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Using Trauma-Informed Techniques in Workplace Investigations

By Liz Paris



“Trauma-informed” techniques, depending on who you are talking to, are seen as either a fad or as the holy grail of interviewing techniques. In actuality, trauma-informed interview techniques are just another tool for workplace investigators. And like any tool, sometimes the techniques are helpful, and sometimes inapplicable for a particular interview.

This article explores what a trauma-informed interview looks like, explains why the techniques are effective, and provides examples of how to implement the techniques in a workplace investigation. A quick word on what this article will *not* cover: the science behind trauma-informed interviewing. That fascinating topic is amply covered elsewhere, including in previous issues of this publication.¹

Trauma-Informed Interviewing: Defined

Trauma-informed interviewing is a method of asking questions in a manner that minimizes harm to the interviewee while improving the reliability of the information being provided.

Sometimes people get caught up in what it means to be traumatized. Sometimes they question whether the techniques should be used in all interviews, or only in ones with suspected trauma to the interviewee.

As investigators, it’s important not to attempt to diagnose anyone’s trauma or to dismiss its existence. Keep in mind there are myriad definitions of trauma, some of which have distinctly clinical meanings. The one that might be most helpful is simple and to the point: Trauma is anything that exceeds our ability to cope.² For example, you may feel challenged by a day in which you miss a deadline (or two), forget to pick up dinner, and get into a fight with your significant other. While stressful and tiring, none of those events—either collectively or singularly—is going to exceed your

ability to cope. You might just be in a really bad mood while coping with them.

In contrast, things that exceed the ability to cope shake your world in a very real and lasting way. In the excellent book exploring trauma in veterans, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*,³ psychiatrist and author Bessel van der Kolk notes: “We all want to live in a world that is safe, manageable, and predictable.” While our world is often anything but safe, manageable, and predictable, a traumatic experience often shatters this illusion in ways that have far-reaching implications on the body and the brain.

Most workplace investigators can safely assume the people being interviewed have experienced trauma, in some form, at some point in their lives. In fact, they might be interviewing someone who was traumatized by the very incident being investigated. While the concept of trauma-informed comes up most often in cases involving allegations of very serious sexual harassment, the tech-

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niques can and should be used in many different investigations and interviews. The techniques also apply to all individuals being

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President's Message

I sat down to write my last message several times during the past two weeks, but the only thing that came to mind was the Grateful Dead lyric: "What a long, strange trip it's been." My term as president of AWI was not what I expected it to be, much like the past 18 months have not been what any of us expected them to be.

Part of the reason for my procrastination is that I did not know if AWI would hold an in-person conference in Denver in October. The Annual Conference Committee and AWI leadership struggled, but we came to realize that there is no right decision. The verdict: in-person, with safety precautions of masks and proof of vaccination or test results. Regardless of what we decided, some members will be disappointed and others will be happy—similar to our workplace investigations.

When making our findings, workplace investigators take our emotions out of the equation and draw conclusions based on what is presented to us. Oftentimes that means someone you believe does not deserve to lose a job will do so because of the employer's policies, or someone your gut tells you engaged in misconduct will not be disciplined because there is no feather tipping the scale to establish by a preponderance of the evidence that the alleged misconduct more likely than not occurred. What we do as workplace investigators is not easy and often results in an unpopular result; just ask Robert Mueller (Russia investigation) or Ted Wells (Deflategate).

But despite the pandemic and other challenges, AWI is thriving. This is due to the many members who stepped up during this tumultuous time. I have repeatedly acknowledged most of them in my president's messages, so I won't repeat myself.

As the end of my term approaches, I am thrilled that AWI is on solid ground financially. This is due in large part to the Training Institute Committee's implementation of a virtual institute and the Seminar & Webinar Committee's ability to offer AWI's Basics Seminars in an online format. We have also grown—all the way to 1,675 members.

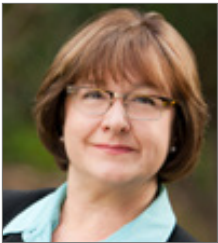
I learned during my unusual term as president of AWI is that it really does take a village. I met so many members during the past two years, via Zoom and phone, who have not only offered to volunteer in some way, but have actually done so. Whether they started a local circle, served as part-time faculty for the Training Institute, or wrote an article for the *AWI Journal*, members have devoted countless hours to ensure the success of the organization. For that, I am truly grateful.

Despite being amid a pandemic, AWI was able to accomplish quite a bit during the past two years—including creating and holding three virtual Training Institutes; creating virtual Basics Seminars; forming a Diversity, Equity & Inclusion Advisory Committee; and many things that occurred behind the scenes, such as revisions to AWI's bylaws and Guiding Principles.

As AWI enters its 12th year, a new group of leaders is emerging. I joined the Board in 2012. As many former AWI board members will tell you, I was reluctant to join and even more reluctant to become an officer, let alone president. I cannot pinpoint what changed that caused me to accept a board nomination, but I believe it was one of the best decisions I ever made. I am honored by the overwhelming support given to me and the organization, not only by closest colleagues, but by members I never met.

Perhaps the people who have been most supportive are AWI's Vice President Eli Makus, and Treasurer, Monica Jeffrey. Eli's calm presence and sage advice have been invaluable, while Monica was often the voice of reason who assured me that I was not overreacting when yet another obstacle came our way. I am confident AWI is left in good hands and will continue to thrive under their leadership.

Karen Kramer
President of the Board of Directors
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Letter From the Editor

Dear Friends and Colleagues,

With apologies to Bob Dylan, the times are not a-changin' quite as quickly as we all hoped they would. Although we are out and about more than last year at this time, the world is not as close to "post-pandemic" as many of us would like.

The work doesn't stop, however, and AWI is here to remind us that we don't need to do it alone. To that end, it is exciting that we've had two successful virtual Training Institutes this year. We have a whole world of AWI colleagues to lean on and learn with—and that's a beautiful silver lining.

This issue begins with Liz Paris's excellent article on using trauma-informed techniques in workplace investigations. Paris doesn't simply explain how to conduct a trauma-informed interview, she defines what it means to be traumatized and provides the context in which this approach will be beneficial. With context established, Paris walks us through the critical components of interviewing a witness who has experienced trauma—from how to set the stage for the interview to how to phrase questions. Her sound, practical approach makes this an article many readers will rely on in future investigations.

COVID-19 continues to sow confusion in workplaces. Some employees are returning to work, and some continue to work from home. Some jurisdictions continue to require masks, while others prohibit such mandates. Some employers are requiring vaccinations as a condition of employment. This confusion in the workplace translates into questions for workplace investigations. We are grateful to Kelly Scott and Pooja S. Nair for their article, "Wear a Mask, Not a Blindfold: Navigating Work Issues during the Pandemic." Their overview of issues faced by California employers will be useful to all who confront COVID-19 related issues in investigations. Of course, remember to stay abreast of rules in your jurisdiction when dealing with these rapidly changing issues.

Speaking of rapidly changing, the amount of information about investigations (not to mention everything else in the universe) available on the internet is constantly expanding—again, like the universe. That makes it a real challenge to sort through it all to find truly useful material. Alexis Eichelberger and Meena Hatab have provided a great head start with their article, "Online Resources for Workplace Investigations." In it, they introduce reliable and mostly free resources that can assist investigators throughout an investigation.

We have our very own National Labor Relations Board guru, Michael Robbins, to thank for explaining the latest on how much information an employer must provide a respondent in an ongoing investigation. Investigators who work with public sector clients will appreciate this clear explanation of the relevance to workplace investigators of *United States Postal Service and Central Michigan Area Local 300*.

Finally, a colossal thank you to Ann Boss, Miles Grillo, and Alezah Trigueros, dedicated Publications Committee members who researched and drew up guidelines for writing book reviews for the *AWI Journal*. Trigueros has gone the extra step and shown us how it's done with her lively review of *The Modern Detective* by Tyler Maroney. Although my practice is certainly not as glamorous as Maroney's sounds, I am looking forward to learning more about his approach to corporate intelligence. If you want to suggest a book to review, or want to write a review for our pages, please get in touch at awijournal@awi.org.

Thanks to all our readers for engaging with the *Journal*. I still can't wait to see your smiling faces in person.

Susan Woolley
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interviewed during an investigation: complainants, respondents, and witnesses.

What Trauma-Informed Is Not

To clarify and acknowledge: The concept of a trauma-informed interview approach has generated controversy. The label has been cited as proof of bias in favor of complainants. There are many assertions in the media, especially related to Title IX sexual assault cases, that trauma-informed approaches are used to excuse inconsistencies complainants might make. This reflects a misunderstanding, and at times a misapplication, of a trauma-informed interview.

Trauma-informed interviewing is not:

- An interview in which no hard questions are asked;
- An excuse to give someone a “free pass” on credibility;
- A way to measure a person’s alleged trauma; or
- “Proof” that something did or did not occur as alleged.

Trauma-informed interviewing is never the end of an investigative inquiry. It is a tool used to get better, more accurate information, while lessening harm to the interviewee. It allows investigators to ask hard questions in a non-accusatory, non-judgmental way. It is also an effective way to build trust and rapport with the interviewee. A sound trauma-informed approach leads to better questions; it is not a means to draw conclusions.

Setting the Stage

Imagine yourself in the shoes of your interviewee: You have been told by your employer that you are expected to talk to an investigator. You likely know little to nothing about the investigative process. You also may not have any idea about the topic of the investigation. You only know you are directed to be present, and you are talking to someone who may or may not believe what you say. That sounds pretty stress-inducing. Think about the added stakes for complainants and respondents: jobs, reputations, and faith in the company and the process are all on the line.

Workplace investigators know they cannot guarantee outcomes or offer empty assurances to anyone. But before they even start asking questions, they can take some small, simple steps to try to make interviewees feel as though they have some control within the investigative process.

Consider doing the following:

- Asking interviewees where they would like to sit;
- Offering them water, coffee, or tea;
- Reminding them they can take a break at any time during the interview; and
- Asking if they are ready to begin.

All these small gestures go a long way toward building trust and rapport with the person being interviewed.

Conducting the Interview

Once the stage has been set for interacting with the interviewee, the questioning can begin. Tone, manner of phrasing the questions, and commitment to listening without interruption are all critical components of the trauma-informed interview.

Tone

Aim for a tone that conveys genuine curiosity in the answers and conveys no judgment. One helpful way to achieve this tone is to be genuinely curious about what the interviewee has to say. Personally, I am terrible at feigning interest. So I take time before each interview to review the case and think of points that genuinely intrigue me. This also goes a long way in building rapport with the interviewee. Who does not want to talk to someone who seems to actually care what you are saying? The “non-judgmental” component of tone comes through most clearly in the manner questions are asked, as described next.

Questioning

Simply rephrasing questions may go a long way in changing the tone of an interview. One of the strongest tools in a trauma-informed toolkit is the phrase “Help me understand...” It seems simple—and it is—but it can have a massive impact on the relationship with an interviewee. “Help me understand” can replace or supplement most “why” and “what” questions.

Trauma-informed also means focusing less on the linear narrative of a person’s story. This can be hard for investigators, most of whom like clear timelines with a beginning, middle, and an end. Trauma-informed means focusing on the details themselves, instead of forcing interviewees into timelines they cannot properly articulate. Initially, focus on getting the details of the event. Asking questions such as “What else happened?” instead of “What happened next?” helps take pressure off interviewees to comport their stories into your desired narrative form. It also helps get needed details. You can always go through the timeline with the interviewee toward the end of the interview to ensure you have a good understanding of the sequence of events.

Allowing for narratives and focusing on open-ended questions are also essential components of a trauma-informed interview. These are techniques most workplace investigators already use, but they are especially important in a trauma-informed interview, as they allow interviewees to tell their own stories their own ways. This approach also helps remove the pressure to convey information in a manner in which they are not comfortable.

Here are some examples of “traditional” interview questions and some trauma-informed alternatives.

Question	Trauma-Informed Alternative
Why didn't you tell anyone what happened?	Did you think about telling anyone? Help me understand your thoughts about telling others.
Why didn't you leave the meeting?	Did you think about leaving the meeting? Help me understand what you were experiencing during the meeting.
Why did you wait so long to file the complaint?	The incident occurred in 2017 and you filed this complaint in 2021. Help me understand why you filed the complaint when you did.
Why didn't you tell the respondent to stop talking?	Help me understand what you were experiencing while the respondent was talking.
What did you do next?	What else happened? Was there anything about the experience you cannot forget?
What was the first thing respondent said that upset you?	Help me understand what led you to file this complaint.

Listening

As noted, trauma-informed interviewers allow interviewees to tell their stories, their own way. This means interruptions should happen rarely, if ever. Think of the times you have been interrupted. Did it feel as though the person had been truly listening to what you were saying? Or did it feel like they were just waiting for a break to jump in? Were you able to maintain your train of thought? Or did the interruption make you stumble a bit and lose track of where you were?

It is inevitable that you will have questions as a person takes you through a narrative. Design a method for flagging those questions that allows you to return to them once a person has completed a narrative. As an example, I will typically use a double asterisk (**) when interviewees say something that requires additional detail or clarification. When they complete the narrative, I thank them and let them know I have a few follow-up questions for them based on the information they provided. I do a quick search of my document and start filling in all the blanks previously marked. This allows me to get needed information while ensuring the interviewee feels respected and heard.

Why Trauma-Informed Works

Trauma-informed interviewing works because it ensures interviewees are treated like human beings—deserving of time and respect. It takes them out of a defensive mindset and conveys that an investigator is there to hear and understand their perspectives.

To illustrate why this interviewing technique is effective, think about a serious fight you had with someone important to you.

Help in Your Hip Pocket

In my early days of conducting trauma-informed interviews, I kept a list of trauma-informed questions at the top of every interview outline and consulted it frequently. Like most things, the questioning eventually became second nature.

A list to help you get started—or reminded of the technique:

- What else happened?
- Tell me more about that.
- Help me understand what you were experiencing while this was occurring.
- Is there anything you cannot forget about the incident?
- Are there any sounds or smells you recall noticing during the incident?
- What was your thought process about who to tell?
- What made you decide to report this?
- What do you think the other party will say during our interview?
- Help me understand...
 - What you were thinking or experiencing when you heard other people outside.
 - Why you filed the complaint when you did.
 - Your decision not to tell anyone about what occurred.

—Liz Paris

Now imagine sitting across from an investigator—a stranger who is going to make findings on that fight—and having to explain what happened.

Picture being peppered with these questions:

- Who started the fight?
- What was the first thing that person said?
- How did you respond to that?
- Then what happened next?
- Wait, I need you to go back and clarify some things. Who else was in the room?
- Why didn't you just walk away?
- Why did you respond to the comment?
- Why didn't you tell anyone about what happened?

This fight was undoubtedly an emotional experience, making it even harder for you to remember the precise order of events, of exactly who said what, and why you made all the choices you

made. It is even more distressing to think about conveying all of this to an investigator who is preparing to make findings as to what occurred and who was at fault.

Now imagine you have to discuss that same fight, but the interviewer asks you the following questions:

- Can you help me understand what happened?
- Please take me through the argument, sharing what you can remember.
- What were you experiencing when the person said that?
- What else happened?
- Help me understand how you were feeling when you said that.
- You said you did not tell anyone what happened. Help me understand why you made that decision.

These questions will likely elicit the same information as the first set of questions. However, note that you would not likely feel pressure to tell the story in the way you think it should be heard.

Making the Change

Incorporating a trauma-based approach to interviewing builds trust with an interviewee, which leads to better and more accurate information being shared. But changing to a trauma-informed approach takes practice, patience with yourself, and patience with the interviewee.

As you consider this approach, check out some of the many resources about the science of trauma, as well as the benefits of approaching interviews with a different mindset.⁴

As investigators, we cannot change the incidents that occurred, nor can we control what steps an employer does or does not take

after our investigation. But we can influence how interviewees feel about the interview process. We can take small, simple steps to ensure the people we meet with feel respected and heard. Trauma-informed interviewing can be one effective way to accomplish that goal.



Liz Paris is a partner and hearing officer director at Van Dermyden Makus Law Corporation, with offices based in Sacramento, San Rafael, and San Diego, California. She regularly uses trauma-informed interview techniques when conducting workplace investigations and Title IX investigations, and serves as a Title IX hearing officer. She is also faculty with the T9 Mastered training program and provides training on implementing trauma-informed techniques in investigations. She can be reached at lp@vmlawcorp.com.

¹See, e.g., Keith Rohman, Brenda Ingram & Cathleen Watkins, *Trauma-Informed Interviewing in Workplace Investigations*, AWI J., July, 2018 and Alec M. Smidt and Richard D. Hart, *Institutional Betrayal: A Primer for Workplace Investigators*, AWI J., July 2018.

²M.J. Horowitz, *Treatments of Psychiatric Disorders: A Task Force Report of the American Psychiatric Association*, American Psychiatric Association Task Force on Treatments of Psychiatric Disorders (ed.) (1989).

³Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, Penguin Books 2014.

⁴See, Rohman, Ingram & Watkins and Smidt & Hart, *supra*, note 1. See also, Center for Substance Abuse Treatment (U.S.), *Trauma-Informed Care in Behavioral Health Services*, Substance Abuse and Mental Health Services Administration (2014); Treatment Improvement Protocol (TIP) Series, No. 57, §1, *A Review of the Literature*. See also, the podcast *Believed* (NPR Dec. 17, 2018) and the film *UNBELIEVABLE* (ProPublica and Netflix, July 18, 2019).

THANK YOU TO OUR 2021 AWI CONFERENCE SPONSORS



Wear a Mask, Not a Blindfold: Navigating Workplace Issues During the Pandemic

By Kelly Scott and Pooja S. Nair

Complying with California's many employment laws is never easy—and having workers physically return to the workplace is no exception. Considerations include not only the ever-changing pandemic restrictions we have all lived with for well over a year, but a myriad of practical and legal issues.

While the recent surge in COVID-19 cases due to the Delta variant has caused some employers to take a step back in reopening, those that choose to go forward with in-person work must be ready to adapt to new regulations. What follows is a discussion of some of the more important issues for California employers and investigators to review while moving forward in reopening our economy.

Guidance on Mandatory Vaccines

Both California's Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC) have issued COVID-19 vaccination guidance that permits employers to require returning employees to receive a vaccine approved by the Food and Drug Administration (FDA), subject to some exceptions and requirements.

The DFEH guidance provides that an employer's mandatory vaccination policies or practices cannot serve to harass or discriminate against employees or applicants based on a characteristic protected by the Fair Employment and Housing Act (FEHA), such as a disability or religious belief. Further, an employer must reasonably accommodate disabilities and sincerely held religious beliefs and engage in an interactive process with the employee to determine those conditions. An accommodation need not be provided if it would impose an undue hardship.

The DFEH guidance provides examples of accommodations for a disability-based objection to the vaccine—including permitting an employee to telecommute and providing on-site safeguards that protect both the employee and co-workers. For a religious objection, the guidance indicates that a reasonable accommodation must eliminate the conflict between the employee's sincerely held religious belief and practices—also known as religious creed—and the vaccine.¹ Examples include job restructuring, job reassignment, and work modifications. Significantly, unless requested by the employee, an accommodation to address a religious belief or practice will not be deemed reasonable if it results in the employee being segregated from other employees or from the public.



However, as with disability-based accommodations, if the employer shows that an accommodation imposes an undue hardship, the employer may exclude the employee from the workplace.

An employer may not retaliate against an employee who requests an accommodation based on a disability or sincerely held religious belief. Further, employers must protect employees from retaliation for engaging in protected activity, such as alleging that the employer's vaccination policy intentionally discriminates based on race, national origin, or another protected characteristic, or has a disparate impact on a protected group. However, if an employee objects to receiving a vaccination solely because of vaccine safety concerns, the FEHA does not require the employer to make an accommodation.²

A reasonable accommodation must eliminate the conflict between an employee's sincerely held religious belief and practices and the vaccine.

An employer administering a vaccination program may ask employees questions related to COVID-19 intended to elicit information about a disability as long as the inquiry is job-related and consistent with business necessity. And an employer requiring an employee to receive a COVID-19 vaccination from a third party may require proof of vaccination. Records regarding vaccination of an employee or applicant must be maintained as confidential medical records. Additionally, the Americans with Disabilities Act requires employers to keep confidential any employee medical information related to a vaccination program, including pre-screening questions.³

Recently, new vaccine mandates for employees have been imposed on both government and private employers. On August 5, 2021, the California Department of Public Health issued a State Public Health Officer order requiring that all workers who provide services or work in hospitals, skilled nursing facilities, and

certain other health care facilities “have their first dose of a one-dose regimen or their second dose of a two-dose regimen by September 30, 2021.”⁴ This order applies to both private and state health care employees. In addition, all California state employees must either show proof of full vaccination or be tested at least once per week, and the state has encouraged all local government and other employers to adopt a similar protocol.

Pandemic Guidelines and Laws Still Apply

Regardless of the increasing number of vaccinations in most locales, employers and investigators should bear in mind certain COVID-19 rules continue to apply to every business. As local guidelines can often exceed state requirements, employers and investigators should begin by checking county restrictions on a given activity through the state’s website summarizing current safety measures.⁵ In addition to complying with local orders, it may be helpful to review the restrictions that apply to certain workplaces and activities, as summarized on the site.

Further, employers must continue to comply with Cal/OSHA’s temporary COVID-19-related emergency regulations, which were revised on June 17, 2021. These regulations apply to most California employees, excluding only employees working from home, worksites that require a single employee who does not have contact with others, and employees covered by Cal/OSHA’s Aerosol Transmissible Diseases standard. The regulations require that employers implement a written COVID-19 Prevention Program (CPP), as well as a training program on compliance for employees. Employers should also designate a workplace infection prevention coordinator who is responsible for these issues, as this person will still have an important role in the post-pandemic workplace. As the regulations have been extended by Governor Newsom’s Executive Orders, these emergency regulations are now set to expire on January 14, 2022, but the rules can be extended if a Certificate of Compliance is transmitted to Office of Administrative Law by January 13, 2022.

Failing to comply with COVID-19 rules creates significant risks for employers. In addition to fines or closure as a result of local or state health department or Cal/OSHA action, lawsuits and federal enforcement actions are possible. As of September 17, 2021, there were 3,571 lawsuits (including 315 class actions filed against employers due to alleged COVID-19 labor and employment violations, 1,050 of them in California.⁶ *USA Today* recently reported hundreds of these lawsuits targeted businesses for allegedly failing to provide adequate personal protective equipment (PPE), not enforcing mask-wearing or temperature checks, and failing to comply with sanitation protocols.⁷ In addition, the federal government announced almost \$4 million in citations arising from 300 OSHA workplace inspections for COVID-19 violations—including failing to implement a written respiratory protection program and failing to properly keep records.⁸ Similarly, recent California cases include allegations that employers failed to provide sufficient PPE or implement social distancing protocols.⁹

In fact, pandemic safety measures and restrictions remain in place in many states. Hawaii, Louisiana, Nevada, New Mexico, Oregon, Puerto Rico, Washington, and the District of Columbia require masks in indoor public places, regardless of vaccination status. California, Connecticut, Illinois, and New York have indoor mask mandates for those who are not vaccinated. These rules for unvaccinated people generally require masks and physical distancing when masks are not possible, as well as requirements for sanitizing surfaces and hands.

Additional employment-law related obligations may also apply. In California, employers must fully compensate employees for time spent undergoing COVID-19 screenings and for protective measures such as temperature checks. Indeed, California law requires that employers compensate employees for off-the-clock work, even if this time is *de minimis*.¹⁰ Additionally, businesses must keep employee responses to COVID-19 screening questions, including temperature checks and questions about symptoms, confidential.

Recent cases include allegations that employers failed to provide sufficient PPE or implement social distancing protocols.

In addition, federal CDC and OSHA guidance require that all employees, regardless of vaccination status, wear masks in public indoor settings in areas of substantial or high transmission except for those who are unable to wear a mask due to a disability or who need a religious accommodation. In addition, OSHA recommends that employers in retail or other public-facing workplaces suggest or require that customers and guests wear masks in areas of substantial or high transmission, defined as 50 or more new cases per 100,000 people over the past week or at least an 8 percent positivity rate.

Rules on notice of exposure to COVID-19 will continue under both the Cal/OSHA regulations and under AB 685, which added Sections 6325 and 6432 to the Labor Code on January 1, 2021. Indeed, until January 1, 2023, employers learning of a worksite COVID-19 exposure must provide written notice of possible exposure to all employees, as well as the employers of subcontracted employees, who were on the same worksite as the qualifying individual within the infectious period.¹¹

Other important continuing requirements are the Cal/OSHA regulations stating that an employer must continue earnings, seniority, and all other rights and benefits for any employee who is avail-

able for work, but who is excluded from the workplace due to a positive COVID-19 test, a local or state isolation order, or during a 14-day period after COVID-19 exposure or a positive test.¹² If an employer can prove that an employee's exposure was not work-related, the regulations do not require that pay or benefits must be continued during any exclusion from the workplace.

And finally, California in-home supportive services providers and employers with 25 or more employees may also be subject to Senate Bill 95, which became effective on March 29, 2021, applies retroactively to January 1, 2021 and is currently slated to remain in place through September 30, 2021. It provides for supplemental paid sick leave (SPSL) for covered employees who are unable to work or telework due to COVID-19.¹³

The Reluctant Employee

In most workplaces, everyone has had the opportunity to be vaccinated. Workers have been informed of all the steps the business has taken to make sure that the workplace will be a safe environment, and many have returned to their workplaces.

Nevertheless, some employees do not want to work on site due to concerns about COVID-19 and the recent Delta surge and are asking to work at home instead. In these situations, the employer first needs to find out why. Employees who cite health issues should be asked for a note from a medical provider. As stated above, those with medical conditions or disabilities that prevent vaccinations and returning to work on any basis at this time may be entitled to reasonable accommodations. Those caring for someone else with health issues may be entitled to a paid or unpaid leave of absence, depending on the circumstances. It is also important to consider all leaves that might apply, such as the recently expanded California Family Rights Act, federal Family Medical Leave Act leave, and Pregnancy Disability Leave. Employers must also consider the use of SPSL and other paid sick leave, as well as accrued vacation time.

Remote Work Post-Pandemic

Whatever the future holds, one thing is certain: Workplaces will not be the same. For the immediate future, it is likely that state and local health departments will continue to require employers to consider allowing employees to work remotely to the extent practical. Further, pandemic restrictions still require that telework should be considered for people over the age of 65, for those who have health conditions, and those who may be pregnant.

But regardless of any COVID-19 restrictions that may apply, it is clear that a significant portion of employees have learned to appreciate working from home. A recent survey by Prudential indicated that 68 percent of U.S. workers would prefer a hybrid workplace model post-pandemic, and 42 percent would seek a different job if their employer refuses to offer long-term remote work options.¹⁴ For many businesses, this will mean that it will

become essential to allow remote work to some degree to remain competitive and retain key employees.

Whatever the circumstances, having an employee work from home does not provide a free pass in terms of wage and hour requirements. Employers are still required to comply with laws requiring them to track hours and issue paychecks¹⁵ and provide meal and rest breaks as mandated.¹⁶

In addition, employers must pay expenses associated with telework, such as cell phone and Wi-Fi. The law provides that employees must be reimbursed "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."¹⁷ In recently filed lawsuits, employees alleged that after their employers switched to remote work during the pandemic, they did not reimburse expenses, including PPE, cell phone, personal computer, and utility costs.¹⁸ These cases are still being decided, but employers continuing to have employees work remotely should make sure to have a written business expense reimbursement policy that specifically addresses all employer telework expenses.

Indeed, from workers' compensation issues to the treatment of an employer's confidential information or trade secrets, all of the employment law concerns that plague an employer's premises continue to apply when employees are working remotely. Claims of discrimination or unfair treatment are also likely where an employer has failed to establish clear standards for telework.

Right of Recall Law

In terms of reopening, recall requirements might apply. Collective bargaining agreements frequently have recall rights provisions. In addition, Los Angeles, Long Beach, San Francisco, Pasadena, San Diego, and Oakland have all established recall ordinances that apply to certain sectors. More recently, Senate Bill 93 added a statewide right of recall intended to assist California workers in sectors that have been especially hard hit by the COVID-19 pandemic. This law, which added Section 2810.8 to the Labor Code and is similar to earlier city COVID-19 ordinances, became effective on April 16, 2021 and will remain in effect through December 31, 2024. SB 93 applies to certain hotels, private clubs, event centers, airport hospitality operations, and providers of janitorial, maintenance, or security services to office, retail, or other commercial buildings.

When rehiring, covered employers must offer jobs to all qualified laid-off workers in order of seniority. Workers who previously held the same or a similar position who have satisfied the six-month service requirement are considered qualified. The rehire offer must be in writing and workers must be given at least five business days to accept or decline it. The written offer must be sent to the last known physical address, email address, and text

message number. An employer may make simultaneous, conditional offers of employment, with the final hiring decision based on seniority. An employer that declines to recall a laid-off employee based on lack of qualifications and instead hires someone other than a laid-off employee must provide the laid-off employee a written notice within 30 days that includes the length of service of those hired in lieu of that recall, along with all the reasons for the decision. The law also applies in certain cases where ownership of an employer changes.

A claim under the new law may only be brought by the California Division of Labor Standards Enforcement. Remedies include reinstatement and damages including front and back pay and the value of lost benefits. In addition, a violation will expose the employer to a civil penalty of \$100 for each employee and liquidated damages in the amount of \$500 for each employee, for each day an employee's rights are violated. The court may also issue preliminary and permanent injunctive relief. SB 93 also imposes liability on any corporate officer or executive who owns or operates an enterprise and employs or exercises control over the wages, hours, or working conditions of any employee.

All or any part of the new law may be waived by a clear and unambiguous valid collective bargaining agreement. California employers subject to the law should take care to abide by its terms; the statute allocates \$6 million to the labor commissioner for staffing resources to implement and enforce the provisions related to rehiring and retaining workers.¹⁹



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⁹ See, e.g., *Booth v. Staples, Inc.*, 2020 WL 7348654 (Cal. Super.) filed Dec. 11, 2020; *McGhee v. Postmates Inc.*, 2020 WL 2405000 (Cal. Super.) filed May 5, 2020.

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¹² CAL. CODE REGS. tit. 8, §3205.

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¹⁵ CAL. LAB. CODE §226.

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¹⁷ CAL. LAB. CODE §2802(a).

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¹⁹ S.B. 93, §2, 2021-2022 Reg. Sess. (Cal. 2021).

Call for Articles

If you are interested in writing for the *AWI Journal*, please send an abstract describing the topic you will be covering to awijournal@awi.org. We are seeking substantive feature articles; practical articles about investigation skills or the management of an investigations practice; case notes (shorter articles focusing on recent legal decisions or laws and their potential impact); and articles that examine past employment laws or court decisions that affect workplace investigations today.

Online Resources for Workplace Investigations

By Alexis Eichelberger and Meena Hatab

Workplace investigators may find themselves searching for tools for guidance while conducting investigations. The internet offers a number of helpful resources to assist in navigating the process efficiently, effectively, and compliantly. From concise checklists to extensive online courses that help investigators continue to improve their skills throughout their careers, these online tools provide an abundance of guidance.

This article offers a sampling of such resources available online. While it can be difficult to find trustworthy guidance that doesn't come at a cost, most of the resources described here are either free or provided by nonprofit organizations. Many other resources, not included here, can be used without cost via a free trial (which usually involves providing a credit card number) or by providing contact information (which often involves receiving a follow-up sales call).

Seeing the Big Picture

Some state and federal government agencies offer excellent resources to help investigators working in any jurisdiction. Those noted are among the sites offering comprehensive information and guidance.

California Department of Fair Housing and Employment Workplace Harassment Guide

[Accessible at www.dfeh.ca.gov; then search for “workplace harassment guide”]

This guide provides a comprehensive introduction to understanding and investigating harassment. It outlines the basic steps of a fair investigation and addresses issues such as confidentiality and credibility determinations.

Oregon State Government Investigations Toolkit

[Accessible at www.oregon.gov; then search for “investigations toolkit”]

This thorough guide is designed for state government investigations, but contains a wealth of information applicable to investigations in the private sector. It is organized chronologically, as an investigation would unfold. Rather than provide a list of interview questions, it focuses on skills and strategies to conduct an effective interview. The guide also contains a helpful list of “10 Common Investigation Mis-



takes,” which is something investigators could tape to their computer monitors as a reminder.

The U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors

[Accessible at www.eeoc.gov; then search for “vicarious liability for unlawful harassment”]

In this guide, the EEOC outlines the legal framework of harassment law in the United States. It also summarizes the elements of an effective workplace investigation and provides examples of appropriate questions to ask the parties and potential witnesses, as well pointers on determining the credibility of witnesses.

Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process (Canada)

[Accessible at www.canada.ca/en/government/publicservice; then search for “investigating harassment-guide”]

This well-organized guide is directed at investigations of misconduct under Canadian law, but those practicing in other jurisdictions will also find much useful information here. For example, the “Analyzing the Facts” section (Annex 7) walks investigators through the steps of analyzing the evidence and includes charts they can use in their work.

Getting Organized

When an investigation begins, it can be difficult to know where to start and what steps to follow. As new information begins to emerge through reports, witness interviews, and document reviews, it can be challenging to stay on course and stay organized.

Failing to document the investigatory process correctly or communicate necessary details to those involved in the investigation can also have legal implications, such as exposing the company to liability for wrongful termination or retaliation, in addition to being bad business practice.

Referring to lists can help investigators remain focused on the scope of the investigation as well as keep priorities aligned and the timeline

on track. Form templates can also help workplace investigators record or convey information clearly and completely. These fill-in-the-blank style documents can simplify a uniquely challenging part of the investigatory process.

Society of Corporate Compliance and Ethics (SCCE) Investigation Report Checklist

[Accessible at www.corporatecompliance.org; then search for “investigation report checklist”]

This checklist is available free from SCCE, a global organization promoting compliant and ethical business practices across all industries.

Society for Human Resource Management (SHRM) Investigation Summary Report

[More information at www.shrm.org; then search for “investigation summary report”]

This short template provides space for all of the essential information collected in a workplace investigation. It is available only to SHRM members. Membership costs \$219 per year for a professional membership; \$49 annually for a student membership.

Accessing Interview Questions

Constructing questions to ask the employee who filed the complaint, the employee the complaint is directed toward, and potential witnesses of the alleged incident is a vital skill in conducting effective workplace investigations. The following online sources can help workplace investigators generate compliant and helpful interview questions.

Society for Human Resource Management (SHRM) How to Conduct a Workplace Investigation

[Accessible at www.shrm.org; then search for “how to conduct a workplace investigation”]

This article provides guidelines on what to do and what not to do when conducting interviews during a workplace investigation.

HR Acuity’s Blog

[Accessible at www.hracity.com; click on “Blog” to pull up a list of topics]

This site offers free, short articles on various aspects of workplace investigations. “Investigating Signs of a Hostile Work Environment” includes a list of questions to ask when investigating such complaints.

See also the interviewing tips in the Oregon and Canada guides listed above.

Learning Online

There is an ever-growing amount of information about conducting workplace investigations fairly, effectively, and in compliance with current law. Those seeking more in-depth learning might consider enrolling in an online training course. These classes typically come at a cost. However, they provide a comprehensive overview of the workplace investigation process and helpful tips for those who facilitate the investigations.

Association of Workplace Investigators (AWI) Seminars and Webinars

[More information at www.awi.org; click on the Seminars/Webinars tab]

Targeted offerings on various relevant topics provide learning opportunities for workplace investigators throughout the year. AWI members can access recordings of past presentations and supplemental materials such as handouts and links, and can also register to attend future programs.

Association of Workplace Investigators (AWI) Training Institute

[More information at www.awi.org; click on the “Institute” tab]

The institute is a two-week training course including a series of tests that provides exceptional workplace investigation training, considered the gold standard in the Human Resources profession. It consists of eight days of training, including 10 hours of small group sessions led by experienced faculty, and two days of tests. Students who pass receive a certificate indicating they have mastered the materials and can include the designation AWI-CH after their names. Cost is \$3,085 for AWI members and \$3,235 for nonmembers.

Society for Human Resource Management (SHRM) Leading Workplace Investigations

[More information at www.shrm.org; go to SHRMStore, then search for “leading workplace investigations”]

SHRM offers the course in a one-day session, or over a three-week period. It includes live online classes, making it a good option for those who feel more engaged with an instructor presenting information in a synchronous format. Cost is \$925 for members; \$1,200 for nonmembers.

Society of Corporate Compliance and Ethics (SCCE) Essentials of Compliance Investigations

[More information at www.corporatecompliance.org; then click on the Conferences tab]

SCCE conducts comprehensive conferences as well as virtual and in-person trainings several times a year. Costs vary.

Staying Informed

With updates on workplace issues happening so frequently, it can feel difficult to keep up. Workplace investigators who are particularly busy, but looking to refresh their skills or get up to speed on emerging topics affecting investigations, might find newsletters and other periodicals especially helpful.

Association of Workplace Investigators (AWI) Journal

[For more information, go to ww.awi.org; click on the Publications tab]

AWI's professional, peer-reviewed journal on various topics related to workplace investigations is published quarterly. The *AWI Journal* is available online and in print, exclusively for AWI members and subscribers.

Association of Workplace Investigators (AWI) Weekly Newsletter

[For more information, go to ww.awi.org; click on the Publications tab]

This newsletter provides members with the latest news and developments, both in workplace investigations and the AWI organization.

Society for Human Resource Management (SHRM) Email Newsletters

[Go to www.SHRM.org, click on the HR Today tab, and click on Newsletters to sign up, free of charge]

These newsletters provide periodic updates on the latest HR news and trends. Those interested can tailor their subscriptions to receive versions on a daily or weekly basis, or various specific workplace topics.

Getting Connected

Some of the most valuable resources when tackling a challenge in the workplace are experienced investigation professionals. The internet allows professionals from all industries to connect in an instant. Online forums allow workplace investigators to take advantage of that interconnectivity.

Online forums provide platforms for asking questions and offering advice. When unique scenarios arise for which training courses and form templates can't prepare a person, fellow investigators can be invaluable reference points.

Association of Workplace Investigators (AWI) Listservs

[For more information, go to www.awi.org; then click on Member Resources]

The AWI Listservs offer closed forums to be used exclusively by a community of those with common concerns, allowing human resources experts and other workplace professionals to confidentially seek guidance from each other conveniently and efficiently.

HR.com

[Accessible at www.hr.com]

This is another go-to resource for tools and information to assist HR and other workplace professionals. Joining the site is free, and membership gives users access to discussion boards they can use to solicit advice from nearly 1.9 million other HR professionals.

Human Resources on Reddit

[Accessible at www.reddit.com; then search for [r/humanresources](https://www.reddit.com/r/humanresources)]

This is a useful, informal forum to discuss all things HR—including workplace investigations. The site is free to use, and the HR page has more than 50,000 members.

Linked:HR on LinkedIn

[Accessible at www.linkedhr.com]

This is one of the most popular groups for HR professionals on the platform, with more than 1 million members. Questions posted on this forum are met with responses from a number of HR leaders from around the world.



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CASE NOTE: U.S. Postal Service and Central Michigan Area Local 300

Union Not Entitled to Detailed Information Before Pre-Disciplinary Interview

By Michael Robbins

In *United States Postal Service and Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL-CIO*,¹ the National Labor Relations Board (NLRB) recently considered whether an employer, the postal service, was required to provide information to the union before interviewing an employee accused of misconduct.

Facts

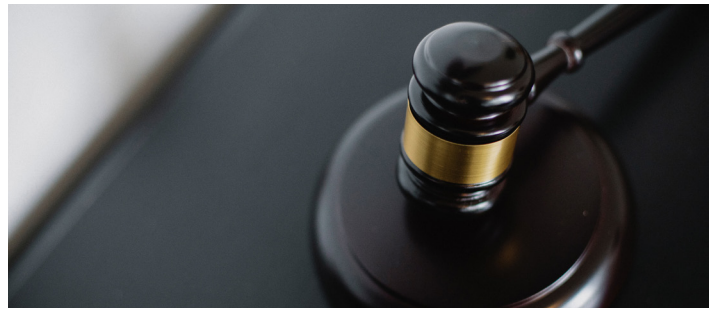
Charlotte Barker was employed by the U.S. Postal Service (USPS) and was represented by the union. On both November 20 and 27, 2018, she failed to report to work. In response, the USPS issued absence without leave, or AWOL, charges against her. On November 28, it notified the union that it had scheduled a pre-disciplinary interview with Barker.

The next day, the union asked for “copies of all records and documents including questions to get used in the interview.” However, the USPS declined to provide the information prior to the interview. The postmaster who responded to the request, on advice of the labor management department, noted: “Cart before horse. This is an investigatory interview and if we take action then you can have copies. The logic is this. Information is just that until it is used for a basis or support of a decision. Investigatory interview is just a part of the process to make a decision.”

Barker was interviewed on December 4, with a union representative present. Two days later, the union filed unfair labor practice charges with the NLRB, claiming the USPS failed to provide the requested information in a timely manner. The USPS investigation concluded on December 11. Thereafter, it mailed a notice of removal to Barker. The union was informed of the removal notice on January 4, 2019. And on January 10, the USPS provided the union with the information it had requested earlier.

Union Argument

The union’s position was based on the U.S. Supreme Court’s holding in *NLRB v. J. Weingarten, Inc.*² The decision in *Weingarten* requires that, during an investigatory interview, any union-represented employee who reasonably believes that discipline might



The NLRB held the union was not entitled to detailed information about the investigation until the investigation was completed.

result from the interview has a right, upon request, to have a union representative present during the interview. The union argued that, under *Weingarten*, it had a pre-interview right to the information it had requested.

NLRB Decision

The NLRB determined that the USPS did not have an obligation to provide the requested information before Barker’s interview. Instead, it was not required to provide the information until December 11, when the USPS completed its investigation into Barker’s misconduct.

The NLRB opined that the union had a right to know the “general subject matter” of the investigatory interview, but that was “very different from having access to the entirety of an ongoing investigation.” As a result, the USPS was within its right to decline to provide the requested information in advance.

However, it did have an obligation to provide the information after the investigation concluded. The NLRB further held that because the investigation was completed on December 11, 2018, but the information wasn’t provided until January 10, 2019, the USPS acted unlawfully—in violation of the National Labor Relations Act.

Relevance to Workplace Investigations

The NLRB’s decision is relevant to most private sector employers in the U.S. who have union-represented employees. Additionally, because public sector requirements frequently reflect NLRB decisions, public sector employers may also be affected by the decision.

Based on the NLRB's decision, a union representing an employee is entitled to information about the general subject matter of an interview to be conducted of an employee accused of misconduct. However, unlike this general information, the union is not entitled to detailed information about the investigation until the investigation has been completed. However, once the investigation has been completed—and presumably, if the results are averse to the union-represented responding party—a union that has requested detailed information about the investigation is entitled to such information in a timely manner, near the conclusion of the investigation.



Michael Robbins is president of EXTTI Incorporated—a company he founded 23 years ago, after practicing as a labor and employment attorney for 20 years. He has conducted or supervised more than 600 workplace investigations and has served as an expert witness in nearly 700 employment cases—primarily on workplace investigation issues. A past president of AWI and a past chair of the Los Angeles County Bar Association's Labor and Employment Law Section, he can be reached at MRobbins@extti.com.

¹United States Postal Service and Central Michigan Area Local 300, American Postal Workers Union (APWU), AFL-CIO, 371 NLRB No. 7 (July 21, 2021).

²NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

BOOK REVIEW

The Modern Detective: How Corporate Intelligence Is Reshaping the World by Tyler Maroney

(Riverhead Books, 2020)

Reviewed by Alezah Trigueros

A career as a private investigator has never seemed more intriguing, alluring, or noble than as described by Tyler Maroney in *The Modern Detective: How Corporate Intelligence Is Reshaping the World*. Maroney is a journalist turned PI from Brooklyn, who previously worked at Kroll Associates and the Mintz Group before cofounding his own investigations firm, Quest Research & Investigations. In this book, he takes readers on a trip around the world, detailing one fascinating saga after another as he endeavors to shed light on the varied role of the modern private investigator in the corporate world.

The Modern Detective details 10 investigations conducted in various parts of the world, demonstrating the diverse matters a PI might look into—from résumé padding to political corruption to embezzlement to fraudulent reporting. These investigations take place in North America, Europe, Africa, the Middle East, and Asia. Each case is unique and, together, they showcase the various investigative skills different matters require. One case might involve computer forensics or database research, while another relies more heavily on interviewing witnesses and street-level investigative work.

Significantly, Maroney takes pains to highlight the important role PIs play in enforcing the law and resolving matters fairly. In one case, creditors of a wealthy American investor hire a PI to track down the investor and recoup their money after the investor fled the country to avoid bankruptcy. In another, a fast-fashion label



hires a PI to prove that the BBC aired a documentary that included staged footage of supposed child labor. Each case Maroney details highlights the lack of legal recourse for these clients absent the crucial role played by the private investigator.

Maroney critiques the old-school stereotype of PIs as being seedy, ruthless, and willing to flout the law in pursuit of a paycheck from their clients. Instead, he frames the private investigator as an essential enforcement arm in situations in which the clients are legally within their rights or have had their rights violated, but where there is no role for law enforcement or the courts in enforcing the clients' rights. Note that Maroney's version of the modern PI does work that differs from most workplace investigators, which typically involves less international travel and much more paperwork.

Still, *The Modern Detective* would be a good read for anyone considering a career as any type of investigator. It provides practical guidance—including information concerning PI licensing exams, the logistics of retaining a forensic consultant to retrieve electronic evidence, and PI ethical obligations. It also discusses the varied backgrounds of private investigators—from former law enforcement officers to intelligence officers to journalists and researchers—and how these professionals use their varying skill sets to investigate matters for their clients.

The Modern Detective: How Corporate Intelligence Is Reshaping the World by Tyler Maroney

Maroney *continued from page 15*

A word of caution, however: *The Modern Detective* might oversell the profession a bit to someone considering this career path. The book reads much like a spy novel and, while certainly entertaining, the cases Maroney selected were by and large high-profile international cases, whereas the average workload for most investigators, including those focused on the workplace, may be more mundane than what Maroney depicts.

That said, *The Modern Detective* is both entertaining and informative, and would be valuable reading for anyone seeking to learn more about investigations from the perspective of private investigators.



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