



CRA Insights:

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Conducting sensitive investigations of workplace misconduct

Movements such as #MeToo have helped raise awareness about workplace misconduct. Employers have been mandated to pay hundred-million-dollar settlements for mishandling sexual harassment and abuse complaints.¹ Disputes that have spilled into public view have damaged reputations and corporate brands. The courts and the Equal Employment Opportunity Commission (EEOC) are also clear: sexual harassment in the workplace is a violation of Section 703 of Title VII.^{2, 3, 4}

Allegations of inappropriate sexual conduct in the workplace raise sensitive and complex issues that must be addressed in a proactive way. Whether and how a company responds to these allegations will have a direct impact in a number of ways.

Financial implications

For public companies, the corporate response to a sexual harassment case can have a direct financial impact on market share and on shareholder value. In an April 2021 study published in the *Journal of Corporate Finance*, the authors examined 199 reports of sexual harassment at public companies worldwide and found an average decrease in market value of 1.5% (an average of \$450 million) on the trading day immediately following the day the allegations become public. The study also showed that the news coverage of sexual harassment claims in the workplace increased fourfold after the #MeToo movement began.⁵

The authors further found:⁶

¹ Shiu-Yik Au, Ming Dong, Andreanne Tremblay, "How Much Does Workplace Sexual Harassment Hurt Firm Value?," Working Paper, updated 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437444

² US Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, March 19, 1990, <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment>

³ 42 U.S.C. § 2000e et seq.

⁴ New York City Bar, Legal Referral Service, "Gender Discrimination," <https://www.nycbar.org/get-legal-help/article/employment-and-labor/gender-discrimination/#:~:text=New%20York%20State%20and%20New,a%20victim%20of%20gender%20discrimination>.

⁵ Mads Borelli-Kjaer, Laurids Moehl Schack, and Ulf Nielsson, "#MeToo: Sexual harassment and company value," *Journal of Corporate Finance*, April 2021, Vol. 67, ISSN: 0929-1199.

⁶ Ibid.

- The involvement of a CEO in a sexual harassment claim had the largest negative impact on market returns, when compared to other executives and non-executives.
- Self-disclosing information of sexual misconduct was associated with a less negative reaction in the market and connotes more responsiveness of the firm.
- The magnitude of news is also strongly related to the market reaction, suggesting investors' response to misconduct depends on the extent to which they notice it.
- The long-term market value corresponds to an approximately \$250 million loss per company involved in a sexual misconduct claim, indicating companies cannot afford to be unresponsive in the hopes the financial consequences will be a temporary setback.

Conducting an investigation

Sexual harassment allegations present unique investigation challenges and require a high degree of sensitivity and care. In addition to reputational and financial implications, how a company handles these allegations may have lasting impacts on corporate culture and employee morale and could result in lower employee retention rates and lower productivity. At its core, sexual harassment investigations are about people. It is critical to conduct these investigations in a thorough and sensitive manner.

Sexual harassment investigations are not cookie cutter. Our experience shows that each investigation brings unique challenges. For example, a confidential complaint made through a hotline tip is different from allegations of systemic sexual harassment that has been made public to the press. Both require sensitivity and finesse but may have different issues to contend with. The make-up of your team—who is conducting interviews, how they are asking questions, and how they operate in a discreet and sensitive manner—is important.

When conducting sensitive investigations, it is essential the investigative team is comprised of individuals with the requisite experience while also excluding individuals with a conflict of interest from participating in the investigation, such as those who have worked closely with the subjects of the investigation. For example, companies often hire external counsel and independent experts to advise them on their rights and to preserve the integrity of the investigation. An internal-only investigation may include those with loyalties and inherent biases. Safeguards should also be considered such as the application of encrypted, read-only access to evidentiary documents and investigative notes. To the extent possible, efforts should be made to protect the identities of the individuals interviewed during the course of the investigation and memorialized findings should be kept in a strictly confidential and non-attributable basis.

The team should also be experienced in approaching the matter with a demeanor consistent with the highly emotional and personal nature of the allegations and be aware of the reputational and legal ramifications of all involved. Interviews occasionally contain responses inconsistent with email reviews or performance evaluations. At times, other allegations arise during the investigation, requiring appropriate responses and subsequent follow-up questions based on an understanding of the directive of the investigation and awareness of the potential criminal and civil culpabilities. Often, the investigative team gets one opportunity to speak with a key person, so it is imperative to review a preponderance of records prior to interviews and have the most appropriate people lead the interviews.

In the COVID-19 world of remote work, written interactions such as emails and collaboration applications (Microsoft Teams, Slack, and Lync) have increased, providing additional data for

investigators to review. Employees can often be unguarded in a digital “chat,” providing evidence of malice or bias. A thorough investigation should include this evidence. However, these chats and online messages must always be balanced with the need to conduct thorough interviews.

Using social media tools to monitor reputational damage

Sexual misconduct allegations can lead to reputational and brand damage. Using specialized social media monitoring tools to crawl traditional and social media platforms, investigators can identify references to the allegations and the company. Furthermore, this social media monitoring can be conducted on an ongoing basis to identify negative coverage in real time.

At the conclusion of the investigation, the investigative team makes an objective evaluation based on a totality of information, such as interviews, email reviews, performance evaluations, among others. Not every case is the same—each requires a unique approach. In some instances, a written report with a set of recommendations may be appropriate. In other cases, it may be appropriate to notify law enforcement authorities as there could be criminal liability for the accused harasser. Depending on the severity of the allegations, companies may decide to fire employees for their failure to treat allegations with seriousness. Often, companies work with outside firms to revise their policies and procedures and establish anonymous tip lines to encourage employees to report.

A company must demonstrate its commitment to create an open and welcoming environment for all employees and a commitment to transparency and good governance. Harassment in the workplace can result in reduced capital and operating margins, lower productivity amongst employees, lower employee retention and recruitment, lawsuits, federal investigations, and negative publicity. These issues must be addressed affirmatively by conducting unbiased, thorough, and complete investigations into all allegations of sexual misconduct.

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