Cross-Border Sexual Harassment Claims and Investigations

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Introduction

Workplace investigations are not new. Employers frequently investigate allegations of sexual harassment or other wrongdoing in order to determine the relevant facts and, if necessary, take remedial action to correct the problematic conduct. What is new, however, is the increase in international criminal and civil charges, and allegations of cross-border misconduct. In the wake of the #MeToo movement, multinational corporations increasingly must focus on the challenges of cross-border workplace investigations and conflicts of laws. The need to conduct multiple investigations in different jurisdictions can overwhelm an HR department and indeed their counsel.

Sophisticated investigations conducted by in-house or outside counsel, attorney-client privilege, and discovery, among other tools, are cornerstones of U.S. investigations. Rationally, U.S. companies assume that other jurisdictions, and especially the European Union, will have a corollary for these American tools. Many multinational corporations discover all too late that this assumption is incorrect. Failure to implement and conduct an internal investigation in compliance with local rules and customs can create corporate liability and damage a company's reputation.

American companies must consider local law and custom overseas before carrying out an investigation—just as we would expect an overseas-based company to do prior to carrying out an investigation in the United States. The issues are wide-ranging, and they are cultural and legal: who may or should conduct the investigation, who may be questioned, the right to review documentary evidence, data privacy, discipline, collective rights, the attorney-client privilege, interactions with local government, and many more.

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I. Oversight and Principles of Sexual Harassment Law in the United States and Abroad

The first issue to evaluate, upon receiving an employee's allegations of sexual harassment, is the law of the relevant jurisdictions. Great differences from country to country underlie the legal landscape for eradicating workplace sexual harassment and can create significant problems if investigators do not respect these differences. Understanding the legal framework will permit the employer to determine, among other matters, how broad the scope of the investigation must be, what investigative tools may be appropriate to use, and what legal analysis will need to be performed.

A. Overview of Sexual Harassment Law

1. U.S. Approaches

In the United States, sexual harassment is a form of unlawful sex discrimination which violates Title VII of the Civil Rights Act of 1964 (Title VII).[1] It includes both (a) *quid pro quo harassment*, occurring when employment benefits are granted in exchange for submission to unwelcome sexual advances;[2] and (b) *hostile work environment harassment*, occurring when unwelcome sexual conduct is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[3]

2. Overseas Responses

The legal frameworks for handling sexual harassment claims differ dramatically from country to country.[4] More than a third of countries, including Russia, Indonesia, Saudi Arabia, and Nigeria, have no workplace-specific prohibitions of sexual harassment in place.[5] In 2015, the Russian State Duma considered monetary penalties on sexual harassment and unwanted flirting, but it ultimately did not vote the

1. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–67 (1986).
2. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).
3. Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).
4. *See generally* Donald C. Dowling, *U.S. Workplace Investigation Practices Raise Concerns Overseas*, SOC'Y FOR HUM. RESOURCE MGMT. (May 6, 2013), https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/workplace-investigations-overseas.aspx [https://perma.cc/DZK2-L5GK] [hereinafter Dowling, *SHRM*]; Donald C. Dowling, *How Well Do Your Anti-Harassment Tools Work Overseas?*, LITTLER (Dec. 7, 2017), https://www.littler.com/publication-press/publication/how-well-do-your-anti-harassment-tools-work-overseas [https://perma.cc/6HR6-RF6W] [hereinafter Dowling, *Littler*]. *See generally* Marion Crane & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56 (2019); Catharine A. MacKinnon, *Where #MeToo Came from, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313 [https://perma.cc/ N6CA-8BL6].
5. WORLD POL'Y ANALYSIS CTR., PREVENTING GENDER-BASED WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT: NEW DATA ON 193 COUNTRIES 3, 5 (2017), https://www.worldpolicycenter.org/sites/default/files/WORLDDiscriminationatWorkReport.pdf [https://perma.cc/PUQ7-XSJU].

policy into law.[6] In Indonesia, an employee may file an action in tort to recover damages for an unlawful act, but the employment law does not provide any remedy for harassment.[7] In Nigeria, only general laws against violence are in place. Similarly, Saudi Arabia prohibits immoral conduct, but not sexual harassment per se.[8] In Japan, no express provision of law clearly prohibits sexual harassment at the workplace, except criminal law provisions regarding rape and forcible indecency.[9]

In contrast, some common-law countries, like England, recognize sexual harassment as a form of gender discrimination and prohibit it by statute, similar to the U.S. model. The United Kingdom's Equality Act 2010 specifically prohibits harassment in employment based on, among other characteristics, sex and sexual orientation. Under the Equality Act 2010, a claimant need only show one instance of harassment.[10]

France, Angola, and India impose thorough sexual-harassment laws and even criminalize sexual harassment. Harassers can go to jail, and their conduct can implicate their employers. Employers in France may be held liable under both civil and criminal laws prohibiting sexual harassment.[11] Sexual harassers in Angola can face civil and criminal liability.[12] In India, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, requires employers to create internal committees dedicated to investigating and resolving claims of sexual harassment. Employers must also assist employees in filing a criminal complaint, should the circumstances warrant.[13]

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6. Alexander Titov & Anna Fufurina, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Russia § 4.4 (Trent Sutton ed., 6th ed. 2018).

7. Theodoor Bakker et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Indonesia § 4.4 (Kristen Countryman ed., 6th ed. 2018).

8. Fadi Nader et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Saudi Arabia § 4.4 (Eric A. Savage ed., 6th ed. 2018); Inam Wilson & Ijeoma Uju, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Nigeria § 4.4 (Johan Lubbe & Kristen Countryman eds., 6th ed. 2018).

9. Kazutoshi Kakuyama et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Japan § 4.4 (Kristen Countryman ed., 6th ed. 2018).

10. Equality Act 2010, c.15, § 26 (U.K.); Hannah Mahon & Richard Harvey, Littler, The Littler Mendelson Guide to International Employment and Labor Law, United Kingdom §§ 1.1, 4.4 (Tahl Tyson ed., 6th ed. 2018).

11. Dowling, *Littler, supra* note 4, at 24–25; Alexandre Roumieu & Sixtine Gosselin, Littler, The Littler Mendelson Guide to International Employment and Labor Law, France § 4.4 (Kristen Countryman & Geida Sanlate eds., 6th ed. 2018).

12. Marta de Oliveira Pinto Trindade et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Angola § 4.4 (Johan Lubbe ed., 6th ed. 2018).

13. Dowling, *Littler, supra* note 4, at 25; Vikram Shroff et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, India § 4.4 (Anthony Rizzotti & Kristen Countryman eds., 6th ed. 2018).

Other countries have tough anti-harassment laws on paper, but not in practice. For example, China and Mexico[14] purport to ban workplace harassment, but tend not to provide enforceable remedies. Thus, among the thirty-four Chinese cases of sexual harassment from 2010 to 2017 available publicly, only two were brought by victims suing alleged harassers, and both of those cases were dismissed for lack of evidence.[15] That said, there are exceptions to this trend. In February 2013, Chinese "[m]ilitary prosecutors indicted a one-star general on charges of sexually harassing a military officer."[16] One report states that, in Mexico, over 23,000 employees resigned from their workplace in just three months in early 2019 to avoid a hostile work environment.[17]

Other countries maintain anti-sexual harassment laws, but do not consistently support the discipline of harassers. In Thailand, for example, some cases have held dismissals of sex harassers to be "'without cause' and the employer has been required to pay severance."[18]

It is no secret that many countries' cultures tolerate and even condone the demonstration of affection in the workplace. A kiss between colleagues may be perfectly appropriate in Latin America and many European countries, but no culture or social norms should tolerate the demeaning of any individual based on their gender, or their unwelcome submission to sex in exchange for workplace advances, or their unwelcome exposure to sexual conduct that creates a hostile work environment. Companies must make clear that they do not tolerate these activities if they wish to have a productive workforce where employees are free to do their jobs and if these companies wish to attract women as employees.

14. Mexico, for example, bans sexual harassment under Ley Federal del Trabajo [LFT] art 47, Diario Oficial de la Federación [DOF] 10-4-1970, Últimas reformas DOF 12-06-2015.

15. Sophie Richardson, *China's Victims of Sexual Harassment Denied Justice*, HUM. RTS. WATCH (July 31, 2018, 8:00 PM EDT), https://www.hrw.org/print/321111[https://perma.cc/SG3H-SNU4].

16. Joseph Yeh, *One-Star General Indicted for Sexual Harassment*, CHINA POST (Feb. 26, 2013), https://chinapost.nownews.com/20130226-99989 [https://perma.cc/C727-ZVKM].

17. *Workplace Harassment Prevails in Mexico*, EL UNIVERSAL (July 8, 2019), https://www.eluniversal.com.mx/ english/workplace-harassment-prevails-mexico [https://perma.cc/UDM2-X2SM].

18. DOWLING, *Littler, supra* note 4, at 25 (citing S. Sangrungjang & V. Sucharitkul, *Thailand: Sexual Harassment and the Workplace*, IBA DISCRIMINATION & EQUALITY L. NEWS, Oct. 2014, at 15).

B. Sexual-Harassment Prevention (Policy) and Response (Investigation)

The International Labor Organization adopted the Violence and Harassment Convention in 2019.[19] The Convention recommends that members mandate, through laws and regulations, that employers maintain a workplace violence and harassment policy that will protect the rights of workers and provide complaint and investigation procedures.[20] Further, it recommends that members take appropriate measures to protect migrant workers and work arrangements where exposure to violence and harassment could be more likely, such as night work, hospitality, and domestic work.[21] Among the core principles of the recommendation is that members ensure that all workers have the right to collectively bargain "as a means of preventing and addressing violence and harassment and, to the extent possible, mitigating the impact of domestic violence in the world of work."[22]

1. U.S. Approaches

In the United States, the Supreme Court has created an affirmative defense to "hostile environment" sexual harassment claims.[23] The affirmative defense is only available when the employer can show that it took reasonable care to prevent or correct harassment and that the employee unreasonably failed to complain under the employer's policy, or otherwise to avoid harm. Some U.S. jurisdictions, such as New Jersey, have adopted a version of the defense for state law purposes, but others, such as California and the New York City, have not.[24] The presence of such an affirmative defense nevertheless provides a strong incentive for employers to take preventative action to avoid harassment in the first place,[25] to investigate, and to take any necessary disciplinary steps thereafter.[26]

2. Different Approaches Overseas

Sexual harassment policies and internal investigations abroad are subject to a panoply of restrictions under the local law and culture.

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19. International Labor Organization (ILO), Violence and Harassment Recommendation (R206) (June 21, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:400 0085 [https://perma.cc/7PSN-CSQA].

20. *Id.* § 7.

21. *Id.* § 9.

22. *Id.* § 4.

23. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

24. Kevin M. Kraham et al., Littler, Littler on Harassment in the Workplace 4–5 (2018).

25. *See* Kohler v. Inter-Tel Techs., 244 F.3d 1167, 1180 (9th Cir. 2001) (describing how the employer's policy in that case was appropriate preventive action).

26. *See* Andreoli v. Gates, 482 F.3d 641, 644 (3d Cir. 2007) (describing effective investigation); Holly D. v. Cal. Tech., 339 F.3d 1158, 1177–78 (9th Cir. 2003) (same).

Similar to the U.S. model, in the United Kingdom, employers are expected to be proactive in preventing sexual harassment by implementing clear policies and providing training to their staff—particularly to managers, who may be in a position of power over other employees.[27] After a study found that forty percent of women and eighteen percent of men have at some point experienced unwanted sexual behavior, the United Kingdom announced its intention to develop a statutory Code of Practice "so employers better understand their legal responsibilities to protect their staff as part of a package of commitments to tackle sexual harassment at work."[28]

In the European Union**,** a recent survey found that thirty percent of establishments had procedures in place to deal with bullying and harassment at work.[29] Procedures were most common in companies in the Scandinavian countries and less observed in the southern and eastern countries, as well as in some continental countries, such as Austria and Germany.[30] Another survey found that workplace policies to deal with bullying and harassment were in place in fewer than twenty percent of organizations in Hungary, Estonia, Bulgaria, Latvia, and Portugal.[31] In addition, procedures to cope with harassment are more common in the public sector than in the private sector.[32]

Costa Rica,[33] India, and South Korea require employers to adopt specific rules on sexual harassment policies and training.[34] The Indian Sexual Harassment Act (SH Act) and the Sexual Harassment of Women at Workplace Act[35] require employers to establish and maintain an

27. *See* MAHON & HARVEY, *supra* note 10, § 10.1.

28. Press Release, Government of the U.K., Government Announces New Code of Practice to Tackle Sexual Harassment at Work (Dec. 18, 2018), https://www.gov.uk/government/news/government-announces-new-code-of-practice-to-tackle-sexual-harassment-at-work [https://perma.cc/HL9K-R9KN].

29. *See* EUR. AGENCY FOR SAFETY & HEALTH AT WORK, SECOND EUROPEAN SURVEY OF ENTERPRISES ON NEW AND EMERGING RISKS (ESENER-2) OVERVIEW REPORT: MANAGING SAFETY AND HEALTH AT WORK 50–52 (2016), https://osha.europa.eu/en/tools-and-publications/publications/second-european-survey-enterprises-new-and-emerging-risks-esener [https://perma.cc/TPQ5-J2WV].

30. EUROFOUND, VIOLENCE AND HARASSMENT IN EUROPEAN WORKPLACES: EXTENT, IMPACTS AND POLICIES 39, 41–42, 47–48 (2015), https://www.eurofound.europa.eu/sites/default/files/ef_comparative_analytical_report/field_ef_documents/ef1473en.pdf [https://perma.cc/8KLL-9PFS].

31. *See* POL'Y DEP'T FOR CITIZENS' RIGHTS & CONST. AFFAIRS, EUR. PARLIAMENT, BULLYING AND SEXUAL HARASSMENT AT THE WORKPLACE, IN PUBLIC SPACES, AND IN POLITICAL LIFE IN THE EU 49 (2018), http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604949/IPOL_STU(2018)604949_EN.pdf [https://perma.cc/C6GQ-9BLK].

32. EUROFOUND, *supra* note 30, at 4.

33. L. 7476, Ley Contra el Hostigamiento Sexual en el Empleo y la Docencia [Law against Sexual Harassment in Teaching and Employment], La Gaceta, marzo 3, 1995, num. 45, pp. 1–2 (Costa Rica).

34. DOWLING, *Littler, supra* note 4, at 27.

35. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

Internal Complaints Committee (ICC) at each office with a minimum of ten employees; organize workshops and awareness programs at regular intervals for employees and orientation members of the ICC; provide necessary facilities to the ICC for dealing with a complaint and for conducting an inquiry; assist in securing the attendance of the respondent and witnesses before the ICC; and formulate and disseminate an internal policy on the prohibition, prevention, and redress of sexual harassment at the workplace.[36] In South Korea, the Gender Equality Employment and Work-Family Balance Support Act (GEEA) and its Enforcement Decree require employers to conduct training on sexual harassment prevention at least once a year.[37]

In Japan, the Equal Opportunity Act requires employers to establish specific measures to prevent sexual harassment, provide appropriate counseling to employees, and otherwise deal with the issue, so that (1) employees do not suffer any disadvantage in their working conditions by reason of being subject to sexual harassment in the workplace; and (2) the working environment is not disturbed by any sexual harassment.[38] The government has also developed guidelines that specify the measures that employers are required to take to prevent sexual harassment.[39]

In China, on July 1, 2018, the Special Regulations on Labor Protection of Female Employees of Jiangsu Province took effect, and, for the first time in China, they provide detailed requirements for employers to establish internal policies and systems against sexual harassment.[40] Additionally, China is preparing a Civil Code, which is expected to be adopted in 2020. The most recent draft of the code imposes requires employers to take reasonable measures to prevent sexual harassment, such as establishing reporting and investigating procedures. It also

36. *See* SHROFF ET AL., *supra* note 13, § 4.4.

37. Act on Equal Employment and Support for Work-Family Reconciliation, Act No. 3989, Dec. 4, 1987, *amended by* Act Nos. 4126, 4876, 5933, 6508, 7564, 7822, 8372, 8781, 9792, 9795, 9998, 10339, art. 13 (S. Kor.).

38. Act on Securing, Etc. of Equal Opportunity and Treatment Between Men and Women in Employment, Law No. 113 of 1972, art. 11, translated in (Ministry of Health, Labour and Welfare), https://www.mhlw.go.jp/file/06-Seisakujouhou-11900000-Koyoukintoujidoukateikyoku/0000133458.pdf (Japan).

39. Guidelines Concerning Measures to Be Taken by Employers in Terms of Employment Management with Regard to Problems Caused by Sexual Harassment in the Workplace, Notice No. 615 of 2006, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

40. K. Lesli Ligorner & Dora Wang, *Time to Review Your Policies Against Workplace Sexual Harassment in China*, SHRM (Aug. 24, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-china-anti-harassment-requirements.aspx [https://perma.cc/L8YR-3HLZ].

extends civil liability to employers that do not properly investigate sexual harassment claims.[41]

Other countries have laws that require investigation of complaints, including Austria, Chile, Costa Rica, India, Japan, South Africa, and Venezuela.[42] However, the scope of the investigation may differ from country to country.[43]

3. Starting Points for Conducting the Investigation

Because U.S. anti-harassment policies were engineered for the U.S. at-will employment environment, simply exporting these tools into overseas investigations may cause problems. While U.S. employers must investigate and attempt to eliminate sexually harassing conduct, U.S. law imposes few constraints on how an American employer may investigate suspicions of employee wrongdoing. Overseas, however, the legal environment differs greatly.

Under French law, for example, when employee representatives raise a sexual harassment claim, the employer must include employee representatives in the investigation.[44] An occupational physician may also be involved in the investigation to provide contextual information.[45] In addition, the Labor Inspector may be advised of the situation and may decide to start an on-site investigation to determine whether sexual harassment has occurred.[46]

At the very least, multinational employers must consider the following issues: (1) identifying the proper investigation team; (2) the application and possible preservation of the attorney-client privilege;

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41. Erika C. Collins et al., *China Responds to #MeToo; Employers Stay Alert*, PROSKAUER (Jan. 15, 2019), https://www.internationallaborlaw.com/2019/01/15/china-responds-to-metoo-employers-stay-alert [https://perma.cc/FQ9T-9EJ4].

42. DOWLING, *Littler, supra* note 4, at 27.

43. The Swedish Labor Court, for example, recently clarified that an employer providing in-home care services had no obligation to investigate an employee's claims of sexual harassment when the person who allegedly harassed the employee was the client's cohabitant and not considered to perform any work for the employer. The court declined to consider the cohabitant as a worker; thus, the company was not required to investigate the harassment. Arbetsdomstolen [AD] [Labor Court] 2017 case. no. 61/17, ¶ 45, http://www.arbetsdomstolen.se/upload/pdf/2017/61-17.pdf [https://perma.cc/U3KD-5U4F] (Swed.); Anna Jerndorf, *Swedish Labor Court Clarifies Employer's Obligation to Investigate Claims of Sexual Harassment in the Workplace*, LITTLER (Jan. 19, 2018), https://www.littler.com/publication-press/publication/littler-global-guide-sweden-q4-2017 [https://perma.cc/ET4D-KSPL].

44. CODE DU TRAVAIL [FRENCH LABOR CODE] art. L. 2312-59 (Fr.), https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=271AF741D1D17BFB3B3A707D5265F3DA.tplgfr37s_3?idArticle=LEGIARTI000038791189&cidTexte=LEGITEXT000006072050&categorieLien=id&dateTexte=.

45. MINISTÈRE DU TRAVAIL, HARCÈLEMENT SEXUEL ET AGISSEMENTS SEXISTES AU TRAVAIL: PRÉVENIR, AGIR, SANCTIONNER (2019), https://travail-emploi.gouv.fr/IMG/pdf/30645_dicom_-_guide_contre_harce_lement_sexuel_val_v4_bd_ok-2.pdf.

46. Richard Lister, *How Employers in European Countries Should Deal with Workplace Sexual Harassment*, IUS LABORIS (Dec. 13, 2017), https://theword.iuslaboris.com/hrlaw/insights/how-employers-in-european-countries-should-deal-with-workplace-sexual-harassment [https://perma.cc/2A4G-C4V].

(3) culture and language differences; (4) the rights of representation for the reporting party as well as the subject and the witnesses interviewed; (5) possible discipline imposed based on the investigation results; (6) privacy concerns during the collection, preservation, and analysis of a broad spectrum of information; and (7) the form, content, and disclosure of the investigation reports.

Investigators must be aware of and consult the employer's policies and code of conduct and must have a working knowledge of the specific country's laws on the subject, or be assisted by individuals who have that knowledge. Policies should make it clear that employers will not retaliate against employees for raising concerns or participating in the investigation.[47]

C. Proper Investigation Team

1. Choosing the Proper Investigation Team

In every event, choosing the proper investigator is crucial. A sexual harassment investigation is far more intricate than simply asking the accused if he or she is guilty or asking the parties involved what happened. The investigator ideally should have a background in employment law, have experience conducting investigation, and understand whom to talk to and when, how to ask questions, and how to document the process. And, as emphasized below, an investigator must know local law and workplace customs, or be guided by an individual who has that knowledge. Of course, investigations should be conducted in an unbiased manner, regardless of the rank or importance of the accused, and in a manner that is likely to be perceived as unbiased. A company should have a detailed procedure or protocol that outlines which department or individuals will bear responsibility for overseeing the investigation.

Among the possible investigator or investigative team leaders are in-house human resources, in-house counsel, internal audit, and outside counsel (U.S. or foreign). And, in many circumstances, this may be a combination of different resources that will need to work together to carry out the investigation and formulate remedial measures.

2. Potential Conflict Issues and Other Consequences of Retaining Internal vs. Outside Investigators

Each of these different types of investigators offers advantages and disadvantages, which are set forth below.[48]

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47. Philip M. Berkowitz, *Investigations Guidance for Multi-Nationals*, N.Y. L.J. (May 10, 2017), https://www.law.com/newyorklawjournal/almID/1202785747011/Investigations-Guidance-for-MultiNationals.

48. *See* Helene Wasserman, *Dear Littler: Can I Immediately Fire a VP Based on Sexual Harassment Allegations?*, Littler (Feb. 28, 2018), https://www.littler.com/files/18_dearlittler_feb_immediately_fire_vp_sexual_harass ment_allegations.pdf.

a. Internal Investigator

If an employer faces allegations lodged against an employee who is not high up in the company, the employer certainly normally performs the investigation in-house. The advantages offered by having an internal investigator do the work include cost containment and the speed of the deployment, both because such an investigator is cognizant of the organization and because that investigator may already be located in or near the place of the necessary fact-finding.[49]

Nonetheless, the company needs to be aware of an internal investigator's potential lack of impartiality and independence. Legal or compliance personnel who may be familiar with the employee's conduct under investigation due to their having played a role in reviewing or making decisions regarding the employee's duties at the time that conduct was occurring normally should not actively participate in an investigation of that conduct. Those legal and compliance personnel may be potential witnesses who themselves may need to be interviewed. Separating them from the investigation team will maintain the integrity of the investigation.

b. Outside Investigator

It is often recommended that the employer retain an outside investigator, especially if the alleged harasser is a senior executive in the organization or if the allegation involves alleged criminal or other high-risk conduct. Moreover, with the significant increase in the need for workplace investigations in the #MeToo era, many human resources officers are simply unavailable to handle all the necessary investigations.

An outside investigator can offer several advantages. First, the outside investigator normally has expertise in conducting sensitive investigations. Second, the outside investigator may be less likely to be influenced by internal politics, favoritism, or preconceived perceptions of the parties involved. His or her livelihood does not depend on the employee's or the employer's success. That detachment can help ensure a neutral and fair investigation. Third, hiring a dedicated, impartial investigator signals to the alleged victims, their coworkers, and others that the employer is taking the allegations seriously. This step can encourage cooperation and trust in the neutral and the process, which benefits everyone involved.

However, the employer should carry out due diligence into the third party's credentials and experience and establish a protocol for assuring that investigations are carried out in an acceptable manner and for follow-up regarding investigation results, potential discipline,

49. D. Jan Duffy, Best Practices in Internal Investigations: 2013 Edition (2013) (unpublished manuscript), https://www.americanbar.org/content/dam/aba/events/labor_law/Transatlantic%20conferences/2013/whistleblowing_duffy.authcheckdam.pdf.

and appropriate documentation. The employer should maintain communication with the investigator as they go about doing their job and be sure that the investigator keeps the employer informed of the process of the investigation. Counsel should be consulted in this process, which may require imposing certain limitations, for example, on the number of individuals to be interviewed and access to documentation to assure confidentiality, and limiting the investigator's mandate as may be appropriate.

Sometimes, it is appropriate to retain a law firm to conduct an independent investigation. Normally, this choice should not be the firm with which the company has an ongoing relationship. The firm should be experienced in conducting investigations and should have subject matter expertise. The decision whether to retain a law firm to conduct the investigation may depend on a number of considerations. For example, if the alleged victim has filed a lawsuit and has left the company, retaining a law firm likely becomes essential. If the alleged victim remains employed, other factors, such as the seriousness of the charges, the alleged victim's and harasser's levels in the company, the number of alleged victims, and similar issues become important considerations.

In the United States, the investigation and advice regarding the investigation may be shielded by the attorney-client privilege if the investigation is conducted by counsel or if the investigator is retained by the company's attorneys for the purpose of providing legal advice to the employer. Again, however, the ability to keep an investigation confidential as privileged is viable only in countries that recognize a true attorney-client privilege and not just an obligation on counsel to keep confidential advice it renders to the client.

Employees overseas may have certain due process rights during investigations, such as being accompanied by their own lawyers or other representatives. A U.S.-based lawyer acting without knowledge of these rights could ultimately prejudice the multinational employer by inadvertently preventing the employer from being able to impose discipline on the employee.

c. Local Lawyers or Investigators

In a cross-border investigation, counsel must be conversant with local laws, rules, and custom. Because foreign workplace laws tend to have no counterpart to U.S. employment-at-will, they often confound American investigators. In Europe, instead, grounds for employee dismissal are often quite limited and provide far more job security for workers, whether at the outset of employment or after completion of a probationary period.[50]

50. *See, e.g.*, Thomas Griebe et al., Littler, The Littler Mendelson Guide to International Employment and Labor Law, Germany § 14.1 (Jeffrey L. Adams & John Lubbe eds., 6th ed. 2018); Salvador del Rey Guanter, Littler, The Littler Mendelson Guide to

American investigators who are unfamiliar with these essential differences may be reluctant to tamper with their sophisticated and familiar investigation strategies. However, overseas clients and witnesses may find the approach of a brash American questioner who uses adversarial cross-examination to be off-putting and inappropriate.

The failure to modify U.S. investigatory practices abroad may expose an investigator to a charge of violating the local law of the workplace, to say nothing of diminishing the utility of the investigation itself.[51] Local counsel can provide guidance both on the jurisdiction's legal framework and cultural sensitivities, and on how failing to pay attention to these may jeopardize the success of an internal investigation.

At the outset of any investigation, careful attention must be given to the laws, bar rules, and privilege customs of the local jurisdiction in which the investigation is being conducted. In France, for example, the Parisian Bar Association, in 2016, developed strict guidelines that specify the measures that lawyers are required to take in conducting internal investigations.[52] Furthermore, the French Supreme Court has held that an external lawyer cannot assist an employer when conducting a pre-dismissal meeting.[53]

Under the inquisitorial system in place in many countries outside the United States, a judge, not a lawyer, normally conducts witness questioning, and witnesses are not usually subject to aggressive investigatory questions. Overseas, lawyers often simply do not ask questions of witnesses, both as a matter of practice and as a matter of other legal and cultural sensitivities. Depositions, for example, are purely an American phenomenon; it is part of the discovery process, which simply does not exist in the vast majority of countries.

Cultural differences also may hinder an employee's ability or willingness to participate in an investigation. In many Asian communities, for example, traditional social norms mean that many women and men fear speaking up due to a deeply rooted stigma associated with sexual

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INTERNATIONAL EMPLOYMENT AND LABOR LAW, SPAIN § 14.1 (Peter Susser ed., 6th ed. 2018); ANNA JERNDORF ET AL., LITTLER, THE LITTLER MENDELSON GUIDE TO INTERNATIONAL EMPLOYMENT AND LABOR LAW, SWEDEN § 14.1 (Kristen Countryman ed., 6th ed. 2018); MAHON & HARVEY, *supra* note 10, § 14.1.

51. Dowling, *SHRM*, *supra* note 4.

52. Avocats Barreau, Conseil de l'Ordre, Nouvelle Annexe XXIV : Vademecum de l'avocat chargé d'une enquête interne (Sept. 13, 2016), http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/nouvelle-annexe-xxiv-vademecum-de-lavocat-charge-dune.

53. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 27, 1998, Bull. Civ. V, No 284 (Fr.).

harassment.[54] And, of course, it is essential to retain an interpreter who speaks the local language and dialects to help conduct interviews.[55]

D. Attorney-Client Privilege Abroad, as Contrasted with the Privilege in the United States

1. Different Approaches

a. United States

In the United States, companies investigating claims of sexual harassment must be concerned with the possibility that the results of the investigation—wherever in the world conducted—may be subject to discovery in a lawsuit or arbitration brought by the alleged victim, or by the government, or even in related claims brought by others. However, discovery normally may not be had of information that is protected by the attorney-client privilege. Of course, the privilege is often waived in order to assert an affirmative defense, and it may be waived by necessity if the employer seeks to rely on the investigation results in formulating a legal defense. Nevertheless, the employer is best advised to assure that the attorney-client privilege attaches to the investigation.[56]

b. Overseas

Overseas rules of privilege and confidentiality often catch U.S. attorneys and clients by surprise. These U.S. doctrines are limited only to the United States and to a limited number of other common-law jurisdictions, such as the United Kingdom, Australia, and Hong Kong, where legal professional privilege protects from disclosure (a) confidential communications between a client and their lawyer that come into existence for the purpose of giving or receiving legal advice, as well as (b) confidential communications and documents generated for the sole or dominant purpose of actual or contemplated litigation.

Most countries do not recognize the attorney-client privilege at all, or recognize only a principle of confidentiality that is not coextensive with the protections provided by the privilege in the United States.[57] Thus, many jurisdictions may prohibit the lawyer from revealing

54. *See* Motoko Rich, *She Broke Japan's Silence on Rape*, N.Y. Times (Dec. 29, 2017), https://www.nytimes.com/2017/12/29/world/asia/japan-rape.html; Mandy Zuo, *Why Chinese Women Don't Speak out About Sexual Harassment in the Workplace*, S. China Morning Post (Apr. 21, 2018), https://www.scmp.com/news/china/society/article/2142703/why-chinese-women-dont-speak-out-about-sexual-harassment.

55. Philip M. Berkowitz, *10 Tips for an Effective Cross-Border Investigation*, Law360 (Oct. 31, 2012, 1:39 PM EDT), https://www.law360.com/articles/390178/10-tips-for-an-effective-cross-border-investigation.

56. *Id*.

57. *Id.*; *see* Felix Helmstädter et al., *Maximizing Protection of Attorney-Client Privilege in Germany*, Morrison Foerster (Aug. 13, 2018), https://www.mofo.com/resources/publications/180813-attorney-client-privilege-germany.html.

communications with the client, but do not protect the client from having to disclose communications with counsel, nor will the law protect the attorney's advice from being subpoenaed by the government.

In China, for example, there is no concept of legal privilege, although there is a similar concept of confidentiality.[58] However, communications with the client can be disclosed if required by law or court order.[59] Thus, as explained by some commentators, Chinese and U.S. lawyers may view the scope of their fiduciary duty to clients differently. A U.S. lawyer advising in China could be compelled to testify regarding what that lawyer might otherwise consider confidential or privileged company information.[60] Similarly, in Japan, no attorney-client privilege exists. While the confidentiality of communications between an attorney and a client may be protected, the protection is not overarching and does not belong to the client.[61]

To illustrate the point, in Germany, prosecutors have dramatically conducted numerous "dawn raids" on U.S. law firms, seizing records of internal investigations that would be considered protected from discovery by U.S. privilege law. Courts throughout Europe are grappling with the scope of the legal professional privilege and the confidentiality of internal investigations.[62]

2. Special Considerations for In-House Counsel

U.S. courts, consistent with *Upjohn Co. v. United States*,[63] generally recognize that the privilege may attach to communications between in-house counsel and the corporate client. Yet again, this approach has limited utility outside the United States. Indeed, the European Court of Justice held in September 2010 that communications with in-house counsel simply are not privileged. The court held, in sum, that in-house counsel are not sufficiently independent to warrant extending a legal professional privilege.[64] While the no-privilege

58. Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 T. JEFFERSON L. REV. 171, 172–73 (2011).

59. *See id.* at 184–85.

60. *See id.* at 185; Kyle Wombolt et al., *China*, 2 GLOBAL INVESTIGATIONS REVIEW, THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 162, 174–75 (Judith Seddon et al. eds., 4th ed. 2020).

61. *See* Mayu Arimoti, *Is There Attorney-Client Privilege in Japan?*, LLM L. REV. (June 16, 2018), llmlawreview.com/2018/06/16/is-there-attorney-client-privilege-in-japan; ALVIN HIROMASA SHIONZAKI, LEX-MUNDI, IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE: JAPAN (2009), http://www.lexmundi.com/Document.asp?DocID=1942.

62. "German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry," N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html.

63. 449 U.S. 383 (1981).

64. Case C-155/79, Akzo Nobel Chems. Ltd. V. Comm'n, 2010 E.C.R. I-08301; Case 155/79, AM & S Eur. Ltd. V. Comm'n, 1982 E.C.R. 1575.

rule has only been recognized in antitrust cases, the rule could permit access to valuable information that would otherwise be privileged as attorney-client communications. The question is left to counsel and the multinational company to determine risk tolerance.[65]

While EU regulation has led to some measure of consistency in member states' laws dealing with attorney-client privilege, there are still significant differences of emphasis and approach. Thus, the United Kingdom, Denmark, Ireland, Netherlands, Romania, Germany, and Spain protect the confidentiality of the communications with in-house counsel, but France, Italy, and Sweden do not.[66]

Because the status of in-house counsel as a professional legal advisor for the purposes of applying the U.S. attorney-client privilege is not guaranteed overseas, employers may need to consider involving outside counsel to help ensure application of the privilege.

E. Understanding Culture and Language Differences

Understanding culture differences can play a pivotal role in interviewing individuals in order to avoid potential misunderstandings and helping to put a witness at ease. Indeed, in the United States, people are more accustomed to confrontational and even accusatory interviews. Again, however, this is less common outside the United States, where it may result in a hostile and unproductive reaction.

For example, in many cultures (even in the United States), an investigator suggesting to an employee that he is accused of wrongdoing, rather than just gathering evidence, can trigger push-back and anger. Even body language may differ from country to country and may affect the interview process. For example, looking someone in the eye may be considered rude in some countries, and so not maintaining eye contact with an investigator does not necessarily signal that a person is obfuscating.[67]

As noted above, outside the United States, lawyers may rarely question a witness. In most instances, the judge, and not the lawyer, asks the questions. Many countries operate under the inquisitorial system, whereby the judge may question witnesses.[68] In contrast, as noted

65. J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 Int'l Law. 35 (2004).

66. Jacques Buhart, *Comparaison internationale des statuts de juristes internes*, Juriste d'Enterprise Mag., Apr. 8, 2014, at 101, 102.

67. *See* KPMG Int'l, Cross-Border Investigations: Are You Prepared for the Challenge? 16 (2013), https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf [https://perma.cc/D7D2-VVCN].

68. *See*, *e.g.*, Neil Montgomery & Helena Penteado Moraes Calderano, *Legal Systems in Brazil: Overview*, Thomson Reuters Practical Law Global Guide § 24 (last updated Jan. 1, 2020); Catherine Allen & Rachel Hanly, *Legal Systems in Ireland: Overview*, Thomson Reuters Practical Law Global Guide § 24 (last updated Jan. 1, 2020);

previously, under the adversarial system in the United States, lawyers conduct the questioning. This difference in style and practice may lead to miscommunications or conflict in countries where individuals are not familiar with the practice.

F. Rights of Representation and Imposing Discipline of the Individuals Under Investigation

One of the starkest differences between domestic and cross-border investigations is that, in some jurisdictions, the employee may have (a) the right to representation during an interview, (b) the right to be informed of procedural rights during the investigation, and (c) the right to have access, at least to some degree, to investigation materials that identify the employee.

France, for example, strictly protects the rights of all individuals under investigation. Under some circumstances, the French investigator must explain to these individuals that they can be assisted by lawyers.[69] In Finland, if an employer is seeking to terminate the employee, the employee must be informed of his or her right to have a lawyer present during an interview.[70] Likewise, in Nigeria, investigators must inform a witness that he or she has the right to legal representation during an interview.[71] In contrast, the United States and the United Kingdom generally do not impose such duty.[72]

In certain countries, the employee interview must be suspended if the interview reveals that the employee engaged in wrongful conduct that may subject him or her to discipline. Statutory rules concerning representation (for example by a union committee, an employee representative, or a work council), as well as considerations regarding legal prerequisites to imposing discipline, must be considered. In China, for example, the applicable union must be consulted for any unilateral termination of employment by the employer even if it is based on a statutory ground.[73]

Marco Gubitosi & Sara Colombera, *Legal Systems in Italy: Overview*, THOMSON REUTERS PRACTICAL LAW GLOBAL GUIDE § 24 (last updated Nov. 1, 2019).

69. *See* Avocats Barreau, *supra* note 52.

70. *See* Markus Kokko & Vilma Markkola, *Finland: Corporate Investigations 2020*, § 7.3, ICLG, https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/finland [https://perma.cc/UP8A-QFPG] (last visited May 1, 2020).

71. *See* Kunle Obebe & Bode Adegoke, *Nigeria: Corporate Investigations 2020*, §7.3,ICLG,https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/Nigeria [https://perma.cc/F3SS-2XY4] (last visited May 1, 2020).

72. *See* Jean-Pierre Grandjean, *L'avocat chargé d'une enquête interne, une révolution!*, GAZETTE DU PALAIS, Dec. 13, 2016, at 8, 8–9, https://www.gazette-du-palais.fr/wp-content/uploads/2017/12/904.pdf [https://perma.cc/8T27-KPZY].

73. Melvin Sng et al., *China: Handling Internal Investigations*, GLOBAL INVESTIGATIONS REV. (Sept. 20, 2016), https://globalinvestigationsreview.com/insight/the-asia-pacific-investigations-review-2017/1068616/china-handling-internal-investigations [https://perma.cc/T6QP-EJKG].

In some jurisdictions, such as France, employees have the right to refuse to cooperate with an employer-led investigation, even if they are not its target. [74] The refusal to cooperate will not preclude the ongoing investigation and subsequent consequences.[75] Witnesses who refuse to cooperate for fear of retaliation should, in any event, be reminded of their right to be protected against retaliation.[76]

In some instances, it may be advisable, once litigation commences, to permit an employee's lawyer to be present during an interview, even if it is not required, to maintain the integrity of the investigation. Any such decision should be made only after consultation with legal counsel cognizant of the local implications.

G. Collection, Preservation, and Analysis of Data

1. Data Privacy Concerns

a. Collection of Data

Any efforts to search email—whether or not located on company-owned systems and computers—or even to review any personnel records, must be considered with privacy law issues in mind. Many European countries prevent companies from extracting the employee's email accounts without the employee's consent.[77] In Japan, when an employer collects employees' personal information, the employer must disclose in advance the purpose for which such employees' personal information is to be used.[78] Disclosure may be made by, for example, a written notice provided to each employee or in the form of a website notice on the intranet of the employer.

b. Transmission of Data

Data privacy permeates all aspects of an investigation carried out overseas or that involves the transmission of data—whether electronic or hard copies—from overseas to the United States. In Europe, French and Swiss "blocking statutes" prevent the transmission of evidence abroad unless certain procedural safeguards are met.[79] Moreover, the European Union's expansive data privacy regime, the General Data

74. *See* Daniel Fridman & Ludovic Malgrain, *Under Scrutiny: Internal Investigations*, White & Case (July 1, 2015), https://www.whitecase.com/publications/insight/under-scrutiny-internal-investigations [https://perma.cc/8P6J-CMYZ].

75. Ministère du Travail, *supra* note 45.

76. *See id.*

77. *See* Jérôme Aubertin, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Belgium § 11.2 (John Lubbe & Trent Sutton eds., 6th ed. 2018); Griebe et al., *supra* note 50, § 11.2; Cătălin Roman, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Romania § 11.2 (Philip M. Berkowitz & Kristen Countryman eds., 6th ed. 2018).

78. Article 18, Paragraph 2, Japan Act on the Protection of Personal Information.

79. *See* Fridman & Malgrain, *supra* note 74.

Protection Regulation (GDPR),[80] is more restrictive than previous data privacy regulations (containing strict rules requiring consent, legitimate interest, and necessity to perform a contract for processing personal data), and will have a significant impact on the way both cross-border internal investigations are conducted. The GDPR defines personal data broadly to include any information related to an identified or identifiable natural person. Significantly, the GDPR applies to all EU residents, whether or not they are EU citizens. Violations of the GDPR carry significant administrative fines.[81]

Similarly, China imposes tough requirements regarding the collection and analysis of "state secrets" and other information that is in China's "national interests." However, these notions of state secrets and national interests are not clearly defined by China's laws.[82] Companies can help ensure compliance by keeping much information within China's borders and hiring local experts who are intimately familiar with the risks of violating China's laws.[83]

The Japanese Data Privacy Law does not restrict the export of personal information. However, generally, when an employer transfers employees' personal information to third parties (including a U.S. company), in principle, the employer is required to obtain the relevant employees' consent before the transfer.[84]

Even after the conclusion of the cross-border investigation, a company needs to keep in mind the differences in data privacy laws between nations. Some countries prohibit outdated personal information from being retained, even if it is contained in investigatory materials. This ban could affect the applicability of certain laws and regulations that require a U.S. company to maintain investigatory materials and work product for a period of time. In Brazil, for example, employment-related documents must be kept in the company's files even after an employee's termination. The term of retention varies from two to thirty

80. *See* General Data Protection Regulation (GDPR) 2016/679, 2016 O.J. (L 119) 1 (EU).

81. *Id.*; PHILIP L. GORDON, TEN STEPS FOR U.S. MULTINATIONAL EMPLOYERS TOWARDS COMPLIANCE WITH EUROPE'S NEW DATA PROTECTION FRAMEWORK—THE GENERAL DATA PROTECTION REGULATION 1 (2016), https://www.littler.com/files/2016_1_10stepsformultinationalemployers_dataprotection.pdf.

82. *See* Jerry C. Ling, *Traps for the Unwary in Disputes Involving China*, JONES DAY (Aug. 2012), https://www.jonesday.com/en/insights/2012/08/traps-for-the-unwary-in-disputes-involving-china.

83. *See* KPMG INT'L, *supra* note 67; *see also* Susan Ning et al., *Development of PRC Regulations on Cross-Border Data Transfer*, CHINA LAW INSIGHT (June 19, 2019), https://chinalawinsight.com/2019/06/articles/crossing-borders/development-of-prc-regulations-on-cross-border-data-transfer [https://perma.cc/N2LU-HFAY].

84. Act on the Protection of Personal Information, *supra* note 78, art. 24; *see also* KAKUYAMA ET AL., *supra* note 9, § 11.3(a).

years, depending on the document.[85] In France, records concerning the employee's use of the Internet should not be retained by the employer for more than six months.[86] The disciplinary file can be retained beyond the statute of limitation of three years.

Failure to anticipate the impact of local data protection laws not only can significantly impede an investigation, but it also can be costly in terms of added expenses, sanctions, and, in some cases, prosecution. European "data subjects," for example, have a private right of action for data law violations.[87] In France, exceeding the maximum retention duration for personal data provided either by law or regulation, by a request for authorization or opinion, or by a prior declaration addressed to the French data privacy watchdog (CNIL), where applicable, may constitute an offense punishable by a five-year imprisonment and a fine.[88]

c. Preservation of Data

At the commencement of the investigation, the investigation team must consider whether to issue a legal hold instructing employees to retain documents related to the investigation. Promptly issuing and assuring compliance with document preservation notices can help the company preserve foreign evidence while disputes are resolved with any regulatory bodies concerned with blocking statutes, or with employees refusing to consent.

H. Investigation Report

1. Form and Content

At the close of the investigation, the company will typically prepare an investigation report, unless legal considerations suggest a different approach. The appropriate form and content of the report in a cross-border investigation will depend on many factors and the unique factual circumstances of the matter investigated. The labor laws in a particular jurisdiction may call for a written report, especially if disciplinary action is taken or if the company has the duty to provide certain investigatory material, including a written investigatory report, to the target or the witness under investigation. Of course, careful attention must also be paid to the content of the report. The report should focus on the facts of the alleged conduct, information gathered during the

85. Vilma Toshie Kutomi, Littler, The Littler Mendelson Guide to International Employment and Labor Law, Brazil § 11.6 (Kristen Countryman & Geida Sanlate eds., 6th ed. 2018).

86. *Les outils informatiques au travail*, CNIL (July 25, 2018), https://www.cnil.fr/fr/les-outils-informatiques-au-travail [https://perma.cc/V4ME-QL7N].

87. GDPR, *supra* note 80, arts. 77–84.

88. Code pénal [Penal Code] arts. 226–20 (Fr.).

investigation, and whether the conduct runs counter to the company's applicable policies, as opposed to whether laws were broken.

Again, the employer must be sure that every individual, consultant, management or director—whether local or outside of the country—who receives the report complies with the local data privacy laws. The report should be shared in a manner that preserves the attorney-client privilege where applicable. It is often advisable to consult with in-house or outside counsel prior to finalizing any drafts of the report.

2. Required or Optional Disclosure

As noted previously, a key difference between domestic and cross-border disclosure regulation is the lack of discovery, per se, in most jurisdictions overseas.[89] Civil law jurisdictions, especially in Europe, generally limit disclosure of evidence to what is proffered by each party as evidence in support of the party's case. In contrast, pre-trial discovery obligations in common law countries, particularly in the United States, but also in the United Kingdom, are much broader. This can be especially challenging when investigatory materials or other evidence sought in discovery by a U.S. party include information considered by European countries to be "personal information" relating to an individual, raising privacy concerns.[90]

In addition, in some jurisdictions, resolutions may require the disclosure of investigatory findings to the U.S. government or authorities located outside of the United States. In Australia, for example, the company has a duty to report evidence of certain criminal offenses to police.[91]

Conclusion

Workplace investigations, becoming quite commonplace in the wake of the #MeToo movement, increasingly implicate global issues with which HR executives and counsel who advise them must be familiar. Multinational companies and their counsel must consider the cultures and the laws of the countries in which they do business before carrying out investigations that involve cross-cultural issues and the laws of multiple jurisdictions.

89. *See* Samantha Cutler, *The Face-off Between Data Privacy and Discovery: Why U.S. Courts Should Respect EU Data Privacy Law When Considering the Production of Protected Information*, 59 B.C. L. REV. 1513, 1514 (2018).

90. *See* Karin Retzer & Sherman Kahn, *Balancing Discovery with EU Data Protection in International Arbitration Proceedings*, NYSBA N.Y. DISP. RESOL. LAW., Spring 2010, at 47, 47.

91. *See* KPMG INT'L, *supra* note 67.