



Are You Ready if a Sexual Harassment Scandal Hits Your Business? – Part III

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As outlined [in our earlier posts](#), business leaders are subject to increasing scrutiny in light of the national dialogue happening right now. This movement is not limited to the arena of celebrities and politicians. Does your business know what to do if allegations are lodged against your CEO or other critical managers?

Given the spotlight being shined on these issues, and the importance of ensuring a safe work environment free from unlawful discrimination, we have prepared a series of blog posts focused on relevant considerations for employers. So far, [we've discussed the basics of required anti-harassment policies and reporting procedures](#). We've [also covered a number of considerations when it comes to implementing those policies](#), to ensure your practices conform to the written policies and procedures. Now we'll shift our focus to discuss some steps to take when issues come to light. Below we outline some considerations as you approach investigations into potential workplace problems.

1. It's important to train managers, supervisors, and other decision-makers so they understand how to identify potential red flags. If any supervisor or decision-maker becomes aware of a complaint or potential misconduct, even if he or she learns of it indirectly rather than by someone making a formal complaint, the company is "on notice" of the problem and needs to take steps to prevent further issues. Therefore, supervisors and decision-makers must be trained to understand what triggers their responsibility to report allegations of possible harassment or discrimination.

- *Practical Pointer*: Under a typical anti-harassment/discrimination policy, the person(s) to whom to report allegations is clearly set forth, and involves Human Resources (or other trained decision-maker – but for purposes of this article, we'll refer to this trained individual as "HR"). Consistency in how your business handles these complaints is absolutely critical. Standard requests for information in a lawsuit involve how your company has handled other similar complaints (and sometimes not-so-similar complaints), so having the same person(s) handle these issues is strongly encouraged. If a complaint or potential misconduct involves an officer, executive, or other C-Suite employee, especially if that person is the supervisor of whoever receives and handles these complaints, your business should have a plan in place to involve legal counsel who has experience with workplace issues.

2. If an employee raises a potential issue, it is important managers are trained not to make any assumptions or jump to conclusions. Managers should encourage the employee to speak with HR, but they shouldn't require it. Regardless of whether an employee speaks with HR, once anyone on management is aware of the issue, the company is deemed to know about it and that manager MUST follow the reporting requirements and make it known. Even if the manager

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doesn't know who the employee's complaint might involve, report the information and let the process move forward from there.

- *Practical Pointer:* When a potential workplace issue comes to light, it is particularly important that management be mindful about what they put in writing. If a decision-maker has not been trained on how to appropriately handle an internal complaint, asking him or her to prepare documentation could be exacerbating the potential legal exposure. If a decision-maker is relaying sensitive information and also has questions about legal liability, they should copy in-house or outside legal counsel to protect those exchanges as privileged.

3. When an issue comes to light, some level of investigation is likely appropriate. A business should take a thoughtful approach to the planning process. One of the first questions you will need to consider/decide: who should conduct the investigation? Assuming a complaint involves an upper-level executive, it would be wise to engage your outside legal counsel to conduct or arrange for an independent, outside investigation.

- *Practical Pointer:* If litigation ensues, remember that the company may need to disclose details about the investigation in support of its defense, meaning the investigator is likely going to be a witness. We often arrange for legal counsel at another firm to conduct an investigation for our clients, when outside investigations are warranted; which allows us to continue representing our client without risk of waiving our privileged communications or having to withdraw as counsel because we are witnesses. (Similarly, sometimes we are engaged by a company for the limited purpose of conducting an investigation.)

4. An investigation should yield findings and conclusions about the underlying allegations, which are usually delivered in a final report from the investigator. Appropriate discipline, if warranted by the investigation's results, MUST ensue. It is a critically important defense to a company that is sued by an employee for harassment or discrimination that a thorough investigation took place, followed by appropriate corrective/remedial actions.

- *Practical Pointer:* Deciding the appropriate response to an investigation depends on numerous factors, such as the findings/conclusions of the investigation (Corroborated? Negated? Inconclusive?), any prior misconduct by the accused, past practices of the company, relative positions of the involved parties, and input from HR and legal counsel.

A company cannot be afraid to implement appropriate discipline when appropriate, which is why every investigation must be conducted impartially and professionally, in an effort to determine exactly what happened. The more transparent the process, coupled with an appropriate response to its results, the better equipped a business will be to mitigate disastrous consequences should the national spotlight on harassment hit your company.

If you have questions about or would like to discuss coordinating a potential workplace training or investigation, please contact [Megan Moritz](mailto:moritz@brownwinick.com) / moritz@brownwinick.com or [Mike Dee](mailto:dee@brownwinick.com) / dee@brownwinick.com.

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