not go unaddressed. If complaints are put to the wayside, even during tough times, employees may feel addressing misconduct is not important to the employer. Ultimately, the failure to undertake an appropriate and timely investigation can have significant consequences, including frustration, decreased morale, lack of trust, and litigation. Accordingly, employers should aim to consistently demonstrate that they will not allow misconduct to be excused under any circumstance. Doing so will increase effective and positive business management during this critical time.

As businesses begin to reopen and employees work in both remote and in-office environments, employers must remember to take all complaints seriously. In doing so, employers uphold the law and create a positive working environment for their employees.

Evolving Workplace Complaints in the COVID-19 Era

By: Deborah Maddux and Matthew Rose

Surreal times. Face masks, gloves, home confinement, closed offices, and brave essential workers. COVID-19 has rapidly altered the American workplace. Employers – particularly Human Resources professionals – are grappling with a host of difficult issues. How to monitor a remote workplace, how to keep employees safe, how to manage the return to the workplace, to name a few. In this blog post, we explore some possible trends related to employee complaints.

More Discrimination Complaints. Consider this. Audrey received a 20% pay cut several weeks ago, and was told cuts were necessary due to reduced sales. In a call with her co-worker, Audrey learns other employees did not receive the same pay cut. Her next call is likely to Human Resources. To transition to the remote economy, employers have had to alter assignments, change employee schedules, reclassify workers, cut pay, and institute furloughs. And fast. With more changes to come. This means a higher risk of misunderstandings about management decision-making during a time when employees are particularly worried about job security. And, COVID-19 has already spurred new laws and regulations which provide increased protections for workers, such as the Families First Coronavirus Response Act. Employees will certainly bring complaints when they do not believe those protections have been provided in a fair or compliant manner.

Continued Sexual Harassment Complaints. During a recent Zoom meeting, Audrey is embarrassed and uncomfortable when her supervisor leads the meeting from his bedroom. Audrey can see a nude photograph framed above his bed when her supervisor takes a bathroom break. Even without face-to-face interactions, sexual harassment claims will continue. The remote workplace is equally fertile ground for sexually offensive posts, inappropriate phone calls, unwanted sexual comments, or sexually offensive photos or imagery. It is also foreseeable that employees might be more prone to making ill-advised comments or entering into personal or intimate conversations, given the blurring of lines between home and work and collective feelings of isolation and vulnerability.

More Workplace Safety Complaints. Zack has been working at Superstore for nearly six weeks, stocking the shelves with essential items like toilet paper and hand sanitizer. He has interacted closely with customers who crowd around the area, uncomfortably close to Zach and each other. Finally, Superstore enacts social distancing requirements and asks customers to wear face protection. Zack becomes ill and tests positive for COVID-19. Healthcare workers and other employees in "essential" industries like groceries and pharmacies have already begun to file complaints in response to employers' inadequate safety protocols. For example, medical professionals have complained about hospital policies prohibiting them from wearing protective face masks in certain areas, such as lobbies and waiting rooms. Likewise, Amazon is seeing an uptick in employee concerns over the cleanliness of its warehouses and its health screening protocols for workers. And, as we look forward to the lifting of shelter-in-place mandates, workers returning to non-essential functions will be on high alert about safety, from concerns about insufficiently cleaned workspaces to inadequate social distancing practices. Retaliation claims will follow. Employees who complain about safety may perceive employment decisions are not being made for legitimate business reasons, but instead for retaliatory purposes.

Given these trends, employers and employees will continue to be challenged as we move through the dramatic shifts of the past few months, as well as those still to come. As workplace investigators, we stand ready to assist by conducting thorough, impartial and prompt investigations to help address workplace complaints and concerns.

Keeping A Finger On The Pulse Of Employee Morale In The Covid-19 Landscape – The Climate Assessment

By Tessa Nevarez

April 2, 2020

As workplaces adjust to COVID-19, it may become harder for employers to keep a pulse on employee morale. Are people happy working from home? Do workers understand their responsibilities as remote employees? Is there going to be a decline in employee work performance? Will social distancing cause more misunderstandings, potentially leading to increased claims of discrimination? These questions will likely keep managers and employers up at night in the COVID-19 landscape.

This blog describes a tool that employers can use to help keep their finger on the pulse of the workplace – the climate assessment.

- **What is a climate assessment?** Climate assessments seeks to identify areas where an organization is doing well, and where improvements can be made. They are generally conducted through surveys, in person interviews, or a combination of both. The information gathered helps an organization make tailored improvements to its workplace.

- **When to conduct a climate assessment?** A climate assessment is useful when an employer grows concerned about its workplace, but does not have a discrete employee complaint to investigate. A climate assessment is also a great option for organizations that have received

multiple complaints for conduct like "bullying" or "unprofessionalism" that on their own, may not amount to a policy violation. Likewise, an assessment can be useful when an organization has received multiple anonymous or generalized complaints that on their own, would be difficult to investigate, for example ongoing, anonymous complaints alleging "women are treated better than men in this company." A word of caution – climate surveys are not prudent in all circumstances. For example, if your organization already has in place a robust anonymous complaint system frequently utilized, you will likely not learn new information through a climate assessment. Likewise, if you already have a sense of what is driving a dip in morale, it is best to focus on addressing problems through proactive solutions.

- **Who should conduct the climate assessment?** Climate assessments may be conducted internally or by an independent consultant. There are advantages and drawbacks to both. Internal climate assessments may be conducted efficiently and with little resources. One drawback, however, is that employees may be less likely to share thorough, candid information directly to internal leadership. That concern can be mitigated by utilizing an independent consultant. This helps to ensure a level of anonymity for participants, which is useful in evoking candid feedback. Moreover, independent consultants are generally free of obvious biases and can more neutrally evaluate employee concerns.

- **How to utilize the feedback?** Once feedback is collected, analyze the concerns and categorize them by magnitude and severity. Then, distill the information into themes which outline the primary sources of discomfort in the workplace. Using these themes, prepare tailored recommendations to address concerns. One option is to put into practice the best recommendations submitted by participants. After all, no one knows the workplace better than those who work there day in and day out. Another option is for leadership to study the themes learned through the survey and develop their own protocols and recommendations. Ultimately, and most importantly, the climate survey should result in visible efforts to improve the workplace. Otherwise, employees may feel the process was not a genuine effort, which may result in a further dip in employee morale.

In the COVID-19 landscape, more employers will benefit from climate assessments, as the decrease in face-to-face interaction brings with it a decreased ability to monitor workplace culture. When done correctly, there are tangible benefits to conducting a climate assessment: employees feel their concerns are being heard, serious concerns – including potential policy violations – may be uncovered and addressed before a complaint is filed, and employers can determine any sources of workplace discomfort and address situations at an informal level before an investigation is needed.

Tessa Nevarez is an Associate Attorney with Van Dermyden Maddux Law Corporation. Her practice focuses on conducting workplace and Title IX campus investigations.

Reopening California: One Stage at a Time

By Maureen Dahl

California is currently in the second stage of Governor Gavin Newsom's four-stage plan to gradually reopen the state amid the COVID-19 pandemic. During this stage, lower risk workplaces, including business offices, may reopen with modifications to protect public health and safety.

Businesses are handling the reopening differently. For those of us at Van Dermyden Maddux, half of our team of 28 is still fully remote, while the other half is returning to the office approximately two to three days a week. Some workplaces are filling their office space at 50% capacity, while others are offering flexible schedules or remote work. Still, some businesses have been reluctant to open their doors at all. With the reopening of the workplace, new challenges and opportunities arise as social distancing remains the norm.

In this blog post, we provide helpful tips to help make the transition to reopening your workplace easier.

Check in with Employees. The effects of the pandemic have been different for everyone. It's important to check in with your employees to determine their individual feelings of comfort and safety. The impact can manifest in a wide range of emotions, including stress, anxiety, fear, and anger, amongst others. While some employees may be anxious to return to work, others may be reluctant. If possible, take time to check in with employees about how they are feeling and what precautions would make them more comfortable. If possible, implement suggestions that are reasonable and feasible. Ideally,

feedback from employees should be obtained in a private or anonymous way – either through surveys or individual meetings.

Adopt Precautions. Monitor state and local guidelines to ensure you are in compliance with any industry-specific requirements. Beyond mandated guidelines, consider and determine which additional precautions are practical for your workspace. These precautions may include:

- Modifications to the physical workspace to allow for social distancing, such as closing breakrooms or other gathering spaces, reducing capacity, altering shared workstation arrangements (shared offices and open workspaces), and placing social distancing markers and signs reminding employees to maintain six feet of distance.
- Adopting additional sanitization measures: limiting hours of operation to allow for adequate sanitization of the work space, installing hand sanitizer dispensers, implementing physical entry and exit protocols, and requiring masks or other personal protective equipment.
- Other precautions: using in-office videoconferences or phone calls in place of in-person interactions when possible and limiting or modifying services provided.

Provide Reassurance. Clearly communicate precautions to both employees and customers or clients. If possible, provide employees with explanations for why certain precautions have or have not been adopted. Transparency and communication can help reduce apprehension.

Anticipate and Prepare for Potential Conflicts. In these uncertain times, there may be an increase in workplace conflict. Be cognizant of the following potential conflicts:

- Employee disagreements over which return to work precautions are necessary;
- Interpersonal conflicts based on the uncertainty of the situation, which may leave employees "on edge";
- Disagreements over how responsibilities are distributed, especially if it requires some employees to physically return to the workplace earlier than others, may contribute to conflict;
- Concerns regarding employees not following COVID-19 related policies and procedures; and,
- Politically and socially-based conflicts among employees with differing views.

Develop Policies in Advance. In order to create a smooth transition and avoid potential conflicts, develop internal policies and practices and disseminate them to employees in advance of a return to the workplace. Having clear policies in place to respond to anticipated conflicts helps ensure the same standards are applied to everyone. Clear guidance and expectations are also reassuring to employees. Present the new policies in a way that encourages employees to understand the unprecedented nature of the situation and cultivates an environment of open communication and compassion. Additionally, be flexible and allow for changes in the policies as new issues arise. New or modified policies may be needed in the following areas:

- Policies on paid leave (such as sick time), unpaid leave, and telecommuting may need to be updated to account for the current circumstances.
- Policies on how to respond to employee complaints about compliance issues and interpersonal conflicts. For example, what is the consequence if an employee refuses to wear a mask despite the employer's policy? Will the response differ if it is a local or state issued requirement?
- COVID-19 Specific Policies: Will employees be screened for symptoms? If so, how? What will be done with that information? What steps will be taken if an employee tests positive, or is known

to have interacted with someone who tested positive? Will certain activities (like traveling interstate) require a self-quarantine period before returning to work?

As we move forward into Stage 2 remember that these are ever-changing times. Employers need to be ready to address the individual and collective needs of their employees. By taking these steps, employers can demonstrate they are committed to the well-being, safety, and health of their employees.

AMY OPPENHEIMER

Attorney-at-Law

Workplace Investigations • Training • Mediation • Arbitration • Case Consultation & Testimony

Amy Oppenheimer, AWI-CH, Managing Partner

Amy Oppenheimer has over 30 years of experience in employment law, as an attorney, investigator, arbitrator, mediator, and trainer for a large range of employers and employees - public and private, large and small - throughout the country. She is also a retired administrative law judge. Her areas of expertise include preventing workplace harassment and responding to allegations of harassment, investigating workplace harassment, discrimination, retaliation, whistleblower claims, diversity in the workplace, how unconscious bias impacts decision-making and other forms of workplace misconduct. Amy frequently does public speaking on these issues.

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

Amy is also the founder and past President of the Board of the Association of Workplace Investigators, Inc. (AWI). She is also the former Chair of the Executive Committee of the Labor and Employment Section of the State Bar of California and serves as an advisor to that committee. Amy is the former President of the Board of the Berkeley Dispute Resolution Services. Amy has received certificates from the Association of Title IX Administrators (ATIXA) and T9 Mastered to conduct Title IX investigations.

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Sue Ann Van Dermyden

Partner, AWI-CH

Sue Ann Van Dermyden, JD, AWI-CH, is a founding and senior partner of Van Dermyden Maddux Law Corporation. She has been an employment attorney since 1993, her practice focusing on conducting workplace and Title IX investigations. She also provides expert witness testimony on employment matters; advises clients on complex employment-related matters; and, conducts interactive and entertaining training seminars.

Sue Ann has been listed in Northern California Super Lawyers every year since 2010, and from 2015 to 2019 she was recognized by Sacramento Business Journal's Best of the Bar and Sacramento Magazine's list of Top Lawyers. In 2015, Sue Ann was elected as a Fellow to the College of Labor and Employment Lawyers – the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication and excellence.

Sue Ann has handled hundreds of lawsuits and investigations on all types of employment matters, including claims of discrimination, harassment, retaliation, whistleblower retaliation, substance abuse, threats of violence, assault, sexual assault, theft, fraud, embezzlement, violations of company policies, wage and hour violations, conflict of interest and other forms of alleged misconduct and performance related issues. Sue Ann is also an experienced investigator in Title IX sexual assault, and is a shareholer of T9 Mastered, a training company focused on educating Title IX sexual assault investigators. She is experienced in conducting Internal Affairs investigations, and those involving the Public Safety Officers Procedural Bill of Rights Act and the Firefighters Procedural Bill of Rights as well as in testifying during administrative and judicial proceedings regarding completed investigations. Through her experience as an investigator, author, lecturer, lawyer, and student of investigations and investigative technique, Sue Ann is familiar with the standards in California for conducting a proper investigation related to the workplace.

Sue Ann's commitment to improving the quality of workplace investigations globally is demonstrated by her unwavering dedication to the Association of Workplace Investigators (AWI) and involvement in other key

organizations that set standards for investigations. As a founding member, she was critical in establishing its purpose, molding its principles, and assuring its mission materialized. In addition to being involved in AWI's creation, Sue Ann has remained deeply involved in every aspect of its evolution. She has served on the Board from its inception in 2009, and held the position of acting President from 2015-2017 and immediate Past President from 2017-2019. She was previously a member of the Investigations Standards Technical Committee of ASIS International - charged with preparing standards and guidelines for workplace investigations – and currently serves as co-chair of the Workplace Investigations subcommittee of the American Bar Association's Employment Rights and Responsibilities section.

Sue Ann is a former partner of Hanson Bridgett Marcus Vlahos & Rudy. She grew up on a fifth-generation farm in North Dakota and graduated from Wahpeton High School in 1983. She moved to California and attended California State University, Chico, where she earned a Bachelor's Degree in Political Science with a minor in Business Administration in 1990. She attended University of the Pacific, McGeorge School of Law and received her Juris Doctor in 1993.

Sue Ann has authored numerous articles on employment law and conducted countless training seminars, including *An Investigator's Guide: Achieving Excellence in Conducting Workplace Investigations* and *STAYING IN YOUR LANE: Neutrality – Not Advocacy – In Conducting C-Suite Investigations.* She regularly lectures on all topics involving employment issues and has written extensively in this area. For a partial listing of her speeches, presentations and publications, you can visit www.vmlawcorp.com.

Professional Organizations, Community Involvement and Training

- Shareholder and Senior Faculty of T9 Mastered
- Association of Workplace Investigators – Immediate Past President, Board of Directors (Member: October 2009 – present) and Current Outreach Committee Chair
- American Bar Association – Co-Chair of Employee Rights and Responsibilities: Workplace Investigations Sub-Committee (Member, 2013 to present; Co-Chair, 2014 to present)
- Senior Faculty of Association of Workplace Investigators Training Institute (2011 to present)
- University of the Pacific, McGeorge School of Law, Board of Directors, Alumni Association (2019 to present)
- Anthony M. Kennedy Inn of Court (September 2006 – present)
- American Inns of Court, Program Awards Committee (2010 – 2011)
- Street Law International, Volunteer Instructor for High School Students (2008)

- University of the Pacific, McGeorge School of Law, Board of Directors, Alumni Association (1995-1997)
- Sports Lawyers Association, Member
- State Bar of California, Labor & Employment Section, Member
- Sacramento County Bar Association
- The Fellows of the American Bar Foundation, Member
- Investigations Standards Technical Committee of ASIS International Committee Member
- AWI Accredited Certificate, AWI Institute
- Trained in Trauma Informed Forensic Interviewing

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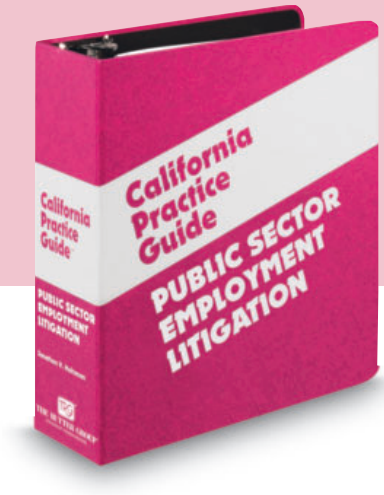

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