

Surveying The State Of Workplace Harassment Investigations

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In the wake of the Harvey Weinstein scandal last fall, the #MeToo movement has caught fire. Many allegations of sexual harassment or other workplace misconduct now merit board and C-suite attention, and often result in investigations conducted by or with the assistance of outside counsel. After completing an investigation, companies face an important decision: How much, if any, information about the investigation's findings and conclusions should be shared with employees or the general public? To help answer that question, we have surveyed for-profit companies that investigated sexual harassment and other workplace misconduct allegations over the past six years, and examined how they have handled the release of information regarding their investigations. Our findings are detailed below, along with several case study examples, emerging trends and considerations for companies faced with making such a decision.

Survey Trends and Case Studies

Between 2012 and 2018, at least 39 investigations have been conducted by 32 for-profit companies in response to sexual harassment or other workplace misconduct allegations. (This figure is based on publicly available information; in reality, it is likely considerably higher.) Out of those 39 investigations, 30 were complete as of October 2018, two were ongoing and the status of the remaining seven was unknown.

Out of the 30 publicly known completed investigations, the companies that conducted them overwhelmingly opted not to release reports detailing their findings and recommendations. In nine of the investigations, companies released no such information at all. In 17 investigations, companies released concise statements regarding their investigations or findings. Further, only four companies — NBC, Dallas Basketball Ltd. (the Dallas Mavericks), the NFL/Miami Dolphins and Uber — publicly released reports regarding their investigations, which varied widely in detail, scope and length.[1]

Reports Released



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In May 2018, NBC released a **seven-page report** following its investigation into sexual misconduct allegations against former news anchor Matt Lauer.[2] While NBC's report does not provide details about the nature of the alleged incidents or draw any conclusions about the veracity of specific allegations, it acknowledges that the investigative team heard "credible" accounts that Lauer engaged in sexual overtures toward colleagues. The report concludes, among other things, that Lauer "frequently engaged in sexual banter or joking in open working environments," but that there was no systemic problem or "culture of harassment" at NBC. It also concludes that no managers or others in positions of authority were aware of Lauer's behavior. Finally, the report outlines specific recommendations for NBC, including that it offer interactive, in-person harassment training, set a strong "tone from the top," and improve the use of reporting channels. The report does not include personnel recommendations (Notably, Lauer was terminated the same day that the allegations became public, and less than two days after NBC reportedly received the initial complaint).[3]

In September 2018, the Dallas Mavericks released a **43-page report** detailing the results of an internal investigation into alleged sexual harassment and workplace misconduct over a period spanning more than 20 years.[4] The investigation began in February 2018, following a **Sports Illustrated article** that described a hostile workplace for women within the organization.[5] It discusses specific allegations in great detail, but uses anonymous identifiers to protect employees' privacy. Where possible, it also includes the accused individual's version of events. The report contains 13 recommendations for the organization, including that it increase the number of women in leadership and supervisory positions, conduct anonymous workplace culture and sexual harassment climate surveys, and strengthen and expand its human resources department. It concludes that the former Mavericks CEO was "a serial harasser," that another employee "was allowed to harass, intimidate, and threaten co-workers for more than a decade," and that specific management personnel "failed to effectively discipline and terminate employees when warranted."

Between 2012 and 2017 (prior to the #MeToo movement), two other companies released reports following investigations into alleged workplace misconduct. Most recently, in June 2017, Uber released a 13-page report following an investigation into allegations of sexual harassment, discrimination and retaliation raised by former engineer Susan Fowler in her widely publicized blog post.[6] The report briefly outlines the events leading up to the investigation and the investigation's methodology. It also provides detailed recommendations to improve the company culture, which it noted had all been adopted. The report does not discuss any findings or conclusions with respect to Fowler's allegations.

In 2013, the NFL conducted an internal investigation into claims that a Miami Dolphins player had left the team due to "persistent bullying, harassment and ridicule" by teammates. "Because of the extraordinary public interest in th[e] matter," in February 2014, the NFL decided to release the full and unmodified 148-page report.[7] The report is fact-heavy and provides a detailed account of specific events that allegedly occurred, as well as examples of insults reportedly made against the player and specific text messages exchanged between teammates. Some individuals are named, including the accused players, while others' names are redacted. The report does not include personnel or other specific recommendations, but does "encourage[] the creation of new workplace conduct rules and guidelines[.]"

Reports Not Released

As noted above, a majority of for-profit companies that conducted investigations into sexual misconduct in the past six years chose not to release detailed reports about those investigations. Out of 30 completed investigations, nine involved no release of information about the investigation's findings or

conclusions, and 17 involved the release of a brief statement containing only general information.

Fox News is one company that chose not to release any information about its investigations of sexual harassment allegations. In 2016, the network faced intense media scrutiny stemming from a sexual harassment lawsuit and other sexual misconduct allegations against then-Chairman and CEO Roger Ailes. Fox News hired outside counsel to conduct an investigation, but released no information about it, aside from the fact of Ailes' resignation. When similar claims against Bill O'Reilly surfaced in April 2017, Fox News announced that it fired O'Reilly after an "extensive review," but did not provide any information about the nature or findings of that review. The network took the same approach when sexual harassment allegations were made against then-President of Fox Sports Jamie Horowitz and then-host of "The Specialist" Eric Bolling in July 2017 and August 2017, respectively.

When for-profit companies did issue statements regarding their investigations, the statements were typically brief and discussed the investigative findings in general terms. For example, following an investigation into allegations that the Executive Chairman of Guess Inc., Paul Marciano sexually harassed models, the company released general details about its findings in a Form 8-K.[8] The Form 8-K, filed with the U.S. Securities and Exchange Commission in June 2018, includes one sentence about the investigation's methodology, some details about Marciano's resignation, and a paragraph about conclusions, laid out in general terms: "[m]any of the allegations could not be corroborated;" "the investigation found that on certain occasions Mr. Marciano exercised poor judgment in his communications with models and photographers and in placing himself in situations in which plausible allegations of improper conduct could, and did, arise." The Form 8-K also notes that the company paid \$500,000 to settle allegations against Marciano.

Other companies have made public statements following sexual harassment allegations. These statements may acknowledge inappropriate behavior on the part of the accused or opportunities for improvement on the part of the company, however, they often do not include other details about the investigation. For example, in the wake of an October 2017 investigation into sexual harassment allegations against a former Vox Media executive, Vox Media's CEO sent a memo to employees describing the former executive's behavior as "inappropriate and unacceptable." The memo also noted that, "in hindsight, there were stronger steps the company should have taken to investigate more vigorously while also looking out for those who were brave enough to come forward to share information."

Trends and Key Takeaways

Several trends have emerged from our survey of companies' releases of information following internal investigations of sexual and other workplace misconduct:

First, in the #MeToo era, companies are facing mounting pressure for transparency and accountability when it comes to their handling of sexual misconduct allegations. Increasingly, we have seen employees and the public alike demanding details about what investigative steps and personnel actions the company is taking in response. We expect this trend to continue.

Second, likely in response to this increased pressure for transparency, many companies are issuing some statement relating to their investigations of sexual harassment or other workplace misconduct. Approximately 80 percent of those companies in our study that concluded investigations post-#MeToo released some statement about their investigations, compared to approximately 60 percent of companies that concluded investigations prior to October 2017.

Third, this pressure has not, however, resulted in a significant increase in the release of full investigative findings or reports. Out of 18 publicly known sexual harassment and other workplace misconduct investigations that have been completed since October 2017, only two — NBC and the Dallas Mavericks — publicly released an investigative report. Out of 12 publicly known investigations between 2012 and October 2017 (pre-#MeToo), only two involved publicly released investigative reports — the NFL/Miami Dolphins and Uber. One possible explanation for this is that, given the heightened awareness and sensitivity to these issues in the #MeToo era, companies are more worried about negative reputational repercussions from the release of an investigative report. Companies may also be concerned about the negative ramifications on their defenses to shareholder or accuser lawsuits arising from harassment allegations.

Considerations for Companies Deciding How Much Information to Release

A company's decision about whether and how much information to disclose following an internal investigation of workplace misconduct involves a complex and fact-dependent analysis. Some considerations companies may weigh before making this decision include:

1. Your company's standards and ideals and any message you may wish to send to employees, customers or other stakeholders.
2. Commitments your company may have made to its employees, customers or others in its relevant policies or when the allegations were first made public.
3. The scope of the problem. Do the allegations concern one or two instances of misconduct or a systemic problem? Do they raise issues of public concern?
4. The seniority level of the accused and others involved.
5. Are employees, customers or other stakeholders demanding transparency, accountability or change?
6. Protecting and respecting the privacy of the individuals involved, including accusers, witnesses and the accused. Relatedly, how will disclosure affect the willingness of individuals to participate in current or future investigations? How will it impact their candor and the company's ability to analyze its actions critically?
7. Legal ramifications and risks of releasing information. Consider whether you have been or may be sued by shareholders or alleged victims, or for defamation by the accused, or subject to government enforcement action. Are you prepared to waive attorney-client privilege or other protections? How might your release of information impact your defense?
8. Reputational damage and other public relations considerations. How would releasing (or not releasing) information affect your company's reputation and public image?
9. Regulatory disclosure requirements.

Companies should keep in mind that these considerations may change from investigation to investigation depending on the specific facts involved and any then-current context. While there is no

best or “one-size-fits-all approach” to determining how much, if any, information to release following an investigation, companies should thoughtfully balance these considerations.

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[1] While this article focuses on for-profit companies, during this same period (2012-2018), we are aware of 35 publicly known workplace misconduct investigations conducted by government, educational and other nonprofit organizations — which were more likely to release full reports. Indeed, based on publicly available information, out of 30 such investigations that were complete as of October 2018, there were 20 reports issued publicly, 10 of which were released post-#MeToo. Prominent examples include the report of the National Public Radio investigation and the study conducted by the Federal Judiciary Workplace Conduct Working Group. Morgan Lewis, Report of Independent Investigation into Allegations of Sexual Harassment at NPR, Feb. 19, 2018, https://www.npr.org/about/2018_Report/ML_Report_of_Investigation_021918.pdf; James C. Duffy, Report of the Federal Judiciary Workplace Conduct Group to the Judiciary Conference of the United States, June 1, 2018, http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

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