

Best Practices for Sexual Harassment Investigations in the Wake of #MeToo

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CONDUCTING SEXUAL HARASSMENT INVESTIGATIONS IN THE #METOO ERA
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What the h---- is this flag for?



Pre-Investigation

- Before initiating an investigation, employers must address five questions:
 - Should the employer initiate an investigation?
 - How should the employer conduct an intake?
 - Who should conduct the investigation?
 - Should the employer take protective or remedial measures during the pendency of the investigation?
 - What steps should the employer take at the inception of the investigation to protect the attorney-client and/or work product privileges?

Who Should Conduct the Investigation?

- Non-human resources management
- Human resources personnel
- In-house counsel
- Outside counsel
- Independent investigator

Protective or Remedial Measures

- Should you take protective or remedial measures during the pendency of the investigation?
 - Necessary remedial measures
 - Interim safety measures
 - Suspension of the alleged harasser
 - Preservation of evidence

Investigation

- What should be included in an investigation plan?
 - Define scope of investigation
 - Decide order of witness interviews
 - Determine what documents to gather
 - o Email
 - o Text messages
 - Decide where to conduct interviews
 - Determine who should be privy to investigation

Interviewing the subject of the complaint

- What should be kept in mind when interviewing the subject of the complaint?
 - Explain the accusations
 - Allow the subject to respond to the accusations
 - Follow up on any exculpatory evidence or witnesses identified by the accused
 - If necessary, conduct follow up interviews with the accused

Credibility Determinations and Factual Findings

- How does an investigator make and report credibility determinations and factual findings?
 - Credibility determinations
 - Factual findings
 - Reports
 - Preserving the privilege

Investigation Results

- How do you communicate the results of the investigation?
 - Summarize what the investigator did
 - Summarize what the investigator found
 - Summarize next steps

Post-Investigation

- What action should you take in response to the results of an investigation?
 - Termination
 - Discipline
 - No disciplinary action
 - Training
 - Audits of past investigations
 - Support for reporter and victim

#MeToo

- New considerations in the wake of #metoo
 - Multiple accusers and credibility determinations
 - Auditing past investigations
 - Examining effectiveness of reporting mechanisms
 - Auditing past non-disclosure agreements
 - Publicity concerns

Questions?

Does anyone have any questions about anything we have covered today?

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Cast of Characters

Auditors

- Maria, CPA
- Mai Lin, HR Director
- Michael, Maria's supervisor
- Morgan, another CPA

Widgets

- Jack, CFO

Auditors/Widgets Scenario- Part I

Maria is a CPA at Auditors. She is working on an audit for Widgets, a local manufacturer of high-quality widgets. Her main contact is Jack, the CFO of Widgets, who was a Principal at Auditors, but left the firm five years ago. Jack is close to Michael, Maria's supervisor.

Maria requests a private meeting with Mai Lin, the director of HR for Auditors, where she states:

- Jack has asked her out for drinks a few times.
- Maria has declined, citing other commitments.
- Yesterday, Jack said "Why is Auditors sending over all of these pretty young accountants if they don't want a real client relationship?"
- Maria senses Jack is interested in a sexual relationship even though he has not touched or propositioned her.
- Maria does not wish to fraternize with Jack, but is concerned about the repercussions of not doing so.

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Auditors/Widgets Scenario- Part II

The investigator has interviewed Maria and Michael, Maria's supervisor. Michael seemed annoyed and defensive and denies observing Jack say or do anything inappropriate. Michael mentions that another woman—Morgan—did the Widgets audit last year, and he would have used Morgan again this year, but she insisted that she did not have capacity. When asked whether Morgan agreed to do projects for Michael's other clients, Michael said yes.

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Auditors/Widgets Scenario - Part III

You interview Morgan, who is very uncomfortable, but eventually states that:

- Jack repeatedly asked her out for drinks.
- She felt like she had to say yes.
- On the one occasion they went out, Jack put his hand on her leg.
- Morgan told a female supervisor at Auditors, who sympathized with her and, said Jack had harassed her when he was at the firm, and suggested Morgan: “keep busy” to get out of the audit next year.
- Morgan will not name the female principal.

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Auditors/Widgets Scenario- Part IV

You interview Jack, who is very charismatic, but firm. He states that:

- He always asks Auditors' CPAs—men and women—out to happy hour to mentor them, which was his intention with Maria and Morgan.
- He did not intentionally touch Morgan's leg, but admitted that he may have accidentally done so.
- He has an email from Morgan—which he later provides—thanking him for his advice.

After the interview with Jack, you follow up with Morgan who says:

- She did send an email to Jack thanking him for the happy hour because she felt she had to.
- Jack intentionally touched her leg and begins crying, stating “This is why I didn't ever report this— I knew that no one would believe my word against his.”
- She still will not identify the female principal who she told about the incident.