

# Internal Compliance Investigations

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Lea Fourkiller, JD, CHC, CCEP, CCEP-I, CHPC  
Lea.Fourkiller@ankura.Com

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## How Investigations are Initiated

- Competitor complaints
- Consumer complaints
- Current employee
- Former employee
- Whistleblower complaints
- Payor complaints/investigations

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## Your Role as an Investigator

- Your investigation decision is supported by evidence
- You are independent
- You are impartial and open minded
- You have no connection to the participants or a stake in the outcome
- Manage the roles of decision-maker and investigator
- Fairness and credibility

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### When Must You Investigate?

- Any time there is:
  - A report of improper conduct or non-compliant activity
  - An allegation of a violation of law
  - A potential for government overpayment
  - A potential for an overpayment by any other third-party payer
  - An allegation of policy or Code of Conduct violation
  - A potential for whistleblower activity
  
- Others.....

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### Evaluating the Evidence & Information

- You owe it to the company, the investigation process and the people involved to get done quickly
- Determine whether your gathered information matches your scope
- The burden of proof is the preponderance of the evidence
- Are you sure there is no tip of the iceberg?
- Determine the credibility of the witnesses
- Don't be afraid to get a second opinion

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### Doing Nothing is Risky

- Greater potential for harm to reputation
- Greater potential for harm to individuals
- Potential greater financial penalties and sanctions as issues walk out the door
  - Lawsuits
- Increased fees for counsel, consultants, experts
- Need to do the work and get a handle on situation before it becomes unwieldy and out of control and ends up in the hands of third parties, including enforcement and regulatory authorities

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### Doing Nothing is Risky

- Demotions, counseling and bad evaluations after a compliance issues reported
- Promotions of employees who caused non-compliance
- Complaints dismissed because employee was rude, incompetent, lazy, fill in the blank
- Multiple internal audit reports identified the issue and management ignored it
- Administrator looked the other way because the physician was a high admitter

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### Key Purposes for Your Investigation

- You must determine the true story as well as the back story
- You must determine the root causes of the non-compliant activities
- Your findings must establish accountability and those involved in the non-compliant activity
- Your findings must maximize the decision-making process for the business people
- Your findings must help the bigger needs of the business. This includes avoiding and mitigating damages.
- The investigation must be done timely both for practical reasons as well as to prove there was no cover-up of improper conduct

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### How Much Must You Investigate

- Depends on the facts
- Initially, need to investigate enough to gauge the credibility of the allegation and to advise client as soon as possible
  - Reliable and credible evidence
  - Documentary evidence
- Dollar amount of potential exposure impacts practical decisions regarding scope, depth and personnel involved in investigation
- Tailored investigation vs boiling the ocean

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### Investigation Roadmap

- Investigations should follow the same basic roadmap:
  - Identify potential issue – those already identified, others that should be investigated
  - Identify individuals likely to have information, both inside and outside the company
  - Identify potentially relevant documents and institute document “holds” to prevent destruction or disposal;
  - Identify individuals best suited to conduct investigation (in-house resources or outside counsel and/or consultants)
  - Prepare investigation plan – the more serious the issue, the more detailed the plan

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### Investigative Process

- An investigations policy or associated policies that address non-retaliation, duty to cooperate and confidentiality provisions
- Process for report intake with assessment steps and escalation criteria
- Protocol for conducting investigations organization wide
- Toolkit with instructions and template documents for consistent investigation tasks
- Training for all the team who would be conducting investigations organization-wide
- Reporting at appropriate levels of investigations statistics – volume, results, trends

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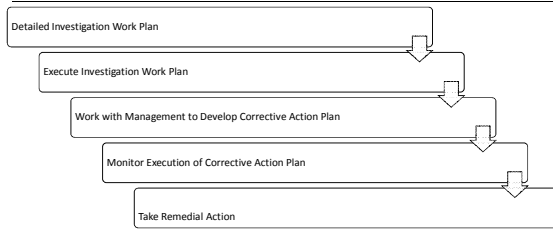
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### Investigative Process – Issue Validated



Document Investigative Process and Findings      Follow-up to See if Corrective Action Plan Worked

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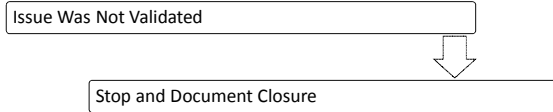
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### Investigative Process – Issue Not Validated



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### Investigators

- Who should investigate?
  - Different categories of problems are best investigated by different personnel:
    - Criminal issues or issues likely to result in significant civil liability (whistleblower situations, high dollar overpayments, systemic problems) should not be investigated without the assistance of competent and experienced legal counsel and investigative team
    - Attorney-client privilege important – may want outside counsel involved to strengthen application of attorney-client privilege
- Staff who conduct internal investigations
  - Training
  - Skillset
  - Professionalism and competency
  - Independence & objectivity

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### Guidelines for Conducting an Investigation

- Established guidelines/work plan
  - thorough
  - credible
  - complete investigations are done in a consistent manner
- Avoid rush to judgement
  - Measured investigative response
  - Avoid siege mentality
  - Don't rely on unverified information
- Investigation process is effective
- Individual accountability as part of investigation plan
- Doing nothing is risky

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### Investigation Plan

- Based on the allegation, decide what you precisely need to know. A broad objective can be worse than a narrow one.
- From whom in the company do you need information?
- In what order should you conduct your interviews?
- Consider the information others within the company need for post-investigation activity
- Make sure you have informed the right managers that you will be conducting an investigation

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### Conducting Investigation – Document Reviews

- First step is to identify, gather and review documents
  - Authorized personnel should collect and deliver documents to counsel (i.e. custodian of records)
  - Track where documents came from
  - Make sure system reports are dated and the search criteria, author/generator and time frame of report are documented.
  - Keep confidential documents confidential
- Identify "hot" documents
  - Documents that suggest wrongdoing
  - Documents that are exculpatory (favorable to defendant)
  - Documents that raise questions and need further clarification

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### Getting Proper Documents

- You don't need every shred of paper to complete your inquiries. Don't drown in paper
- Documents are needed only to help your specific investigation topic
- Each type of investigation presents a different paper trail
- E-mails generally tell useful snippets of the bigger story
- Personnel files of witnesses are helpful, but only to round out the picture, such as when there might be a pattern of conduct
- There is no reasonable expectation of privacy in company systems, desks or other company property.

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### The Interview Process

- Interview witnesses by starting with a “skeleton” and filling in the landscape
- Gather intelligence on your witnesses before you interview them
- Make a list of interview topics, not questions. A script will limit you unfairly
- The interviewer must control the interview
- Keep your opinions to yourself when conducting the interview

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### The Interview Process

- Never ignore a witness's contradictions. And look for information to corroborate their statements too.
- Always look for leads regarding other relevant areas of inquiry
- Always maintain confidentiality during the interview
- Review your notes with the witness. Do not ask the witness to sign your notes.
- Do not allow tape recording of interviews

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### The Interview Process

- Phone interviews are a necessary fact of life, but they have limited value to the investigation
- Never allow joint interviews. They can be a recipe for disaster
- Interview questionnaires are good for discrete questions. Sometime an interview is not needed
- The implicated person is not usually interviewed. You are looking for a confession more so than additional information.
- The implicated person should be confronted with the information but there is a limit to the information shared

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### Interviews

- Interviews should be conducted in private
  - To the extent practical and needed for the type of investigation being undertaken, have witness present during interview to take notes and corroborate your understanding of facts and impressions of witness
- Keep notes of interview
  - Do not record interviews
  - Do not transcribe interviews
  - May prepare written report describing facts of each interview

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### Interviews

- Management rarely needs to be present
- Employees must be advised that legal counsel represents company, not employees individually and what they say may not be kept private (legal counsel can provide guidance)
  - Depending on the severity of the allegations and potential culpability of the employee, you may choose to advise them of the potential need for their own counsel
  - In some instances, organization may pay for employee counsel
- Employees must be encouraged to report if they have been threatened or asked to change their stories

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### Interviewing the Reporter

- The reporter is your initial source of information. Take full advantage of the opportunity to gain understanding and clarity
- Make sure you understand the substance of their report
- Don't adopt the reporter's characterization of the facts
- Be alert to confidentiality and retaliation concerns
- Be sure to manage the reporter's expectations
- Start considering what the "back story" may be when the report is considered

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## Quality and Consistency of Investigations

- Ensure that the who, what, when and how is answered in every investigation; sample log entries
- Practical Initial Questions
  - Conflicts of interest?
  - What is the time period of the issue?
  - What if there are collateral issues?
  - Who are the point people internally?
  - Who is and who is not on the investigative team?
  - How to preserve privilege?
  - How much to reserve or escrow?
  - What is the scope of the subject matter to be addressed?

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## Quality and Consistency of Investigations

- Audit investigations to look at:
  - Quality of questions asked and content considered, involved parties and report out of findings
  - Did they involve the appropriate parts of the organization
  - Are they broad enough
  - Did they use internal or external auditors
- Does the audit files reflect a through, timely and consistency in the investigation process among investigators
  - Audit investigation files
- Triage your process: Do a mock report/multiple mock reports on different issues to test process
  - Mock presentation – mock presentation (devil's advocate) role playing what a regulator might ask regarding the investigation and remediation process at your organization

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## Communication of Investigation Outcomes

- Oral or Written Report
  - Report is discoverable in litigation
  - The report should be distributed within organization on a limited basis.
- Report must remain confidential-limit circulation of report-oral report preferred
- Work with counsel on reporting to organization on some matters

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## Internal Investigation Report

- Report “should” include a summary of facts
  - Describe allegation and how it was reported
  - Identify potential cause(s) of the incident
  - Describe the incident in detail, including how it happened and/or continued and procedure of investigation
  - Identify individuals interviewed and documents reviewed
  - Identify financial impact and any health and safety matters
  - Identify time period in question
  - Identify individuals who should have detected non-compliance
  - Include at least an estimate of the magnitude of the issue and recommendations for corrective and other remedial action

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## Fix the Problem

- Using the report, identify and assist in development of root cause analysis and corrective actions needed to fix the problem.....monitor corrective action plans
  - Will action taken in response to the issue prevent a reoccurrence of the issue
- Need to assess compliance process and policies to identify deficiencies in existing compliance programs and reporting mechanisms
- Responsible employees should be disciplined, as appropriate
- Additional policies, procedures or reporting layers should be added as necessary to promote future compliance

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## Now What....

- Ensure adequate and timely escalation of investigation outcomes
  - Significant investigations are reported to senior leadership and the governing body
- Voluntary Disclosure
  - Need to discuss with organization
    - Whether past conduct needs to be disclosed and any related liability resolved with government
    - Options of self-disclosure – to whom?
      - Department of Justice, Attorney General, Insurance Commissioner?
- Tracking and Trending Investigations
- Incorporating “lessons learned” into training...department education...leadership training.....foster/building relationships with risk partners.....contract & policy revisions
- Take time to assess your investigation processes and how they worked or did not work
- Measuring Compliance Program Effectiveness: A Resource Guide 1-17-2017

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Questions? \_\_\_\_\_

**Thank you**

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