

# The Import of a Rapid, Thorough Corporate Response to Allegations of Harassment

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Tuesday, March 20, 2018

## Summary

The increased focus on issues of harassment is putting corporate culture under a microscope. Corporate management and board members—regardless of whether the entity is private, public or charitable—must adjust the way they think about harassment in the workplace and how to respond to allegations of misconduct.

## In Depth

As the #MeToo social responsibility and similar movements continue to gain momentum, it is shining a light not only on alleged misconduct by executives and other individuals in positions of power, but also on the corporate response to allegations of such misconduct. From the US Olympic Committee and USA Gymnastics to leisure companies and even charities, the media, regulators and investors are focusing on the adequacy of the response to complaints raised, including, in some cases, complaints raised many years ago.

An inadequate response can lead not only to bad publicity and reputational harm, but to corporate liability. The complainants are not the only ones seeking to hold corporations liable for unaddressed misconduct. Other stakeholders, including shareholders, are filing suits against corporations based on a drop in stock price following disclosure of allegedly unaddressed misconduct. While the viability of such lawsuits remains to be seen, the filing of such suits is likely to continue, at least for now. In addition, while there are no specific securities law requirements that mandate the reporting of harassment allegations, public companies must at least consider whether the allegations are so significant as to create legal or other financial exposure that rises to the level of a reportable event.

The board of directors, consistent with its fiduciary duty to preserve corporate assets, including corporate reputation, can and should take a leadership role on behalf of the organization in establishing a corporate culture that seeks to identify, eradicate and prevent harassment. Up-to-date compliance policies, appropriate training that includes all levels of an organization, including its board, a confidential reporting system and individual and corporate accountability are all a part of establishing such a culture. Putting such processes in place will have the effect of preventing misconduct, setting the right tone, and allowing for prompt reporting of misconduct when it occurs. Once an allegation of misconduct has been made, however, the response is critical.

In this current environment, an investigation that may previously have been handled by the human resources department may now need to be addressed through an investigation by a special committee of the board, assisted by outside counsel. Increasingly, such investigations are being handled by teams comprised of employment law specialists and members of white collar practice groups, including former prosecutors.

A special committee and outside counsel provide protections to a corporation, its management and its board that an internal investigation cannot. As an initial matter, the involvement of counsel can provide privilege protections to the investigation, which may be particularly important if outside parties, whether they be private litigants or even regulators, initiate their own investigation or file suit. Perhaps more importantly, however, bringing in outside counsel reporting to independent board members brings independence and neutrality to an investigation that may not be as easily achieved through an internal investigation conducted by other employees. Members of white collar investigative practices with experience responding to, and in many cases conducting, government investigations also bring expertise in interviewing potentially reluctant witnesses and, where necessary, making credibility determinations. Having outside counsel, as opposed to a human resources officer who may be known to the relevant employees, also emphasizes the import of the investigation to the interviewees who may be more forthcoming in a more formal setting and with interviewers they are not going to see in the hallway the next day. Outside counsel can then prepare a privileged report summarizing factual findings.

Once the investigative members of the team have completed their report, the employment experts can take the information and provide substantive recommendations regarding whether there were any policy violations and what, if

any, disciplinary or other corrective action should be taken. Bi-furcating the response in this way provides a further layer of neutrality—the employment lawyer rendering the advice has been shielded from interactions with the employees involved and cannot be accused of bias towards any of them. This is also an opportunity for employment counsel to review the policies and procedures in place and make any recommendations for revisions to those processes.

Armed with an investigative report and advice from outside counsel, the board can make the decision as to whether to share any or all of the results of the investigation in response to inquiries from the media, regulators or private litigants. Given the privileged nature of the report and recommendations, it generally will not be discoverable by third-parties absent a board decision that it is in the best interests of the corporation to waive the privilege. Moreover, the mere fact that the corporation conducted an independent inquiry, supervised by independent board members and conducted by outside counsel, demonstrates a commitment to addressing misconduct allegations that, in and of itself, provides both legal and reputational protections to the corporation.

The increased focus on issues of harassment is putting corporate culture under a microscope. Corporate management and board members—regardless of whether the entity is private, public or charitable—must adjust the way they think about harassment in the workplace and how to respond to allegations of misconduct. In addition to having appropriate policies and procedures in place for preventing, identifying and reporting misconduct, corporations must consider how to adequately respond to allegations. Corporate management and board members must be counseled by the right team, be it employment counsel alone or a combination of employment experts and trained investigators who can conduct a neutral, thorough and privileged investigation and then provide recommendations and advice based on the results of that investigation.

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