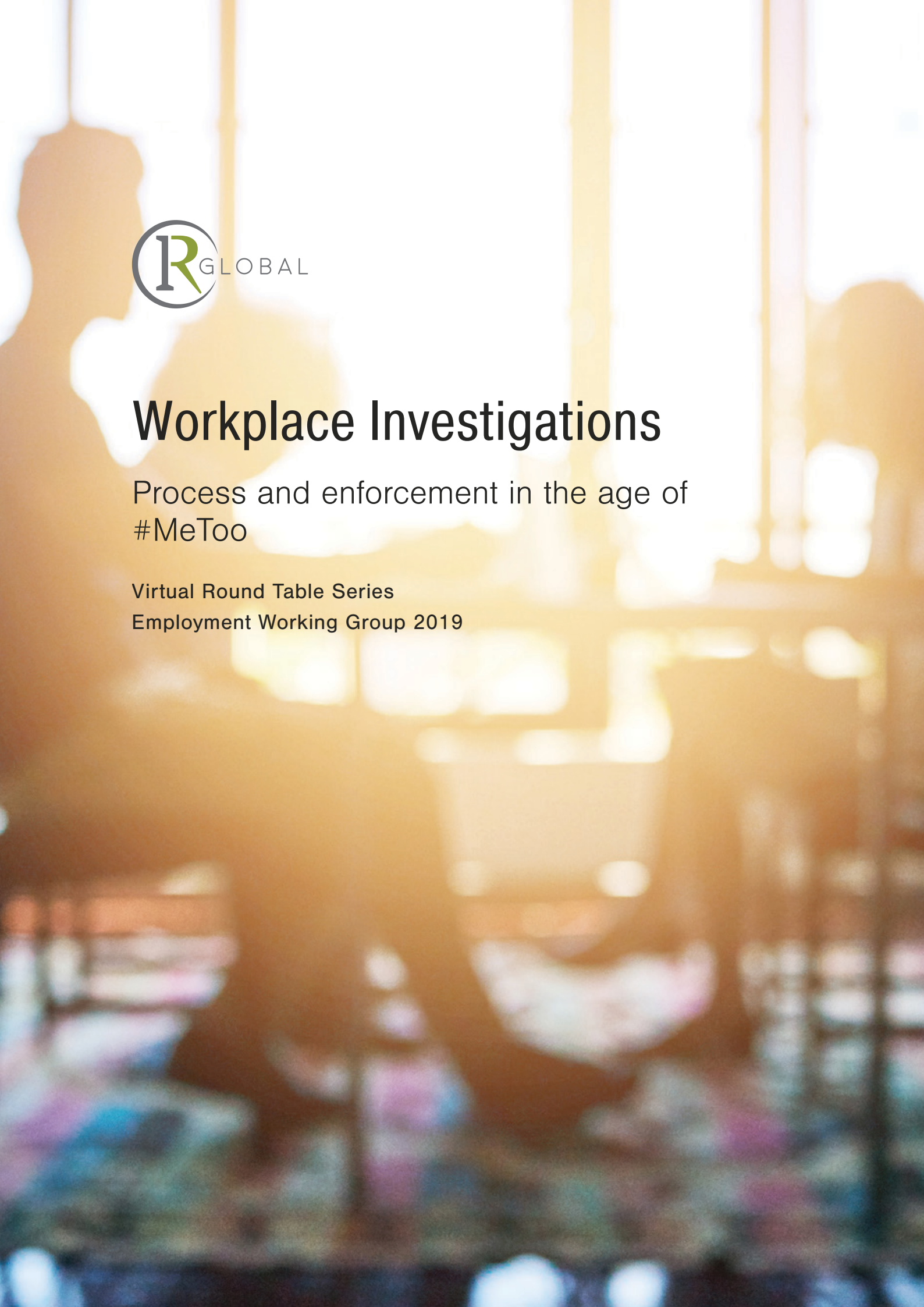

Workplace Investigations

Process and enforcement in the age of #MeToo

Virtual Round Table Series

Employment Working Group 2019

Workplace Investigations

Process and enforcement in the age of #MeToo

The #MeToo movement was founded more than a decade ago, as a vehicle against sexual abuse and harassment. Despite its longevity, it really only entered the public consciousness in October 2017, in the aftermath of high profile sexual misconduct allegations involving Hollywood.

It was adopted as a social media hashtag by people when discussing the scandal, that involved film producer Harvey Weinstein, but has since been used much more widely to highlight the prevalence of sexual harassment in broader society.

The 'Age of #MeToo', as some commentators have dubbed it, has increased the general understanding of what constitutes sexual harassment and put more emphasis on its eradication. The movement has precipitated new legislation in advanced, forward-thinking countries, designed to make sexual harassment unacceptable.

In the US, the Empower Act – "Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting" – was introduced in Congress in 2018. The overall aim of the legislation is to protect employees from workplace harassment and make it less dangerous for those affected to come forward. Provisions of the legislation include requiring confidential tip lines for anonymous reporting of workplace harassment, banning non-disparagement and non-disclosure agreements in settlements, requiring that public companies disclose settlements; and reforming tax law to eliminate penalties against survivors of harassment.

In the UK, a 2018 report from the Equality and Human Rights Commission, surveyed 1,000 individuals and employers about sexual harassment in the workplace. It asked employers to provide evidence about what safeguards they have in place to prevent sexual harassment, what steps they have taken to ensure that all employees are able to report instances of harassment and how they plan to prevent harassment in the future. The Commission used this data to issue guidelines to employers.

Initiatives like these have increased the pressure on employers to put in place comprehensive, written, anti-harassment policies. These should include clear guidelines for reporting, recording and investigating complaints internally and, where necessary, via third-parties.

Companies that fail to do this, risk, at worst, contravening the law of the jurisdiction they are operating in and, at best, some seriously bad PR.

Investigating complaints of sexual harassment is fraught with difficulty and requires an employer to uphold the rights of the accused, as well as the accuser. The potential damage such tensions can cause within a workplace, mean investigations should be prompt, quick and thorough, adhering tightly to the procedures laid down.

The requirement for clear process is also apparent in enforcement of a harassment claim, meaning that evidence gathered and arguments made must be comprehensive, in order to avoid a counterclaim for unfair dismissal by the affected employee.

The following feature assesses complaints procedures involving sexual harassment in the workplace, best practice investigatory techniques and available enforcement actions; all in the context of #MeToo. We speak to eight employment law experts from different jurisdictions around the world, recording their unique take on developments. Together they offer a comprehensive view on global sexual harassment procedure.

This information is designed to be of use to multinational corporations operating in numerous jurisdictions, or small companies interested in a better understanding of employment practices in their own country.

Happy reading.

The View from IR

Ross Nicholls

Business Development Director

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

SWITZERLAND

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Monika has been a partner with Dufour Advokateur (since 2005). She was previously head of section law of an International Chemicals Group and Legal Advisor to human resources and the pension fund of an International Pharmaceutical and Chemicals Group. She is also a member of the board of several SMEs and spent 14 years living abroad on three continents (USA, Europe and Japan).

Her practice covers employment law (corporate, international, expats), contract, trade and company law, negotiation (management and tactics), mergers & acquisitions (M & A) and dispute resolution (litigation and arbitration).

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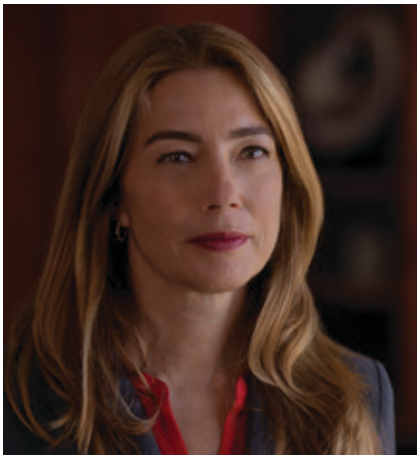
Sebastian's clients include companies as well as company bodies and executives. He represents his clients in court in all instances and out of court. His work focuses on the long term counselling of medium-sized companies and Start-Ups regarding labour law, the planning and execution of separation processes, the representation in arbitration proceedings and assisting in restructurings. Sebastian regularly publishes practical contributions in Social Media and HR magazines on current labour law topics.

He completed his first law state exam in 2008 at the University of Cologne. He then obtained his doctorate with Prof. Dr. hc. Ulrich Preis in labor law and passed his second state exam in Hamburg in 2013.

In 2018 Sebastian was selected for the list of Germany's Top 100 Out Executives 2018. He is also a member and regional coordinator of the Völklinger Kreis e.V.



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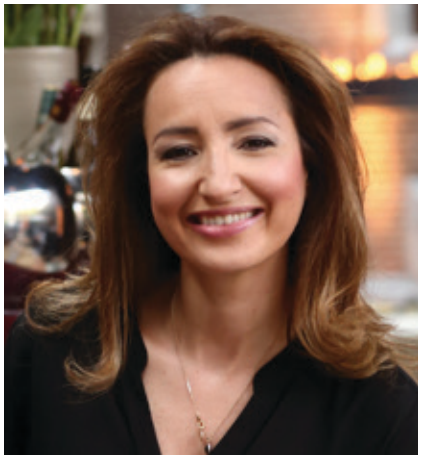
Rebecca Torrey is a partner at Elkins Kalt Weintraub Reuben Gartside LLP in Los Angeles and head of the firm's employment practice.

She is experienced in all aspects of employment law, with an emphasis on defending employers in 'bet the company' class action and multi-plaintiff state and federal court trials and arbitrations. Rebecca is committed to developing an employer's understanding of the law to reduce the sting of litigation.

Her clients include healthcare companies, professional services firms, entertainment, digital media and technology innovators, manufacturers and recyclers and tax-exempt organisations operating both internationally or domestically.

Rebecca is a frequent speaker and writer on key developments and cutting edge legal issues, including the current proliferation of employment regulation at state and local levels and the challenge to compliance and litigation risk.



NETHERLANDS

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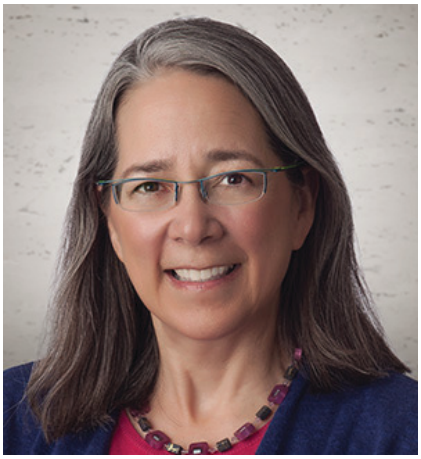
As co-founder of SAGIURE, Rachida began her career as a lawyer in 2002 with C'M'S', an alliance of major law firms founded by the UK firm Cameron McKenna and the German Firm Hasche Sigle. Together with Jos Pothof, head of the International Employment Group, Rachida focused on the firm's major international clients and cross border work. In 2008 Rachida continued her career and corporate employment focus with Bird & Bird LLP in The Hague, an international law firm with offices across Europe, China and the Middle East.

Rachida joined forces with former C'M'S' and Bird & Bird colleagues to establish SAGIURE® in January 2014. Her background in International Trade & Company law is a key element of her business-oriented approach. Her primary goal is to achieve solutions that promote and support the business endeavours of her clients. She acts as a trusted and valued strategic business partner for her clients' legal and executive teams



U.S - MINNESOTA

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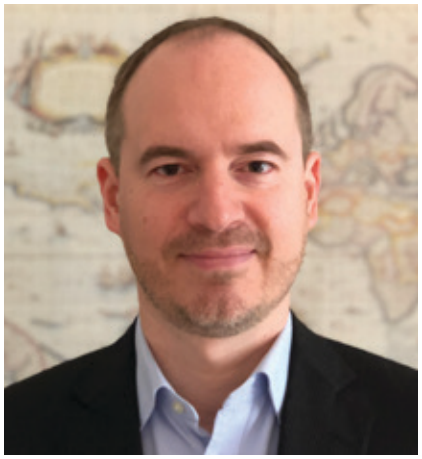
Anne advises and defends businesses, non-profit organisations, executives, officers and directors in all areas of employment and personnel practice on a national basis.

Her expertise includes hiring practices, reductions in force, downsizing, reorganisation, termination and compensation practices. It also includes affirmative action compliance, OFCCP, DOL and other federal and state agency audits, shareholder/employee issues and harassment, misconduct and other investigations.

Anne regularly practices before federal and state administrative agencies, including the Equal Employment Opportunity Commission and the U.S. Department of Labor, as well as related state and local agencies. She speaks frequently to professional and business groups on employment and international employment issues, and conducts training for businesses on employment law issues.



FRANCE

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Admitted to the Bar in 1997, Lionel Paraire founded Galion in 2008, a boutique law firm focused on labour and employment law.

Lionel has lectured at the University of Paris XII in Labour Law and European Labour Law. He is currently Senior lecturer at the University of Montpellier I (DJCE and Certificate of Special Studies in Labour Law), where he teaches employment litigation. He is a member of various national and international organisations including Avosial (Association of French Employment Lawyers Association), EELA (European Employment Lawyers Association) and IBA (International Bar Association). He is an active member of IR Global.

Lionel has developed an acknowledged expertise in the area of individual employment relations and (high risk) litigation and dispute resolution. He regularly assists companies with restructuring and the labour and employment law aspects of corporate transactions, extending his activity towards Alternative Dispute Resolution (ADR), notably as a mediator.

Lionel speaks French, English, Spanish and German.

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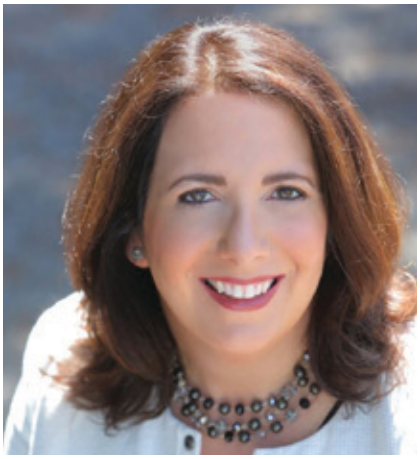
Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high-value commercial dispute resolution and contentious corporate matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes. Shilpen also advises and represents employers, employees and professional clients in all aspects of employment law. He has particular expertise in acting for senior executives, self-employed professionals and company directors in connection with their entire employment needs, including claims in the Employment Tribunal and the High Court.

Shilpen provides day-to-day employment law and practical troubleshooting advice to the senior management of high profile corporate clients, including the London arm of a leading multi-billion dollar US private equity house and one of the world's foremost and best recognised designer fashion brands.

Gunnercooke is a full service corporate and commercial law firm comprised solely of senior lawyers. There are 100 partners, operating nationally and internationally via offices in London and Manchester.



U.S - NEVADA

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Laura is in her 25th year of practicing management-side labor and employment law in Nevada. She is a founding member of Hartwell Thalacker, Ltd., a Las Vegas-based employment and commercial law boutique recognised as a top Las Vegas law firm by U.S. News and World Reports and Best Lawyers.

Laura focuses on representing employers in Nevada, throughout the U.S., and worldwide in employment law and litigation matters. She is also certified as a senior professional in human resources. Using her unique combination of practical human resources experience and in-depth legal knowledge, Laura takes a pro-active, preventative and strategic approach in helping her clients navigate complex employment law issues and avoid litigation where possible.

When litigation does occur, Laura represents employers in administrative proceedings and before Nevada state and federal courts. She has represented employers in a variety of cases including matters involving harassment and discrimination, wrongful termination, wage and hour class actions, whistleblowing, non-competes, and trade secrets.

Laura is a former Chair of the State Bar of Nevada's Labor and Employment Section. She is currently a member of IR Global's Labour and Employment Steering Committee.

SESSION ONE – COMPLAINTS PROCEDURE

What is the process for receiving sexual harassment complaints in your jurisdiction? Who is generally involved? Any examples?

Nevada – Laura Thalacker (LT) In the US, there are both federal and state law considerations - in my case for the state of Nevada. Generally, employers will maintain a written policy prohibiting harassment discrimination, and explaining what happens in the complaint process.

Employees sometimes follow the employer's complaint policy, but sometimes they don't. Generally, in the US, you must have what's called a "bypass procedure," in your harassment policy, where employees can choose who they're going to report to. For example, if it's their immediate supervisor who's harassing them, they will obviously not feel comfortable going to that supervisor. In such a case, they are allowed to go outside the chain of command and report to someone else within the company. I have clients who apply this rule in different ways.

Normally employees always have the right to go to the HR department, but my clients often go beyond this. I represent a lot of small and mid-size employers, and many will allow employees to go to an Executive Vice President, or even the President of the company, in order to show that these complaints are taken very seriously from the get-go. Complaints can be verbal or written.

If the complaint is verbal, we always recommend that it be reduced to writing, meaning that either the employee writes it out themselves, or that it is typewritten and signed by the employee. If the employee is not willing to write out the complaint, then the HR department should do that typically and then ask the employee to sign it. However, even if the employee refuses and the complaint is never reduced to writing or signed, an employer with knowledge of a problem would still have an obligation to investigate.

California - Rebecca Torrey (RT) The process is similar in California, however, like most issues regarding employment in California, there are additional legal requirements that heighten the importance of some of those practices.

Firstly, regulations that were implemented two years ago require employers of all sizes to have a written policy against harassment. The regulations itemise what needs to be in the written policy, for instance, it must include at least two people that an employee can complain to. One may be their supervisor, and there must be one additional management position to whom they can raise concerns.

The written policy also must spell out the internal complaint process in adequate detail to enable employees to understand what they can expect from the complaint investigation and what they feedback they will receive as to the outcome.

The written policy must also be acknowledged in writing by all employees. Best practices would include providing the policy against harassment as a standalone document distributed annually and acknowledged by all employees, in addition to including it in the employee handbook.

A year ago, the Department of Fair Employment and Housing, the California state agency charged with enforcement of harassment and discrimination laws, issued guidelines setting forth detailed instructions for employers about how to conduct a fair and thorough workplace investigation. As a result, employers are scrambling to establish an internal complaint process that meets the requirements of these guidelines and offers organizational protection in case of harassment complaints.

England - Shilpen Savani (SS) The complaints procedure hasn't changed at all in England following #MeToo.

The position is generally similar to the American position, in that the employer would receive the complaint from an employee, with the method for processing it normally found within the employer's staff handbook. That should contain an anti-harassment policy and guidance on how to deal with any complaint.

A complaint of harassment will normally be dealt with according to the employer's anti-harassment policy and this will be similar to dealing with an internal grievance. Criminal and unlawful conduct can also be dealt with through one form of whistleblowing report or another.

There should be an internal means for doing that via a nominated whistle-blowing officer, but quite often employers will also arrange for access to a counselling or advisory hotline that deals with matters of a criminal nature or a legal nature, and any reports of unlawful conduct.

There is, ultimately, the resort to regulatory authorities, but going to the police tends to be the last resort. The very first port of call should be the employer, where they should have proper procedures in place.

Germany - Dr. Sebastian Schröder (DSS) In German employment law, we deal with the topic of sexual harassment in a very restrained way, although, allegedly, one in every two employees has already experienced sexual harassment in the workplace according to a recent study.

We have a general act on equal treatment which partially deals with the whole topic, however, there's no statutory guideline or policy for employers on how to deal with such incidents.

There's hardly any employer who has a guideline or policy or works agreement with the Works Council explicitly detailing with the whole process when it comes to sexual harassment.

So it is basically very much up to the victim in each case and how he or she wants to deal with the topic, and who they want to talk to. This is usually HR, of course, but it may also be the supervisor or a co-worker. In Germany the Works Council does play a role in such incidents.

Switzerland - Monika Naef (MN) In Switzerland, we have a very similar system to Germany. There is a Gender Equality Act which has prior to the #MeToo movement already allowed victims to either make a complaint towards the employer, or to go directly to the state arbitration body, to stop the sexual harassment.

Such a demand will either be aimed at requiring the aggressor to cease and desist the sexual harassment or impose a declaratory judgment against the employer for allowing such behaviour and a damage claim. Protection is also granted by other bodies of law which all pertain to the employer's duty of care for the well-being of the employee and protect employees from any harassing behaviour.

As a minimum standard, an employer should conduct staff education and clearly state that sexual harassment will not be tolerated and will draw consequences. Some larger companies have extensive internal regulations. In addition, criminal proceedings can be instigated, however, that is much more burdensome on the victim than going through the state complaints procedure outlined previously.

As a rule, the employee would make a complaint to their supervisor, or to the human resources department or to another management level complaints officer. Both the criminal proceedings and the complaints proceedings can be done in parallel, but it might be a little bit burdensome on the victim to have to go to through two different investigations.

Netherlands - Rachida el Johari (RJ) In The Netherlands, we have this general notion that an employer must take care of or ensure a safe environment for his employees. We have different laws to safeguard that obligation.

The first contact for an employee who experiences harassment is generally a person of trust within the company. That could be a company-appointed person with whom employees can direct any complaints that they do not wish to share with their managers or HR. It could also be an external party, such as the company doctor, whose services are retained by the company.

A third way is through a policy directing employees to raise any concerns they have to their line manager, their HR business partner or any third party that is mentioned within that policy. Anonymous hotlines are sometimes used, but not encouraged, in The Netherlands.

In summary, it is important to have a proper policy in place. Employers who want to be compliant or take this topic very seriously will generally have proper policies in place that are made known to the entire staff. They will also organise occasional all staff meetings in which the information is shared, or the awareness is created to help employees and encourage employees to speak up in the event of any unwanted situation.

France - Lionel Paraire (LP) As in the Netherlands, there is a general obligation on employers in France, to ensure the safety and security of employees.

I recommend to clients that an investigation (neutral and discreet) is launched as quickly as possible when an employee reports sexual harassment. This is firstly to protect the victim, but also because any disciplinary measures against the aggressor will be time barred if it has not been launched within two months of being brought to the attention of the employer. An immediate reaction is then required from the employer.

Investigations will be carried out by the general management, but, in most cases, the HR management is involved. There is no statutory procedure here, nor formalism, except if provided by a policy or, more often, by the internal regulations ("règlement intérieur") that are mandatory for companies with more than 20 employees.

And of course if there is a formalism provided by regulations, the HR manager and the investigator will have to follow this in order for the procedure to be binding against the aggressor.

Criminal investigations could be held in parallel, but, of course, this would be done

by the police. Here, we are only speaking about the internal approach led by the company and, most often, by the HR team.

Switzerland - (MN) In terms of procedure, there's also one further procedure that the victims could address in Switzerland. This is based on the act on assistance of victims in criminal cases, which allows victims to obtain help and assistance both in psychologically, but also in financially for their case without even having to file a criminal charge.

Minnesota - Anne Radolinski (AR) For context to the discussion, federal and state statutes in the United States, and, depending on the jurisdiction, local city ordinances, prohibit discrimination and harassment, including sexual harassment. There are jurisdictions, such as California, where a written harassment policy and training with respect to harassment in the workplace is required.

Even where not required under applicable state or local law, a well-written harassment policy (which the company can demonstrate was followed) is critical to the defence of a legal claim in this arena. Most employers, particularly in the current post-#MeToo environment, have written policies in place prohibiting harassment and protecting individuals against retaliation for reporting concerns, participating in an investigation under the policy, and otherwise exercising their rights under federal, state, and, where applicable, local law. Importantly, the policies will inform the workforce as to who to contact in the event the individual has witnessed, been informed of, or has experienced harassment or inappropriate behaviour.

The wording of the policies varies widely. Generally speaking, the individuals are directed to reach out to individuals in

leadership: supervisors, other members of management, the human resources professionals at the company, and the board of directors if the concern relates to Chief Executive Officers of the company. A well-written and conceived harassment policy is a necessary component of a risk management strategy; however, in the current environment, written policies should be viewed as only one component of an overall risk management strategy with regard to harassment in the workplace. Policies alone have done little to prevent harassment in the workplace and to protect employers from costly sexual and other harassment claims.

Employees also have the right to file a claim directly with the federal Equal Employment Opportunity Commission, which is the federal agency charged with enforcing a number of the major federal human rights laws or a state or local human rights agency, depending on local law. The federal law - Title VII - prohibits harassment in employment based on sex, and a number of other protected class statuses, and applies to employers who have 15 or more employees. In some states, including Minnesota, the individuals may either move directly to the filing of a lawsuit, or may file a claim with the state or local human rights agency. State and local statutes often apply to employers with less than 15 employees. As an example, the Minnesota Human Rights Act covers all employers regardless of size.

SESSION TWO - INVESTIGATIONS

What are the best practices you would recommend in order to conduct a successful investigation? What are the common problems clients might encounter, in your experience, when attempting to interview an accused employee?

France – LP The investigation must be led under very strong confidentiality because at the beginning nobody knows if the facts are true or not.

So it must be impartial, confidential and very carefully led, because the procedure must be followed, if there is a procedure, and if there is no procedure provided by any policy or internal regulations, it must be shown in case of litigation that every trustee under immediate investigation was led impartially and that everyone has been heard.

So the process is to gather evidence about the suspect, interviewing the victim and the whistle blower, then the alleged aggressor, hearing every person who could lead to the truth, including witnesses. The most important will be to get enough precise facts and evidence before interviewing the alleged aggressor.

It is not mandatory to hear every single employee, but just every witness or any person that could quickly help to find the truth. There is no obligation to lead the investigation with the assistance of staff representatives, but, as they are entitled to be alerted, they could take part in the investigation.

Since the first of January of this year, every single company employing more than 250 employees has to designate a point of contact who should be alerted in case of sexual harassment or sexual aggression. This person may carry out prevention measures, orient victims to the right persons or conduct the investigation further to a complaint.

Nevada - LT An absolute key requirement is that any investigation occurs promptly. This is not something that you can sit back and wait on. As soon as a complaint comes in, you need to get started right away. That's a legal obligation.

One of the critical decisions that has to be made early on is whether the investigation will be handled by somebody on the inside or somebody on the outside of a company. There are benefits to both approaches and sometimes it's driven by the capacity within the organisation, and who an employer has available to do this type of investigation.

I would say it needs to be somebody who's experienced and who can keep an open mind and maintain fairness during the process. If you don't have anybody within your organisation who has conducted this type of investigation, they should not handle it, since botched investigations can create serious liability for employers.

Generally, you bring in the complaining employee first and ask; who, what, where, when, why, etc., and any follow-up question, and gather any documents, recordings, photos, text messages or other evidence. This allows you to gather as much detail as possible from the complainant before interviewing other witnesses.

Getting background on the interactions with the accused prior to the complaint is also valuable. Detailed notes of all interviews are essential. Usually I tell my clients that there should be two people in the room, one person who's a note taker and then the investigator who's actually asking the questions. Usually I tell my clients that there should be two people in the room,

one person who's a note taker and then the investigator who's actually asking the questions.

I usually recommend that the investigator prepare the written notes before the witness, the complaining party or the accused leaves the interview. It is best to have the person being interviewed, look at the notes that were generated from their interview, have them read them and then sign them at the bottom and say that they agree with the contents. Those notes are likely to be discoverable and could be used in any subsequent litigation. I don't typically like my clients to record the interview sessions, and usually prefer the written notes signed by the employee instead.

From there you follow the trail with other witnesses and listen closely to the issues raised. Don't prejudge if you need to take an interim step to keep the accuser and the accused apart during this process, you should process. You should also assure everyone of confidentiality and no retaliation.

It's also a good idea to request that the employees who are being interviewed not discuss the investigation or underlying facts with others in the workplace to avoid having such conversations affect other witnesses' memories and perceptions of events. It's generally best for the integrity of the investigation that the investigator talks with witnesses before they've heard about the issues and allegations from somebody else.

California - RT I don't think there are many differences in California with a few exceptions.

There is a Penal Code section that does not permit recordings without an individual's consent, so I don't recommend recording interviews of California employees. It is possible with express consent, but I agree with Laura that written notes are more than adequate.

Prior to #MeToo , an employer's decision to use either an internal investigator or an outside investigator was based primarily on the severity of the allegations and speculation as to whether there might be a lawsuit, with outside investigators used primarily when the employer or counsel considered a lawsuit likely. Employers currently use outside investigators more often, for the very reason that Laura pointed out, that it's necessary for the person doing the investigation to have experience conducting investigations, and perhaps a greater fear of impending lawsuits among employers. Most managers and many internal human resources personnel lack experience in conducting effective workplace investigations. In California, employers relying on outside investigators must either use legal counsel or a licensed investigator.

One of the questions that often comes up is the issue of confidentiality. People sometimes make a complaint to a manager and say they want to keep the issue confidential.

The compelling obligation on employers to investigate limits the ability of an employer to keep a complaint confidential. It would be practically impossible to investigate if management kept complaints completely confidential.

So, the preferred response if an employee comes forward with a complaint of harassment, is for the manager or the HR professional to tell the employees that they can keep the complaint confidential on a need-to-know basis. This, of course, means they couldn't keep it fully confidential, because the organisation has an obligation to investigate and take effective remedial action that will stop it from ever occurring again.

There also is authority that determines whether employees can be told not to communicate about their meeting with the investigator as they go through the investigation process. The two-pronged guidance on this particular issue is that managers may be told to keep an investigation confidential on a need-to-know basis.

In contrast, non-management employees should not be instructed to keep the fact of the interviews or their content confidential. This would impact the overall awareness in an organisation about the investigation process, as a result.

Nevada - LT Under Nevada law, we don't have quite the same confidentiality issues as in California but, under US federal law, overly broad statements/restrictions on the issue of confidentiality are problematic.

The employer, under the National Labor Relations Act, would have to state a legitimate reason for asking for confidentiality. When I talk to my clients about this, I basically recommend that they frame it as a request to the employee that they keep the matter confidential, as opposed to a mandate prohibiting them from discussing it. The investigator can say something like, "we would prefer that this be kept confidential so we can have the opportunity to thoroughly investigate," but without actually mandating it.

If a non-management employee were to disregard this request and share information about the investigation or underlying facts with others, it could be protected conduct under the National Labor Relations Act. Because of this, I would generally tell my clients, absent some egregious circumstance, not to discipline the employee for the alleged breach of confidentiality, even though it's not ideal in terms of the investigator actually getting to the truth of what happened.

Minnesota - AR Many employers in the US are moving well beyond a focus on harassment specifically and engaging in concerted discussions to evaluate and define for their particular businesses the overall corporate culture and corporate code of conduct that they wish to establish and promote.

Companies can actually promote the desired message regarding corporate culture in the manner in which they receive complaints of harassment, conduct the investigations, and the manner in which they communicate with the concerned parties throughout the process.

Most would agree that, in the #MeToo environment, companies serious about risk management and prevention will seek to promote an environment where employees are encouraged to speak up and bring concerns to the attention of appropriate persons within the organisation without fear of retaliation, so that the company may investigate and respond.

Thus, executives, managers and other leaders within the organisation should be prepared to stop whatever they are doing and take the time to listen, should concerns regarding potential harassment be brought directly or indirectly to their attention. They should also communicate to the individual that the organisa-

tion takes these concerns seriously and that the concern will be brought to the attention of the human resources professionals, or others within the organisation charged with responding to the concerns.

In terms of the investigation itself, there are numerous considerations. Companies should respond promptly and act promptly, but not without carefully considering the best possible approach given the particular complaint, context, and those involved and who is being accursed. Some of the many considerations for an effective and successful investigation include:

- Determining who should investigate. Should the investigator be an internal, trained human resources professional, or an outside investigator? Should the organisation involve its internal or external legal counsel and at what point in the process? What is the strategy/communication plan in the event of potential media attention?
- Determining before the first interview (and then periodically during the process, depending on the information obtained) who should be interviewed, where should the interviews be conducted and in what order.
- Ensuring that the investigator is a trained, experienced individual and that he/she conducts the interviews and the investigation in a respectful, fair and impartial manner.
- Ensuring that there are accurate and legible notes/written records of the interviews, and that all documents, communications and recordings, where applicable, are collected, preserved and reviewed.
- Determining whether a formal written report of the investigation and/or its conclusions should be prepared.
- Determining who should make the decision regarding any action taken as a result of the investigation and who should effect/communicate the action.

England - SS There are a lot of similarities in terms of what we have to be concerned with in England.

I think there's an inherent tension between the desire for confidentiality and discretion and the imperative to take action. That is true whether the request for discretion is coming from the complainant, or from the employer who wants to keep it under wraps.

In terms of best practices, there's five points that I would briefly touch on which probably apply to most jurisdictions.

The first thing, as we've already heard, is confidentiality. Proceeding with discretion is paramount here, but at the same time, you do need enough information to be able to investigate. This is the case whether the complaint is anonymous, or where the complainant is known. You do need to know who it is that is supposed to have committed the alleged harassment. So although discretion is important a degree of visibility is also necessary.

The second thing is a major question as to how the investigation should be undertaken and by whom, depending on the seriousness. In the English jurisdiction, an employer will ordinarily investigate the complaint or grievance themselves. But for a more serious complaint, my recommendation is almost always to go for a suitably qualified external advisor. This is someone who can investigate and report with objectivity.

The third point I would make, is that it's very important to ensure that the complainant is safeguarded and there are no repercussions whatsoever against the persons who have come forward. This feeds into the fourth point, which is the importance of recognising the rights of the accused employee. Even if the accused individual is suspended temporarily pending the outcome of the investigation, there must be no conclusions drawn prematurely.

The last point is also vitally important, which is that the investigator should be aware that they are generating evidence. Certainly in the English jurisdiction, this evidence could be used for the purposes of litigation or in an employment tribunal. This is often one more reason to outsource the investigation, because the witness statements that are generated may show up in disclosure or further witness evidence down the line if the matter isn't resolved, or if it triggers claims of unfair dismissal, sexual harassment or discrimination.

Germany - DSS When a German employer faces a complaint, they have to start the investigations as quickly as possible and determine the facts. When it comes to those investigative measures, the employer should find answers to three questions.

Did the sexual harassment occur? Under what circumstances did the sexual harassment occur? How serious was the incident?

Depending on the answers to these questions, the employer will have to decide how to deal with the incident, because it goes without saying that criminal conduct requires different action than something more minor.

In Germany, there are no professional investigators other than the police or the state prosecutor, so most employers deal with those complaints themselves. Investigations usually start with a detailed interview of the affected person, which has to be very confidential and should always be undertaken by two persons - one investigating and the other one taking detailed notes.

After that, the employer should present the accused person with the accusations and give them an opportunity to comment on these. Usually the accused person will consult a lawyer, which will also involve further time. The employer will always have to safeguard the personal rights, both of the accused person and of the person affected, but, once the interviews have been done, the employer must decide whether to check emails or even phone data.

Sometimes those investigations will occur together with a Works Council, and we recommend our clients follow five golden rules when it comes to these investigations.

Firstly, always interview the person affected and the person accused with two people, one investigating and the other one taking detailed notes. Secondly, document all investigation steps and preliminary results, which can be very useful for a court procedure. Thirdly, always keep the number of people involved very small, because the whole topic should be very confidential and the public shouldn't be involved.

Fourthly, we suggest clients carry out investigations as quickly as possible, because otherwise the employer faces the risk of losing the right to terminate without notice. There's a two-week notice period when it comes to a termination without notice, which is very crucial in Germany.

Last, but not least, we suggest a lawyer is consulted to run through the different measures available once the investigation has been completed.

Switzerland - MN I would like to add one element of consideration that we haven't spoken about yet, which is the size of the company. Depending on whether or not you dealing with a large corporation or a small corporation, there may or may not be the specialists in-house to be able to conduct a formal internal investigation.

It is also quite important to ensure that the person who is conducting the internal investigation is actually qualified or has the training to do this kind of investigation, obviously, because they are extremely delicate. Not only is this the case for the victim who is exposed, but also for the potential wrongdoer who may or may not be accused unjustly. In addition, Switzerland does not recognise legal privilege for in-house counsel. Anything that is disclosed in an internal investigation, as Shilpen already mentioned, would be generating evidence and would need to be handed over to the authorities.

In terms of the internal investigation itself, it is very important to explicitly state that it is a formal investigation and put a protocol in place for the meetings both with the victim and the potential wrongdoer.

The accused wrongdoer must be confronted with the accusations made by the victim and given an opportunity to also present exonerating evidence, because there are usually two sides to the story. Employees do have to cooperate with these procedures, and are obliged to put up with internal investigations and legal questioning.

Switzerland still has a very high tolerance level when it comes to sexual harassment, meaning these investigations are not frequent. What often happens, is that, as soon as there is a claim from a victim, there is retaliation from the accused wrongdoer, via a libel or defamation claim. Usually, if this happens, the libel or defamation proceeding is generally stayed until the formal investigation has been completed.

Keeping the number of people involved to a minimum, is seen as good practice. It is very important to train and educate employees to make sure that they understand the process and what rights they have during an investigation, but also what the consequences will be.

The employer must act very quickly if there is an immediate dismissal of the wrongdoer. Employers only have two to three days after having become aware of all the information and facts, to dismiss a wrongdoer.

Netherlands - RJ In The Netherlands, there is no legal obligation prescribed by mandatory laws for employers to have a complaint policy, or even to have appointed a trusted person within the company.

What is relevant is that complaints are dealt with adequately and, most importantly, that both parties get a chance to be heard. Proper measures should be taken to ensure this.

Even if the law does not oblige companies to have a policy in place, it is highly recommended, and we advise our clients to have such a policy in place and to ensure that it is followed meticulously.

The downside is that if you have a policy and you don't follow it, it is an indicator that the employer has not fulfilled its duty of care to create a safe environment for their employees.

Having a complaints procedure in place, does create evidence of fulfilling such obligations, and it can offer the involved individuals, like HR or the line managers, a road map as to how to deal with complaints in a consistent manner.

Consistency is something that is very important, especially if you are a bigger organisation where there are different individuals who are responsible for dealing with any upcoming complaints. The more you are able to create a consistent response to such situations, the stronger the process is.

The imperative to act quickly the moment that a complaint is raised has already been mentioned. I agree with that approach, however in The Netherlands we have also seen cases where employers were too quick in taking action after having received the complaint and did not follow their own policy properly.

Because of this, they were considered not to have fulfilled their obligation of care towards the person that had been accused, because there were not sufficient grounds to assume that inappropriate behaviour had occurred.

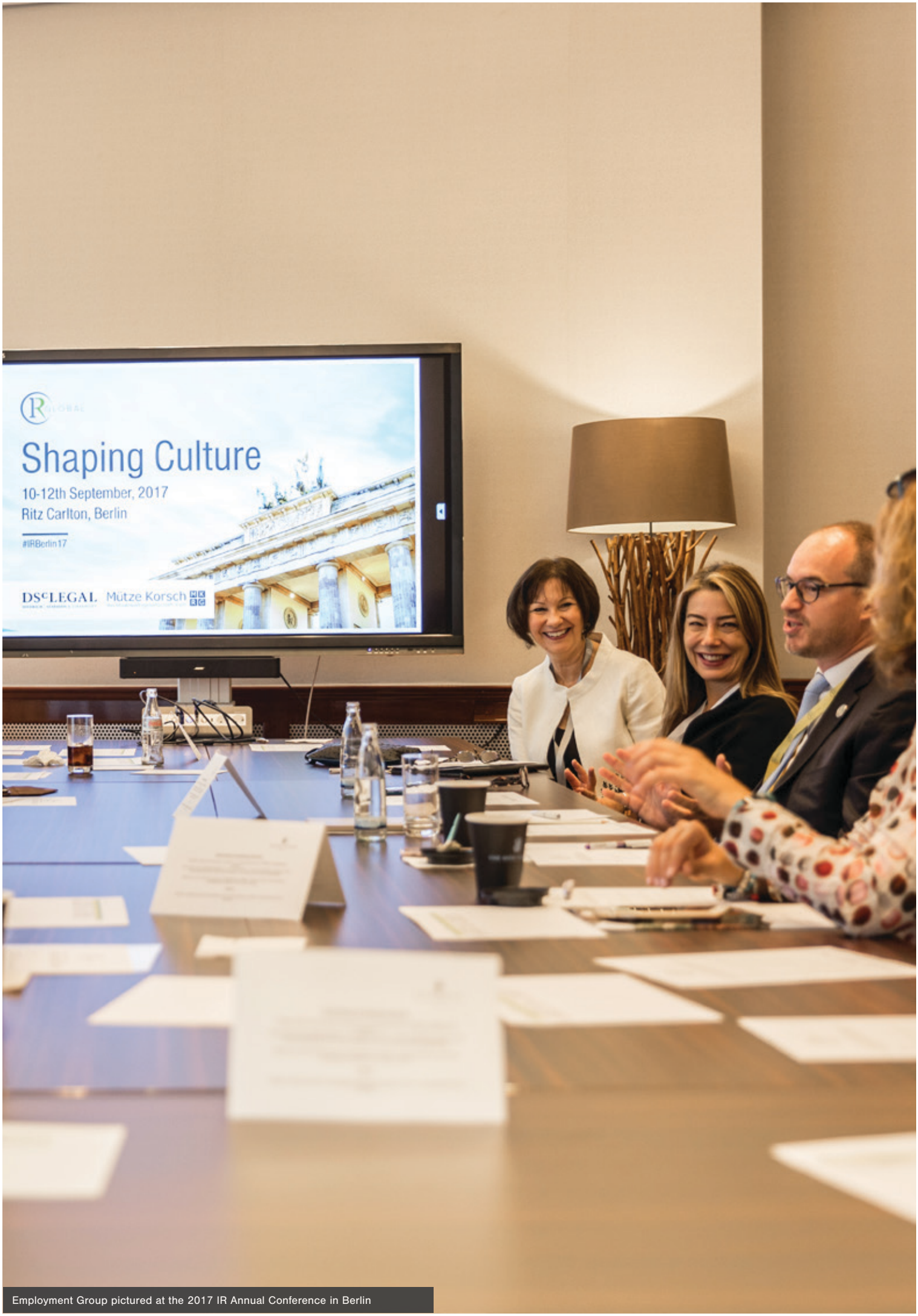
As mentioned, from a statutory law perspective, we do not have any guidelines, except for open norms as to how to deal with complaints.

The rulings given by The Netherlands Institute for Human Rights are helpful though. They deal with complaints from individuals, unequal treatment and sexual harassment, and are considered part of the unequal treatment legislation in the Netherlands.

They provide a few points to consider when conducting an adequate and diligent investigation procedure, including the fundamental principle of hearing both parties. They also recommend that both parties must be heard separately and not in the same meeting. Investigations must be objective. There is no obligation to hire an external party or agency to conduct the investigation but it is important that the investigators are independent and competent.

We do have privately run investigation companies, however, when they prepare a report they generally provide such under the condition that it is not made public and is not used in any court proceedings. This is less effective, because, as an employer, you do want to use the outcome of the investigation to take the appropriate measures, which may include dismissal.

Should the investigation have not been dealt with adequately, it could be a reason for both parties to claim damages from the employer. Raising a complaint can create huge reputational damage, not only for the involved individuals, but also for the company itself. In that regard, it is deemed important that the interviews with the involved individuals are put in writing.



Employment Group pictured at the 2017 IR Annual Conference in Berlin

SESSION THREE - ENFORCEMENT

What actions are available to clients once an investigation is concluded in your jurisdiction?

France – LP If the facts are evident, then the victim must get protection from the employer, in particular against retaliation. If the facts are not evident, they must receive a letter of explanation about the outcome of the investigation, but the employer will have to avoid any climate of suspicion by accompanying the continuation of the work relationship

With regard to the accused person, the employer has to carry out disciplinary procedures and sanctions. Under French law, sexual harassment automatically leads to a charge of gross misconduct, based on case law.

But getting back to the general obligation on employers to ensure the employees safety and security, the employer has to prevent any sexual harassment.

There are three types of prevention:

- Primary prevention involves training employees, staff representatives and managers, putting in place policies and procedures and promoting sexual equality.
- Secondary prevention involves organising investigation and protection measures when a case is revealed to the management.
- Tertiary prevention means the provision of care to the victim of sexual harassment, helping the victim to get back to their job position. Both psychological care and professional care are important.

England - SS The first consideration revolves around the findings of the investigation. Assuming a positive finding against the alleged harasser, I think the very first thing must always be for an employer to consider the welfare of the complainant and ensure that the complainant is not victimised as a consequence of raising a concern.

The practical question then arises, as to what action is appropriate against the person who has been found to have harassed the complainant. In the employment context, in England, this usually leads to disciplinary action, which can have a range of outcomes including gross misconduct leading to a summary dismissal of the employee concerned.

If the matter is serious enough, there is always the option of reporting the matter to the police. This is normally something that's best left to the complainant to do, if that's what they want to do. There is also the possibility of pursuing private action against the individual, but, again, that's something for the victim to decide.

In short, the employer's imperative is to make sure that correct disciplinary action is taken in the event of a positive finding.

Nevada - LT In the US, the general standard is that if harassment is determined to have occurred, the employer has to take prompt action that's reasonably calculated to prevent the harassment from occurring in the future. That standard is not just as to the particular employees involved. It's supposed to be action that should prevent it from happening against other employees in the future as well. Of course, the employer response often depends on the severity of the incident. In addition to taking disciplinary action, the employer might take other steps such as providing additional workplace training on harassment reporting and prevention.

In circumstances where the employer determines that no harassment or discrimination has occurred and in situations where the employer determines that something has happened, the employer always need to talk with the employees involved, specifically the complainant and the accused. The employer should tell them about the results about the results of the investigation and whether you have confirmed or not confirmed harassment. That's really important.

The other thing that comes up, is that sometimes the person who is the complainant will try to dictate the employer's response (for example, demanding that the alleged harasser be fired, demoted, or transferred). The employer is obligated to listen to the employees and take their input on that, but it's ultimately the employer's reasonable determination to decide what action to take against a person found to have committed harassment. Case law says the employees don't get to decide for the employer how they respond. But that also, of course, can create situations where the complaining party accuses the employer of not responding adequately, which may lead to a lawsuit.

I would also say it is okay for employers to make credibility determinations. Obviously these are 'he said she said' situations sometimes, but if an investigator has a reasonable basis for determining credibility then they should do it.

Sometimes employees will try to get access to written findings from an investigation through the Nevada statute on access to personnel records – Nev. Rev. Stat. 613.075.

There is, however, an exception in that statute that says that employers are not required to disclose records from a confidential investigation. Even if an employee says they want to see the report or witness statements, employers are not required under Nevada law to provide those. We counsel employers to keep the investigation documentation in a separate confidential file outside of the personnel files. That's permitted under Nevada law.

California - RT I agree with Laura's recommendations. It is important to note that there might be a range of outcomes, depending on the severity of the conduct, assuming there is a conclusive finding following investigation of a complaint against an employee.

In some cases, individual counselling, coaching or anger management are offered to the person who engaged in inappropriate conduct. Such a finding doesn't necessarily result in dismissal, depending on the severity of the behaviour.

Dismissals are more common now than they were several years ago. Employers more readily disassociate the company from inappropriate conduct of employees to avoid the disapproval and adverse publicity

Rachida el Johari pictured at the 2019 IR 'Dealmakers' Conference in Rome

of any workplace culture condoning or supporting harassment. It is becoming more common for employers to announce that an executive or official has been let go following an investigation, a result that rarely occurred before #MeToo.

Fines or criminal prosecution are rare in California, except in cases involving celebrities. Often those cases involve a business relationship such as a film director or producer and not an employment relationship.

In some cases, there could be an inconclusive result from an investigation if impossible to determine, based on the evidence, whether inappropriate conduct actually occurred. In those cases, the employer may counsel the employees involved about the policy against harassment and remind the individual accused of harassment not to engage in retaliation. Best practices would involve monitoring the interaction of those employees more closely going forward to ensure there was no retaliation or future incidents.

California recently adopted a law requiring universal harassment training of all employees, applicable to employers with five or more employees. The state legislature's belief is that broader training will help prevent harassment and encourage internal and agency complaints. Employers who fail to train their employees regarding the prohibition against harassment, the complaint process and the need for remedial action are likely to suffer more costly liability from harassment lawsuits.

Germany - DSS Once the investigation establishes a sexual harassment incident has taken place, the employer must take all appropriate measures to eliminate any repeated sexual harassment. That means, in the words of the law, taking any suitable, necessary and appropriate measures to put a stop to harassment. In practice, this may include a written warning, or the moving of the accused employee to another team or another business. In the last resort, it would involve dismissing the employee in question, either without notice or with given notice.

Apart from that, there's no fine for the accused employee other than in a criminal procedure. With regard to any liability of the employer, they must smartly decide on how to deal with the accused employee, because if there is a second incident between the affected employees, the employer can be held liable.

Switzerland - MN It would depend very much on the outcome of the investigation and how severe the sexual harassment was.

If it is not a very severe case of sexual harassment, there would be dialogue between the supervisor and the accused person about the possible consequences followed by a reprimand. The victim might be referred to an employee representative or external counselling, if support is needed.

In a similar fashion to Germany, the actions that the employer can take against the harassing employee in more severe cases, include a reprimand, a formal warning, relocation, ordinary termination or even immediate dismissal. Whatever action the

employer does take needs to be proportionate and adequate considering the severity of the harassment.

In addition, the employer must also prove that they have taken appropriate actions to prevent sexual harassment from happening again. This will include the education of the other employees, with a clear message that sexual harassment will not be tolerated, and what the consequences are.

It does not mean that in the case at hand the involved persons need to be named. The victim and the wrongdoer also have the right to be protected. In a criminal prosecution, the result could be a fine.

Netherlands - RJ It is quite similar in The Netherlands. Once it has been established that there was inappropriate behaviour or sexual harassment, any measure that is imposed must be adequate and proportional.

In The Netherlands the employer must make the assessment, leveraging the interests of the victim and the company on the one hand and the interests of the accused person on the other.

This is important, because courts often take into consideration other circumstances that are not directly related to the harassment case, such as an accused employee's very long history with the company, or their performance record. We hear a lot of voices in literature, especially in the Netherlands, that encourage courts to not take those circumstances into consideration when dealing with court cases relating to sexual harassment.

The law does not state what appropriate or adequate disciplinary measures are, but we have seen that the government sees potential measures like informal warnings or formal warnings or suspension as necessary. The imposition of a fine would require an agreement in the contract to that effect. In such an instance, an employee would agree to pay a certain penalty in case of breach of certain clauses in their contract.

Instant dismissal is the most severe legal option provided by Dutch law to terminate an employment contract.

In The Netherlands, we have something that is known as the closed dismissal system, where the law allows for a certain limited number of ways to legally terminate an employment contract. We do not know the concept of at-will employment, so, in practice, this means that you cannot fire an employee against their will, unless there are extreme circumstances that create a situation that the employer cannot continue the employment relationship and the employer has an urgent reason to instantly terminate the employment contract.

Once that decision has been made, it is assessed heavily by courts, and commonly ruled as invalid. This creates a huge problem, because the employee is then generally entitled to return to work.

The decision that is made by the employer in the end is extremely important, because it also creates a precedent for future cases. Precedent is something that is taken into consideration by the courts or the employer's disciplinary process in any future cases.

Minnesota - AR In the United States, under the various federal, state, and local human rights law, employers generally speaking are obligated to take timely and appropriate action based on the outcome of the investigation of the sexual or other harassment complaint or concerns. The nature of the recommended action taken can vary widely and depends upon a number of factors including the severity of the behaviour found to have occurred, the position of the individual who has engaged in the behaviour, the particulars of the work environment, and other factors. As an example, outcomes for less egregious behaviour might include, written disciplinary action, and one-on-one coaching regarding workplace behaviour and/or participation in a formal workplace harassment and related training session(s).

More egregious behaviour may result in written disciplinary action to include a demotion, removal of supervisory authority, or other significant work consequences and required ongoing one-on-one coaching and monitoring; or of course immediate termination of employment. Many employers, as part of their overall risk management strategy, will use the results of each investigation as an opportunity to evaluate the overall harassment prevention strategies and determine, for instance, if additional employee discussion forums on the topics are advisable, further training overall is needed of management and staff on the topics, or if leadership or other organisational changes might be needed or advisable in one or more areas of the company.

Even where the investigation was inconclusive, or the conclusion is that no policy violation occurred, the investigation can be used as an opportunity to remind individuals of their obligations under the company code of conduct and policies, and to encourage individuals to come forward if there are future concerns or questions. In addition, regardless of the outcome of the investigation, companies should carefully plan the content of the communication with the interested parties, including the individual(s) who complained and those who participated in the investigation. Again, the manner in which investigations are conducted and the communications related to the investigations are valuable tools in promoting desired corporate culture and preventing future harassment and inappropriate behaviour.

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