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Expert Analysis

The New Imperative to Investigate Workplace Misconduct

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The important ongoing national conversation about sexual harassment should serve as a wake-up call to companies, board members, and C-suite executives about the need to be proactive when confronted with allegations of harassment or other workplace misconduct. Raising serious legal and reputational concerns, many of these matters will require an investigation led by experienced employment and white-collar attorneys who can efficiently and sensitively examine the truth of claims and determine the best path forward.

Evidence suggests the risks posed by employee misconduct claims have not been top of mind for many corporations. Consider a survey released in October 2017 by the Boardlist, which maintains a directory of women board members, and data analytics firm Qualtrics. The survey, conducted in August 2017 with more than 400 board members at public and private companies participating, showed that nearly 80 percent of surveyed board members had not discussed sexual harassment at their companies. Additionally, nearly 90 percent of surveyed board members had not implemented a plan to address it and more than 80 percent of surveyed board members had not reevaluated their respective company's risks. The reason most board members gave for their inaction was a belief that sexual harassment was not a problem at their company.

It is now abundantly clear that not taking workplace misconduct issues seriously or failing to ask the right questions can be very damaging, and possibly fatal, for a company. Exhibit A, of course, is The Weinstein Company, the entertainment studio co-founded by Hollywood producer Harvey Weinstein. The allegations against Weinstein of systemic sexual abuse of dozens of women for decades appear to have brought the company to its knees, forcing it into a possible sale to avoid bankruptcy. In addition, the company is facing several lawsuits from Weinstein's accusers.

One of the lawsuits names members of the board of directors, alleging that they knew or should have known Weinstein was "unfit or incompetent" to work with the plaintiffs and "posed a particular risk of sexually assaulting them…" In addition, the New York State Attorney General's Office has announced that it is investigating whether any civil rights or anti-discrimination laws were broken at the company. The Weinstein Company has not publically commented on the litigation nor the investigation.

Although an extreme example, The Weinstein Company is hardly alone in facing litigation over its management of employee misconduct. To cite just one more example: Signet Jewelers Ltd. and

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two of its former CEOs are facing a shareholder class action over disclosures about sexual misconduct allegations at the company's Signal division. The case stems from a report in The Washington Post detailing written declarations made in private arbitration proceedings by current and former Signet employees who painted a picture of a company where sexual harassment and abuse were tolerated and encouraged by its top executives. The lawsuit claims that in SEC filings and other public statements, the company "steadfastly denied and downplayed the allegations made by the plaintiffs in the arbitration" even though the arbitrator issued an interim decision in 2015 noting that "[f]or the most part Sterling has not sought to refute this evidence." The company has said that the shareholder case is without merit.

Beyond the financial and regulatory risks these cases demonstrate, they highlight the reputational damage companies, boards, and executives face if they do not adequately handle allegations of workplace misconduct. Reputation damage can be substantial and can negatively affect a range of important relationships involving customers, regulators, employees, and potential employees.

New Prism

In this new environment, employee misconduct issues cannot be viewed only through the prism of employment law. Instead, they should be seen as potentially putting the entire enterprise at risk. In some cases, a thorough inquiry by credible outsiders with experience conducting internal investigations and dealing with government entities may be necessary.

Of course, employment law experience is essential in these matters. Understanding the company's potential legal exposure under relevant laws, such as the Title VII of the 1964 federal Civil Rights Act and the New York State Human Rights Law and ensuring the employer protects the rights of accuser and accused during the pendency of the investigation are critical. Employment attorneys also have relevant and significant experience speaking with victims and evaluating their credibility as well as advising employers.

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Nevertheless, employee misconduct issues have taken on new salience. As women—and men—are empowered to come forward with allegations of workplace misconduct, the potential for more systemic problems to be revealed will increase. These issues will involve not only the facts of the particular allegation but also who at the company knew about the alleged behavior, what they knew, and when they knew it. Combining the substantive knowledge and experience of employment attorneys with white-collar defense attorneys who routinely conduct sensitive internal investigations will ensure that these inquiries are appropriately holistic and effective.

Regulators are more attuned than ever to these issues. The New York State Attorney General Office's Civil Rights Bureau, for example, has the authority to investigate—and often brings civil actions—against companies for patterns and practices of harassment or discrimination that often affect large groups of people. The bureau recently updated its guidance about laws that protect New Yorkers from sexual harassment in the workplace.

"No New Yorker should be forced to walk into a workplace ruled by sexual harassment, intimidation, or fear," New York Attorney General Eric Schneiderman said in a statement this past December.

The New York State Attorney General Office's investigations have led to significant monetary settlements. In 2015, for example, it, along with U.S. Equal Employment Opportunity Commission, announced a $3.8 million settlement with the Consolidated Edison Company of New York, Inc. to resolve allegations of sexual harassment and discrimination against women field workers by co-workers and supervisors. Notably, the New York State Attorney General's Office found that the company failed to address the widespread harassment and discrimination.

Key Elements to Internal Investigations

When allegations of employee misconduct surface within a company, the most prudent response in many cases will be to conduct an internal investigation to determine the facts, including whether the underlying conduct is part of a broader pattern at the company. Further, under Title VII and similar state civil rights laws, investigations are not only wise, but required as part of the employer's obligation to prevent and promptly correct discrimination or harassment. Done correctly, an investigation can assure key constituencies—employees, regulators, customers, board members, business partners—that the company takes the allegations seriously and that the allegations have been addressed fairly and fully.

Internal investigations, however, can cause unforeseen damage if not done correctly. It is beyond the scope of this article to outline every element needed for a successful internal investigation, but two fundamentals are worth highlighting.

Credible and experienced investigators. Historically, many companies have chosen to handle their own internal investigations of employee misconduct issues. The degree of in-house expertise and the quality of their investigations vary from excellent to nonexistent. In this new climate, however, in-house investigations, regardless of the quality of the investigators, could be particularly vulnerable to criticism, especially when high-profile employees are involved. An internal investigation attacked (legitimately or not) as a whitewash could make matters worse for the company by potentially damaging its credibility with key stakeholders, such as an alleged victim of misconduct, triers of fact, prosecutors, and rank-and-file employees. By engaging outside counsel with sufficient independence and credibility, companies can blunt this kind of criticism.

A clearly defined work product. It is also critical to know what type of final work product will result from the internal investigation and for whom it is intended. Initially, it is prudent to decide whether a privileged report will be produced that can be withheld from both the accuser and the accused, with the option of waiving privilege as needed. Throughout an investigation, lawyers make many complex decisions about what kind of information they are willing to share with other third parties, including opposing parties in litigation and regulators or prosecutors, implicating other questions about work product and attorney-client privilege. Accordingly, lawyers must carefully consider whether there should be a final report and if so, whether it should be written or oral.

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Conclusion

After months of news about employee misconduct across many industries, it appears that our culture has reached an inflection point. It is imperative that the business community demonstrate that it understands the gravity of this moment. To inspire confidence with their key constituencies and appropriately handle what could become a particularly sensitive and damaging matter, companies should seriously consider turning to attorneys with the needed credibility and experience investigating sensitive and complex matters to bring about a satisfactory resolution.