



# Unconscious Bias:

## Increasing Awareness, Providing Training and Mitigating the Impact of Bias in Workplace Investigations

► 2020 ECI WORKING GROUP PAPER



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# UNCONSCIOUS BIAS: INCREASING AWARENESS, PROVIDING TRAINING AND MITIGATING THE IMPACT OF BIAS IN WORKPLACE INVESTIGATIONS

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### ABOUT THE ETHICS & COMPLIANCE INITIATIVE

The Ethics & Compliance Initiative (ECI) empowers organizations to build and sustain High Quality Ethics & Compliance Programs (HQP®). ECI provides leading ethics and compliance research and best practices, networking opportunities and certification to its membership.



**The Kirwan Institute for the Study of Race and Ethnicity defines implicit bias as:** the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

## Defining Implicit or Unconscious Bias

### A. Bias Basics

Our brains are constantly taking mental shortcuts to help us choose between options, reducing the drain on other cognitive processing. These shortcuts are known as biases. Webster's Dictionary defines "bias" as "an inclination or preference, especially one that interferes with impartial judgment: prejudice".



"Cognitive biases are the unconscious drivers that influence our judgments and decision making."<sup>1</sup> Biases help us get through the day without being overwhelmed by information. The downside to

biases is the potential for prejudice to become hard-wired into the brain. They can relate to the way we remember an event, perhaps due to the emotional content of the event, and that in turn

can lead to biased thinking and decision making. Other cognitive biases might relate to problems with attention. The more expertise we have at something, the more we may rely on our biases. Some of these biases reflect personal tastes or experiences.

Others are impacted by societal images, social pressures, emotions, culture, or norms.

Even though these individual personal cognitive biases can be helpful and adaptive, it's important to recognize that they can also lead to perceptual distortion, inaccurate judgment, or illogical interpretation, blind a person to new information or inhibit someone from considering valuable options when making an important decision.<sup>2</sup>

Because our brains are constantly taking mental shortcuts, and because these biases are mostly invisible to us, we need to initiate the effort to recognize how they individually and institutionally influence decisions and choices we make, starting in our early childhood systems. Experts on the study of race and ethnicity use the term

implicit bias to describe the beliefs and societal messages we carry without awareness or conscious direction and which are interwoven with our evolutionary biases. The Kirwan Institute for the Study of Race and Ethnicity defines implicit bias as:

**The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner, activated involuntarily, without awareness or intentional control. This can be either positive or negative. Everyone is susceptible.<sup>3</sup>**

Unconscious biases happen outside of our control and are ingrained habits of thought that can lead to error in how we perceive, remember, reason, and make decisions. Recognizing and understanding that all humans have biases and that these biases are neither good nor bad, is the first step to overcoming them. Once individuals and organizations are aware that unconscious bias exists, it can no longer be called "unconscious." Individuals and organizations should begin to take steps to recondition attitudes or stereotypes that affect their understanding, actions, and decisions.

### B. Measuring Bias

The challenge with our brains is that we can't just take an unconscious thing and make it conscious. It's not possible to be aware of unconscious processes in the moments that we make choices or decisions. Awareness and education only go so far, but awareness can help you understand the ways you've been biased in the past and the ways that you might be again in the future.

**"The challenge with our brains is that we can't just take an unconscious thing and make it conscious. It's not possible to be aware of unconscious processes in the moments that we make choices or decisions."**

Social psychologists at the University of Washington and Yale Researchers published a paper in 1998 about their Implicit Association Test (IAT), which focused on discovering unconscious bias for or against certain groups of people. The IAT measures the strength of associations between concepts based upon the speed in key stroking when responding to four categories—images of members of groups that have been traditionally disadvantaged (e.g., African Americans, overweight people, gays and lesbians, older people), images of members of groups that have been traditionally advantaged (European Americans, thin people, straight people, young people), images or words with positive associations (happiness, goodness) and images or words with negative associations (depression, war). A longer delay in key stroking when asked to associate positive words with a disadvantaged group, as compared with an advantaged group, shows a bias against that group. Individuals can take the test on a computer, and the tests are available online.<sup>4</sup>

Prior to taking the test, individuals are asked to rate themselves on bias, and that rating is compared with their scores on implicit bias tests. The test has now been taken more than 18 million times.<sup>5</sup>

The researchers involved in administering and evaluating the IAT test results acknowledge that a single IAT is unlikely to be a good predictor

<sup>1</sup> Matthew Lieberman, David Rock and Christine Cox, Breaking Bias ([http://www.scn.ucla.edu/pdf/Lieberman\(2014\)NLI.pdf](http://www.scn.ucla.edu/pdf/Lieberman(2014)NLI.pdf)), *NeuroLeadership Journal*, Volume 5, May 2014.

<sup>2</sup> Heidi Grant Halvorson and David Rock, Beyond Bias, *strategy+business*, July 2015. <https://www.strategy-business.com/article/00345?gko=d11ee>

<sup>3</sup> Staats, C., Capatosto, K., Tenney, L., and Mamo, S. (2017). The State of Science. Implicit Bias Review. Columbus, OH: Kirwan Institute on Race and Ethnicity.

<sup>4</sup> Information about the IAT and the test themselves is available at <https://implicit.harvard.edu>. Project Implicit is a non-profit organization and international collaboration among researchers who are interested in implicit social cognition—thoughts and feelings outside of conscious awareness and control. The goal of the organization is to educate the public about hidden biases and to provide a "virtual laboratory" for collecting data on the Internet.

<sup>5</sup> Greenwald, Anthony G. & Krieger, Linda Hamilton, Implicit Bias: Scientific Foundations, 94 *California Law Review* 945 (2006).

of a single person's behavior at a single time point, but they maintain that across many people, the IAT does predict behavior in areas such as discrimination in hiring and promotion, medical treatment, and decisions related to criminal justice.<sup>6</sup> They acknowledge that the link between implicit bias and behavior is fairly small on average but can vary greatly. Small effects can build into big differences at both the societal level (across many different people making decisions) and at the individual level (across the many decisions that one person makes).

Another tool, the Intercultural Development Inventory (IDI), provides a cross-cultural assessment for building cultural competence in organizations.

## Training/Breaking Bias: The SEEDS Model

Raising awareness can help us realize that we might be biased, but it does not enable us to recognize bias in our own thinking—we simply do not have conscious access to the inner workings

of bias in the brain. We can't entirely get rid of these biases, but we can mitigate the impact they have on the choices we make. We can do this by preparing in advance for decisions where a bias might come into play.

The Neuro Leadership Institute SEEDS Model<sup>®</sup> identifies processes that can interrupt and redirect unconsciously biased thinking. Practice with this model can help guide our use of such processes. The SEEDS model simplifies the roughly 150 identified cognitive biases and recognizes five categories of bias, each of which responds to a different set of actions that will help mitigate the bias. Use the SEEDS model by the three steps excerpted below:

1. Accept that we are biased by virtue of our biology. People and systems are deeply biased and don't know it.
2. Label the types of bias that are likely to occur in any system or might influence a particular decision, using the SEEDS model.
3. Mitigate bias by using strategies that go directly to the core processes underpinning the bias.<sup>7</sup>



**Table 1. SEEDS Model**

FIVE CATEGORIES OF BIAS	WHAT IT LOOKS LIKE	HOW TO MITIGATE THE BIAS
<b>SIMILARITY:</b> <ul style="list-style-type: none"> <li>• People like me are better</li> <li>• “The mirror”</li> <li>• In-group and out-group bias</li> </ul>	Involves more positively evaluating people who are similar to us or who share similar goals; perceiving people who are different from us more negatively; common in decisions about people.	Find ways to acknowledge the similarities/commonalities that exist between you and all others; remove identifying and potentially biasing information from materials that go into the decision-making process; ensure that relationships are kept professional and do not let personal ideals interfere with your judgment. Consider benefits of changing your perception based on facts and the potential dangers of maintaining old perceptions.
<b>EXPEDIENCE:</b> <ul style="list-style-type: none"> <li>• If it feels familiar and easy it must be true</li> <li>• “The time machine”</li> <li>• Confirmation bias</li> </ul>	Can occur in everyday decisions that involve complex calculations, analysis, evaluation, or identifying conclusions out of data.	Slow down the process, mentally stop, and involve others in the decision. Take more time to gather a wider array of information.
<b>EXPERIENCE:</b> <ul style="list-style-type: none"> <li>• My perceptions are accurate</li> <li>• “The know-it-all”</li> <li>• False consensus effect</li> </ul>	Can occur anytime we fail to see that things may not be the way they seem and in any situation in which we fail to appreciate other people's perspectives.	Seek objective outside opinions from those not involved in the project or team; revisit ideas after a break, look at yourself and your message through other people's eyes. Build in systems for others to check your thinking, share their perspectives and reframe the situation at hand.
<b>DISTANCE:</b> <ul style="list-style-type: none"> <li>• Closer is better than distant</li> <li>• “The family circle”</li> </ul>	Involves focusing on short-term (here and now) thinking rather than long-term investment.	Take distance out of the equation; evaluate the outcomes or resources as if they were equally close to you in distance, time, or ownership.
<b>SAFETY:</b> <ul style="list-style-type: none"> <li>• Bad is stronger than good</li> <li>• “The protector”</li> <li>• Loss aversion</li> </ul>	Can occur any time we make decisions about the probability of risk or return. Studies show that we prefer not to lose money even more than we prefer to gain.	Imagine you are making the decision for someone else. Create distance between self and the decision. Imagine that a past self already made the decision successfully.

What's important to remember about the SEEDS Model<sup>®</sup> is that no one can mitigate bias alone. It takes an entire group using a common language around bias to help individuals make smarter decisions.

**“The Neuro Leadership Institute SEEDS Model<sup>®</sup> identifies processes that can interrupt and redirect unconsciously biased thinking.”**

<sup>6</sup> <https://implicit.harvard.edu/implicit/faqs.html>

<sup>7</sup> Lieberman, M.D., Rock, D., Grant Halvorson, H., & Cox, C. (2015). Breaking bias updated: The SEEDS model. Retrieved from [http://www.scn.ucla.edu/pdf/Lieberman\(2015\)Neuroleadership.pdf](http://www.scn.ucla.edu/pdf/Lieberman(2015)Neuroleadership.pdf).

## Best Practices in Training on Unconscious Bias

There is growing criticism of corporate America's approach to unconscious bias training, and its failure to address systemic bias, prejudice, and discrimination. Many companies, with the best of intentions, throw a lot of training at people, creating a jaded view of any new training initiative. Many of these training programs have focused on creating awareness of personal unconscious bias, with the idea that awareness will result in the mitigation of those biases, a supposition for which there is no evidence.

Expecting employees to be able to overcome their biases after an unconscious bias training session has made them aware of them, is akin to expecting them to eat healthy and be active because the company held a health and nutrition seminar. The programs are good tools for delivering information and creating awareness. However, research shows that to be truly effective in creating a more equitable, inclusive and diverse environment, the program has to bring people into the experience:

- A.** Training should be designed to reduce defensiveness by explaining that we don't have unconscious biases because we're bad people—we have them because we are people.
- B.** Employees must understand behaviors that are the result of individual biases, for alternative behaviors to be implemented.
- C.** Training should be focused on specific, real situations, e.g., reviewing resumes, conducting interviews, dealing with clients, demonstrating how group-think may impact results due to lack of diversity, and providing examples of situations where implicit bias can conflict with company values.

- 1.** This is most powerfully accomplished by having employees in the organization (under protection of anonymity) share how they have observed or experienced inequity and bias within the organization.
- 2.** Use simulations, role-plays, and interactive exercises so learners can assume the perspective of others.
- 3.** Implement a "Day of Diversity" involving leadership in discussing their own experiences. This could range from company-wide presentations, organization discussions, and/or small group discussions. The main point here is to provide a starting point for companies to have these conversations and to share experiences that enable people to get to know each other better. Once this starting point is established, it's important to identify and maintain ways to continue the conversations. These discussions must be held on an ongoing basis to help eliminate biases that have existed for decades.
- 4.** Hold monthly or even weekly diversity conversations that are open to smaller groups of people (25-40). Topics should be determined ahead of time, and they should focus on interests and/or concerns that matter to the people in the organization. Companies may need to start with non-sensitive, fun topics that allow individuals to become comfortable with one another, before moving to the more serious, sensitive topics that will enable discussions to move towards true change. Examples of non-sensitive topics include vacation destinations, communities to live in, owning pets, managing work life effectiveness, beauty, sports, etc. Examples of serious topics, needed to really move the needle on eliminating unconscious bias, include race, gender, sexual orientation, disabilities,



age, etc. The main point should be to have discussions with socially dissimilar groups. The HR resources in the company should be able to help guide the process and have a sense of awareness of topics that are good for discussion within the organization.

- D.** Employees who have observed or experienced inequity and bias should be empowered to be part of the design of the solution or changes. Consider having an open dialogue for 5-10 minutes at the beginning of team meetings for an open discussion on bias.
- E.** Training must be ongoing and long-term and include materials for managers on the topic of unconscious bias (e.g., tips and tricks for identifying and mitigating potential bias, definitions of common types of unconscious bias, and how to communicate better within their teams). This training should be provided to top leaders and middle management.
- F.** Company protocol, policies, and procedures should be standardized.
- G.** Evaluate the potential impact of unconscious bias in areas such as recruiting and hiring, utilization (how audit assessments and client engagements are assigned), and investigations; including conclusions and resulting discipline/remediation.
- H.** Ensure that all are trained uniformly.

**“Employees who have observed or experienced inequity and bias should be empowered to be part of the design of the solution or changes.”**

- I.** Designate and/or divide responsibility for training, communication, and implementation to ensure issues addressed are relevant to the audience. For example, how does unconscious bias affect your company's business? The work of Human Resources, Ethics or Compliance? What should managers be on the lookout for to reduce the risk of unconscious bias? All training should be coordinated and convey a consistent, cohesive message.
- J.** The training impact should be measured throughout the life cycle of the training.
- K.** Live training is the best practice. Facilitators should be highly qualified and well versed in the social psychology of attitude formation, be excellent and empathetic facilitators, and have a non-threatening and inclusive style that avoids guilt trips.
- L.** Training needs to be supported with an ongoing communication and awareness campaign and discussions on the subject; we all need to get comfortable with being uncomfortable on these topics.
- M.** Training objectives and course design should tie back to competencies and performance review
- N.** Create a Culture Team—companies can create an initiative that recruits employees to volunteer to be culture champions. This is similar to the Ethics Ambassador team/roles created in some companies, but less formal. Employees self-select to be on the team. It may include responsibility to help train employees to be able to respectfully call each other out in a safe manner when it appears that bias may be impacting decision making.

**“Implement a “Day of Diversity” involving leadership to discuss their own experiences.”**

## o. Tools/Resources

- Organizations should ensure that employees understand the common types of unconscious bias that exist:
  - <https://lattice.com/library/how-to-reduce-unconscious-bias-at-work>
  - <https://builtin.com/diversity-inclusion/unconscious-bias-examples>
  - <https://www.catalyst.org/2020/01/02/interrupt-unconscious-bias/>
- Individuals and organizations should become familiar with useful websites to help organizations educate themselves about unconscious bias and overall diversity and inclusion:
  - <https://diversity.ucsf.edu/resources/unconscious-bias-resources>
  - <http://kirwaninstitute.osu.edu/implicit-bias-training/>
  - <https://www.diversityinc.com/>
- Other useful articles:
  - <https://hbr.org/2016/01/how-managers-can-promote-healthy-discussions-about-race>
  - <https://www.diversityinc.com/companies-work-to-identify-and-disarm-implicit-bias/>
  - <https://www.diversityinc.com/kpmg-driving-inclusive-virtual-collaboration/>

Individuals and organizations must **acknowledge** that there is unconscious bias, **educate** themselves, and **take action** to eliminate it. This must be an ongoing exercise done intentionally by individuals and organizations.

## How Unconscious Bias

<sup>8</sup> In its Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, <https://www.eeoc.gov/policy/docs/harassment.html> the EEOC advises employers to select an investigator who can conduct a “thorough and impartial investigation” and who has no stake in the outcome of the investigation. Potential candidates may include a member of the employer’s human resources department, in-house counsel, or an outside, neutral third-party investigator. Regardless of the selection, the employer should select an investigator who can objectively gather and consider the facts without any pressures from the employer. Any potential or actual conflict of interest, such as the selection of an investigator with supervisory authority over key witnesses, may jeopardize the integrity of the investigation and open the employer up to liability. All investigators should be: 1) experienced in the skills required for interviewing witnesses and evaluating credibility; 2) be familiar with the employer’s policies and procedures; and 3) have a general understanding of the legal standards applicable to the investigation.

<sup>9</sup> See e.g. AMY OPPENHEIMER, THE PSYCHOLOGY OF BIAS: UNDERSTANDING AND ELIMINATING IAS IN INVESTIGATIONS (2012) [http://anyopp.co/wp-content/uploads/2013/07/Psychology\\_of\\_Bias\\_May\\_2012.pdf](http://anyopp.co/wp-content/uploads/2013/07/Psychology_of_Bias_May_2012.pdf) discussing the impact unconscious biases can have on investigations). Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL.L.Rev. 945, 951 (2006)

## Impacts Workplace Investigations

The nature of workplace investigations rests upon the assumption and expectation that workplace investigators are capable of being impartial fact finders.<sup>8</sup> If cognitive biases unconsciously steer us towards biased behavior, this represents a significant hurdle to attaining true impartiality and is likely to impact the workplace investigator’s role.<sup>9</sup>

Investigators who are subject to standards and professional codes related to their credentials (e.g., attorneys, private investigators), as well as those who are not otherwise regulated, must educate themselves as to the potentially detrimental impact such biases can have at each stage of the investigation process and make conscious and consistent efforts to reduce that impact.

An essential duty of any investigator is to conduct an independent, unbiased inquiry about allegations or complaints that have been raised. For workplace investigations, this process might involve taking a number of corrective measures at each stage of the investigation.

There are two common challenges regarding bias that arise during workplace investigations: 1) knowing at least one of the parties involved, and making assumptions based upon what the investigator believes about the employee; or 2) judging parties on the basis of preconceived notions about people holding certain titles, holding certain levels of power in the organization, or making certain salaries, and judging them as more



or less credible as a result.<sup>10</sup> These views may be colored by external events (e.g., media stories about #METOO complaints, stories of employees receiving high payout as a result of allegations of similar behavior).

Here are five relevant ways in which unconscious bias may manifest itself during workplace investigations:

**A. Confirmation bias** is the tendency to give more weight to information that tends to confirm the investigator’s preconceived notion or, conversely, to give less value to information or evidence that contradicts an existing belief. This can be evident when he or she seeks to collect and analyze evidence supporting his or her beliefs. For example, scrutinizing performance appraisals for any evidence of prior performance issues to discount allegations, opting not to interview individuals identified by the reporting party on the grounds that these individuals might have similar reasons to complain about the accused party.

**B. “Like me” (or “not like me”)/Affinity bias** occurs when the investigator tends to favor information received from individuals who are, in some respect, “like” the investigator. This affinity might be based on similar backgrounds, positions in the company, or interests. The converse of this is also

true. People are more willing to condemn strangers than individuals they know. The deeper the investigator’s ties, the stronger the tendency toward overlooking certain evidence or dubious practices.

**C. Priming bias** refers to a phenomenon in which our reactions to stimulus are affected by our exposure to another stimulus. Reactions and responses can be influenced by the words used to describe an event or situation. Asking leading questions or using charged words may impact how the witness answers the question.

**D. Expediency/Rush to solve bias** occurs when an opinion is formed without considering all available data. This tendency may be exacerbated by external factors, such as time and budget pressures and may inadvertently lead decision-makers to fall into other biases.

**E. Availability bias** occurs when an investigator is influenced by the most easily retrieved data. When looking at evidence or data, personal experiences may influence an investigator, which results in accepting immediate and available data when making investigative decisions.

## Mitigating the Impact of Unconscious

<sup>10</sup> Patti Perez, “Is Your Investigator More Biased Than You Think? Part I: Unconscious Bias Can Disrupt Your Workplace Investigations,” Ogletree Deakins, July 25, 2017 <https://www.mondaq.com/unitedstates/Employment-and-HR/613624/Is-Your-Investigator-More-Biased-Than-You-Think-Part-I-How-Unconscious-Bias-Can-Disrupt-Your-Workplace-Investigations>



## Bias on Workplace Investigations

Good investigators recognize that they may have certain types of biases that can interfere with their ability to be effective and fair, and they take steps to prevent biases from influencing the way they conduct or make decisions about an investigation.

**A. SELF-AWARENESS**—It is important to first understand your own biases.

1. Take the IAT or other test to identify bias. Taking such a test can be a great way to learn about your implicit biases. This is the first step to overcoming them.
2. Obtain feedback from those around you on how you may be showing up and/or making decisions.
3. Set realistic targets and deadlines and communicate those deadlines to manage expectations and reduce the risk of expediency bias.

**B. COMPLAINT PHASE**—deciding whether to conduct an investigation.

1. Make a fair assessment about whether the concerns raised need to be formally investigated (establish objective criteria for conducting investigations to remove subjective decision-making) and avoid prejudging the allegations.
2. Be prepared to justify your investigation/decisions and challenge yourself with the information you've been given/collected/assembled.
3. Be conscious of communicating a bias—be careful when making comments in writing or to others about the allegations, even

before you start your work. Avoid writing notes that suggest pre-judgment “this is a lie,” “that is only her perspective,” or “this didn't happen,” or “we've heard this type of allegations before.”

4. If you identify with the complainant/target—force yourself to think of similarities between yourself and the complainant/target.

### C. PRE-INVESTIGATION PHASE:

1. Ask yourself about your views on the subject you're investigating and whether you may have a well-formed opinion on it. Challenge your assumptions and seek the advantages of alternative ways of doing things. How did you react upon hearing the Weinstein or Epstein allegations?
  - a. If your first reaction was “they're lying,” or “they waited too long,” or “they're doing this for the money or the publicity,” you might have a predisposition to disbelieve people who complain about this type of behavior.
  - b. Did you think the allegations were true because you might not like these men for reasons unrelated to the misconduct allegations or because you believe these types of allegations are never made up?
  - c. Have you been or do you know a victim who raised (or did not raise) similar allegations? How might that impact your view of the investigation?

### 2. Prepare

- a. Put together an investigation strategy that objectively and precisely defines the scope of the investigation. Beware of expediency and availability bias. Ensure that the witnesses most likely to have useful information will be interviewed.
- b. Have a methodology for conducting interviews (including consistent strategies for opening the interview and making the witness feel comfortable).
- c. Prepare a detailed interview outline that uses open-ended questions related to the concerns raised. Consider writing down questions on key points to avoid leading questions or charged words that may result in priming bias.
- d. Follow a clear, concise investigation plan that has proven objectivity built into it.

### D. GATHERING AND ANALYZING EVIDENCE

1. Confirmation bias might come into play when an investigator
  - a. Selects witnesses to interview, making assumptions about which individuals can offer relevant evidence, or chooses which evidence to review, perhaps unwittingly focusing on evidence that confirms his or her preconceived ideas about the parties involved or the allegations, or analyzes evidence in such a way that confirms the investigator's preconceived beliefs about the situation.
  - b. Establishes rapport with witnesses. An investigator may feel more comfortable with some witnesses (i.e., may exhibit a “like me” bias), because the investigator has something in common with the witness. Investigators may, in turn, create a more comfortable or

safer environment in which to share information. An investigator may also give more credence to what certain (i.e., “like me”) witnesses say.

- c. Asking skewed questions—investigators may be inadvertently priming witnesses by asking them leading or charged questions that may influence the witnesses' responses.<sup>11</sup>

2. Review and document your analysis of all evidence. In order to prevent confirmation bias, interview witnesses and review documents that corroborate the allegations *and* evidence that contradicts the allegations (particularly if you recognize that you might be forming impressions or arriving at conclusions before you finish gathering evidence).

3. Create a setting conducive to sharing information. Consider common-sense realities as you interview witnesses and evaluate their statements. People are often nervous, scared, or defensive during interviews. To avoid priming bias, ask questions that are precise and nonjudgmental; make it clear that you have not reached conclusions about the concerns; and make sure you use techniques to make all witnesses feel comfortable and that they trust that you are simply trying to uncover facts (that you have no hidden agenda).

### E. ANALYSIS AND CONCLUSION

1. Focus on collecting and considering just the facts—In-house attorneys and Human Resources professionals may see their role as being one who must defend or protect the company and its assets, rather than as an unbiased investigator. However, the chances that a complainant will bring a claim because of his or her dissatisfaction with the investigation process and conclusion increases exponentially if the investigator is a biased advocate

<sup>11</sup> Perez, Is Your Investigator More Biased Than You Think? Part I: Unconscious Bias Can Disrupt Your Workplace Investigations,” Ogletree Deakins, July 25, 2017 <https://www.mondaq.com/unitedstates/Employment-and-HR/613624/Is-Your-Investigator-More-Biased-Than-You-Think-Part-I-How-Unconscious-Bias-Can-Disrupt-Your-Workplace-Investigations>

rather than an independent factfinder. Make sure the verbal or written report the investigator prepares at the conclusion of the investigation includes the facts that support and those that might contradict the allegations. This will allow an investigator and decision makers to fairly analyze and judge the validity of the claims brought.

2. The use of tools can help investigators see the evidence more objectively. Here are some examples:
  - a. Create a timeline of key dates and events (avoid commentary about the meaning of those events) to allow viewing the evidence in a much more detached and fact-based way.
  - b. Consult appropriate subject matter experts—unconscious bias might be leading to a conclusion that is based on a portion of the data, or overemphasize portions of the data gathered. Someone with more experience in the substantive area can guide you to a judgment-neutral assessment.



- c. Play Devil's Advocate—ask yourself how an advocate of the accused might present the facts. Test your conclusions with colleagues with whom you can share the information if it will not breach a duty of confidentiality.
- d. Create a checklist to help recognize, react to, and reject bias in investigations: Emtrain checklist.<sup>12</sup>
- e. Create a review committee or accountability partner to provide a second level of review of the data gathered to help identify the presence or check the impact of bias.

#### F. DECISION-MAKING

Bias might impact decision-making when deciding whether misconduct occurred, who was wronged or the wrongdoer, and the remedial measure(s) to implement in the event of a finding of misconduct. An investigator may reach a conclusion that aligns with his or her preconceived ideas about the conflict and/or the parties involved. The investigator might also recommend a remedial measure that's more lenient on a "like me" offender.

When deciding which remedial measure to implement, investigations should include steps to ensure that bias is not affecting the investigation. Assuming there is some level of misconduct found, do not let assumptions or preferences dictate the remedial measure you will implement. Depending on the severity of the misconduct, some factors might be appropriate to use in deciding which remedial measures to implement. Does the matter involve a long-standing employee with a strong performance history? Were there mitigating circumstances? How has the company historically handled this type of misconduct? Other factors, however, are not appropriate and might be considered evidence of unconscious bias. A common

<sup>12</sup> To help investigators become more aware of their own unconscious bias risk, Emtrain has created a referenceable checklist that helps professionals recognize—and reject—unconscious bias pitfalls. The checklist includes: Ways in which to test your thinking when presented with different complaint scenarios; Why it's important to develop a methodology for receiving and understanding complaints; Why it's important to have a standard approach to interviews; What to think about when creating an investigation strategy; How to develop a system that is reliable, accurate and consistent; And many more recommendations. The checklist is available here: <https://www.emtrain.com/resources/unbiased-workplace-investigations-checklist/>

example involves **imposing a lenient remedial measure, or no remedial measure at all, because the misbehaving employee is a highly-valued employee or is an executive of the company.**

Appropriate remedial measures are those that are (1) commensurate with the level of wrongdoing and (2) tailored to prevent recurrence. Consider creating a list of possible remedial actions on a spectrum of 1 to 10. A 1 might be a meeting to provide verbal coaching; a 10 is immediate termination. When you reach the end of your investigation, think about the level of seriousness of the misconduct. If you use the same kind of scale to judge the misconduct to be a 3, do not implement a fix that is a 7 on the remedial measure spectrum. Conversely, do not implement a 3 fix (or no fix at all) when the level of misconduct was an 8.<sup>13</sup>

While unconscious bias can be an issue in organizations, it is one that can be addressed. Through awareness, process and structures, leaders and organizations can enhance decision making and minimize the impact of unconscious bias.

**“While unconscious bias can be an issue in organizations, it is one that can be addressed.”**

<sup>13</sup> Perez., Is Your Investigator More Biased Than You Think? Part I: Unconscious Bias Can Disrupt Your Workplace Investigations,” Ogletree Deakins, July 25, 2017 <https://www.mondaq.com/unitedstates/Employment-and-HR/613624/Is-Your-Investigator-More-Biased-Than-You-Think-Part-I-How-Unconscious-Bias-Can-Disrupt-Your-Workplace-Investigations>

## Additional Tips/ Measures to Reduce Impact of Bias

### A. Track Conclusions and Remedial Measures

It is possible to measure unconscious bias in investigations if you keep track of your investigation decisions and conclusions and any lessons learned from the particular investigation. Similarly, keep track of remedial measures you have implemented at the conclusion of each investigation.

### B. Analyze the Results

Tracking and analyzing the results of your investigations (e.g., founded, unfounded), source of complaint (employee, service provider, manager), target (manager, employee), nature of allegations (bullying, discrimination, harassment, unethical conduct), type of violations (code of conduct, policy, legal) provide the opportunity to analyze data and uncover evidence of unconscious bias in investigations. For example:

- Are investigations of external party complaints more likely to be “founded” than those of employees?



- Are certain allegations always “founded” or “unfounded”?
- Do the results vary by investigator?
- Are results biased in favor of managers more often than lower level employees?
- Do certain types of claims (bias based on race or gender, for example) seem to conclude with similar findings?
- Do you tend to find allegations made by “high-value” employees to be without merit?

You should also look at the record of decisions for remedial measures:

- Are harsher measures implemented against members of a particular group?
- Are you more lenient in your implementation of discipline to employees in a certain department or region?
- Do you tend to favor employees with whom you have something in common?

### C. Share Information across Departments

Where other departments conduct investigations, there should be coordination across the organization on process, conclusions, findings, and bias. This will allow you to track decisions department-wide or company-wide by using the same criteria cited above. Are findings balanced based on employee characteristics, department, rank, etc.? Are remedial measures evenly handed out irrespective of these characteristics or who conducts the investigation?

### D. More Information

In the course of its research, the Working Group identified two resources that offer additional training on unconscious bias and internal investigations.

The Association of Workplace Investigators (AWI)<sup>14</sup> is an international, professional membership association of more than 900 workplace investigators, including attorneys, human resource professionals, private investigators, and many others who conduct, manage, or have a professional interest in workplace investigations, either from inside the company as employees or as external investigators.

AWI offers training and education programs about conducting impartial workplace investigations, and publishes *Guiding Principles for Conducting Workplace Investigations*<sup>15</sup> and the *AWI Journal*, a quarterly peer-reviewed professional journal.

The Association of Certified Fraud Examiners offers an online self-study course in “Overcoming Bias in Investigations and Audits” available here: <https://www.acfe.com/selfstudy.aspx?zid=2c92a0076a07e3be016a27279a452766>.

By listing these as additional resources, the Ethics and Compliance Initiative does not endorse these organizations or their programs.

**“Where other departments conduct investigations, there should be coordination across the organization on process, conclusions, findings, and bias.”**

<sup>14</sup> [https://www.awi.org/page/about\\_AWI](https://www.awi.org/page/about_AWI)

<sup>15</sup> [https://www.awi.org/page/Guiding\\_Principles](https://www.awi.org/page/Guiding_Principles)

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