



Governance Watch: Harassment

Why Board Oversight is Critical in Helping Stop Harassment

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Sexual Harassment in the Workplace

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Sexual Harassment in the News

Over the course of the past few months, sexual harassment allegations against well-known figures across different industries have become a common feature the news.

The collage features several news snippets:

- Style**: Violence. T... Weinstein's Hollywood. By Monica Hesse and Dan Zak
- CBS NEWS SUSPENDS CHARLIE SHEEN**: COMES AFTER ALLEGATIONS OF SEXUAL M...
- Most Read Lifestyle**:
 - 1 Anita Hill and I congressional Biden: You we problem
 - 2 Perspective David Cassidy star in the wor years
 - 3 Gayle King 'wi Colbert's Char sat for an inte
 - 4 John Oliver has been pointing
- News Article**: HOME > BIZ > NEWS. NOVEMBER 29, 2017 12:34PM PT. **Matt Lauer Accused of Sexual Harassment by Multiple Women (EXCLUSIVE)**. By Ramin Setoodeh and Elizabeth Wagmeister.

Sexual Harassment in the News

Started in media and entertainment, but quickly expanded to finance and business.

#MeToo: Hashtag Becomes Anti-Sexual Harassment and Assault Rallying Cry

Say goodbye to Steve Wynn, and put our money where our MeToo is

WITH LAWSUIT AGAINST STEVEN COHEN'S FIRM, #METOO COMES TO WALL STREET



By Sheelah Kolhatkar February 16, 2018



Do you know what is and is not legal under federal law?

- “Quid Pro Quo” Sexual Harassment:

Harasser makes unwelcome sexual demand to victim and 1) threatens to take negative employment action against the victim unless victim submits to demand or 2) promises victim employment benefit in exchange for the sexual demand.

- “Hostile Work Environment” Sexual Harassment:

Unwelcome sexual advances, requests for sexual favors and other sexual language or conduct that unreasonably interferes with victim’s work performance or creates an intimidating, hostile or offensive working environment.

Examples of sexual harassment under the law:

- Repeated physical contact, such as putting an arm around a shoulder when work is reviewed, finding excuses to brush against someone, or insisting on farewell or congratulatory hugs or kisses.
- Repeated requests from a supervisor for a date, even after the subordinate has already rejected a request.
- Frequent inquiries about a coworker's sexual or social life and attempts to turn work discussions to sexual topics.
- Displays of pornographic matter, degrading cartoons or insulting images; distribution of obscene notes or e-mail.
- Remarks about sexual prowess or sexual characteristics.
- Leering, ogling or staring.

What are the potential legal risks?

- Under federal law: Title VII or RICO
- Under state law: in general, states have more plaintiff-friendly frameworks, examples include New York and California.
- Under foreign law: scope of potential legal liability may be broader than in the U.S.; for example, some countries have laws about bullying, and in some countries sexual harassment is a crime.
- Enforcement actions: from either State Attorney Generals (for example, The Weinstein Company) or the Department of Justice.
- Shareholder litigation: *Caremark* claims for failure to exercise oversight, or lawsuits alleging material disclosure violations.

Do senior management and the board know your company's policies and procedures relating to sexual harassment?

- Have you thought broadly, globally and proactively in developing your policies and procedures about workplace harassment?
- Boards that have not reviewed these policies recently should do so in the near term.
- All boards should have a practice of periodically reviewing relevant policies to ensure that they continue to reflect best practices as they evolve, particularly regarding reporting channels, victim anonymity, and prohibitions on retaliation, among other key features.

Do your company's policies and procedures relating to sexual harassment follow best practices?

- Adopt strong internal codes of conduct, policies and procedures.
- Don't think about sexual harassment and workplace misconduct policies in a vacuum – think about them in connection with other policies that may affect workplace conduct (e.g., diversity and inclusion policies, maternity and paternity leave policies)
- Companies' policies and procedures can sometimes go beyond what is required under the law – the best defense is a good offense.
 - For example, the policies could penalize instances of harassment that would not likely provide a basis for a legal claim against the employer (such as a one-off remark about gender).
 - In addition, the policies could have clear guidelines about what employees should do in the event that they are sexually harassed (such as offering employees the option to report to an outside third party).

Does the board communicate that sexual harassment issues are important to the company?

- It is important to set tone at the top that sexual harassment is not acceptable.
- Must be clear not only through policies but also in actions that inappropriate behavior will be promptly investigated and result in appropriate consequences.
- If employees do not believe that issues of sexual harassment are being treated seriously by the board and management, they may decide to escalate their complaints by going outside of their companies' reporting procedures.

What other good governance practices have an effect on setting tone at the top on sexual harassment issues?

- Issues related to board refreshment have been a feature of good governance in recent years years.
- In addition to the other benefits of board refreshment, in the sexual harassment space, new directors will bring fresh perspectives, may be perceived as more independent and may be better positioned to exercise oversight and provide direction for senior management.

What other ways can boards tangibly address these issues?

- Compensation programs: some companies have revised clawback policies or definitions of “cause” to include reputational or economic harm that might arise from violations of company policies that concern workplace conduct.
- Training: ensure that sufficient training is conducted at all levels to ensure management and employees understand expectations and procedures for reporting violations.
- Hiring: when hiring executives, ensure that appropriate diligence is done on the front end with respect to these issues and questioning to determining whether the person is accretive to the company’s culture.

Is the board sufficiently informed about these issues and what steps can they take to proactively investigate whether the company may have a problem?

- Violations of company policies and reports of harassment and statistics should be reported to the board on a periodic basis
- Certain issues should be escalated to boards outside of the periodic reporting process, for example:
 - Reports involving senior management;
 - Identification of a pattern (e.g., multiple reports in a department);
 - An increase in reports uncovered outside the formal process (e.g., through exit interviews);
 - Lawsuits.

Is the board sufficiently informed about these issues and what steps can they take to proactively investigate whether the company may have a problem? (cont'd)

- If there is an investigation, consider delegating the responsibility to a committee of independent directors and consider being advised by outside counsel.
 - Independent directors play an important role in seeking information about discrimination, sexual harassment and other misconduct.
- Boards should ask management probing questions during briefings on issues of harassment to ensure there is an appropriate plan to address issues and that it is effective.

Is the board sufficiently informed about these issues and what steps can they take to proactively investigate whether the company may have a problem? (cont'd)

- The board may also consider taking steps to ensure they are hearing from a variety of sources with respect to workplace harassment issues in order to avoid a potential bottleneck of information. For example, a board (or committee thereof) may hear from:
 - The company's head of HR;
 - A workplace council tasked with assessing these issues (comprised of either employees from different divisions or external experts);
 - Outside legal counsel tasked with doing an assessment of sexual harassment matters.

Are you prepared if a crisis happens?

- It is important that companies are prepared to respond quickly – discuss in advance who should be involved and who has decision-making authority.
 - Consider having a P.R./crisis management firm and/or law firm identified.
- Practice – table top exercises can be helpful.
- Proactively review employment agreements to understand relevant termination provisions.
- Evaluate how the use of a non-disclosure agreement (“NDA”) will be viewed.
- Consider developing a press strategy.

Has a disclosure obligation been triggered?

- 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.
- In certain cases, a public company may have an obligation to publicly disclose harassment claims, lawsuits or investigations, to the extent that the matter is likely to have a quantitatively or qualitatively material impact on the company.



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- **The Job of the Corporate Director: Perspectives of the Delaware Bench & Bar Roundtable**
March 28th – Newark, DE
- **Book Discussion Webcast: “Earning It” with Joann S. Lublin**
April 3rd – 12:00PM ET
- **Governance Watch**
April 17th - 12:00PM ET
- For more details about these and other governance programs and research, please visit www.conferenceboard.org/governance



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March 20, 2018, 12PM EST

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