



Ep. 12: The #MeToo Movement in the Corporate World

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Hashtag culture has become second nature to many, even outside the confines of social media. This is perhaps nowhere more apparent than with #MeToo.

Originally coined in 2006, this shorthand message of solidarity and shared suffering became a mainstay of Twitter and other such platforms, even achieving recognition among many who never use social media. The experience of harassment Me Too represents, as well as the higher visibility claimed by harassment's victims, are now a consideration—and a cause of concern—in boardrooms around the country.

This is the second in a mini-series of podcasts that delve into the topics covered in the 2019 edition of Akin Gump's annual *Top Ten Topics for Directors* report, and we have with us today Akin Gump labor and employment partner Lauren Leyden. Lauren's practice focuses on leading the labor and employment components of transactional and restructuring engagements, as well as advising clients on the acquisition and structuring of labor.

We'll be discussing Me Too and its significance in the corporate world, how boards can protect their company and employees, and how this concept is changing the workplace.

Welcome to the podcast.

Lauren, thank you for appearing on the show today.

Lauren Leyden:

Thanks for having me.

Jose Garriga:

This topic has been a mainstay of headlines and editorial pieces for almost two years. So, let's start with a little background information to set the stage for listeners. Could you sketch out the rise of the Me Too movement in the United States?

Lauren Leyden:

Sure. You touched on it a little bit in your introduction. There have been folks using this hashtag and supporting this movement, like the founder Tarana Burke, for over 10 years, but it really gained, I would say, national and international attention, in every boardroom and kitchen and home across the country during the news and the publicity surrounding the fallout from the Harvey Weinstein allegation, and I think that that really made the Me Too movement relatable to every person. They understood what people were talking about, because it was something that played out in newspapers, on TV and online for everyone to see.

Jose Garriga: Lauren, you mention Harvey Weinstein, and it seems that, at least initially, most of the news stories covering Me Too focused on the entertainment industry. A lot of big names, a lot of allegations concerning well-known people in front of and behind the camera. So, how then is it playing out in the corporate world?

Lauren Leyden: I think it gets maybe less publicity, or widespread publicity. Folks that, I think, sit in my shoes spend a lot of time reading about how it is playing out in the corporate world, and you see some of it in varying degrees. I think some of it has been in the newsstands, whether it's what the board has been dealing with at Uber, or when the Intel CEO decided to step down for a violation of their internal policy that's still on this subject matter, and we're seeing more and more in the news about how it's affecting our government, and how folks at Capitol Hill are sitting down—I saw this yesterday with Bernie Sanders—to discuss some of the harassment allegations in our government, and we're seeing a similar thing play out in the corporate world, where we are seeing more folks not just have these allegations come up, but even in places where there isn't a live claim, or a live allegation, you have whether it be your C-suite or your board coming to us and asking us these questions about, well, what if this does happen? Or getting calls from board members that they think something like this is happening, and what to do about it, because I think corporate boards are more attuned to this being the type of issue that is not something that they maybe advise and look over, but they don't get actively involved in. I think there is a recognition that when this involves, especially the C-suite, or depending on if the nature of the allegation is even below that, this is part of their responsibility at the board level.

Jose Garriga: That's a good point. A reminder, listeners, that we're here today with Akin Gump partner Lauren Leyden in the second of our *Top Ten Topics for Directors* podcast, and we're discussing the Me Too movement and the impact it is having in boardrooms nationwide. So, let's zero in a bit on that. You talked about boards being particularly cognizant of some of these issues. What are some of the steps a board can take, then, to protect the company and its employees?

Lauren Leyden: I think they fall into two general buckets. One is about setting a tone at the top and the culture, and the other is about being prepared. I think, boards in general, they do have a culture of their own, sometimes separate from a company, but they really help direct what the C-suite is going to reflect, and I think that, in the past, some boards maybe haven't taken the opportunity to make sure that their C-suite understands what they think of is necessary as the company culture, thinking that that is the role of the C-suite, rather than maybe a joint role between the board and the C-suite, and develop it.

Then I think it's about being prepared. Boards are better able to handle this if they have set up procedures, policies, thought about this, and I know it's a topic that nobody wants to think about, sort of hoping you don't get struck by lightning, but if you prepare for the lightning strike, you are better able to handle it if, God forbid, it happens, and I think that's important, rather than shying away from it. I think you want to prepare for it like you would any other type of top-level issue. You have plenty of board procedures and committees set up if there is a problem with the financial reporting. I would treat this exactly the same way, and every board's a little bit different, in terms of whether this would be more appropriately handled by the whole board or a committee.

I think the first step is to take a look at your governing documents and decide where this would fall, and if it's not already set forth, make it a game plan: This is what would happen. If we get this call, this is what happens. Okay, what do our policies and procedures look like, in the event of this situation, for what the board is supposed to do?

Do I notify the whole board right away? Do I engage in some fact finding as part of a committee first? Who's on that committee?

Also, looking at, and getting a report from, most likely, the general counsel. What are the procedures at the company level when there is this type of allegation, and making sure that it's not a procedure that isn't readily applicable to your C-suite. If the allegation is against, God forbid, the CEO, who do you go to complain to? Is it realistic to expect someone to go complain to HR in that situation? HR plays a different role in every company. You've got to think about that, and how much easier to think about that when you're not in the midst of, "Oh my God, I got this horrible allegation on this call. I've known this person for 20 years! I have all these emotions about it. What do I do? And I have to respond quickly."

You will make better choices thinking about this ahead of time, even though it is unpleasant. I would go as far, too, and develop a short list of outside counsel with this type of expertise. Boards do that all the time, like I said, if there's certain other types of crisis that hit, but you don't do it in this situation, and I would recommend doing it. That way you know who to call. You're not sending out feelers and trying to figure out what attorney you call. Who has the right expertise? Who is the right fit when you are on the clock and facing things that are emotional? Then you want to look at how you, as a board, would get involved. Would the board want to designate someone in the C-suite or in HR to do the investigation, maybe with the help of counsel? Does the board want to do their own investigation and potentially get involved in speaking to the folks making the allegations or the folks in the C-suite that the allegations might be against.

Now, I'm not suggesting in any way that the board would get involved if this was not at a level of C-suite or something similar, but the board wants to make sure that anyone that they might not be directly involved with, in terms of the investigation and the decision, because it just doesn't rise to a board level, there's still the right procedures in place. Maybe it's a 24-hour hotline, maybe making sure HR is filling the right role. So, it's the things that should be handled at the company level are being handled properly, from afar. And then I think you make a separate decision about what the board's role will be and how they fulfill that role if it rises to the level of allegations in someone in the C-suite.

Jose Garriga:

That's a great point. Preparedness, and it's something that I know we've run across, and I know it's discussed in terms of other crisis management scenarios, including things like data breaches.

Stepping back a bit, you talked a bit about attention on Capitol Hill and within the government on this. So, can we talk a bit about the law itself? To what extent can we say anything about the changes in the law regarding sexual harassment compared to actual changes in the workplace and in litigation environments?

Lauren Leyden:

There are, and this is something I hear a lot, right? the law hasn't changed in the sense that the conduct that we're hearing about was not okay five years ago. It's still not okay. We haven't broadened the definition of what is "misconduct." There have been some changes in the law—for example, I'm sitting here in New York, so I'm thinking of New York—but in terms of confidentiality restrictions or the ability to require arbitration of certain claims of this nature. So, there have been some legal changes that impact this area, but I think the biggest change is how these allegations are viewed both internally and externally.

It used to be that these allegations, like I said, they were always horrible. There was always misconduct. That hasn't changed, but there used to be, in my experience, a longer time where people went through the court case, or we went to the arbitration, and there was a determination of facts and credibility, and there was a longer window, where

people might have lived under a shadow of “Is this true, is this not true, what really happened here?” But there was a longer process before that direct impact was felt, whether because of the press or customer support or internal employee outrage and morale issues.

I think that time frame, and that ability to really get closer to the truth of what happened—not that I think we ever really know—has really collapsed on itself, and sometimes the allegation, being out there in and of itself, is damaging, and partially because it can suggest that there are controls in place that are not being used properly—that HR wasn't open or the general counsel's office wasn't equipped to deal with these complaints, didn't recognize them for what they were, and the world has decided that, that means there's a bigger problem there. And I agree, that is a bigger problem, but that used to not be the focus. The focus used to be, did this happen? did it not? We're going to see it play out in whether it's a settlement or a court case or an arbitration, or something like that.

I think, because of that is another reason why boards really need to be prepared about how confidentiality plays and being very cognizant in this situation of how you do an investigation—you should always do an investigation, but you do it in a way that doesn't make yourself unnecessarily—and in a way that's protective of, not just the company, but the people involved—open to folks going about things well before you've had a chance to even find out what's gone on: Is this a rumor? Is this a complaint? Sometimes it's not sure, and there are steps you can take, and I think, there's also an importance of understanding attorney-client privilege that happens between outside counsel and the board, and understanding how to protect that, because these things do, right? even though we're dealing with them in a much quicker timeframe these days, they ultimately still do end up in that court case or that arbitration. So, you always have to think about all of it.

I think, also, one thing that's hard—and that can be helpful by being prepared and taking some of the steps we discussed earlier about running these scenarios, and maybe deciding what works and what doesn't before an actual allegation happens—is being flexible in terms of the remedial steps. A lot of board members that I speak to have a gut reaction of, “I got a call. General counsel said that someone came in and complained about this against the CEO. I want the CEO fired.” Right? it's this gut reaction of absolutely no tolerance. And I think “no tolerance” is the right call for misconduct, but do you actually know if misconduct has happened, or do you have any indication that it has?

I think to avoid being stuck with just “you fire the person, or you don't fire the person,” there's a lot of steps in between that can be taken, and a lot of it depends on the fact finding and an investigation. So, knowing and having the comfort of you don't have to make that call immediately, but you do need to take immediate steps to get yourself into a position where you will make a decision, can really help, given this collapsed timeframe and the outside attention, which has been the biggest change, more so even than the law. I think that's one way that being prepared as a board can really help you deal with the changes that we've seen in our culture.

Jose Garriga: So, just to close, you've laid out a lot of really great information. What were the key takeaways, would you say, for corporate America regarding Me Too?

Lauren Leyden: Be prepared. That. I think if you hear one thing on this podcast—and I hope they listened to all of it [*laughs*—this is an opportunity to get ahead of things, and just because you discuss it as a board, and just because you get prepared, that is, I think, the most important step you can take. You are not opening the door for these allegations because

you get prepared. Asking these questions doesn't suggest that you think there is an issue.

It suggests that you want to make sure that there is not an issue, there won't be an issue, and that, God forbid, if there is an issue, you can deal with it in the best way that you're supposed to. So, I really think that engaging someone to guide a board through how this works and what they should do—or look into their own members who might have expertise in this area—is a really important thing, that all boards should be looking at doing, if they haven't done it already.

Jose Garriga:

Thank you. Listeners, you've been listening to Akin Gump partner Lauren Leyden. Thank you, Lauren. That was a terrific exposition and discussion of this critical topic. One that I know will continue to be on employers' and employees' minds for some time to come.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

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