

## Compliance Today – September 2020

# Dos and don'ts of internal investigations for healthcare organizations

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In December 2017, a nurse practitioner reported that she smelled alcohol on a physician's breath during work. The physician was questioned about the incident and placed on an administrative leave pending an evaluation for alcohol abuse through the state medical association. The physician was subsequently diagnosed with alcohol use disorder, completed a treatment program, and returned to work subject to a mandatory five-year monitoring program.<sup>[1]</sup>

The healthcare organization's response seems reasonable, right? An Indiana jury disagreed and awarded \$4.75 million to the physician in her ensuing lawsuit against a St. Vincent hospital and medical practice for defamation, tortious interference with an employment relationship, and related claims in January 2020.<sup>[2]</sup>

A postmortem of publicly available information about the investigation that started this chain of events can help *all* healthcare organizations understand how to identify and avoid potential compliance issues related to internal investigations.

### **Don't: Deviate from internal policies and practices**

Every healthcare organization should have clear, written policies for receiving, investigating, and responding to complaints from and about workers. In fact, federal<sup>[3]</sup> and some state civil rights laws require covered healthcare organization employers to maintain written policies for receiving and investigating complaints of harassment, retaliation, and discrimination.<sup>[4]</sup> Whether or not it is legally mandated, maintaining and following written procedures for handling complaints is recommended for workplace morale and consistency. It is also advisable, and in some cases mandated by state law,<sup>[5]</sup> that healthcare employers train all employees to promptly report complaints to management, a compliance officer, or human resources.

In the *Denman v. St. Vincent* case, written procedures existed but were not followed. According to hospital policy, physicians suspected of being under the influence of alcohol were supposed to be *immediately* removed from duty and requested to submit to blood testing.<sup>[6]</sup> However, the nurse practitioner waited until the next day to report her suspicions to anyone, on the ground that she was allegedly unaware of the policy that required her to immediately report her suspicions.<sup>[7]</sup> St. Vincent allegedly waited another two days before it disclosed the nurse practitioner's report to the physician, at which time the physician was not asked to submit to testing. At trial, the physician successfully argued that St. Vincent violated its internal policies by delaying its investigation until it was too late for her to be able to clear her name through blood testing.

The *Denman v. St. Vincent* case demonstrates the potential pitfalls of failing to follow internal written procedures when conducting investigations. In reality, it may not always be possible to follow existing policies to the letter.

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Deviating from normal policies and procedures for conducting investigations should be a rare occurrence and justified by the particular circumstances. When deviating from standard internal policies and procedures, healthcare organizations should be sure to document the reasons for the deviation.

While it is critical for healthcare organizations to follow their internal procedures, beware that the reverse does not hold true—healthcare organizations are not excused from investigating complaints because the reporting party failed to follow internal procedures. For example: A healthcare organization’s written anti-harassment policy states that workers must use a complaint form to submit complaints. A hospital technician verbally complains to his supervisor that a physician touched him inappropriately but refuses to fill out a complaint form. The healthcare organization cannot refuse to investigate the hospital technician’s complaint because he would not fill out a complaint form per the written policy.

## **Do: Become familiar with all applicable procedural requirements**

Healthcare organizations are subject to a variety of regulatory authorities. It is critical that healthcare organizations assess which authorities, rules, regulations, and guidelines apply to the matter at issue *before* commencing any investigation. For instance, if physicians are the subject of an investigation, they may be entitled to certain rights above and beyond those set forth in an employee handbook. In particular, accreditation standards and some state laws require healthcare organizations to have peer review processes in place for regulation of physicians.<sup>[8]</sup> Failure to respect those peer review rights potentially exposes healthcare organizations to significant liability, as demonstrated by the *Denman v. St. Vincent* case. In that case, the physician alleged that she was not afforded a peer review process and her statutory right to participate in a hearing prior to having her privileges restricted, which damaged and harmed her reputation and career.

How can healthcare organizations determine which authorities should guide their investigatory procedures? It depends on the nature of the complaint, the parties who are involved, and other factors. Consider the following questions:

- **Does the complaint involve harassment, discrimination, and/or retaliation?** Healthcare organizations that are subject to federal and/or state antidiscrimination and harassment laws are obligated to conduct prompt, neutral, and thorough investigations. That does not mean healthcare organizations have the duty to only investigate complaints involving employees. Employment relationships in the healthcare industry are notoriously complex. Physicians are often not directly employed by hospitals, and the use of temporary and agency workers is common in the healthcare industry. While those workers may not be technically employed by a healthcare organization, the healthcare organization may nonetheless be deemed an employer for purposes of civil rights laws. In the *Denman v. St. Vincent* case, although the physician was not employed by the hospital, she sued the hospital *and* the medical practice that was her employer.
- **Does the complaint involve bullying?** Bullying is a common characteristic in hierarchical and predominantly male industries, including healthcare. While bullying is not against the law, healthcare organization employers should be aware of bullying as a gateway to prohibited conduct. In 2018, a Boston jury awarded \$28 million against Brigham and Women’s Hospital to a nurse who alleged she was investigated for alleged poor patient care in retaliation for her complaints about a physician’s verbally abusive conduct toward a coworker.<sup>[9]</sup> Because bullying can often lead to claims of discrimination, harassment, and/or retaliation, healthcare organizations should take concerns about abusive conduct very seriously.
- **Is the healthcare organization covered by Title IX?**<sup>[10]</sup> Title IX prohibits discrimination based on sex in education programs and activities in federally funded educational institutions and requires covered

entities to investigate complaints. Healthcare organizations that fall under the Title IX umbrella and fail to follow Title IX guidelines and procedures may be penalized by the Department of Education. In September 2019, the Department of Education imposed a \$4.5 million fine against Michigan State University for its “‘systemic failure’” to investigate patients’ complaints of sexual abuse against gymnastics doctor Larry Nassar.<sup>[11]</sup>

- **Are any of the parties represented by a union?** Healthcare workers are more likely to be represented by unions than workers in many other private industries.<sup>[12]</sup> According to the Bureau of Labor Statistics, approximately 20% of healthcare workers in the United States are members of a labor union. Employees who are covered by a collective bargaining agreement may have certain rights in an investigation, such as having representation at meetings with the investigator. Failure to adhere to collective bargaining agreement procedures—especially with respect to a complaining or responding party—may result in grievances, reversal of employment decisions, and/or imposition of fines and penalties.
- **Was workplace violence by a patient alleged?** According to the United States Department of Labor, healthcare workers are more than four times as likely to suffer workplace violence than other private employees.<sup>[13]</sup> If a complaint involves workplace violence, state laws may require investigations and reporting to regulatory agencies. For example, California law requires such incidents to be investigated and reported to the state agency governing industrial relations.<sup>[14]</sup>

## Don’t: Rush to judgment

For any investigation to be credible, the rights of all parties should be carefully considered before any employment decisions are made. In the *Denman v. St. Vincent* case, the physician denied using alcohol on the day in question but was nonetheless required to submit to an alcohol abuse evaluation and treatment in order to return to work—all within a matter of days.<sup>[15]</sup> However, at trial, the jury agreed that the accusation against the physician was false, the physician had been defamed, and the healthcare organization should not have acted on the nurse practitioner’s unsubstantiated accusation.

While it is good practice to promptly investigate complaints, how can healthcare organizations also conduct investigations in a way that protects the rights of all parties?

- **The investigation should be as thorough as necessary.** When conducting an investigation, all pertinent, nonduplicative evidence should be evaluated. When investigating “she said, she said” situations, such as in the *Denman v. St. Vincent* case, greater weight should be placed on evidence that can be corroborated by documents or disinterested third parties. For example, did anyone else observe signs of alcohol use by the physician during the shift in question? Were there any photographs or recordings that corroborated the nurse practitioner’s suspicions?
- **The investigation should be conducted by an impartial and knowledgeable investigator.** The type of investigator that should be used depends on the type of investigation. The U.S. Equal Employment Opportunity Commission’s guidelines on conducting harassment investigations recommend that employers “ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts” and “be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.”<sup>[16]</sup> In some cases, it is advisable to retain a neutral outside investigator to conduct an investigation. Although trained internal investigators (such as human resources professionals) are capable of performing investigations, it is sometimes prudent to retain external investigators (such as licensed attorneys or private investigators) to avoid the appearance of bias by internal investigators—

especially where upper management has been accused of misconduct or highly sensitive allegations are involved. Another advantage of retaining a licensed attorney to conduct an investigation is that it gives the investigation the protection of the attorney-client privilege (unless and until the privilege is waived or a court orders disclosure). In cases of alleged financial misconduct, it may be necessary to retain forensic experts to conduct the investigation.

- **Give the accused party an adequate opportunity to respond to allegations.** That means interviewing the accused party, allowing the accused party to present evidence in their defense, interviewing witnesses identified by the accused party, and considering evidence and arguments made by the accused party. These basic due process protections lend credibility to any type of investigation.
- **Document everything.** Investigators should create and maintain notes from witness interviews, document their bases for making credibility determinations, and record the investigatory process, including all efforts to talk to witnesses. Proper documentation is critical when defending against future lawsuits or labor grievances.

Internal investigations can present tricky compliance issues for healthcare organizations. These issues should be carefully considered *before* launching any investigation for best outcomes.

## Takeaways

- Maintain and consistently follow clear written procedures for receiving and responding to complaints from and about workers.
- The procedural requirements and criteria for selecting investigators to conduct internal investigations vary according to the nature of the issues under investigation.
- Federal and state antidiscrimination, harassment, and retaliation laws require prompt, impartial, and neutral investigations.
- Other laws, such as Title IX; processes, such as peer review; and collective bargaining agreements may affect how investigations should be conducted.
- Always give the responding party an adequate opportunity to respond, and carefully consider the responding party's side of the story before making any employment decisions.

<sup>1</sup> Denman v. St. Vincent's Medical Group Inc. et al., 49D01-1807-PL-026160.

<sup>2</sup> Dave Stafford, "Jury finds against St. Vincent's, awards wrongly accused doctor \$4.75 million," *The Indiana Lawyer*, January 17, 2020, <https://bit.ly/2NIBuCS>.

<sup>3</sup> 42 U.S.C. § 2000e-2.

<sup>4</sup> Burlington Industries Inc. v. Ellerth, 524 US 742 (1998).

<sup>5</sup> Cal. Government Code § 12950.1 (2020).

<sup>6</sup> Alia Paavola, "Indiana physician accused of being intoxicated on job wins \$4.75M defamation suit," *Becker's Hospital Review*, January 28, 2020, <https://bit.ly/2BrTvTj>.

<sup>7</sup> Dave Stafford, "Jury finds against St. Vincent's."

<sup>8</sup> Cal. Business and Professions Code § 805 (2018).

<sup>9</sup> Ayla Ellison, "Nurse awarded \$28M in retaliation suit against Brigham and Women's Hospital," *Becker's Hospital Review*, May 24, 2018, <https://bit.ly/2ZsLvte>.

<sup>10</sup> 20 U.S.C. § 1681 et seq.

<sup>11</sup> Colin Dwyer, "Michigan State University To Pay \$4.5 Million Fine Over Larry Nassar Scandal," NPR, September

5, 2019, <https://n.pr/2YJFU2B>.

**12** “Economic News Release; Table 3: Union affiliation of employed wage and salary workers by occupation and industry,” U.S. Bureau of Labor Statistics, last modified January 22, 2020, <https://bit.ly/2ChIDYk>.

**13** U.S. Department of Labor, Occupational Safety and Health Administration, *Workplace Violence in Healthcare: Understanding the Challenge*, December 2015, <https://bit.ly/3ioeW8L>.

**14** Cal. Labor Code § 6401.8 (2017).

**15** Dave Stafford, “Jury finds against St. Vincent’s.”

**16** U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, June 18, 1999, <https://bit.ly/2YMU08d>.

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