

JENNER & BLOCK

# CLE RELAY

## Addressing Workplace Misconduct Claims in the Time of Rapid Cultural Change

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# Agenda

- Introduction
- Compliance Measures to Prevent Workplace Misconduct
- Conducting Workplace Misconduct Investigations
- Litigation Considerations and Other Risks
- Lawyers and Workplace Misconduct
- Hypothetical Case Study

# Introduction

- Criticality of workplace culture and what is changing
  - Impact of social movements
  - Effect of pandemic
  - Generational change
  - Increasing regulatory focus (e.g., SEC ESG rules and related comments)
- What do we mean by workplace misconduct

# The Shark Fin

- What to deal with ‘in the moment’
- Reporting mechanisms + Speak Up Culture = Prevention opportunity...but...
- Trust → “arrives on foot, leaves on horseback”
- Toxicity → risk

*“If you would like to know the financial health of the business in the moment, you look at the P&L – if you would like to know how well you will do in the future, you look at the happiness of your people”*

# Poll: Which risks have you faced in your own workplace culture?

- Sexual Harassment
- Racially Hostile Environment
- Lack of Speak Up Culture
- Other/None of the Above



# Compliance Measures to Prevent Workplace Misconduct

# Best Practices in Compliance

- Effective education for employees
  - Review (and improve) current materials and curriculum
  - Ongoing training
  - Consider value of in-person training
- Training (and re-training) managers
  - Management involvement is significant driver of liability
  - Well-positioned to see and stop or report misconduct on the ground
  - Educate, warn and set expectations
  - Keep records of problems with managers



# Best Practices in Compliance

- Robust and multiple reporting mechanisms
  - Well-publicized and easily accessible
  - Recognize that reports come in various forms
- Responding to reports
  - A prompt, empathetic response can prevent claims
  - Keep a record of all meetings and interviews
  - Consider using two interviewers
  - Create a public response action plan to have on standby



# Best Practices in Compliance

- Ongoing improvement initiatives
  - Evaluate how company has handled allegations in the past
  - Survey employees to assess satisfaction with compliance program
  - Review and revise handbooks and policies (and publicize updates)
  - Stay informed with legal and cultural landscape
- Consider
  - Multiple reporting channels for allegations of different degrees (e.g., problematic comment vs. physical contact)
  - Secured and ready access to information / document preservation
  - Independent board committee or designated board member



# Best Practices in Compliance

- Management

- Tone at the top promoting positive workplace culture and reporting
- Statement that company will investigate all complaints thoroughly and promptly
- Acknowledge the need to fight and address sexual harassment and other misconduct inside the workplace. No company is immune.
- Emphasis on anti-harassment *and* anti-retaliation
- Ensure confidentiality (with caveats)

- Anti-harassment policies

- Clear, consistent, well-communicated
- Consider pros and cons of “zero tolerance” policy
- Multiple mechanisms of distribution



# Social Media Compliance

- Companies are increasingly focused on employee social media risk
  - Potential source for workplace misconduct
  - And potential source of evidence
  - Intersection of employee personal and professional lives
- Strong social media policy includes guidance on
  - Social media conduct generally (professionalism, defamation, IP issues)
  - Disclosures, disclaimers, and conflicts of interest
  - Confidentiality and privacy
  - Consequences of policy violations



## Poll: How does your company address employee social media risk?

Policy on acceptable use

Training

Policy on acceptable use *and* training

Monitoring of employee social media accounts

Other

None of the above

# Conducting Workplace Misconduct Investigations

# Identifying an Investigator

- There are many options (consider a hybrid)
  - In-house counsel
  - HR
  - Non-lawyer investigators / consultants
  - Outside counsel
- Qualifications and expertise of investigators
- Make-up of investigative team (e.g., gender)
- Impact of privilege concerns
- Navigating potential concerns of reporting survivors

# What Does an Investigation Entail?

- Beginning an investigation
  - Develop an investigative plan
  - What to communicate – at the outset of the investigation – to the reporting individual, the reported wrongdoer, staff and other relevant constituencies
  - Measures to prevent further misconduct
- Document review
  - Communications (e.g., emails, text messages, screenshots of other messaging applications, social media posts)
  - Personnel files
  - Written complaints
  - Relevant codes of conduct and policies

# What Does an Investigation Entail?

- Identifying witnesses
  - Social media sites
  - Outreach to potentially represented witnesses/former employees
- Witness interviews (in general)
  - Upjohn warning
  - Encourage confidentiality to protect integrity of investigation
- Special considerations in interviewing alleged victim and alleged wrongdoer

# What Does an Investigation Entail?

- Credibility determinations
  - Balance objective search for truth and need to be skeptical with unique sensitivities and vulnerabilities of individuals involved
- Analysis of witness statements, evidence, applicable policies and other relevant information
- Final report
- Remedial measures
- Post-investigation steps



# Litigation Considerations and Other Risks

# Pre-Litigation Considerations

Litigation holds

Document preservation

Indemnification demands

Choice of counsel

# Other Litigation Considerations

- Social media contact rule
  - Lawyers may not use covert efforts to gain access to private social media pages
  - *E.g.*, lawyers may not use deception to “friend” a party
- Outreach to potentially represented witnesses/former employees
  - Model Rule 4.2 – “no contact” rule
- Remember who your client is
  - Model Rule 1.13(a): Organization as Client
  - “A lawyer employed or retained by an organization represents the **organization** acting through its duly authorized constituents.”

# Potential Litigation Considerations – Defamation

- Defamation claims in connection with workplace misconduct claims
  - Alleged victim
  - Alleged wrongdoer
- How can companies and investigators avoid defamation claim risk?
- Scope of liability

**Trump's denial of E Jean Carroll rape allegation was 'official response', justice department says**

**Writer says Trump defamed her when he denied rape but justice department seeks to substitute itself as defendant in case**



# Non-Litigation Risks

Loss of Trust

Employee risk

Consumer risk

Data risk

Loss of Time

# Lawyers and Workplace Misconduct

# Background on Workplace Misconduct Rules for Lawyers

- In 1992, the ABA adopted a recommendation resolving to take action on the issue of sexual harassment in the workplace and legal profession.
- The report, compiled by the ABA Commission on Women in the Profession, was released in the wake of Anita Hill's testimony during the Supreme Court confirmation hearings for Justice Clarence Thomas. Those hearings sparked a national debate about sexual harassment as a "matter of national concern" for the first time.



## Model Rule 8.4g

- “[I]t is professional misconduct to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”
- Prior to the adoption of this rule, the ABA Model Rules did not contain any express prohibition on lawyers engaging in workplace harassment or discrimination.
- ABA rules are not binding.
  - Lawyers are governed by rules adopted by courts in the jurisdictions in which they are admitted.
  - Only Vermont, Maine, New Mexico, and the US Virgin Islands have adopted Rule 8.4(g).

# Hypothetical Case Study

# #MeToo in the Workplace

- Issue is industry-agnostic – high-profile cases in science, media, entertainment, finance, education, and politics.
- This includes accusations against lawyers working in in-house legal departments.
  - *E.g.*, David Meltzer (American Red Cross) and Wayne Levin (Lions Gate Entertainment Corp.) (others likely, but not public)
- Report: Overall, while 72% of US employees are happy with their employers' efforts to stop sexual harassment, **more than 1/3 of Americans believe their workplace fosters sexual harassment.**
- NY Legislation: 2019 legislation that strengthens anti-harassment protections and lowers the barrier for claims of workplace sexual harassment to be pursued through litigation or an administrative tribunal.

# Nuances of Sexual Misconduct Investigations

- Requires nuance/expertise to address the given subject matter
- Employer must be aware not only of legal obligations but also of the perceptions about how it carries out those obligations
- An objective, unbiased and thorough investigation demonstrates the employer's commitment to an ethical culture, allows for complainants to be heard and provides due process to the accused
- Speed of exposure
- Expectation of *ethical* leadership
- New ways employers "should have known"
- Even claims without any legal basis can cause publicity and economic damage



# Poll: Which risks does your company consider in assessing sexual misconduct claims in the workplace?

- Employment law risk
- Defamation risk
- Consumer or shareholder risk
- Employee culture/morale risk
- Public relations risk
- None of the above



# Hypothetical Case Study

- The company's CEO is a hugely popular star who does or says something inappropriate (potentially illegal). Mainstream media attention is drawn, and the story goes viral on social media. Rumors and stories of past misconduct surface on social media, too.
- The business (the division and network to which the star is central) is very concerned about its programming as well as a future syndication deal.
- Corporate, especially legal, is worried about backlash across all platforms (as well as litigation risk). Corporate undertakes an investigation to address legal risk and discovers that some reports of a past pattern of misbehavior have foundation.
- The legal department within the business has, in fact, implemented a litigation strategy of settling prior allegations with non-disclosure agreements.
- The business and its lawyers have not communicated regularly or in detail about the problem. Because of success on both sides, the issues do not get elevated up the chain of command. Similarly, the business and its lawyers have not communicated regularly or in detail with corporate about this situation over time.

## Poll: Can the in-house legal department effectively investigate this matter?

Yes, they have the most background knowledge

Yes, no one in the legal department is alleged to have committed the sexual misconduct

No, they should hire outside counsel to report to the GC

No, they should hire outside counsel to report to the Board

# Questions to Consider

- How does the legal department navigate the tension with the business side?
- When do you stop being the litigator trying to resolve the case and start looking at the larger problem that may be beneath the surface?
- How do you bridge the divide between the legal process and business process when the company hasn't implemented a formal line of communication to do this?
- How do you approach investigating the allegations?
  - To whom do the investigators report?
  - Do you engage with witnesses over social media?
- What about the potential for litigation?

# Lessons Learned for Investigating in Times of Rapid Cultural Change

- Conducting investigations after the onset of the #MeToo movement presented new challenges
  - Who does the investigation?
  - Special issues with interviewing survivors
- Need to educate participants in the process
- Assessing credibility and making determinations when cultural touchstones are rapidly changing
- High profile and aggressive niche plaintiffs' bar

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