

Asking the Right Questions: How Corporate Boards Can Better Respond to Race Discrimination and Harassment

Directors should proactively—and comprehensively—assess their programs with a critical eye, just as they do in other areas of compliance.

By Preston Pugh and Michelle Onibokun

Even in the wake of the COVID-19 pandemic, recent headlines have been rife with stories about racial tension, incidents of violence and **civil unrest**—as some corporate board directors have coined it, “**a crisis within a crisis.**” Comparable in some ways to the #MeToo movement, pressure is mounting for corporate **boards** to tackle racial injustice in the workplace, promote a truly inclusive environment, and rewrite company policies to make it clear to internal and external stakeholders that there is no room for racial discrimination or harassment. Leaders **know** that if companies do not strengthen their policies in this changing environment, they risk not only violating discrimination laws, but also the reputational damage that comes from alienating potential customers, investors, and the public.

Conventional efforts to address racial discrimination and harassment are of course not new, but there is mounting evidence that they have not been **enough**. Increasingly, there are calls for a new framework, new tools, and a better way to engage employees to address the problem. Experienced board directors know that searching for the prototypical “smoking gun” to uncover racism in the workplace often falls short, as “**treat-**
ing people unequally because of their race ... often manifests in more subtle ways, such as the



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assignments workers are given, the pay or benefits they receive, and the ways their performance is judged or rewarded.” Increased research and awareness around the **consequences** of implicit bias have made this **clear**.

This imperative for creative thought leadership and action is similar to the start of the 2017 social media conversation about the #MeToo movement. Up to that time, corporate directors were not accustomed to dealing with harassment and discrimination issues unless they reached crisis level, which was rare. However, the rise of social media made those issues much more likely to become crises. In short, it amplified them. Stories that previously spread over a long period of time, now spread in minutes, resulting in a close to immediate impact on many different stakeholder groups. Tellingly, in a recent **study** by the Institute

for Crisis Management of more than 760,000 crisis news stories, discrimination cases accounted for more than 11% of stories in 2019, and that was before the events from this past summer.

So, how should directors operate in this new environment? When dealing with other types of compliance issues, leaders have long understood the importance of establishing the right tone at the top, as the right tone shapes the broader corporate culture and sets an example that other employees strive to follow. This is equally true when companies address race discrimination and harassment; if midlevel managers and other employees doubt the board's or senior management's commitment, the "tone from the middle" and "echo from the bottom"—both critical parts of stemming harassment and discrimination—will be in disarray.

Further, setting the right tone is more than a one-time statement by the board. It is instead a dynamic activity, including, among other things, how the board itself behaves both inside and outside the corporation, how it conducts meetings, the quality of its discourse, and the honesty of its assessments of the company. It requires the board to continue to ask the right questions of the companies they oversee, and ensure that senior management does too.

And what might those questions be? As discussed in "**A More Effective Way for Corporate**

Excerpts From DOJ's Evaluation of Corporate Compliance Programs

- "What methodology has the company used to identify, analyze and address the particular risks it faces?"
- "What information or metrics has the company collected and used to help detect the type of misconduct in question? How have the information or metrics informed the company's compliance program?"

Boards to Respond in a #MeToo World," guidance used in other contexts, particularly in dealing with other types of compliance issues, can be helpful. Among the guidance that has been issued, the "**Evaluation of Corporate Compliance Programs**" by the U.S. Department of Justice is one of the best. Audit committees and others focused on anti-corruption and combating fraud are no doubt familiar with this guidance, but it is not specific to any particular field and provides helpful insight when evaluating compliance programs of any type. It is focused around three fundamental questions that are outlined in its first two pages:

1. Design: Is the program well designed?
2. Function: Is the program adequately resourced and empowered to function effectively?
3. Accountability: Does the program work in practice?

Directors can start with these three questions to gain a better understanding of their companies' anti-discrimination and harassment programs. However, the inquiry should not stop there. Directors should proactively—and comprehensively—assess their programs with a critical eye, just as they do in other areas of compliance. The DOJ's guidance provides additional questions that directors can use to begin that process, as shown below.

Additional Questions Tailored to Prevent, Detect and Respond to Racial Discrimination

Risk Assessments, p. 3

- Has the company identified and analyzed the specific discriminatory risks that it faces? What methodology has the company used to address these risks?
- What metrics specific to discrimination does the company use? How have those metrics influenced the company's discrimination procedures? Are those metrics reported to the company's board of directors?

Training and Communications, p. 5-6

- “What training have employees in relevant control functions received?”
- “Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred?”
- “What analysis has the company undertaken to determine who should be trained and on what subjects?”
- What types of training have been provided to supervisors, employee relations and higher management? Does the company provide respectful workplaces training?
- Does the company provide additional training for officers and key employees?
- Has the company determined which parts of its business experience the highest rate of racial discrimination claims, and have additional measures been taken to effectively train employees in those

Training and Communications, p. 5-6

- “How has the company measured the effectiveness of the training?”
- “What has senior management done to let employees know the company’s position concerning misconduct?”
- “What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company’s policies, procedures, and controls?”
- parts of the business? Have the EEOC’s recommendations from its June 2016 Report on the Study of Harassment in the Workplace been reviewed and adapted for the company?
- How frequently, and in what manner, do company leaders speak about the company’s anti-discrimination policy?
- What “lessons learned” have been communicated throughout the company when a key employee or company officer is terminated for violating the company’s anti-discrimination policy?

Effectiveness of Reporting and Tracking Results, p. 6-7

- “How has the company collected, tracked, analyzed, and used information from its reporting mechanism?”
- “How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information
- After a discrimination complaint is received, how does the company determine who should review and investigate the complaint to ensure that the investigation is fair and conflicts of interest are avoided?
- Who has access to complaints and investigative information? How does the company handle allegations of racial discrimination by employees in the control functions, such as compliance or HR?
- Has the company audited its reporting mechanisms by placing a complaint through the hotline and determined whether the correct protocols are followed?

Management's Commitment, p. 10

- "How have senior leaders, through their words and actions, encouraged or discouraged ... the type of misconduct involved in the investigation?"
- "What concrete actions have [the leaders and other stakeholders] taken to demonstrate leadership in the company's compliance and remediation efforts?"
- "Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?"
- Are leaders at all levels helping to instill a clear and consistent message of compliance with the law? How are leaders communicating this message to the rest of the company?

Autonomy and Resources, p. 11-12

- "Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? ... How does the company ensure the independence of the compliance and control personnel?"
- "Who reviews the performance of the compliance function and what is the review process?"
- Who determines the compensation, bonuses, discipline, and promotion of compliance personnel?
- How have decisions been made about the allocation of "personnel and resources within the compliance" and relevant control functions?
- Have there been "specific instances where compliance raised concerns" or objections in the area in which the wrongdoing occurred? How has the company responded to such compliance concerns?
- Does the company have a chief human resources officer or an equivalent who reports to the board?
- Is the company's compliance function properly staffed and trained to handle discrimination complaints?
- Does the board of directors periodically review selected responses by the compliance or HR team to ensure adequacy and consistency?
- Who has the authority to agree or disagree with investigative findings by the HR team? Who is the final decision-maker?

Analysis and Remediation of Underlying Misconduct, p. 13-18

- "How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?"

Analysis and Remediation of Underlying Misconduct, p. 13-18

- “Has the company outsourced all or parts of its compliance functions to an external firm or consultant? ... How has the effectiveness of the outsourced process been assessed?”
- “What is the company’s root cause analysis of the misconduct at issue? Were any systemic issues identified?”
- “Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations [of similar issues]? What is the company’s analysis of why such opportunities were missed?”
- “What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?”
- The independence of investigations is important in every case, but particularly key where discrimination allegations are against a high-ranking or -performing employee who may receive significant protection from inside the company. What steps does the company take to protect the integrity of its investigative process? Are external investigators consulted for sensitive investigations?
- In discrimination investigations, does the company assess the full scope of the problem, i.e., whether it is solely caused by one person, or whether it is accepted practice in the business unit at issue?
- If there were systemic issues that led to a culture where discrimination was not prevented or detected earlier, why were those opportunities missed?
- Have the disciplinary actions been consistently applied across the organization? Have new protocols been implemented to improve training and reporting protocols?

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