
The #MeToo Movement: The Critical Role of the Board in Preparing for, Responding to and Avoiding Sexual Misconduct Allegations

MARCH 8, 2018

As the #MeToo movement gains momentum, companies in nearly every major industry are dealing with allegations of gender discrimination, sexual harassment or even sexual assault—including allegations of widespread misconduct and inappropriate behavior within the upper echelons of the corporate structure. These types of allegations can have a significant negative impact on a company—damaging its brand, employee morale, goodwill and bottom line. A company's efforts to address corporate culture before any allegations are made, and to respond appropriately when allegations do arise, are an increasingly critical part of good governance. Boards are recognizing their critical role in setting the “tone at the top” on sexual misconduct and in taking action when troubling information comes to light.

Boards can take a variety of measures to create a culture of transparency and provide a road map for responding promptly and effectively to sexual misconduct reports:

- **Focus on corporate culture.** The board plays a unique role in defining a company's culture, and should promote a tone of zero tolerance when it comes to sexual misconduct. This requires engaging with senior management and, when necessary, holding management accountable. The board should work with management to identify and underscore important cultural values and ensure that all employees responsible for hiring, firing, promoting or supervising other employees are aware of, promote and act in accordance with those values.
- **Review and modify written policies as needed.** The board should ensure the careful review of written policies related to workplace behavior, including policies addressing harassment, relationships, travel, hiring, promotions and investigations of alleged misconduct. The board should assure itself that such policies are best-in-class and ask management to confirm that the policies are communicated effectively to all employees. Workers at every level of the company should know the “ground rules,” understand that company leadership expects the ground rules to be observed, and have confidence that

they can safely report instances in which the ground rules are not followed.

- **Conduct investigations in accordance with written policies and sound practices.** The board should work with senior management, human resources and counsel to ensure that the company is following its internal policies and processes to respond to reports and complaints of sexual misconduct. The board should make clear that the same processes apply at all levels of the organization. The board should also be prepared, when appropriate, to engage independent counsel to investigate allegations of sexual misconduct. The use of independent counsel may be particularly critical where there is evidence of a pattern or practice of misconduct or harassment, or where the conduct at issue involves corporate leadership, a board member, a member of the human resources team, or someone with real or apparent authority over the investigation. In addition, if the board becomes aware of complaints or allegations regarding the company's handling of past complaints of sexual discrimination, harassment or assault, or has reason to assess company culture more generally, a broader investigation—one that includes a review of policies and training, the company's historical responses to allegations of sexual misconduct, and overall corporate culture—may be necessary.
- **Proactively manage risk.** The board, or a subcommittee thereof, should consider requiring periodic reporting of data regarding complaints, as well as notification of high-risk complaints. While the board generally is not involved in decisions related to hiring, promotions and compensation, it should nevertheless pay attention to trends in those areas and scrutinize members of management who have been the subject of multiple complaints. The board should also review and assist management in developing thoughtful diversity and inclusion programs and training.

For many of those in the C-suites and boardrooms of corporate America, perhaps the most sobering revelation from the #MeToo movement is the extent to which those at the top may be unaware of or oblivious to concerning characteristics of the company's culture and what may be going on in the bowels of the organization. The impact that sexual misconduct has on performance, recruiting, morale and a company's bottom line—while difficult to measure—is significant. Boards should be vigilant about addressing this issue promptly, energetically and transparently.

WilmerHale attorneys have a broad range of experience conducting internal investigations for companies, nonprofits and institutions of higher education, including investigations of sexual misconduct and harassment. We regularly conduct sensitive internal investigations for public and private companies with respect to executives accused of sexual misconduct, including internal reviews of broader issues of corporate culture that often arise from such allegations. WilmerHale attorneys also have significant experience working with clients to develop and implement policies, practices and trainings on issues related to sexual misconduct, as well as other forms of workplace harassment and discrimination.

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