Session 503 | Gathering Facts, Building a Case and Appearing in Court in the New Normal

Conventional wisdom held that evidence gathering and witness interviews should be conducted in-person and only by lawyers. This was especially true for sensitive topics, such as allegations of workplace misconduct, harassment or discrimination. But hybrid work has brought to light the need for other approaches. Are they better? While virtual interviews carry the benefits of saved time, travel costs and the ability to talk to witnesses anywhere in the globe on short notice, they also pose distinct challenges in assessing witness credibility and building trust. This panel will discuss techniques to overcome these and other challenges in conducting remote witness interviews, depositions and legal proceedings, including: How do you gain a victim’s trust? Establish rapport with witnesses? Effectively depose the other side? Prepare and guide a witness or client through a remote virtual proceeding? How can investigators help make evidence gathering and witness preparation run seamlessly in a hybrid setting? How do you protect privilege when using an outside investigator? When you are the client, what are best practices for working with investigators and outside counsel? This diverse panel will feature viewpoints from various actors in the investigative landscape, including plaintiff’s and defense counsel, a member of the bench and the CLO of an investigative firm.

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Speakers:
Hon. Ona Wang, United States Magistrate Judge, Southern District of New York
Patricia Astorga, Chief Legal Officer, Mintz Group
Lisa Mak, Associate, Minami Tamaki LLP
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The following articles address the challenges presented by remote or online investigations, and suggested strategies in navigating these challenges. Also included are articles that highlight issues and challenges of traditional workplace and pre-hire investigations in the #MeToo context, as well as evolving trends in cross-border M&A due diligence in light of the COVID-19 pandemic.
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. 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. In India, in 2018, the actress Tanushree Dutta revealed that she left the film industry after she was aggressively


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 2008. 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 rape.

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. 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.

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.

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.

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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/37aebeae-8221-11e9-b592-5fe435b57a3b?accessToken=zwAAAWssOtawkc83rmbugiER6dO1kl_kNhV6Ow_MEUCIe3j9FKH2UhtmJx0eHE2ixBP3F-yifGnGRRBDXN_NC1AiEa7qZpVgE2hRjL7zrNka9yhSHRC6xVg-ne2zM4KLCYGE&sharetype=gift?token=bb290387-cf97-4d13-bdbf-711bdcbbe912
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.

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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
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.

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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 Act\(^\text{13}\) 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.

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\(^{13}\) 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 “tradecraft” 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 compliant 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

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

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.  

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.

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Among the many corporate functions upended by the coronavirus crisis is M&A due diligence. After all, deals used to start with a handshake, with assurance conveyed by a touch. But now handshakes, management meetings, dinners, and rounds of golf have been replaced by faces in Zoom boxes. And that’s just the beginning of how due diligence is adapting, particularly for cross-border deals facing newly hostile borders.

To a greater degree now, taking advantage of cross-border deal opportunities means doing business with people you do not know, and will likely not even meet for a while. In risky times, being skillful at independent fact-gathering—diligence—is more important than ever.

We have noted on many occasions how investigation is the job of a private equity deal team. How successful investing depends on deep investigating—gathering independent facts that deal teams need to test the representations being made to them across the table.

Well, in the age of coronavirus, your investigations just got harder and more complex. We hope this article helps by highlighting some specific due-diligence considerations in these changing times. After all, it’s not the first time that diligence has had to adapt to new risks (think 9/11 and terrorist financing).

As due diligence professionals with experience helping private equity and other institutional investors, we want to offer four observations, a sort of report from the front on how an investigative due diligence firm and its clients are adapting to the coronavirus crisis, a few months in:

1. Check the Politics
Recent unprecedented events have shaken industries the world over, and deal diligence is racing to keep pace. For example, governments are speeding to erect barriers against foreign investment, out of concern about protecting increasingly vulnerable local industries. This protectionism is adding a layer of complexity to pre-transaction due diligence.

Some governments are taking “drastic” steps to repel foreign investors, according to Baker McKenzie’s Samantha Mobley, in a recent Legal Business column. Spain, for example, is requiring non-EU players to get Madrid’s approval to invest in strategic sectors such as technology, health care, and even media.

These developments highlight the need for investors to carefully consider foreign investment review risks at this highly-sensitive and volatile time both for deals currently underway and transactions being contemplated,” Ms. Mobley said. “Never has it been more relevant for [investment] companies to keep in mind the age-old advice for acquirers: buyer beware.”

Luigi de Vecchi, Chairman of EMEA banking capital markets advisory at Citigroup, has predicted “a return of state intervention, triggered not only by protectionist moves to deter unwanted takeovers, but by the sheer necessity to rescue entire industries, revive strategic assets, and, where possible, create domestic champions through consolidation.”

While there have always been prospective transactions that drew scrutiny from host governments, depending on the industry and origin of investment, we are now faced with many governments erecting barriers and reviews, apparently overnight, and often without announcement or explanation.
In addition to such direct expressions of political concern, we can see the likelihood of indirect effects of the virus crisis; we would predict, for example, that the concept of “politically sensitive persons” will effectively be broadened in this new environment.

Among the issues that we have been asked to investigate over recent months:

- Beyond official, Committee on Foreign Investment in the United States (CFIUS)-like standards on deal approval, will unannounced anti-foreign standards be informally applied?
- Which competitors, merchants’ associations or gadflies will stir up opposition to deals like ours?
- Does the company’s lobbyist have a good reputation locally?

2. Frauds & Exaggerations Are Flourishing

Cross-border deal diligence began adapting the day that the first deal team canceled plans to fly out and lay eyes on a business. The challenge is to understand with whom one is really dealing, without handshakes, dinners, and management meetings.

With borders and air travel restricted, there is now a premium on local and hyper-local resources who can lay eyes on something for you, without needing to go through an airport.

A due diligence team who has “boots on the ground” can still ask around locally as an independent check on what a party claims. We tell our clients: You invest globally, we investigate locally.

Those local inquiries often encounter shades of gray—less often finding an outright scam (although they do happen) and more often uncovering exaggeration and artful omission. (Like the out-of-work holes in résumés that we find have been filled in by self-created “employers.”)

The best sources for a detailed, nuanced view of a local businessperson’s reputation are often former employees and former partners —identify them in social media, local records, and industry directories; and then go knock on their doors.

During the pandemic, contacting and interviewing sources has gotten both harder and easier. Harder because lives have been turned upside down, but easier because, working from home, people now have more time than ever to chat with us.

Our experience would confirm the conventional wisdom that downturns expose frauds; most famously, Bernie Madoff confessed in December 2008. But THIS downturn seems to be launching as many frauds as it exposes.

Our lives are more online than ever, and so is fraud. We note a rise in completely fabricated identities (the ink isn’t dry on their LinkedIn profiles); “supporters” whose social media profiles were all created by the company they endorsed; online bios with aspirational (stock) photos; and, countless other snares for those not careful.

We use a wide range of open-source and proprietary tools to dig up information, and you can incorporate some of these into your own diligence. The Internet Archive — commonly known as the “Wayback Machine”—is a database of past versions of websites. You can use it to see whether the company you are looking to acquire has changed management or focus over the years, and if the representations they are making to you actually match reality. If they’ve been in business for nine years, why did their 2016 website say they were founded last year? Would you be as confident in your thesis if the lighting company you are looking at was selling used books two years ago?

In other words, web-savvy diligence needs to keep pace with web-savvy fraud.

3. Each Party Is Checking the Depth of the Other’s Pockets

Creditors have always asked our investigative due diligence company to check on a company’s or individual’s assets and financial wherewithal, but in this new environment, that particular assignment is even more common.

And we are asked by companies to check the financial bona fides of investors. We recently reported to a client that the fund offering to finance them was itself tapped out, and that the financing was actually coming from another party.

In the current environment, everyone assumes that claims of solvency and buoyancy are at least out of date, if not outright optimistic. At a time like this, almost every company is stressed or distressed. Don’t trust until you verify.

4. Supply Chain Is a Business Issue, a Political Issue, and an ESG Issue

The pandemic has accelerated the rethink of supply chains, and, again, diligence is running to keep pace. Let’s say your client is thinking of investing in a company that is in the process of
Case Study: Supply Chain Diversification from China to Ethiopia

Before COVID-19, some manufacturers were already looking to shift their supply chains away from China, due mostly to rising costs, and in part from the pressure of the escalating trade war. The pandemic has fueled this trend further, as recent factory closures in China and logistical challenges forced manufacturers to seek greater diversity in their supplier bases.

In recent months, we have helped clients diligence new supply chains as they consider moving production from China to countries like Vietnam and Ethiopia. Export manufacturing zones such as Ethiopia’s industrial parks—with favorable tax treatment, foreign ownership allowances, and generous staff visa requirements—present attractive opportunities, especially in the textile and garment industry. But supply chain diversification carries with it a variety of concerns that corporations and investors will want to face with their eyes wide open:

- **Business-related concerns:** Turnkey factories may be of a high standard, but industrial parks are often located in regions hungry for economic development. Local infrastructure deficiencies (e.g., electricity, road and transport links, and labor availability) can easily hamstring state-of-the-art facilities, and thus a holistic diligence process is required.

- **Political concerns:** Export manufacturing programs are usually popular at the national level, but regional support can be mixed. With national industrial policy crafted by the capital, some facilities face opposition from local leaders, which may involve protests or labor strikes. One approach is to perform a stakeholder mapping exercise, and then to conduct interviews with key actors to identify sensitive issues.

- **ESG-related concerns:** In addition to concerns around wages, housing, and working conditions, national industrial programs have faced repeated allegations of land grabs and wide-scale—sometimes violent—displacement of local groups. For one client that was facing damaging accusations in the media, we conducted a comprehensive investigation of the raw materials in its supply chain. We were able to prove that none of the cotton supplying its factory came from farms that had forcibly displaced the local community, and our client was able to use our findings to refute the accusations.

As firms increasingly seek to diversify their supply chains to Myanmar, Vietnam, Mexico, and Ethiopia, the need arises to apply multiple layers of diligence that are informed by on-the-ground knowledge of the local business, political, and ESG landscapes.

Moving their supply chain from China to Vietnam. Of course, we would want to check the legitimacy and solvency of the new vendors in Vietnam. (At this point, that country’s business environment is so overheated that one issue might be whether they’re too busy to fulfill a new customer’s orders.)

But these days, an additional issue could arise from the China side in this hypothetical: Is the jurisdiction being abandoned (China) likely to impede the company’s departure, with tax penalties or holding inventory hostage? And when Chinese joint-venture partners have felt aggrieved by a Western partner moving on, local security forces have even detained departing managers. To assess these risks, you will want eyes and ears on the ground to provide local knowledge and context, such as how the government has responded in similar previous cases.

Due diligence investigating—though more difficult during the pandemic—is more important than ever. And we investigators—and I mean you too, investors—are ready to meet the new challenges.

About the Author

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Founded in 1994, the Mintz Group has conducted more than 10,000 investigations in more than 100 countries, from internal fraud investigations in Dubai to due diligence background checks in China.
Sleuthing Out Potential Harassers Before They’re Hired

By Staci Dresher and Morgan Taylor

Since the #MeToo movement began in 2017, many people have come forward with allegations of sexual misconduct or abuse of power in their workplaces. Many of them described decades of unreported problems and corporate cultures that permitted the misconduct to continue. Investigators have long been called on to gather facts about allegations of misconduct at work. Now there is mounting concern over the risk of hiring someone who has a history of improper conduct, both in and outside the workplace.

Not only is looking into past behavior important in the context of a new hire, it is also crucial when elevating an individual to a position of power or prominence, such as a promotion to a C-level position or one that has significant public-facing duties. The #MeToo movement has demonstrated that sexual harassment and other abusive conduct have often been overlooked across many industries—including entertainment, tech, higher education, and politics. This is particularly true when it is committed by individuals who have been in positions of power for many years or who are considered to be high performers or otherwise untouchable figures.

With the currently changing landscape, former colleagues, subordinates, and classmates who may have felt silenced for years, or even decades, are now coming forward with complaints of past misconduct. Allegations against Harvey Weinstein and
Larry Nassar, for example, highlighted years of abuse that had gone unreported or unacknowledged.¹

The spread of social media and wide coverage of #MeToo allegations by mainstream media have not only encouraged those who have been mistreated to speak out about it, but also have the potential to tarnish the reputations of alleged aggressors. Further, public disclosure of an executive’s past inappropriate behavior that should have been discovered through previous due diligence can lead to a public relations nightmare for an employer.²

One insight gained from years of investigating workplace misconduct and conducting background checks on executive candidates is that the most important step in preventing misconduct is to identify potentially problematic employees with reputational concerns from the get-go, during the pre-hire vetting process. This requires going deeper than an inexpensive, cursory check-the-box background check, and is essential when hiring managers and executives who will set the stage for a company’s or a department’s culture.

The most important step is to identify potentially problematic employees with reputational concerns from the get-go, during the pre-hire vetting process.

Checking the Public Record

It can be difficult to identify past issues of workplace misconduct and harassment in the public record, given that:

• There is historical trepidation about filing formal complaints;
• Many complaints do not identify the accused by name; and
• The accused and their companies may make efforts to keep allegations confidential.

Most veteran executives who have harassed or abused their colleagues in a prior job have a history of that behavior, and they often have tried to scrub any evidence of their actions.³ Rooting out reality takes careful research across dozens of sources, sometimes in multiple countries and languages, given the increasingly global talent pool.

A professional background checking firm still has many resources and strategies that can uncover past misbehavior. When employers hire someone in a position of power, the safest and most comprehensive background checks include:

• Verification of employment, education, and professional licenses, including searches for undisclosed affiliations;
• Research into relevant legal and regulatory actions that involve the executive and prior employers, even if the actions do not name the executive personally;
• Deep press and social media research on the person and his or her prior companies; and
• Reputational interviews with former colleagues not included in the list of references provided by the executive, if appropriate.

What to Look for When Checking

When investigation firms are looking for discrepancies, past bad acts, or controversies, a thorough background check should take notice of a number of facts and behaviors.

Patterns of jumping from job to job, or an abrupt or suspicious departure from a job. Such behavior may require a closer look for evidence that improper conduct was an issue.⁴

Undisclosed positions. Sometimes individuals will leave problematic past jobs off their résumés. If any undisclosed affiliations are identified, a background checking firm may look closer into the culture at the company, or any coverage of general problems with its leadership.

History of personal disputes or litigation in the professional context. A lawsuit might include allegations that highlight a candidate’s problem behaviors, such as a tendency to bully colleagues, a prior affair with a subordinate, or inappropriate conduct at social company events. Sometimes, the press coverage of the lawsuit or controversy might highlight the candidate’s behavior more clearly than court filings.

Claims in the workplace that do not name the accused individuals. Search for actions taken against the candidate’s prior employers, such as employment lawsuits, SEC investigations, and EEOC or state agency complaints, because problems that occur in the workplace often do not name the individuals accused of the wrongdoing, even though their fingerprints are all over them.

In addition, a comprehensive search of social media is also needed to see what candidates have posted over the years, as well as what has been posted about them.

• Have they “liked” an offensive tweet or scandalous photo?
• Do they support or “like” posts from known bad actors or people who post racist or misogynist content?
• Have they referred to the opposite sex or protected class in a dismissive or derogatory way?
• Beyond their own posts, there’s a world of blogs, industry forums, anonymous job review forums, grassroots watchdogs, and crowd-sourced social media profiles that may reveal a candidate’s questionable or inappropriate behavior.
Posts on these websites could make clear allegations that an individual created a “frat-house” or aggressive atmosphere at the office, or treated certain employees differently or unfavorably. Remember that anonymous posts require additional verification.

- Scrutinize those same sources for general reviews of past employers where the candidate held leadership positions, searching for insights about the culture or general comments about the leadership. For example, there have been telltale posts calling a company’s leadership team sexist or an exclusive “boys’ club,” while never naming any specific executives.

Interviews: Powerful Tools to Fill in the Gaps

Sometimes past misconduct is not mentioned anywhere in the public record. If nobody posted about it online, mentioned it in a lawsuit or a news article, or filed an external formal complaint naming the individual, there could be no public record of the wrongdoing or subsequent internal HR investigation. This is troubling, as sometimes a high-level executive has a reputation for being abusive or inappropriate, even though it has never been explicitly stated in public records. Absent interviews with former colleagues, it may not be possible to uncover his or her true reputation and background.

Often there may be clues to dig deeper, and in those cases, it is a good idea to conduct interviews of the candidate’s past colleagues, subordinates, or others who were present to get a more complete picture. These should be people who were not identified by the candidate as professional references.

Ex-colleagues have shared surprising and disturbing details about a candidate’s inappropriate conduct with subordinates, sexual affairs with colleagues, or HR investigations of misconduct and reputations for bullying, to name a few. Background-checking firms do their best to substantiate an allegation through additional interviews, and to discredit unsupportable or false claims.

Search claims against past employers, because workplace problems often do not name the individuals accused, even though their fingerprints are all over them.

Legal Limits on Background Checks

In addition to practical limits on what a pre-employment background check may uncover in the public record, some laws strictly limit what employers, private investigators, and background checking firms can disclose to their clients.

Background checking firms and private investigation companies—which are deemed “consumer-reporting agencies” by the Fair Credit Reporting Act (FCRA) and similar state laws—are restricted by myriad federal, state, and local laws from reporting certain kinds of past bad acts to prospective employers. For example, the FCRA prohibits CRAs from reporting civil suits, judgments, and arrest records that are more than 7 years old or when the governing statute of limitations has expired, whichever is longer. It similarly restricts reporting paid tax liens, collections, or “any other adverse item of information, other than records of convictions of crimes which antedates the report by more than 7 years.”

These FCRA reporting restrictions do not apply if the job being offered has an annual salary of more than $75,000, and executive background checking firms routinely vet candidates for high-paying positions well above this floor. Also note that an employer may always conduct in-house research on a candidate to determine fitness for a position, which could include uncovering details on the candidate that a CRA would not be allowed to report.

California, which has one of the most restrictive state laws, prevents CRAs (called Investigative Consumer Reporting Agencies or ICRAs under California law) from reporting most adverse findings that are more than 7 years old, no matter if the candidate would earn $75,000 or $5 million a year. This means that if you’re vetting a candidate for a position located in California—even if the candidate currently resides in another state—and you uncover evidence of sexual harassment or workplace misconduct that’s 8 or 9 years old, you could not legally report it to the prospective employer.

Further, many states and municipalities—including San Francisco, New York City, and Philadelphia—have passed ban-the-box statutes, which prohibit employers and CRAs alike from asking candidates about their criminal backgrounds or searching for their past criminal records, until a job offer has been made. And often it’s criminal records that disclose evidence of violent behavior, such as disorderly conduct, assault, or domestic abuse. Note that the FCRA and relevant state laws require employers and CRAs to have candidates sign a consent form that clearly details their rights under these laws.

Should adverse findings be uncovered and ultimately used to deny an employment application, the FCRA requires that the candidate must be alerted and have an opportunity to dispute incomplete or inaccurate information.

This article has only scratched the surface with the relevant legal limitations on reporting past misconduct, harassment, or other adverse issues when conducting pre-hire background checks. It’s a minefield that requires vigilant attention and research. Many employers and background screening firms have been sued and required to pay millions of dollars for violations of the FCRA and relevant state laws.
Pre-Hire Restrictions Lifted for Internal Investigations

If an individual is hired and subsequently accused of misconduct—whether by a current work colleague or person from the past—the legal restrictions that regulate pre-employment vetting of candidates are no longer in force. A company’s internal or external counsel could authorize an investigation into the alleged aggressor’s background that searches more than 7 years back, including a deeper dive into their social media activity, litigation history, and interviews with former colleagues.

Pre-hire background checks are minefields that require vigilant attention and research.

When making decisions about who authorizes and conducts an investigation, employers should work with counsel who are familiar with the local jurisdiction’s rules on how best to protect the attorney-client and work-product privileges, if these are a concern. These issues are too complex to dig into here; employers would be wise to consult professionals who stay on top of the constantly changing laws.

The risk to employers in hiring known bad actors has never been higher and no industry has been spared from the public embarrassment and criticism of a bad hire. Companies should be prepared for possible pushback from shareholders and employees to enforce the changing expectations of what is acceptable behavior in the workplace.

With wall-to-wall social media coverage and unfettered access for everyone to share and post about their experiences and knowledge of misconduct, close scrutiny and comprehensive background checks are absolutely critical for companies to maintain cultures of inclusivity, trust, and safety—and to avoid public relations catastrophes.

Staci Dresher is a partner and associate general counsel at the Mintz Group. She specializes in investigating disputes involving intellectual property theft and brand protection, finding hidden assets and connections, and responding to employment disputes and workplace misconduct allegations. She also focuses on fraud and internal investigations and complex pre-transactional and pre-employment diligence worldwide. She can be reached at sdresher@mintzgroup.com.

Morgan Taylor is a director at the Mintz Group. She specializes in investigations around the world for high-level executive or board placements, as well as into potential partners or targets in transactions. She also oversees investigations for attorneys and HR departments related to issues such as employment disputes, fraud investigations, and allegations of workplace misconduct. She can be reached at mtaylor@mintzgroup.com.

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ARTICLE

Virtual workplace investigations: The “next normal” - Postponing the investigation vs. proceeding by virtual means

This is the first part of a three-part series.

The COVID-19 pandemic has already impacted how we live and work in significant ways. As we move forward in the transition between the “new normal” and the “next normal”, we find ourselves re-evaluating many fundamental practices of our professional lives. Workplace investigations are certainly not being spared.

Since in-person meetings are either still prohibited or ill-advised in several jurisdictions, some investigators are considering remote investigations out of necessity.

However, many experts posit that this virtual shift may be here to stay. Indeed, employers, having already witnessed the precious resources saved by virtual investigations, may not be willing to fully revert back to traditional ways.

This publication is the first of a three-part series on virtual investigations. In Part II, we will discuss best practices related to investigating virtually, addressing topics such as confidentiality, the use of technology and investigator flexibility. In Part III, we will delve into the complexities of assessing witness credibility when meeting virtually.

Part I – Postponing the investigation vs. proceeding by virtual means

Whether choosing to conduct the investigation internally or delegating it to a qualified third party, the first critical decision for the employer is whether to proceed with a virtual investigation or to postpone the investigation until it can be conducted in person.

Depending on the jurisdiction, one can expect that face-to-face investigation interviews may soon be possible to resume. In any case, a pivotal question arises: how late is too late in the context of a workplace investigation? Employers should consider the following issues when making this decision.

Workplace stability

Once a workplace harassment complaint has been received and the employer determines that an investigation is warranted, the employer should immediately focus on the situation in the workplace.

Due to the pandemic, some (or all) of the parties to the investigation (i.e. the complainant, the respondent and the witnesses) may not be physically present in the workplace. While this can provide relief from otherwise tense workplace dynamics, the employer should be aware that the virtual workplace of employees working remotely can be just as conducive to generating conflict and stress.
An investigation into a serious complaint involving parties still working together or interacting (whether in person or by virtual means) should not be postponed, as it can escalate the conflict and the related stress on the parties involved.

**Witness memory**

The more time that goes by between the alleged events and a witness’s interview on the matter, the less exhaustive and reliable their testimony will be. This factor alone will generally militate in favour of investigating as soon as possible, by all means necessary.

The investigation could be postponed to some extent, however, if there is a serious expectation that in-person meetings can soon resume and, most importantly, if specific considerations warrant live meetings.

**Collecting evidence**

Governments across the country have imposed confinement measures due to COVID-19, including shutting down workplaces. As a result, investigators may have limited access to the physical workplace and to any evidence that could be located there.

If the investigator suspects that the inaccessible evidence may be determinative, it may be advisable to postpone, at the very least, the respondent’s interview and the issuance of the report. If the allegations can be confirmed without this evidence or obtained by alternate means, however, this should not slow down the process. For instance, if the respondent admits to an alleged physical contact, postponing the investigation to gather video evidence available only in the workplace would not be warranted, as it would not be needed by the investigator to make their determination.

**Employee perception**

Postponing the investigation, even for a few weeks, can erode the complainant’s trust in the employer and the investigation process. It can give the impression that the employer is not treating the matter with the urgency the complainant feels it deserves.

In addition, if the complaint involves a significant number of employees (such as multiple complainants or respondents, or where the situation has not been kept confidential), this erosion of trust can become more generalized within the organization. In such a case, employees may feel that the process is too slow and that the employer does not take complaints seriously. Ultimately, this may lead employees to become less inclined to report harassment and to choose more litigious avenues instead of trusting the process.

Lastly, the passage of time may have the effect of exacerbating or confirming ruminations and subjective perceptions of the parties to the investigation. This may distort the information that will ultimately reach the investigator and/or be detrimental to an amicable resolution of the conflict in question. Thus, employee perception considerations typically favour a swift investigation.

**Employee cooperation**

Certain parties to the investigation may not currently be inclined to cooperate in the investigation process. For example, an employee who is on lay-off due to COVID-19 may not want to be involved. Employees generally have a duty to collaborate with an investigation. That said, the employer would be ill-advised to necessarily impose disciplinary action based on a temporarily laid-off employee’s refusal to do so. Also, interviews with uncooperative witnesses often do not provide the investigator with the most reliable and complete information.

If important witnesses (or a significant proportion of them) risk being uncooperative for the above reasons, the investigator could wait and interview them when they are back on the employer’s payroll. If this is not advisable, the investigation could be postponed. In certain circumstances, the employer may also consider recalling these employees to work temporarily, with pay, for the limited purpose of participating in the investigation.
In conclusion, when employers consider whether to postpone an investigation or to proceed virtually, they should keep in mind that their decisions may ultimately have to be justified before the relevant governmental or judicial authority seized with a harassment complaint. Indeed, any lack of diligence in the management of the complaint (either by postponing unnecessarily or by skipping crucial steps) may lead such authority to conclude that an employer did not meet its legal obligation to provide its employees with a harassment-free workplace.

Next in this series

- Part II – Considerations related to conducting virtual investigations
- Part III – Assessing witness credibility during a virtual investigation [Coming soon]

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Virtual workplace investigations: The “next normal” – Best practices

This is the second part of a three-part series

In the first part of our series on Virtual Workplace Investigations, we discussed how the COVID-19 pandemic has impacted workplace investigations, and why proceeding virtually can be an attractive option.

In this Part II, we take a closer look at virtual investigation best practices. While traditional principles generally still apply, the well-informed e-investigator will keep the following guidelines in mind.

Part II – Best practices

Knowing your tools

The investigator must be comfortable with the chosen virtual platform before meeting with their first witness. Notably, they should ensure proper understanding of the video and mute functions, and be ready to provide technical assistance to their witness. Indeed, tech challenges may jeopardize the rhythm of the interview, and investigators should avoid this by familiarizing themselves with the technology ahead of time.

The investigator should also have a plan for gathering documentary evidence electronically in an efficient and secure manner, and be ready to explain the process to the witness.

Establishing a connection, face to "FaceTime"

The investigator should make a conscious effort to understand the circumstances and state-of-mind of their witness, as it may influence the meeting. Notably, the investigator should consider the following:

- Did the witness have to make childcare arrangements to attend the interview that is restricting their time with the investigator?
- Is the witness being interviewed during their work hours?
- Is the witness uncomfortable with the technological aspect of the meeting?
- Does the witness have any visual, hearing, or other impairment, which can create a challenge in the communication?
- Is the investigator’s appearance, background and physical positioning welcoming, non-distracting and non-threatening?

If the witness feels the investigator has strived to make them comfortable, it may help in creating a positive virtual
connection. While such a connection may be more difficult to create and maintain across computer screens, it is important to foster connection, as it will generally promote a more open disclosure and fruitful meeting.

**Knowing when to use the phone**

While a visual interview is typically preferable, it is not always required. A phone interview may be appropriate and justifiable in some circumstances, such as the following:

- The witness is only relevant for specific and limited corroboration;
- The scope of the questions is very narrow (one or two secondary allegations);
- The witness refuses a virtual interview and cannot be compelled (e.g., they are not an employee of the company).

Notwithstanding the above, a phone interview is generally not recommended for complainants and respondents. Indeed, as these are the main actors in relation to the complaint, the investigator should gather as much information as possible on them and their version of events, including visual information such as visual cues, body language and demeanour.²

If there is a necessity to interview the respondent or complainant over the phone (e.g., if the alternative is no interview at all), then certain precautions should be taken. Notably, the investigator should obtain a written statement from the party, stating that the interview will be conducted over the phone at their express request. In addition, the investigation report should make the appropriate distinctions, mentioning how each witness was interviewed and why.

**Confidentiality and integrity**

The investigator in a virtual interview does not control the environment of the witness, which can create challenges.

First, the investigator should confirm with the witness that they are not recording the interview and that no one else is in the room. Before the interview, the investigator should also find out if another company employee lives with the witness (or is present in the witness’s location). This is to avoid unintentional confidentiality breaches.

In any event, the witness should be alone during their interview, to ensure that their testimony is not being influenced or even coached. If the witness has legal counsel involved, then generally the witness should be required to abstain from emailing or otherwise communicating with their counsel (or any other third party) during the interview.

If it is appropriate to ask the witness to sign a confidentiality agreement before the start of the interview, then the investigator should have this document ready to send right at the start of the meeting. An e-mail format is preferable as it can be quickly filled out, without the need for the witness to manipulate a physical document.

**Final word**

In conclusion, the virtual setting requires the investigator to be nimble and vigilant, and to adapt their methods to circumstances, which are not fully under their control. The main challenge will continue to be striking the right balance between pragmatism and rigour, in the ever-changing landscape of the “new normal”.

**Next in this series**

Part I – Virtual workplace investigations: The “next normal” - Postponing the investigation vs. proceeding by virtual means

Part III – Assessing witness credibility during a virtual investigation [Coming soon].

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¹ The term “witness” as used herein refers to any person who may need to be interviewed in connection with a complaint.
The term “witness” as used herein refers to any person who may need to be interviewed in connection with a complaint, including the respondent and complainant.

Please see Part III of this series for our comments on the assessment of witness credibility in the context of virtual investigations.

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Even as businesses reopen across the country, remote work will likely remain popular for the foreseeable future. While remote work arrangements help keep employees healthy and safe in the midst of the coronavirus (COVID-19) pandemic, they create unique challenges for teams and managers, particularly when it comes to conducting workplace investigations.

Workplace investigations are crucial when it comes to establishing a safe and welcoming work environment. However, these investigations are often complex and can involve navigating sensitive topics and disputes. Adding in the complexity of the remote work environment can further complicate these investigations.

Accordingly, it’s important for managers, HR professionals and business leaders to understand best practices for conducting remote workplace investigations.

**When is an investigation needed?**

There are many reasons HR professionals may have to conduct a workplace investigation, including, but not limited to, the following:

- Employee behavior
- Suspected substance use
- Concerns of discrimination, harassment or threats
- Violations of workplace rules
- Workplace theft

Employers are expected to take investigations and employee concerns seriously in order to foster a supportive workplace culture. In fact, organizations that fail to conduct proper investigations may face legal action if they mishandle a workplace investigation.

**Establish Investigation Goals**

In-person and remote workplace investigations share some similarities, including establishing investigation goals. One of the best ways to ensure effective investigations is to establish a consistent framework that can be repeated for various incidents and account for the following:

- **Objectives of the investigation**—In general, the goal of an investigation is to resolve workplace issues in a fair and efficient manner. Clear objectives can guide investigators and promote the timely resolution of workplace incidents.
- **Scope of the investigation**—Formalizing the scope of an investigation can help investigators gather the appropriate information and carry out corrective action for various types of incidents.
- **Timing of the investigation**—Generally speaking, timeliness is key when it comes to workplace investigations. Regardless of the perceived merit of the complaint, it’s in a company’s best interest to trigger investigations upon request. Failing to act quickly could be considered prejudicial to the employee and result in potential claims.
- **Process of the investigation**—Unlike when you’re in the office, you can’t hold casual meetings or interviews while you’re
Employers must demonstrate procedural fairness when conducting workplace investigations. These investigations should be thorough and well documented before an employer takes any action. Additionally, effective workplace investigations embrace the following three principles:

- **Neutrality**—HR and other personnel involved in an investigation must be detached from an incident. Those involved should remain objective and have no personal stake in the outcome of an investigation. Employers have a duty to conduct workplace investigations in a fair and impartial manner. To remain neutral, it’s important to give all employees involved in an investigation the opportunity to provide their version of the incident.

- **Thoroughness**—To ensure that the proper decision is made following an investigation, you must be thorough in uncovering all the necessary information. Ask detailed questions throughout the process.

- **Timeliness**—Once an investigation is triggered, investigators must act promptly to avoid further acts of wrongdoing. Any disciplinary action should be administered in a timely manner to avoid potential legal issues.

It’s important for organizations to decide whether they will utilize internal or external investigators. While internal investigations tend to be quicker and comply with organizational policies, external firms ensure neutrality throughout all investigations.

**Respect the Privacy of Those Involved in an Incident**

In some instances, employees may be reluctant to participate in an investigation due to privacy concerns. Because of this, employers walk a fine line and must balance the privacy interests of their employees with their own legitimate business and safety interests.

All parties involved in an investigation have a right to privacy and confidentiality. These rights are especially important if an incident involves sensitive subject matter. Employers must be tactful and avoid oversharing details regarding the incident. Only those who need to know should be given the facts of the case.

It’s better to be overly cautious when handling workplace investigations, limiting information as follows:

- Respondents (e.g., the alleged harasser, subject of an incident or a bully) are entitled to know that a claim has been brought against them. They should also be informed of the details of the claim and what to expect during a formal interview.

- Witnesses can provide your investigators with valuable information regarding workplace incidents. However, employers should still keep the details of the incident to a minimum when speaking with witnesses.

**Preserving and Protecting Confidentiality**

Preserving and protecting all involved parties’ confidentiality should be an utmost priority for any workplace investigation. However, remote workplace investigations pose potential risks to preserving such confidentiality.

The following best practices may help minimize risks to an investigation’s confidentiality:

- **Ensure all data and evidence is secure**—When sharing data or evidence on online tools or through email, it’s crucial to check that platforms and systems are secure. Consider adding built-in protections to prevent unauthorized distribution or access of relevant materials.

- **Restrict access to information**—Those involved in the investigation should only have access to information that specifically pertains to them. Before sending an email or other electronic correspondence, double-check that the appropriate party receives the appropriate information.

- **Comply with applicable data protection legislation**—Consult legal counsel to ensure compliance with applicable federal, state and local data protection requirements.

In addition to these best practices, be sure to evaluate any risks to investigation confidentiality unique to your business.

**Ensuring Interview Privacy and Confidentiality**

Unlike in-person investigations that can take place in a private room, holding virtual investigation interviews presents a risk to privacy and confidentiality.

The following best practices may help minimize privacy and confidentiality risks when conducting virtual interview investigations:
Virtual Interview Best Practices

Conducting and attending a virtual meeting may be a new territory for involved parties. As such, keep in mind the following best practices for holding a successful virtual interview:

- Request that the virtual interview is held via video call to allow for nonverbal expressions to be seen, which can enhance comprehension and humanize the interaction.
- Ask parties to speak clearly and to ask questions if clarification is needed.
- Request the use of headsets or microphones to improve the audio quality.
- Utilize screen sharing capabilities or other tools during the meeting to improve engagement.
- Dress professionally to preserve a sense of formality during the interview.

By keeping these tips in mind, employers and employees alike can preserve a sense of normalcy and formality while conducting a virtual meeting.

Taking Action

If, after an investigation occurs, you find that the employee’s complaint is substantiated, the employer should take action to:

- Prevent the harassment, fraud or misconduct from recurring. To accomplish this, issue training and educational resources as needed.
- Make accommodations to ensure employees feel safe at work.
- Discipline the subject of the complaint in a manner proportional to the severity of the misconduct, up to and including dismissal. Do not take action against an employee if you have no clear evidence of misconduct.

If the complaint is not substantiated, the employer should notify the parties accordingly and explain how this conclusion was reached. After an investigation concludes, you should compile your findings in a final report. It’s also a good idea to assess the effectiveness of your investigation process and make any improvements.

More Information

Navigating the new normal of remote work can be difficult. Contact Tilson HR to learn about our complete line of services.
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Rise to the Challenge of Remote Investigations

By Allen Smith, J.D.
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Investigating workplace issues is rarely easy and doing so remotely can be even harder. Some employers insist on in-person investigatory interviews, even as telecommuting has increased during the coronavirus pandemic. But many now rely on remote investigations, which bring unique challenges: stilted conversations, difficulty making credibility assessments from afar and at-home distractions.

"It is harder to establish rapport with anyone when you are not meeting face to face," said Janene Marasciullo, an attorney with Epstein Becker Green in New York City. "Likewise, it may be difficult to ensure confidentiality of any communications because you and the person you are interviewing are not together, and the person you are interviewing may not have sufficient privacy to speak candidly."

It's also harder to assess credibility without being able to see someone's body language, she added.

Break the Ice

"Every good investigator engages in conversations as opposed to interrogating others," said Jonathan A. Segal, an attorney with Duane Morris in Philadelphia. The goal is to determine what happened relative to the issues subject to investigation, he noted. This is true regardless of how interviews are conducted.

Hon. Rebecca Warren, a retired prosecutor and now an attorney with Norris McLaughlin in Allentown, Pa., had this advice for investigators: "Start with easier questions to develop the interviewee's level of comfort, ask open-ended questions, listen and keep an open mind."

Many believe talking face to face makes for a better interview. "Meeting with someone in person generally helps enhance the potential for a genuine conversation," Segal said.

That's why David Barron, an attorney with Cozen O'Connor in Houston, encourages investigators to consider creative alternatives to onsite interviews while employees are working from home. "It is important to not concede that an investigation has to be done remotely," he said. "There may be middle ground, like meeting at a coffee shop even if offices are closed or the employee is working remotely."

The interview time may have to be compensated, Segal noted.

Warren said one disadvantage of using videoconferencing tools for investigations versus interviews at the office is the inability to make unannounced visits, which she described as "a powerful tactic for an investigator."

"The rationale for such an approach is that a person engaged in misconduct will not have time to think of excuses or fabricate alibis," she explained. "No such surprise can be accomplished via remote interviews, which require advance scheduling."

"Gone are the days when the interviewer chose and controlled the physical location and appearance of the interview venue" in investigations, she added. "Remote interviews truly require an investigator to rethink the mechanics of an interview. What is the best method to observe an interviewee, establish rapport and obtain information?"
Assess Credibility

If interviewing in person isn’t feasible, videoconferencing, rather than conducting the investigation by phone, can help with credibility assessments because it allows the investigator to see the interviewee’s facial expressions, Marasciullo noted. That will help the investigator know if an interviewee is uncomfortable with a particular subject.

However, it’s important to remember that what may appear as discomfort might be attributable to something else. "Some witnesses prefer not to look directly into the camera or video, which can be mistaken as being not truthful when, in fact, it is simply a function of that person’s culture or personal style," cautioned Michelle Phillips, an attorney with Jackson Lewis in White Plains, N.Y.

"Videoconferencing also helps the investigator to distinguish between situations where the witness has finished his or her answer from situations where the witness has paused to collect his or her thoughts or [to] regain his or her composure," Marasciullo said. "It is particularly important to make sure that the witness has finished his or her answer before asking another question." This can be hard during telephone conversations but interrupting witnesses tends to chill communications, she cautioned.

Taking extra care to engage in active listening is one way to establish trust even during remote interviews, noted Molly Batsch, an attorney with Greensfelder in St. Louis.

Minimize Distractions

Distractions may nonetheless interfere with a remote interview. A toddler may be walking around in the background, for example, or there might be a concern with real-time coaching or prompting by a third party off-screen, Warren said.

Marasciullo recommended that, when scheduling a time to talk, employers ask interviewees when they can speak confidentially and without distractions.

If the employee is too distracted during an interview or has a personal issue that has to be addressed, such as with his or her children, reschedule the call, Baron said.

"It is harder to take a break when an interview is being conducted by telephone or videoconference as opposed to an in-person interview," according to Marasciullo.

The investigator should indicate upfront that he or she will take notes to ensure an accurate record of the conversation. "If the investigator needs to pause to finish notes, the investigator should tell the interviewee so he or she does not become uncomfortable during a prolonged silence," she said.

Investigators who fail to take comprehensive notes and prepare thorough reports waste the company’s time, said Andre’ Caldwell, an attorney with Ogletree Deakins in Oklahoma City.

The same kinds of questions should be asked during a remote interview as in person. Segal said he has noticed a tendency to ask fewer questions in remote interviews. "Be aware of that tendency and avoid it," he cautioned.

When sharing sensitive documents, use a videoconference service that allows the investigator to share his or her screen with the interviewee to avoid delivering copies of the confidential documents by e-mail, Marasciullo recommended.

[SHRM how-to guide: How to Conduct an Investigation (www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoconductaninvestigation.aspx)]
Uphold the Attorney-Client Privilege

Be careful not to inadvertently waive the attorney-client privilege, Marasciullo cautioned.

If the investigator will be working with an attorney, for example, the two should not use any chat function associated with the videoconference tool, she said, to avoid any possibility that the interviewee might see the communications. Such communications might affect the interviewee’s answers, offend the interviewee or result in a waiver of the attorney-client privilege.

Investigators also should avoid using the recording function when using videoconference services because that, too, may lead to a waiver of the attorney-client privilege, she added. In many states (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/secret-recordings.aspx), it is illegal to record conversations without the consent of all participants. Moreover, interviewees may be less candid if they know they are being recorded.

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