



# Investigate Before You Terminate

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## **Emmet Ore:**

Hello and welcome, everyone. Thanks so much for being here today. My name is Emmet. I'm the Marketing Coordinator for Avitus Group, a division partner of Vensure Employer Services. And I will be your host for the next hour. We'll be spending the next hour talking a bit about why and how you should do a bit of investigating before terminating an employee. We'll be covering these relevant topics through a Q&A with our panelist. We're going to do our best to answer all the questions, but any that we don't get to will be responded to on an individual basis after the session.

This webinar is brought to you by Vensure Employer Services and all of our PEO partners. Vensure Employer Services is a leader of 20 plus PEO partners, and our clients are in all 50 states and will be generating most of the questions today.

Our agenda today includes why investigate, what to investigate, how to investigate, a few do's and don'ts of conducting the investigation, and closing the investigation, followed by a Q&A. If you hear a topic you need more clarity on, feel free to submit a follow up in the Q&A box.

We're thrilled to have Robin Paggi joining us today as our panelist. She's a seasoned human resource practitioner specializing in training on topics such as harassment prevention, communication, team building, and supervisory skills. And with that, I'll hand it over to Robin.

## **Robin Paggi:**

Thanks, Emmet. Last week, I talked about the #MeToo movement, during which dozens of men and high-profile positions in entertainment, business, sports, and politics lost their jobs as a result of sexual harassment. And there was a bit of an outcry that these men were losing their jobs simply because of allegations made against them. Generally, it wasn't

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accusations that cost them their jobs. It was the investigations that followed the accusations. When you're an employer, it's important that you investigate before you terminate. And this webinar will provide you with some critical aspects of investigations. However, I strongly encourage you to obtain more in-depth training before you conduct your own investigation, especially if you're going to do it for the first time.

First of all, why investigate before you terminate? Well, when employees make a complaint, it's really easy to believe them and to want to take swift action against the accused. But that is the wrong thing to do. Laws such as the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Occupational Safety and Health Act, Sarbanes-Oxley Act, and state and local nondiscrimination laws require that employers investigate complaints of harassment, discrimination, retaliation, safety violations, and ethical misconduct, and that they do so in a timely manner, which means right away. Additionally, investigations tend to reveal situations that do need to be corrected, and they can help the organization identify and resolve internal problems before they become big, giant problems. Investigations allow employers and HR to build trust among employees. Employees tend to have trust in employers and HR when they know that a fair, impartial, thorough investigation will be conducted when there is an accusation. And finally, investigations help lawyers defend employers if a lawsuit results from the accusation. Responsiveness to a complaint and an investigation not only helps obtain information and evidence, but it enhances the investigators, HR, and the employer's credibility, given that every complaint has the potential to become a lawsuit. You should investigate every case, every complaint as if it is going to go to court, and as potentially disruptive as investigations can be, you've got to make them quickly. They've got to be prompt, thorough, and effective to ensure everyone's protection.

So what did you investigate? Sexual harassment complaints. And I talked about sexual Harassment a little bit, but if you weren't with us last week, it is verbal, visual, and physical conduct of a sexual nature that's unwanted. And there are two types of sexual harassment. One is called quid pro quo, which means this for that. And it occurs when someone in a position of power states or implies that sexual favors are a job requirement of someone in a subordinate position. Then there's hostile work environment. This is a form of sexual harassment that can be created by anyone in the workplace. Again, it's conduct of a sexual nature that's unwanted. But a hostile work environment can also be created because of behavior directed at someone or about someone, because of being in a protected class such as race, religion, national origin, age, et cetera. Discrimination comes in two forms: unequal or disparate treatment, which is treating people differently because of their protected class status or the perception. So, for example, giving favors to people of a certain race and not to other races. And then there's unequal or disparate impact. We don't mean to treat people differently. It just ends up happening because of our policies or procedures. It's really important that you know the protected classes in your state. We have our federal protected classes, but then some states have more than Federal's. And so you need to be sure you know what those are. Retaliation is when an employer, supervisor or coworker, or a third party takes any kind of adverse action against an employee for filing a complaint. Filing a complaint is considered to be a protected activity, which means that if somebody takes action against someone because of engaging in a protected activity, that's illegal. Common types of workplace retaliation are firing, demoting, transferring to a less desirable location, get a performance review, withholding a raise or promotion, limiting the number of hours worked, and even keeping employees from attending meetings or other events the business hosts. I read about a lawsuit where a woman filed a complaint and in her workplace, people took turns managing the reception area while meetings were in session. And so the employees would rotate managing the reception area while everybody else was in a meeting. Well, after this employee filed a complaint, she had to stay upfront in the reception area during every meeting and she was not allowed to come to the meetings. And so she filed a suit for retaliation. And the court found that, yes, that was retaliation. Now, you might say, I want to get out of a meeting. And so that's a good way to do it. But the reason it was retaliation is that even though no tangible recourse, as far as nothing happened to pay or performance reviews or anything like that, the court found that the employer treated her

differently after she made a complaint and that was retaliation. You also want to investigate employee misconduct, such as violating policies. And generally, that's the focus of an investigation, is determining whether policies were violated, not necessarily whether somebody broke the law or not. So, for example, if there is an accusation of harassment, even though harassment is against the law, you want to determine if the employee violated the company's anti-harassment policy. You don't need to determine whether they violated the law. You just need to determine whether they violated the policy. So you want to stick to that. Now with employer misconduct, employers can violate their own policy as well. For example, someone in a very high-level position was just fired as CEO for a major company (and I'm thinking it was McDonald's) because of violating the company policy against dating subordinates. And so employers have to follow their own policies, too. But sometimes investigations against employers do pertain to illegal behavior. And that's what happened at Enron. At Enron, the accounting department was cooking the books. And so that's illegal. And that's what they were looking into. And then safety issues and hopefully you've got your own safety department that will investigate safety issues. But every once in a while, HR has to investigate safety issues, too, because they wear the same hat. And of course, you're looking at whether someone violated any of your safety policies. But sometimes it does arrive to a legal action because of violating OSHA laws, as well.

Now, I kind of ran through those pretty quickly because it's going to take a long time to get through these next couple of slides, how to do the investigation itself.

First of all, you need to determine if a formal investigation is even necessary. Employees, in my experience, tend to think they're being harassed or discriminated against when they're not. Also, a lot of times employees don't know how to resolve their own conflicts. And so they get HR involved. And a lot of times supervisors don't want to do their jobs supervising and try to abdicate their responsibility to HR. So before you jump into an investigation, you need to find out what's happening to determine whether that's something you need to handle or if it needs to go pushed back to the supervisor or push back to the employee to handle it themselves. Now, it's really good if you can have some type of form or template to get the complaint because this way we'll make sure you get all the information that you need and you want to write stuff down anyway, so it's nice just to have a form to complain. The form is going to have the date that the complaint is coming forward, the complainant's name, their title, the position, the department, the employees, immediate supervisor (So sometimes things take a while, especially you end up going to court. It can be years later. So while it might seem like, you know, what the employee's position is and you know who their supervisor is and all of that, if it goes to court years later, you're going to want to have all of that information readily available.), you're gathering information on the date of the incident and the event when it happened, who was involved in it, the employee's relationship to the people involved. And one of the reasons that's important is because sometimes you have people who work together or who have personal relationships. And so you want to find out if they have those personal relationships because that might be the reason that there is because of personal relationships. You want to get names and contacts of people who might be a good witnesses from the complainant. You want to get the employee's version of what happened and be as specific as possible. Who said what? Who did what? Everything that you possibly can, like you're creating a police report. Just the facts. And get a signature and the date and time again of when this complaint is being made. So that's just in determining if you need to have an investigation. One other thing, don't wait for employees to complain as one of the things that supervisors said to me before is that nobody complained. So I didn't think I had to do anything about it. No, frequently people come forward and they say, "OK, this isn't a complaint, but this is what I've heard, this was what I've seen." And they share some important information. So just because it's not a complaint doesn't mean that you shouldn't do something about it. Also, if coworkers and managers are observing that employee's behavior is changed or their morale, their productivity, or they are expressing some concerns that something's wrong here, investigate it. Certainly, if you've noticed that your inventory isn't what it used to be or we're not making as much money as we used to suspicion of any kind of misconduct, or sometimes

you have to do investigations because you receive an administrative agencies inquiries such as the EEOC. So an employee went to the EEOC or your state agency and filed a complaint with them, then you're going to have to do an investigation. And certainly, if somebody sues the company and that's a surprise to you and you haven't done an investigation, you're going to have to do it then.

Now, then, that next bullet point, "Identify Organizational Risk and Political Issues" is good to do before you launch into an investigation to find out or determine how bad it could possibly get. So, for example, if the complaint is about somebody in management, you need to be aware and be prepared going forward. If the complaint is about somebody who is related to management or best friends with management, it's not that that's going to deter you from doing an investigation. It's just that you need to keep these things in mind and what could potentially go wrong and prepare for it, determine who should handle the investigation. And based upon relationships with management, maybe you're not the one to do it.

This is huge as far as who's doing the investigation. And again, you need to have much more training besides this webinar in order to conduct an investigation for the first time. So as far as who's going to do the investigation, a primary target for defendants attorneys is attacking the investigation and especially the investigator. And they usually try to prove that investigators did not know what they were doing. They didn't have the training or that they were biased. And so sometimes you want to have somebody who has done much more investigating than you have. Sometimes you want to have somebody outside the organization because it looks less biased. If you have somebody outside of the organization who doesn't know anybody and they have no reason to come up with the results, that whether somebody violated policy or they didn't. That might be the best thing to do. And finally, when you're thinking about who should handle the investigation, you should also consider issues about gender, especially in sexual harassment claims. So if you have a female who comes forward and complains that a male sexually harassed her and you have a male conducting the investigation, that might be a little intimidating for her and vice versa. If you have a woman doing the investigation, it might seem like she might be a little biased. And so maybe the best-case scenario is you have investigators with both sexes who are doing the investigation if that's at least possible. And the rank of the investigator when I was pretty young and starting out, that's one of the things that I encountered when I was investigating people who were higher up on the food chain than I was. And there was some concern that they would intimidate me and that I was not up to the challenge. And so those are all things to consider, as well.

And then you want to identify evidence to be gathered and reviewed now there are three types of evidence: One is documentary, one is testimonial, and one is physical. Documentary evidence is just like it sounds. It's documents. And so some examples include time and attendance records, travel receipts, expense reports, performance reviews, disciplinary warnings, email messages, sales reports, just a variety of records that are generated through your daily business transactions and getting documentary evidence is critical and minimizing the "he said, she said." If you've got real documents, it's tough for people to lie. Testimonial documentation is the stuff that people tell you. And you do want to gather that information because it is important. But if you just do nothing else but talk to people, your case is not going to be as strong or your investigation is not going to be as strong. So you want to have documentary evidence which clearly substantiates allegations along with testimonial evidence, without the documentary evidence your case is just not going to be as clear. Now, I just watched the series Broadchurch, which is a few years old, but I just watched it. And it's about an investigative team in England. And they would show examples of why documentary evidence is so important. They'd ask the suspect whether he or she did something and the suspect would say, "No," very convincingly. And then the detectives would provide a receipt or a phone record or other kinds of documentary evidence that demonstrated the suspect was lying. So that's the reason that documentary evidence is so important. By the way, that's a good way to do it, is that you have that evidence, but you don't tell witnesses or suspects or the accused that you have it. You ask questions to get their

responses, and then especially if they're lying, you've got that documented evidence to prove otherwise. Now, a word of caution about emails, which is documentary evidence, particularly in a harassment or discrimination investigation, under the federal rules of evidence, email is discoverable. You probably are very well aware of that, be careful what you email or text to other people because it is allowed in court. However, we also know that tech-savvy people have been able to fabricate emails, and so you want to make sure that you authenticate that emails are really coming from the sender before you use them against them. Now we have documentary evidence, we have testimonial evidence, and the last is physical evidence. That is evidence that is tangible, such as security videos, a damaged vehicle, a piece of machinery, things that you can physically hold or touch. Now, most of the time, you're going to need to take a picture of these things so that you can preserve them in real-time. Remember, sometimes lawsuits don't happen until years later. And the other thing is that if you do have physical evidence, you've got to be careful where you store it and who's in charge of it. One thing, gather documentary and physical evidence first before talking to anybody to get their testimony.

Sometimes you won't need to talk to them, which would be a good thing, because if you can prove that something happened without talking to people, then it prevents people from talking about it and leaking information. We need to identify potential witnesses and locations. And remember, just at this stage, it is just identifying it's not going out and doing the interviews yet. So first you want to look at people who might have actually seen or heard whatever the complainant was talking about. An example would be interviewing somebody who was in the break room when the fight broke out there that the complainant is complaining about. In some cases, you're not going to be able to get firsthand witnesses or any other witnesses at all. You'll need to rely upon who the complainant tells you you should talk to. And also you'll want to find out who the accused says you should talk to as well. One of the things you can do is look at where people work and see if maybe somebody in their department might be able to tell you something based upon what they know, even though they weren't there or weren't identified by the complainant. And you might even want to interview people who don't even work for the organization, such as delivery people, repair technicians, suppliers, vendors, customers, visiting supervisors or workers, anybody who might be around to be able to tell you what happened. And remember, at this stage, you're just trying to identify, you're not actually going out and investigating. One of the things you need to keep in mind when you are about to create the strategy for the investigation is the availability of the witnesses. And so that's one of the things you want to do, those investigations quickly. And you need to find out, are people going on vacation? Is the plant shutting down? What's happening so that you can involve that into your strategy?

Now you want to prepare the interview questions, and this is something that sometimes doesn't happen, investigators just go out and start talking to people and ask the questions that just come naturally to them and they start writing notes. And then that's a big problem. And one is inconsistency in the interviews. And the second is that you don't ask all the questions that maybe you should have. So you want to also use a computer as much as you possibly can. Now, truth be told, I don't like doing this. When I'm doing interviews. I like to write things down. It's faster for me. But the problem is, is that sometimes people can't read their own handwriting. And then another thing is that often when you are doing interviews, you want to type everything up and then read it to the person that you're interviewing and make sure that you've gotten the information correctly and even have them sign it, that they are verifying that the information is true. So it's hard to do all of that when you're just writing things down. Now, preparing your questions, there are a variety of questions you can ask, and I encourage you, based upon the training that I have received, to start with what are called "baseline questions." And these are ones that people will most likely answer truthfully because they are just easy questions like what is your name and where do you work and who is your supervisor and things like that. And so those are just softball questions. They're easy ones. You need to gather information and you want to start with those, because one thing is that when people are answering these questions, they're usually telling the truth. And you can watch how they're answering the questions to get an idea of their facial expression, their body language. When people begin to lie, usually their facial expressions and body

language indicate that they're not telling the truth. Be careful about this, though. Don't just as somebody appears very nervous, think that they're automatically lying. Because when I've done investigations, people who aren't the complainant or the accused are very nervous about being a part of the investigation. So don't assume that you're a body language expert and begin to figure out that people are lying. But you do want to see if there is a shift in how people behave when they're answering questions. Now, after your baseline questions, just gathering the information about who they are, where they work, how long they've been there, what they do, that kind of thing. You want to then move to chronological questions. And so chronology is the order of things. And so this confirms the who, what, where, when, how, why. If you ever took a journalism class, that's the basics of journalism. And so questions would be who else was present at the time? What exactly did they say? Where were you standing? When did this happen? How did the situation change? So who, what, when, where, why? How are those chronology questions? And then they help you get an idea of the sequence of events as well. So you can begin to understand exactly what the situation was. [The] next kind of questions are open-ended questions, and these are ones that people can't answer with a yes or no. So an example would be, "What's the working relationship between Bob and Joe? What is Bob's demeanor been like the last few weeks? Anything going on in the department that seems unusual?" And so these are questions that try to dig a little bit deeper to see why things might have happened the way they did, what might be a motive behind why the accused did something, or why the complainant is making a complaint. Open-ended questions also help investigators understand the connections between people, the personal relationships whose friends with who, who is related to who, and just what kind of pressure people are under in the work environment. After that is the clarifying questions and sometimes people say one thing and then they say something else, and so the clarifying questions help you figure out what actually happened." You said this, but then you said that. So then what actually happened?" So you're trying to help verify the facts. And it also helps to make sure that you've heard things correctly. So a sample clarifying questions would be something like, "Let me make sure I have this correct. You said that you walked into the break room at 11:00 and then you walked out at 11:30. But then just a second ago, you said that you walked in at 10:30. So what time exactly did you walk in?" So you always want to appear as if you were giving the benefit of the doubt. Not that you're trying to catch somebody in a lie, but that you're just trying to clarify to make sure you understand correctly. And then the last question is the bullseye, and these are closed questions that have to be answered with a yes or no that helps you cut through the bull and get to the truth. An example would be, "Joe, did you steal the money?" And investigators often struggle with these kinds of questions because they're kind of scary. And so if you don't ask those kinds of questions, then you're not really going to get to the truth. By asking questions in an assertive tone and a direct manner like that, you can have psychological leverage with the accused, especially because it's just putting it out there. And one of the things, don't be afraid of silence either. That's one of the things that I learned as an investigator, is that people get really uncomfortable with silence when you are asking them if they've done something. And if you just sit there in silence, often they'll blurt out the truth because they're so uncomfortable with the silence. So these kinds of questions prepared beforehand can help make sure that you ask all of the questions that you need to ask. Of course, any follow-up questions will be different based on how they are answered. But at least you've got a template for moving forward, asking each person that you're talking to, the same questions in general.

Creating a strategy is like planning a vacation, and there are numerous strategies you can use during investigations, so you need to figure out overall what your strategy is. For example, you might want to have simultaneous interviews. You're interviewing all the witnesses at one time so that they don't have an opportunity to talk to each other. Another strategy is scheduling the interviews one after the other so that the person who is accused of wrongdoing does not have an opportunity to talk to people who are being interviewed because that often happens. But you need to just review the situation on a case by case situation and figure out what would be best for yours. And also go through scenario planning. OK, what happens if the accused says this? Or what happens if that would happen? What will we do then? So you just want to have a plan of action because things can move pretty quickly once you get into an investigation. So you want to

be able to chart out how you might change. And things will change, too. You'll have a strategy and the strategy will end up changing based upon what ends up happening. One other thing that I'd like to tell you about is you need to be careful about security when you are interviewing people. And I really learned this when I was a younger person. I was doing an investigation and I had, at that time, a little red convertible Thunderbird. And I drove my little red Thunderbird that had personalized license plates on it, also up to the room or the building where I was going to conduct an investigation. And the person who made the complaint ended up being not psychologically sound. And when I was asking him, he was making a complaint of harassment. And when I was asking him about the particulars and talking to him about things, I said something about "harassment lawsuits can wind up costing employers millions of dollars." Now, what he heard me say was he was going to get millions of dollars. And so as the investigation continued, it became apparent that he was not psychologically sound. As a matter of fact, we had to send him to get a psych test. And I realized when I walked out of the building after interviewing him and my car was right there in front of the building and he walked out with me, that I had a very distinctive car that could be easily found by someone who I just realized was not psychologically sound. And so that's why I quickly gave up that car and bought one that is nondescript and does not have personalized license plates on it. But when you're interviewing people, especially the accused, sometimes things can get a little dicey. And it's important that you think about these things beforehand and that you make any kind of security measures that you need to. Once when I was working at a law firm, an attorney and I were interviewing the person who had been accused of something and he was a really big guy. And so we got one of our really big attorneys just to sit in the room with us. And he pretended that he was taking notes and things like that. But basically, he was just there in case this really big guy that we were accusing of wrongdoing decided to hurt us. So, unfortunately, that's the thing that you need to consider. And the other thing that I learned about doing investigations is that people will lie to you. And I was so surprised when people started lying to me. And I just I was raised saying with the philosophy, if you fess up, things will be easier for you. And so I fess up, but people will lie to you. And so that's one of the things that you just have to keep in mind.

So what are some dos that you want to keep in mind?

Well, first of all, it's really important, especially when you are interviewing witnesses, that you don't make this any more scary than it needs to be. So introduce yourself the reason for the meeting and build rapport. And one of the questions that I would ask people frequently, especially when I worked in a law firm, I was a little tough to find. And so I would ask people, "Did you have a difficult time finding the place?" I mean, the answer was never wrong. If they said, "Yeah, I did." "Well, I'm glad you found us." Or "No, I came right to it." "Oh, well, good. I'm glad it was easy." I mean, you just want to have some chit-chat to break the ice so that people are a little bit more comfortable. So be conversational. I mean, you're not the police here. You're not CSI. And so be conversational. You want to offer people something to drink, especially sometimes investigations can get quite lengthy or interviewing people can. And so having something to drink is a nice, hospitable thing to do. And also, they might need to have some water or something because of talking so much. Even though you want to be conversational, you want to remain neutral and objective. And that's really important. Don't try to be one of the guys, especially if you're doing an internal investigation. You work with the people that you're investigating or that you're talking to as part of the investigation. And so it's really critical that you don't appear that you're taking sides that that you're treating it lightly, anything like that. It's important that when you are asking questions also, that you're very neutral, that your facial expression isn't giving anything away. You don't want to frown. You don't want to roll your eyes. You don't want to smile too much. You don't want to do anything. You want to have a blank slate, for the most part with just a little bit of a smile so that you don't look too scary. But it is important to demonstrate empathy, especially for the complainant. But that doesn't mean that you then say, "Well, we're going to get that person," or anything like that. It's just that you're sorry. Even with the accused, you're you're sorry that everybody's having to go through this. And so you

want to demonstrate that to a certain degree. So be personable without being too personable. And then eye contact with note-taking. As I said, I prefer to write things down. But how whether you're writing things down or whether you're typing on a computer, you want to try to make as much eye contact as you possibly can with whoever's talking to you. And so that's why sometimes it's good to have two investigators, one who is actually doing the talking and one who is doing the notetaking, if that's possible. So those are some dos. Let's look at some don'ts.

OK, again, you're not the police, so don't go in and interrogate or coerce or threaten people or anything like that, you're just there to gather information. And it's difficult to not have foregone conclusions. I mean, I know this from experience. You have a complainant who comes in and their complaint seems really valid and you really feel for them. And so you've already decided what's happened before you get to the accused. Don't do that for very important reasons, because once you start thinking that, then you start filtering what you hear. So keep an open mind throughout the whole thing. Don't ask questions that suggest answers to them. You just want to ask those questions that we talked about. Tell me about what happened. When exactly did it happen? That kind of thing. Don't fail to treat witnesses with respect and even the accused. I mean, people make mistakes, we all make mistakes. And so when you're talking to the accused, don't act like they're pond scum. I mean, they're a person who deserves your respect as well. Don't express your opinions, make any promises, anything like that. Just gather the information and don't talk about it with anyone who does not have a need to know about the investigation. And that's tough to do. Sometimes you go home and you're talking to whoever is there about your day, you just can't do that with investigations. And then finally, don't forget about privacy rights. And that's one of the reasons that you don't want to gossip about it, is because people have the right to privacy. I'm in California. It's part of our Constitution here in our state. And so when you have access to this information, you've got to make sure that you are not telling people who do not have a need to know because if you do, you are violating privacy rights, which could be a lawsuit in itself.

Closing the investigation. So after you've done the whole thing, you want to review all the evidence you have, you want to review everything you've written down, get it all shipshape, make sure that you have discovered everything that you need to discover. And I know sometimes you just want to get this investigation over. But if there's other people you think that you can talk to, go talk to them. I mean, it's just important that you gather as much information as you possibly can in order to try to demonstrate that you had a thorough investigation. I remember one time I worked in an organization, and there was an accusation against somebody very high up in management, and the HR director at our organization just simply asked him, "Did you do it?" And he said, "No." "OK." Well, it went to court and oh, my goodness, she looked bad because her investigation consisted of asking this person if he did it or not and then just believing him. And so the organization ended up paying money as a result of that. So I know a lot of times you just want to get it over with, but make sure it's very thorough. So one of the things that you want to do is you want to meet with the leadership, HR professionals, anyone who might need to be involved in making a decision about the investigation before you communicate findings. So this is a preliminary meeting. And this meeting gives you an opportunity to share what you've learned, but also to talk about what happened in the past. And so if this happened before, how did we handle it? And that's very important because you want to discipline as consistently as possible. So an example would be two employees got into a fight. Both violated company policies. However, one is terminated and the other is just written up. If you discipline inconsistently, that can lead to discrimination lawsuits. So you want to look at what we've done in the past when something like this happened to make sure we're as consistent as possible. And the other reason that you want to meet before you put everything out there is to consider again who's involved in the accusation. If we're going to have to end up firing somebody as a result of this, we want to have everything lined up beforehand. And we considered about all of the ways that whenever we discuss what we have found from the investigation, how it's going to be played out and who's going to react the way that they're going to react and all of those types of things so we can get prepared for it. So you will want to have an investigative

report. The investigative report will be something that involves an executive summary, what the allegations were, what the policy implications were, what the specific findings were, the conclusion and appendix, what have you. But it's really important that this investigative report looks as professional as possible because, again, if something goes to court that is going to be scrutinized and you want it to be in language that people can understand, you want it to be something that people would come to the same conclusion that you did, even if you're not there, you want it to be self-explanatory, but just looking as professional as possible. Now, you need to communicate the findings of the investigation, certainly to the person who made the complaint. And that's something that happens every once in a while. I'll go and do harassment prevention training and people will tell me I made a complaint and nothing ever happened about it.

And my responses. Did the harassment stop? Yes. Well, then something happened, so that's something that people have a tendency to not do, is to go back to the complainant and tell them, "OK, we've investigated and this is what we have determined." I think people don't do that sometimes because if they discipline someone, they can't tell the complainant how they discipline them. And so they don't tell them anything at all. That's the absolutely wrong thing to do. You should talk to the complainant in person or via telephone or Zoom or what have you, and let them know that an investigation has been completed. Each of the issues raised has been reviewed, because sometimes it's not just one thing, it's several things. The appropriate action is being taken. You don't tell them how you're disciplining somebody. You're just telling them that you are taking the appropriate action. Ask if they have any questions, have all of this in writing as well, and be sure to tell them that retaliation is against the law if anybody retaliates against them to let HR or management know immediately. Let them know that you'll follow up with them in a couple of weeks or a month to make sure everything's going OK and have all of this in writing that you can hand to them. And then you're also going to communicate with the person who was accused and determine what happened at that point. So sometimes you conclude that they did violate policy and you let them know that that was the conclusion. And what's going to happen as a result? But sometimes investigations are inconclusive and you don't know what happened. Sometimes in those cases, you'll just remind them. Retaliation is against the law, that that they cannot get back at somebody or let anyone else get back at the complainant in their stead and that sometimes you just need to remind them what policies are. So I did an investigation once where an employee was accused of pointing his finger at people and pretending he was firing a gun. And eight of his coworkers said that he did that. And, of course, he denied it. And I said, "Why would eight of your coworkers say that you did this when you did not?" And he said, "They don't like me." "Why don't they like you?" "I don't know." I said, "Well, you are doing something that is making them file this accusation against you. So I suggest that whatever it is you are doing, you stop it." So even if it's inconclusive, you can still remind them of policies or procedures or inappropriate behavior that might have happened. That needs to not happen in the future. And then finally closing the case. Once the investigation has reached its conclusion, what are the plans? What are we going to do at this step. Action steps should be dependent upon company policies, past practices, the egregiousness of the conduct. So that's one of the things that people ask me frequently. Do I fire somebody because they violate the policy? Do I write them up? What do I do? And the things that we look at is how bad was the conduct? What is the employee's employment record? What did we do in the past? And do you have progressive discipline policies in place? So all of those things need to be determined. This is what's going to happen now. And then finally, you're done. And I'm done, so that's all the information that I have for you. Do you have any questions for me?

### **Emmet Ore:**

Awesome, thanks, Robin. We do have a couple of questions here. The first one is, may employers discipline employees for not participating in an investigation.

**Robin Paggi:**

In general, yes, they may. One of the things that you want to do is, first of all, look at who is refusing to participate. Is it witnesses or is it the accused? And so that's one of the things that depends upon who the employee is and why they don't want to participate. But you want to have it in your employee handbook about investigations and the fact that people are expected to participate in them. And then the other thing is that you want to let employees know that they can't be retaliated against because of participating. So that's one of the things retaliation has been extended because sometimes people who were just witnesses were retaliated against by the accused for participating in an investigation. And so retaliation protection has been extended to include people who are just witnesses. So in general, yes, you can discipline people when they just refuse. But if you're going to do that, you always want to check with your legal counsel discussing the circumstances because the devil is always in the details.

**Emmet Ore:**

Great, thank you. What should employees do when they're accused of doing something wrong?

**Robin Paggi:**

Well, the first thing is don't get back at anyone who's accused you, that's retaliation. Again, I encourage you to participate in the investigation, especially because it gives you an opportunity to clear your name if you did not do something wrong, it gives you an opportunity to talk about your perspective of any situation or to provide any kind of alibi or something like that. So if somebody accuses you of doing something wrong, you definitely want to take advantage of the opportunity to demonstrate that you did not do anything wrong. But even if you did do something wrong, you want to, I would say "fess up," immediately, because, again, just like my parents taught me, the punishment is going to be way worse if you lie to us about it and we find out the truth. So sometimes it's just easier to take your lumps and move on. But most important thing is that if you're accused of doing something wrong, and especially if you didn't do it, don't talk about it with people who don't have a need to know. That's one of the things that happens frequently is that people start telling their side of the story to anyone who will listen, and that just makes their situation worse for them. And by the way, that this reminds me of something that I should tell you. People have asked me, can we tell the people involved in investigations not to talk about it and then discipline them when they do? And the answer used to be yes. But because of recent situations, it is generally no, you can't. And the reason for that is the National Labor Relations Act says that people have the right to talk about the terms and conditions of their employment. And when you tell people you can't talk about stuff that begins to violate the National Labor Relations Act, Section seven. And so just that's one of the things you can encourage people not to talk about it. You can tell them how talking about it can make the investigation muddy, but you cannot prevent people prohibit it or discipline them for doing it.

**Emmet Ore:**

Great, thank you. We do have a few more here. Can one record the discussions at an interview?

**Robin Paggi:**

Well, you can record as long as you have everybody's permission to do so.

**Emmet Ore:**

Got it. OK, how would a closed question look different when interviewing someone directly?

How would a closed question look when interviewing someone directly? Oh, so a close question is yes or no answers. And so most of the time, I mean, during an investigation, when you're interviewing people, you want to start with open

questions that can't be answered with a yes or a no to get as much information as you possibly can. The closed questions come at the end, especially with the accused, because that's when you want to directly ask them, did you do this? And so that's what a closed question would look like at the end.

**Emmet Ore:**

Excellent. Can you terminate an employee for false accusations proven by an investigation with footage showing that employee violating policy?

**Robin Paggi:**

OK, well, so I'm assuming the policy is that people have to tell the truth and when making complaints. But yes, you can terminate somebody if you can demonstrate that they falsely accuse someone of something else.

**Emmet Ore** OK, excellent. I want to return to a question I asked you earlier, just because I didn't see the end of it, it was cut off. So how would a closed question look different when interviewing someone directly involved versus a witness.

**Robin Paggi:**

Oh, OK, yeah, and the question usually is more toward the person being accused of something. Because a close question for somebody who was just a witness would be maybe something like, "Do you think this person did something?" As opposed to asking the accused, "Did you do this?" And so close questions are usually more for the person who is accused of something so that you can ask them directly whether they did it or they didn't do it. Don't need them so much for a witness.

OK, awesome. It looks like that's all the questions we have time for today. If you have any other questions, feel free to submit a pull this screen up one more time here and submit them to [webinarHRhelp@vensure.com](mailto:webinarHRhelp@vensure.com) and we'll answer those. With that, just like to thank Robin for being here today and thank you all for being here today as well.