

CAUGHT BETWEEN A ROCK AND A HARD PLACE: #METOO MOVEMENT CREATES CHALLENGES FOR DIRECTORS

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The #MeToo movement continues to make headlines across the globe, toppling more than 200 powerful U.S. company leaders in entertainment, media, sports and a variety of other industries. According to EEOC reports, sexual harassment charges have increased by 14% and EEOC-filed lawsuits asserting harassment have increased by 50%. Larger amounts of cash are being paid to settle harassment suits, and those amounts may be minor compared to the reputational damage of being tried in the court of public opinion.

Directors have long grappled with how to oversee company "culture" and employee behaviors. Now many boards find themselves wedged between a rock and a hard place, as they struggle to balance the need for swift action when a complaint is made versus the need for appropriate due process rights for the accused.

Boards increasingly are expected to investigate stale and non-actionable claims and off-duty conduct. They are also expected to treat wrongdoers swiftly and severely. Employees and stockholders push for transparency in investigations, as boards temper the need for transparency with the risks of defamation, tort or other claims that may be brought by the accused, as well as personal privacy rights when dealing with controversial, off-duty conduct.

The potential unintended consequence of polarizing genders also must be monitored by the board. Recent research found that two-thirds of male executives hesitate to hold one-on-one meetings with women in more junior positions for fear they could be misconstrued. This behavior effectively deprives one gender of valuable mentorship and opportunities to interact with senior management. Boards need to ensure that executives and all employees understand that it is illegal to interact with and mentor only people like themselves.

While there are no easy answers to address the board's dilemmas in a #MeToo era, the following proactive steps may help mitigate the risks:

- Clarify the board's role in investigations and follow-up actions. Boards should oversee investigations and engage independent counsel to conduct the investigation.

- Boards should ensure company policies and the code of ethics are up to date with current industry standards and take a clear stance against sexual harassment and discrimination in the workplace.
- Boards should request reports of any allegation of harassment or misconduct involving the C-suite. To better understand a company's history of handling sexual harassment claims, a board may want to undertake an independent audit of allegations and investigations.
- Directors should attend training and support training of entry-level employees to C-suite executives. All participants should be informed that illegal harassment and discrimination at work will not be tolerated. Having a director make an introduction at the beginning of each training session can help emphasize the importance of fair treatment of all company employees.
- Boards should specifically assign oversight of cultural risks to a board committee, preferably with diverse members.
- Boards should regularly refresh board membership to avoid close ties with (and possible control by) management.
- Boards should seek to tie compensation incentives to cultural goals, in addition to financial goals, and consider clawback policies and loss of severance packages in harassment situations.
- Boards should ensure that everyone works together toward solutions to workplace problems, rather than making this a gender battle.

By following the proactive action steps above, boards should be better prepared to face difficult decisions in alleged harassment situations. They can decisively evaluate investigation results and act objectively and responsibly, in the best interests of the company, its shareholders and its employees. As society's expectations change and directors' decisions are increasingly scrutinized in hindsight, boards must work diligently to mitigate the risks of a #MeToo crisis.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers address challenges related to the #MeToo movement. If you or your organization would like more information on this or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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