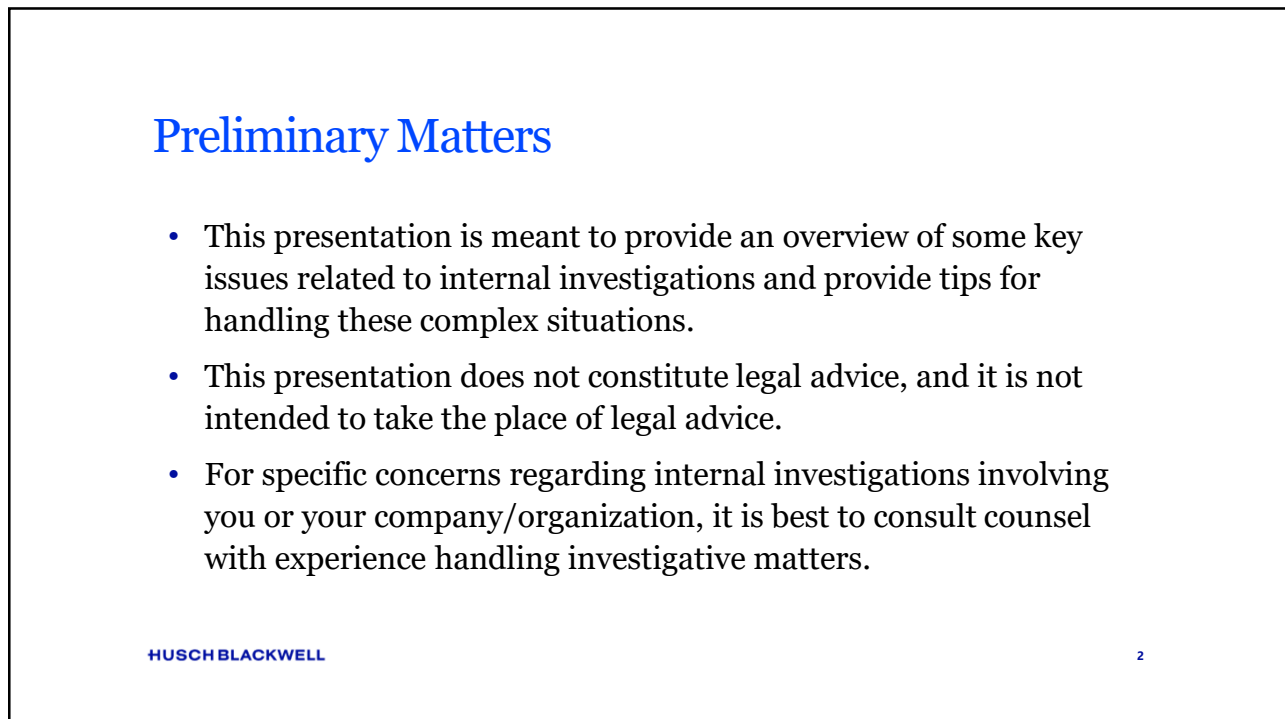


HUSCHBLACKWELL

Managing Internal Investigations: Best Practice Tips

Liz LaFoe Frederick
Katey Hinz

1



Preliminary Matters

- This presentation is meant to provide an overview of some key issues related to internal investigations and provide tips for handling these complex situations.
- This presentation does not constitute legal advice, and it is not intended to take the place of legal advice.
- For specific concerns regarding internal investigations involving you or your company/organization, it is best to consult counsel with experience handling investigative matters.

HUSCHBLACKWELL

2

2

Overview

- Triggering the Investigation
- Duty to Investigate
- Conducting the Investigation
- Post Investigation Steps

HUSCHBLACKWELL 3

3

Triggering the Investigation

HUSCHBLACKWELL 4

4

Triggering Events – Not an All-Inclusive List

- Employee Complaints
- Whistleblower Complaints
- Customer/Patient Complaints
- Professional License Issues
- Subpoena/CID
- Government Investigation
- Lawsuit
- Media Reports
- Internal and External Audits
- Survey Deficiencies
- Record Requests or Demand Letters
- Reportable Incidents
- Accidents

HUSCHBLACKWELL

5

5

Duty to Investigate

HUSCHBLACKWELL

6

6

When should you conduct an investigation?

- Did the conduct or alleged conduct:
 - Violate the law?
 - Violate company policy?
 - Violate fiduciary duty?
 - Create a health or safety risk?
- What is the risk level?
- Isolated or ongoing conduct?
- Internal Controls reveal?
- Involve senior leadership?



7

7

When are you required to investigate (duty)?

- Federal and state laws impose duties on providers to investigate in numerous situations, including when there is a potential that wrongdoing has occurred or there may have been an overpayment for care/services.
- Failure to use due diligence to promptly investigate and resolve legitimate issues can result in harsher penalties / greater liability down the road.
- DON'T bury your head in the sand and hope problems go away on their own.
- DO have a robust and effective compliance program with a “top down” cultural commitment to ethics and compliance and the ability to submit complaints and concerns anonymously (e.g., a 24/7 complaint hotline).

HUSCHBLACKWELL

8

8

Requirements for your Compliance Program

OIG Guidance - 65 Federal Register 14289

- Implementing written policies, procedures, and standards of conduct.
- Designating a compliance officer and compliance committee (task force).
- Conducting effective training and education.
- Developing effective lines of communication.
- Enforcing standards through well publicized disciplinary guidelines.
- Conducting internal monitoring and auditing.
- Responding promptly to detected offenses and developing corrective action.

HUSCHBLACKWELL

* Failure to have and/or maintain a proper compliance program can lead to survey deficiencies, including F895.

9

9

Requirements for your Compliance Program

CMS Compliance Program Requirements for SNFs – 42 CFR Sec. 483.85

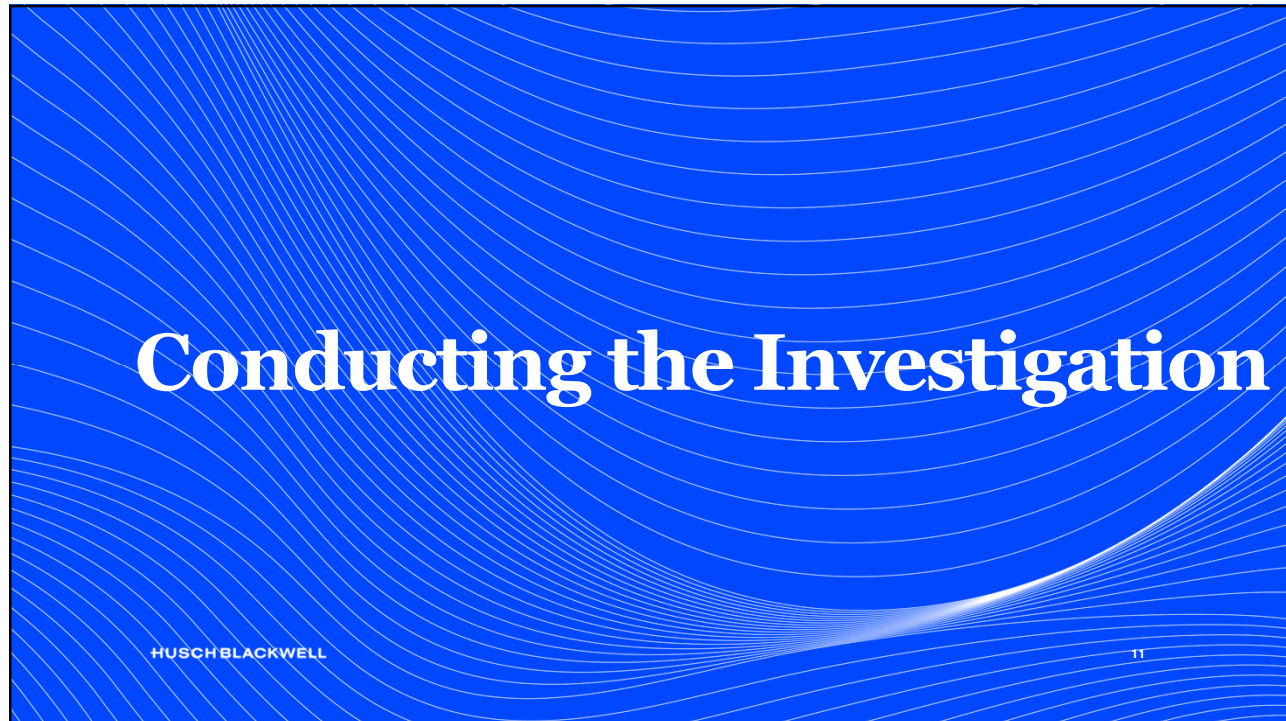
- Written compliance and ethics standards, policies, and procedures.
- Assignment of “high level” individuals responsible for overseeing compliance.
- Sufficient resources and authority to individuals overseeing the program.
- Due diligence to ensure individual(s) overseeing the program do not have the propensity to engage in illegal or improper behavior.
- Effective communication of program standards, policies, and procedures.
- Reasonable steps to achieve compliance with the program’s standards, policies, & procedures.
- Consistent enforcement of program.
- Appropriate response to violations.

HUSCHBLACKWELL

* Organizations with 5 or more facilities have 3 additional components (annual and mandatory training, compliance officer, and compliance liaisons at each facility)

10

10



11

First Steps

- Determine whether the company should investigate.
- *If needed, consider involving Legal Counsel early for the most Privilege.
- *Consider a Legal Hold for Documentation.
- Identify who will lead the investigation and consider an Investigative Team.
- Identify, gather, and review relevant policies, personnel records of those involved, and other relevant information and documentation.
- Prepare a chronology (timeline).
- Determine whether removal of any employees from the workplace, pending the investigation, is necessary.

HUSCHBLACKWELL

12

12

When to Contact Counsel or Consider Counsel

- Subpoena/Demand Letter/Lawsuit
 - Compliance Complaints or Waste, Fraud, and Abuse concerns (*e.g.*, billing issues, lapsed licenses)
 - Government Investigations
 - Other Reasons (*e.g.*, threats to sue, survey tags the facility is considering contesting)
- ~ Consider contacting counsel early! ~

HUSCHBLACKWELL

13

13

Attorney-Client Privilege

- Privilege protects both the giving of legal advice and the giving of information to the lawyer to enable them to give sound and informed advice.
- Confirm that non-attorneys assisting counsel with the investigation are acting as counsel's agents.
- Attorney-client privilege applies regardless of whether the investigation is conducted pursuant to a mandatory OR voluntary compliance program so long as a significant purpose of the investigation is to obtain or provide legal advice.

HUSCHBLACKWELL

14

14

Attorney Work Product

- Attorney Work Product will provide qualified protection of documents and other tangible items prepared in anticipation of litigation, which can include research, analysis of legal theories, mental impressions, and notes.
- All documents in an investigation should be identified as confidential and privileged.
- This is another advantage of involving counsel early!

Quality Assurance (QA) Privilege

- Protects from the disclosure of records of the quality assurance committee, but this is not restricted to only records created by the committee members. *See* 42 U.S.C. § 1395i-3(b)(1)(B).
 - Records that relate to quality assurance and improvement.
 - This may include incident reports.
 - This may also cover emails and other communications about quality control issues.
 - In some circumstances, the Facility may want to disclose QA information (*e.g.*, to regulators to help clear, abate, or reduce survey deficiencies)
 - F865 – the Facility cannot be required to disclose the records of the QA committee except so far as the disclosure is related to compliance with F865.
- There are certain requirements the quality assurance committee must meet:
 1. Must meet at least quarterly.
 2. Must develop appropriate plans of action to correct any deficiencies.
 3. Must analyze and act on available data to implement improvements.
 4. Must consist of at least the DON, medical director, at least 3 other members of the staff (at least 1 administrator or other individual in leadership role), and infection preventionist.

Other QA Protections

- Peer Review Committees under § 537.035
 - Limits discovery of the records and testimony from the members of a peer review committee (a committee of healthcare professionals with the responsibility to evaluate, maintain, or monitor the quality and utilization of health care services).
 - Common Law Privilege
 - Protects certain self-evaluative documents and procedures to encourage frank and open discussions about quality improvement from discovery.
- *Note: Generally, to be upheld as confidential, QA materials must be between *healthcare professionals* and focused on improving care.

HUSCHBLACKWELL

17

17

Interviews

- Interview Tips :
 1. Gain cooperation of interviewee but do not express thoughts, agreements, or conclusions with interviewee.
 2. Begin with background questions.
 3. Stick with mostly open-ended questions.
 4. Address one fact at a time.
 5. Circle back to topics as needed
 6. Identify sources of information and request documentation as needed.
 7. Take detailed notes regarding not only what is said but also body language and physical movements.
 8. Remind interviewee that you take all allegations seriously and this interview should be kept confidential, but do not promise confidentiality, only that you will share info with those who need to know.
 9. Use strategic silence to get additional information.
 10. End interview by asking interviewee if they have additional questions or information to share.
- *Note: Witness statements should be labelled, typed, and signed by the interviewee, and identify the person taking the statement if applicable.

HUSCHBLACKWELL

18

18

Interviews when Counsel is Involved . . .

- Interviews in investigations led by counsel are typically more formal, privileged, and will likely involve the attorney giving certain mandated warnings prior to conducting the interview.
- Upjohn Warnings
 - Attorney-client privilege for the investigation protects the communications between the attorney and the employee, BUT the privilege is controlled solely by the company, not by the employee (different than if the attorney was the employee's personal attorney).
 - The company may therefore choose to waive the privilege and disclose what the employee told the attorney to any third party, including the government.
- Weingarten Rights (*pertains to union employees)
 - If the interview could result in discipline or some adverse employment action ("investigatory interview"), a unionized witness has the right to have a union representative present at the interview.

HUSCHBLACKWELL

19

19

Investigation Documentation – Best Practices

- Preserve any photos, emails, video, messaging platforms, and physical files.
- Type investigation documents (*e.g.*, timeline and witness statements) when possible.
- Appropriately label investigation materials (*e.g.*, with "Confidential" when applicable).
- Preserve and Protect Investigation Documentation
- Exercise caution regarding whether to put conclusions in writing; consider consulting counsel.

HUSCHBLACKWELL

20

20



21

Final Steps of an Investigation

- Conduct any follow up interviews or gather additional information.
- Assess witness credibility from interviews.
- Reach a conclusion about what occurred.
- Document the investigation findings.
- Submit the investigation findings as indicated by corporate policy and/or as required by regulation.
- Consider a 'root cause analysis'.
- Consider corrective actions if needed.

HUSCHBLACKWELL

22

22

Potential Actions

- Remedial/Corrective Actions
 - Consider taking personnel action (*e.g.*, discipline up to and including termination)
 - Restrain personnel as needed
 - Root Cause Analysis / QAPI measures
 - Analyze effectiveness of Compliance Program
 - Consider additional corrective measures as needed or required
- Reporting to Organizational/Corporate Leadership
- Involving Counsel as Needed
- Reporting to Regulators
- Reporting to Law Enforcement
- Disclosure and Repayment Considerations

HUSCHBLACKWELL

23

23

Sources

- 42 C.F.R. Sections 483.12, 483.70, 483.75, 483.85;
- 42 U.S.C. Section 1395i-3(b)(1)(B);
- AHCA, *Compliance and Ethics Program Toolkit* (Updated May 2018)
- Medicare and Medicaid Programs; Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Efficiency, and Transparency, 84 Fed. Reg. 34737 (proposed July 18, 2019) (to be codified at 42 C.F.R. pt. 410, 482, 483, 485, 488)
- Publication of the OIG Compliance Program Guidance for Nursing Facilities, 65 FR 14289 (March 16, 2000)
- OIG Supplemental Compliance Program Guidance for Nursing Facilities, 73 FR 56832 (September 30, 2008)
- Health Care Compliance Association and Office of Inspector General, *Measuring Compliance Program Effectiveness: A Resource Guide* (Issued: March 27, 2017)

HUSCHBLACKWELL

24

24

Questions?

Liz LaFoe Frederick

Liz.Lafoe@huschblackwell.com



Katey Hinz

Katey.Hinz@huschblackwell.com



HUSCHBLACKWELL

25