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Sexual Misconduct: Spotting Harassers Before They Come in the Door

Kelsey Froehlich



When companies commit to new hires, they are exposing themselves to differing degrees of risk, and one of the major risks is hiring a candidate with a history of sexual misconduct. A culture of vigilance against harassment must be nurtured at every level of a company and at every phase of an employee's engagement with the company - especially for executives who will be in a position of authority in the organization.

Potentially problematic employees, even if ultimately cleared of wrongdoing, must be identified up front, during pre-hire vetting. This type of investigation benefits from a due-diligence professional who will conduct much more than a routine tick-the-box background check.

Where Do Routine Background Checks Fall Short?

A typical pre-employment background check is restricted to an examination of public information. Background-checking firms are unlikely to find conduct by the candidate, whether in private life or in the workplace, that has been hushed up by both the candidate and the employer, or has not yet percolated to social media attention or legal action.

Example

A media company hired a senior executive from another media organization, which did not disclose that it had fired him after a detailed sexual-harassment complaint was filed against him. The hiring company had picked up rumors about the firing, but did not inquire much further. There is no database of people accused of harassment, no comprehensive list of bad actors: it takes careful research across dozens of sources, perhaps in multiple countries and languages given the increasingly global talent pool.

In our experience, veteran executives who have sexually harassed subordinates in past positions often try to scrub any evidence of bad behavior. Inappropriate

actions in the past-sometimes widely rumored-can result in lawsuits or social media posts many years later, with the elevation of the perpetrator's profile through promotion and in the context of the #MeToo movement.

What Should a Robust Background Check Include?

Deep social media checks on the person and his or her prior companies. Research into relevant regulatory and legal actions that involve the executive's prior employers (even if they do not name him or her personally).

Reputational interviews with former colleagues not included in the list of references the executive provided. To uncover past sexual misconduct, it is crucial to examine a patchwork of sources: court records, U.S. Equal Employment Opportunity Commission (EEOC) claims, news reports, social media. We might find that the candidate has been a named party in a lawsuit or arbitration dealing with sexual harassment, or has been the subject of a civil restraining order along those lines. Because claims in the workplace might not name the individual accused of the wrongdoing, it is important to search for actions taken against the candidate's employers-by the EEOC or a state equivalent, for example. A news report that the executive candidate suddenly and inexplicably left a company always merits closer review.

A comprehensive social media search will reveal what the candidate has posted over the years. Has the candidate "liked" an offensive or explicit Tweet or referred to a specific gender in a dismissive or pejorative way? Beyond the candidate's own posts, there is a world of blogs and forums that may reveal questionable behavior. Mentions can range from accounts of a specific incident to the perception that the executive candidate created a general "frat-house" atmosphere within their department. Anonymous posts on job-review sites like Indeed.com or Glassdoor.com are equally revealing, although they do require verification.

Grassroots watchdog groups have emerged online, comprised of people from a certain industry or even a specific company who are dedicated to exposing

executives whom they consider to be bad actors.

Social media has become a regular tactic for outing sexual harassers, often after an appointment has been announced.

A word of caution

Background checking that relies solely on artificial intelligence offers low-cost solutions that can help identify potential issues that merit further investigation. AI-powered tools can also make serious mistakes, as these lawsuits suggest, by-for example- matching people to the records of others who have the same or similar names. It is important to use a firm that employs both cutting-edge technology and human expertise.

The Importance of Interviewing

Past misconduct often comes to light only through interviews with the candidate's past colleagues, subordinates and others. Consider this scenario: an administrative assistant filed a lawsuit alleging her employer had created a hostile work environment for women. The plaintiff named the company as the sole defendant, but in the complaint described offensive behavior by two unidentified male supervisors.

The candidate in question might have been one of these supervisors, but it is impossible to know from public information alone. Interviews are often the only way to find out.

Mintz Group was hired to conduct a routine pre-hire background check on a prominent executive being considered for a C-level position at a U.S. publicly traded company. We found no red flags in the executive's past from a comprehensive review of the public record and open-source material. One month after he was hired, however, a social media account with thousands of followers crowd-sourced a list of top executives who were notorious sexual harassers in that industry, with this executive among the top ten. Several women at his new company followed the account and approached the company's legal department.

We were hired again by the general counsel to conduct

a two-phase investigation to:

1. Quietly dig deeper into the executive's background, this time without the Fair Credit Reporting Act and other research restrictions that apply to pre-hire background checks, as this was an internal investigation.

Again, no red flags were found.

2. Identify female colleagues who previously worked with the executive at past companies. Once we identified several women, we began making calls. Most had nice things to say about the executive. One woman said she heard of an HR investigation involving him, but couldn't recall any further details. A second woman, after speaking with us initially, decided to call us back with details of the HR investigation and of the executive's inappropriate behavior with at least one female colleague. When the general counsel confronted the executive, he admitted to the previously undisclosed investigation at his prior employer.

Finally, be aware that some U.S. states prohibit background-checking firms from reporting certain kinds of adverse information to prospective employers.

For example, California law bars investigators from reporting most adverse information naming a candidate that predates the report by more than seven years, whether found in a lawsuit, a news article or elsewhere. The California law recently prevented a U.S. company, which had commissioned a background check of a prospective senior executive, from learning that he had been sued for sexual harassment more than seven years before.

In this era of **#MeToo**, as investigators and due-diligence professionals are called upon to help companies mitigate hiring risks, an investigation can just as easily identify a sexual predator as it could end up lifting clouds of suspicion from embattled individuals. These are not two opposing tasks but one: unearthing the most factual information available to help people navigate risk in a changing world.



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