

# KIRKLAND GOVERNANCE UPDATE

3 October 2019

## #MeToo Compliance — Two Years In, “Wait-and-See” Is No Longer An Option

### KEY TAKEAWAYS

- » Companies of all sizes and across industries should consider whether reputational and legal exposure from #MeToo issues can become enterprise-level risks.
- » If a #MeToo issue arises, a best-in-class workplace compliance program puts a company in a better position to demonstrate that it takes these issues seriously and that the problem is not systemic.

Over the past two years, the #MeToo movement has driven major societal change and reform, exposing areas for improvement in workplace compliance across the country. It has also led to a paradigm shift, turning allegations of workplace sexual misconduct at some companies from isolated HR matters into potential enterprise-level risks similar to the threats of cybersecurity breaches or corruption. Companies of varying sizes and across industries, including public and private companies, have seen allegations of sexual misconduct, particularly against senior management, rapidly evolve into corporate crises, and the consequences have included significant lost shareholder value, reputational harm, boycotts, litigation and even shareholder activism.

In light of these significant risks, boards and senior corporate leadership should consider upgrades to their workplace compliance and crisis response capabilities. Adopting best-in-class workplace compliance programs helps mitigate the potential risk of any misconduct occurring and can help stem any reputational or legal exposure if it does by demonstrating that the company takes these issues seriously, that the problem is not systemic, and is in fact directly contrary to its culture and values.

Below are five key proactive initiatives for companies to consider in the current environment:

- 1. Conduct a Risk Assessment.** Having an anti-harassment policy is important but may no longer be enough. Companies should consider a risk assessment to review existing workplace compliance policies and procedures and determine whether they are in line with changing laws and best practices, including enhanced employee anti-harassment training, clarification of managers' obligations to report complaints, and robust documentation and tracking of allegations.
- 2. Create Strong Reporting-Up Mechanisms.** The best intentioned workplace compliance programs are ineffective absent effective mechanisms to “report up” allegations without fear of retaliation. For instance, some companies are creating confidential reporting channels to the board of directors for sexual harassment allegations against senior management, as often the

normal channels lead to those same individuals. Such initiatives can be accomplished through specified email inboxes monitored by appropriate personnel.

**3. Ensure the Right “Tone at the Top.”** Boards and senior management should be proactive in establishing a strong “tone at the top” for appropriate workplace conduct and culture. This means that, in addition to establishing anti-harassment policies and trainings, senior management should consider whether to introduce and attend the trainings to demonstrate that these issues are of critical importance to the company. Similarly, boards should evaluate whether they should receive regular updates from senior management about workplace compliance matters, including the status of policies and trainings, as well as allegations of misconduct, particularly involving senior management.

**4. Enhance and Empower Legal and Compliance Functions.** Senior management should evaluate whether the company as a whole (including divisions and subsidiaries) is appropriately resourced with legal and HR personnel equipped to handle and track incoming complaints and sufficiently empowered to investigate. This becomes even more important for companies that operate with stand-alone divisions or subsidiaries. Senior management should also determine whether, if it does not already exist, a corporate-wide workplace compliance role is appropriate, and to whom that person should report.

**5. Establish a Crisis Response Protocol.** Flat-footedness or counterproductive crisis response can quickly turn an isolated #MeToo situation into a potential enterprise-level reputational crisis. A manageable problem can blossom quickly into a full-blown emergency if the initial void is filled with knee-jerk reactions in press releases, leaks or off-hand comments to reporters. Incomplete or premature responses could further destabilize an organization already on its back foot and may even contravene securities laws or other regulatory frameworks and create more legal risk. To ensure a streamlined response, companies should assemble a team of experienced crisis advisors, legal counsel, senior management and other internal stakeholders, game-plan responses to myriad potential situations, and periodically update the board and senior management.

---

If you have any questions about the matters addressed in this *Kirkland Governance Update*, please contact the following Kirkland attorneys or your regular Kirkland contact.

[Sarkis Jebejian, P.C.](#)

sarkis.jebejian@kirkland.com  
+1 212 446 5944

[David B. Feirstein, P.C.](#)

david.feirstein@kirkland.com  
+1 212 446 4861

[Shaun J. Mathew](#)

shaun.mathew@kirkland.com  
+1 212 909 3035

[Lauren O. Casazza, P.C.](#)

lauren.casazza@kirkland.com  
+1 212 446 4661

[Kim B. Nemirow, P.C.](#)

kim.nemirow@kirkland.com  
+1 312 862 3095

[Lisa Madigan](#)

lisa.madigan@kirkland.com  
+1 312 862 2374

[Erica Williams, P.C.](#)

erica.williams@kirkland.com  
+1 202 389 5044

---

*This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.*