SLAUGHTER AND MAY/

WORKPLACE MISCONDUCT: IDENTIFYING AND HANDLING RISK

CRISIS MANAGEMENT
Part of the Horizon Scanning series

The character and conduct of business leaders has become an increasingly topical issue – a trend compounded by a string of high-profile resignations triggered by the personal conduct of senior figures. It is not only the individuals', conduct that makes headlines; organisations and how they respond to and investigate this conduct are also in the spotlight. In a landscape of increasing scrutiny and changing attitudes on what conduct is acceptable, organisations need to understand the various factors in play and adopt effective measures to address them at an early stage.

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OVERVIEW OF REGULATORY REGIME

The conduct of directors and other senior figures is governed by an expansive regime which stems from a range of different sources, including:

- directors' duties, contained in the Companies Act 2006 and accompanying case law;
- contractual provisions in, for example, the employee's employment contract;
- company policies, which often cover topics including equity and inclusion, workplace behaviour, discipline and reporting;
- the Senior Managers and Certification Regime (SM&CR), which requires relevant firms to assess the fitness and propriety of certain employees and corresponding conduct rules; and
- the Equality Act 2010, which seeks to protect people from discrimination and harassment.

This regulatory regime continues to adapt and grow. For example, the Worker Protection (Amendment of Equality Act 2010) Act 2023 imposes a new duty on employers to take reasonable steps to prevent sexual harassment.

EXPOSURE FOR COMPANIES AND BOARDS

The need for companies and boards to effectively address inappropriate personal conduct is heightened by their exposure to significant risks.

- Legal: misconduct within organisations can lead to legal claims brought by colleagues, and to difficult legal situations when deciding how to deal with the individual in question. The range of legal issues that can arise from instances of misconduct includes whistleblowing and related claims, victimisation and harassment claims, discrimination claims, constructive and/or unfair dismissal claims and in companies subject to FCA and/or PRA regulation, difficult questions relating to how and when to report misconduct to the regulators, and the attendant risk of challenge from the person who is the subject of the report.
- Regulatory or criminal investigation: poor conduct could trigger one or more regulatory regimes, such as those set out above, and serious misconduct such as sexual assault, theft, or financial impropriety, may lead to criminal investigation.

- Reputational: irresponsible actions, unethical business cultures and an ineffective response by the organisation, can seriously damage the trust and confidence of a business' stakeholders, including staff, investors and customers.
- Financial: workplace misconduct can damage a company's share price and create significant financial costs, for example those resulting from disruption and turbulence amongst management and possible follow-on litigation. Claims for discrimination and harassment also attract unlimited compensation.

REDUCED TOLERANCE

The likelihood of exposure is much higher now than in the past. Staff and investors feel more empowered to raise issues, and there is greater connectivity and media interest. Plus, stakeholders have less tolerance for poor behaviour, including behaviour that doesn't have a criminal element or otherwise falls below the level of producing a legal claim.

There is also evidence of regulators taking workplace misconduct more seriously. The FCA and PRA, for example, have recently published consultation papers that target improving diversity and inclusion. They are also proposing more comprehensive guidance on non-financial misconduct and to expressly include it within their conduct rules and fitness and proprietary assessments. Similarly, the Equality and Human Rights Commission has been active, recently undertaking investigations of, and reaching agreements with, McDonald's Restaurants Limited, Jaguar Land Rover Ltd and Sainsbury's.

WORKPLACE RELATIONSHIPS

The increased level of exposure has also been felt by a number of companies as a result various failures by senior figures to disclose past relationships with employees.

The effects of such departures demonstrate how important it is for businesses to manage and be seen to be managing the risks – both present and future – associated with workplace relationships or other conduct of this kind. A company might, for example, require any workplace relationships to be disclosed, or it might impose a ban on such relationships.

BEST PRACTICE

Given the increased focus on improper management and conduct, companies ought to be thinking about best practice. There is a general trend towards greater transparency, but companies could also consider:

- recruitment processes, and what qualities to look for when hiring new employees;
- creating codes of conduct, and reviewing these at regular intervals;
- developing effective whistleblowing mechanisms;
- putting in place a dedicated investigations team and processes - which can be relied on if an investigation is needed; and
- if the alleged conduct involves a criminal or regulatory element, what that means for the investigation and whether any reporting obligations have been triggered.

Please speak to your Slaughter and May contact for further advice about how to adopt better practice, prevent workplace misconduct and how to deal with it if it arises.

CONTACT US TO FIND OUT MORE

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