

Workplace Investigations

EP 55

Wednesday, October 16, 2024
10:30 a.m. E.S.T.



Meet Your Presenters

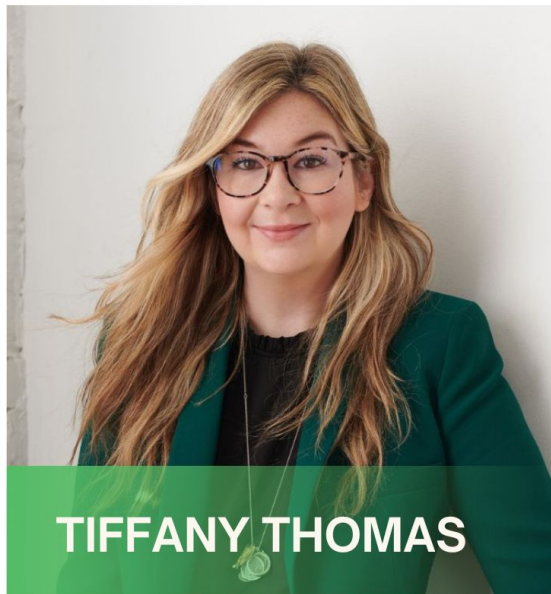
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Land Acknowledgement

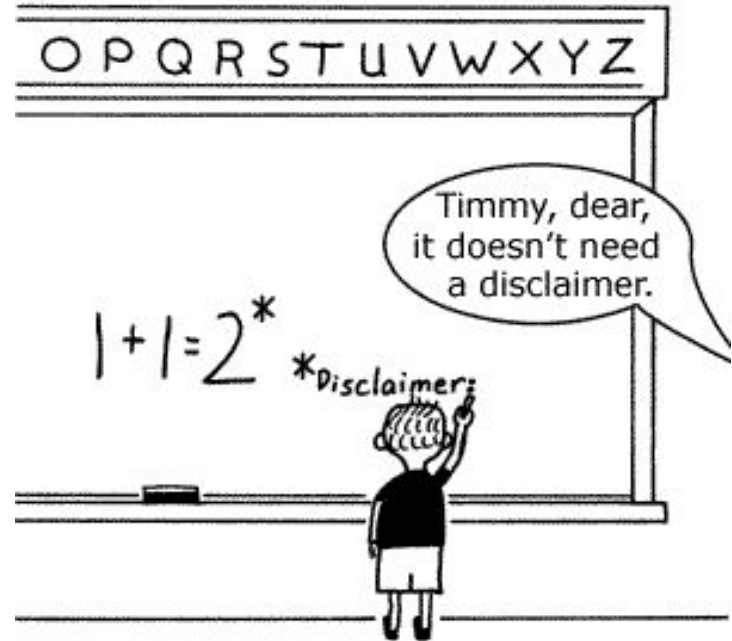
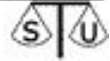
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We are grateful to live and work on this land.

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Timmy
doesn't need
a disclaimer
but we do...



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Presentation Roadmap

- When are investigations necessary?
- Initial steps, principles and considerations
- Hallmarks of reasonable investigations
- Alternatives to investigations
- Best practices for an effective (and defensible) employer response to allegations/incidences of workplace misconduct
- Mistakes to avoid

When Are Workplace Investigations Necessary?



When Are Workplace Investigations Necessary?

- Are you aware of allegations or incidents of workplace harassment, violence or discrimination?
- If yes → legal obligation to investigate
- Planning the investigation: what is “appropriate in the circumstances”
- The standard is reasonableness, not perfection

You Are Legally Obligated to Investigate!

OHSA

- Section 32.0.7(a): an employer shall ensure that an investigation is conducted into incidents and complaints of workplace harassment

Human Rights Code

- The rationale underlying the duty to investigate a complaint of discrimination is to ensure that the rights under the *Code* are meaningful...*The Tribunal's jurisprudence has established that the employer's duty to investigate is held to a standard of reasonableness, not correctness or perfection.*

Initial Steps When Allegations / Incidences Arise



Initial Steps When Allegations / Incidences Arise

- Duty to investigate is easily triggered under OHSA: complaints and incidents (s.32.07.7(1)(a))
- How serious are the allegations / incidences?
- Assess the complexity
- Who / how many at the organization will need to be involved?
- Consider each party's perspective when planning the employer's response
- What is "appropriate in the circumstances"?
- Consider strategic legal consultation with employment law counsel

Pre-Investigation Considerations

- Once you decide a matter requires a formal investigation
- If so should the investigation be internal or external?
- If Internal – who will lead?
- If External – who will the organization select and work with?
 - Who will be responsible for providing the External Investigator with instructions?

Pre-Investigation Considerations

- What does your internal policy say?
 - Does it require a written complaint?
 - Does it include a threshold assessment?
 - Does it require external investigation?
 - What steps are required to complete the investigation?
 - What timelines must be met?

Hallmarks of a Reasonable Investigation



Hallmarks of a Reasonable Investigation

- Prompt
- Compliant with policy/legislation
- Neutral, unbiased, thorough
- Procedurally fair:
 - Allegations
 - Interviews
 - Other evidence
- Conclusions, reports, communications, and corrective action

General Principles of Investigations

- Act expeditiously, fairly and decisively
- Fairness as the overriding requirement throughout
- Objective/neutral investigation
 - ...and the questions that commonly arise in typical workplace scenarios

Alternatives to Investigations



Alternatives to Investigations

- Cultural assessment
- Performance management
- Coaching
- Mediation
- Early termination with or without cause is sometimes a cost-effective & appropriate solution

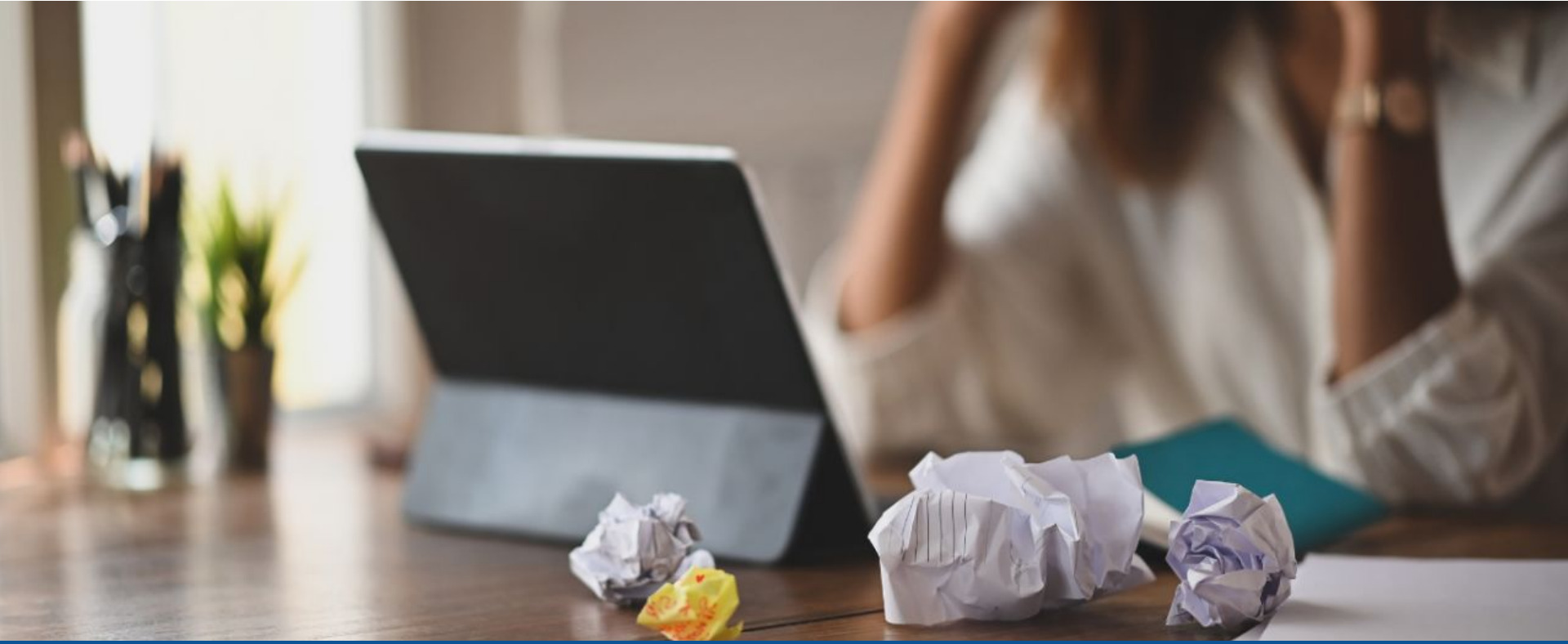
Best Practices



Best Practices

- Even if you are not the investigator:
 - Ensure parties and potential witnesses maintain **confidentiality**
 - Take steps to **prevent reprisals** / allegations of reprisal
 - Be mindful of all internal communications - no evidence of predetermination!
 - usually not privileged and are producible in litigation (assume they are!)
 - **Procedural fairness throughout** will lead to a more defensible employer response, and often a better outcome

Mistakes to Avoid



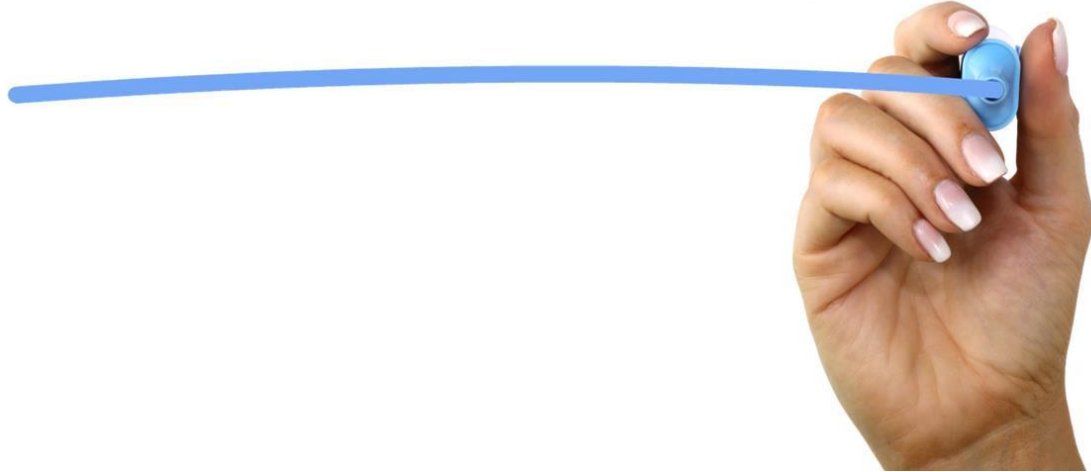
Mistakes to Avoid

- Do's and Don'ts of (internal) investigations
 - no particulars of allegations provided in advance
 - investigator is not impartial or perceived to be impartial
 - evidence of pre-judgment / pre-determination
 - balance efficiency with thoroughness (e.g. inadequate follow up with witnesses / gaps - can lead to claims of procedural unfairness)
 - same with unreasonable delays

Wrap Up

- Assess seriousness and complexity of allegations / incidents
- If an investigation is required, what is 'appropriate in the circumstances'?
- What alternative methods could address the workplace discord?
- Procedural fairness:
 - Treat the parties the way you would want to be treated if in their shoes
 - Leads to a better outcome and more defensible employer response

QUESTIONS



Thank you!

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