

# Burke, Warren, MacKay & Serritella's Labor & Employment Update Spring 2025



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# Important Employer Takeaways from the first 100 Days of the New Administration

By: Brittany Martin and Rachel Bossard



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## National Labor Relations Board

- Changes in guidance on labor practices is expected with administration changes.
- Seeing that start to happen. Acting General Counsel William Cowen has rescinded several Biden-era memorandums.
  - Rescinded in a sweeping memorandum issued on February 14, 2025.
- Does not change the current law, but does give us insight into the direction the law is likely to go in.



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## Non-Competes

- GC Memorandums 23-08 and 25-01.
- 23-08 provided guidance suggesting non-compete agreements interfered with employees' exercise of rights under Section 7 of the NLRA.
  - Advised that such agreements should be narrowly tailored and specific.
- 25-01 provided guidance suggesting "stay or pay" provisions requiring employees to repay an employer if they leave before a designated time period were unlawful.



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## Confidentiality and Non-Disparagement in Severance Agreements

- GC 23-05, which provided guidance related to the *McLaren Macomb* decision issued by the NLRB.
  - Found overly broad confidentiality and non-disparagement provisions in severance agreements was in violation of NLRA.
- *McLaren Macomb* is still good law. Will not be reversed until the NLRB has a quorum.



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## Workplace Rules and Policies

- GC 23-02 provided specific guidance on employer's digital surveillance of employees.
- Decision in *Stericycle, Inc.* from 2023 also remains good law.
  - Under *Stericycle*, an employer rule is presumptively unlawful if it has a "reasonable tendency" to chill employees from exercising their Section 7 rights.
  - Based on the perspective of someone "economically dependent" on the employer who considers engaging in a protected activity.
- Again, will not be reversed until there is a quorum.



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## Executive Order: *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*



- Issued January 20, 2025.
- All federal agencies, including the EEOC, must adopt strictly biological definitions of sex (male and female); remove all statements promoting gender ideology.
- All charges alleging discrimination on the basis of sexual orientation or gender identity being reviewed at EEOC Headquarters in light of Executive Order.



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## ***Bostock v. Clayton County*, U.S. Supreme Court**

- Issued June 15, 2020.
- Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation or gender identity.
- This means that employers cannot fire or refuse to hire someone simply for being gay or transgender, as such actions are considered discrimination based on sex.



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## **Executive Order Instruction**

- Directs the attorney general to “immediately issue guidance to agencies to correct the misapplication of the Supreme Court’s decision in *Bostock v. Clayton County* (2020)” to the extent that it has been interpreted as requiring “gender identity-based access to single-sex spaces.”



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## Executive Order: *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*

- Issued January 21, 2025.
- Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system.



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## What that Means for Federal Contractors

- The Office of Federal Contract Compliance Programs shall immediately cease:
  - (A) Promoting “diversity”;
  - (B) Holding Federal contractors and subcontractors responsible for taking “affirmative action”; and
  - (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.



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## What that Means for Federal Contractors

Executive Order 14151 § 2(b)(i) (the “**Termination Provision**”) (Requires termination of all “equity-related” grants or contracts within 60 days):

Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:

(i) terminate, to the maximum extent allowed by law, . . . all . . . “equity-related” grants or contracts[.]



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## What that Means for Federal Contractors

Executive Order 14173 § 3(b)(iv) (the “**Certification Provision**”) (Mandates that federal contracts and grants include terms requiring compliance with federal anti-discrimination laws and certification that no DEI programs violate these laws):

The head of each agency shall include in every contract or grant award:

- (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws; and
- (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.



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## What it Means for Private Employers

Executive Order 14173 § 4(b)(iii) (the “**Enforcement Threat Provision**”) (Directs the attorney general to submit a report with recommendations for enforcing federal civil rights laws and deterring DEI programs that constitute illegal discrimination or preferences):

- (i) Key sectors of concern within each agency’s jurisdiction;
- (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;
- (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated “DEI” or otherwise) that constitute illegal discrimination or preferences;
- (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all federal civil-rights laws;
- (v) Litigation that would be potentially appropriate for federal lawsuits, intervention, or statements of interest; and
- (vi) Potential regulatory action and sub-regulatory guidance.



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## What Can We Expect?

- Preview of likely EEOC enforcement and policy priorities, including evenhanded enforcement of civil rights laws by:
  - Rooting out unlawful DEI-motivated race and sex discrimination;
  - Protecting American workers from anti-American national origin discrimination;
  - Protecting workers from religious bias and harassment; and
  - Remedying other areas that have been historically under-enforced by the agency.



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## DOJ and EEOC Joint Statement

- On March 19, 2025, the EEOC and the Department of Justice issued a joint warning against unlawful DEI-related discrimination and included guidance on “What To Do If You Experience Discrimination Related to DEI at Work,” effectively encouraging private sector employees to file Charges of Discrimination with the EEOC if they believe they have experienced DEI-related discrimination at work or “reverse discrimination.”



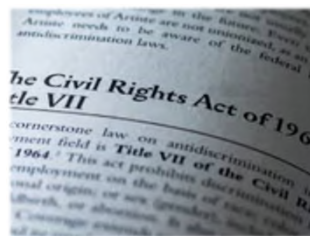
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## What is the Law?

- Under Title VII, it has always been the case that employers cannot consider protected categories in any employment decisions.
- Does not allow for quotas, reserved seats, or policies that explicitly favor or disfavor employees based on a protected class.



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## U.S. Department of Education Guidance



- Whether an initiative constitutes unlawful discrimination does not turn solely on whether it is labeled “DEI” or uses terminology such as “diversity,” “equity,” or “inclusion.”
- The federal government’s assessment of policies and programs depends on the facts and circumstances of each case.



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## What Employers Should Consider?



- Close review of policies and materials based upon risk tolerance.
  - Consider updating outward-facing statements.
  - Review recruitment, hiring, promotion policies that give preference to certain groups.
  - Exclusive internship or mentoring programs?
  - Exclusive affinity or resource groups?
  - Reconsider goals based on protected classes; focus on belonging, inclusion, and benefit to business.



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# The Nuts & Bolts of Employment Practices Liability Insurance

By: Chris Kentra & Blake Roter



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## What is Employment Practices Liability Insurance (EPLI)?



- Purchased by any Company with employees
- Typically included in Management Liability Policies which include Directors & Officers (D&O) and Fiduciary Liability Coverage
- Coverage for third-party claims from employees, former employees or prospective employees alleging employment-related wrongful acts
  - Third-Party Discrimination claim.
- Claims-Made Policies
  - Must be reported to insurer in the policy period in which the claim is received



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## What Type of Alleged Misconduct is Covered?

### *Policy Dependent*

- Discrimination
- Retaliation
- Sexual Harassment
- Workplace Harassment
- Wrongful Discipline/Demotion/Termination/Reference
  - Failure or refusal to hire/promote
- FMLA or other statutory violations
- Breach of Employment Agreement
- Wage & Hour
  - May be excluded or limited to Defense Costs Only

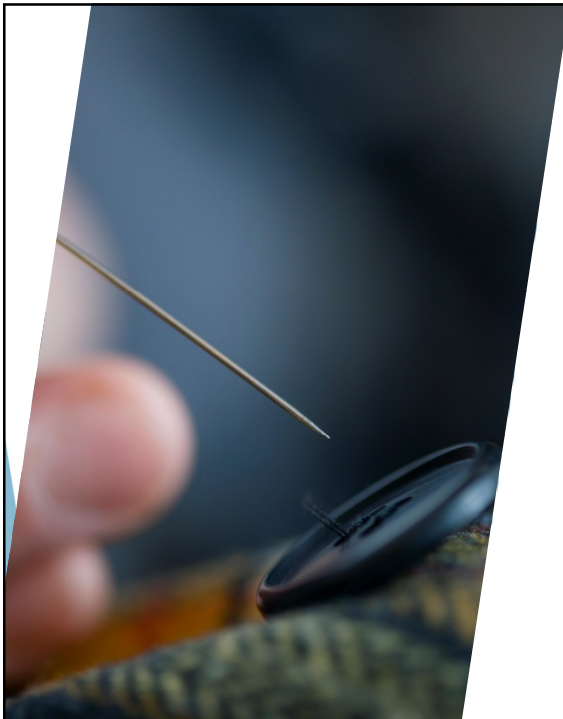


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## What Constitutes a Claim?

- A written demand against any Insured for monetary damages or non-monetary or injunctive relief
  - Demand Letter
  - Litigation Hold Notice
  - Text message or email from past, current, or prospective employee
- A lawsuit, arbitration or mediation commenced against any Insured
- An administrative or regulatory proceeding commenced against any Insured
  - EEOC or Illinois Department of Human Rights



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## What To Do When a Claim is Made?

- Notify Your Broker – Make A Claim
  - Request that Broker provide notice to all potential carriers
  - Primary & Excess Carriers
- Review Policy with Broker & Lawyer
  - Duty to Defend/Duty to Pay
  - Potential Applicable Exclusions?
- Review Insurer's Coverage Letter
  - Reservation of Rights Letter
  - Denial
- Retain Counsel to Respond to Claim

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## Common Grounds for Denial/Reservation



- Denial
  - Not a Claim
  - Late Notice
  - Exclusion Precludes Coverage
- Coverage Limitations
  - Choice of Counsel / Rates
  - Self-Insured Retention
  - Insufficient Limits/Defense Costs Coverage Only
  - Eroding/Wasting Limits

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### What to Do When Insurer Denies/Limits Coverage?

- Retain coverage counsel to advise you through the process
- Have counsel write letter to insurer refuting insurer's coverage position
- May need to file suit against insurer to obtain rightful coverage



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## I-9 Compliance for Employers

By: Christine Eduardo and Eric VanderPloeg



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## Background

- The Immigration Reform and Control Act (IRCA) of 1986
  - Requires employers to verify the identity and employment eligibility of their employees and sets forth criminal and civil sanctions for employment-related violations.
- Immigration and Nationality Act (INA)
  - Section 1324a(b) of the INA mandates that all employers in the U.S. must verify the identity and employment eligibility of every person hired after 11/6/86, by completing Form I-9. 8 U.S.C. § 1324a(b).
- Immigration Act of 1990
  - Prohibits discriminatory documentary practices during employment eligibility verification process.



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## Form I-9 and E-Verify

- Form I-9
  - Mandatory (Employees must complete Section 1 no later than the first day of work; Employers must complete Section 2 no later than the third business day from employee's first day of work).
  - IMAGE offered to private sector employers for compliance assistance.
- E-Verify
  - Voluntary web-based system that compares an employee's Form I-9 information with government databases to verify employment eligibility.
    - Does NOT replace the legal requirement to complete and retain Form I-9.
  - Tentative Nonconfirmation (mismatch)
    - Does NOT mean employee is unauthorized to work in the U.S.
    - Must notify employee.
    - Employers may not terminate or take other adverse action against an employee based on a mismatch.
  - If opting in, employers must use E-Verify for all new hires.



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## Illinois Right to Privacy in the Workplace Act (820 ILCS 55/1-20)

- New amendments under Public Act 103-0879 effective as of January 1, 2025
  - Imposes new responsibilities on employers with Illinois-based employees related to E-Verify and workplace verification.
- Under the Act, employers:
  - Must notify employees about E-Verify discrepancies and provide instructions to contest findings.
  - Must inform entire workforce of a federal I-9 audit.
  - Must complete compliance certification with Illinois-specific E-Verify training, if E-Verify is used.
  - Cannot retaliate against employees who exercise their rights under E-Verify (i.e., challenge discrepancies or report compliance concerns).
  - Cannot use E-Verify to prescreen applicants.
- Illinois law does NOT require employers to use E-Verify.



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## Visas and Lawful Permanent Residents

- Form I-551 or Permanent Resident Card
  - Employers are NOT required to reverify the LPR's employment authorization, even if the Card later expires.
  - If expired or expiring, they must also present an Application to Replace OR Application for Naturalization.
- Visas or Temporary Form I-551 require verification
  - Employers must complete Supplement B: Reverification and Rehires.



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## Retention

### ➤ Current employees:

- Employers are required to maintain for inspection original I-9 Forms on paper or stored electronically that can produce legible and readable paper copies.

### ➤ Former employees:

- Employers are required to retain I-9 Forms for a period of at least three years from the employee's first day of employment or one year from the date employment ends, whichever is later.

- Reminder to download records – E-Verify records are only kept for 10 years.



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## Enforcement and Penalties



U.S. Immigration  
and Customs  
Enforcement

- Responsibility of U.S. Immigration and Customs Enforcement (ICE, HSI)
  - But also: DOJ, DOL, and IER (Immigrant and Employee Rights Section) may inspect for forms and records
- Primarily two types of violations:
  - Paperwork violations
  - Knowingly employing unauthorized aliens



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## Enforcement and Penalties

- New Administration = New Scrutiny for Employers
  - Worksite enforcement actions increased substantially from 2017 to 2018 under prior Trump administration.
  - Also increased in 2024 under Biden administration.
  - April 15, 2025 – Administration reported arrests of 1,000 undocumented workers and \$1M in fines for employers since January 21, 2025.
  - Administration claims to have “ramped up” worksite enforcement over last two months.



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## Records Inspections (Notice of Inspection)

- Prior to Inspection:
  - Review paperwork and identify missing records or discrepancies.
  - Attempt to obtain completed I-9 form and documentation prior to inspection: BUT
    - DO NOT BACKDATE FORMS
    - DO NOT DESTROY RECORDS OR ALTER INFORMATION
    - DO NOT RUSH TO TERMINATE EMPLOYEES WITHOUT DISCUSSING WITH COUNSEL



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## Records Inspections (Notice of Inspection)

### ➤ Prepare for Inspection:

- Follow instructions in notice and address any concerning or unusual requests.
- Assemble records and provide a specific area, workstation for inspection.

### ➤ During Inspection:

- Cooperate with reasonable requests and instructions related to records inspection.
- Agents are NOT authorized to access non-public areas **without permission.**
- Agents are NOT authorized to question employees.



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## Other Inspections, Searches, or “Raids”

### ➤ Subpoenas:

- Typically provides time to respond and identifies specific records to be produced.

### ➤ Judicial Search Warrants:

- Must be signed by a judge or magistrate judge; may expire (typically 14 days).
- Specifies areas to be searched, documents or persons to be seized.
- Employers should cooperate, BUT:
  - Not required grant access to any non-public areas, records or persons not identified.
  - Employees have right to remain silent, cannot require employees to answer questions or discriminate against those who remain silent.
- **Arrest warrants:** Authorizes arrest of specific individual(s), but does not grant officials access to your business for that purpose.

### ➤ Administrative Warrants: (DHS Form I-200 or I-205)

- Not “real” warrants issued by a court of law.
- Officials can access public areas; other areas require permission or warrant.



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## Preparing for Immigration Enforcement

- Perform internal audits of I-9 and Visa Documentation
- Review I-9 and Visa processes and training
- Train staff and develop action plan and policies for government searches
- Identify areas and records that are not accessible without judicial warrant

## During Inspection or Search

- Contact counsel
- Confirm identity of agents and ask for identification
- Review warrant or other inspection authorization and make copies
- Confirm scope or purpose of search or inspection
- Cooperate with lawful requests and document details of visit



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## Penalties

- Fines are primary penalty for employers
- Fines Increased in June 2024 (Under Prior Administration):
  - I-9 Paperwork Violations: \$281 to \$2,789 per Form I-9
  - **Knowingly** Employing Unauthorized Alien:
    - First Offense: \$698 to \$5,579 per violation
    - Second Offense: \$5,579 to \$13,946 per violation
    - Third or More Offense: \$8,369 to \$27,894 per violation
  - E-Verify Employers – Failure to Inform DHS of Continuing Employment Following Final Non-confirmation: \$973 to \$1,942 per relevant individual employee



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## Penalties

- Fines depend on various facts: size of employer, good faith, unauthorized worker, etc.
- Criminal and Civil Penalties are Possible:
  - Injunctions and Court Orders.
  - Criminal penalties more likely where there is a pattern of intentionally disregarding immigration laws or exploiting undocumented workers.



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## Takeaways

- Administration has announced a policy to ramp up worksite enforcement actions as part of immigration strategy.
- Employers should review I-9 and Visa Documentation strategies and prepare for potential worksite inspections or “raids.”
- Employers should train employees and establish policies on responding to worksite actions and government officials.
- Employers should avoid actions that discriminate against undocumented workers or other foreign citizens.
- Employers should allow undocumented employees reasonable time to obtain documentation or authorization to remain employed.



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# Overview of Employer Investigations

By: Alexandra Rogers and Alexander Marks



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## Which Complaints Require Investigations?

- Harassment
- Discrimination
- Retaliation
- Whistleblowing



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## What Are the Goals of Any Investigation?

- Fact Finding
- Due Process
- Documentation
- Credibility among staff
- Risk mitigation

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## Steps of a Proper Employer Investigation

- Obtain copies of all related documents;
- Create an investigation file for the complaint;
- Prepare your investigation plan;
- Interview the parties involved;
- Collect relevant documentation concerning the complaint;
- Make a determination and communicate this to the involved parties; and
- Take corrective action or implement disciplinary measures.

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## First — Obtain Copies of All Documents Pertaining to the Complaint

- You will need to review the complaint or statement provided by the employee (if one exists);
- Any evidence submitted by the complaining employee and;
- Any policies related to the conduct complained of.



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## Second — Create an Investigation File For the Complaint

- Next, you will want to create a file of your investigation which could potentially include the following:
  - The complaint;
  - Interview notes;
  - Reports of the investigation;
  - Text messages;
  - Emails; and
  - Personnel file.



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## Third — Prepare your Investigation Plan



- You will want to determine the concerns and the allegations of the misconduct.
- You will also want to identify the following information concerning the complaint:
  - The parties involved;
  - Facts surrounding the misconduct;
  - The parties you will need to notify concerning the complaint;
  - The relevant policies that apply to the misconduct (e.g. a sexual harassment policy); and
  - The parties who will need to be interviewed.



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## Fourth — Interview the Parties Involved

- As previously mentioned, you will have thought about the parties that will need to be interviewed, such as the complainant, respondent, any key witnesses, and current or former employees.
- When you begin interviewing the parties, it may be important to interview the parties involved in a specific order.
- It may be beneficial to interview the complainant first (if you know their identity), the witnesses after the complainant and the respondent last so in the event you have any last-minute questions that were raised by witnesses, you have the opportunity to question the respondent.



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## Fifth — Collect Relevant Documentation Concerning the Complaint

- Once you begin interviewing the parties involved, you will want to begin collecting documentation concerning the complaint.
- The documentation that may be relevant to the complaint may include the following:
  - Employment policies, procedures or rules;
  - Text messages;
  - Emails;
  - Grievances or other reports and related concerns with the complainant and respondent; and
  - Work history details.



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## Sixth — Make a Determination and Communicate This to the Parties Involved

- After you have interviewed all of the relevant parties, analyzed all of the relevant documentation, you will then prepare an investigation report outlining your findings.
- This report should include the following:
  - Incident;
  - Parties involved;
  - The factual and credibility findings;
  - The relevant policies at play;
  - Formal determination whether the employer's policies were violated; and
  - Recommendations for corrective action.



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## Seventh — Take Corrective Action or Implement Disciplinary Measures

- Once the investigative report is provided to the individuals with decision-making authority, it is important that corrective action or disciplinary measures are taken.
- Some corrective actions or disciplinary actions may include:
  - Updating employment policies;
  - Providing more training;
  - Verbal or written warning;
  - Suspension; and
  - Termination of employment.



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