

Conducting Workplace Investigations: A practical guide to obtaining defensible and impartial findings

TUESDAY, OCTOBER 10, 2023 | 12:00 PM – 1:00 PM

**THANK YOU
FOR JOINING US!**



Host & Moderator

MELISSA KUEHNE
Senior Program Manager
Institute for Local Government



WEBINAR OVERVIEW

Welcome & Introductions

Strategies to Navigate Workplace Investigations

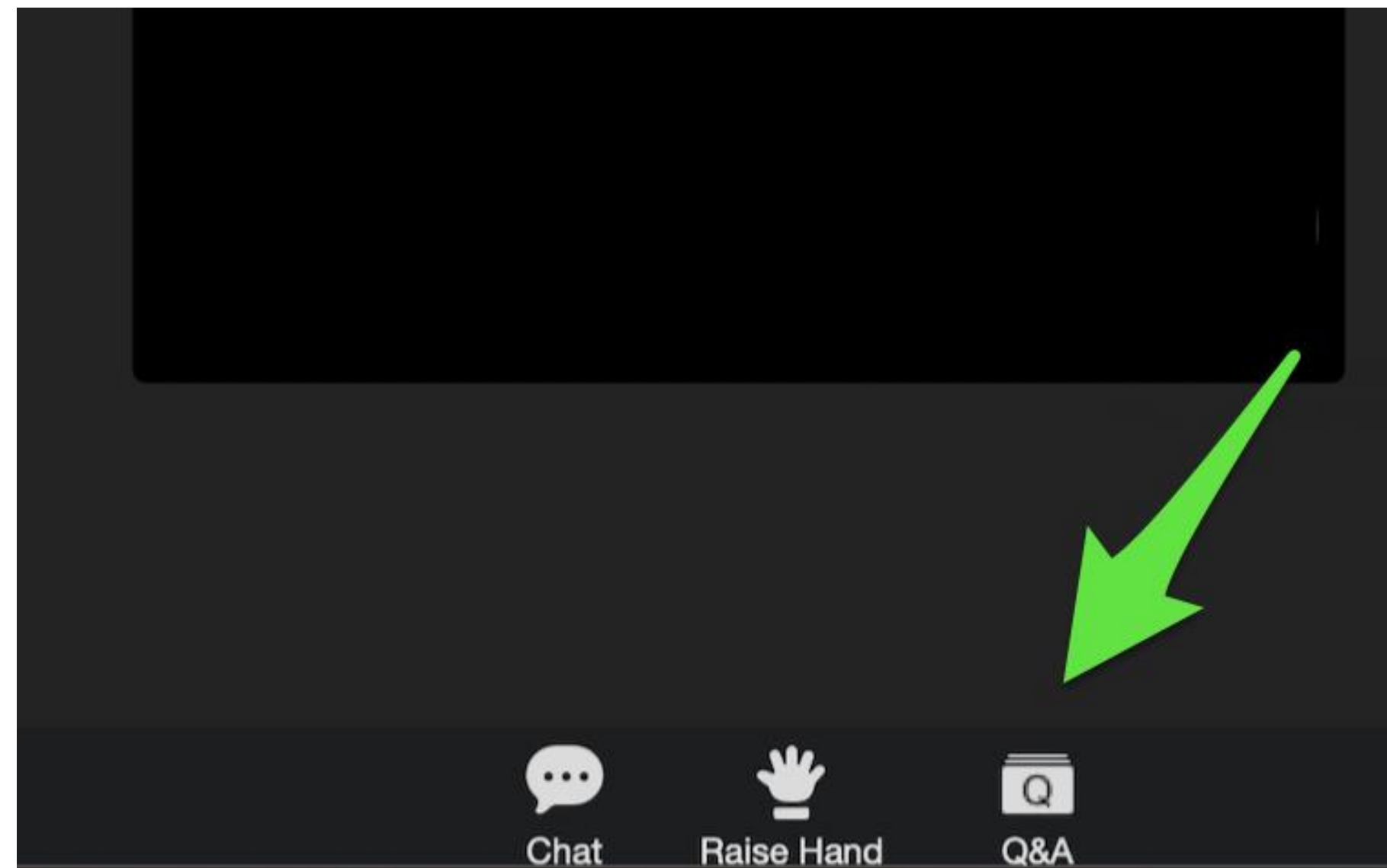
Audience Q&A

Wrap Up & Adjourn

We welcome your written questions and comments in the Q&A throughout the webinar

TECH OVERVIEW & HOUSEKEEPING

- All webinar participants will be on **MUTE** for the duration of the event.
- Please type any questions for into the **Q&A BOX** at any time during the session.



- A recording of the session will be available shortly after the webinar.

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- Together with our affiliates, we serve over 2,500 local agencies – cities, counties and special districts
- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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Our mission is to help local government leaders **navigate complexity, increase capacity & build trust** in their communities

TODAY'S PRESENTERS



SALLY TRUNG NGUYEN
Partner, Labor and Employment
Law Practice Group
Burke, Williams & Sorensen



SUSAN ARDUENGO
Partner, Labor and Employment
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CONDUCTING WORKPLACE INVESTIGATIONS:

A PRACTICAL GUIDE TO OBTAINING DEFENSIBLE AND IMPARTIAL FINDINGS



PRESENTED BY SUSAN ARDUENGO, AWI-CH AND SALLY NGUYEN, AWI-CH
OCTOBER 10, 2023

INSTITUTE OF LOCAL GOVERNMENT

Susan Arduengo, AWI-CH

- ▶ Susan Arduengo is a Partner in Burke's Los Angeles office and a member of the firm's Labor and Employment Law practice group.
- ▶ Susan is an Association of Workplace Investigators (AWI) Certificate Holder and the Convener for the AWI Los Angeles Mentoring Circle. Susan conducts workplace investigations as a neutral fact-finder.
- ▶ Additionally, Susan is experienced in management training on workforce matters. Susan also provides her clients preventative employment counseling focused on litigation avoidance.
- ▶ SArduengo@bwslaw.com



Sally Nguyen, AWI-CH

Sally Nguyen is a Partner in Burke's Silicon Valley office and a member of the firm's Labor and Employment Law practice group.

Sally has conducted and advised on countless workplace investigations for public and private employers. She is an Associate of Workplace (AWI) Certificate Holder and a member of the AWI Seminar Committee.

She regularly advises and counsel employer on a wide-range of labor and employment issues. She is also experienced in employment management training.

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SESSION OVERVIEW

- ▶ (1) Why Conduct Workplace Investigations
- ▶ (2) Responding to a Complaint
- ▶ (3) Defining the Investigation
- ▶ (4) How to Conduct an Investigation
- ▶ (5) Top Investigation Mistakes
- ▶ (6) Post-Investigation Considerations





WHY CONDUCT WORKPLACE INVESTIGATIONS

DUTY

A LEGAL DUTY TO INVESTIGATE

FEHA:

“Take all reasonable steps to prevent discrimination and harassment from occurring.”
Gov. Code § 12940(j)(1) and (k)

Title VII:

“Take all steps necessary to prevent harassment from occurring.” 29 C.F.R. § 1604.11(f)

CONSEQUENCES

OF FAILING TO INVESTIGATE

- ▶ Violates employer policy and state and federal law
- ▶ Employer policies will be perceived as meaningless among employees
- ▶ Discourages complaints
- ▶ Denies employer opportunity to resolve issues before litigation
- ▶ In litigation, gives the plaintiff the opportunity to attack for failure to investigate





RESPONDING TO THE COMPLAINT

WHAT

IS A COMPLAINT

- ▶ Oral or written communication alleging complaint
- ▶ General statement about poor or unfair treatment
- ▶ No “magic words” required
- ▶ Anonymous is sufficient

WHEN

TO INVESTIGATE

- ▶ Complaint of harassment, discrimination, or retaliation
- ▶ Best practice to investigate abusive conduct or workplace bullying
- ▶ Differing facts / disagreement as to what occurred
- ▶ Complaint by subordinate against supervisor





DEFINING THE INVESTIGATION

WHO

SHOULD INVESTIGATE

- ▶ Supervisor or manager
- ▶ Designated compliance officer/coordinator
- ▶ HR Department
- ▶ Outside counsel
- ▶ Licensed P.I. specializing in investigations
- ▶ California Private Investigator Act
(*Bus. & Prof. Code* §§ 7520-7539)

SIX ESSENTIAL INVESTIGATOR QUALITIES



- ▶ Neutrality
- ▶ Experience
- ▶ Professionalism
- ▶ Availability
- ▶ Excellent Writing Skills
- ▶ Knowledge of the Relevant Laws
- ▶ Bonus - Investigator has limited prior experience with parties

A portrait of a man with dark hair, wearing a light grey suit jacket over a white collared shirt. He is smiling slightly and looking towards the camera. The portrait is partially obscured by a white diagonal shape on the left side of the slide.

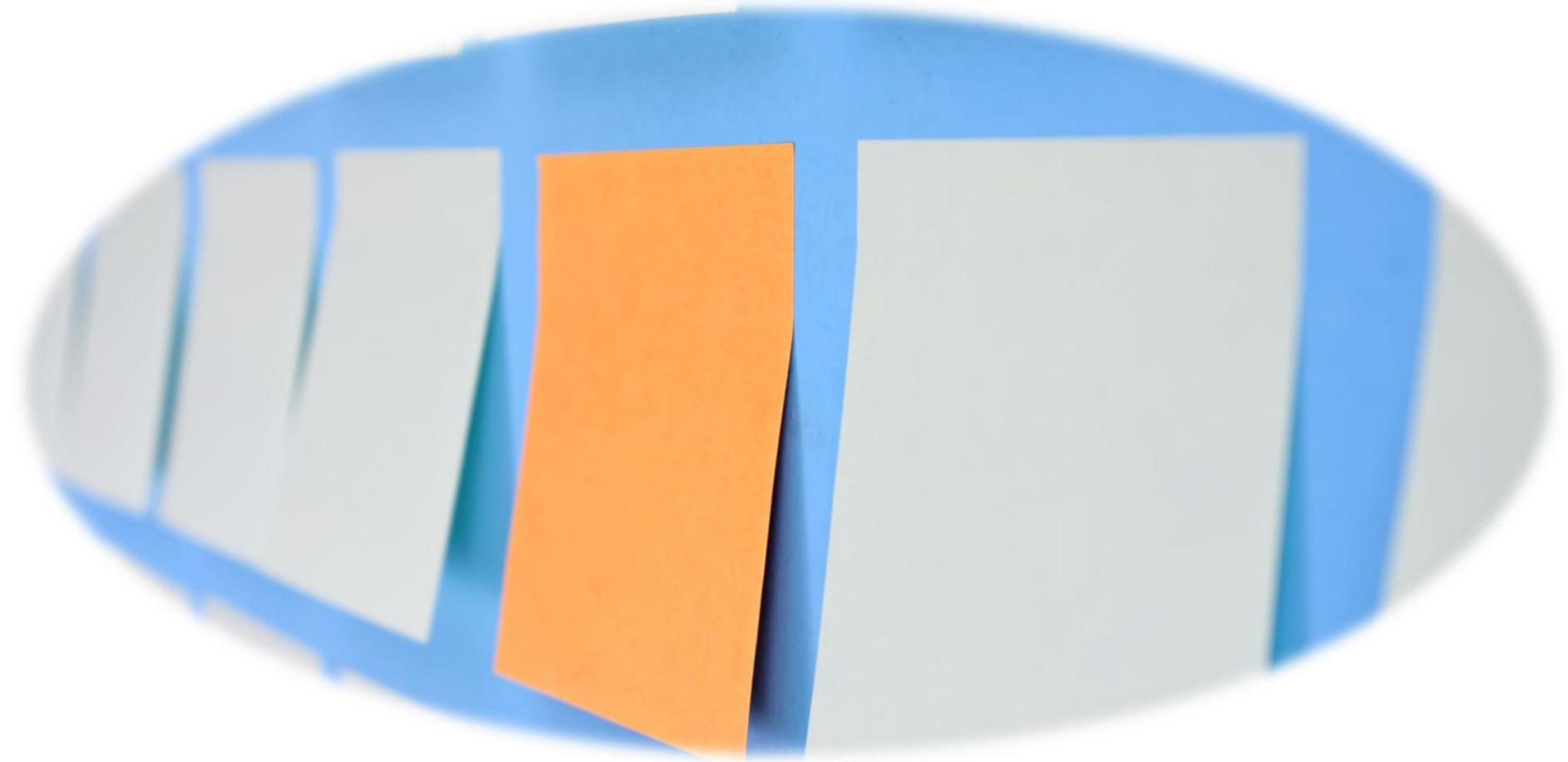
ADVANTAGES OF USING AN EXTERNAL INVESTIGATOR

- (1) Perception of impartiality is paramount.
- (2) Scope of an investigation, i.e., number of complainants, respondents, or issues, are so large that it would be unduly burdensome for an internal investigator to take it on.
- (3) Internal investigators may become overwhelmed by the number of ongoing investigations that they are handling.
- (4) Investigations conducted by external attorney investigators are protected by the attorney-client privilege and attorney work product doctrine.

Cons

- ▶ Expense
- ▶ Institutional knowledge

SCOPE



- ▶ Once an investigator is selected, it is important to adequately define the scope of the investigation
- ▶ Decide on the allegations to be investigated
- ▶ Who makes the decision as to scope of allegations?
- ▶ “Scope creep”

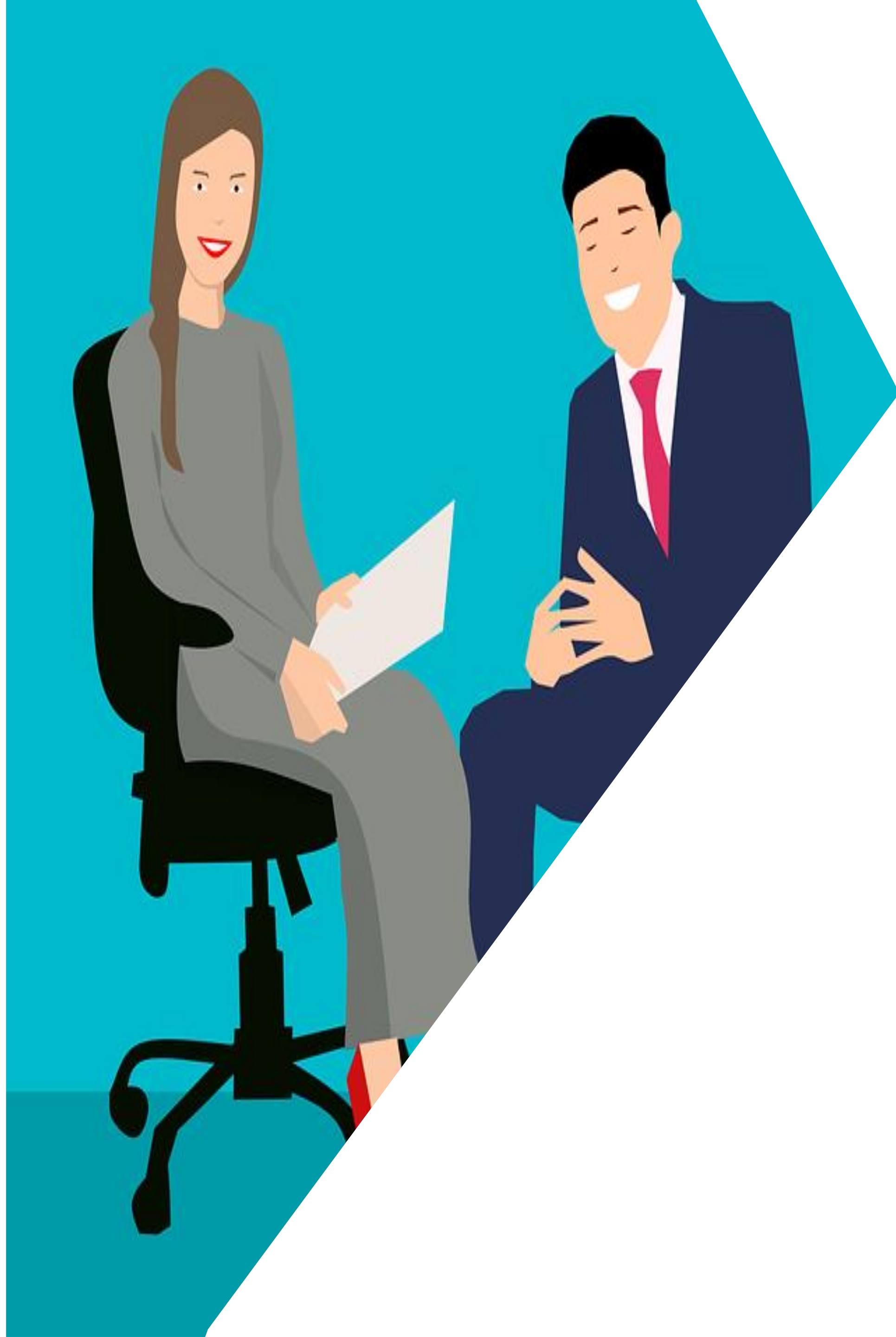


HOW TO CONDUCT AN INVESTIGATION



INVESTIGATION PROCESS

- (1) Employer will review the complaint
- (2) Employer will select an investigator and determine the scope of the complaint or allegations that will be investigated
- (3) Investigator will conduct interviews of the complainant, witnesses, and respondent
- (4) Investigator will review documentation/evidence on an on-going basis
- (5) Investigator will prepare the investigation report summarizing the investigator's findings on the allegations made



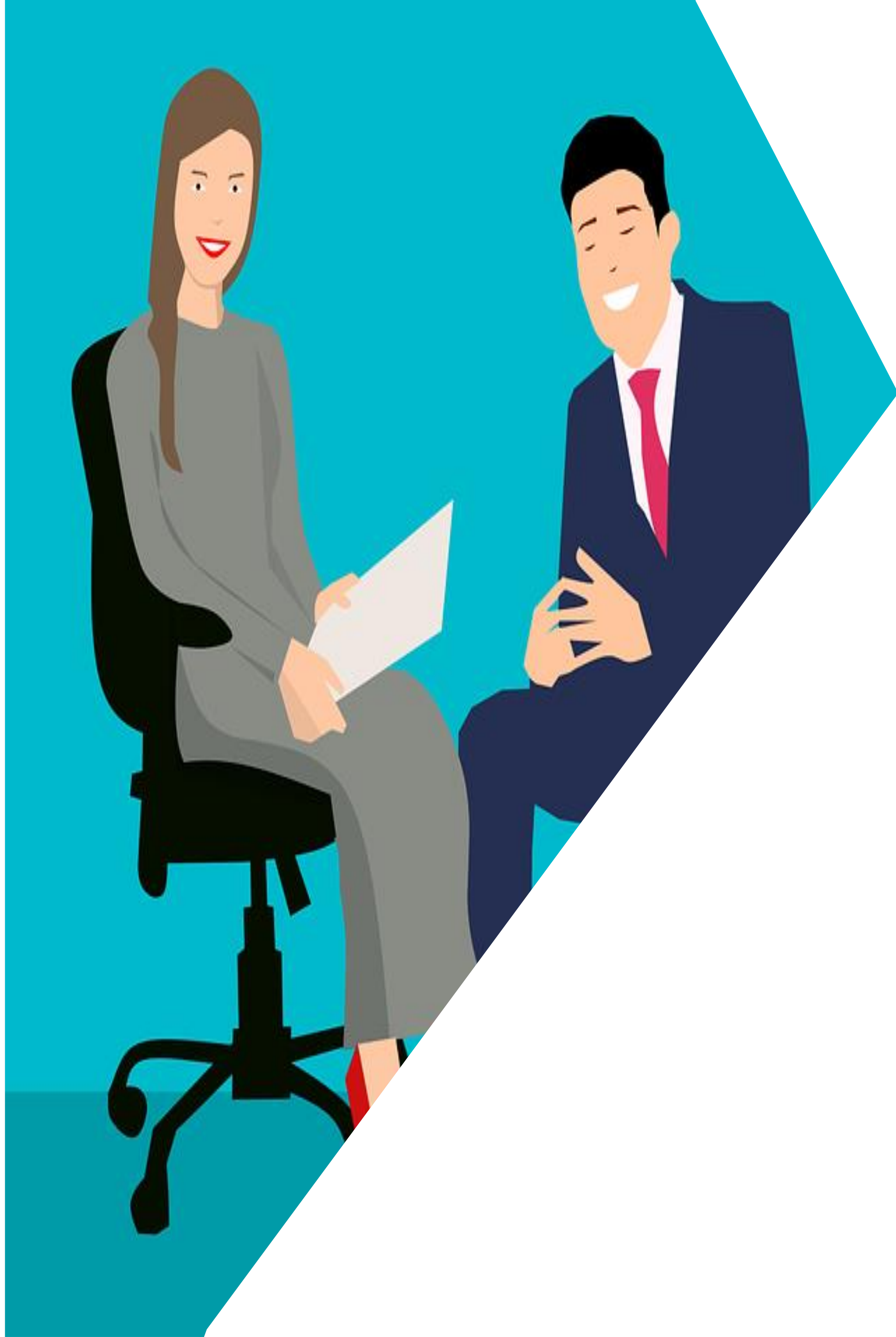
INTERVIEWS

- ▶ In most investigations, witness testimony is not obtained under oath.
- ▶ Witnesses should be afforded a full opportunity to provide information relevant to the issues in the investigation and to follow up with the Investigator after the initial interview. *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 260-261
- ▶ In-person vs. Zoom
- ▶ Order of Interviews; Attendees

ADMONITIONS

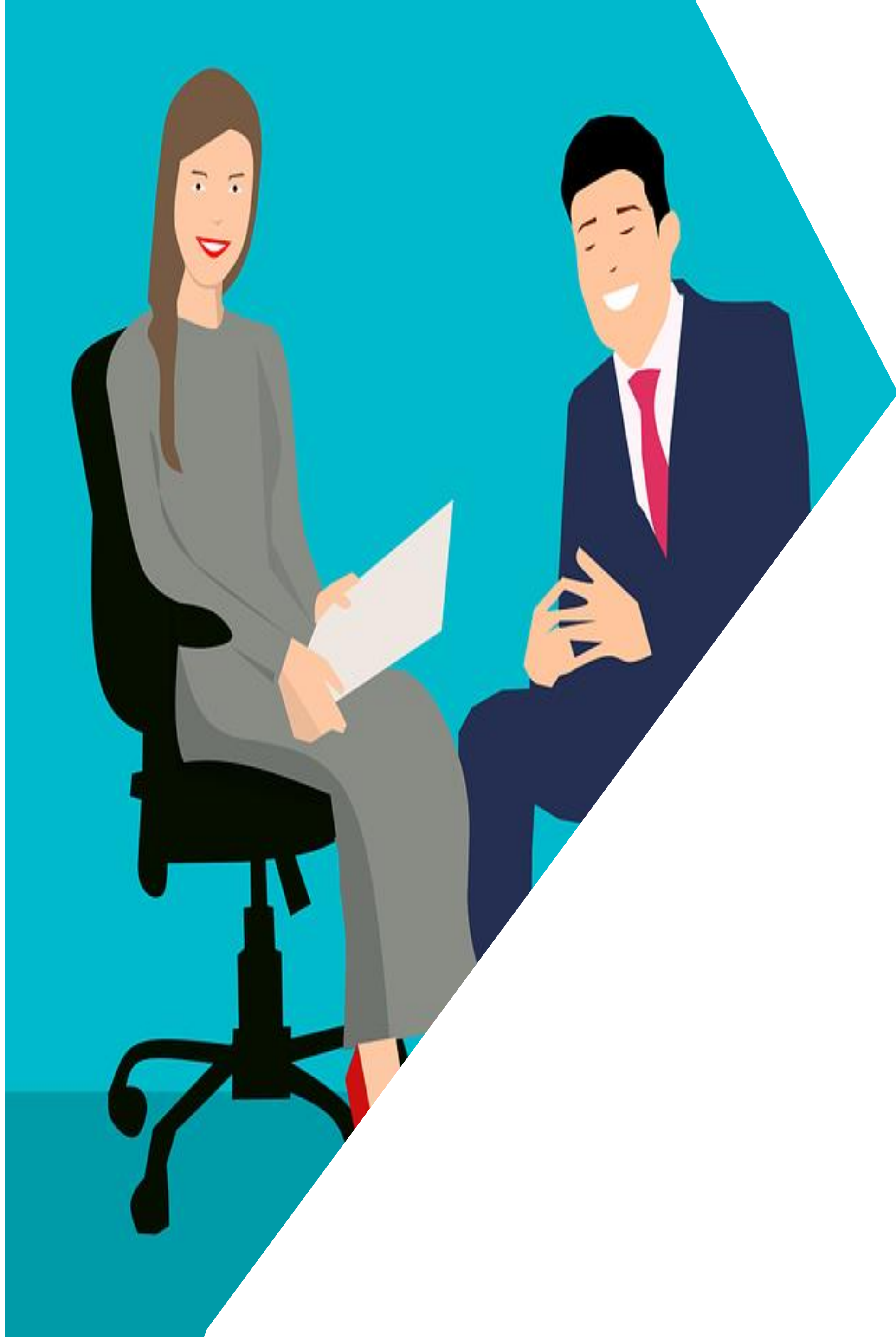
- ▶ Explain investigator's role
- ▶ Notify that interview is being recorded
- ▶ Brief description of the investigation process
- ▶ Request confidentiality
- ▶ Employee witness required to cooperate and tell the truth under threat of insubordination
- ▶ Prohibition against retaliation for making a complaint or participating in the investigation; How to report retaliation
- ▶ If you are recording, obtain permission before turning recorder on, and again after the recording





INTERVIEWS

- ▶ Strike the Right Balance
 - ▶ Connection
 - ▶ Warmth
 - ▶ Transparency
 - ▶ Professionalism
 - ▶ Organization
 - ▶ This is NOT a deposition



INTERVIEWS

- ▶ Your Interview Plan
 - ▶ Think about who you are talking to
 - ▶ Tailor questions based on expected answers/elements of allegations
 - ▶ Listen to his/her answers
 - ▶ Be flexible



REMOTE INTERVIEWS

- ▶ Ensure your location is as distraction-free as possible
- ▶ Ask witness if they are in a private location where they feel comfortable speaking with you
- ▶ Remember to maintain eye contact
- ▶ Let witness know that no one else is in the room with you (if true)



CONFIDENTIALITY

- ▶ As a general matter, the investigator should maintain the investigation file in a manner that will protect the confidentiality of the information contained therein.

(Association of Workplace Investigators Guiding Principles (2012).)

- ▶ Make sure that the complainant understands that complete confidentiality is not guaranteed.
- ▶ However let them know that the goal is to confine the details of the investigation to those on a need to know basis



CREDIBILITY

MAKING DETERMINATIONS

- ▶ Every investigation requires a credibility assessment of some kind
- ▶ Investigators have an obligation to be deliberate, systematic, and objective when determining witness credibility
- ▶ Assessing credibility is difficult for experienced and inexperienced investigators
- ▶ Do you have conflicting statements - which one will you rely upon?
- ▶ This is not the time to trust your gut
- ▶ You are not trying to figure out who is “lying”



CREDIBILITY

MAKING DETERMINATIONS

- ▶ Accepted credibility factors include the following:
 - ▶ Inherent Plausibility
 - ▶ Motive to Lie
 - ▶ Corroboration
 - ▶ Ability to Perceive
 - ▶ Reputation for Honesty/Dishonesty
 - ▶ Habit/Consistency
 - ▶ Inconsistent Statements
- ▶ Try to assess multiple factors in making a credibility assessment
- ▶ Proceed with caution or not at all:
 - ▶ Past Record
 - ▶ Reputation
 - ▶ Attitude**
 - ▶ Demeanor**
 - ▶ **Not at all

WRITING THE REPORT

Investigation
process

Scope of the
investigation

Documents
reviewed

Summary of
relevant
background

Complainant's
allegations

Respondent's
response

Witness
statements

Findings

Credibility
determinations

WRITING THE REPORT

In making investigation findings, the preponderance of the evidence standard is typically used.

Preponderance of the evidence, for the purposes of workplace investigations, means that the evidence on one side outweighs, or is more than, the evidence on the other side.

The following standards are used by investigators in making findings of fact:

Unfounded - A preponderance of the evidence establishes that the allegation is not true.

Unsubstantiated - There is insufficient evidence to determine whether the allegation is true.

Sustained - A preponderance of the evidence establishes that the allegation is true.



TOP INVESTIGATION MISTAKES

TOP INVESTIGATION MISTAKES - #1



- ▶ Not following up on details with witnesses
- ▶ When someone says, “He does that all the time.”
 - ▶ Ask, “How often?”
- ▶ When someone says, “I've worked with him for years.”
 - ▶ Ask, “How many years?”
- ▶ When someone says, “I've never seen him do that.”
 - ▶ Ask, “How long have you worked with him?” and “How often are you on shift together?”

TOP INVESTIGATION MISTAKES - #2

- ▶ Failure to interview relevant witnesses
- ▶ An experienced investigator's judgment is key
- ▶ Balance thoroughness with efficiency and cost



TOP INVESTIGATION MISTAKES - #3

- ▶ Refusal to interview former employees or third parties
- ▶ Former employee can make excellent, neutral witnesses
- ▶ Limited motive to fabricate
- ▶ Do not let fear of litigation taint the investigation



TOP INVESTIGATION MISTAKES - #4

- ▶ Failing to make a finding when the evidence is “one word against another or he said, she said”
- ▶ Many, if not most, investigations require a judgment/credibly call
- ▶ Balance the feather
- ▶ This is the investigator’s purpose



TOP INVESTIGATION MISTAKES - #5

- ▶ Not providing the respondent the opportunity to respond to all allegations against them
- ▶ No not hide the ball
- ▶ A respondent has the right to respond to all allegations against them





POST INVESTIGATION MATTERS

CONCLUDING THE INVESTIGATION

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- ▶ If the investigator sustained that wrongdoing occurred, the employer should take action
- ▶ Purpose:
 - ▶ (1) Prevent similar misconduct from taking place
 - ▶ (2) Serve as discipline towards the wrongdoer
 - ▶ (3) Send a clear message that the employer will not tolerate misconduct in the workplace

CONCLUDING THE INVESTIGATION

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Review the Report

- ▶ The decision-maker reviews the report and supporting documentation
 - ▶ Is it ever appropriate to request that the investigator change the report?
 - ▶ Is it appropriate to request that the investigator conduct additional follow-up?

DISCLOSURE OF REPORT

- ▶ Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 206 (Public employer must provide a copy of the materials upon which an adverse employment action is based).
- ▶ “Adverse Comment” Rule, a respondent must be provided notice and an opportunity to respond to “adverse comments” in their personnel file. Gov. Code § 3305; § 3255.
- ▶ In City of Redding, the City was ordered to produce an investigation report and witness statements, subject to redaction of all employee names and identifying information, where the union asserted that access to the report was necessary in order to represent its members in being free from a hostile work environment and to work in a safe workplace. (2011) PERB Decision No. 2190-M.





ANY QUESTIONS?

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AUDIENCE Q&A

What questions or comments do you have for us?



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RECORDING AVAILABLE SOON



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