

# WORKPLACE INVESTIGATIONS

By: Louis Lopez

## I. INTRODUCTION

Recent developments in the law have placed increased and focused attention on workplace investigations. For example, many employers have come to use workplace investigations as part of their defense to discrimination and harassment claims. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Likewise, some employers may seek to assert a workplace investigation as a defense to state wrongful termination claims. *See Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998). Finally, in this age of increased scrutiny of corporations and their financial conduct, the Sarbanes-Oxley Act of 2002 further illustrates the need for employers to have effective procedures to investigate employee claims of corporate misconduct. *See* 15 U.S.C. §7201 *et seq.*

Irrespective of the reason for the workplace investigation, the manner in which the investigation is conducted can significantly affect both an employer's ability to defend against legal claims, as well as an employee's trust and confidence in the employer's investigation process. While the exact procedures to be followed may differ based on the employer, employee, or alleged conduct involved, individuals requesting and conducting workplace investigations should be aware of certain key principles. This paper is intended to highlight some of these principles and to provide readers with a practical framework from which to begin the investigation process.

## II. BEGINNING THE INVESTIGATION

Quite obviously, it is first critical to know *when* to conduct an investigation. In virtually all circumstances, prompt and thorough interviews of the complainant, the accused, and all witnesses are essential elements of a sufficient response. *See, e.g., Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action to remedy situation); *Dougherty v. Henderson*, 155 F. Supp. 2d 269 (E.D. Pa. 2001) (investigation was prompt and thorough where company learned of complaint and, a week later, initiated a thorough investigation); *Schemansky v. Cal. Pizza Kitchen, Inc.*, 122 F. Supp. 2d 761 (E.D. Mich. 2000) (employers response deemed sufficient where managers responded within days each time the plaintiff complained about co-workers by interviewing and counseling employees and, where appropriate, suspending culpable parties and re-educating the staff about the company's sexual harassment policies); *Hodoh-Drummond v. Summit County*, 84 F. Supp. 2d 874 (N.D. Ohio 2000) (investigation was sufficient where the employer immediately placed the alleged harasser on unpaid leave pending an investigation

which occurred a week later, and two weeks after that, placed the harasser on 30 days of unpaid leave). *But see Bennett v. N.Y. City Dep't of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989) (four-week delay before interviewing complainant and co-worker not deemed prompt); *Sorluccho v. N.Y. City Police Dep't*, 971 F.2d 864 (2d Cir. 1992) (complaint and interview of alleged harasser eight months after complaint insufficient).

#### **A. Actual Versus Constructive Notice**

An employer may be obligated to conduct investigations in the absence of an employee complaint or request if the employer otherwise has notice of the wrongdoing such that the employer “knows or should have known” of the conduct. *See* 29 C.F.R. §1604.11(d) (“[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action”); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000) (employer not liable for what occurred before it was put on notice of the harassment, but is liable for the harm inflicted after it has been put on notice or as a result of its inappropriate response); *cf. Swenson v. Potter*, 271 F.3d at 1192 (“employer cannot be held liable for misconduct of which it is unaware”); *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000) (employer must have advance notice, and, if employer takes appropriate corrective action, it will not have ratified the conduct).

#### **B. Interim Relief**

In certain circumstances, an employer may consider interim relief to the complainant until the investigation is completed. For example, interim relief may be appropriate when the complainant is in a highly emotional state; when the relationship between the parties has become so adversarial that it is disruptive to the workplace and coming to work has become highly unpleasant to the complainant; when the allegations are very serious and credible; or when the complainant asks for such relief. *See, e.g., Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001) (employee’s contention that slanderous statements were made to her by coworkers and managers and her demotion from server to busboy created an issue of fact as to whether the employer deliberately created intolerable working conditions as perceived by a reasonable person with the intention of forcing the employee to quit); *Degitz v. S. Mgmt. Servs., Inc.*, 996 F. Supp. 1451 (M.D. Fla. 1998) (plaintiff’s evidence was sufficient to create a jury question as to whether a reasonable person would have found the working conditions at issue and employer’s inaction so intolerable as to be compelled to resign).

Examples of interim relief could include: (i) offering temporary transfer to a position using the same general skills, with retention of all compensation and benefit levels; (ii) a paid leave of absence until the investigation is concluded; (iii) an unpaid leave of absence until the investigation is finished; and (iv) reassignment to a different building, floor, or department, or to a special project that can be completed either at home or in a different work area.

### III. RESPONSIBILITY FOR INVESTIGATION

Responsibility for conducting a workplace investigation should rest in someone who is objective, skilled, experienced, and who has sufficient authority to be credible. Typically, this person should work in human resources and not be a member of line management. *See, e.g., Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (if ultimate decision-maker influenced by others who had retaliatory motives, investigation is not “independent”); *Smith v. First Union Nat’l Bank*, 202 F.3d 234 (4th Cir. 2000) (investigation inadequate when investigator had never previously investigated a sexual harassment claim, focused on complaints about management style and ignored allegations of sexual harassment, and failed to ask whether accused made sexually harassing remarks); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000) (investigation not model of competent and efficient responsiveness where supervisors interviewed non-English speaking employees without aid of interpreter though key witness could not understand questions); *Quela v. Payco-General Am. Credits, Inc.*, 82 Fair Empl. Prac. Cas. (BNA) 1878 (N.D. Ill. 2000) (investigation of sexual harassment allegations tainted by personal bias and self-interest when investigator held high managerial position and person who aided in investigation was business partner of accused).

Investigations conducted by experienced counsel often yield more relevant information than might be disclosed if less experienced employer representatives conducted the investigations. Also, as a general rule, when an attorney directs an investigation, there is a stronger likelihood that privilege will attach to the investigation. *See, e.g., McIntyre v. Main St. & Main Inc.*, 84 Fair Empl. Prac. Cas. (BNA) 1032 (N.D. Cal. 2000) (motion to compel production denied with respect to investigation into sexual harassment conducted by defendant’s counsel; paralegal’s notes and memoranda are privileged); *Casella v. Hugh O’Kane Elec. Co.*, 84 Fair Empl. Prac. Cas. (BNA) 432 (S.D.N.Y. 2000) (notes made by investigator retained by counsel to assist in advising defendant in sexual harassment case covered by attorney-client privilege); *see also Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1999); *Peterson v. Wallace Computer Servs., Inc.*, 984 F. Supp. 821 (D. Vt. 1997); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084 (D.N.J. 1996).

Inclusion of attorneys in a workplace investigation, however, does not automatically insulate an investigation from disclosure — despite assertions of attorney-client privilege. In-house counsel with multiple responsibilities who may have been involved in decision-making before an investigation commences should be particularly cautious in concluding that their investigation will be found to be primarily for legal advice purposes. *See, e.g., City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7, 8-9 (D. Mass. 2000) (document must have been intended to be confidential and made for the purpose of giving or obtaining legal advice to be vested with the attorney-client privilege); *F.C. Cycles Int’l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998) (“What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.”) (citing *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994)).

Even when an employer retains counsel to conduct an investigation in response to a threat of litigation, the company waives any attorney-client privilege when it asserts that the prompt investigation of alleged misconduct operates as a defense against liability, as will be done in response to most claims of harassment. *See, e.g., Sinclair Oil Corp. v. Texaco, Inc.*, 208 F.R.D. 329 (N.D. Okla. 2002) (privilege waived when asserting party files suit or asserts affirmative defense, when the asserting party put protected information at issue by making it relevant to the case or if applying privilege would deny the opposing party access to information that was vital to the opposing party's defense); *Vardon Golf Co., v. Karsten Mfg. Corp.*, 213 F.R.D. 528 (N.D. Ill. 2003) (attorney voluntarily disclosed selected portions of privileged communications, including letters between the attorney and the client, in his petition to the Seventh Circuit without placing them under seal for *in camera* inspection and therefore waived the attorney-client privilege to all documents of the same subject matter); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084 (D.N.J. 1996) (company that used results of the sex harassment investigation conducted by its attorney as a defense was forced to produce "all of the underlying evidence" that reveals to the plaintiff the "nature and scope of the investigation" including otherwise privileged attorney-client information); *Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660 (D. Colo. 1994) (attorney's notes during investigation of harassment were work product protected from discovery in anticipation of litigation unless employer relied upon contents of interviews to support its defense); *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1999) (plaintiff's motion to compel discovery of investigation by defense counsel granted because written statements were related to affirmative defense asserted by the defendant against the plaintiff's sexual harassment claims).

An employer asserting that it properly investigated a complaint and responded appropriately to the findings of its investigation places the details of the investigation directly at issue and cannot claim attorney-client privilege to preclude any scrutiny of the investigation. Thus, employer and counsel must be prepared for the possibility that notes, documents, and records generated during an investigation will have to be disclosed in discovery. An employer would be well advised to adopt a strategy to use documentation of the investigation to demonstrate its reasonable investigation and prompt remedial action, and not to hide the process or results.

In some cases, plaintiffs may be able to take the deposition of the defense counsel who conducted the internal workplace investigation. *See Harding v. Dana Transport., Inc.*, 914 F. Supp. at 1091 (employer waived privilege by asserting affirmative defense of good faith investigation and combining role of attorney and investigator); *Jones v. Scientific Colors, Inc.*, 2001 U.S. Dist. LEXIS 10633 (N.D. Ill. July 9, 2001) (when attorney initiated and directed undercover investigation presented by employer as reasonable measure to prevent and correct harassment, nature and scope of investigation placed at issue; attorney in capacity as investigator must give deposition regarding scope and findings of investigation). *But see Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660 (D. Colo. 1994) (denying motion to compel production of counsel's investigatory notes and deposition of counsel regarding the investigation); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 422 and n.6 (7th Cir. 1989) (attorney's investigative notes not discoverable under work-product privilege; attorney testified at trial, and investigative notes and report admitted into evidence).

#### IV. CONDUCTING AN EFFECTIVE INVESTIGATION

The workplace investigation should be conducted carefully and effectively if an employer hopes to remedy the immediate problem, keep employees' confidence in the process, and lay the groundwork for an effective defense to a legal claim. There are several fundamental principles that an employer should consider when conducting an investigation.

##### A. Confidentiality

Confidentiality is essential to an effective investigation. Counsel must keep all investigation records separate from other corporate materials. A few tips include:

- § Allow people access to the file only on a "need to know" basis;
- § Be careful not to put documents into the personnel files of any party;
- § Handle the investigation of a complaint on a "need to know" basis — that is, make sure that facts and opinions are discussed only with individuals who must be involved in the investigation or in deciding the outcome;
- § Do not promise absolute confidentiality when interviewing witnesses or the complaining employee;
- § Where possible, avoid using the accused party's name — for example, in questioning a witness about Mary's complaint that Bill sexually harassed her, instead of asking, "Did you see Bill touch Mary?" you might ask, "Have you seen anyone at work touch Mary in a way that made her feel uncomfortable?"; and
- § Assume that everything said or written in investigation may be discoverable.

##### B. Fairness of Process

Fairness is key to an effective workplace investigation. Typically, an investigation entails interviewing involved parties and any witnesses, and reviewing relevant documents. The investigation must treat both complaining employees and employees accused of misconduct in a fair and equitable manner. At a minimum, this requires that an employer not retaliate against any employee who participates in this investigation process.

A fair investigation ensures that the employee has a meaningful opportunity to tell his or her side of the story and to influence the employer's decision. *See, e.g., Waters v. Churchill*, 511 U.S. 661 (1994) (focusing attention on reasonableness of employer's investigation of statements made and whether factual conclusions as to what was said were reached in good faith); *Olivarez v. Centura Health Corp.*, 203 F. Supp. 2d 1218 (D. Colo. 2002) (reviewing pertinent documentation, interviewing complainant, three managers, and two employees before reaching conclusion of no harassment was thorough and fair investigation); *Fuller v. City of Oakland*, 47

F.3d 1522 (9th Cir. 1995) (criticizing sexual harassment investigation that failed to promptly interview accused, to attempt to corroborate accused's explanation, to interview witness for complainant, or to credit complainant's evidence); *Kestenbaum v. Pennzoil Co.*, 760 P.2d 280 (N.M. 1988) (plaintiff's verdict in wrongful termination suit upheld based upon summary and ineffective investigation of false sexual harassment charges).

An employer may need to allow employees to have union representatives present during the investigation. See *IBM Corp.*, 341 N.L.R.B. No. 148 (2004) (holding that a non-union employee is not entitled to the presence of a coworker during any investigatory interview of the employee's charges, *overruling Epilepsy Foundation of N.E. Ohio*, 331 N.L.R.B. 676 (2000), *enf'd. in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002)). Indeed, unions also have an obligation to investigate allegations of wrongdoing or discrimination against their members, arising out of their fiduciary duty to fairly represent them in their grievances. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *McConney v. Great Atl. & Pac. Tea Co.*, 455 F. Supp. 1143 (E.D. Pa. 1978). An inadequate investigation can be the basis for a claim that a union has breached the duty of fair representation. See *Jackson v. T & N Van Serv.*, 83 Fair Empl. Prac. Cas. (BNA) 137 (E.D. Pa. 2000); *Armstrong v. Chrysler Corp.*, 972 F. Supp. 1085, 1089-90 (E.D. Mich. 1997). *But see Olsen v. United Parcel Serv.*, 892 F.2d 1290, 1296 (7th Cir. 1990) (unions "always retain the authority to exercise an independent judgment on the merits of each petition, subject only to the requirements of 'complete good faith and honesty'" (citation omitted)).

In addition, the employer should allow the accused the opportunity to respond to any allegations. Contrast investigations found adequate in *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (investigators confronted alleged harasser with complaint and questioned him about allegations), and *Foster v. Township of Hillside*, 780 F. Supp. 1026 (D.N.J. 1992), *aff'd without op.*, 977 F.2d 567 (3d Cir. 1992) (investigator informed alleged harasser in detail about complaint to allow alleged harasser to respond to allegations), with *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000) (investigation inadequate where investigator failed to ask whether accused made sexually harassing remarks, had never previously investigated a sexual harassment claim, investigation focused on complaints about management style and ignored allegations of sexual harassment).

An employer also should be sure to interview any other witnesses who might have relevant information. See, e.g., *Foster v. Township of Hillside*, 780 F. Supp. 1026, 1032 (D.N.J. 1992) (investigator met individually with each woman whom alleged harasser supervised); *Giordano v. William Paterson Coll.*, 804 F. Supp. 637, 643 (D.N.J. 1992) (investigator interviewed twenty-one employees who may have known about alleged misconduct); *EEOC v. Mt. Vernon Mills, Inc.*, 58 Fair Empl. Prac. (BNA) 73 (N.D. Ga. 1992) (investigator interviewed all participants and witnesses related to alleged discrimination); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978) (company failed to investigate plaintiff's complaints of sex discrimination other than to call the accused for verification or denial).

### **C. *Determination, Report, and Follow-Up***

The decision-maker in any workplace investigation should review all relevant evidence, not only the investigator's summary report, when evaluating an employee's complaint. Indeed, a witness's credibility cannot be judged under any objective, rote formula, and no single factor is ever determinative. A determination will more likely be viewed as legitimate if the investigation is deemed complete, including any appropriate follow-up with second interviews with the complainant or others after interviews or other evidence raises new questions. *See College-Town, Div. of Interco, Inc. v. Mass. Comm'n Against Discrimination*, 508 N.E.2d 587 (Mass. 1987) (inadequate investigation absent follow-up interview with complainant after interview with alleged harasser); *Broom v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989) (same); *Marsh v. Digital Equip. Corp.*, 675 F. Supp. 1186, 1191-97 (D. Ariz. 1987) (investigation inadequate absent attempt to corroborate or disprove allegations and no follow-up); *see also EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000) (employer who concludes that employee/witness knowingly lied during internal investigation may legitimately terminate employee).

In general, the result of a workplace investigation should be documented in a written report. The result should be communicated to the complainant, the accused, and possibly, to key witnesses. Employers would be well advised to remind parties and witnesses about confidentiality and possible defamation and privacy actions for breaches thereof, and should retrieve any documents distributed to those who "needed to know." Finally, employers should follow up with the relevant parties every couple of months for a reasonable period of time, or as otherwise necessary and appropriate.

## **V. MISCELLANEOUS ISSUES**

### **A. *Polygraph Tests***

There may be situations where an employer might seek to use polygraph testing in a workplace investigation. An employer desiring to use such a test should be aware of the significant limitations on the practice. The Employee Polygraph Protection Act of 1998 ("EPPA"), 29 U.S.C. § 2001 *et seq.*, prohibits lie detector tests on employees except in certain narrow circumstances and establishes rights for employees in the administration of lie detector tests, including polygraphs, by private employers. EPPA also punishes violations with up to \$10,000 fines, and remedies violations with reinstatement and back pay for aggrieved individuals.

There are three exemptions from EPPA's broad prohibition. First, a private employer can request an employee to submit to a polygraph if "the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage." 29 U.S.C. §2006(d)(1). Second, polygraphs may be given to potential employees by any private employer whose primary business purpose consists of providing armored cars, security systems,

and security personnel. *See* 29 U.S.C. §20069(e). Third, employers who are “authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of Section 202 of the Controlled Substances Act (21 U.S.C. §812)” may use polygraph testing. 29 U.S.C. §2006(f).

Even when a private employer can proceed pursuant to an exemption, there are still rules governing the use of polygraphs, such as the protections guaranteed in Section 2007(b). These rights include reasonable written notice of the date, time, and location of the test and of the examinee’s right to obtain and consult with legal counsel or an employee representative before each phase of the test. In addition, a polygraph exam cannot be the sole basis for an adverse employment decision. *See* 29 U.S.C. §2007(a); *Mennen v. Easter Stores*, 951 F. Supp. 838 (N.D. Iowa 1997) (grocery store improperly demoted employee from manager to stock clerk based on suspected theft absent additional evidence beyond polygraph exam); *Lyle v. Mercy Hosp. Anderson*, 876 F. Supp. 157, 161 (S.D. Ohio 1995) (hospital improperly terminated employee based on his refusal to take a polygraph exam).

Finally, many states also prohibit lie detector tests in the workplace, including:

- § *Alaska Stat. §23.10.037;*
- § *Cal. Lab. Code §432.2(a)-(b);*
- § *Conn. Gen. Stat. §31-51g;*
- § *Del. Code Ann. tit. 19, §704(a)-(e);*
- § *D.C. Code Ann. §§32-901-03;*
- § *Idaho Code §44-903;*
- § *Iowa Code §730.4(1)-(2);*
- § *Me. Rev. Stat. Ann. tit. 32 §7166;*
- § *Mass. Gen. Laws Ann. ch. 149, §19B;*
- § *Mich. Comp. Laws Ann. §§37.201-09;*
- § *Minn. Stat. Ann. §181.75(1)-(4);*
- § *Mont. Code Ann. §39-2-304;*
- § *N.J. Stat. Ann. 2C: §40A-1;*
- § *Or. Rev. Stat. §659.840;*
- § *18 Pa. Cons. Stat. §7321(a)-(b);*
- § *R.I. Gen. Laws §§28-6.1-1 - 6.1-4;*
- § *Vt. Stat. Ann. tit. 21, §§494 - 494e;*
- § *Wash. Rev. Code Ann. §49.44.120;*
- § *W. Va. Code §21-5-5b; and*
- § *Wis. Stat. §111.31(4).*

## **B. *Obtaining Consumer Reports***

Some workplace investigations call for using a consumer report. An employer wishing to obtain a consumer report from a consumer reporting agency must certify to that agency that it intends to use the report for employment purposes and that it will follow the procedures under Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §1681 *et seq.*, if the report is later used as a basis for an adverse employment decision. *See* 15 U.S.C. §1681b(b)(1).

FCRA procedures include the following: (1) providing notice to the employee prior to the investigation; (2) obtaining the employee’s consent to the investigation; (3) providing a description of the nature and scope of the proposed investigation at the employee’s request; (4) potentially releasing the full, unredacted investigative report to the employee; and (5) giving notice to the employee of his or her right under FCRA before taking any adverse employment action.

The Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) clarifies that an investigation into suspected employee misconduct conducted by a third party would not be considered a “consumer report” for purposes of FCRA. Prior to FACTA, an opinion letter from the Fair Trade Commission (“FTC”), the “Vail letter,” had concluded that third parties (e.g., law firms and consultants) used by employers to investigate employee misconduct were consumer reporting agencies under FCRA, and thus the reports they furnished to employers were consumer reports subject to FCRA’s disclosure and consent requirements above. *See* FTC Staff Opinion Letter issued on April 5, 1999, by Staff Attorney Christopher W. Keller, available at [www.ftc.gov/os/statutes/fcra/vail.htm](http://www.ftc.gov/os/statutes/fcra/vail.htm). Being required to provide advance notice to and obtain the consent of an employee suspected of sexual harassment, for example, before conducting an investigation obviously hampered the ability of employers to appropriately respond to possible employee misconduct. FACTA largely resolved this quandary for employers. With FACTA, an employer can enlist the services of a third party to investigate claims of sexual harassment or other employee misconduct without obtaining the prior consent of the accused. Also, if the employer decides to take an adverse action against the accused based on information in the third party report, the employer need only provide the accused with a summary of the “nature and substance” of the report. An employer is no longer required to provide a copy of the report with sources of information obtained in the report (e.g., names of witnesses interviewed).

Employers cannot obtain an investigative report unless, within three days of requesting it, the employer informs the targeted employee that it is seeking such a report and informs the employee that he or she has the right to ask for more information about the nature and scope of the investigation. Upon request, consumer reporting agencies must disclose to the targeted employee “all information” in the consumer’s file. Before an employer may take any “adverse action” based upon a consumer report, the employee must receive a copy of the report and a statement of his or her rights to dispute inaccuracies.

Violation of FCRA can expose an employer to liability for actual damages, punitive damages, and costs, including reasonable attorneys’ fees. *See* 15 U.S.C. § 1681(n). Violations of FCRA, however, may not be used to support wrongful discharge claims based upon a

violation of public policy. *See Salazar v. Golden State Warriors*, 124 F. Supp.2d 1155 (N.D. Cal. 2000).

## **VI. CONCLUSION**

Employers have turned to workplace investigations with increasing frequency to address employee misconduct and guard against liability. As effective as these investigations can be, they must be implemented with attention to potential pitfalls. Fortunately, it is generally possible to anticipate these pitfalls and plan for them. When the employer does so, the investigation should accomplish its objectives of fixing any problem, keeping employees happy and confident in the process, and ensuring that the employer is cleared of liability.