

What To Keep in Mind For Cultural Reviews In The #MeToo Era

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JULY 17TH, 2018



In the wake of the #MeToo movement and broader conversations about sexual harassment and wage discrimination, many financial institutions are wondering whether any of these issues are affecting their organizations and, if so, how to address them.

Addressing specific incidents of sexual harassment or gender inequality is critical. But it is equally important to determine whether such incidents are symptomatic of deeper cultural or systemic issues. To assess this question, financial institutions are increasingly turning to internal cultural reviews. These reviews, in which investigators assess workplace cultural trends, can be a potent tool for identifying, understanding, and correcting issues affecting women in the workplace.

Many financial institutions are rightfully proud of their internal culture. Others may be less focused on culture. In either case, there could be significant value to conducting an internal cultural review, which can either identify the root cause of known problems, reveal previously unknown problems, or verify there truly are no serious issues. With that information, **institutions can not only more effectively understand and, if necessary, improve their internal culture**, but also mitigate legal and reputational risk, especially at a time when bank regulators are beginning to pay more attention to these issues.

Still, in conducting a cultural review, a financial institution must be prudent and balance the benefits of obtaining meaningful information with the risk of creating additional exposure. A well-developed investigation plan can address those concerns.

Maintaining confidentiality

An important factor in deciding to conduct a cultural review is the extent to which the institution can keep the results confidential. If not handled properly, the benefits of an investigation can be significantly outweighed by the potential risk of private plaintiffs obtaining the results or underlying documents in litigation. To mitigate that risk, many institutions choose to engage outside counsel to perform a privileged investigation. While privilege over an internal cultural review cannot be guaranteed, particularly if there is not a current threat of pending litigation, attorneys often can structure the review so as to maximize privilege protections.

Determining the client

In deciding to undertake a cultural review, the institution also should consider whether to conduct an “independent” review or one undertaken by company counsel. Because there are advantages and disadvantages to each approach, a financial institution should discuss with its counsel which approach is better, given the specific characteristics of that institution.

Defining the scope of the review

Unlike investigations into discrete instances of misconduct, the scope of cultural reviews can be potentially overwhelming. To obtain meaningful results, the cultural review’s scope must be well defined. Financial institutions should work closely with those performing the review to focus on the institution’s most important cohort. For example, depending on the institution, the review can assess a specific population, jurisdiction or line of business. If no one cohort appears an obvious choice, then institutions can also review specific data to help define the review’s scope. The investigation then should be designed to answer specific questions.

Identifying and reviewing relevant information

Once the scope has been determined, investigators will begin collecting and assessing relevant documents, such as, workplace discrimination and harassment policies, HR records, employee surveys, training programs, and prior efforts to improve culture. Other information also may be relevant, such as promotion rates for women and men in a particular area.

In addition to documents, investigators should speak directly with employees. In selecting those to be interviewed, investigators often will speak with executive management and both affected and unaffected employees. Employee interviews provide complementary insight, which allows investigators to understand the bigger picture. Interviews can be helpful in obtaining data about the institution's culture, which can be difficult to ascertain from documents alone.

Consider engaging an outside consultant

Law firms experienced in conducting cultural reviews often retain consultants to assist in the review. There is a substantial argument that, under appropriate circumstances, the consultant's work is protected by the work product doctrine and, thus, less vulnerable to disclosure to private plaintiffs. Consultants may provide quantitative and qualitative data based on employee surveys and focus groups, conduct pay equity analyses or implement a platform to facilitate the submission of employee complaints.

The takeaway

There is no one-size-fits-all approach to cultural reviews, and each financial institution interested in conducting a review should carefully consider the best strategies to meet its individual needs. However, at a time when the #MeToo movement has significantly raised the legal and reputational stakes, financial institutions should not ignore the benefits that an internal cultural review can provide.



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