

Sexual Misconduct: Lessons Learned from Investigations in the Workplace

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Since the Fall of 2017, in the wake of the burgeoning #MeToo movement, outside investigators have been called on to gather the facts in response to an avalanche of sexual misconduct allegations in workplaces. This article is based on lessons we have learned from our investigative work and noted from the coverage of investigations that have been launched in the U.S. and around the world. We will focus on best practices for in-house counsel, human resources, and workplace investigators on how to effectively investigate the allegations, preserve evidence and identify who should be interviewed.

These are a few of the insights we have gained in our work that we will explore in more detail:

- The most important step in addressing sexual misconduct is to identify potentially problematic employees and potential reputational concerns – even if ultimately unsubstantiated – up front, during pre-hire vetting. This requires going deeper than tick-the-box background checks.
- Be prepared for new allegations to emerge about an employee at the moment he or she is being promoted or becomes a public face of the company.
- The #MeToo movement started with allegations about sexual predations, and has grown to encompass complaints about consensual relationships between work colleagues.
- It is vital to treat accusers, the accused and other knowledgeable parties with respect and to use a neutral tone – without prejudging.

The allegations against Hollywood producer Harvey Weinstein, published in *The New York Times* in late 2017 jump started the #MeToo movement and served as a tipping point.¹ In the past two years, no industry or continent has been spared from the growing number of sexual misconduct allegations. In December 2018, Britain's Big Four accounting firms each publicly disclosed the number of UK partners who were forced out of their jobs for inappropriate behavior, including bullying and sexual harassment.² In India, in 2018, the actress Tanushree Dutta revealed that she left the film industry after she was aggressively

¹ October 5, 2017 *The New York Times*, "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades," <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>

² : December 11, 2018 *Financial Times*, "Big Four Auditors Reveal Number of Partners Fired Over Misbehavior," <https://www.ft.com/content/5179fb94-fd6c-11e8-ac00-57a2a826423e>

harassed on the set of a Bollywood film in 2008³. In October 2018, M.J. Akbar stepped down as the Indian Minister of State for External Affairs after more than a dozen women accused him of sexual assault and harassment. And in Costa Rica in February 2019, at least nine women came forward with sexual assault allegations against former Costa Rican president and Nobel Peace Prize winner, Oscar Arias; two have filed formal charges of rape⁴.

The #MeToo movement has since grown to include scrutiny of consensual relationships inside organizations. Employers are concerned with potential liability involving any relationships between supervisors and subordinates. Consider, for instance, that in June 2018, the CEO of a large, Silicon Valley technology company resigned from his position after reports surfaced that he had a consensual affair with a middle manager roughly a decade ago—long before he took over as CEO.

State-level legislation in the U.S. has recently begun to respond directly to the #MeToo movement, more specifically addressing sexual misconduct issues in the workplace. In 2018 alone, 11 U.S. states passed new workplace protection laws.⁵ And three new laws in California, passed in 2018 and implemented in 2019, now limit California employers from including certain provisions in employment contracts and settlement agreements that are related to claims of harassment and bullying based on sex.⁶

The stakes for companies in mishandling these kinds of workplace controversies could not be higher. Recently, two senior female partners in a leading global accounting firm resigned after concluding their long-time employer failed to take appropriate action against a male colleague accused of being a serial bully. The departures reportedly stunned the firm and crushed morale.⁷

Moreover, allegations of sexual misconduct have served as inflection points within larger corporate disputes, such as proxy contests, wrongful termination cases and other civil litigation. For example, a major American media company CEO, along with other board members, was recently locked in a battle with a top shareholder for control of the company. After six women came forward with sexual misconduct allegations against the CEO, the battle ended with the company announcing the CEO's departure and adding several new members to its board—mainly replacing those loyal to the ex-CEO.

The #MeToo movement has underlined for all of us the fact that sexual harassment and abusive conduct has been overlooked and often accepted behavior in corporate culture for decades. It is foolish for corporations to establish risk-abatement programs on cyber intrusion and know-your-customer, for example, but to fail to have top leadership help design procedures to handle these kinds of interpersonal crises.

³ October 1, 2018 *Guardian*, “Tanushree Dutta’s Bollywood Sexual Harassment Case Back in Spotlight,” <https://www.theguardian.com/world/2018/oct/01/metoo-bollywood-sexual-harassment-case-reignited-a-decade-on>

⁴ February 14, 2019 *Time*, “Inside the Allegations Against Costa Rica’s Former President and Nobel Laureate,” <https://time.com/5529479/costa-rica-me-too-oscar-arias/>

⁵ December 28, 2018 *CNBC.com*, “New State Laws: From Workplace Harassment Protections to Mandating Women on Boards” <https://www.cnbc.com/2018/12/28/new-state-laws-in-california-elsewhere-inspired-by-metoo-movement.html>

⁶ CA Civil Code §1670.11; CA Code of Civil Procedure §1001; CA Gov’t Code §12964.5

⁷ May 30, 2019 *Financial Times*, “KPMG Loses Veteran Female Partners Over Male Colleague’s Conduct,” https://www.ft.com/content/37ae6eae-8221-11e9-b592-5fe435b57a3b?accessToken=zvAAAWssOtawkc83rm6ugiER6dO1kl_kNbV6Ow.MEUCIEt3I9FKH2UhfM TJ0cHE2ixIIP3F-yjifGoGRBDXN_NCIAiEAqiZPvgE2hRjL7zrNkza9yhSHRC6xVg-ne2zM4KLCYGE&sharetype=gift?token=bb290387-cf97-4d13-bdbf-711bdcbbc912

There are no black-letter laws on how companies should respond to these disputes, and they are being interpreted and enforced in widely disparate ways across different corporate settings. However, some guidance has been provided to U.S. and California employers. The U.S. Equal Employment Opportunity Commission (EEOC) – the agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee based on a protected class – recommended in a 1999 Notice that employers “should set up a mechanism for a prompt, thorough, and impartial investigation into [any] alleged harassment,”⁸ and the EEOC has subsequently confirmed this guidance.⁹ Moreover, the California Department of Fair Employment and Housing (DFEH) published a Workplace Harassment Prevention Guide in 2017 for California Employers that used the same language as the EEOC when responding to workplace harassment complaints.¹⁰

In this era of #MeToo, as investigators and due-diligence professionals are called on to help companies mitigate these risks, an investigation can just as easily identify a sexual predator as it could end up lifting clouds of suspicion from embattled individuals. These are not two opposing tasks but one: unearthing the most factual information available to help people navigate risk in a changing world.

Spotting Harassers Before They Come in the Door

A culture of vigilance against sexual misconduct must be nurtured at every level of a company, and at every phase of an employee’s engagement with the company.

It starts when the corporate talent-acquisition team is on the hunt for new executives. For executives who will be in position of authority in an organization, we recommend robust background checks that include (1) deep social media checks on the person and his or her prior companies; (2) research into relevant regulatory and legal actions that involve the executive’s prior employers (even if it does not name him or her personally); and (3) reputational interviews with former colleagues not included in the list of references provided by the executive.

In our experience, veteran executives who have sexually harassed subordinates in past jobs have often tried to scrub any evidence of the behavior. Or inappropriate behavior in the past – sometimes widely rumored – results in legal action or posting on social media many years later, with the elevation of the perpetrator’s profile through promotion, and in the context of the #MeToo movement.

But a typical pre-employment background check is restricted to an examination of public information; firms like ours are rarely asked to conduct reference interviews on a job candidate out of the gate. And there is no database of people accused of harassment, no comprehensive list of bad actors; it takes careful research across dozens of sources, perhaps in multiple countries and languages given the increasingly global talent pool.

Within this patchwork of sources, we might find that the candidate has been a named party in a lawsuit or arbitration dealing with sexual harassment, or has been the subject of a civil restraining order along those lines. Or, we might find an action taken by the EEOC or a state equivalent against one of the candidate’s employers. It is important to search for actions taken against the candidate’s employers, because claims in the workplace might not name the individual accused of the wrongdoing. Or, perhaps there was a news report that the executive candidate suddenly and inexplicably left a company, which is something we recommend reviewing more closely.

⁸ EEOC Notice no. 915.002, June 18, 1999; see <https://www.eeoc.gov/policy/docs/harassment.html>

⁹ See https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref170

¹⁰ See <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide-1.pdf>

It is also important to conduct a comprehensive search of social media to see what the candidate has posted over the years. Has the candidate “liked” an offensive or explicit Tweet, or referred to a specific gender in a dismissive or pejorative way? Beyond the candidate’s own posts, there is a world of blogs and forums that may reveal questionable behavior, whether accounts of a specific incident, or perhaps that the executive candidate created a general “frat-house” atmosphere within their department. Anonymous posts on job-review sites like Indeed.com or Glassdoor.com can be revealing – although require verification – and we have recently seen some grassroots watchdog groups emerge online, comprised of people from a certain industry or even a specific company who are dedicated to exposing executives whom they consider to be bad actors.

The above flags can all be found in the public domain, and you should expect a background check to find them. When we do come across one or more of these flags, we often recommend conducting interviews of the candidate’s past colleagues, subordinates and others who were there at the time to get a more complete picture.

It’s important to note that even a comprehensive background check might miss a past harassment allegation. There are a few scenarios to keep in mind and to discuss with your due-diligence providers.

Some U.S. states prohibit background-checking firms from reporting certain kinds of adverse information to prospective employers. For example, California law bars background-checking firms from reporting most adverse information naming a candidate that predates the report by more than seven years, whether found in a lawsuit, a news article or elsewhere.¹¹ The California law recently prevented a U.S. company, which had commissioned a background check of a prospective senior executive, from learning that he had been sued for sexual harassment more than seven years before.

Promotions Can Bring Forth Unexpected News

We call this the Brett Kavanaugh Syndrome. The world was not ready for the #MeToo movement in 1991 when the U.S. Senate held hearings on then-Supreme Court nominee Clarence Thomas; when Kavanaugh – then an appeals court judge¹² - was nominated for the U.S. Supreme Court in 2018, an accuser from his high school years went public with her accusations of sexual assault. We’ve seen it elsewhere: People who have felt silenced may finally speak up when the accused is elevated to a position of power.

Companies should be alert to that possibility. Executives who apply for promotions might expect to have their job performance, and that of their division, scrutinized by superiors. But in addition, companies need to prepare themselves for what the rank-and-file – or even outsiders with a years-old allegation – might volunteer.

Interviews Can Be Revealing

Background-checking firms are unlikely to find conduct by the candidate, whether in his private life or in the workplace, that has been hushed up and kept from the public record (and from public view generally) by both the candidate and people around him, or has not yet percolated to social media attention or legal action. Here’s a recent real-life example: A media company hired a senior executive from another media organization, which did not disclose that it had fired him after a detailed sexual-harassment complaint was filed against him. The hiring company had picked up rumors about the firing, but did not inquire much further.

This is where interviewing comes in. Consider this scenario: an administrative assistant filed a lawsuit alleging her employer had created a hostile work environment for women.

¹¹ CA Civil Code § 1786.18(a)

¹² Before Brett Kavanaugh was appointed an Associate Justice of the U. S. Supreme Court in October 2018, he served as a Judge of the U.S. [Court of Appeals for the District of Columbia Circuit](#).

The plaintiff named the company as the sole defendant, but in the complaint described offensive behavior by two unidentified male supervisors. The candidate in question might have been one of these supervisors, but it is impossible to know from public information alone — interviews are often the only way to find out.

Interviewing also proved crucial to resolving a scandal that brought worldwide negative headlines about a high-tech company after an employee stated a superior had sexually harassed her. The company launched an intense, months-long internal probe, examining documents and emails, and interviewing numerous employees, concluding that the allegations were unsubstantiated.

We were recently hired to conduct a routine pre-hire background check on a prominent executive being considered for a C-level position at a U.S. publicly traded company. We found no red flags in the executive's past from our comprehensive review of the public record and open source material. One month after he was hired, a social media account with thousands of followers crowd-sourced a list of top executives who were notorious sexual harassers in that industry, and this executive was among the top 10. Several women at his new company followed this social media account and approached the company's legal department. (Social media has become a regular medium to out sexual harassers and allegations posted online, and is often used after an appointment has been announced.)

We were hired again by the general counsel to conduct a two-phase investigation: First, quietly dig deeper into the executive's background, this time without Fair Credit Reporting Act¹³ and other research restrictions in place for pre-hire background checks. Again, we found no red flags. Secondly, we were asked to identify female colleagues who previously worked with the executive at past companies. We identified several women and began making calls. Most said nice things about the executive. One woman said she heard of an HR investigation involving the executive, but couldn't recall any further details. A second woman spoke with us initially and then called back shortly thereafter. She proceeded to tell us details of the HR investigation and of the executive's inappropriate behavior with at least one female colleague. The general counsel confronted the executive, who admitted to the previously undisclosed investigation at his prior employer.

Conduct Workplace Interviews with Care

The emotional tenor that company representatives use in the first communications with complainants can be as important as the words that are spoken. An employee mounting allegations should be treated with utmost respect and empathy; he or she could well be in a state of hyper-vigilance looking for signs of putdown.

At the same time, company officials and investigators need to avoid premature statements suggesting that the organization has concluded that his or her accusations are officially believed or confirmed.

These are some of the practices we recommend:

- Move quickly to begin an investigation.
- Interview potential witnesses as well as people who may be aware of a larger pattern of harassment.
- Consider interviewing former employees, who perhaps can provide historical context and might speak more freely.
- Carefully regulate the alleged harasser's contact with accusers and potential witnesses.
- Choose the sequence of interviews carefully.

¹³ The Fair Credit Reporting Act (FCRA), 15 U. S. C. § 1681, is U. S. Federal Government legislation enacted to promote the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies.

- Conduct interviews away from the office or other locations where employees will see the conversations.
- Ask for documents and other hard evidence.
- Reveal details about the allegation to interview subjects only when absolutely necessary.
- Who's reliable? Look at the reputation for credibility of both the accuser and the accused.
- Is there any real-time corroboration? One follow-up question might be, "Did you tell anyone about it at the time?" If they did, make sure to speak with that person. But be aware that victims sometimes feel unable to report issues at the time of the incident, and a lack of real-time corroboration should not be used to undermine the victim's allegation.
- Investigate thoroughly, but don't let investigations drag on.
- In high-profile disputes, investigations are happening in real time, often in parallel with social media activity about the allegations and reporters chasing a story, or with efforts by the accused – or others within the company – to intimidate witnesses.

Beware of Continuing Harassment of Witnesses

In high-profile disputes, investigations are happening in real time, often in parallel with social media activity about the allegations and reporters chasing a story, or with efforts by the accused – or others within the company – to intimidate witnesses.

It is important, when possible, to regulate an alleged harasser's contact with witnesses and accusers. For example, we worked recently for attorneys representing a woman who had made allegations against her employer. The allegations were not public, nor was there active litigation. As soon as she came forward, however, packages started arriving at her door. Inside were documents stored on her laptop, which had been hacked. Our client asked us to meet her and collect the evidence in a way that maintained chain of custody, in case they needed to use it in future litigation against the alleged harasser.

Past Consensual Relationships Among Colleagues are Drawing Attention

Not that long ago, powerful executives had consensual affairs with underlings with little concern about the consequences to their careers (the underlings, perhaps, had a different experience). In recent years, these flings, some of them years in the past, are increasingly being brought into the open. The revelations are bringing some careers to a quick end.

Consider, for instance, the recent case of the CEO of a leading U.S. tech company who resigned after reports emerged that he had had a consensual affair with a middle manager roughly a decade ago — long before he took over as CEO.

Obviously, one of the most important factors in these workplace relationships is whether one of the participants had supervisory power over the other. But power can be exerted in settings beyond the traditional boss-subordinate. Some people believe that due to cultural scripts, many women or people who feel marginalized might agree to things that make them feel uncomfortable. We know of cases in which an affair, between a male client of a law firm and a female lawyer at the firm, led to an internal investigation. Such a relationship, if it becomes a matter of dispute, almost inevitably raises the question whether one of the two one-time lovers had some kind of power or leverage over the other.

Emails and Documents

Increasingly, investigators are asked to track corporate or personal funds that were used to buy someone's silence in secret settlements. Throughout these sorts of internal investigations, companies should document everything. Do not discard complaints to HR

or internal hotlines, even if they appear unwarranted or far-fetched. Some of these inquiries will turn on the same kinds of e-discovery that are at the center of many corporate fraud prosecutions; almost nobody has the “tradedcraft” to keep a harassment or an affair entirely offline.

For example, we recently investigated allegations against an executive who denied wrongdoing. He told his employer that he had deleted all his text messages with the complainant, but the complainant saved more than 3,000 text messages that the pair had exchanged. These text exchanges provided revealing context about the actual history of their relationship.

Move Quickly to Begin an Investigation

A recent case example best proves this point. We were hired by a California-based manufacturing plant to look into the background of a claimant, an unskilled hourly worker who alleged her superior had raped her on the job and threatened her with physical harm if she spoke up. She had sued the company for several millions of dollars.

The parent company with deep pockets was legitimately concerned because the plant failed to act in response to the claimant’s original complaint to human resources, and the claimant continued to report to the same supervisor. It wasn’t until the lawsuit was filed and the parent company general counsel’s office was alerted to the situation that outside counsel and our investigation firm were hired.

Had the company acted quickly, it would’ve found that the claimant had a consensual relationship with her supervisor, which she initially pursued and abruptly ended. She then made false accusations about the rape – our interviews with a dozen plant employees corroborated the falsity of her claim. Further, our investigation found that the claimant had attempted this same scenario with two prior employers – started affairs with her supervisor, then alleged he mistreated her, and in both cases, the companies acted promptly and appropriately, and concluded her claims were false. Our surveillance also discredited claimant’s allegations that she suffered significant emotional distress that prevented her from leaving the house.

Nonetheless, the plant’s failure to act ended in a multi-million-dollar settlement in the plaintiff’s favor.

A Company’s Reputation and Credibility is at Stake

In the past two years, companies across the globe have been rattled by controversies over employees’ belief that top executives failed to take seriously the sexual-harassment complaints of female employees. Rumors about harassment and misconduct have long circulated in companies, but now victims can easily share their experiences via social media. Scattered rumors quickly become a united voice. This increases pressure on boards, regulators and executives to scrutinize allegations carefully and act quickly to remove alleged bad actors.¹⁴

According to a 2019 survey commissioned by the International Bar Association on bullying and harassment within the legal profession, workplace misconduct can have a devastating effect on retention of valuable staff: “65% of respondents who have been bullied and 37% of respondents who have been sexually harassed left or are considering leaving their workplaces.”¹⁵

¹⁴ May 23, 2019 *Financial Times*, “More Chief Executives are Paying for Their Ethical Mis-steps,”

¹⁵ Pender, Kieran, ‘Us Too? Bullying and Sexual Harassment in the Legal Profession (2019), Legal Policy & Research Unit International Bar Association.

Recall a November 2018 global walkout staged by Google's employees after the news emerged that a favored top executive had retired with a payout worth tens of millions of dollars, following allegations of sexual misconduct that were internally deemed credible.

But a corporation that carries out an internal investigation that seems somehow unbalanced and unfair to the accused can bring trouble as well. Recently, a major bank settled a defamation lawsuit filed by an executive it had fired for alleged sexual harassment, assertions he strenuously denied. The fired executive added that the bank suppressed evidence that the accuser was not credible. Two bank employees who supported the accused executive's version of events during the internal investigation were also fired. The fired executive is of Middle Eastern origin, and asserted he was discriminated based on his ethnicity.¹⁶

A corporation confronting accusations of sexual assault and harassment, or an abusive workplace environment, needs to be at the top of its game, and might need outside expert help. A company that demonstrates that it takes such allegations very seriously stands to benefit.

A well-conducted investigation can help shield employers from legal liability, while also reducing workplace conflict and promoting job satisfaction.

Internal investigations of sexual misconduct that are recognized by employees and outsiders as thorough and balanced are earning praise from judges, the media and the employment law experts. These events can be an opportunity to stand out from the crowd.

Mintz Group is a corporate investigations firm with 200 investigators working out of 15 offices around the world. The firm checks the backgrounds and reputations of individuals and companies prior to relationships, and gathers facts and evidence for companies and litigators during legal disputes, in internal investigations and after fraudulent acts are discovered. **Staci Dresher** (San Francisco) investigates matters involving intellectual property theft and brand protection, white collar defense, internal investigations, and responds to employment disputes and workplace misconduct allegations. **Kelsey Froehlich** (London) focuses on fraud and internal investigations, and complex pre-transactional diligence worldwide. **Clancy Nolan** (New York) focuses on investigations involving complex civil disputes and workplace misconduct allegations.

¹⁶ See e. g. <https://finance.yahoo.com/news/disgraced-ex-bofa-exec-raises-uncomfortable-questions-metoo-140122741.html>