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Board Oversight of Sexual Harassment Risk in the Workplace

In her regular column on corporate governance issues, Holly Gregory discusses the role of the board in preventing and addressing sexual harassment in the workplace.

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Holly counsels clients on a full range of governance issues, including fiduciary duties, risk oversight, conflicts of interest, board and committee structure, board leadership structures, special committee investigations, board audits and self-evaluations, shareholder initiatives, proxy contests, relationships with shareholders and proxy advisors, compliance with legislative, regulatory, and listing rule requirements, and governance best practice.

The recent wave of high-profile revelations about sexual harassment in the workplace has put boards of directors of public, private, and not-for-profit organizations on notice that this conduct may be more prevalent than previously known. Sexual harassment in the workplace harms employee well-being and results in substantial risks and operational costs for a company. It is illegal, unethical, damaging to individuals, and bad for business.

Significant claims of sexual harassment by a senior executive or of a pattern of sexual harassment that is left unaddressed can damage a company's reputation, decrease its stock value, and trigger regulatory scrutiny, litigation, and potential legal liability. To mitigate these risks, boards should review their oversight practices to ensure that the workplace culture does not tolerate sexual harassment.

This article outlines the legal definition of sexual harassment and the circumstances that may create liability based on sexual harassment in the workplace. It also discusses recent guidance for boards from the Council of Institutional Investors (CII) and offers additional recommendations on preventing and addressing sexual harassment in the workplace.



Search [Sexual Harassment Toolkit](#) for resources to assist employers in minimizing the risk of sexual harassment in the workplace and defending against related claims.

DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is a form of discrimination that violates Title VII of the Civil Rights Act of 1964 (the Act) and state law. While it may take many forms, sexual harassment includes unwelcome sexual advances, such as physical touching, requests for sexual favors, and other verbal or physical conduct of a sexual nature that explicitly or implicitly affects an individual's employment, interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Sexual harassment can occur in a variety of circumstances. For example:

- The victim and the harasser may be of any gender, and the victim does not have to be of the opposite sex.
- The harasser may be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person who is harassed, but could be anyone who feels the effects of the offensive conduct. The victim also need not experience economic injury.
- The nature of the unlawful harassment does not have to be sexual. For example, it is illegal to make offensive comments about a person's sex, such as offensive comments made to a woman about women in general.

(US Equal Emp. Opportunity Comm'n, *Facts About Sexual Harassment*, available at [eeoc.gov](#); US Equal Emp. Opportunity Comm'n, *Sexual Harassment*, available at [eeoc.gov](#); see also US Equal Emp. Opportunity Comm'n, Notice No. N-915-050, *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), available at [eeoc.gov](#).)



Search [Equal Employment Opportunity Policy](#) for a model employee policy on providing equal employment opportunities, and prohibiting discrimination and retaliation, with explanatory notes and drafting tips.

LIABILITY FOR SEXUAL HARASSMENT

It is unlawful to retaliate against an individual for opposing discriminatory employment practices or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the Act (US Equal Emp. Opportunity Comm'n, *Harassment*, available at [eeoc.gov](#)). Additionally, a person or company can be held liable for aiding or abetting sexual harassment under the laws of most states.

An employer is automatically liable for harassment by a supervisor that results in a negative employment action, such as termination, failure to promote or hire, or loss of wages. If a supervisor's harassment creates a hostile work environment, an employer seeking to avoid liability must prove that it reasonably tried to prevent and promptly correct the harassing behavior,

and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. An employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (for example, independent contractors or customers on the premises), if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. (US Equal Emp. Opportunity Comm'n, *Harassment*, available at [eeoc.gov](#); see also US Equal Emp. Opportunity Comm'n, Notice No. 915.002, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), available at [eeoc.gov](#).)

Prevention is considered the primary way for a company to combat sexual harassment in the workplace. The possibility that an employer may avoid liability for sexual harassment if it shows that it made appropriate efforts to prevent and correct harassing behavior underscores the importance of:

- Creating and enforcing codes of conduct and policies that make clear that sexual harassment is impermissible.
- Conveying in corporate communications and training that sexual harassment is impermissible.
- Establishing grievance procedures and confidential reporting methods.
- Having a corporate culture in which employees feel free to report concerns.
- Taking timely action in response to any complaint.



Search [Anti-Retaliation Policy](#) for a model employee policy prohibiting retaliation and outlining the procedure for reporting retaliation, with explanatory notes and drafting tips.

Search [Sexual Harassment Prevention Training Checklist](#) for more on the issues an employer should consider in creating training to deter and prevent sexual harassment and related legal exposure.



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CII GUIDANCE FOR BOARDS

A recent report by CII provides guidance for boards on how to lower the risk of sexual harassment in the workplace (Rosemary Lally and Brandon Whitehill, CII, *How Corporate Boards Can Combat Sexual Harassment: Recommendations and Resources for Directors and Investors* (March 2018), available at [cii.org](#) (CII Report)).

The CII Report emphasizes the board's oversight role regarding corporate culture, which includes efforts to support respectful treatment of employees and to eliminate sexual harassment in the workplace. (For more on the board's oversight role regarding corporate culture, see National Association of Corporate Directors, *NACD Blue Ribbon Commission Report on Culture as a Corporate Asset* (2017), available at nacdonline.org.)

A central premise of the CII Report is that the board should review and strengthen the company's policies and procedures aimed at preventing and addressing sexual harassment in the workplace. In particular, the board should confirm that the policies and procedures are applied appropriately and evenly, and that reports of sexual harassment are brought to the board's attention early and investigated thoroughly, especially when the conduct at issue is that of an officer. (CII Report, at 6-8.)

The CII Report recommends that the board focus on specific areas, including:

- Personnel.
- Board composition and structure.
- Policies and procedures.
- Training.
- Diversity and inclusion.

PERSONNEL

According to the CII Report, a company seeking to create an environment that encourages employees to report sexual harassment needs HR and compliance personnel who can handle sexual harassment concerns with sensitivity and have a mandate to monitor corporate culture. Boards should understand and assess these efforts. While the CII Report recognizes that the details will vary from company to company, it suggests that companies and boards:

- Establish an executive-level position, such as a chief diversity and inclusion officer, with responsibility for day-to-day workplace, social, and institutional culture issues.
- Hire sufficient personnel to be accessible to employees to raise concerns and address violations.
- Ensure that employee supervisors (front-line managers) who respond to concerns are both approachable and knowledgeable.
- Encourage coordination between HR and the legal department to develop relevant policies on sexual harassment and diversity and inclusion initiatives.

(CII Report, at 5.)

BOARD COMPOSITION AND STRUCTURE

The CII Report recognizes that board independence and composition influence a company's ability to cultivate diverse perspectives and to hold individuals accountable when sexual harassment occurs. The CII Report recommends that boards consider enhancing their monitoring and management abilities by:

- Adding female and minority directors. The CII Report notes that many institutional investors and the Thirty Percent Coalition view boards that are composed of at least 30% women and minorities as having a "critical mass" of board diversity.
- Creating a board committee or subcommittee to work with management to establish and monitor metrics on diversity and inclusion.
- Requiring a high proportion of independent directors (which most public company boards already have) and instituting independent board leadership. While the CII Report does not advocate a particular form of independent leadership, either an independent lead director or an independent chair likely would satisfy this recommendation.

(CII Report, at 5-6.)

POLICIES AND PROCEDURES

The CII Report asserts that oversight of corporate culture is "a key board responsibility" that deserves "regular, routine discussion among corporate leaders" (CII Report, at 6 (quoting the *NACD Blue Ribbon Commission Report on Culture as a Corporate Asset*)). Hallmarks of an appropriate corporate culture include respectful treatment of employees, promotion of diversity, an absence of sexual and other forms of harassment in the workplace, and trust between employees, managers, and company leaders that makes employees comfortable raising concerns. To achieve this, the CII Report recommends that boards consider:

- Evaluating the corporate culture, systematically and on a regular basis, including by:
 - reviewing the company's history of sexual harassment reports, and seeking a detailed explanation if the reports identify repeat offenders. The board should evaluate the reports in light of the company's stated values and policies. The board should also ensure it receives reports of any sexual harassment-related settlements;
 - requiring employee surveys that include questions about the workplace environment;
 - assessing any company-specific risk factors for sexual harassment; and
 - discussing with counsel whether it is necessary to disclose incidents of sexual harassment to shareholders (and, if so, what information to disclose).
- Including sexual harassment risk in the workplace in regular risk assessments.
- Emphasizing that the company has zero tolerance for sexual harassment, and confirming that the company's policies reflect this. The policies should cover a range of topics related to corporate culture and sexual harassment, including office parties, consumption of alcohol, and disclosure of romantic relationships in the workplace. The policies should be disseminated to and accessible by all employees, and highlighted in regular company communications.

Evaluating Board Oversight of Sexual Harassment Risk

The CII Report highlights several issues on which a company's shareholders should focus when evaluating the quality of the board's oversight of sexual harassment risk in the workplace, including:

- How the board establishes the tone at the top of the company, and how that tone filters through the company.
- Whether the entire board discusses corporate culture on a regular basis, and whether a board committee has special responsibilities in this area.
- What mechanisms enable the board to learn about employee allegations of sexual harassment, and whether the board receives direct reports of employee sexual harassment complaints, including sexual harassment complaints against officers.

- What the company's procedures are for handling sexual harassment complaints, placing an accused individual on administrative leave, and protecting a complainant from retaliation.
- Whether the board or a board committee meets regularly with the head of HR and other officers who are responsible for workplace issues.
- Whether there is adequate staffing for HR functions that handle potential employee concerns regarding sexual harassment.

(CII Report, at 9-10.)

Board members should consider how they would respond to questions from the company's shareholders on these issues.

- Reviewing agreements with employees to ensure that sexual harassment triggers recoupment of executive compensation (particularly where issues are endemic) and that a violation of the company's policies on sexual harassment is a "for cause" termination.
- Ensuring that the company's standards regarding sexual harassment are considered in conjunction with any interaction with third parties, such as vendors and customers.
- Evaluating the adequacy of the procedures employees may use to report sexual harassment, including sexual harassment by an officer, to the board.
- Taking a more active role in overseeing the investigation of endemic issues or complaints against an officer or manager. "In some situations, particularly involving allegations against the CEO and other top officers, a formal or informal committee exclusively composed of independent directors should investigate, drawing on resources including non-conflicted outside law firms."

(CII Report, at 6-8.)



Search [Anti-Harassment Policy](#) for a model employee policy prohibiting harassment, outlining the procedure for reporting complaints, and prohibiting retaliation for harassment complaints, with explanatory notes and drafting tips.

Search [Romance in the Workplace Policy](#) for a model employee policy on romantic relationships in the workplace, with explanatory notes and drafting tips.

TRAINING

The CII Report recognizes the role that awareness plays in fostering a corporate culture that is free of sexual harassment.

Awareness may be raised through training about appropriate workplace behavior and relevant company policies. The CII Report recommends that boards require instructional, interactive training that is tailored to an employee's level of responsibility and includes a contact to whom the employee may address any questions or concerns. (CII Report, at 8.)



Search [Sexual Harassment Prevention Training for Supervisors: Presentation Materials](#) and [Sexual Harassment Prevention Training for Employees: Presentation Materials](#) for PowerPoint presentations for educating supervisors and rank-and-file employees at a US company on sexual harassment prevention and reporting.

DIVERSITY AND INCLUSION

The CII Report emphasizes the importance of a company's efforts to promote diversity and inclusion in establishing an environment in which the risk of sexual harassment is lessened. It therefore recommends, among other things, that boards oversee diversity-oriented hiring practices and set goals and performance metrics for these initiatives. (CII Report, at 9.)

ADDITIONAL RECOMMENDATIONS

The board should proactively inquire about the company's approach to preventing sexual harassment and handling complaints. The board should set clear expectations about the circumstances and time frame in which it should receive reports of complaints. The board should also review:

- **The company's policies and procedures, as written and as enforced.** The board should review the company's policies and procedures regarding sexual harassment and diversity and inclusion, whistleblower reporting avenues (including direct reporting to the board), complaint handling procedures,

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and training that employees and managers receive on these issues. The board should seek information from HR and the compliance department about the effectiveness of company policies, procedures, and controls, and confirm that the board learns of significant allegations in a timely manner.

- **The scope of board versus management responsibility, reporting lines, and escalation factors.** The company's policies and procedures regarding sexual harassment should be discussed in a board meeting at which the board's oversight role with respect to sexual harassment is reviewed with counsel. The board should examine whether management is actively engaged in risk management on this issue, how complaints are assessed, and what factors cause a complaint to be escalated to the board. Guidance on reporting a complaint to the board, or to an independent board committee, should be expressed in writing, and should distinguish between matters that are reported periodically (for example, on a quarterly basis or at a regular meeting of a board committee) and matters that must be reported immediately. The board should consider when and how corporate executives, HR personnel, and counsel can assist in determining the process for and scope of an investigation, and how a pattern of misconduct can be identified and escalated to the board before significant risk has attached.
- **The key responding personnel.** Given the high level of attention that is paid to sexual harassment claims involving officers and other high-level employees, the board should be prepared to address complaints quickly. It is helpful to identify in advance the key legal, public relations, and crisis management advisors who will assist the company in responding to these complaints.
- **Any history of misconduct and how it was handled.** The board should review and understand reports of sexual harassment or similar misconduct by members of the management team made within the past five years, and how these matters were handled. In addition, the board should review any complaints of any type lodged against officers, including the CEO and the CEO's direct reports, within the past five years by an employee and consider whether the concerns were handled appropriately. This review should

include consideration of whether prior complaints were handled pursuant to company policy and whether board-level reporting occurred (or should have occurred).

- **Public information sources.** There have been several recently reported instances in which the board only learned of allegations, including a pattern of wrongful conduct, from public information sources. While the board should expect to be timely informed of negative news involving the company, or of a serious complaint of sexual harassment, the board should also regularly scan the available public information sources for news involving the company.
- **The company's safeguards to prevent retaliation.** The company should have safeguards in place to prevent its employees (including HR personnel and front-line managers who respond to sexual harassment claims) from taking any action with respect to a complainant or investigation participant that could give rise to a retaliation claim. This is important not only to limit further liability, but also to create an environment in which employees feel comfortable reporting complaints.



Search [Preventing and Responding to Sexual Harassment Complaints Checklist](#) for more on the steps employers should take to prevent sexual harassment claims and minimize the risk of related litigation.

The views stated above are solely attributable to Ms. Gregory and do not necessarily reflect the views of Sidley Austin LLP or its clients.