

# Conducting Lawful Investigations

January 17, 2024

**Littler**<sup>®</sup>

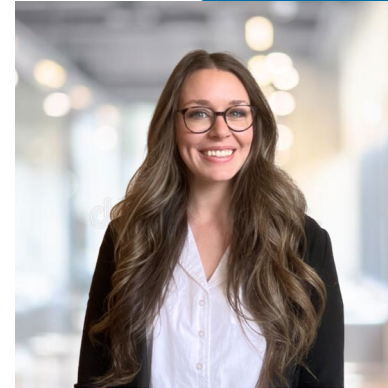
Compliance **HR**

# Today's Webinar Host:

**Stephanie Zielinski**

Marketing Director | ComplianceHR

Zielinski@ComplianceHR.com



# Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

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

## Simplify the complexity of employment law



### **PolicySmart™**

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



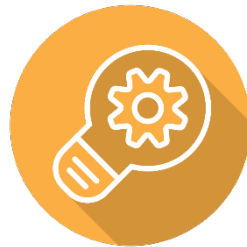
### **Navigator Independent Contractor**

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



### **The Document Center**

Efficiently generate state and federal compliant documents throughout the employee lifecycle

# Compliance Essentials



**ComplianceHR**  
**PolicySmart™**  
Changing the way companies create and maintain compliant handbooks

Crafting and maintaining compliant handbooks is a daunting task. Your company's employee handbook is an invaluable tool that helps shape company culture, communicates operational policies, and minimizes the risk of employment-related legal liability. A well-written and legally compliant handbook is essential to keeping the HR process running smoothly, and most employers would agree that keeping up with federal, state, and local employment laws can seem overwhelming.

**PolicySmart™ takes handbooks to the next level.**  
PolicySmart™ is an intuitive handbook compliance tool that provides employers with national and state-specific templates, a unique compliance timeline, and so much more.

Fueled by the subject matter expertise of Littler, the world's largest employment law firm and built on Nexip's AI-powered platform, PolicySmart™ allows users to easily create and maintain legally compliant handbooks that are cost-effective, up-to-date, and delivered on-demand.

- Federal and State Compliant Templates:**  
A comprehensive library of federal and state-specific templates, as well as policy templates that are fully customizable, depending on your workforce and operational needs.
- Innovative Compliance Timeline:**  
Provides an up-to-date timeline of important legal changes that will soon take effect in your selected jurisdictions, helping to ensure that policies are updated at the right time.
- Handbook Policy Checklists:**  
Gain access to jurisdiction-specific checklists that tell employers which policies are required by law to appear in their handbook and who is covered by each policy.
- Automated Monthly Emails:**  
Receive a summary and analysis of relevant legal developments that impact your workplace, with guidance on how to revise policy language.



**ComplianceHR**  
**Reference Center**  
The Comprehensive Solution for Employment Law and Common Compliance Questions

Last year, thousands of employment law requirements were created and overhauled. Maintaining compliance across all jurisdictions is an incredibly difficult feat, but the Reference Center is here to help.

**Answer your compliance questions with the Reference Center**

ComplianceHR is committed to innovation. To better suit your workflow, we have created the Reference Center. This solution provides you with a simple way to answer your compliance questions, easily find content on several employment law topics, and even provide deeper content that bridges multiple employment law topics.

Your organization needs a proactive strategy instead of a reactive approach to compliance. The Reference Center provides state and local information for a variety of topics, such as final pay, FMLA, minimum wage, predictive scheduling, and workplace posters, among many others.

Fueled by the subject matter expertise of Littler, the world's largest employment law firm, the Reference Center is a critical tool for your HR and legal teams.

- Local, State and Federal Information**  
A comprehensive library of state and national information that bridges a variety of compliance topics to ensure you're able to access important data.
- Wide Range of Compliance Topics**  
From COVID-19 to final pay, FMLA to rate changes, pay frequency to an call, organizations of any size and in any sector can benefit from this information.
- Streamlined Workflow**  
The Reference Center is designed to help people across your organization quickly find answers to their questions, whether they're on a centralized legal team or an HR team distributed across the country.

## PolicySmart provides you with:

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

## The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
  - COVID-19, final pay, FMLA, rate changes, and more

When coupled, these two solutions provide you with comprehensive compliance program support

# Sign Up for a Demo

## Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

## Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

### ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

#### Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

# Presented By:

**Rocio Blanco Garcia**

Shareholder

Little | Miami, FL



# Agenda

1. Understanding the Investigator's Role and the Importance of Investigations
2. Triggers to Start an Investigation and the Escalation Process
3. Planning the Investigation
4. Interviewing the Parties
5. Factual Findings, Final documentation, and Follow Up





# Effective Investigations

- Helps with mitigation with government agencies
- Reduces civil litigation/damages
- Increases morale
- Helps to keep complaints internal
- Helps to create a culture where employees feel comfortable bringing complaints or making reports



# The Investigator's Role

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# Your Role As An Investigator

- Impartial fact-finder (no biases)
- Good listener
- Fairness, respect, and integrity
- Protect the record
- Appropriate investigation
- Attention to detail
- Take off your HR hat
- Properly document investigation
- Take out the emotion
- Reach FACTUAL findings



# A “Good” Investigation Defined



**Backed by policy with complaint procedure**



**Trained professional to receive complaint**



**Timely investigation**



**Interview witnesses**



**Speak with accused**



**Documented interviews**



**Documents collected and secured**



**Report and findings**



**Remedial measures**



**Closeout with complainant**

# Investigation Triggers

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# It's All About Notice

- Does there need to be a formal complaint to trigger an investigation?

**No! It's All About Notice**



# How Is The Complaint Made

- Anonymous
- “Off the record”
- Through a hotline?
- Through social media post of a team member or third party



# Receiving the Complaint

- 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.





# Planning the Investigation

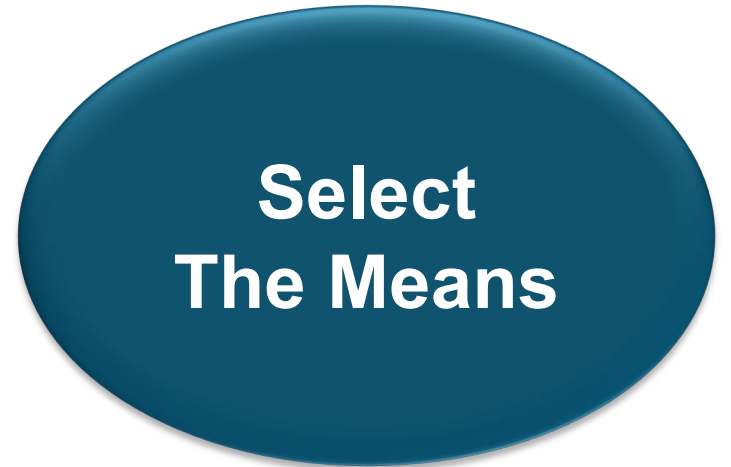
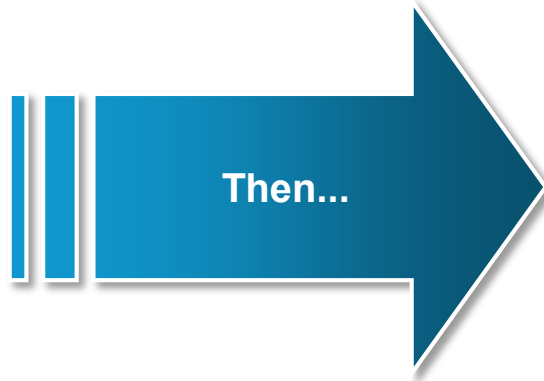


# Steps in Planning



*The Specific Issues*

*Laws and Policies*



*Documents*

*Other*

*Interviews*

# The Plan

- An investigation plan should set the scope properly so you will have the right parameters to guide you.
- You always must be prepared to explain why you did what you did.
- Never put yourself in the position of explaining your plan by saying that you never considered any other course of action.



# Documents



- Personnel Files
- Timecards
- Medical Files
- Expense Files
- Project Files
- Meeting Agendas
- Email and Voicemail
- Photos and Videos
- Calendars
- Documents in Possession of the Claimant and Witnesses

# Electronic Data and Communications

- Electronic Storage Devices
- Email
- Cameras/Videos/Photos
- Recordings
- Internet Searches
- Voicemail

\*\*\*Know your company's retention period\*\*\*



# **Interviewing the Parties and Witnesses**



# Taking Notes

- **Be Prepared**
- Written outline of allegations.
- Written list of basic questions organized by allegation.
- Space for “parking lot” issues



# 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 they know 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.

# Confidentiality

## Confidentiality of Investigation

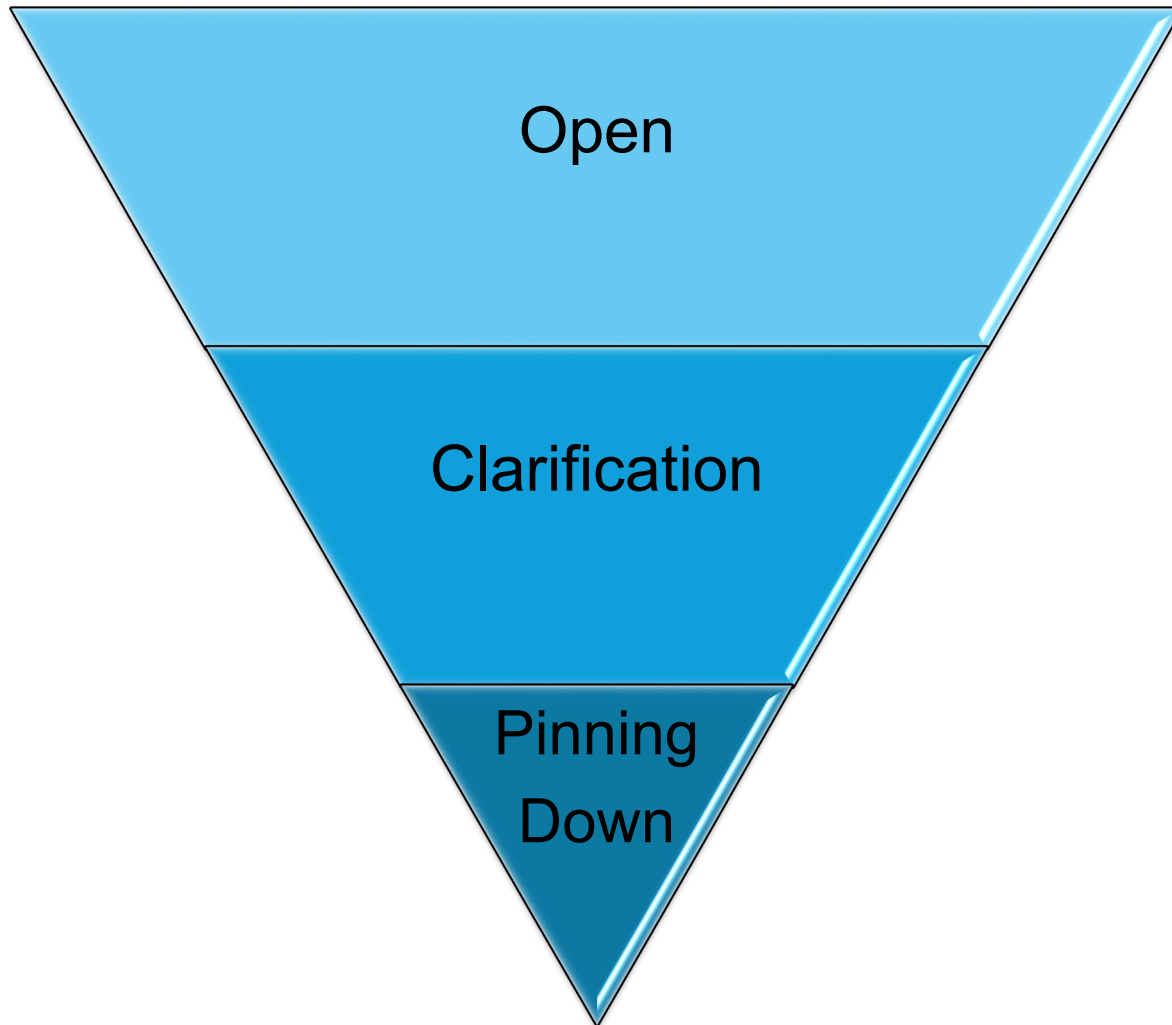
To have a fair investigation we take steps to maintain confidentiality of this matter, including complying with our privacy policies - but we cannot guarantee confidentiality.



# Opening the Interview: Answer Process Questions

- Clarity: Ask the interviewee to tell you when your question is not clear or when the interviewee does not understand the question; offer to clarify your question if needed.
- Questions: Ask if the interviewee has any questions and answer them before moving forward with the interview.
- Compliance: Confirm they will be truthful and complete and that they are not recording the interview.

# Use “Funneled” Questioning



## Ask the Right Questions

- ➔ Open-Ended Phase
- ➔ Clarification Phase
- ➔ Pinning Down Phase  
(i.e., closing the door)

# 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 shorthand for quotes

Stick unwaveringly to script

# Making Credibility Determinations

## Bias

What else is going on in the workplace?

Are there feuds, hate relationships,  
or sour grapes?

Any motivation to lie?

## Consistency of Account

Does the story remain the same over time with  
totally different people?



# In “He Said/She Said” Allegations, Credibility and Corroboration Are Key

## Memory

- Ask specific questions to assess the witness' memory.

## Corroboration/Lack of Corroboration

- Did you ask open-ended questions to find out if any corroboration exists?
- Did you ask for documentary evidence/other witnesses?

## Veracity

- Is this witness' version of events inherently plausible??
- What is their demeanor like?



# Documenting Credibility Determinations

## Do not document credibility conclusions:

- “Mary’s Lying” or “Mary’s biased”

## Instead, present facts:

- “Mary gave inconsistent information as follows... ”

or

- “Mary and Carl both admitted to having a relationship outside the office.”





# Investigator Credibility Pitfalls

## Confirmation Bias

- ✓ Making a determination too soon
- ✓ Failing to make a determination
  - ✓ Conclusory determination

# Four Ps

Patience

Persistence

Power of  
Silence

Poker Face

# Closing the Interview

## Closing Questions

- Is there any other person whom I should be speaking with regarding this matter?
- Is there anything we didn't cover that would be helpful for me to understand about the topics we have discussed today? Sometimes I might not have asked the specific question, but is there anything else I should know?
- Keep asking the same question until they say there isn't anything else.
- Are there any documents, files, and emails/texts relating to the subject matters we have discussed today that we should be looking at or that might shed further light on these matters? Could you please provide copies to me?

# Closing the Interview

## Closing Comments and Instructions

- If you later remember anything that you couldn't remember here today, or you want to supplement or correct something you said to me, please call me at \_\_\_\_\_.
- Where documents are involved, tell the interviewee: You cannot destroy or alter any information or documents relevant to this matter and you must keep them until you are notified otherwise.
- Explain to the interviewee that “documents” includes emails, instant messages, and texts.
- A thorough and efficient review will be conducted, but it is not possible to predict timing of closure.
- Please call if anything comes up or if you have any questions.
- The company will decide fairly about proper action at the end of our review, including any needed remedial action.

# Closing the Interview

## Reminders

- Reminder about confidentiality.
- Reminder about the Non-Retaliation Policy.
- *Tell the interviewee if they feel they are being retaliated against or treated differently because they [participated in this review or came forward with concerns], they need to tell you right away.*

# Interviewing the Complainant

- Get as much detailed information from the Complainant as possible.
- Emphasize complaint will be taken seriously.
- Listen impartially without committing yourself.
- Ask open-ended questions.
- Evaluate the complaint from the Complainant's perspective.



# Allegations Are Not Facts

- Don't accept the Complainant's allegations at face value.
- Analyze the facts you are offered and make your own determination.
- The report from the person who made the allegation is just a report.
- Offer no opinions to the Reporter.



# Interviewing Witnesses

- Get their piece of the story
- Use the funnel
- Aim for corroboration
- Think about credibility questions





# Interviewing the Accused

A man in a dark suit stands on the left pan of a scale, and a woman in a dark suit stands on the right pan. The scale is positioned in the center of the image. The background is a blurred cityscape with a network of glowing blue lines and nodes overlaid. The text 'TWO GOALS' is written in large, white, bold, sans-serif letters with a black outline, centered above the scale.

**TWO  
GOALS**

***Fair Opportunity  
to Respond***

***Confidentiality***

# Plan For Confidentiality

Consider ways to give the targeted employee notice of the claims against him or her without compromising the identity of the Complainant



# Useful Questions

## Question

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

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

## Purpose

Refreshes recollection and gives chance to respond.

After shock has worn off; gather full story and documentation.



# Useful Questions

## Question

## Purpose

“It’s been reported that you said X,Y, or Z”

Responding to denial;  
corroboration.

“Why do you think someone would report you said/did this, with this specificity if you didn’t?”



Responding to denial;  
corroboration; credibility.

“Others have reported you did say this, any reason for us to think you didn’t?”

Responding to “I don’t recall;  
corroboration: credibility.

# Useful Questions

## Question

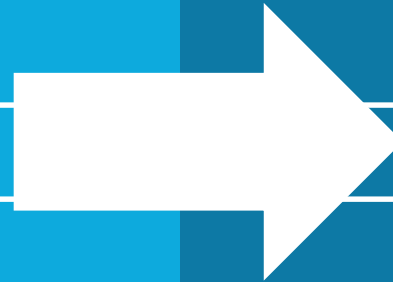
“Whom should we speak with concerning this claim?”

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

## Purpose

Chance to respond;  
create witness list.

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



# Post-Interview

Record employee's reactions



Document that the interview occurred



Maintain documentation control



Distribute notes and documents to  
investigation file



# Final Documentation



# Objectives

- ➔ Address all allegations raised.
- ➔ Identify and review the policies, procedures and business practices that pertain to the allegations.
- ➔ Make a record of your reasoning and steps taken.
- ➔ Avoid unnecessarily controversial comments.





# Know Your Audience

- Who?
- When?
- Where?



# Critical Tasks of an Investigation “Report”

- ➔ Can a 3rd Party understand it without having to reference other materials?
- ➔ Does it document findings objectively and accurately?
- ➔ Does it provide decision makers with enough information to determine whether they should take further action?
- ➔ Indicate whether the allegations were substantiated, unsubstantiated, or whether there's something missing that is needed to come to a conclusion.

# Report Writing Map

## Overview of issues

- General description of the assignment: “Employee came to me with a complaint about her supervisor, John Doe. Employee alleged Mr. Doe has violated the company policy against harassment by engaging in the following activities.”

**Include details regarding complainant, alleged wrongdoer, date of complaint/action, nature of complaint.**

# Report Writing Map

## Employees interviewed

- Date and location of interview.
- Include reason for involvement.

## Itemize each document reviewed

- Include applicable policies, electronic evidence and physical evidence relating to the allegations.
- Include reason for review.



# Witness Summaries

- Flow from the factual issues
- Distill the interview to the relevant information
- Should include only information, no opinions or conclusions
- Must not contradict your interview notes



# Report Writing Map

## Factual Findings:

- A short factual finding on each allegation with reasons
- Likely occurred as alleged.
- Likely did not occur as alleged

# Findings Considerations

## Are your factual findings objective and accurate?

- Are your findings based on reliable evidence that is relevant?
- Are they factual?
- Did you consider any evidence that doesn't support your conclusion?

**Avoid Editorializing!!**

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# After The Report



## Recommended Final Steps

- Follow up with witnesses as appropriate
- Implement any decisions Remedial and disciplinary
- Follow up with Complainant in reasonable time



# Follow Up with Complainant

## Do

Do it!

Thank them for raising their concerns

Let them know you conducted a thorough investigation

Let them know whether a policy violation was substantiated or not

If substantiated, let them know appropriate remedial action was taken

Reminder of no retaliation policy

## Don't

Provide specifics about the investigation

Get into a debate

Provide specifics about remedial measures

# Recommended Final Steps

## Maintain a separate investigative file, to include:

- Copy of the complaint (if written)
- Interview notes
- Relevant policies
- Documentation gathered during the investigation
- Physical Evidence
- Electronic Evidence
- Chain of Custody can be important if criminal allegations possible
- Written report, if one was created

**Keep Separate from  
personnel file**

Sole exception = record of  
discipline imposed

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# Questions?

Please add any additional questions to the Q&A box

**Thank you!**

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