


1

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation



2010 Western Region Conference

Investigations *Dos and Don'ts*

Presented by:
Irma Rodríguez Moisa
Atkinson, Andelson, Loya, Ruud & Romo

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

2

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Validating the Facts – Workplace Investigations

Whether an employee makes a formal written complaint or an informal verbal complaint, arguably the most critical aspect of responding is the ability to conduct a prompt, thorough and effective investigation.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

3

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Legal Requirements for Investigations

Contran v. Rollins Hudwig Hall Int'l (1998)
17 Cal.4th 93 ("Contran")

- The "objective" reasonableness of the employer's factual determination of misconduct
- The Supreme Court held that the employer does not have to prove that the alleged misconduct occurred, but rather the employer need only prove that it had a reasonable good faith belief that the wrongful conduct took place

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

4

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Legal Requirements for Investigations

Silva v. Lucky Stores, Inc (1998)
65 Cal.App.4th 256 (“Silva”)

- An appropriate investigation under the circumstances
- The Employer must show that it reasonably believed that the alleged misconduct took place and otherwise acted fairly

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

5

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Important Definitions

- Direct Evidence
- Circumstantial Evidence
- Corroborating Evidence

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

6

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

The Elements of Validating the Facts

Element 1:
Plan the Investigation & Prepare for Interviews

- Promptly Review the Complaint
- Prepare Memos to the Investigation Participants
- Choose an Appropriate Environment for Interviews

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

7

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Planning –

- **Investigator:** Who is an appropriate investigator? An investigator should be: Trained and Qualified, Available, Impartial and unbiased.
- **Guidelines:** What policy, regulations, or procedure guide responding to the complaint? Is there a uniform complaint procedure?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

8

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Planning –

- **Agreements:** Are collective bargaining agreements relevant?
- **Identify/Review Laws:** What laws and/or policies apply to this complaint?
- **Paid Administrative Leave:** Are there issues that warrant paid administrative leave for the respondent pending the investigation?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

9

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Prepare– Prepare Memos to the Investigation Participants

- Prepare a memo from the appropriate management employee to the complainant, accused and witnesses. That contain the following:
 - A brief, general description of investigation without revealing any names or other identifying information.
 - Introduce the investigator.
 - Direct the participant to tell the truth.
 - Give admonishment against retaliation.
 - Give confidentiality directions.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

10

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Planning – Choose an Appropriate Environment for Interviews

- Location
 - Not obvious to the community involved
 - Off-hours
- Interview Room
 - Private
 - No distractions
 - Easy access to exit
 - Clear visual of interviewee
 - Be ready for emotions

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

11

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

The Elements of Validating the Facts

Element 2:

Recognize & Record Relevant Evidence

- Tips for Getting the Most Relevant Evidence Out of an Interview
- Interview the Complainant
- Interview the Witnesses

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

12

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Tips for Getting the Most Relevant Evidence Out of an Interview

- Have Confidence
 - Evaluate the information and make a good faith decision as to what occurred.
 - Standard is "preponderance of the evidence"
- Be Prepared to Make Credibility Determinations
 - Plausibility
 - Corroborating evidence
 - Motive to lie
 - Person's demeanor
 - Past record

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

13

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Tips for Getting the Most Relevant Evidence Out of an Interview

- **Be a Good Listener**
 - A neutral listener is sensitive to the interviewee.
 - Notice gaps in the story and follow-up with more questions to close the gap.
 - Identify details
- **Be a Keen Observer**
 - Listen to what and how the interviewee tells their story
 - Observe body language
 - Attitude
 - Expression of emotion

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

14

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Tips for Getting the Most Relevant Evidence Out of an Interview

- **Ask Good Questions**
 - Avoid leading questions, instead ask "What did you do next? or Did you say anything?"
 - Avoid compound questions.
 - Allow for silence after the question.
 - Don't be afraid to ask the question again if the person failed to answer it.
- **Ask for a Demonstration**
 - Have the witness demonstrate the behavior
 - If possible, tour a the scene of the event with the witness.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

15

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

- Take Thorough Notes
- Tape Record?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

16

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Interview the Complainant

- **Formal interview with complainant**
 - Even though the complainant may have submitted a written complaint, an interview is necessary to collect all relevant details.
 - Who can be present?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

17

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

- **Gather the facts from the complainant**
 - Who, What, When, Where, Why and How questions for each allegation.
 - How did the alleged conduct make him or her feel.
 - How did the alleged conduct affect the work environment.
 - Ask about eye-witnesses.
 - What does complainant want from the investigation
 - Is there anything else?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

18

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Interview the Witnesses

- **Determine which witnesses to interview first.**
 - Interview those witnesses with the most information first.
 - Who can be present?
- **Gather the facts from the witness**
 - Who, What, When, Where, Why and How questions for what occurred. Ask them to in detail what they observed.
 - For reluctant witnesses, explain the importance of their participation and employer's stand against retaliation.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

19

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

The Elements of Validating the Facts

Element 3:

Opportunity for Response

- Prepare for Interview with the Accused
- Give Introductory Comments to Accused
- What if the Accused Refuses to Answer Questions?
- Gather the Facts from the Accused

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

20

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Prepare for Interview with Respondent

- Provide opportunity to respondent to fully respond to each and every allegation.

- Review documents, notes for interview
- Who can be present?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

21

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – What if Respondent refuses to answer questions

- What if respondent refuses to answer questions.

- Explain that the investigator's job is to weigh evidence.
- 5th Amendment Right?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

22

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Gather the Facts from the Respondent

- Gather the facts from the accused.
 - Get the details of what occurred using Who, When, Where, Why and How questions.
 - Get confirmation, admission or denial for each and every allegation.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

23

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

The Elements of Validating the Facts

Element 4:

Organize the Evidence

- Review All the Evidence Gathered
- Weigh the Evidence for Each Allegation
- Make a Factual finding for Each Allegation
- Review All the Factual Findings to Determine if a Violation of Law or Policy
- Prepare a Confidential Investigation Report

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

24

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Review All of the Evidence Gathered

- Review Evidence
 - Review, documents, and policies.
 - Determine if anything was overlooked or questions forgotten.
 - Anything too close may require a second interview to clarify facts.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

25

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Weigh the Evidence for Each Allegation

- Review Evidence of Each Allegation
 - Apply “preponderance of evidence” standard.
 - Look at disputed evidence which is most persuasive.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

26

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Make a Factual Finding for Each Allegation

- Review Findings
 - What conclusion was reached?
 - Does each allegation have a finding?

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

27

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Review all the Factual Findings to Determine of a Violation of Law or Policy

- Violation of Law or Policy
 - Look at the totality of the circumstance.
 - “Sustained” Allegations.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

28

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Prepare a Confidential Investigation Report

- **Report Preparation**
 - Restate the date of the complaint, parties involved, documents reviewed and procedures followed.
 - Write up each allegation separately.
 - Under each allegation provide the evidence and credibility assessments for each allegation.
 - After the evidence, provide the factual finding.
 - Prepare a final analysis and conclusion at the end of the report.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

29

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

The Elements of Validating the Facts

Element 5: Follow-up

- Determine an Effective Remedy
- Communicate, generally, the Results of the Investigation to the Complainant
- Communicate the Results of the Investigation to the Accused
- Disciplinary Action against Accused should reference specific findings of investigation
- Communicate to Witnesses Regarding Closure of the Investigation

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

30

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Determine an Effective Remedy

- **Remedy**
 - If the complaint has merit, then determine how to implement an effective remedy.
 - Remedy should end the misconduct.
 - Consider taking action to improve victim's employment environment.
 - Conduct "follow-up" with the parties to determine if the remedy has been effective.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

31

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Communicate the Results of the Investigation to the Complainant

- **Communication to Complainant**
 - Send a letter to the complainant regarding the results of the investigation.
 - Maintain the investigation documents in a separate, confidential investigation file.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

32

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Communicate the Results of the Investigation to the Accused

- **Communication to Accused**
 - Send a letter to the accused regarding the results of the investigation.
 - Do not place the letter about the results of the investigation in the personnel file. If disciplinary action is taken, attach the disciplinary letter and place that information in the file.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

33

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Disciplinary Action against Accused

- **Employee Discipline**
 - Action can include, counseling, verbal warnings, training, letter of reprimand, reassignment or transfer, suspension or dismissal.
 - Be aware and follow any progressive discipline principles.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

34

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Examples – Communication to Witnesses Regarding Closure of the Investigation

- **Communicate to Witnesses**
 - Notify witness(es) that the investigation has ended.
 - Results are confidential and cannot be released.

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO

35

Atkinson, Andelson, Loya, Ruud & Romo
A Professional Law Corporation

Thank you!
Atkinson, Andelson, Loya, Ruud & Romo

For questions or comments, please contact
Irma Rodríguez Moisa
(562) 653-3200 or imoisa@aalrr.com

CERRITOS • FRESNO • IRVINE • PLEASANTON • RIVERSIDE • SACRAMENTO • SAN DIEGO
