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Workplace Investigations: Are You Ready to Investigate In The New Age of Employee Complaints?

Presenter
Leticia “Letty” P. Aguilar (San Antonio)

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The New Age of Employee Complaints



Investigation Trends-Top 5

Hypotheticals

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Trend #1: “The Aftermath...” The Changing Face of Internal Complaints

- Victims are more willing to speak up and are more demanding
- Systemic racism
- Reverse racism
- Unconscious bias and micro-aggression issues
- Cultural misconduct
- Political angst
- Safety concerns
- Sexual assault and misconduct

**Complaints are increasing in volume, nuance, and complexity.*



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Trend #2: “Hanging on By a Thread” Mental Health Issues at the Forefront

- Significant uptick in employee mental health issues
- Employees are more vocal about mental health
- Impact on witness interviews
- Be prepared by emphasizing psychological safety



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Trend #3: “Dancing with a Stranger” The New Reality of Remote and Hybrid Workforces



- Post-COVID prevalence of remote workplace
- Coworkers operating *within* a vacuum and *without* sufficient personal interaction
 - Remote working/lack of personal contact sometimes yields inappropriate conduct
- Major factor for consideration in witness interviews and investigative findings
- Incorporate “proper remote conduct” protocols into your training programs

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Trend #4: “Real or Fake” The Impact of AI on Investigations

- AI and Deepfakes complicate evidence
- Credibility assessments and corroborating evidence become even more important
- Privacy considerations can be mitigated



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Trend #5: “Did you see his socials?” Social Media, Workplaces, and Off Duty Conduct



- Almost all employees have some form of social media and often interact with social media for work-related purposes
- Then the inevitable happens, employees are privy to another employee’s off duty conduct/speech
- Some states have enacted laws protecting employees from being terminated due to off-duty, off-site “legal recreational activities.”
 - e.g., California, Illinois, NY, Colorado, North Dakota.

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Are you ready for some real-life scenarios?



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Scenario I Social Media Scuttlebutt

- Your HR dept receives an email from Whistleblower24@Protonmail.com containing screenshots of a social media post of an employee (delivery driver) drinking a beer in what appears to be the cab of large vehicle – possibly a truck. He has a marijuana vape in his front pocket.
- You cannot quite tell if the vehicle in the photo is part of the company fleet of delivery trucks.
- The screenshots are accompanied with an anonymous note complaining that the employee is a jerk, gets high, and shouldn't work there.



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Scenario I Social Media Scuttlebutt (cont'd)

What would you do?

- Do you have an obligation to investigate an anonymous complaint of what could be off duty conduct?



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Scenario I Social Media Scuttlebutt (cont'd)

You decide you should conduct a preliminary inquiry into the matter.

What should you do next?

- a) Review the employee's Facebook and/or Instagram page to determine the date of the post
- b) Ask the employee's manager if he's ever seen the post
- c) Check the employee's medical file to see if he has an accommodation on file for medical marijuana
- d) Contact the employee to discuss the matter
- e) Review the employee's personnel file to determine if he's on a warning for similar conduct

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Scenario I Social Media Scuttlebutt (cont'd)

The HR person speaks to the employee and determines the following facts:



- The picture was taken last Saturday at a Company-sponsored BBQ held in the Company's truck yard.
- The employee was sitting in a stationary truck taking selfies.
- The employee didn't smoke his marijuana joint at the BBQ (but did later).
- The employee thinks the complaint came from an Indian co-worker who dislikes him because he's from Canada (and called him a racially-charged name).

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Scenario I Social Media Scuttlebutt (cont'd)

What Would You Do?

- a) Make a note to file
- b) Speak with the delivery department manager about the BBQ
- c) Review company polices and procedures concerning use of marijuana
- d) Review company policies about social media in the workplace
- e) If appropriate, write up the employee for violating drug free workplace and social media policies
- f) Arrange a training on drug use and social media for the delivery department
- g) Find out more about the relationship between the employee and his co-worker
- h) All of the above



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Scenario II AI, A-OK, or Otherwise?

Your HR Department receives the following Complaint from a non-supervisory employee who normally sends one sentence emails with no punctuation:

Dear [Employer]

I am writing to formally express my concerns regarding discriminatory practices I have experienced at MyCo. As an employee dedicated to my work, I believe it is essential to address these issues for the betterment of our workplace.

Recently, I felt marginalized due to [specific instances of harassing conduct]. These experiences have not only affected my professional growth but have also taken a significant toll on my mental health. I have found myself feeling isolated, which has impacted my overall well-being and productivity.

I believe in the values of inclusivity and respect that MyCo upholds. I urge you to investigate these matters and implement measures that promote a more equitable work environment. Thank you for your attention to this pressing issue.



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Scenario II

AI, A-OK, or Otherwise (cont'd)

What do you do first:

- Go to ChatGPT and ask it to “write a response to a complaint from employee to their employer about discrimination and mention mental health.”
- Respond to the employee and let them know that you have received their complaint and would like to set up a time with them to discuss the details.
- Ask the employee if they have retained counsel because there is no way they wrote the complaint themselves.
- Reach out to your in-house legal contact to discuss next steps.



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Scenario II

AI, A-OK, or Otherwise (cont'd)

You have been given the green light by in-house legal to engage with the employee, but she says her work environment is already taking a toll on her mental health and she cannot participate in an interview because it will erode her mental health further.

In fact, she tells you she needs a leave of absence to cope with these challenges. She asks you to please not contact her further until she returns from leave regarding the investigation.

What do you do?

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Scenario II AI, A-OK, or Otherwise (cont'd)

What do you do?

- You make one last stab at trying to talk to her before she goes on leave by assuring her that your good faith goal is to try to fully investigate the complaint and that, if her mental health can withstand it, you would like to speak with her before she goes out.
- You tell her, “no problem, we’ll wait until you return to work and are ready for us to speak with you.”
- You demand she speak with you because, after all, she is the one filed this stupid complaint in the first place, and she needs to cooperate.
- You let her go on leave but communicate with her about a week into the leave and ask her to *pretty please* speak with you for a few minutes and that you will pay her for her time.



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Scenario II AI, A-OK, or Otherwise (cont'd)

She agrees to speak with you briefly but as soon as you start the interview, she starts crying and says “forget it, I just can’t. My mental health is worse than I thought. I cannot move forward with this interview. Please do not contact me again.”



What’s the playbook from here?

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Scenario II

AI, A-OK, or Otherwise (cont'd)

“The script”

1. Your mental health is a top priority for me.
2. I want to make sure you feel completely comfortable speaking with me about your concerns. This is your story, and I want to hear it.
3. I know you are nervous, but I can assure you that if you need a break at any time, you can just tell me and I'll provide you with it.
4. I think you will find I will treat you with respect and dignity throughout this interview. If you find that I am not doing that, you can tell me immediately and we will work towards finding a better way to communicate.
5. If we get to a place where you feel you cannot move forward with the interview, then we can find another time to complete it.
6. I want to make sure you feel this is a safe space for you to share.
7. Remember, we have an anti-retaliation policy, and we take that very seriously. My role doesn't end after this interview. I will be here for you to raise any future concerns with me as they may arise.
8. Are you ready to go forward?

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Scenario II

AI, A-OK, or Otherwise (cont'd)

She agrees to go forward with the interview but only under the following terms:

1. Off camera
2. You allow her to record the interview.

For the love...what on Earth do you do now?

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Thank You!

leticia.aguilar@ogletree.com

210-277-3612

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