

## Internal Investigations: Lessons from a Litigator

Leigh Campbell Joyce

Legal advice is often highly dependent on the facts unique to each situation. As such, the content of this presentation is not legal advice and is provided for general information purposes only. No attorney-client relationship is created by the use of this content. Any opinions that I express herein are my own and do not necessarily represent the opinions of Baird Holm LLP.

---

---

---

---

---

---

---

---

### What is an internal investigation?



- Formal inquiry
- Before or after violation
- Employee, outside investigator, or attorney
- Fact-finding process

---

---

---

---

---

---

---

---

### The Decision to Investigate

- Who?
- What?
- Where?
- When?
- Why?
- How?

---

---

---

---

---

---

---

---

## The "Who"

- HR Manager
- In-House Legal Counsel
- Outside investigator
  - Attorney vs. Non-Attorney

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>®</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "Who": *Upjohn* Warnings

- Applies when corporate counsel are involved in investigation
- The corporate "Miranda" warning

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>®</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "Who": Cat's Paw Theory



© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>®</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "What"- Scope of Investigation

- Remember written report is likely
- Allow for some flexibility
- Watch out for biases

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "Why": Farragher/Elleerth Defense

- No tangible employment action
- Reasonable care to prevent and correct
- Failure to take advantage of preventative or corrective measures

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM  
ATTORNEYS AT LAW

---

---

---

---

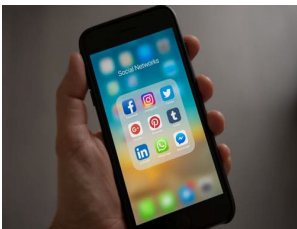
---

---

---

---

## The "How": Addressing Social Media



- Workplace Privacy laws
- Know your state!
- Neb. Rev. Stat. 48-3503; 48-3507
  - "specific information"

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "How": The Duty to Preserve

- Litigation Holds/Preservation of Evidence
  - Instruction to refrain from destroying records
- "Reasonable anticipation of litigation"
  - Examples from case law
  - What about empty threats?
- What if you fail to preserve?

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>SM</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## The "How": Investigation Report

- Thorough, accurate, and unbiased
- Recommend corrective action?
- Discoverability of information



© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>SM</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## Protected Activity

- Anti-retaliation provisions in company policy
- Anti-retaliation provisions in state and federal law
- What constitutes protected activity?
  - Crawford v. Metropolitan Gov't of Nashville (SCOTUS 2009)

© 2022 BAIRD HOLM LLP

**BH** | BAIRD HOLM<sup>SM</sup>  
ATTORNEYS AT LAW

---

---

---

---

---

---

---

---

## Dos and Don'ts

© 2022 BAIRD HOLM LLP



---

---

---

---

---

---

---

## Questions?

Leigh Campbell Joyce

402.636.8328

[lcampbell@bairdholm.com](mailto:lcampbell@bairdholm.com)

© 2022 BAIRD HOLM LLP



---

---

---

---

---

---

---