

# “Employee Concerns” Basics for Causal Analysts:

What’s Similar, What’s Different, and How to Stay Out of Trouble

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# Stipulation:

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*This presentation is based upon the considered, professional opinions of the author developed in the course of a 45 year career in the US Nuclear Industry.*

*Professional Differences of Opinion, disagreement with content, and constructive criticism from attendees are encouraged!*

# Motivation

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At a high level, *“investigations are investigations,”* BUT,

Root Cause and “Employee Concerns” investigations:

- Serve different purposes;
- Address different criteria;
- Take place in different environments; and,
- Require somewhat different approaches.

Analysts who do not recognize and respect these differences have been known to unwittingly compromise “Employee Concerns” investigations.

This presentation outlines the similarities and differences, then discusses what Root Cause Analysts should know to stay out of trouble.

# Today's Discussion:

## Four Key Queries

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1. What are "Employee Concerns" Investigations?
2. What is Similar Between RCA and EC Investigations?
3. What is Different Between RCA and EC Investigations?
4. How do I Stay Out of "EC Trouble" when Performing Root Cause Analysis/Event Investigations?

# 1. “Employee Concerns” Investigations (1)

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- What Purpose Do They Serve?
- Where Do They Exist?
- Where Do They Come From?
- How Do They Work?
- Why Should I, as a Causal Analyst, Care About ECP?

# 1. “Employee Concerns” Investigations (2)

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*PURPOSE: “Employee Concerns Programs” (ECP) Provide an Alternate Path for Raising and Evaluating Concerns Related to ‘Protected Activities’ and/or Implementation of Protected Activities.*

- The primary (and preferred) path to resolve such concerns is through the chain of command and problem identification/resolution processes.
- The alternate *ECP* path exists for use when individuals do not feel free to use the preferred mechanisms to resolve their concerns, for whatever reason.

# 1. “Employee Concerns” Investigations (3)

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“Employee Concerns Programs” (or Equivalent) Exist at:

- US Nuclear Generating Facilities;
- US Department of Energy Facilities;
- Many Other US Commercial Facilities Where Safety of Personnel, or Public Health and Safety are Central to Organizational Mission and the Concept of ‘Protected Activities’ Exists.

# 1. “Employee Concerns” Investigations (4)

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## History of US “Employee Concerns Programs” (or Equivalent):

- Existed ad hoc in Small Number of Companies (by late 1970s);
- Formal Requirements Started with US Department of Labor (before 1980);
- DOL Set Requirements; Investigation Criteria Evolved via “case law”;
- DOL and NRC Alignment Documented in 1982 Memo of Understanding;
  - MOU Revised in 1998; US NRC Recognized “Employee Concerns Programs” as “One Way” to Provide ‘Alternate Resolution Path’;
- Adopted by US Department of Energy;
- Exist Under Different Names in Different Organizations.



# 1. “Employee Concerns” Investigations (5)

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ECPs Generally:

- Maintain Reasonable Levels of ‘Confidentiality’;
- Strictly Enforce “Need to Know” (including Sr. Execs);
- Investigate Complaints of Employees Involved in ‘Protected Activities’ Alleging:

Harassment

Retaliation

“Chilled Work Environment”

Intimidation

Discrimination

“Hostile Work Environment”

# 1. “Employee Concerns” Investigations (6)

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*Elements Necessary to Substantiate Allegations (from case law) Tend to be Very Specific and Narrowly Defined:*

e.g., To Substantiate ‘Retaliation,’ FOUR Elements Must be Present:

- Alleged Victim was Engaged in a Protected Activity; and,
- Alleged Victim was Subjected to an Adverse Action; and,
- Decision-Maker Knew of the Protected Activity When Making the Decision to Initiate the Adverse Action; and,
- There is a Causative Link Between the Protected Activity and the Adverse Action

# 1. “Employee Concerns” Investigations (7)

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*Why Should I, as a Causal Analyst, Care about ECP?*

Causal Analysts Should Understand that ECP Investigations:

- Tend to be Fragile and Easily Disrupted by Outside Interference;
- Usually Deal with Allegations of “Intentional Wrong-Doing”;

Causal Analysts Face a ‘Higher Standard’ and are:

- Formally Qualified and Presumed to be Skilled in Investigations;
- Expected to be Recognize the Significance of Evidence they Find;
- Responsible to Minimize Disruption from Investigation Methods Used

# 1. "Employee Concerns" Investigations (8)

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*Why Should I, as a Causal Analyst, Care about ECP?*

Regulators and Legal Departments May Consider:

- Causal Analysts "Should Have Known" the Significance of ECP "Red" and "Caution Flags" Present During their Investigation
- The "Intentional Wrong-Doing" Involved was Criminal in Nature;
- Disruption of ECP Investigations by Causal Analysts to be:
  - Interference with a 'Protected Activity' and a Criminal Investigation;
  - Violation of Regulation(s) Subject to Legal Sanctions; and/or
  - Subject to Disciplinary Action

## 2. Similarities Between RCA and ECP Investigations

Both RCA and ECP Investigations are generally:

- Organizationally Sanctioned
- Targeted (Not 'Witch-hunts')
- Supported or Required by Regulations
- Governed by Internal Organizational Procedures
- Based on Evidence and not on Conjecture or Assumptions
- Formally Documented
- Subject to Regulatory Review

AND they both . . . . .

- Investigate Behaviors and Conditions that Shaped the Issue
- Develop Action Recommendations
- May Lead to Regulatory Sanctions (Fines/Penalties)

### 3. Differences: RCA and ECP Investigations (1)

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#### A RCA Investigation:

- Is Focused on Fully Explaining Factors that Shaped an Event
- Is Not About Culpability
- Is About Behaviors & Conditions
- Is Openly Communicated & Widely Available Throughout the Organization, in Most Cases

#### An ECP Investigation:

- Is Intended to Substantiate (or Not) Whether Alleged HIRD/Chilling Took Place
- May be About Culpability
- Is About Behaviors, Conditions, and Perceptions
- Maintains Confidentiality on Strict 'Need to Know' Basis

### 3. Differences: RCA and ECP Investigations (2)

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#### A RCA Investigation:

- May Engage Many Techniques & Various Analytical Criteria
- Requires Reasonably Developed Interview Skills
- Does Not Deal with 'Intentional Wrong-Doing'
- Is integral Part of a 'Public' Process (CAP)

#### An ECP Investigation:

- Needs to meet Criteria From Established Case Law
- Requires Excellent Interview Skills Due to Fragility of Key Evidence
- Generally Deals with HIRD; Regulatory Agencies Usually Consider HIRD to be 'Intentional Wrong-Doing' that May Be Criminal in Nature
- Is an 'Alternate Resolution' Path That is Outside of 'Public' Processes

## 4. How to Stay Out of “ECP Trouble” (1)

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- Don't Conduct ECP Investigations Unless Authorized and Conversant with ECP Investigation Techniques (*especially techniques related to critical interviews*)
- Stay Within RCA Investigation Charter
- Look for & Respect 'Caution Flags'
  - Warnings from ECP re: Nature & Scope of Ongoing Investigations
  - Information Intentionally Withheld by Witnesses
  - Reluctant Witnesses
  - Non-Responsiveness to Information Requests
  - Cautions from Legal Staff



## 4. How to Stay Out of “ECP Trouble” (2)

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- Look for & Respect ‘Red Flags’
  - Evidence of Intentional Wrong-Doing/Criminal Activities
  - Emergent Complaints or Evidence of HIRD and/or ‘Chilling Effect’
  - Allegations of Misconduct
  - Witnesses Refusing Interviews without Confidentiality Guarantee
  - Unjustified Refusal to Provide Information/Evidence
  - Ongoing Investigations by Legal Staff
  - Ongoing External Investigations
    - Department of Labor
    - NRC Office of Investigations
    - Office of the Inspector General

## 4. How to Stay Out of “ECP Trouble” (3)

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### Staying Out of Trouble - The Bottom Line:

- Know and Respect the Boundaries of Your RC Investigation;
- Recognize the Fragility of ECP-Related Evidence that Deals with ‘Culpability’ and ‘Perceptions’ and Leave it Alone;
- When in Doubt, no Matter How Slight, Ask Someone Knowledgeable Whether You Might Be Heading into Trouble.

# Recapping the Session (1)

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## ECP Investigations Most Often:

- Respond to Allegations of Harassment, Intimidation, Retaliation, Discrimination, Hostile Work Environment, or 'Chilling Effect' That Are Raised Outside the 'Chain of Command';
- Are Mandated for US Nuclear and DOE Facilities, and for Some Commercial Facilities;
- Evaluate Facts Against Criteria Established by Case Law;

# Recapping the Session (2)

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ECP Investigations Most Often:

- Tend to be Fragile and Easily Disrupted;
- Are Investigated Discretely and Maintain Confidentiality;
- Evaluate ‘Intentional Wrong-Doing’ that May be Criminal;
- Consider Culpability and Perceptions;
- Require More Advanced Interview Skills than RCAs;
- Are Not Performed by Causal Analysts.

# Questions, Comments & Discussion

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