Received a Sexual Misconduct
Complaint? 10 Steps Companies
Should Take

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This article summarizes best practices companies should employ
when responding to allegations of sexual misconduct.

The #MeToo movement has created an unprecedented shift in the way
companies are expected to address allegations of sexual misconduct.
Although the appropriate response will vary depending on the circum-
stances of a given case, these best practices should be considered. In all
cases, it is important that the company act swiftly and take the allega-
tions seriously.

1. REVIEW THE COMPLAINT

Carefully review the complaint to understand the exact nature of
the alleged misconduct, as well as the individuals involved. Determine
whether there have been prior complaints involving the alleged wrong-
doer or the complainant. Oral complaints should be memorialized and
treated with the same seriousness as written complaints.

2. DESIGNATE A POINT PERSON TO SPEARHEAD
THE RESPONSE EFFORT

Designate someone, typically from the legal or human resources
departments, to coordinate the initial response. The designee should not
be someone who is implicated in the complaint or who may have wit-
nessed any of the alleged misconduct, since such a person likely cannot
be considered a neutral and objective third party.

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3. INFORM OTHERS IN THE ORGANIZATION AS NECESSARY

If the complaint is sufficiently serious or implicates senior management, the point person may need to notify the company's board of directors, key executives, human resources personnel, and/or the legal department. Generally, it is not advisable to inform the alleged wrongdoer of the complaint until the company forms a plan as to how to proceed. The complaint should only be shared with other parties on a need-to-know basis.

4. ASSESS WHETHER TO ENGAGE OUTSIDE COUNSEL TO INVESTIGATE

In determining whether to engage outside counsel to conduct an independent investigation, consider the following factors:

- Positions of the complainant and alleged wrongdoer: Investigation of senior executives by someone lower in the chain of command can lead to conflicts of interest and reluctance on the part of the investigator to pursue the allegations aggressively and is therefore disfavored. Similarly, investigation by an employee who typically reports to the complainant is also disfavored because of potential conflicts of interest.

- Nature of the allegations: More serious or complex allegations weigh in favor of hiring outside counsel with expertise in conducting internal investigations. Generally, the greater the degree of independence, the more reliance parties will place on the findings.

- Bandwidth: If in-house personnel do not have the capacity or proper training to conduct the investigation, the company should retain outside counsel.

- Privilege: If any of the conduct at issue took place outside of the United States, or if interviews may be conducted outside of the United States, the use of external counsel may improve the company's ability to assert the attorney-client privilege over investigative materials.

5. TAKE IMMEDIATE STEPS TO PRESERVE INFORMATION

All potential sources of evidence should be identified promptly. Document retention notices and/or electronic document holds may be
required to ensure that valuable evidence is not deleted, whether intentionally or through automatic deletion practices. Sources of evidence may include company email, network drives, company issued devices, and personnel files.

6. TAKE NO PUNITIVE ACTION AGAINST THE COMPLAINANT

Generally, no action should be taken against the complainant during the pendency of the investigation because such action could be perceived as punitive or retaliatory. The complainant should receive assurances that the company is taking the allegations seriously and conducting an appropriate investigation. The complainant should also be assured that he/she will not be retaliated against for having filed the complaint. Where the complaint is made anonymously, the company should not confront any employee about whether he/she submitted the complaint or insist that the complainant reveal his/her identity.

7. ADDRESS THE ALLEGED WRONGDOER

Based on the nature and severity of the complaint, determine whether to place the alleged wrongdoer on leave during the pendency of the investigation. The company may choose to inform the alleged wrongdoer about the general nature of the allegations, but it is generally not advisable to show him/her the complaint or identify the complainant, at least during the early stages of an investigation.

8. CONDUCT A THOROUGH, INDEPENDENT FACT-FINDING INVESTIGATION

- Prior to commencing an investigation, consider conducting the investigation under the protections afforded by the attorney-client privilege, whether through in-house or outside counsel. It is generally prudent to establish the privilege at the outset, even if the company anticipates waiving the privilege at some future point.

- Ensure that all potential witnesses are made available for interviews and that the investigative team has access to all potentially relevant documents and other sources of evidence for review. Interviews should be in person, where possible. Document all steps taken during the investigation and memorialize interviews accurately and completely. The purpose of the investigation is strictly to determine facts rather than to make determinations about whether any laws or company policies have been violated.
9. ASSESS THE NEED FOR DISCLOSURES

Assess whether to advise regulators, shareholders, and external auditors about the allegations and the investigative findings. Outside counsel can assist public companies in determining whether disclosures are warranted or required while being mindful of the impact of such disclosures on the attorney-client privilege.

10. ACT UPON INVESTIGATIVE FINDINGS

- Consult with employment counsel on the legal implications of investigative findings and potential employment actions before making final determinations in response to an investigation. Document the rationale behind any decisions the company makes in response to investigative findings, including where the company takes no further action.

- To the extent practicable, provide stakeholders, including the complainant and alleged wrongdoer, with a high-level overview of the company's conclusions regarding the allegations and the actions the company intends to take in response. The company should take care to avoid inadvertent privilege waivers during these communications.

- Examine whether the investigation uncovered areas of concern in relation to the company's existing policies and procedures around sexual misconduct. Determine whether additional trainings or other remedial measures are needed for further educating employees about appropriate workplace behavior and identifying, reporting and responding to misconduct in the workplace. Consider updating existing handbooks and codes of conduct to address identified weaknesses. Document all remedial measures taken in response to the complaint.

- Prospectively, consider providing periodic updates to the board of directors on the number and nature of sexual misconduct complaints received in a given time period and the resolution of those complaints.