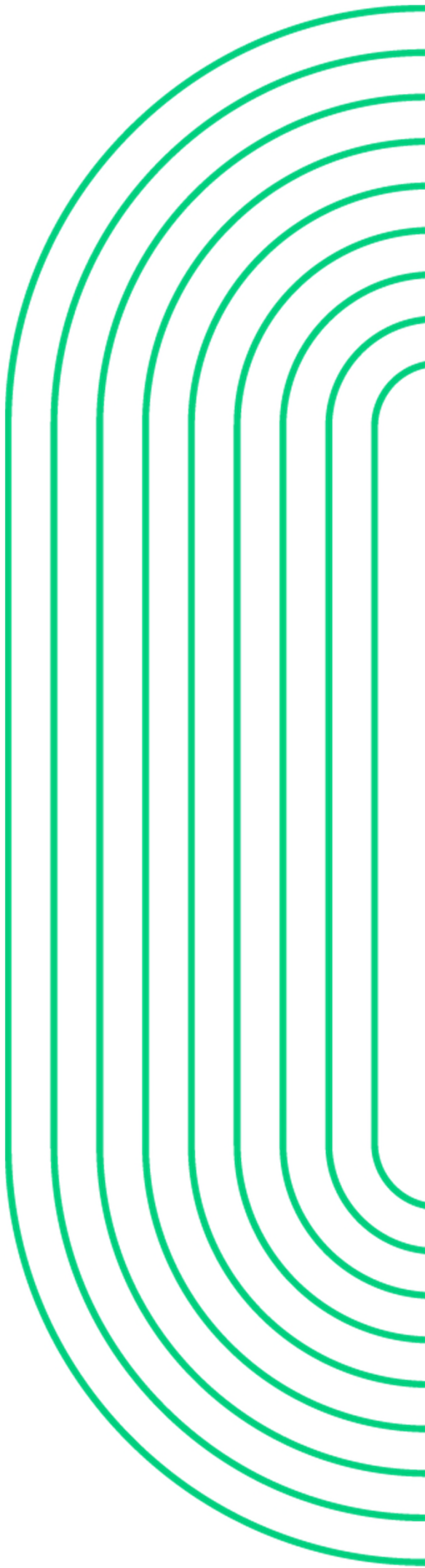


Internal Investigations in Manufacturing: Pitfalls, Protocols & Practical Tips

December 8, 2021

Paul E. Starkman
+1 312.517.7508
pstarkman@clarkhill.com



Overview

- Recent developments involving internal investigations
- How internal investigations can become weaponized
- Structuring investigations to protect the company
- Conducting the investigation
- Concluding the investigation and follow-up



What Kind of Investigations Are We Talking About?

Investigations into Alleged Misconduct

- Investigations into allegations of discrimination and harassment
- Investigations into alleged civil and criminal misconduct
 - Sexual assault, theft, fraud, trade secret misappropriation, etc.
 - Investigations involving executives and Board of Directors
 - Non-routine investigations into employee misconduct

Proactive Investigations for Compliance Purposes

- ESG/DEI Internal audits
- M&A due diligence
- Investigations in response to governmental enforcement activity





RECENT DEVELOPMENTS INVOLVING INTERNAL INVESTIGATIONS



Recent Developments Involving Internal Investigations:

Companies can no longer afford to ...



ANTICIPATE THE BLITZ ...
Your Investigation may be Scrutinized

Recent Developments Involving Internal Investigations

Internal Investigations are in the News

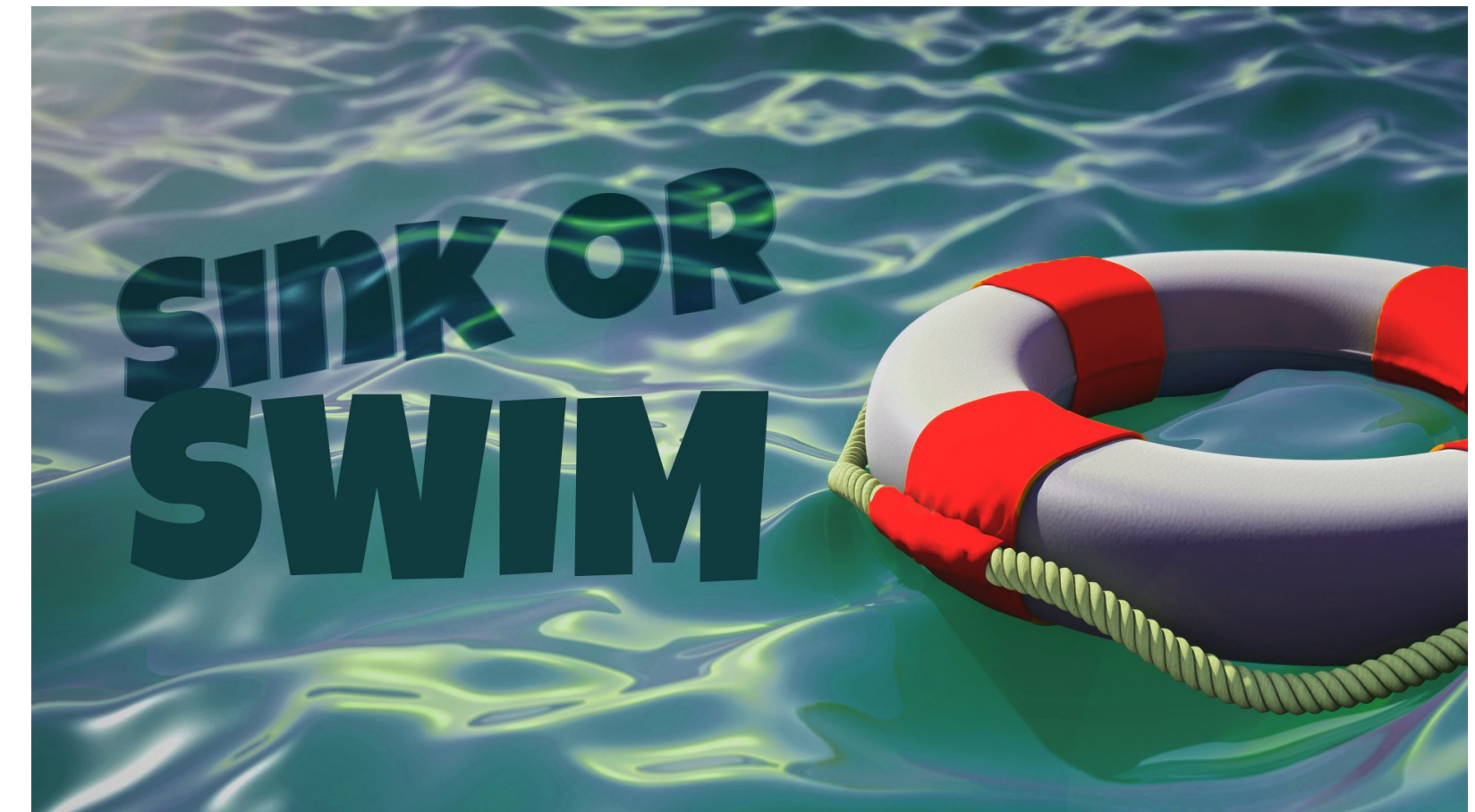


- The fallout continues from an investigation into how the Chicago Blackhawks responded to allegations by a player in 2010 of being sexually assaulted by a video coach (Chicago Tribune, Oct. 29, 2021).
- Chicago radio station accused of conducting “sham investigation” into sexual harassment by radio host (Chicago Tribune 2021).
- Auto maker faces scrutiny over its internal investigation of former top executive’s compensation (Automotive News Europe, Nov. 19, 2021)
- Automotive supplier criticized for “serious shortcomings” in its internal investigation conducted regarding scandal over diesel cheating (Automotive News Europe, Nov. 19, 2021).
- Congress continues to pressure NFL for records related to internal investigations of “rampant sexual harassment.” NFL critiqued for a “lack of transparency” and “troubling precedent for other workplaces” (Roll Call, Nov. 3, 2021).

Investigations Can Save or Sink Legal Defenses

Cases

- ***Gamble v. FCA* (7th Cir. 2021)** (auto maker granted summary judgment because internal investigation was not a pretext for racial discrimination).
- ***Donley v. Stryker Sales Corporation* (7th Cir. 2018)** (medical equipment manufacturer and retailer had summary judgment in its favor reversed because internal investigation of employee presented issues of material fact as to whether employer terminated employee because of retaliation animus).
- ***Hall v. Teva Pharmaceutical USA, Inc.* (USDC, S.D. Florida 2016)** (A leading manufacturer of generic medicines worldwide was granted summary judgment in part because internal investigation delay was not done so to strategically gather evidence while employee was out on FMLA leave).

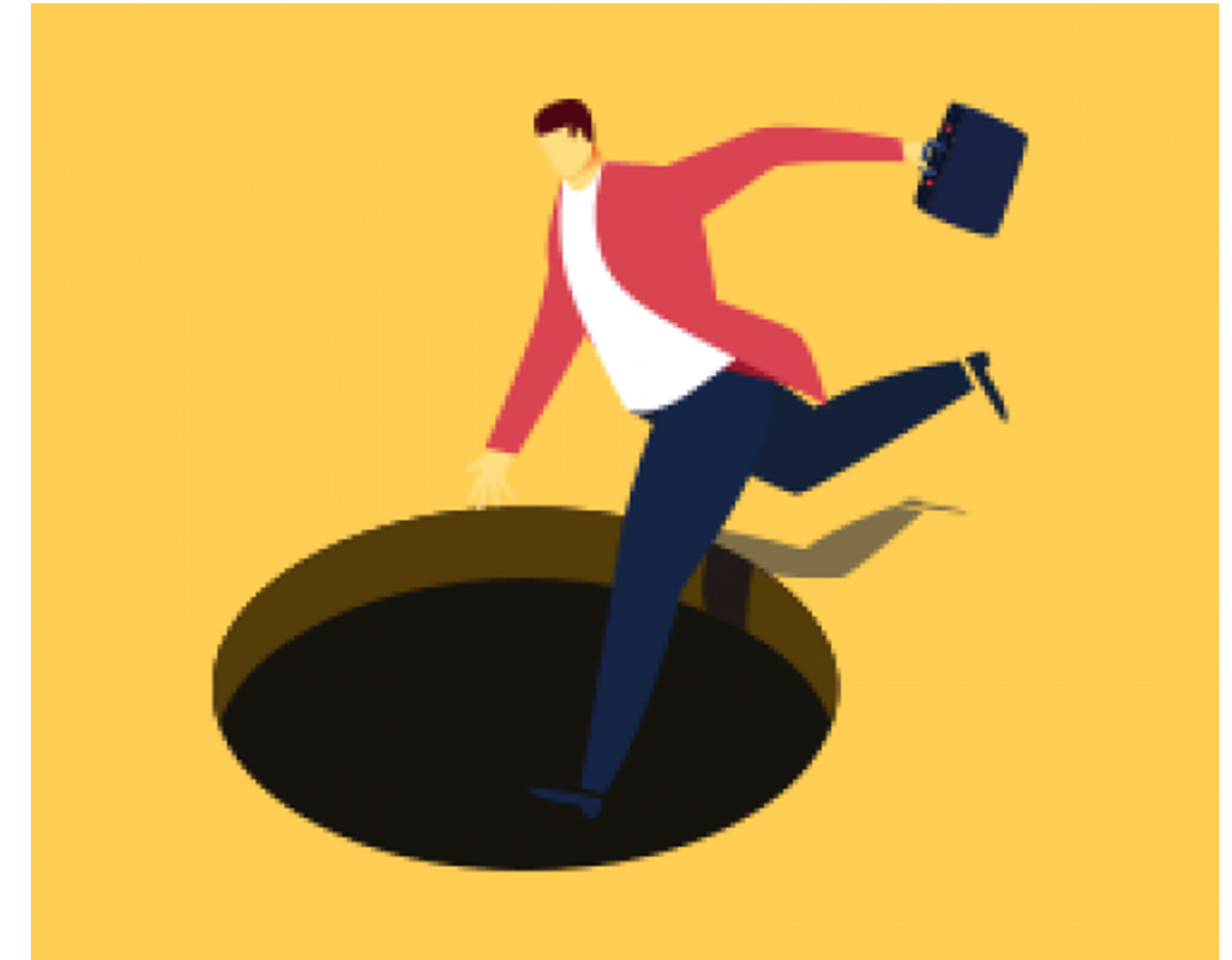




PITFALLS, PROTOCOLS, AND PRACTICAL TIPS FOR CONDUCTING EFFECTIVE INVESTIGATIONS

Potential Pitfalls in an Internal Investigation

- NOT recognizing the need for an investigation
- NOT dealing with delayed and/or anonymous complaints
- NOT preparing for an investigation
- NOT protecting privileges and confidences
- NOT conducting effective interviews
- NOT accurately preserving witness statements
- NOT properly documenting the investigation
- NOT following through on decisions based on the investigation



Recognizing The Need For An Investigation

An employer may need to conduct an investigation even if:

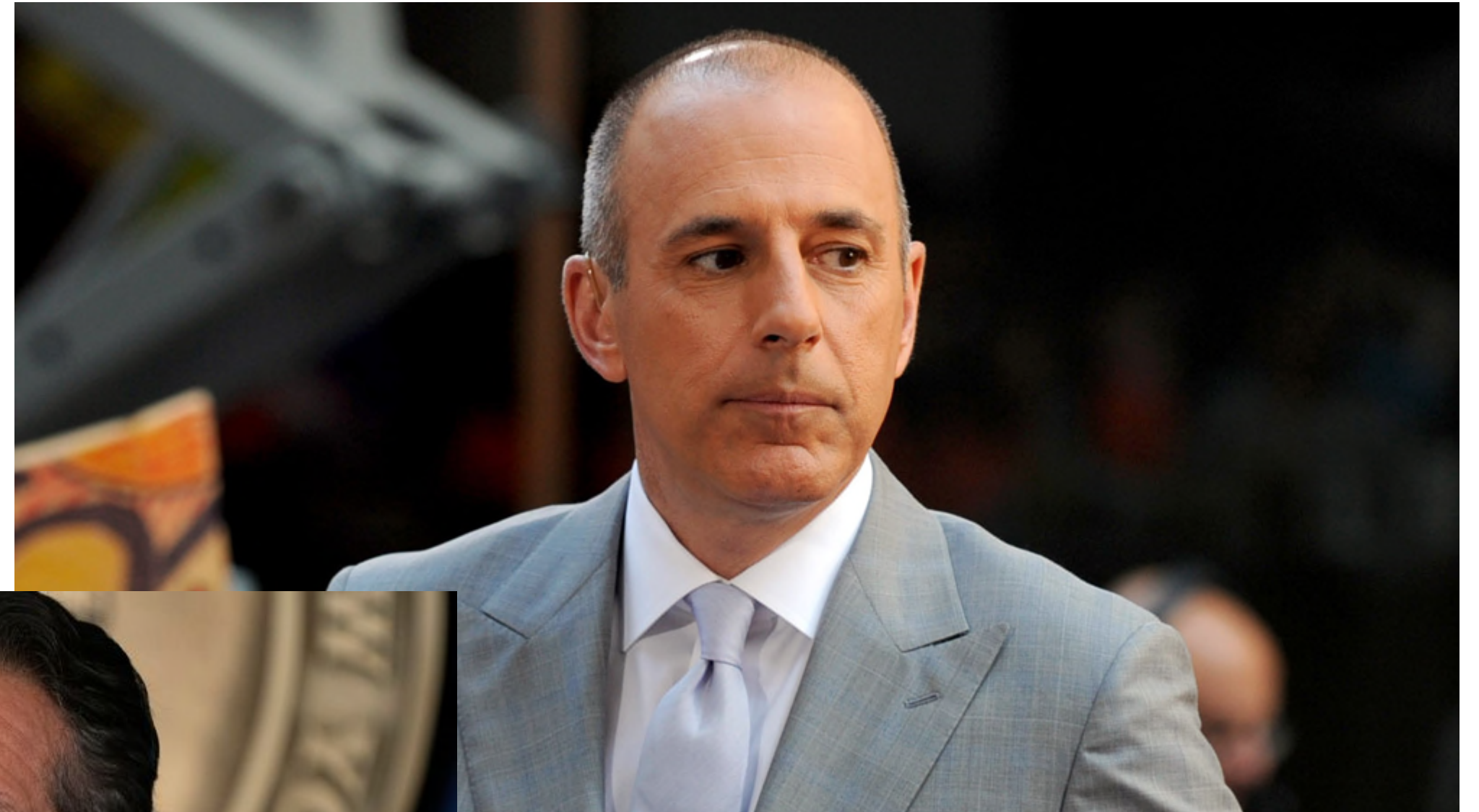
- No one requests that an investigation be conducted
- The person complaining requests that no investigation be conducted
- The person complaining states that he or she is speaking “off the record”
- The employer’s policy requires that complaints be in writing, and no written complaint has been filed
- The relevant facts appear to be clear to you



Recognizing the Need for an Investigation

Dealing with Delayed Complaints

The #MeToo Movement



Recognizing the Need for an Investigation

Dealing with Anonymous Complaints

- **Step 1: Is the anonymous complaint credible or a hoax?**
- **Step 2: How extensive should the investigation be?**
- **Step 3: When in doubt, err on the side of caution**





STRUCTURING THE INVESTIGATION

Structuring the Investigation

What to Do BEFORE You Have to Do an Investigation

- Plan ahead – investigations are inevitable
- Written policy on internal investigations?
- Internal protocols on investigations



Key Protocols For Structuring An Effective Investigation

Rule #1

- **Don't Wing it!**
- **Stop the Bleeding!**
 - Confirm illegal activity has ceased
 - Determine if Interim Relief is needed
- **Develop your Investigation Plan:**
 - Identify the questions to be resolved/Define the scope of the investigation
 - Establish the lines of reporting and supervision
 - Assess the purpose and objectives of the investigation



EO EnglishOnline

Objectives When Structuring Investigations

- Gather facts and relevant evidence, so that appropriate employment action can be taken
- Obtain information that may assist the employer in defending against employment claims
- Formulate strategy to deal with government investigation or lawsuit
- Deal with actual or potential allegations of whistleblower
- Demonstrate the employer's seriousness in addressing issues of possible misconduct
- Demonstrate commitment of employer to its employment policies
- Structure the investigation to avoid future attacks on the investigation process



Structuring the Investigation

Assembling the investigative team

Who should the investigative team report to? Who is the client?

- General Counsel? CEO? Special Board Committee?

Who should conduct the investigation?

- Non-attorney outside investigator
- In-house counsel/HR
- Outside counsel



Structuring the Investigation

Assembling the Investigative Team

- Retain consultants, if appropriate
 - Using outside consultants v. in-house resources
 - Confidentiality
 - Skill set
 - Who will testify better?
- Determine type of consultant needed
 - Forensic accountants
 - Computer forensic experts
 - Private Investigators
- Should be hired by and work at direction of counsel





CONDUCTING THE INVESTIGATION



First Steps in the Investigation

- Review relevant employer policies and procedures
- Establish protocols for preserving privilege and confidentiality, if applicable
- Establish protocols for gathering and preserving evidence
- Identify order and timeline for interviews
 - Prepare tentative list of questions and topics to cover
 - Create consistent opening statement for use with witnesses
- Anticipate what can go wrong





PREPARING FOR INTERVIEWS

“The big secret of detective work is that you`ve got to get somebody else to tell you what happened. ” - Lt. John Cornicello



Should You Record Interviews?

- Advantages

- Preserves the witness' statement, in his/her own words
- Minimizes the likelihood of allegations that the witness' statement was coerced
- Helpful to law enforcement, if criminal charges are filed

- Disadvantages

- May cause the witness to be less forthcoming
- Requires the witness' consent, in many jurisdictions
- May result in the recording of unrelated information that the employer may not wish to record



Should You Obtain Written Statements?

- Advantages

- Witnesses may become unavailable
 - Witness statements are admissible to show employer's state of mind
- Preserves the information provided by the witness
- Assists with further interviews

- Disadvantages

- Witness may be less forthcoming, if asked to put facts in writing
- Can slow down the investigation
- Creates discoverable record of potentially harmful evidence
- Less candid responses – can be wordsmithed to produce a more favorable impression



Order of Interviews

1. The Complainant or Reporting Employee
2. Witnesses identified by the Complainant/Reporting Employee or known to the employer

Then ...

Review tangible evidence relevant to the information that you have obtained (e.g. – time cards; emails; surveillance tapes).

3. The Accused/Responding Employee
4. Witnesses identified by the Accused/Responding Employee
5. Witnesses who may have contradictory information or where there is a need for clarification
6. The Complainant/Reporting Employee to review contradictory information or obtain clarification



CONDUCTING INTERVIEWS



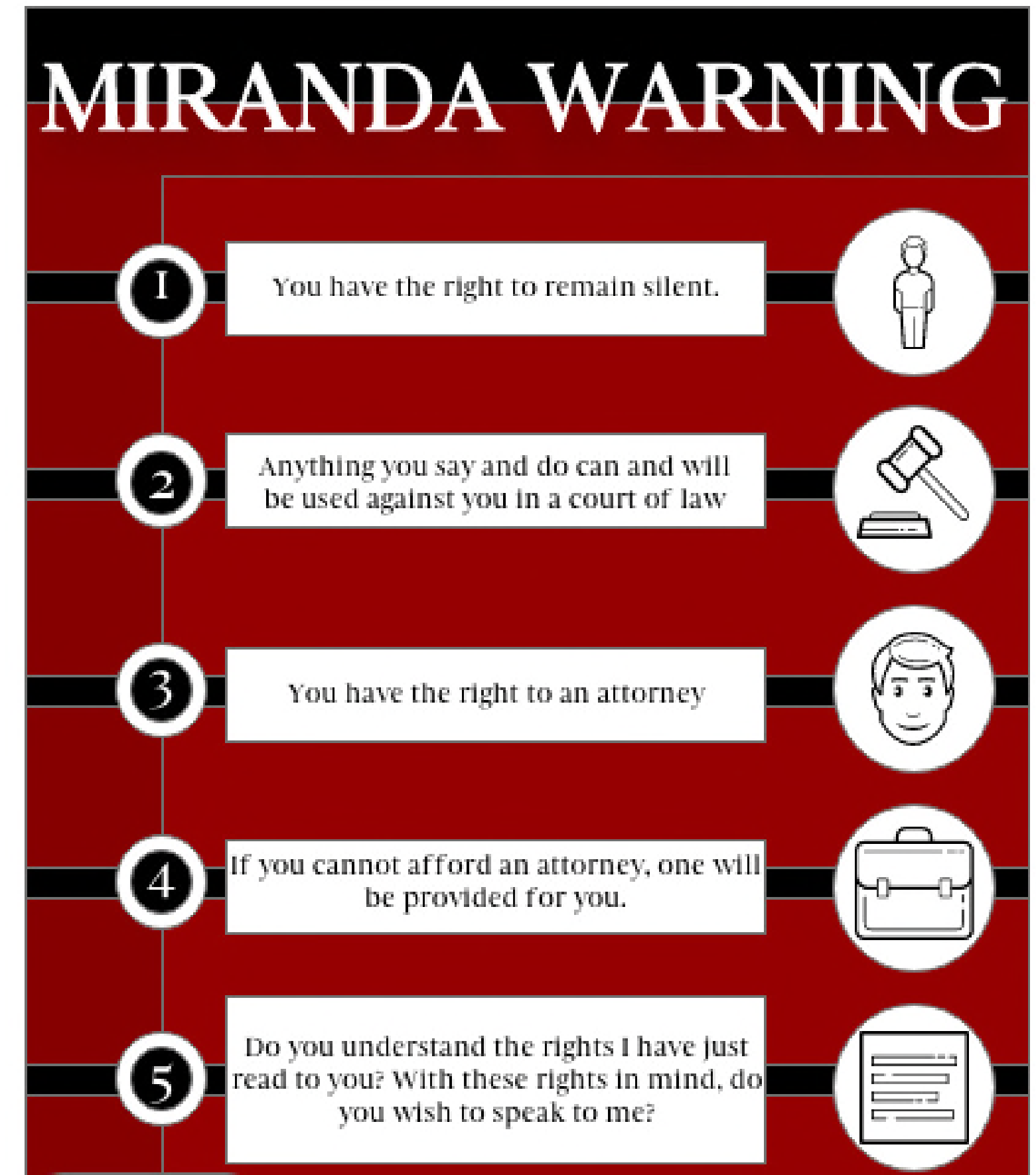
Opening Statement For Interviews

- **Employee's duty to cooperate**
- **UPJOHN WARNINGS – NOT MIRANDA WARNINGS**
 - Represent the company, not individual employee
 - Retained to investigate facts and give legal advice (if attorney investigator)
 - Explain if interview is protected by attorney-client privilege
 - Explain need to keep interview confidential, but privilege belongs to the company and can be waived without employee's consent
 - Explain that company may disclose contents of interview to those inside and outside of company
 - Explain the employer's rules against retaliation and the procedure for reporting retaliation
 - Explain what to do if government contacts the witness

Interviewing Union Employees

- No Miranda rights
- No Fifth Amendment privilege against self-incrimination
- No right to legal representation
- **Interviewing Union Employees**
 - Weingarten right to representation by union or fellow employee, if investigatory interview may lead to discipline
 - Management Rights clause under Collective Bargaining Agreement (CBA)
 - Grievance and arbitration rights under CBA

Confidentiality and the NLRB



Common Mistakes During Investigatory Interviews

- Doing the interview alone
- Approaching the interview with a closed mind
- Disclosing the evidence before questioning the witness
- Making admissions harmful to the employer
- Promising confidentiality
- Making promises about possible outcomes
- Demonstrating bias
- Failing to document the interview



Dealing With An Uncooperative Witness

- Ask the employee why he or she is refusing to cooperate
- Attempt to alleviate the employee's concerns
- Discuss confidentiality – need to know
- Determine whether you can promise that you will not attribute specific information to specific individuals
- Advise the employee of the consequences of continued non-cooperation
- Instruct the employee to cooperate
- Document continued lack of cooperation



Interview Structure

- Start with open-ended questions
- Ask specific questions designed to elicit specific details
- Drill down with pointed questions to elicit the response to core areas
- Ask for identification of witnesses or other persons with knowledge
- Ask for physical evidence – texts, emails, notes, voicemails, pictures
- Inquire into possible biases or motives to lie
- Ask if there is anything that they wish to add
- Ask them to report any additional relevant information that he/she subsequently remembers
- Advise them that the employer will inform him/her of the results of the investigation
- Go over rules regarding retaliation



Interviews – Beware of Implicit Bias

I'm Not Biased!

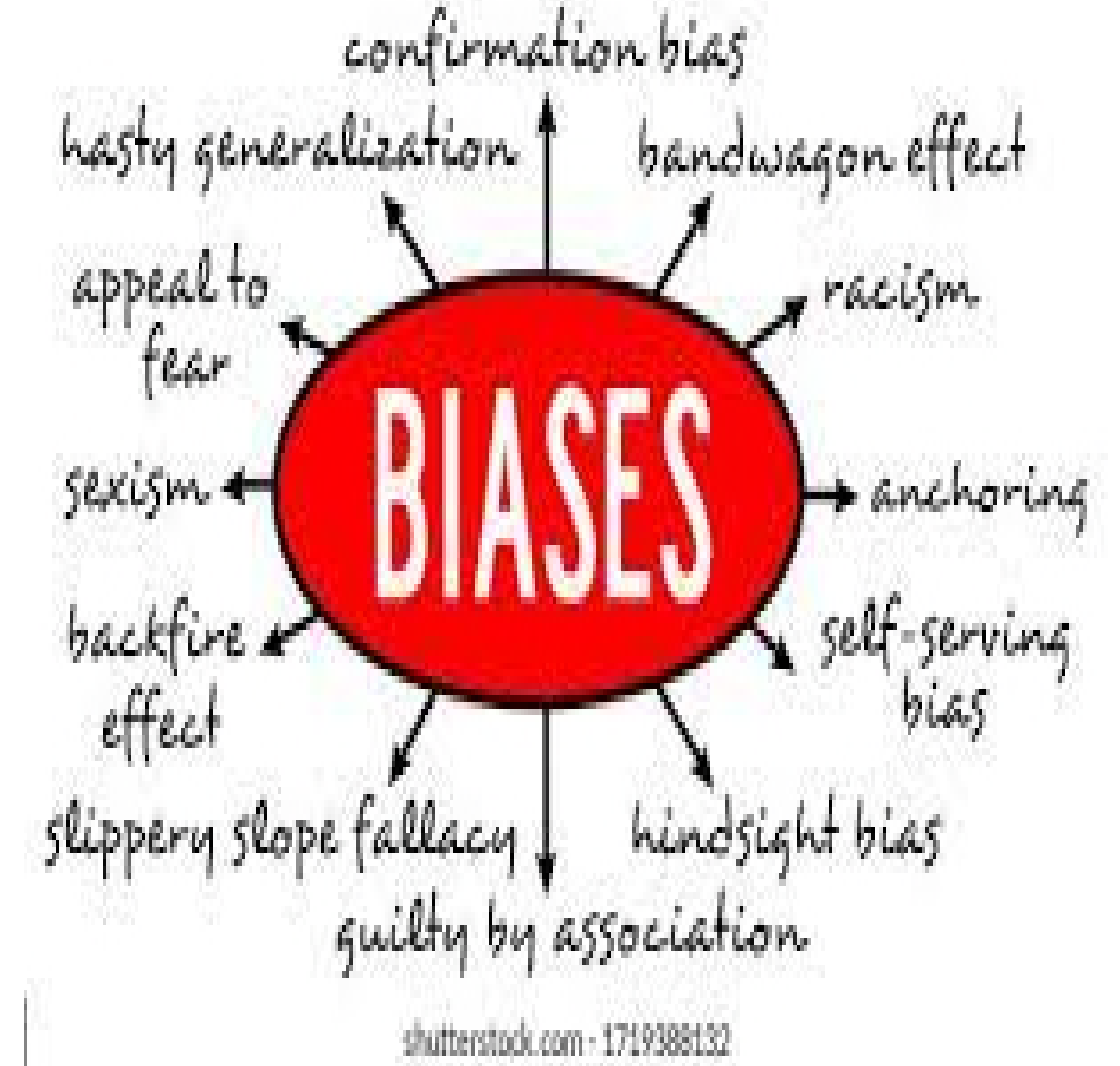
- “Recognizing the fact that you may have implicit biases of which you are unaware is the first step toward ensuring that they do not impact the results of your investigation.” Rachel Albin

Affinity Bias

- Affinity bias refers to the tendency to get along with, or relate to, people who are like you. Conversely, with someone with whom you have little in common, you may subconsciously view them as less credible.

Confirmation Bias

- Confirmation bias occurs when you develop a hypothesis and then view the evidence in a light that helps confirm that hypothesis.





WRAPPING UP AN INVESTIGATION

The Report



Wrapping up the Investigation - The Determination

- Review all of the evidence
- Consider the type and quality of the evidence (e.g.- personal observations v. mere rumor or gossip)
- Consider the quantity of the evidence
- Assess witness credibility
- Should witnesses be named in the report?
- Consider biases and motives of the witnesses
- Proof to an absolute certainty or beyond a reasonable doubt is not required
- Make the best judgment that you can based on the information obtained and on your own experience and intuition

Preparing The Report

- To whom should the report be addressed?
- Is there a duty to report under Sarbanes-Oxley or other laws?
- Impact of disclosure on privilege
- Oral v. written report
- Who will decide on how the report will be used
 - Remedial measures to prevent recurrence
 - Revisions to company policies and procedures
 - Employee discipline
 - Steps to preserve company reputation



Prepare the Report Expecting Scrutiny by Others

- Preparing the final report
 - Should the report identify:
 - the specific wrongdoing or policy violation?
 - witnesses who were interviewed during the investigation?
 - Vulnerabilities in compliance programs?
 - Legal consequences flowing from misconduct?
 - Options to rectify the wrongdoing?
 - Possible new policies and procedures?
 - Revamping compliance efforts?
 - Recommending termination of employees or officers?
 - What if the investigation was inconclusive?



POST-INVESTIGATION CONSIDERATIONS

Post-Investigation Considerations

- Getting the workplace back to normal
- Wrap-up conversations
- Remedial Actions



Questions?

Submit any questions through the Q&A box at the bottom of the screen or reach out after the program.

This program has been approved for 1 HR (General) recertification credit hour through HR Certification Institute® (**Activity/Program ID: 576343**).

This program has been approved for 1 PDC through SHRM (**Activity ID: 21-APMKT**).



Paul E. Starkman

pstarkman@.com



Thank You!

Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.