

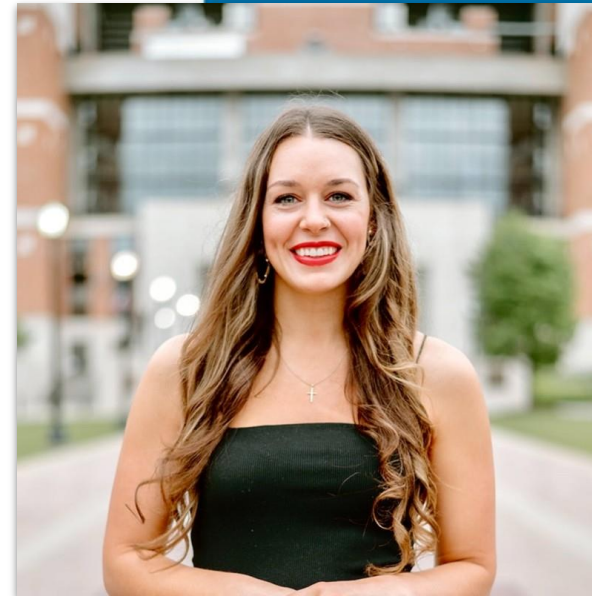
# Conducting Effective and Lawful Investigations

March 14, 2023

Compliance **HR**

# Today's Webinar Presenter

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# Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:  
Deliver expert guidance in a fraction of time and cost as traditional methods

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



### **Navigator Onboarding**

Assemble and produce legally compliant onboarding documents



### **Navigator Leave**

Reduce the risk and administrative burden of leave management

# Why an updated, compliant handbook is essential

## An employee handbook communicates:

- Company culture
- Standards of conduct
- Compliance policies
- Organizational procedures
- Benefits
- Safety protocols



## PolicySmart provides you with:

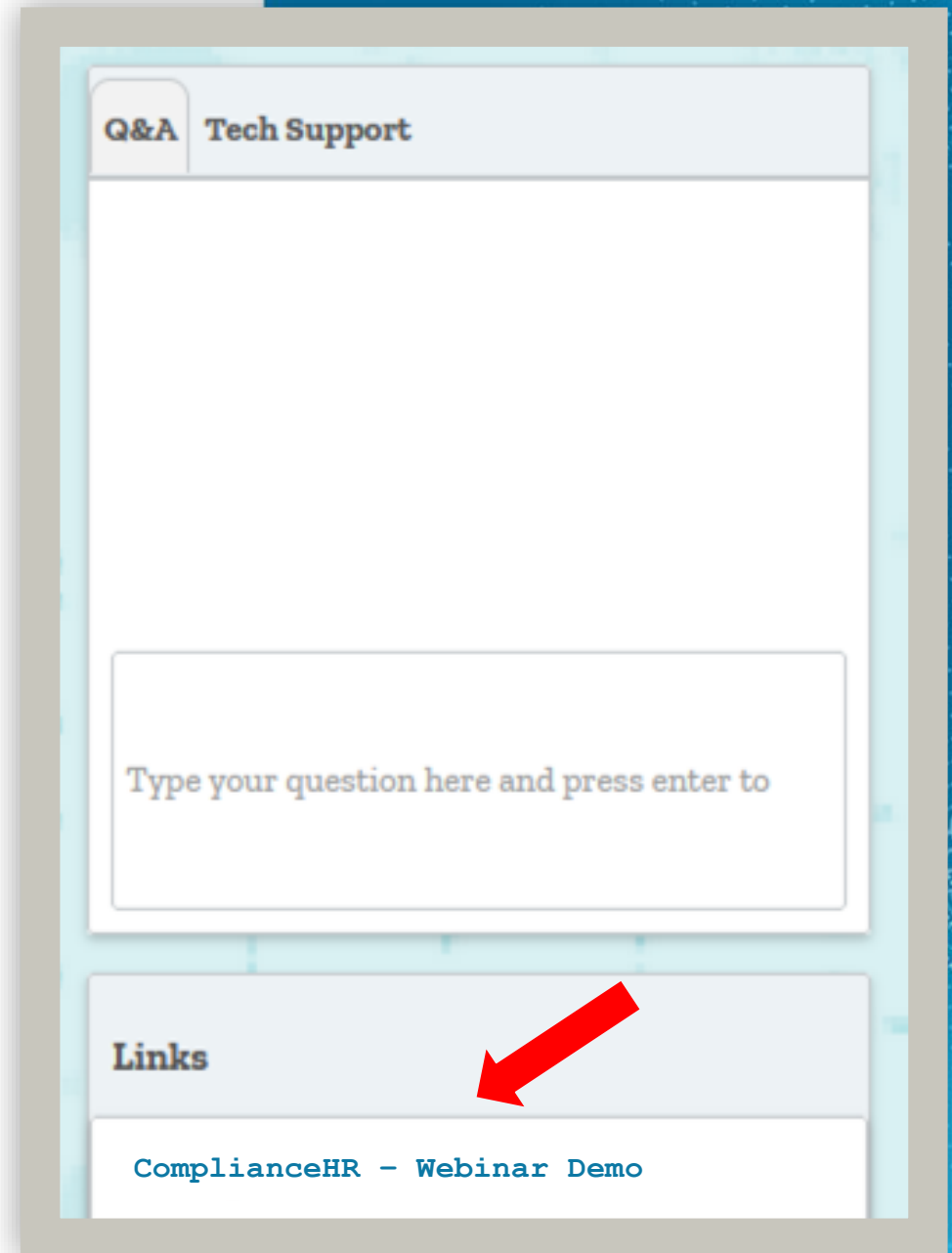
- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

Get a head start on your employee handbook with policies from PolicySmart.

# Register for a Navigator Suite Demonstration

## Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



## Presented by:

**Rocio Blanco Garcia**

Shareholder

Littler | Miami



# Why Do Investigations?

- Builds Fairness & Trust
- Facilitates Teamwork and Accountability
- Reinforces Morale and Pride
- Central to Development of Skills
- Ethical
- Mitigates Financial / Legal Risk
- Complies with the Law





# Your Role As An Investigator



- No biases
- Good listener
- Appropriate investigation
- Attention to detail
- Reach reasonable conclusions
- Properly document investigation
- If appropriate, recommend remedy

## Pitfall #1

Not conducting an investigation



# Do You Investigate?

1. The complainant tells you he doesn't want anyone to get fired or in trouble
2. The complainant tells you she doesn't want you to conduct an investigation
3. When you ask about any witnesses, the complainant declines to offer names
4. The complainant tells you he is afraid of retaliation and doesn't want it to go any further
5. The person who is being accused of the misconduct is a high-performer or other influencer within the organization



# We Always Investigate

- EEO allegations
- Significant violations of policy
- Potentially unlawful or leading to liability
- Potential for risk to the company or other employees



# Do You Investigate?

- ***What if the complaint is included in an associate's resignation letter?***
  - Watch out for:
    - Others also violated the policy and were treated better
    - “Hostile work environment”
    - “Harassment”
    - Vague reference to protected characteristic (age, disability, etc.)

## Do You Investigate?

- ***What if the complaint includes the same allegations that were previously investigated?***
  - “We’ve already investigated this. There’s nothing more to do.”
  - Closing the loop

## Do You Investigate?

- ***What if the complaint is about how HR or management handled an investigation or a prior complaint?***
  - Potential retaliation
  - What is the proper response?
  - Investigate the investigator?

# Do You Investigate?

- *What about anonymous reports or complaints that offer little factual detail?*
  - Many employees do not feel comfortable identifying themselves
  - Accept anonymous complaints because you want maximum feedback on how your employees are acting
  - Remain attentive if someone tells you, even anonymously, that one of your employees could be engaging in misconduct





## Pitfall # 2– Failure to Understand the Scope

- Focus the investigation on the specific allegations at hand; Avoid distractions, BUT
- Document new allegations and rabbit trails: Take responsibility for either following up with new allegations in a separate investigation or properly handing off to appropriate department or stakeholder

# Documenting The Allegations



**DO**

Use objective language

Group together logically



**DON'T**

Use legal conclusions

Put words in the complainant's  
mouth

## Pitfall # 3– Failure to Develop an Investigation Plan

- Each investigation requires an Investigation Plan that is continuously reassessed throughout
- Identify key witnesses and topics at the start
- Augment plan as information is developed
- Revisit plan at end to confirm all witnesses, information and leads have been closed

# Steps In Planning

## Identify The Issues

*The specific allegations*

*Laws and policies*



## Select The Means

*Documents*

*Other*

*Interviews*

## Interviewing Witnesses

- What issues are being investigated?
- Who has knowledge or was involved with the issues being investigated?
- Not a witch hunt, but we want to be thorough



# Documents

- Personnel files
- Performance evaluations
- Timecards
- Medical files
- Expense files
- Project files
- Documents in possession of the claimant and witnesses
- Leave/accommodation requests



# Electronic Data & Communications



- Instant messages
- E-mail on the system
- E-mail stored
- Cameras/videos
- Recordings
- Internet searches
- Voicemail
- Hard drive
- External drives

# Opening the Interview

## **Introduction**

- Tell the interviewee your name and title
- Explain your role at the Company
- Give the interviewee a short statement about why the meeting is happening, which can be tailored depending on whether you are talking to a complainant, witness or subject.

## **Explain the Process**

- This is a neutral review process.
- The goal of the meeting is to have an open and candid conversation; the interviewee should feel comfortable sharing what he/she knows to help the Company.



# Opening the Interview

## Non-Retaliation Policy

- The Company encourages employees to report when they witness something that does not appear consistent with our policies.
- Everyone interviewed needs to hear information about our non-retaliation policy.
  - Tell the interviewee that the company does not tolerate retaliation against a person who raises good faith concerns or who speaks with us as part of our review, and the Company takes the policy very seriously.
  - Explain the non-retaliation policy so the interviewee feels comfortable sharing as much information as possible. Answer any questions they may have.

## Pitfall #4– Failure to Vet Bad Actor’s Side of the Story

- Allow ample time to fully hear (and consider) accused’s side of the story
  - Avoid interview and discipline in same meeting
- Fully investigate facts shared by accused
- Request witnesses that would support accused, and interview them, to the extent possible, or have strong basis for failure to do so

## Interviewing The Accused

Two goals:

- Information gathering
- Fair opportunity to respond



# Interviewing The Complainant

- Get as much detailed information from the complainant as possible
- Listen impartially without committing yourself
- Ask open-ended questions
- Evaluate the complaint from the complainant's perspective



# Interviewing The Complainant

- Emphasize complaint will be taken seriously
- Advise the complainant appropriately about what you intend to do
- Address retaliation and don't forget to discuss (and document) with managers and supervisors "soft" retaliation, such as ignoring employees, changing schedules or assignments, denying time off requests, making "life difficult"
- Ask, "Is there anything else?"



## Ask The Right Questions:

### Use “Funneled” Questioning

- Open-ended phase
- Clarification phase
- Pinning down phase  
(i.e., closing the door)



# Open Phase

## Use “Funneled” Questioning

- Open-ended questions
- Aim for all relevant evidence
- Make sure the witness answers the questions fully
- Ask, “Do you remember anything else?”
- Summarize so witness can offer facts that were left out
- Identify other ways to refresh witness’ memory
- Encircle knowledge with wrap-up question



# Clarification Phase

## Use “Funneled” Questioning

- Who? What? Where? Why?
- Don't disrupt train of thought
- Avoid rabbit trails
- Use active listening:
- Don't be wedded to your outline
- Listen to subtle changes and clarify
- Follow up on cues
- Watch for eye contact
- Gestures
- Body language





## Closing Off

### Use “Funneled” Questioning

- Close the door
- Get the final answer
- Exhaust the subject
- Recap and ask, “Is there anything else?”



# Useful Questions

**Question**



**Purpose**

“Let me give you this information so that you can respond.”



Refreshes recollection and gives chance to respond

“Is there anything else that you would like to add to this?”



Chance to respond; gather full story and documentation

# Useful Questions

**Question**



**Purpose**

**“Whom should we speak with concerning this claim?”**



**Chance to respond; create witness list**

**“Is there any other evidence or fact that you believe would help us resolve this?”**



**Chance to respond; seals off “universe of facts”**

# Useful Questions

**Question**



**Purpose**

**"Here are my card and cell phone numbers. If you have any other information, please call me."**



**Chance to respond; catch follow-up issues. Looks good to judge/jury**

## Pitfall # 5– Showing Bias

- Do not investigate own peers or supervisors
- Avoid investigating colleagues with close ties: friends, family, subordinates, etc.
- Consider perception of bias by employees or victims
- Avoid making judgments during investigation
- Be polite and courteous and use discretion during interviews. Be reserved in your conduct.

## Pitfall # 6– Losing Confidentiality or Promising it

- Understand that NLRA currently prohibits blanket confidentiality requests to non-management witnesses
- When applicable, advise non-management employees that, due to need to protect complainants and witnesses, and need to ensure honesty of all involved, employees must keep the investigation confidential
- Advise management witnesses that disclosure is absolutely prohibited
- Do not discuss outside of “need to know” group. Avoid “HR gossip”

## Pitfall # 7 – Allowing Retaliation

- Remind every employee interviewed of facility policy prohibiting retaliation
- Carefully discuss (and document) with managers and supervisors “soft” retaliation

## Retaliation?

- Exclusion from meetings
- Re-assignment of job duties or department
- Avoiding communications
- Reduction in hours
- Job transfer

*Associates at every level need to be aware of Company's anti-retaliation policy during investigation*





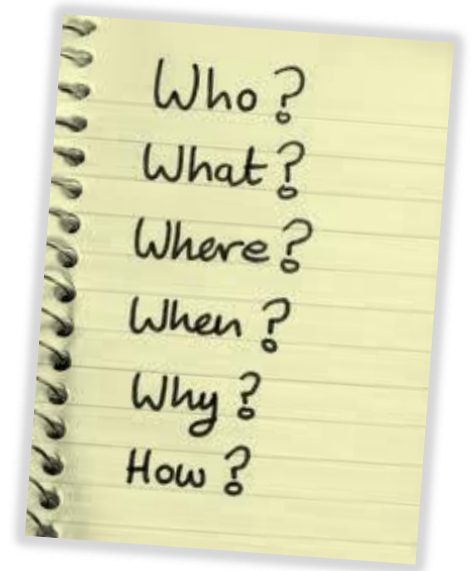
## Pitfall # 8 – Not Properly Documenting

- Take good notes. If someone else cannot read your notes, re-type or re-write
- Typical interviewers only take note of 1 out of 3 material comments.  
Practice capturing more information by using shorthand/typing/re-writing
- Use second person in interview room if appropriate and feasible
- Fill in holes/blanks in notes immediately after each interview
- Properly maintain separate investigation file. Not in personnel file

# Taking Notes

## Be prepared:

- Written outline of allegations
- Written list of basic questions organized by allegation
- Space for new issues



# Interviews: What To Document

## Do



- Write objectively
- Summarize knowledge
- Give specific responses to key questions and documents
- Use quotes
- Close the funnel
- Use relevant facts regarding credibility

## Don't



- Make conclusions as to the facts and credibility
- Use quotes as shorthand
- Stick unwaveringly to script

## How To Document

**Bad** 

- Pat excluded Maria based on her gender

**Good**



- Maria applied for the upgraded position on (date). Four others applied for that same position (names and genders). Maria was not offered the position (reason, if documented). Maria was informed she had not received the position on (date). On (date), Maria left a voicemail on the company hotline stating the following: “(quote)”

## How To Document

### Bad



- Don said Maria was upset by Pat's rude behavior.

### Good



- Don heard Pat tell Maria in a loud voice, "You don't belong in a man's job and should be home taking care of your husband and family."
- "Within a few minutes of hearing this comment, Don saw Maria begin to cry and leave the room."

## A Final Note About Your Notes

- Drafts & final?
- Handwritten or typed?
- Creating a single, definitive and legible draft of notes or just the draft?
- Include the date



## Pitfall # 9– Over Documenting

- Document the facts
- Carefully make credibility determinations, reserve to end of investigation
- Carefully document conclusions
- Avoid documenting recommendations

**How Do You Make a Decision?**

**Credibility Of Witnesses**





# Making Credibility Determinations

## Check your decision-making process

Watch for:

- Preference to confirm your previous views
- Preference for people you like or who are influential to you
- Preference based on results you like

Reason vs. Emotion



# Making Credibility Determinations

## Memory

Ask specific questions to assess the witness' memory

## Veracity

Does the person look like he or she is telling the truth?

What is his or her demeanor like?

## Corroboration/Lack Of Corroboration

Did you ask open-ended questions to find out if any corroboration exists?

# Making Credibility Determinations

**Bias**  
**What else is going on in the workplace?**  
**Are there feuds, hate relationships or sour grapes?**

**Consistency Of Account**  
**Does his or her story remain the same over time with totally different people?**

# Documenting Credibility Determinations

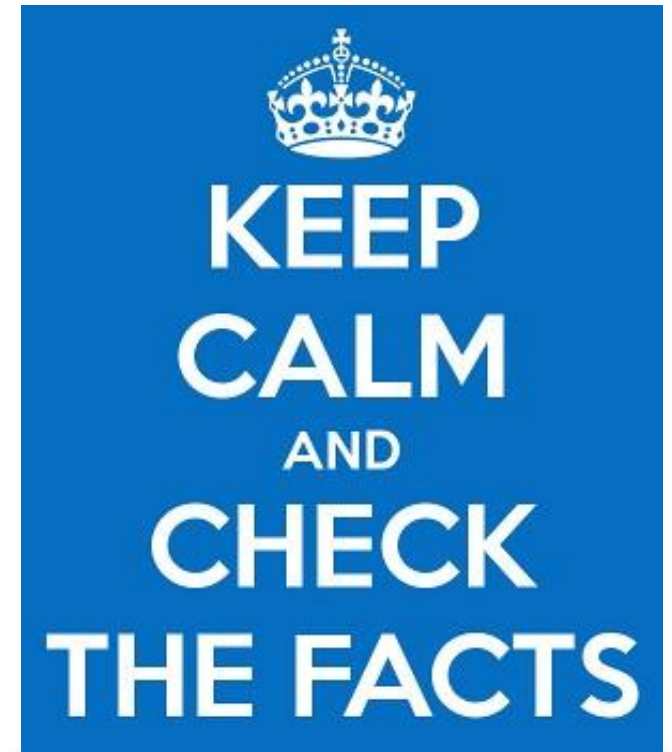
- Do not document credibility conclusions
  - “Mary’s Lying” or “Mary’s biased...”
- Instead, present facts (i.e., “Mary gave inconsistent information as follows ... ” or “Mary and Carl both admitted to having a relationship outside the office...”)



# Documentation Basics

## State facts, not conclusions of law

- Avoid opinions, rumors, or hearsay
- Give concrete examples when possible to document the incorrect behavior or performance
- Include dates, times, and witnesses as applicable



# What Not To Include!

- Subjective information
  - Back up with Specifics
- Personal opinions
- Legal conclusions
- Hearsay, gossip, rumors
- Information about a medical condition
- EEO status
- References to prior irrelevant matters or unrelated history



# Documenting Findings in a Report

- State Issue/Allegations
- Make Findings for Each:
- “We find that this allegation:”
  - *Occurred as alleged*
  - *Probably did not occur*
- “We are unable to determine with reasonable certainty if this incident occurred because...”



# Findings Example

1. Allegation No. 1: \_\_\_\_\_

[A short conclusion with reasons: “We conclude that this allegation occurred essentially as employee Smith alleged. Supervisor Doe admits he made physical contact, including an attempted kiss, with employee Smith in the hallway while attending a company function on the evening of February 1, 2012. Supervisor Doe also acknowledged referencing employee Smith on numerous occasions by the nickname “\_\_\_\_\_.” Co-employees Richards and Sedwick each provided separate and consistent accounts that they had observed Supervisor Doe using the nickname “\_\_\_\_\_” in reference to employee Smith on multiple occasions in February 2012. ]



# Findings Example

1. Allegation No. 1: \_\_\_\_\_

[e.g. “We conclude that this incident probably did not occur. We base this on the fact that there was no other person in the department who observed the allegation, even though many were there at the time. Supervisor Doe credibly denied the allegation. Mr. Doe’s documentation of the event, submitted at the time, appears to be a reliable description of what occurred and there is no evidence, other than employee Smith, that conflicts with it.”]

# Findings Example

1. Allegation No. 1: \_\_\_\_\_

["We are unable to determine with reasonable certainty that this event occurred as alleged. There were no witnesses except for the parties themselves, and no corroborating evidence of any kind. Both witnesses seemed sincere and credible. No documents or other evidence exists to corroborate either party's claims. There is no record in the past to suggest that any event like this had occurred at any other time."] )

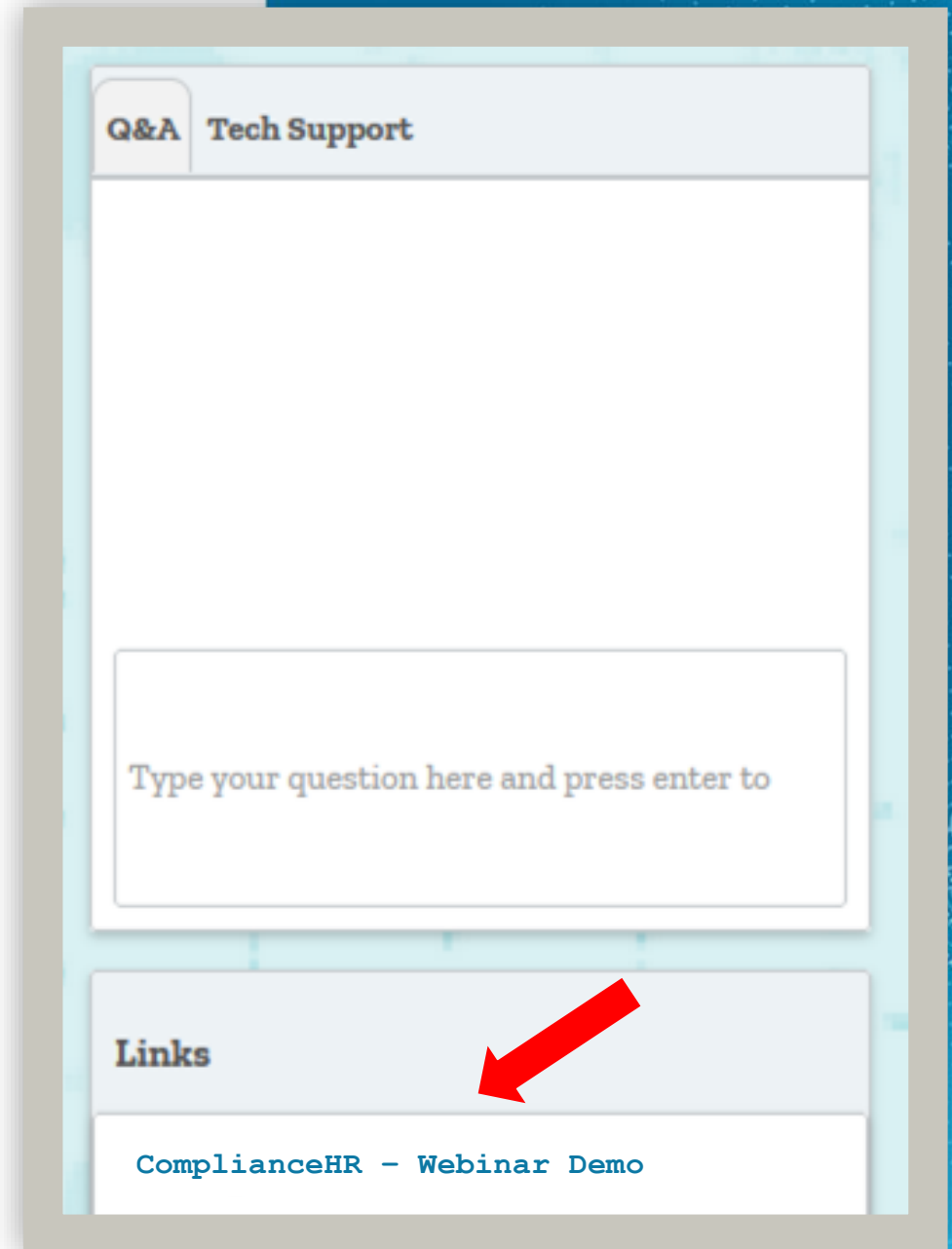
## Pitfall # 10– Not Closing Loop on Investigation

- Advise complainant on conclusion of investigation, in writing if possible
- Impose discipline and/or other remediation (shift changes, supervisor changes, duty changes, etc.)
- Review systemic problems identified in investigation
- Consider training

# Register for a Navigator Suite Demonstration

## Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
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- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



# Questions?

Please add any additional questions to the Q&A box

**Thank you!**

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