

# Alerts & Publications

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## Constructing a Workplace Environment That Rejects Sexual Harassment

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The political and cultural climate surrounding workplace sexual harassment is evolving faster than many companies can address or adapt to on their own. Internal and external stakeholders (management, employees, customers, clients, and business partners) have new and heightened expectations about what companies should be doing to prevent and respond to harassment—whether reported or not. Moreover, recent public campaigns against sexual harassment and assault (e.g., #MeToo, Time's Up) reflect a sea change in how individuals make allegations, how the media covers them, and how the general public views the remedy or response. While corporate policies and practices have long recognized the need for public accountability, today's companies now must prepare for direct public scrutiny of how they address workplace sexual harassment.

Companies are best served by looking at this evolving climate through a proactive lens. Board members and C Suite executives should be asking the hard questions: To what extent is workplace sexual harassment present in your company? Are there structural impediments to individuals reporting harassment, or to your company effectively responding to such reports? Beyond baseline policies, procedures, and training, what other interventions might help facilitate a culture of respect, diversity, and inclusion? Thoughtful answers can help identify—and dismantle—cultural norms that might initially appear unrelated but that allow workplace sexual harassment to fester and spread. Further, companies that meet these challenges head on may be able to leverage that success and establish themselves as corporate

leaders in diversity and inclusion—important factors in recruiting and retaining top talent in today’s marketplace.

## Related Practices

Labor & Employment  
Litigation  
White Collar Defense &  
Corporate Investigations  
Corporate Governance

### Where Is the Best Place to Start?

To begin, companies must expand the range of individuals focused on workplace sexual harassment and related issues. Workplace sexual harassment historically has been treated as a matter for HR, or perhaps in-house counsel, to resolve. These key players need to reach beyond their traditional enclaves and ensure that board members and C-Suite executives are aware of their company’s current practices for preventing and responding to allegations of workplace sexual harassment. For their part, board members and C-Suite executives must find ways to express a commitment to understanding the prevalence of these issues in their companies and addressing them appropriately. Buy-in from the top is essential for support throughout the organization; it sends an important message to internal and external constituents alike.

After obtaining buy-in, companies must rethink the problem of workplace sexual harassment and understand that, fundamentally, this is a problem of cultural norms. For example, if a company’s cultural norms create an expectation that harassers will not be held accountable for their actions, individuals who experience harassment will be less likely to report it. If harassment goes unreported, it becomes more difficult to hold harassers accountable for their actions. And, in the absence of reports (and faith in the effectiveness of a reporting structure), bad actors can engage in harassment with ease. For a company facing this issue, breaking the cycle is imperative. It requires the company to facilitate a workplace culture where employees feel respected and empowered regardless of any actual or perceived characteristic, including sex, gender, sexual orientation, or gender identity. As norms become more inclusive, employees are more likely to report harassment and expect accountability. Would-be harassers, in turn, will understand the consequences of unacceptable behavior, reducing the risk that misconduct will occur.

### How Does a Company Demonstrate its Commitment?

Every company has a different workplace culture, one that may be framed by its industry, leadership, location, recruiters, or other influencing factors.<sup>1</sup> For this reason, understanding a particular company’s needs requires a fact-specific assessment, which can then be translated into tailored recommendations. At a minimum, companies should ensure they have:

- **Written, Published Nondiscrimination Policies:** Companies should have a variety of well-publicized and easily located policies. These policies should address not just harassment and retaliation, but also equal employment opportunity, prohibitions against discrimination, protections for parental and family leave, and accommodations related to lactation.
- **Clear Complaint and Investigation Process:** Companies should establish and distribute information on their procedures for receiving

reports of, and investigating, harassment. The reporting process should provide multiple channels for complaints (e.g., designated trained ombudsmen, managers, HR, and external hotline), at least one of which provides a complainant with anonymity. The investigation process should be based on principles of fairness and equity.

- **Standard Training:** Key individuals, including managers, should be trained on the basics of the law, company policies, required actions, and how/when to engage with counsel.

Beyond those basic requirements to ensure compliance with the law, companies also should consider broader measures aimed at creating a diverse and inclusive culture that discourages workplace harassment in the first place:

- **Comprehensive Training:** Beyond typical training requirements, companies should train all employees about discrimination and harassment, including implicit bias. These trainings should encourage prompt reporting and emphasize the prohibition against retaliation.
- **Flexible Workplace Solutions:** Making flexible work arrangements available to all colleagues can improve the recruitment and retention of all employees. Companies should consider implementing policies that address reduced hours, flex time, and childcare support.
- **Sponsorship/Mentorship Programs:** Companies can take many different approaches to ensure that women and diverse employees have equitable opportunities for advancement through mentoring and sponsorship programs. Some approaches include: implementing mentoring programs and monitoring their effectiveness at increasing equal employment opportunities; establishing affinity groups and designating senior leaders at the company to serve as executive sponsors for the groups; hosting public events that highlight the career journeys and successes of women in your industry; providing leadership training; and engaging women leaders in your company through panels, brown bags, and internal mentoring circles.
- **Periodic Surveys and Assessments:** Companies need to understand what their corporate culture looks like and how that culture frames issues of diversity and inclusion. They also need to be appropriately transparent with their constituents about important takeaways and action plans drawn from their assessments. Consider a periodic cultural audit, engagement survey, or “pulse” survey that is pertinent to the experiences of women and diverse colleagues. Publish an annual diversity report internally and externally, and dedicate a portion of the report to results of the assessment.
- **Talent Review and Succession Planning:** Implement talent review and succession-planning programs with a specific focus on the experiences of women and diverse colleagues. Ensure qualified women and diverse colleagues are being identified for key roles. If there is a lack of diverse candidates, assess why that is and what your company can do to address the absence of such talent. This assessment could include screening job postings and descriptions for language known to deter

diverse candidates from applying for the position, whether as a new or internal candidate.

- **Chief Diversity Officer:** Appoint a Chief Diversity Officer and a supporting committee composed of senior leaders.
- **Change in Management:** These strategies for change will only be as effective as the individuals tasked with implementing them. Companies need to identify core managers who will take the lead. If members of an existing leadership structure are unwilling to prioritize these issues, consider how that unwillingness is affecting the company's ability to move forward and succeed in the marketplace in terms of talent recruitment and retention, as well as profitability.
- **Pay Equity:** An internal, privileged assessment of pay equity is an important undertaking in its own right, separate and apart from an assessment of workplace sexual harassment. Still, significant pay inequities at a company can indicate a larger cultural problem. Consider a formal program to assess pay equity, correct known pay inequities, and ensure equitable pay practices moving forward.
- **Incentives for Fostering Diversity and Inclusion:** Companies can implement a variety of incentives for promoting an inclusive culture. These might include: adjusting performance review metrics; spelling out objectives in job descriptions; and publicly recognizing individuals, both internal and external (such as vendors), who foster diversity and inclusion in a manner consistent with the company's interests and core values.
- **Industry Efforts:** Share your efforts with other companies in your industry and build a broader culture of diversity and inclusion. Collaboration will allow companies to share training programs and facilitate networking among participants.

### Are You Ready?

If you are ready to take a hard look in the mirror, you should begin with an internal, privileged assessment of your company's workplace climate that will elicit recommendations for moving forward. O'Melveny has the expertise required to assess and prepare recommendations tailored to your company, and can do so under the protections of the attorney-client privilege. These recommendations will be informed by our deep knowledge of workplace issues and our firsthand experience in key industries facing this cultural sea change, including clients in entertainment, banking and financial services, hospitality, technology, and education.

Where sexual harassment or assault allegations do arise, recent high-profile cases highlight the importance of a cross-practice approach. Companies will need to analyze such allegations in a manner that accounts for the different fronts upon which a company must respond. For example, in addition to considering traditional state and federal discrimination laws, a company will need to navigate the potential for related government investigations, shareholder litigation, governance issues, and claims by accused harassers related to process and privacy. This legal morass will influence possible public relations/communications responses to the allegations themselves, and a company will need legal counsel to work

closely with internal and external communications experts to achieve the company's business objectives while mitigating the various risks. O'Melveny is prepared to draw on the resources of its highly acclaimed litigators and counselors in multiple practice groups to steer companies through these issues, conduct internal investigations, advise board members, and defend companies in litigation.

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<sup>1</sup> This Client Alert makes US-specific recommendations. As always, clients should be cognizant of the law in applicable countries and localities when structuring their policies and practices.

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