

# **Best Practices for Internal Investigations**

*What We Can Learn from NFL Headlines*  
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Presented by

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# On the One Hand: Effective Workplace Investigations

“The Board believes that the hearing record shows that the Company conducted a fair and thorough investigation and that [the Investigator] conducted himself in a professional and objective manner”

# On the Other Hand: The NFL in the News



“NFL Ignores Ball Deflation Science at  
New England Patriots’ Expense”

- NY Times



“NFL Deflated the Truth – And Owes  
the Court a Correction”

- Washington Post



“True Scandal of Deflategate Lies in  
NFL’s Behavior”

- NY Times

# Effective Workplace Investigations



# Preparation

- Good policies
- Good training
- Consistent execution



## Responding to Allegations

- Identify with specificity
- Decide whether/what to investigate



## Investigating

- Decide who will investigate
- Review policies
- Review documentary evidence
- Interview critical witnesses
- Document everything
- Maintain confidentiality



## Take Appropriate Corrective Action, If Necessary

# *Responding to Allegations:*

## Complaints come in many forms

- Written, oral, from the complainant, a third party, anonymous source . . .
- Criminal charges by law enforcement

## How do you handle?

- “I’m just telling you this to get it off my chest – I do not want you to investigate it . . .”
- “I don’t want anyone to get in any trouble because I complained.”
- “Please don’t tell anyone about this. I don’t want to lose my job and, even if I don’t, I worry that I will be treated differently.”

## What do your Supervisors/Managers know?

# NFL Mistakes: *Identifying/Responding to Allegations*

"Dolphins O-Line Coach Was  
Aware Of, Participated In  
Harassment"

- Deadspin.com



"NFL Personal Conduct Policy requires all players and club employees to report 'any incident that may be a violation of this policy, and, particularly when any conduct results in an arrest or other criminal charge'"

- Robert Mueller Report

# *Conducting the Investigation*

## **First Question: Is an investigation necessary?**

- Are key facts in dispute?
- Is this a systemic issue?
- Is there a legal obligation or business reason to investigate?
- Would the conduct violate the employer's rules or code of conduct/ethics?
- Do the allegations call for an organizational assessment?

## **If you determine that no investigation is necessary:**

- Document the reasons why no investigation was conducted
- Follow-up with the complainant
- Encourage the complainant to report any new or additional information

## **If you determine that an investigation is necessary, commence the investigation PROMPTLY**

- Don't set unrealistic expectations!



# *NFL Mistakes: Delay*



"NFL: 'Deflategate' investigation to be finished in 2-3 days"

- Comcast SportsNet (01/20/2015)

"League statement suggests a long Deflategate investigation"

- NBC SportsTalk (01/23/2015)

"Umm Is The NFL and Roger Goodell Ever Going To Address #Deflategate Or Just Pretend It Never Happened?"

- Barstool Sports (03/17/2015)



# *Define Scope/Goals of Investigation*

## **Pre-Investigation considerations:**

- Define the SCOPE/OBJECTIVES of the investigation
- Determine if there is a need for INTERIM MEASURES
- Assess any PRIVILEGE/PRIVACY considerations
- Are there any LITIGATION HOLD obligations
- Will there be UNION involvement
- Determine the need for any SUBJECT MATTER EXPERTS
- Any immediate DOCUMENT RETENTION concerns

**Be prepared to defend the investigation, including the choice of investigator and the process that was followed**

# *Selecting Proper Investigator(s)*

Impartiality is Key!

Investigator must be impartial and viewed as impartial

- By participants
- By those on the outside looking in

Avoid any actual or perceived conflict of interest

- Personal relationships
- Witnesses
- Same chain of command as complainant or alleged wrongdoer

# *NFL Mistakes: Perceived Bias*

"Report: Former Jets employee in charge of Deflategate investigation  
NFL VP of Game Operations, Mike Kensil, is in charge of the Deflategate investigation, but has ties to the Patriots division rival, the New York Jets."

- Sports Illustrated



# *NFL Mistakes: Perceived Bias*



# NFL Mistakes: Perceived Bias



On May 6, 2015, the findings of the Pash/Wells “**independent**” investigation were made public

-- Hon. Richard M. Berman, U.S.D.J.



“[The Report] was buttressed by a lengthy scientific report prepared by **Exponent**, a consulting firm with **dubious bona fides**, having disputed the dangers of secondhand smoke and asbestos. Exponent was a hired gun. . .”

-- NY Times

# *Review Relevant Documents*

## **Review ALL potentially relevant documents:**

- Documents provided by (or referenced by) the complainant, the accused or other witnesses
- Written policies, procedures, codes of conduct/ethics
- Corporate/Personnel files
- Prior relevant complaints and investigation files
- E-mails, texts and voice mails

## **Be prepared to:**

- Preserve evidence
- Understand computer system(s), retention policies and location of data

# *NFL Mistakes: Failure to Review*



"Our investigation identified a number of investigative steps that the league did not take to acquire additional information about what occurred inside the elevator."

- Robert Mueller Report

*The Associated Press reported that a law enforcement official had, in fact, sent a DVD copy of the surveillance video to the NFL. The official said that he received a voicemail confirmation of receipt in April from an NFL number.*



# *NFL Mistakes: Failure to Review*



# *Documenting the Investigation*

## Documenting the investigation and witness interviews

- Describe the investigative process , procedures and each step of the investigation
- Identify relevant policies, guidelines and other applicable documents
- Reference directives or warnings given to witness at the outset
- If using handwritten notes or summary memorandum, consider confirming accuracy with witness and/or securing witness' signature

## Summarize FACTS learned during the investigation

- Attach documents the investigator found relevant and/or relied upon
- Reach conclusions only on the evidence obtained during the investigation
- Goal is to create a reliable and complete record of the evidence that the investigator gathered and relied upon
- Assume investigation materials will be discoverable

## The investigation report should not contain legal conclusions

## The report should be distributed only to those individuals responsible for making a final determination as to necessary/remedial action

# NFL Mistakes: Lack of Detail

## November 28, 2014 Ray Rice Arbitration Decision

- “The Commissioner’s notes are not detailed and do not contain any verbatim quotes of what Rice said happened in the elevator.”
- More persuasive to me are [the NFLPA lawyer]’s more detailed and careful notes, which emphasize the exact words Rice said with quotation marks. The following are the relevant part of [her] notes, written with the emphasis and quotation marks as they appear in the original:
  - *Exchanged words/arguing @ elevators*
  - *Ray thinks Janay “sort of slapped @ him”*
    - *Entered elevator, still arguing*
  - *Janay moved toward him, “sort of slapped or swung”*
    - *“And then I hit her.”*
  - *She fell, thinks hit head on railing*
    - *Seemed “knocked out”*

# *NFL Mistakes: Lack of Detail*

Dr. Roderick MacKinnon

*Recipient of the 2003 Nobel Prize in Chemistry*

“The major uncertainty in the Wells Report scientific analysis lies in the pregame measurement of ball pressures: there were two gauges that differ by approximately 0.4 psi, it is not certain which was used in the pregame measurement, and the data were not recorded.”



# *Maintaining Confidentiality*



**Request that witnesses not interfere with the investigative process**



**Safeguard confidentiality of investigation without guaranteeing anonymity or complete confidentiality**



## **NLRB Position:**

- No blanket confidentiality requirements
- Document reasons for confidentiality request

# *NFL Mistakes: Leaks*

Bob Kravitz  
(@bkravitz)

- “Breaking: A league source tells me the NFL is investigating the possibility the Patriots deflated footballs Sunday night. More to come.”

Comcast  
SportsNet

- “Strong NFL link to recent 'Deflategate' leak”

Chris Mortensen  
(@mortreport)

- “NFL has found that 11 of the Patriots footballs used in Sunday’s AFC title game were under-inflated by 2 lbs each, per league sources.”

Dailymail.com

- “Only ONE of Patriots’ 12 Deflategate balls was significantly under claims new leak as mysterious ballboy who had them revealed to be ‘elderly man’ on bathroom break.”



# *Taking Corrective Action*

## **Corrective action should be:**

- Prompt and effective
- Designed to stop the conduct

## **If complaint is substantiated:**

- Some level of corrective action is likely necessary
- Follow up with complainant periodically
- Prevent retaliation

**Require additional review of future discipline or negative employee evaluations concerning the Complainant and the Target**



# *NFL Mistakes: Insufficient Action After Poor Investigation*



"Outrage over Ray Rice's 2-game ban for 'knocking out' wife"  
- New York Post

"Goodell fails brutally with two-game suspension for scary Ray Rice"

- CBSSports.com

"Roger Goodell admits he didn't get Ray Rice suspension right, announces new strict policy on domestic violence"

-Yahoo Sports

# *Common Mistakes in Workplace Investigations*

## Common mistakes include:

- Prematurely jumping to conclusions or conducting a “sham” investigation
- Allowing management to improperly influence the investigation
- Using an investigator who lacks objectivity and impartiality
- Delaying the investigation.
- Allowing personal knowledge/reputation to influence the investigation
- Excluding potential witnesses or ignoring potentially relevant documents
- Failing to protect against retaliation
- Poor or inadequate documentation
- Accepting conclusions as fact
- Breaching confidentiality
- Making a decision in a vacuum -- without the benefit of information and documents that are important to the proper consideration and resolution of the complaint

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