

Confronting Sexual Harassment in Today's Workplace: 8 Questions Companies Should Be Asking Themselves

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In recent months, sexual harassment allegations against well-known figures across a growing number of industries have become a common feature in news headlines. In the wake of these allegations, many companies have concluded that their current policies and procedures related to sexual harassment and discrimination are inadequate. Against the backdrop of this rapidly evolving landscape, companies are considering how to improve their policies and procedures not only to appropriately and effectively respond to allegations of sexual harassment, but also to deter inappropriate behavior going forward and foster an environment of openness, diversity and inclusion in their workplaces. To that end, below are 8 key questions that companies should be asking themselves in developing policies and procedures to confront sexual harassment and other forms of misconduct in today's workplace.

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The 8 Questions Companies Should Be Asking Themselves

1. Have we thought broadly, globally and proactively in developing our policies and procedures about workplace harassment?

Under both U.S. federal and state law, companies are incentivized to have policies and procedures in place that address sexual harassment and contain clear guidelines about what to do in the event an employee is sexually harassed. In addition to ensuring that their sexual harassment policies comply with applicable federal and state law, companies should consider developing other internal policies and trainings for employees and executives concerning inappropriate, offensive, or abusive behavior, including:

- Policies concerning bullying, discrimination, retaliation, consensual relationships and nepotism.
- Code of conduct, affirmatively establishing the expected company culture.
- Trainings on unconscious bias, sensitivity in the workplace and behavioral responses to harassment and discrimination (e.g., understanding the “freeze” response to harassment).

In developing these policies and trainings, consideration should be given to the fact that the public’s perception of what constitutes harassment or inappropriate behavior has already begun, and will continue, to change. Likewise, some conduct that is unlikely to provide a basis for a legal claim against a company under the current state or federal law applicable to the company, may be the subject of future legislation. In addition, thinking not just about deterring illegal conduct but about fostering an environment in which such conduct is unlikely to occur is important. Training on unconscious bias, sensitivity in the workplace and behavioral responses to harassment and discrimination are just some ways in which the culture of a company can be improved.

As part of a comprehensive approach to developing policies on harassment, companies may also consider examining perspectives on harassment in foreign jurisdictions, including looking to local rules for guidance. Global organizations should not only adopt uniform policies across geographical areas that reflect global standards of conduct, but also should make sure that any local law requirements are adopted through addenda in relevant jurisdictions.

2. Do our employees *trust* the company’s procedure for reporting harassment?

If the behavior complained of is not expressly covered by a company’s sexual harassment policy or applicable law, employees may not think they have recourse through the company’s reporting procedures. Even if a company has put in place a clear procedure for reporting violations, employees may not use it if they do not trust that their complaints will be investigated thoroughly and without any repercussions. Employees may have the perception that the priorities of the individuals designated to receive complaints are more aligned with the accused or that these designated individuals have an obligation to presume innocence. Employees may moreover fear that their allegations will be perceived as overreactions or that they will face retaliation, particularly where the alleged perpetrator is a senior person or high performer. Where this is the case, employees may decide to escalate their complaints by going *outside* of their companies’ reporting procedures, including by sharing their stories more broadly:

- through the press (Harvey Weinstein);
- on social media (#MeToo);
- on anonymous forums that are, or may become, open to the public (the “Sh*tty Media Men” spreadsheet, Glassdoor.com, Blind conversation app); and
- calling anonymous hotlines set up by organizations outside the company (National Organizations for Women; Equal rights advocates).

In light of this, companies should take steps to ensure that their human resources (“H.R.”) functions are sufficiently staffed and trained on how to handle concerns about harassment that they encounter outside of regular reporting channels. Companies may also consider having those in H.R. functions proactively monitor forums and other websites for allegations of harassment as a complement to their existing processes. A company’s failure to respond to allegations made in the press or on social media or to provide appropriate reporting mechanisms for harassment claims may contribute to a determination that the company has not exercised reasonable care in preventing and addressing harassment, thereby exposing the company to liability. In addition to legal risks, the publication of harassment allegations can also expose a company to reputational harm, which may be mitigated by a company’s proactive response to the allegations.

Companies should also take steps to ensure that all information concerning harassment allegations, even if not raised through the company’s reporting procedures or raised anonymously, is shared with appropriate individuals within the organization and also promptly escalated to senior management or the board. In order to comprehensively address allegations of harassment or unhealthy workplace cultures, it is essential that all known information about alleged violations be promptly and regularly escalated to senior management or the board.

3. Who is responsible for receiving complaints and do they have adequate resources and training?

Even if a company’s reporting procedures designate particular individuals as responsible for receiving complaints, employees may bring allegations to non-designated employees, including their managers and mentors. Employees may also report allegations directly to senior management. For example, recently developed apps like AllVoices enable victims of sexual harassment or discrimination to anonymously report incidents to a company’s CEO and board. Companies should thus ensure that senior management, as well as all employees and others who may receive complaints

of harassment, receive training on how to respond to allegations of harassment and are well-versed on how to promptly escalate complaints within the organization. Employees should be reminded that they should never discourage someone from bringing forward an allegation of harassment and that any such allegations must be taken seriously and reported properly. As noted above, companies should also ensure that all information relevant to harassment allegations is shared with the appropriate individuals and escalated to senior management or the board on a regular basis.

Companies should also consider taking steps to assess the work environment *before* a complaint of harassment arises. For example, companies may consider conducting anonymous surveys of employees on their experiences in the workplace and the current harassment procedures, administering “climate assessments” in particular areas of the business, including H.R., holding skip-level meetings for senior management to gain insight into the culture at various levels of the organization, and establishing a clear open door policy to encourage openness between employees and senior management.

4. Who should be in charge of conducting investigations and do those in charge have adequate resources and independence?

Substantial consideration should be given to *who* is in charge of conducting an investigation into complaints of sexual harassment and to whether those directing the investigation are sufficiently independent. Companies may consider forming a committee consisting of representatives from different parts of the company to direct any harassment related investigations, including determining who should have responsibility for conducting the investigation. Depending on the nature of the allegations, an investigation by personnel in an H.R. function may be appropriate and cost effective. For allegations involving senior management or that involve pervasive behavior by a group or area within a company, a company may also consider bringing in outside counsel. In that scenario, consideration should be

given to who retains the counsel and whether counsel is sufficiently independent.

Companies should also ensure that their investigations are conducted with the utmost confidentiality and assure employees that their harassment complaints are confidential and that they will be protected against retaliation. If, however, a company ultimately decides to settle with a complaining employee, it may consider reevaluating the use of non-disclosure agreements (“NDAs”), either in settlements or in existing employment contracts, which could be perceived as “hush money” or as perpetuating abusive work environments by protecting perpetrators, and which are the subject of proposed legislation in some state legislatures.

5. Has a disclosure obligation been triggered?

Additional considerations may apply with respect to responding to and preventing misconduct by senior executives. Such misconduct can create or exacerbate an abusive work environment and lead to serious reputational injury for the company. If allegations are made against an executive officer, the company should determine when and how to involve the board in dealing with those allegations. Public companies should also keep in mind that the change in employment conditions, resignation or termination of certain executives must be disclosed on a Form 8-K in the U.S., and that other foreign jurisdictions may have similar disclosure requirements.

Companies may also consider whether to review their contracts with senior executives to ensure that the contracts include provisions that require and incentivize compliance with the company’s behavioral expectations. To that end, some companies have chosen to consider, with respect to their new and existing contracts, what rights they have to terminate senior executives for cause for violations of the company’s harassment policies and to deny indemnification in such situations. One reason to consider negotiating arrangements with these protections in place is that payment of large severance packages can cause reputational harm to a company based on the perception that it is being “soft” on

executives whose behavior violated its policies or rewarding executives for inappropriate behavior. On the other hand, these negotiations may present real challenges.

6. Does senior management communicate the message that harassment of any type will not be tolerated?

The adoption of strong internal codes of conduct, policies and robust procedures will have limited efficacy if senior management does not make clear that it will not tolerate harassment of any kind or by any perpetrator. Management’s failure to swiftly investigate claims of harassment or to penalize abusive behavior can exacerbate an already hostile work environment. Further, as noted above, consideration should be given to ensuring that management cannot be reasonably perceived as rewarding senior executives who do not comply with the company’s behavioral expectations or silencing victims of abuse.

Companies should encourage senior management to take steps to facilitate openness and increased communication with their employees even before a complaint arises. Senior management should also regularly remind employees of the existence of their company’s policies and procedures related to harassment and should participate in trainings.

7. Is the board sufficiently informed on the company’s policies and procedures relating to sexual harassment?

Board members may be exposed to claims of breach of fiduciary duty following claims of sexual harassment perpetrated by executive officers or other employees of the company. In particular, public companies may face serious financial consequences following allegations of harassment at the company as a result of such claims. Boards should also be aware that there are financial risks that are not directly tied to payment of civil damages or to legal and remediation costs related to sexual harassment. The media has recently reported numerous incidents of allegations where executives have been accused of sexual harassment and other misconduct, and the companies have seen their stock price fall or lost advertising

revenue, customers and business opportunities. In light of these risks and, most importantly, to protect the safety of the company's employees, the board should periodically review the company's sexual harassment policies, including training and reporting channels. The board should also ensure that it is being informed of violations of these policies, as appropriate, and has a sense of the day-to-day workplace culture as it relates to sexual harassment and other forms of inappropriate workplace behavior.

8. Does the company have effective standards, policies and processes, including diligence processes, to address sexual harassment issues at potential investment targets and existing subsidiaries and/or portfolio companies?

Companies may face major reputational and financial repercussions based on the misconduct of other companies that they have acquired or in which they have invested. During the diligence process, consideration should be given to inquiring into the target's or partner's implementation and maintenance of harassment policies and procedures, the existence of appropriate controls, and whether the investment target or its key personnel have a history of incidents, investigations or allegations of harassment issues. In addition, in appropriate circumstances, consideration should be given to engaging local counsel for investments outside the U.S. to consider whether the company's policies comply with applicable local rules, and the impact any non-compliance could have post acquisition.

Private equity sponsors and other similar organizations should consider reevaluating policies and procedures at existing portfolio companies and subsidiaries in light of recent developments, and may further consider putting in place reporting requirements to ensure that portfolio companies and subsidiaries have implemented effective policies and ongoing training. Companies may also consider steps that can be taken internally to effectively implement appropriate policies, procedures, and training at their portfolio companies and subsidiaries. For example, consideration should be given to whether a company

can leverage its own practices and policies across its portfolio companies and subsidiaries.

Conclusion

Sexual harassment related allegations are increasingly making headlines and rapidly changing perceptions concerning harassment and abusive behaviors. While the allegations initially centered on the entertainment industry, sexual harassment in the workplace has now become a major issue in a growing number of industries, including technology and finance. Companies across all industries are responding by developing strategies for tackling harassment in the workplace and minimizing risk by implementing strong policies, procedures, and complaint systems. To do so, it is essential that companies ask the right questions.

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