

**MRA**

**EMPLOYMENT  LAW UPDATE 2023**

**Session 5:  
Conducting Effective  
Investigations and  
Climate Assessments  
in the Evolving Workplace**

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**Agenda**

- The Investigator's Role
- Practical Complaint "Intake" Strategies
- Witness Interview and Information-Gathering Techniques
- Report and Documentation Strategies
- Concluding the Investigation

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A slide with a green header containing the MRA logo and the text "EMPLOYMENT LAW UPDATE 2023". The main content area has a white background with the title "Climate Assessments" in bold. Below the title is a bulleted list of points. A small number "4" is in the bottom right corner of the slide.

## Climate Assessments

- When to do an assessment
  - Issues do not rise to unlawful conduct but threaten culture
  - Core values and mission of the organization may be threatened
  - Significant turnover
  - Low morale
- Benefits of conducting assessments
  - Opens up lines of communications with third party
  - Allows for a safer environment to disclose concerns
  - Addresses morale issues/threats to culture before legal claims arise
  - Reduces turnover
  - Sends message that organization values its employees and is committed to its mission

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## Effective Investigations

- Help with mitigation when working with government agencies
- Reduce civil litigation/damages
- Help keep complaints internal
- Help create a culture where employees feel comfortable bringing concerns forward

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## A “Good” Investigation Defined

- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected and secured
- Documented results



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## Your Role as an Investigator

- Impartial fact-finder (no biases)
- Good listener
- Fairness
- Appropriate investigation
- Attention to detail
- Take off your HR/legal/safety and compliance hat
- Properly document investigation
- Take out the emotion
- Reach reasonable findings
- Only if appropriate, recommend remedy



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## Timing of the Investigation

- Investigations vary in complexity and the length of time to complete.
- All investigations must be conducted promptly.
- Promptness may be a mitigating factor.
- In almost every level of government enforcement, delay, or indifference can be seen as an aggravating factor.

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# Intake Strategies

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## Investigating in the Workplace: Staged-Based Investigation



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graph LR; S1[Stage 1: Taking the Complaint] --> S2[Stage 2: Planning the Investigation]; S2 --> S3[Stage 3: Conducting the Investigation]; S3 --> S4[Stage 4: Making a Decision]; S4 --> S5[Stage 5: Documenting the Investigation];
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## The Complaint \*fictional fact pattern

Hi this is ... I am a long-term employee and I have had enough. My working environment—store 440—has become unbearable, and I am being harassed! Look, I could almost ignore the daily insults about my “old age,” but getting inundated with comments about an associate’s sexual conquests during his off hours ... and then passed over when that same associate is promoted—well, that just can’t be overlooked! Especially when my manager’s not only encouraging all of this, but participating in the worst way! Anyway, I’m not sure how this hotline works, but hopefully something can be done ...

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## Do You Investigate?

- EEO allegations
- Significant violations of policy
- Potentially unlawful conduct with potential to lead to liability
- Potential for risk to the company or other employees

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## Consider: HR Consultation vs. Investigation?

### General Behavior or Performance Consultation (Corrective Action/ Performance Improvement Plans)

- Inappropriate behavior
- Unacceptable job performance
- Failure to comply with policy/procedure

### Minor Workplace Conflicts

- Minor employee complaints (e.g., perfume, workplace conflicts)
- Coworker miscommunication

### Compliance-Based Allegations

- Discrimination
- Harassment
- Retaliation
- Unfair employment practice
- Code of conduct
- Fair & honest business practice
- Protecting company v. liability
- Health and safety infractions

### Terminations/Removals

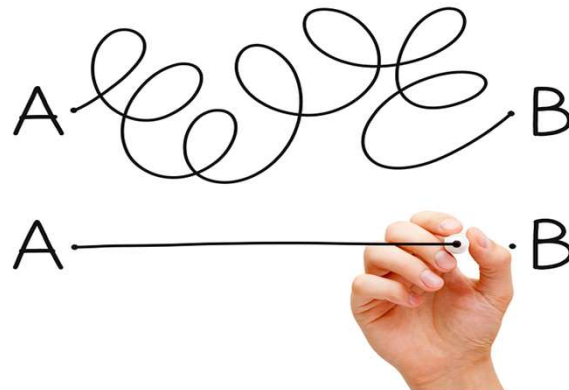
- Serious misconduct/behavior or performance issues

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## The Plan

- An investigation plan should set the scope properly so you will have the right parameters to guide you.
- You always must be prepared to explain why you did what you did.
- Never put yourself in the position of explaining your plan by saying that you never considered any other course of action.



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## Consider Triage and Escalation Issues

- **Safety:** Is the health or safety of anyone put in jeopardy by this situation?
- **Company Impact:** Will this matter have an immediate impact on the company financially or from a brand perspective?
- **Communications:** Who needs to know about the matter or any part thereof? If applicable, how quickly can you speak to the complainant for an initial discussion and to let them know you are taking their concerns seriously?

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## Interview & Information Gathering Techniques

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## Opening the Interview

### Introduction

- Tell the interviewee your name and title.
- Explain your role at the company.
- Give the interviewee a short statement about why the meeting is happening. (This statement can be tailored depending on whether you are talking to a complainant, witness, or subject.)

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## Opening the Interview

### Explain the Process

- Neutral review process
- Goal = open and candid conversation
- If they don't understand a question, you will clarify.
- Ask if they have any questions and answer them before moving forward with the interview.
- Confirm they are not recording the interview.

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## Opening the Interview

### Non-Retaliation Policy

- Explain the policy.
- Use language from the exact company policy.
- The policy encourages employees to report when they witness something that does not appear consistent with the company's policies.
- Tell the interviewee that the company does not tolerate retaliation against a person who raises good-faith concerns or who speaks with the company as part of the interview, and the company takes the policy very seriously.

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## Opening the Interview

### Confidentiality

- To have a fair investigation, we take steps to maintain confidentiality of this matter, including complying with our privacy policies, but we cannot guarantee confidentiality.
- We expect you will keep our discussion confidential.
- Discuss this matter only with me if you have further questions or information.

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## Ask the Right Questions

### Use “Funneled” Questioning

- Open-ended phase
- Clarification phase
- Pinning-down phase  
(*i.e.*, closing the door)



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## Asking the Right Questions: Interviewing the Complainant

- Get as much detailed information from the complainant as possible.
- Emphasize complaint will be taken seriously.
- Listen impartially without committing yourself.
- Ask open-ended questions.
- Evaluate the complaint from the complainant’s perspective.



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## Asking the Right Questions: Interviewing the Accused

- Two goals:
  - Information gathering
  - Fair opportunity to respond



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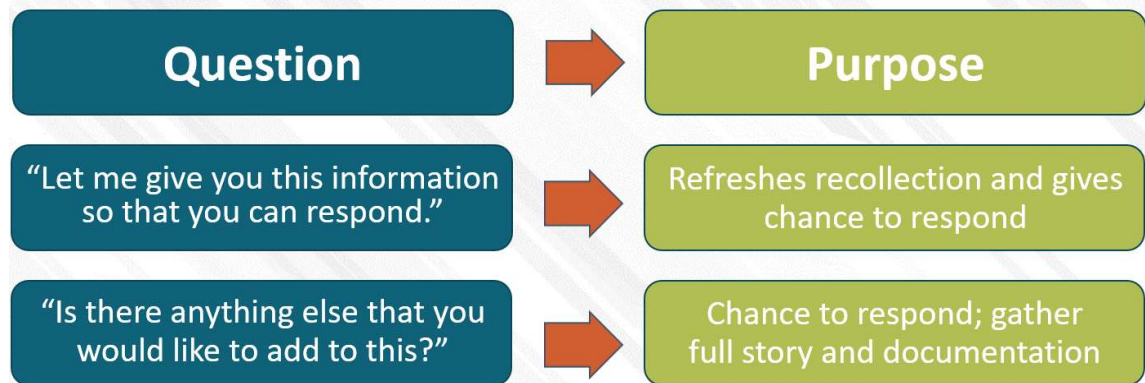
## Ask Questions That Will Help You Assess Credibility Later

- Memory
  - Ask specific questions to assess the witness's memory.
- Corroboration/Lack of Corroboration
  - Did you ask open-ended questions to find out if any corroboration exists?
- Veracity
  - Does the person look like he or she is telling the truth?
  - What is his or her demeanor like?

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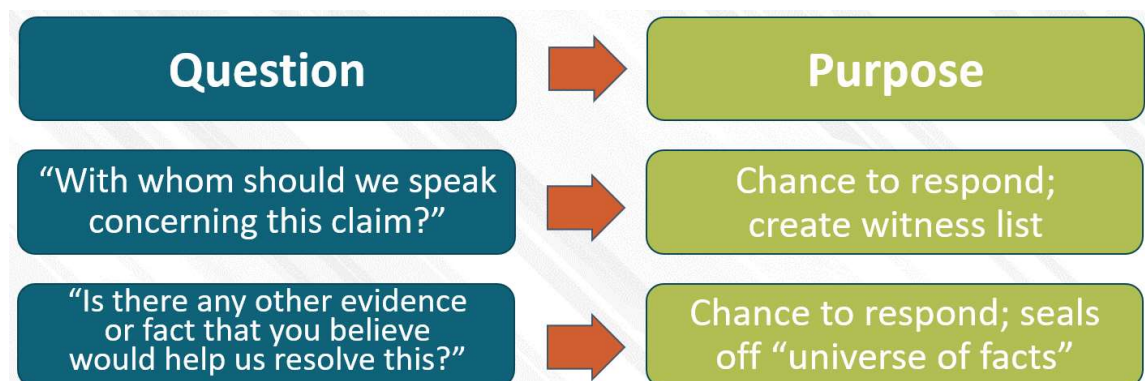
## Useful Questions



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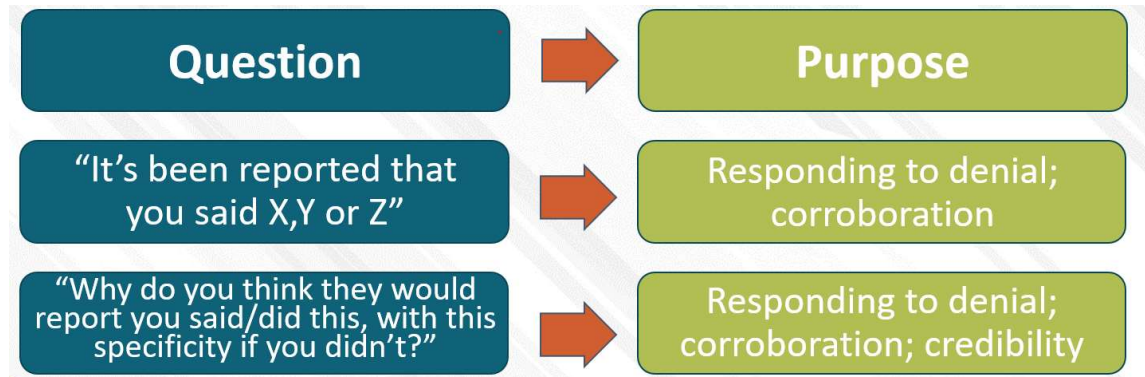
## Useful Questions



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## Useful Questions



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## Closing the Interview

### Thank the Interviewee

- Acknowledge serious and important process.
- Tell them their participation helps to support our continued efforts to maintain a compliance environment that best reflects our values.
- Remind about confidentiality.
- Remind about non-retaliation policy.

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## Closing Comments and Instructions

### Final Comments

- If you later remember anything that you couldn't remember here today, or you want to supplement or correct something, or have questions, please call me at \_\_\_\_.
- Where documents are involved, tell the interviewee: You cannot destroy or alter any information or documents relevant to this matter and you must keep them until you are notified otherwise.
- Explain to the interviewee that "documents" includes emails.
- A thorough and efficient review will be conducted, but it is not possible to predict timing of closure.
- The company will decide fairly about proper action at the end of our review, including any needed remedial action.

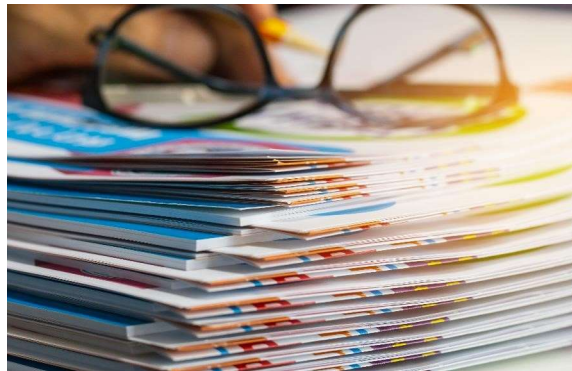
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## Speaking of Documents

### Documents To Collect & Review

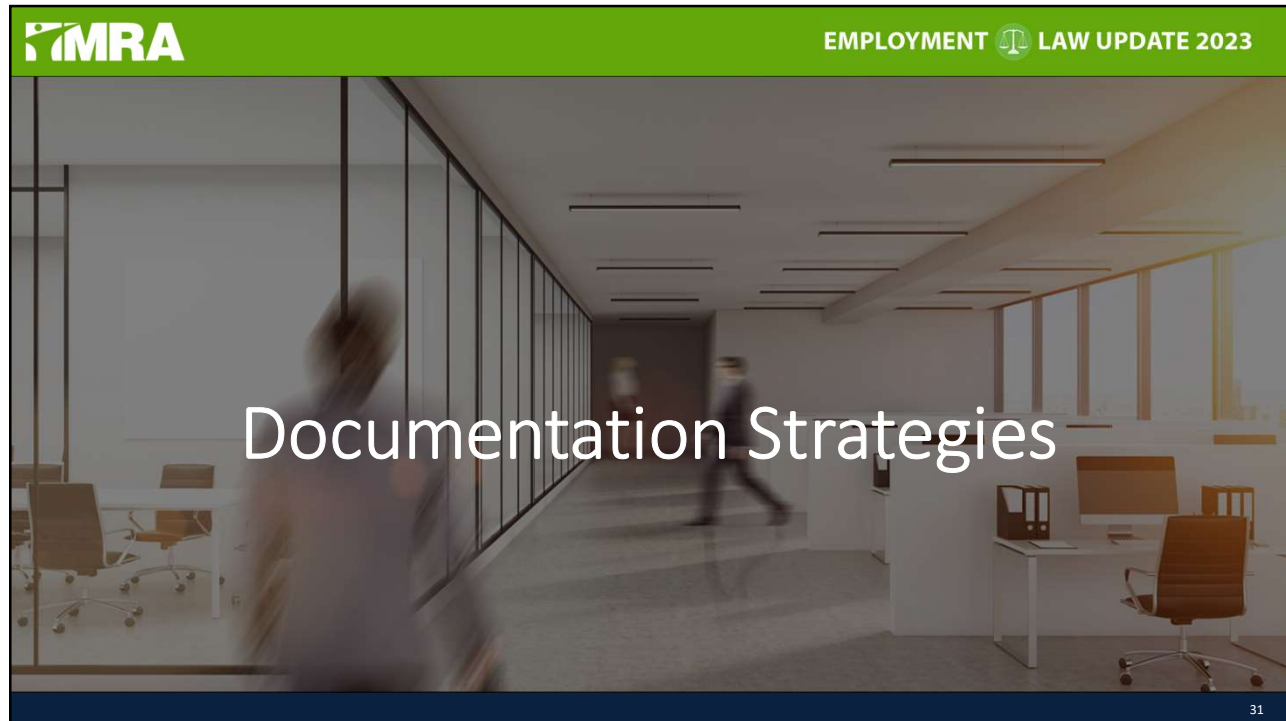
- Personnel files
- Timecards
- Medical files
- Expense files
- Project files
- Documents in possession of the claimant and witnesses




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## Taking Notes

- Be prepared for Interviews
  - Written outline of allegations
  - Written list of basic questions organized by allegation
  - Space for “parking lot” issues

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## Outline the Interview

Prepare a list of questions that must be answered—what they saw, when they saw it, who else was there, why something happened (if known), what happened next, and so on. *Be prepared to customize with certain people.*

- [Interviewee name/title/position]
- [Date, time, and location of interview]
- [Date and location of incident]
- [Physical proximity of interviewee to the incident]
- [Persons involved in incident]
- [Background of interviewee with the parties]
- [Names/relationships of other essential witnesses]
- [Understanding as to claimant's concerns/allegations]
- [Awareness of facts, documents, or persons related to allegations]



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## Interviews: What to Document

### DO

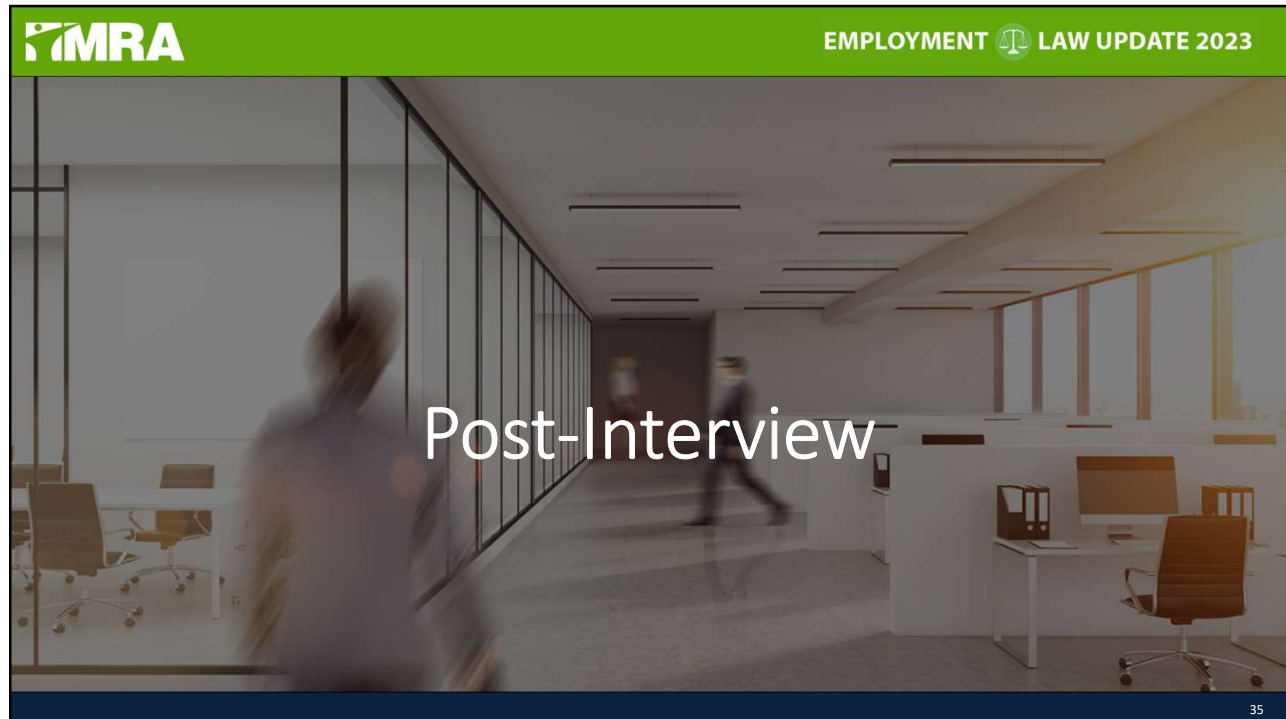
- Write objectively
- Summarize knowledge
- Give specific responses to key questions and documents
- Use quotes
- Close the funnel
- Use relevant facts regarding credibility

### DON'T

- Make conclusions as to the facts and credibility
- Use quotes as shorthand
- Stick unwaveringly to script
- Use labels (e.g., "liar")

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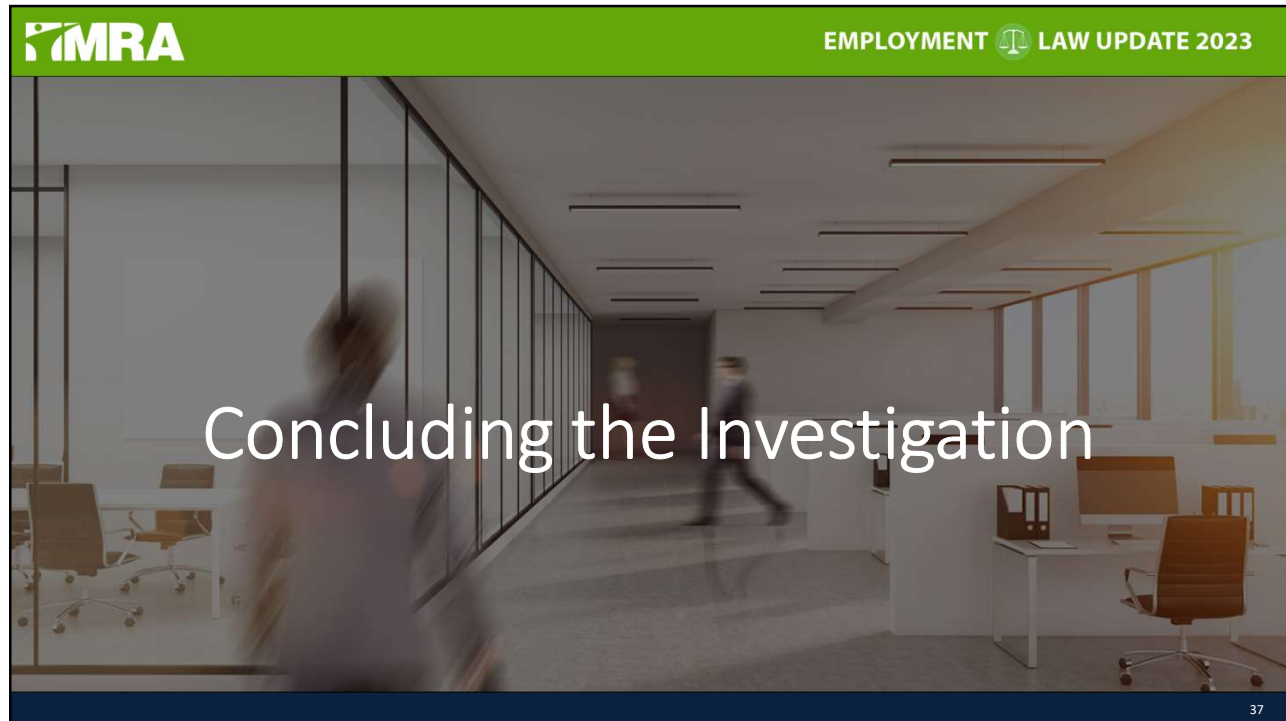
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## Post-Interview

- Record employee's reactions.
- Document that the interview occurred.
- Maintain documentation control.
- Distribute notes and documents to investigation file.
  - Generally uploaded to document management system.
- Assess the credibility of witnesses.

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## Investigation Objectives

- Address all allegations raised.
- Identify and review the policies, procedures, business practices, law, regulations, and ethics standards that pertain to the allegations.
- Make a record of your reasoning and steps taken.
- Avoid unnecessarily controversial comments, opinions, rumors, or hearsay.

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## Document Findings in a Report

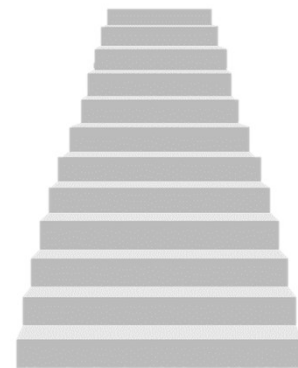
- Document the chronology of the investigation, noting interviews conducted, documents reviewed, evidence examined, and findings on each allegation.
- State issue/allegations.
- Give concrete examples, when possible, to document the incorrect behavior or performance.
- Include dates, times, and witnesses.
- Make findings for each:
  - “We find that this allegation”:
    - Occurred as alleged
    - Probably did not occur
    - “We are unable to determine with reasonable certainty if this incident occurred because ...”

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## Recommended Final Steps

- Appropriate to recommend discipline?
- DUTY: To take immediate corrective action by doing whatever is needed to end the workplace misconduct and to prevent it from recurring. The corrective action should reflect the severity of the conduct.
- Discipline the appropriate people.
- Document what has been done.

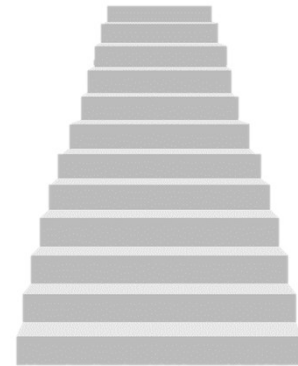


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## Recommended Final Steps

- Maintain a separate investigative file, to include:
  - Copy of the complaint (if written)
  - Interview notes
  - Relevant policies
  - Documentation gathered during the investigation
  - Physical evidence
  - Electronic evidence
  - Chain of can be important if criminal allegations possible
  - Written report, if one was created
- Keep separate from personnel file
  - Sole exception = record of discipline imposed



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## Recommended Final Steps

- Follow up with witnesses as appropriate
- Implement any decisions
- Follow up with complainant in reasonable time



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**Questions? Thank you**