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Best practices for investigating harassment claims in the #MeToo environment

Since the rise of the #MeToo movement, PR firms – and employers in all industries – are faced with increasing complaints of workplace harassment. The quality of a firm’s investigation can limit future instances of workplace harassment and decrease the risk of a legal claim. This article describes some best practices on how PR firms can respond effectively to claims of workplace harassment in the #MeToo environment to protect themselves and their employees.

●Look out for ‘informal’ complaints: #MeToo

First, consider whether a harassment complaint has been raised. This may be clear if a complainant identifies her or his workplace harassment complaint as such when bringing it to the attention of senior leadership or human resources. However, leadership should take seriously even informal or indirect complaints of workplace harassment. The firm should consider initiating an investigation if an employee posts on social media that he or she witnessed or experienced harassment, or if an employer learns about an incident secondhand or through a third party. Sweeping known issues in this context under the rug can lead to cultural, reputational, and legal liabilities for PR firms.

●Respond quickly: Include HR and communicate with the complainant

HR should immediately be notified of any allegations of harassment. HR will be able to offer guidance on appropriate next steps in light of company policies and any other potentially relevant ongoing investigations or historical personnel issues. Promptly tell the person who has registered the complaint that the company has received the complaint. Make sure the complainant feels heard by sending a short email that the firm was made aware of the complaint, takes all matters of workplace harassment seriously, and will be investigating the issue.

●Consider the proper investigator: When to engage outside counsel

Depending on the nature of the complaint and particular office dynamics, any combination of HR, senior leadership, or outside legal counsel may serve as an appropriate investigator. The decision of who should choose to conduct the investigation may depend on the employees involved in the alleged incident of harassment. If the accused is the firm’s CEO, managing partner, or other senior executive, it may be appropriate for the firm to engage independent outside counsel to handle the investigation. When outside counsel is engaged as an investigator for providing legal advice, conversations and notes regarding the investigation may be protected by the attorney-client privilege, which can encourage open communication while maintaining confidentiality around the investigation. However, particularly where a complaint is raised informally, an employer may choose to have HR or senior leadership at the PR firm conduct the interviews. Even in these instances, it may be appropriate to engage outside legal counsel to advise behind the scenes on such matters as the order in which the witnesses are interviewed and how documents and notes are maintained. In addition, when someone from the PR firm is conducting the witness interviews, it is important that an additional person attends the interviews to take notes and corroborate any information gleaned from the conversation.

●Conduct a thorough investigation: The five Ws

Stick to the “five Ws” when conducting an investigation into workplace harassment:

-Who are the complainant(s), alleged harasser(s), and potential witnesses?

Is the alleged harasser in a supervisory position, such that the complainant

may feel that the supervisor exerted improper influence? In most instances, the investigator should interview the complainant first, then any witnesses, and finally the alleged harasser.

-What is the allegation specifically?

Gather as many details as possible, while remaining mindful that it may be difficult for a complainant to discuss sensitive topics. What differences exist among the recollections of the people interviewed?

-Where did the alleged harassment take place?

Was it in the office? At a work-sponsored event? Knowing the location of the harassment will help identify additional witnesses and uncover evidence that may help corroborate differing statements about the alleged incident.

-When did the alleged harassment occur?

Was it during the work day? After hours? How long after the incident did the firm learn of it? If a long time has passed since the alleged incident, interviewees should encourage witnesses to consult with any contemporaneous notes or communication about the time in question, as their memories may be less reliable.

-Fifth and finally, the investigation should explore why the harassment may have occurred and how the firm can prevent future incidents.

Is the workplace harassment policy unclear or historically unenforced? Have employees received adequate training? Are there elements of the firm’s composition, such as a lack of diversity, which may contribute to the potential for workplace harassment? Could elements of the firm’s culture, such as the prevalence of heavy drinking at company events, increase the possibility of misconduct?

●After the investigation: Make corrective steps, maintain communication, and revisit preventative measures

Memorialize the investigation in a memo or clear notes. Seek legal counsel regarding any necessary corrective steps, such as disciplinary action against any employee who is found to have violated workplace harassment laws or company policies. Communicate the results of the investigation to the complainant and check in with the complainant periodically to make sure that he or she feels safe and supported in the workplace. Take care to avoid retaliation against the complainant, even if the investigation reveals that the complaint was unfounded.

Finally, revisit trainings, company policies, and other measures to prevent future instances of workplace harassment. New York and several of other states require employers to maintain proper harassment policies and provide regular trainings on preventing workplace harassment. In-person, interactive trainings are far more effective than webinars or lectures and will be required in New York City by April 2019. Trainings should be conducted by skilled legal counsel or senior HR professionals who can address the types of behaviors that may add up to unlawful harassment and the proper procedures for reporting harassment complaints.

When it comes to workplace harassment, an ounce of prevention is surely worth a pound of cure. ●

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