

EMPLOYMENT

How Investment Managers Can Prevent and Manage Claims of Harassment in the Age of #MeToo

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In the nine weeks since the October 5, 2017, exposé in The New York Times regarding Harvey Weinstein and his reported settlements with various women, allegations of harassment have spread like wildfire throughout the country. From Hollywood to Capitol Hill, corporate America, investment managers and beyond, hardly a day goes by without new allegations emerging against additional male power figures. For the individuals and entities accused, the significant legal and financial risks are only part of the exposure; harassment allegations can ruin reputations and damage businesses long before claims ever get to a judge, jury or arbitrator.

Now is the time for investment managers to act. This article outlines the steps that investment managers should take to ensure compliance with applicable law and prevent future claims of harassment, including reviewing their equal employment opportunity policies, practices and training, and assessing and addressing any shortcomings in their office environments.

Asset Managers Are Prime Targets for Harassment Claims

In many ways, hedge funds and private equity firms are uniquely susceptible to harassment claims. Alternative asset managers are often relatively small in size; tend to lack a dedicated and experienced human resources professional; and may lack the types of formal training, policies and protocols that can help prevent harassment. Further, those employees tasked with human resources responsibilities often wear multiple hats and manage heavy workloads, creating an environment in which policy violations may fall through the cracks.

Meanwhile, an aggressive plaintiffs' bar relishes the opportunity to assert claims against investment managers, given the highly-compensated nature of many firm employees, the potential for an award of significant damages and the inclination of many managers to settle cases rather than risk taking them to a hearing.

How Advisers Can Mitigate the Risk of Harassment Claims

Maintain a State-of-the-Art EEO Policy

A well-drafted equal employment opportunity, non-discrimination and non-harassment policy (EEO Policy) is the starting point for avoiding claims of workplace harassment. In addition to clearly informing employees about a firm's expectations and its commitment to equal employment opportunity, an EEO Policy is a key component of a legal defense available to companies sued for harassment.

Under U.S. Supreme Court precedent, an employer can avoid liability for various types of harassment by (1) maintaining a compliant EEO Policy; and (2) properly investigating incidents of improper conduct and taking appropriate remedial action against offenders. Firms that fail to maintain an EEO Policy lose the ability to assert this defense and leave themselves exposed if and when untoward conduct occurs.

It is not enough, however, for a firm to simply have an EEO Policy; a firm must ensure that its policy is up-to-date and consonant with applicable law. In New York City, for example, the standard for establishing a hostile work environment claim is different (and more lenient) than the standard under federal law. Policies that are drafted based on federal law, or that have not been updated in recent years, may set forth the wrong legal standard and undermine the policies' effectiveness. In addition, a properly drafted harassment policy should prohibit all demeaning or improper conduct – even if the conduct fails to rise to the level of a legal violation.

An EEO Policy should also be strategic and maximize a firm's ability to process and respond to internal complaints. Policies should direct complaints to a handful of specific, trusted firm personnel who can treat those matters with the appropriate degree of urgency, discretion and care. Diffuse policies – such as those permitting aggrieved employees to report concerns to "any supervisor" – tend to be less effective in ensuring complaints are appropriately documented, investigated and redressed.

An EEO Policy should be broad enough to cover conduct outside the office, including offsite meetings, firm-related social events and business-related travel. A policy should also contain a strict anti-retaliation provision, prohibiting reprisals against anyone who files or pursues a complaint or participates in an investigation.

Provide EEO Training

Another element of an effective anti-harassment program is the training of firm personnel regarding equal employment opportunity, discrimination and harassment issues.

In some states, like Connecticut and California, certain anti-harassment training is mandatory for larger employers.[1] For the vast majority of investment managers, however, these trainings are voluntary. Perhaps because of the relatively small size of many managers, along with the less formal and routinized human resources processes at these firms, harassment training is far less prevalent in the investment management space as it is in corporate America. In light of the events of the past few months, however, training is likely to become more commonplace, with a recent spike in firm requests for anti-harassment training.

As is the case with EEO Policies, however, it is not enough to simply have training. Firms should ensure that this training is meaningful for attendees, with examples that are relevant to the investment management industry as well as with clear and important takeaways for firm personnel. Training should focus not only on the law, but on a firm's own policies and on how employees can report instances of potential misconduct. The training for supervisory-level employees should focus on the important role those individuals play in preventing and redressing misconduct. Training should be conducted in a way that highlights the importance of equal employment opportunity, while also not misleading employees into believing that every cross look or piece of critical feedback violates the law.

Ensure Robust Responses to Reports of Improper Conduct

The best EEO Policies are all but useless if they are not followed in practice. Particularly in today's environment, firms should ensure that improper conduct is not brushed under the rug or permitted to fester. Instead, all reports of inappropriate conduct should be promptly investigated, and individuals who violate the firm's EEO Policy should be appropriately disciplined, including in connection with year-end reviews and compensation decisions.

Firms should also ensure that those who come forward with complaints or participate in an internal investigation are not retaliated against in any way – either tangibly or with a “cold shoulder.” As noted above, the equal employment opportunity law affords firms a unique defense in that, even after improper conduct has occurred, firms can often avoid or limit liability by responding appropriately. Firms should not squander this defense through inattentiveness to complaints or by permitting reprisals against those who complain or participate in internal investigations.

The Tone at the Top

While well-crafted EEO Policies, effective training and the prompt investigation and remediation of internal complaints are key pieces of an effective anti-harassment program, there is no substitute for an exemplary “tone at the top” in fostering a positive firm culture. Founders and other members of senior leadership at investment managers tend to have outsize influence throughout their organizations, with employees taking their cues regarding the bounds of acceptable conduct from firm leaders. Senior management, therefore, can meaningfully lower their firm's risk-profile by “walking the walk,” demonstrating a commitment to a respectful workplace through the manner in which they comport themselves and requiring the same commitment from those around them.

The tone at the top is important not just within the four walls of the office, but at other firm-related events and gatherings. Holiday parties, happy hours and other formal and informal social events (particularly ones at which alcohol is served) can be petri dishes for claims of improper conduct. Firm leaders should try to set an example for permissible behavior at these events and clearly communicate their expectations to other firm personnel.

Further, firm leaders should set their sights beyond merely preventing harassment, to promoting equal employment opportunities more broadly. They should strive to create an atmosphere of equality and respect, from promoting pay equity for comparable services across job categories, to creating diverse membership on firm committees, mentoring firm personnel and encouraging managers to consider all employees when planning formal and informal firm social events. The healthiest firm environments are those in which all employees feel valued and that they are judged on their merits, and where an exclusive “boys club” mentality is unwelcome.

See [“Evaluating Pay Equality: Steps Investment Managers Should Consider to Avoid Running Afoul of Equal Pay Laws”](#)
(Nov. 30, 2017).

Consider Dispute Resolution in Advance

Of course, even the best policies and protocols cannot always prevent legal disputes, including claims of discrimination or harassment, from arising. Investment managers should be proactive in considering the venue in which claims should be resolved, including whether a firm prefers a judicial or arbitral forum and, if the latter, the rules that should apply to any arbitration. Arbitration provisions vary widely in content and scope, and if a firm’s existing provisions are sub-optimal – or, worse, unenforceable – the single worst time to discover it is after a dispute has arisen.

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