

YCHRA
YAMHILL COUNTY
HUMAN RESOURCE ASSOCIATION

YAMHILL COUNTY HUMAN RESOURCE ASSOCIATION CERTIFICATE OF COMPLETION AND ATTENDANCE

Workplace Investigations: Beyond the Basics

PRESENTED BY

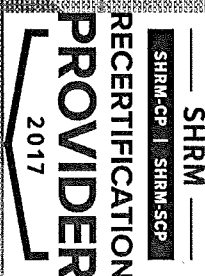
Kyle Abraham, PHR, SHRM-CP - Partner, Barran Liebman

March 8, 2018
Linfield College

Attendee

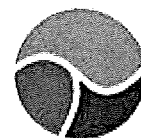
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Simmons, Janell

From: Rebecca Harris <Rebecca@westhillshealthcare.com>
Sent: Monday, February 26, 2018 3:28 PM
Subject: March YCHRA Meeting Announcement
Attachments: Campus Map CPS.pdf, HR Basics II - 06-14-18 Registration Form.pdf



YCHRA
YAMHILL COUNTY HUMAN RESOURCE ASSOCIATION



Yamhill County Human Resource Association March Meeting Announcement

Thursday, March 8th, 7:45 am – 9:30 am

Linfield College, Riley Campus Center, Room 201 (see attached map)

"Workplace Investigations: Beyond the Basics"

Speaker: Kyle Abraham, PHR, SHRM-CP – Partner, Barran Lieberman

Program Description: You receive a complaint that an employee has engaged in harassment or misconduct. What do you do? Act carefully, because your next move is critical. Employers will often need to convene an investigation to determine the facts surrounding a complaint before deciding on what, if any, action to take. If done correctly, an investigation becomes a valuable record to support any corrective action necessary to remedy the complaint. If done incorrectly, an investigation can actually be used against you. Please join Kyle as he explains best practices for convening an investigation and how to conduct a thorough and impartial investigation. Attendees will gain an understanding of the dynamics of investigating complaints, walk through the critical steps in an investigation and learn how to assess credibility and prepare legally defensible findings.

About the Speaker: Kyle is an active member of the Association of Workplace Investigators, and he is one of only a few Oregon attorneys to have successfully completed the Association's Training Institute for Workplace Investigators. Kyle represents employers in both traditional labor and employment law matters. He works with businesses of all sizes, government entities, and not-for-profit organizations. In his employment law practice, Kyle works closely with employers to develop effective workplace policies, and he provides proactive advice and counsel. Additionally, Kyle is a trained, certified and experienced workplace investigator, and he regularly conducts investigations into allegations of employee misconduct, harassment, discrimination, retaliation, or other sensitive issues.

Kyle is an experienced litigator who has successfully represented clients before U.S. circuit and district courts, Oregon and Washington state courts, the Equal Employment Opportunity Commission, Oregon's Bureau of Labor and Industries, and other state and federal agencies. Kyle leverages his experience to help employers anticipate and resolve problems at the earliest possible stage and in a cost-effective manner, with the confidence and capability to defend employers if the matter escalates to litigation.

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Workplace Investigations: Beyond the Basics

with

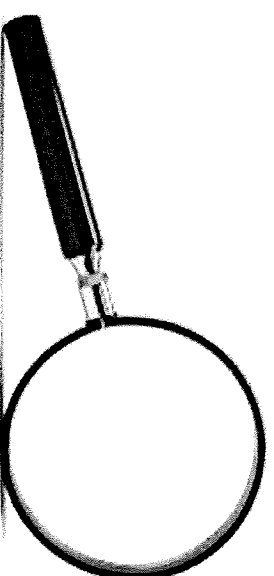
Kyle Abraham

Yamhill County Human Resource Association

March 8, 2018

Why Conduct an Investigation?

- Fairness to employees
- Aid in decision making
- May be required by law
 - Affirmative defense against discrimination claims
 - Title IX
 - Sarbanes Oxley
- Expectations of judges and third parties



What is an Investigation?

- Reaction by management to a complaint
- A search for reliable evidence (direct and circumstantial) related to the issues raised by the complaint



4 Characteristics of an Effective Investigation

1. Impartial,
independent,
2. Thorough, complete,
rigorous
3. Prompt, responsive
4. Consistent, follow the
protocols

A+ excellent!

Developing an Effective Game Plan

Convening The Investigation

1. Complaint intake
2. Assess the complaint
3. Take appropriate interim actions
4. Determine the posture of investigation
5. Select the investigator
6. Set scope & procedures (INVESTIGATION)
11. Take appropriate action

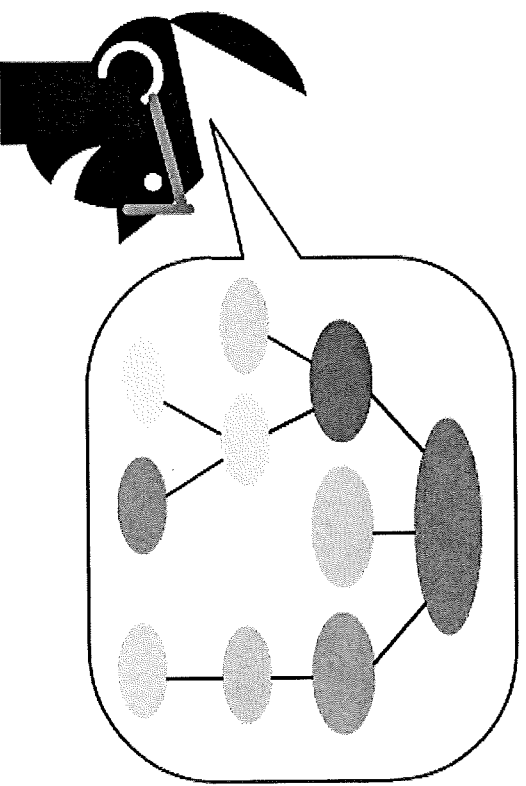
Conducting The Investigation

6. Set scope & procedures
7. Collect documents
8. Refine the complaint
9. Interview witness
10. Prepare the investigation report

Convening the Investigation...

1. Complaint Intake

- **Critical step for the convening official**
 - Allows complaint to remain in-house
- Complainant may be very emotional (e.g. angry, confused, scared)
- Necessary to assist employee organize complaint
- One of the biggest errors in the process



1. Complaint Intake



KEEP

CALM

AND

Listen

Carefully

- This is not part of the investigation
- Focus is empathy, neutrality and policy compliance
- Be careful to avoid:
 - Making promises
 - Interruptions
 - Asking detailed questions
 - Challenging the Complainant's version of the facts
- Blaming the complainant

Complainant Intake Form

Completed by: _____, date _____ time _____

Complainant Information

Name: _____
 Position: _____
 Branch/Department: _____
 Preferred Telephone: _____
 Preferred Email: _____

First contact by _____
 Telephone _____
 Text _____
 Email _____
 Writing _____
 In Person _____
 Other: (_____)

How does the Complainant describe the issue, concern, or problem?	
How long has the issue or problem been going on?	
Who else knows about the situation?	
Briefly note any specific incident described by Complainant, include when and where they occurred	
Has the Complainant taken any other steps to try and address the issue? What steps?	
Has this issue been reported to a supervisor/manager? Who?	
How is the issue currently affecting the Complainant? Can he or she comfortably return to work?	
How did you explain "next steps" in the process to the Complainant?	

2. ***Assess: Need to Investigate***

Ask, if everything in the complaint is true, would:

- It be a violation of law/policy?
- We take disciplinary action?

Absolutely:

- Complaint of harassment
- Violation of a serious rule

Maybe:

- Just blowing off steam
- Minor complaints

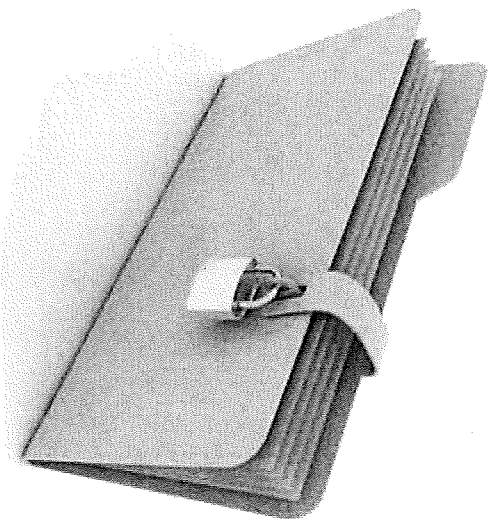


2. Assess: Source of the Complaint

- Employee
 - Frequent filer
- Union
 - On behalf of several employees
 - Signals respondent is likely a supervisor
- Formal complaints
 - Lawyer demand letter
 - Lawsuit/tort claims notice
 - BOLI complaint
 - Grievance

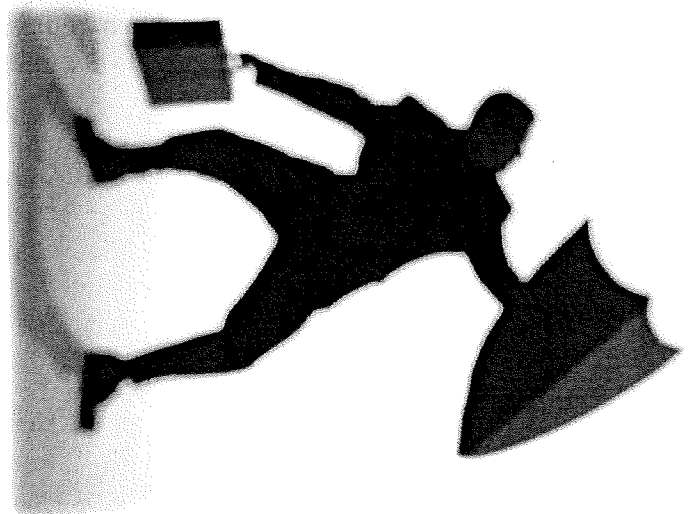


3. Determine Protective Measures



- At the beginning of the investigation, employer should seek to:
 - Protect people
 - Preserve evidence (involve IT)
 - Prevent any new problems
- Factors
 - Workplace disruptions
 - Physical safety concerns
 - Chill investigation
 - (Reported) concerns of retaliation
- Take the least severe option

4. Posture of Investigation: Defense if Complaint of Harassment



- Employer may avoid liability from complaints of harassment by:
 - Responding **promptly** to complaints
 - Conducting an appropriate and reliable **investigation**
 - **Taking reasonable action** based on the results of the investigation

Start Before the Complaint is Filed

- Review policies:
 - Statement of commitment
 - Reporting procedures
- Assess practices:
 - Atmosphere of safe reporting
 - Investigate promptly
 - Take appropriate actions



4. Posture of Investigation: Offense if Employee Misconduct



- Effective method to establish evidence of wrongdoing
- Avoid the employee's "pre-emptive strike"
- Potential for admissions by the wrongdoer
 - Employee was aware of the rule
 - Violation is a serious offense
 - "Lock in" employee's side of the story

5. Selecting the Investigator

- Characteristics
 - Neutral
 - Respectful
 - Well-trained
 - Available
- Internal Investigators
 - Human Resources
 - Risk Management
- External investigator
 - **Be aware HR consultants!**
 - Licensed private investigator;
 - Practicing attorney (ORS 703.405,411; OAR 259-061-0018)
- Selection scrutinized
 - Employer's commitment
 - Really impartial

- Gender??

5. Internal vs. External Investigator

Matter	1 point	2 points	3 points
Claim(s) is	Simple, involving 2 parties and 1 incident	Moderately complex, involving more than 2 parties or multiple incidents	Highly complex, involving several parties and incidents, or allegations of discrimination
Respondent	Non-supervisor	Mid-level supervisor	Senior management
Alleged actions	Language, distasteful jokes	Language, racial slurs	Extreme language, harassing, touching
Internal investigator	Extremely experienced and confident	Experienced, but uncertain on methodology	Inexperienced or subordinate to Respondent

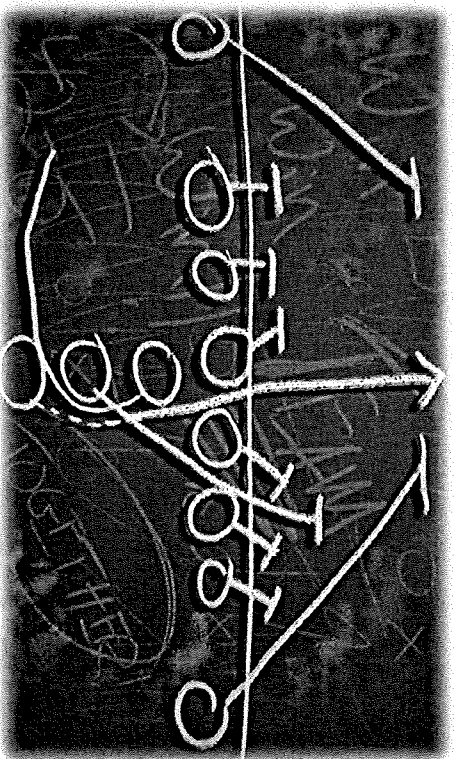
1-4 points: Manageable for an internal investigator

5-8 points: Consider external investigator

9-12 points: Recommend external investigator

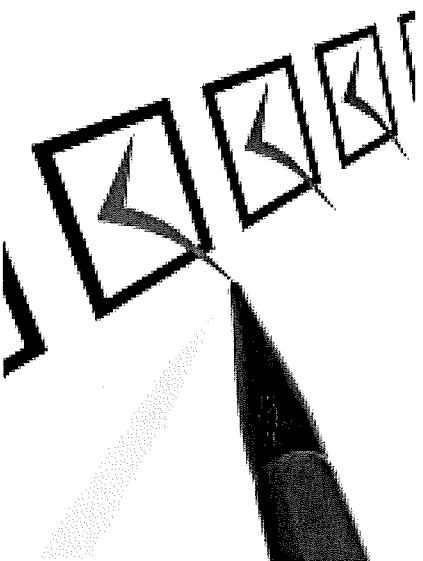
Conducting the Investigation...

6. Set Scope of the Investigation



- Fact-finding
 - No policy violations?
 - No legal conclusions?
 - No recommendations?
- New allegations that surface during investigation

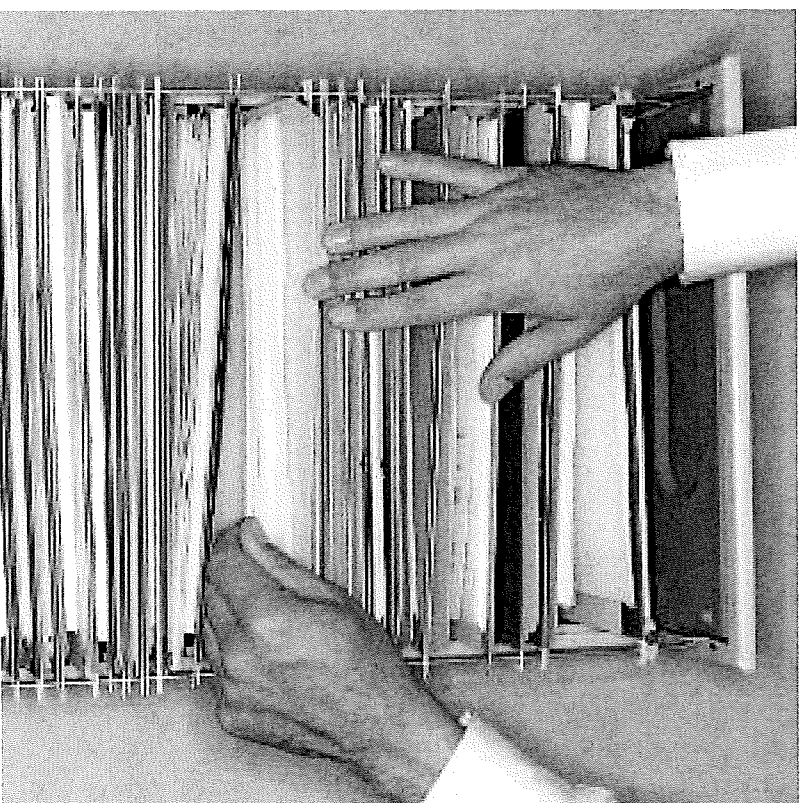
6. Set Procedures



- Audio record interviews
- Facilities for interviews
- Investigation Report format
- Timeline

6. Investigation Outline

- Create while reviewing documents
 - Timeline of events
 - Cite sources
 - Update as you learn more facts
 - Involved persons
 - Include name, role and contact information



7. Documents to Collect

- Employee Handbook
- Procedure Manual
- Collective Bargaining Agreement
- Organizational chart – supervisory chain
- Personnel file?
 - Performance evaluations
 - Prior discipline
- Prior complaints on the individuals involved
- Incident reports
- Emails and social media pages – be careful here
- Maps/diagrams of relevant locations

8. Refine the Complaint

- **Critical step for the investigator**
- Develop “investigation questions”
 - What will need to be answered in order for the investigation to be completed
- Specific to each type of investigation
 - Defensive investigation, elements of claim
 - Offensive investigation, elements of just cause
 - May need to consult with legal counsel

8. Refine the Complaint(s)

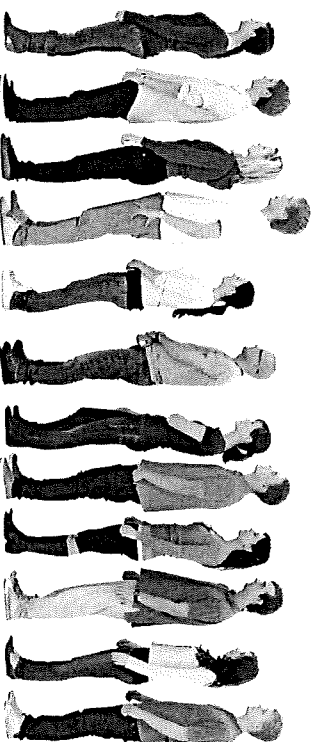
- Review the complaint and initial documents provided
- List the allegations
- Identify the supporting factual claims
- Look for missing factual claims to support the allegations



Witness Interviews ...

9. Interview Logistics

- **Scheduling notices**
- Neutral location
- Configuration of the interview room
- Extra attendees?
 - Spouse/friend
 - Union representative
 - Lawyer
- Order of witnesses
 - Complaining witness
 - Other relevant witnesses
 - Respondent
- Follow-up as necessary
 - Failure to do so could undermine the entire investigation



9. Prepare an Interview Outline

- Interview questions
 - Prepare open-ended questions related to allegations
 - EEOC provides a list of sample questions for various claims (retaliation, discrimination, etc...)



9. Interviewing the Complainant

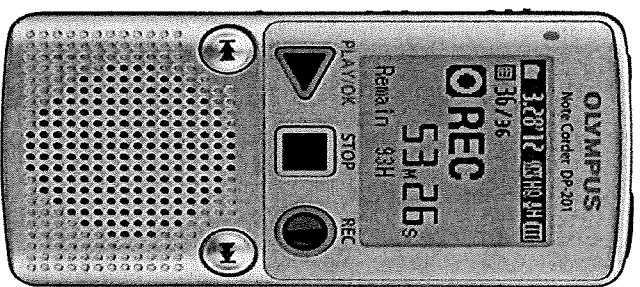
- Employer is committed to the investigation
- Confirm the factual claims
 - Get “buy in” on the allegations of the complaint
- Drill down on fact underlying each allegation
 - Reporters’ questions
- Ask about timing of the complaint
 - “Why did you come forward now?”
- Ask for corroborating witnesses and documents



9. Interviewing the Respondent

- Determine any procedural requirements
- Allow time to update interview outline
- Assure no conclusion reached
- Give the Respondent the last word
- Law Enforcement
 - Brady issues
 - Procedural safeguards
 - ORS 236.350-370
- Defensive Investigation
 - Solicit responses to each allegation against him/her
- Offensive Investigation
 - Confirm awareness of rule and how he/she was made aware
 - If denied, get admission as to the seriousness of offense

9. Documenting the Interviews



- Information to record
 - Date, time, location, persons present
 - Observations about body language
 - Do not include impressions or speculative conclusions
- Audio recording
 - Mutual consent on the recording
 - “Time stamp” key testimony
- Team interviews: note taker and a questioner

10. Report Writing Guiding Principles

- Investigation is done to create a record for the decision makers
- Keep in mind the purpose: shield or sword
- Assume the report will eventually be disclosed to everyone



10. Inconsistent Statements

- Witnesses are people
- People perceive the same events differently
- People remember events differently
- People recall events different
- How to handle inconsistent statements?
 - First, attempt to reconcile the inconsistencies
 - Second, make credibility determinations

10. Credibility Determinations



- Most difficult job of an investigator
- Factors to assess credibility
 - Corroboration with other evidence
 - Bias/Motivation as judged by interest in outcome
 - Inherent plausibility
 - Inconsistencies in statement
 - Opportunity to observe facts
 - Memory of facts reported
 - Behavior during interview (recorded in notes)

Key Components of the Investigation Report

- Executive Summary
- Introduction
 - Nature of complaint
- Summary of findings
 - Quick reference
 - Roadmap for report
- Investigation background
 - How investigation was initiated
 - List of evidence reviewed
 - Other relevant procedural details
 - State any limitations of the investigation
- Factual background
 - Information about departments and individuals involved
 - Other relevant substantive details
- Evidence
 - Facts gathered by allegation
 - Complaining witness
 - Third party witnesses
 - Respondent
- Analysis
 - Consider both sides of the issue
 - Address credibility
 - Write to “the losing party”
- Conclusion

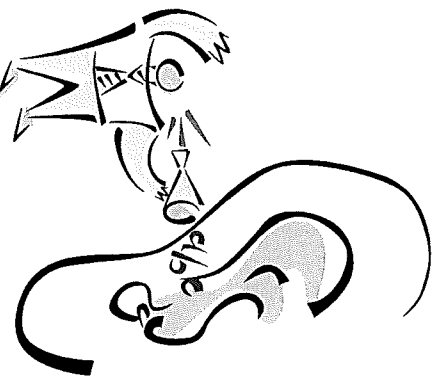
Take Appropriate
Action
...

11. Take Action



- Take action consistent with findings of the report
- Corrective action must be sufficient to end and prevent harassment

11. Communicate the Outcome

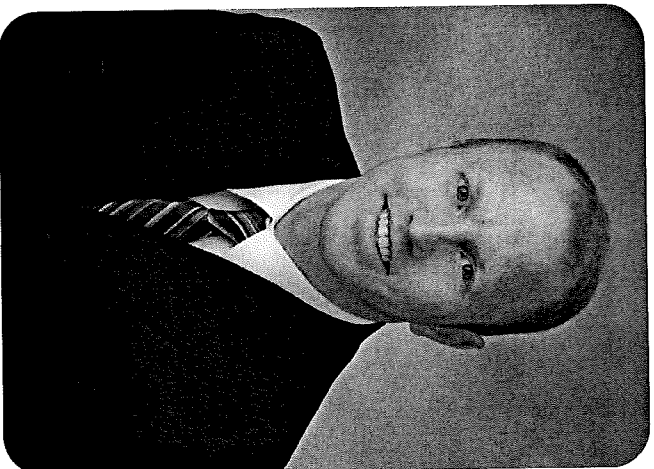


- If corrective action is taken:
 - Inform Complainant action will be taken and impose discipline on Respondent
- If no corrective action is taken:
 - Assure Complainant the situation will be monitored and warn Respondent retaliation may result in discipline
- No need to provide a detailed explanation

Top 10 Common Mistakes

1. Failing to have an effective protocol
2. Not immediately responding to complaints
3. Conflating “intake” and “investigation”
4. Selecting an unexperienced investigator
5. Improperly influencing the investigation
6. Making promises to the Complainant
7. Jumping to conclusions
8. Using inconsistent methodology
9. Not providing Respondent an opportunity for input
10. Failing to communicate the outcome

Questions?



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Complainant Intake Form

Completed by: _____, date _____, time _____

Complainant Information

Name: _____
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First contact by _____
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 In Person _____
 Other: (_____)

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MEMORANDUM

4/9/2018

TO: File

FROM: Kyle T. Abraham

RE: John Doe Investigation – General Questions to Witnesses

FILE: 708920.3

Introduction:

This interview is being tape recorded. I am Kyle Abraham, and I am here with _____. Today is December ____, 2012, the time is _____, and we are meeting in the _____.

Your employer, ABC Company, has received a complaint regarding the conduct of John Doe. The complaint alleges retaliation by Doe. The ABC is conducting a thorough investigation and may take any action that it deems appropriate, based on the results of the investigation. At this point, the ABC has not reached any conclusions regarding the allegations contained in the complaint.

I am an employment law attorney, and I have significant experience conducting workplace investigations. I have been retained by the ABC to conduct this investigation. By selecting a skilled, trained and experienced investigator, ABC has demonstrated its commitment to conducting a thorough, impartial, independent and prompt investigation. My role is limited to fact finding, and I will not be involved with assisting the ABC in determining, what, if any, action to take. My job is to gather the facts and make conclusions about what happened. To the extent your statements differ from other witnesses, it will be my job to make a credibility determination as to what the truth is on the issue.

I ask you provide complete, accurate and truthful answers to my questions. It is important to understand that providing false or misleading information, or failing to cooperate, may be considered as a basis for discipline.

I cannot promise that this investigation or the information you provide will be kept confidential. My investigation will be reduced to a report, and that report will be turned over to the ABC. The ABC has advised me that it will not release the report only on a need to know basis, and to the extent required by law.

I will also advise you that the ABC has a policy prohibiting retaliation against anyone who makes a complaint or cooperates in a workplace investigation. I get my information from a number of sources, and some of them are rather unlikely sources. During my interview, please



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INTERVIEW SCRIPT.1

do not try to guess if a particular question is attributable to a particular witness. You will likely be wrong about where or how the information came to me.

Do you have any questions about what I have just said? Is there any reason why this is not a good time for you to participate in this interview?

The circumstances of this investigation are a bit unusual, and the ABC has agreed to allow you to be accompanied by a union representative, if you so choose. This is in no way to be considered as establishing a practice of allowing union representation during interviews or otherwise expanding the union's right to be present during interviews of bargaining members. Would you like to proceed with or without union representation? [optional if a union is involved]

As we go forward if my questions are unclear, please tell me and I will re-phrase them. If you answer a question, I will assume you understood the questions – is that fair? Also, this interview is being recorded, and I ask that you speak your answers clearly.