

KING & SPALDING

# Workplace Misconduct Investigations in the “Me Too” Era



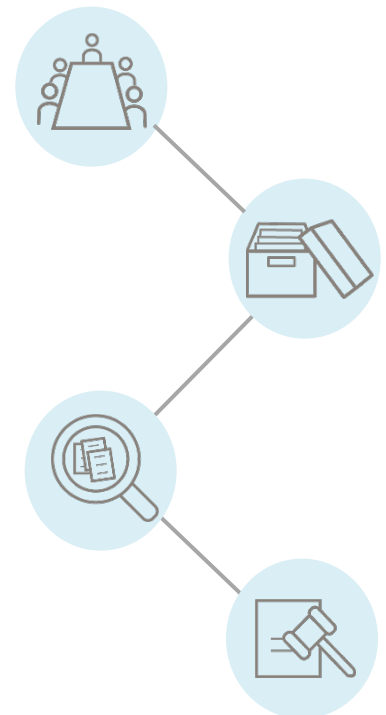
*The “Me Too” movement erupted in 2017, triggering countless women to come forward in accusing scores of high-level executives of sexual misconduct and harassment in numerous industries. The movement has had an acute impact on our society and workforces, causing many employers to reassess their organizational culture and approach to handling sexual misconduct complaints against employees and senior executives.*

## NAVIGATING THE “ME TOO” LANDSCAPE

Creating a culture and environment that seeks to prevent sexual harassment and assault is the most effective way to shape the public perception of the company, to protect it from liability, and to retain the best talent. When there are allegations of misconduct, many responsible employers have long hired experienced and unbiased counsel to investigate such complaints and have taken remedial action (up to and including termination) where warranted. Others, it has become clear, have not, relying on less independent reviews, treating each allegation individually without reconsidering prior allegations in light of new facts, or worse, sweeping serious allegations of misconduct under the rug where the accused seemed critical to the organization or brand.

In reassessing their practices, employers will need to navigate complicated terrain, including evaluating culpability when the evidence is conflicting, and determining the appropriate remedial action based on the severity of the misconduct. Employers must take allegations seriously and act promptly and responsibly to protect the rights of all involved.

Given this complex and sensitive environment, it is worth considering conducting a “wellness assessment,” enabling the company to take a fresh look at historical issues relevant policies, procedures and investigation practices in light of the current environment. When an allegation arises, circumstances may warrant an independent investigation conducted by counsel experienced in navigating the uniquely embarrassing, emotional and sensitive issues that arise whenever someone is the victim of or is accused of sexual misconduct. These issues are even more challenging when there are multiple incidents alleged or the accuser and/or accused are senior executives.



## USEFULNESS OF A WELLNESS ASSESSMENT



Allegations of sexual misconduct can have a profound effect on the organization and the individuals involved. Litigating and settling claims can cost millions of dollars; boards of public companies have obligations to disclose harassment claims to shareholders in specific circumstances (which could lead to stock prices plummeting and invite shareholder liability lawsuits); private and public companies alike face the potential for negative media coverage and reputational damage (which could lead to fundraising, retention, and recruitment problems); and sexual harassment investigations may result in terminations or resignations.

In light of these risks, boards of directors and senior executives play a unique role in defining a company's culture and values and should visibly embrace the company's commitment to a workplace environment that does not tolerate sexual misconduct. This tone is best set with a clear expression—at the board and management levels—that the organization is committed to preventing workplace misconduct, and that this is an issue at the top of the organization's agenda.

Boards and senior management can benefit greatly by engaging outside counsel early to assist in communicating the organization's commitment to take sexual misconduct complaints seriously and investigate them in a manner that simultaneously ensures that the accuser and the accused are treated fairly. There are several required actions and best practices for an organization to consider undertaking, which would set the right tone in this new "Me Too" era, and King & Spalding is well-situated to guide companies through that process.

## IMPORTANCE OF AN INDEPENDENT INVESTIGATION

When an allegation occurs, organizations, either at the management level or at the board level, can benefit greatly by engaging counsel to conduct an independent, unbiased investigation:



- **Credibility of Process.** Experienced and unbiased investigators lend credibility to the process and are less likely to appear biased by prior relationships with the individuals involved.
- **Fairness to Accuser and Accused.** Retaining experienced and unbiased investigators underscores that the organization takes accusations of workplace sexual misconduct seriously while protecting the rights of both accuser and accused. Taking action, or failing to take action, without adequate investigation can lead to unintended negative consequences in the workplace, such as:
  - **Resistance to Providing All Facts:** Employees and others who believe they have been mistreated must trust the process in order to be comfortable providing all relevant facts for fair consideration in the investigation.
  - **Low Morale:** A process that appears unfair may lead to poor employee morale generally and could affect employees who have no connection to any particular incident.
  - **Resistance to Mentoring:** Powerful company personnel who believe they would not be afforded a fair investigation if falsely accused of harassment may avoid mentoring subordinates, especially in situations that would involve travel or other one-on-one social interaction. In many industries, this would have a serious and harmful impact on opportunities for employee advancement.
- **Minimizing Exposure to Liability.** It has long been understood that prompt remedial action against an accused may provide a legal defense to an employer in a subsequent sexual harassment lawsuit by the accuser. On the other hand, in some organizations, employers take steps to quash potential claims and silence accusers before fully understanding them. Employers who assert or plan a defense without first conducting a thorough investigation are at an increased risk of liability from lawsuits brought by accusers, accused, and shareholders.

## OUR EXPERIENCE



Our lawyers—including a **Former Deputy Attorney General** and **multiple former U.S. Attorneys**, former federal prosecutors, and experienced employment lawyers—have substantial experience providing meaningful advice to clients on the critical distinction between a compliance program that merely exists on “paper” and one that actually works to identify and remediate existing weaknesses, prevent future violations, and address new and emerging laws and regulations. Our lawyers have decades of experience conducting highly confidential and sensitive investigations of alleged wrongdoing by employees and senior-level executives, including allegations of sexual harassment, stalking, and assault. Clients have included Fortune-100 corporations, well-known charitable organizations, professional partnerships, and major universities.

Our experience includes advising organizations about appropriate policies and procedures to create a positive organizational culture and process to review and adjudicate complaints; creating and implementing best-in-class compliance programs “from the ground up”; serving as the day-to-day support system for in-house counsel and compliance departments; conducting neutral fact investigations; and advising clients regarding appropriate remedial action, and negotiating separations where warranted, including in situations where the accused has made cross-allegations of discrimination. Our gender- and racially diverse team brings a broad perspective to compliance efforts and investigations, appropriately handling witness interviews often involving personal and embarrassing circumstances.



## REPRESENTATIVE MATTERS

Confidentiality requirements preclude detailed descriptions of the investigations we have handled. However, representative matters involving sexual harassment allegations include:<sup>1</sup>

- Designing, implementing, and overseeing all aspects of a global compliance program for a Fortune 100 company;
- Investigating complaints of sexual assault and harassment against a division-head of a Fortune 100 international consumer products company;
- Investigating a complaint of sexual orientation harassment and discrimination against a Senior Vice President of Human Resources of a U.S. subsidiary of an international corporation;
- Investigating allegations of stalking and sexual harassment against a partner of a major energy joint venture;
- Investigating allegations of sexual harassment, including coerced sexual conduct, against a department supervisor in an international professional services organization;
- Investigating allegations of sexual harassment against a partner in an international professional services organization;
- Investigating allegations of verbal and physical abuse against an owner of a national technology company by the subordinate employee to whom he was engaged;
- Appointment as the first-ever monitor for an international organization for the purpose of supervising the compliance of a major aviation company's adherence to its sexual exploitation prohibition policy; and
- Overseeing the establishment of a whistleblower hotline.

<sup>1</sup> We have extensive experience in many types of investigations concerning management misconduct, including racial, national origin, age, and religious discrimination and harassment claims.