

Tackling sexual harassment risks in the workplace: Part two

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Part one considered what may constitute workplace sexual harassment, the applicable legal framework, and the consequences faced by corporations and executives. In part two, we share our insights and experience about conducting effective investigations and managing risks when allegations arise. Our key focus is on the importance of a robust internal complaint-handling procedure and ensuring both a prompt and impartial investigation process.

Read our series on workplace sexual harassment

[Part one: Key legal elements and recent cases](#)

Part two: How to conduct effective investigations

[Part three: Critical harassment prevention measures](#)

The benefits of an internal investigation

Once an allegation of sexual misconduct is reported, a company must take proactive and timely steps to verify the allegations and implement appropriate remedial action to prevent and/or minimize any potential consequences. Internal investigations not only enable an employer to identify and address potential problems in the workplace, they also help employers avoid or reduce liability in future litigation. The benefits of initiating an internal investigation when allegations of sexual harassment arise include the following:

- *Fact-finding:* Internal investigations allow an employer to procure reliable facts and assess the credibility of the allegations. If the allegations are substantiated, the issues identified can be addressed accordingly. If the allegations are unfounded, investigations can help prevent unjustified further complaints and proceedings (and the potential liability accompanying such actions).
- *Fixing on-going problems and deterring future misconduct:* Investigations may reveal recurring and on-going misconduct in the workplace, especially in the case of large scale or widespread misconduct such as featured in

hostile environment harassment claims. Thorough investigations should also provide employers with a detailed understanding of the organization’s culture, and inform the employer’s policies and practices going forward. The fact that an investigation was launched following a report of sexual harassment may itself act as a powerful deterrent to further misconduct, and demonstrate the employer’s focus on rapidly and effectively addressing harassment issues.

- *Prepare next steps:* Facts and evidence gathered during an investigation inform the employer’s response to the accusations, such as whether to bring a disciplinary action against the subject of the investigation, apply remedial measures to address the complainant’s needs, and/or make a disclosure about the allegations to the public or relevant authorities. At a minimum, it puts the employer in a position to be on the front-foot, if the issues surfaces widely within the organization or publicly.
- *Damage assessment and control:* Investigations assist an employer to assess the potential for initiation of a claim, charge, lawsuit, or investigation by government agencies or other third parties. They can also provide the employer with valuable information relevant to decisions about strategy for dealing with potential claims – for example, whether to consider a negotiated settlement or start preparing a potential defense. A timely investigation may also shield an employer from vicarious liability for the acts of its employees in future litigation, as it may demonstrate that the employer exercised reasonable care to promptly correct any wrongful behaviour identified within the organization.
- *Employee morale:* Complainants of sexual harassment expect their allegations to be taken seriously, and a properly conducted investigation can help reassure the complainant in that regard. Prompt actions taken internally to redress the misconduct may also reduce the likelihood of the complainant taking further action, as well as providing the employer with a potential defense against allegations of indifference to claims of a flawed corporate culture.

Important considerations when conducting an investigation

Allegations of sexual misconduct are sensitive in nature. A poorly handled investigation may exacerbate matters, especially where it could create a perception that the reporter has suffered further distress. Unlike investigations into other types of corporate misconduct such as fraud or financial misappropriation, investigations into sexual misconduct inevitably involve the gathering of evidence from witnesses in an emotionally charged environment, and as such, require careful handling (including involving investigators who have undergone appropriate training to handle such situations). Where necessary, specialist external counsel can be engaged to conduct the investigation in order to establish a further degree of impartiality, beyond that available by appropriate use of the HR function and independent members of senior management and the board. An investigation must be carried out with due process and (to the extent possible) conducted confidentially.

The following table sets out key topics which should typically be considered at the outset of an investigation:

Suspension of the subject of the investigation	<p>Suspension of the alleged perpetrator may at first glance appear to be a sensible response to a complaint of harassment, especially from the victim’s perspective, as well to ensure preservation of evidence. However, the overriding principle that a person shall be considered innocent until proven guilty means that a suspension should not be automatically triggered without careful consideration of, amongst other things, the protection of the subject’s reputation, the potential disruption to the business, and the need to maintain a good relationship with the subject for purposes of the investigation and possibly beyond (should the allegations prove to be unfounded).</p>
Independent investigation committee	<p>Setting up an independent investigation committee can be beneficial in cases where the alleged misconduct is widespread or where the allegations involve a senior figure at the company. An independent committee can ensure the impartiality and credibility of the investigation, as well as helping to protect the company’s image as a fair and responsible employer. Appointees to such a committee should be appropriately trained and supported with sufficient resources, such as the engagement of external counsel and experts, where appropriate.</p>

Data protection	<p>Given the nature of sexual harassment allegations, investigations will invariably involve the collection of personal data, including personal emails, phone records, instant messages and CCTV footage. Employers must ensure compliance with applicable privacy law, such as the Personal Data (Privacy) Ordinance (Cap. 486) in Hong Kong, the Personal Information Protection Law of the PRC, and the Personal Data Protection Act 2012 in Singapore. Companies should consider implementing a firm-wide personal data privacy and monitoring policy (to the extent that one is not already implemented), and issuing a privacy notice to affected employees to explain how their personal data is being used. Under the privacy laws referenced above, a company must have a legitimate reason to collect and process an individual's data. Companies must also ensure that the use of an employee's personal data is proportionate to the objectives of the investigation and not more intrusive than necessary. As such, sexual harassment investigations require an employer to strike a fine balance between compliance with anti-harassment laws and personal data protection laws.</p>
Privilege	<p>Internal investigations are often a precursor to future regulatory investigations and/or potential lawsuits. It is therefore critical that every effort be made to maintain legal professional privilege (in jurisdictions in which it is recognized) throughout the investigation in order to limit disclosure to third parties in future litigation, or to public authorities, law enforcement agencies and/or regulators. In practice, privilege can be maintained by engaging counsel (in-house or external) to conduct the investigation in anticipation of litigation and/or to provide legal advice with respect to the investigation.</p>
Interviews	<p>In order to procure reliable information from interviewees, interviewers must be unbiased and sensitive to the stressful nature of the situation. At least two investigators should be present during an interview so that at least one person can serve as a witness. It may also be sensible for a gender-appropriate team to conduct the interviews at a private place away from other employees so as to make the interviewees more comfortable. The complainant is usually interviewed first in order to clarify details, gather evidence and identify potential witnesses.</p>
Whistleblower protection	<p>In our experience, the majority of sexual misconduct complaints are raised by whistleblowers. This may be the complainant or a third party who has witnessed the conduct. Whistleblowers in Hong Kong and Singapore do not benefit from statutory protection. In the PRC, whistleblower protection applies only to those who report criminal and administrative offences to judicial authorities. Notwithstanding these restrictions, there are whistleblowing guidelines in each of these jurisdictions that encourage employers to adopt or implement a whistleblowing policy. For example, the Code of Corporate Governance published by the Monetary Authority of Singapore, the Corporate Governance Code in the listing rules of The Stock Exchange of Hong Kong Limited and the Basic Standard for Enterprise Internal Control released by PRC financial regulators all require listed companies in their respective markets to implement whistleblowing policies. In practice, it is advisable for employers to offer whistleblowers protection from acts of retaliation, discrimination, and/or other forms of unfair treatment – such protection should help deter future misconduct and strengthen company culture.</p>
Remote investigations	<p>While the COVID-19 pandemic has altered the way that internal investigations are typically conducted, investigations remain an essential tool for employers to evaluate alleged workplace misconduct. Ideally, interviews should be conducted in person, but where that is not possible, interviews may be conducted remotely with careful planning and provided that certain precautions are taken. Questions such as whether and how the interview will be recorded, what software will be used to ensure the security and privacy of the conversation, how documents can be shared in a secure way, and what location will be used for the remote interview must be considered. The appearance of multiple participants on a computer screen may also present challenges to investigators hoping to assess the eye contact and body language of the witnesses, as well as for obtaining accurate information from the interviewees. Steps should also be taken to ensure that the witnesses are able to speak freely (e.g. no other person is present in the room to overhear and/or to coach the witnesses during the interview) and that confidentiality of the discussion is maintained.</p>

Disclosure considerations

At each stage of the investigation, corporations should assess whether disclosure to third parties is required or warranted (e.g. to customers, auditors, regulators, the market).

For publicly listed companies, failure to disclose allegations and/or investigations of serious sexual harassment to investors may trigger securities class action lawsuits in some jurisdictions. While such class actions are uncommon in Asia, disclosure may nevertheless be appropriate in certain circumstances. For example, the Hong Kong Securities and Futures Commission encourages licensed firms to proactively disclose information about “all investigative actions”, regardless of whether the subject matter covers regulated or unregulated activities, so long as the action may give rise to concerns about the fitness and properness of a licensed person. Even if a company deems an allegation to be

immaterial, the public's perception of materiality may be lower in the current environment.

In cases where public disclosures are required, companies should consider whether previous representations made to regulators or auditors remain accurate. As the investigation progresses and additional facts are uncovered, companies may need to consider updating previously made disclosures.

Financial institutions are also increasingly requiring companies with which they are transacting to disclose allegations of serious misconduct or threatened litigation. In such cases, companies should evaluate whether they are contractually bound to inform their business partners about sexual harassment investigations.

Corporate crisis management

In addition to the investigation itself, corporate crisis management, with the assistance of expert external advisers wherever appropriate, helps avoid and manage negative publicity and potential damage to reputation. News of allegations involving sexual misconduct often spreads very quickly, potentially leaving companies flat-footed. Companies should proactively plan for such potential crises in advance, with "fire-drills" involving a range of potential scenarios.

A crisis management plan should include the following:

- *Internal and external communications:* A solid crisis communication strategy should involve proactive and transparent communications, both internally and externally. Such an approach can help a company set the record straight and regain trust from employees and the public. The content of communications needs to be reevaluated and updated as the investigation progresses.
- *Monitoring of press and social media:* Monitoring mainstream press and social media coverage can help a company prepare an appropriate response that addresses any questions raised and corrects any misinformation being spread.
- *Succession planning:* In the wake of the #MeToo movement, many alleged bad actors were fired, resigned or faced other professional consequences. The lack of preparedness for unplanned executive exits due to the lack of a robust succession plan can hinder a company's ability to adapt to fast-changing circumstances and leave a business vulnerable. An orderly succession plan can help a company to identify replacements, increase the availability of candidates to fill critical roles, and reduce recruitment costs where external talent is hired.
- *Potential financial consequences:* The crisis management plan should take into the financial impact on the company arising from the investigation (including expenses associated with negotiated settlements or lawsuits, impact on contracts and business, as well as the costs of the investigation).

Conclusion

Sexual harassment allegations should be handled seriously and promptly. Their potentially headline-grabbing nature, as well as the sensitivity for the individuals involved, makes internal investigations into such allegations particularly challenging. Acting in a timely and planned manner to conduct an adequate and well-managed investigation will protect an organization as well as create a workplace culture and environment in which sexual harassment allegations are handled promptly and appropriately, to the benefit of everyone.