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COVER STORY

Outside investigations of harassment complaints rising

By Andy Serbe

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Companies are looking to outside investigators in claims of workplace harassment with unprecedented frequency and speed, sometimes at the direction of high-level executives, attorneys say, citing a need for both the optics and substance of non-biased probes.

“What I am seeing is a far greater interest in engaging investigators right away to investigate allegations, particularly against executives or board members,” said Jeffrey S. Horton Thomas, an Akerman LLP partner. “I am seeing it in circumstances where literally a year or two ago, human resources and executive leadership would not have called for or hired an independent investigator, and now they are.”

Fisher & Phillips LLP regional managing partner Jason A. Geller in San Francisco said in one instance a smaller company client of his called for an external investigator in a situation he felt could have been handled internally. In that situation, a rank and file employee accused a mid-level manager of misconduct.

“I would say there definitely has been a push towards wanting to use outside investigators, for all the obvious reasons: transparency, objectivity, sometimes efficiency, and for message-sending that the company takes these types of complaints seriously,” Geller said.

“Not just larger companies, smaller companies too. When there’s a complaint of alleged misconduct, they immediately want to go outside,” he added.

“I think the call for an investigation and action comes from a higher level now than it would have before. Leaders have sensitivity to these allegations and place an urgency on them that is unprecedented in my 37 years of practice,” Thomas said.

As an example, Thomas pointed to allegations against ousted Papa John’s founder John Schnatter.

Schnatter stepped down after he was accused of using a racial slur on a company call, and more recently, in a Forbes report, of sexual misconduct. In July, the company announced it had hired an outside investigative team from Akin Gump Strauss Hauer & Feld LLP to look into allegations of a company-wide harassment culture Forbes said Schnatter fostered.

“I do think, generally speaking, the decisions are being made at higher levels. It depends on the



Photos courtesy of Akerman LLP, Fisher & Phillips LLP and Meyers Nave Riback Silver & Wilson PLC

From left, Jeffrey S. Horton Thomas of Akerman LLP, Jason A. Geller of Fisher & Phillips LLP and Camille Hamilton Pating of Meyers Nave Riback Silver & Wilson PLC report more of their clients opting for outside investigations.

situation and who’s involved,” said Emily Burkhardt Vicente of Hunton Andrews Kurth.

The University of Southern California also looked outward for the investigation of allegations against Dr. George Tyndall, a former staff gynecologist accused of abusing female students. USC Board of Trustees Chairman Rick Caruso announced a team from O’Melveny & Myers LLP would handle the inquiry immediately after his election at the end of May.

“Because of the heightened awareness and media attention, I’ve seen more of a directive when these issues come up from folks higher up in organizations, and I think that’s more common now than it used to be,” Vicente said.

“It’s the messaging. They want to send the message that we’re taking it seriously, we’re committing resources,” Geller said.

Attorneys agreed the shift is at least in part driven by the #MeToo movement’s efforts to root out pervasive sexual harassment and address a culture of silence. Outside investigators are one way companies have addressed that pressure.

“I think that now there is an understanding that people will not come forward if they don’t have faith in a credible process. That’s what the #MeToo movement was about, understanding why people wouldn’t come forward,” said Camille Hamilton Pating, a principal at Meyers Nave Riback Silver & Wilson PLC.

Pating chairs the firm’s workplace investigations practice and has performed outside investigations.

Micha Star Liberty of Liberty Law Office agreed #MeToo is a driver of the increase in outside investigations but

said the intentions might not be pure.

“Because of the publicity related to the #MeToo movement, we’re seeing companies wanting to purchase plausible deniability and pat themselves on the back and say, ‘We’ve hired this independent investigator,’ but if the investigator isn’t truly independent, they haven’t done anything other than provide themselves with sound bites,” she said.

“From an employer point of view, the investigation is likely to be viewed as self-serving and biased if done by any internal process, whether by HR or the general counsel. It’s not encouraging people to come forward,” Pating said.

In an example Pating cited, after NBC news anchor Matt Lauer was accused of sexual misconduct, the subsequent investigation into whether executives knew about his behavior was conducted by NBCUniversal general counsel and saw its veracity met with skepticism.

“If an organization wants to have honest answers about harassment within their own workplace culture, you can’t investigate yourself,” Pating said.

According to Vicente, who has also conducted harassment and discrimination investigations, the benefits of looking outward go beyond optics.

“I think an outside investigator can be more impartial in many instances. In some cases, they can also be more experienced in investigations,” she said. “You might get more impartial results and better or more complete information.”

Plaintiff-side attorneys expressed skepticism and said the optics might not always be accurate. To them, investigations can be flawed or prob-

lematic regardless of their genesis; it comes down to that all-important credible process.

“In my practice, the fact that it’s an external investigation does not carry additional weight. I’m looking at the report itself, what questions were asked, and whether the investigator followed appropriate practices,” said Genie Harrison of Genie Harrison Law Firm.

Harrison and others also raised concerns about how independent so-called independent investigators truly are because at some level they carry a similar problem as internal ones: who cuts their paychecks.

“My first concern would be, any time you talk about independent investigators, is the same thing as arbitrators, which is that they see the defense as a frequent flyer or a regular customer,” said Brian S. Kabateck of Kabateck Brown Kellner LLP.

“There is always an inherent amount of bias in an investigation where the investigator is being paid by one party and not receiving any remuneration from the other,” said Liberty.

Liberty, Kabateck, Mike Arias of Arias Sanguinetti Wang & Torrijos LLP, and John D. Winer of Winer, McKenna, Burritt, & Tillis LLP all drew the arbitration comparison and echoed the concerns.

Winer said he has attempted to hire an investigator who refused the case because the defendant was already a client. Harrison said she knew of one investigator who lost a client after finding truth to allegations against the company.

Pating and Vicente said an advantage of having internal counsel perform an investigation was keeping the information privileged. A risk of outside investigators is that benefit cannot be taken for granted.

Vicente added that waiving that privilege is a litigation issue companies must wrestle with.

“It’s very hard to close that box once you open it, and it becomes more out of your control because if you haven’t exposed it, you can be confident you keep it. Once you open it up, it’s up to a judge to decide the parameters,” Vicente said.

A heightened level of awareness at the executive level comes with risks too, she continued.

“From the legal side, you do open the organization up to more arguments about punitive damages if higher-ups are involved in decision making and don’t take the appropriate steps,” she said.

