

#MeToo Pressure On UK Businesses Is Set To Rise

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In the United States, the #MeToo movement has transformed sexual misconduct in the workplace from a human resources issue to a core business risk. A spate of high-profile scandals, and related litigation and enforcement developments, have caused sexual misconduct and harassment to receive increased attention at the board level, and substantial resources are being devoted to identifying and remediating the workplace culture issues that allow harassment to occur.



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As a prior Law360 article highlighted, the approach to investigating specific allegations of sexual misconduct has shifted, with many companies now engaging white collar investigations lawyers to lead investigations that would likely have been managed by employment lawyers or internal human resources departments just a few years ago.



Helena Milner-Smith

Two years on, the effects of the #MeToo movement are increasingly being felt in the U.K. This is particularly true in the financial services sector, following recent declarations by the Financial Conduct Authority and Prudential Regulation Authority that sexual harassment and other forms of nonfinancial misconduct may give rise to consequences under the Senior Managers and Certification Regime, which was extended to approximately 47,000 additional firms on Dec. 9.



Sarah Crowder

More broadly, recent media reports and regulatory warnings across a range of sectors, and legal reforms being considered by the U.K. government, have left many U.K. companies wondering what they should be doing to evaluate workplace culture and address sexual harassment and misconduct issues.

The SMCR has a central role in the increasing focus on culture in the financial services sector.

Following the 2008 financial crisis, the FCA made reforming culture and governance in the financial services sector one of its core priorities, based on its view that culture was a key root cause of the conduct failings that had occurred within the industry.

Culture and governance have since featured prominently in the FCA's annual business plans, speeches and other publications, including a March 2018 discussion paper titled "Transforming culture in financial services." The PRA has similarly focused in recent years on using its formal powers to address serious failings in the culture of firms, on the basis that such failings have the potential to impact the PRA's core regulatory objectives.

The SMCR has been a central feature of the increasing regulatory focus on firm culture. Introduced in the banking sector in March 2016, and subsequently extended to the insurance sector in December 2018, the SMCR now applies to all firms authorized under the Financial Services Market Act 2000.

In broad terms, the SMCR increases the accountability of senior managers by making their roles and responsibilities more visible to regulators, which in turn enables regulators to more easily identify the key responsible individuals in the event of regulatory breaches. More specifically, the SMCR imposes the following requirements:

- Senior managers who perform key roles with the greatest potential to cause harm or impact market integrity must be approved by the FCA or PRA, and firms must ensure that they are fit and proper to perform their roles. FCA guidance indicates that a fitness and propriety assessment should consider, among other things, the individual's honesty, integrity and reputation. Further, firms must prepare a statement of responsibilities for each senior manager, which clearly sets forth the areas for which he or she is responsible, and management responsibilities maps describing how responsibilities have been allocated across the firm. If a firm breaches an FCA or PRA requirement, the senior manager responsible for the relevant area may be held personally accountable (in addition to the firm itself) if he or she did not take reasonable steps to prevent the breach.
- Certification functions are functions other than senior management functions that could have a significant impact on customers, the firm or market integrity. Individuals who perform certification functions do not need to be approved by the FCA or PRA, but the firm is responsible for assessing whether they are fit and proper.
- Individual conduct rules apply to most employees, and additional senior manager conduct rules apply to senior managers. Firms are responsible for training staff on the conduct rules and notifying the FCA of any breaches of the rules.

In addition to potential fines for firms, breaches of the SMCR rules can result in significant consequences for individuals, including a fine or being banned from working in financial services.

The FCA and PRA have warned firms that they are focused on sexual misconduct.

In the wake of the #MeToo movement, the FCA's focus on culture (and, more recently, the focus of the PRA) has grown to encompass sexual harassment and misconduct.

In May 2018, Megan Butler, the FCA's executive director of investment, wholesale and specialist supervision, gave evidence to the Parliamentary Women and Equalities Committee in connection with its inquiry into sexual harassment in the workplace.

In her testimony, and in a follow-up letter sent to the committee in September 2018, Butler clarified that the FCA views sexual harassment as misconduct that falls within the scope of its regulatory mandate. Butler linked sexual harassment to the FCA's core mandate of protecting markets and consumers by explaining that:

A culture where sexual harassment is tolerated is not one which would encourage people to speak up and be heard, or to challenge decisions ... [i]t would be an obstacle to creating an environment where the best talent is retained, the best business choices are made and the best risk decisions are taken.

Butler indicated that involvement in sexual harassment or misconduct may be relevant to fitness and propriety assessments, and that sexual harassment can amount to a breach of the FCA's conduct rules giving rise to a notification requirement. She emphasized that employees should feel free to report issues to the FCA, regardless of any confidentiality agreements with employers, and that the FCA would be "especially interested if firms were systematically mishandling allegations or incubating a culture of sexual harassment."

The FCA has on at least one occasion found that an individual was not fit and proper based on nonfinancial misconduct. In March 2018, the FCA issued an order prohibiting the former chairman of a U.K. bank from working in the financial services industry based on conduct that demonstrated a lack of integrity — including, among other things, using a work email account to send and receive "sexually explicit and otherwise inappropriate messages."

Further, press reports from 2018 and 2019 suggest that the FCA was involved in investigating allegations that the London branch of an international bank had mishandled allegations of sexual misconduct.

The PRA has recently echoed the FCA's call for firms to address sexual harassment and misconduct. On Nov. 5, 2019, following a raft of media reports of sexual harassment and discrimination in the London insurance market, Gareth Truran, the PRA's acting director for insurance supervision, sent a letter to the chief executives of PRA-regulated insurance firms stating that the reports were "of deep concern," and that it was "clear that some firms have more work to do to improve aspects of corporate culture and individual behaviour."

Truran's letter stated that instances of nonfinancial misconduct may impact the PRA's view of the fitness and propriety of individuals subject to the SMCR, and that the PRA plans to "work closely with the [FCA]

to assess instances where inappropriate culture and behaviour within firms may impact compliance with regulatory expectations, standards and our statutory objectives.”

Other sectors are facing growing scrutiny in the wake of the #MeToo movement.

Reports of sexual harassment and other workplace culture issues have emerged across a range of other sectors, prompting increased scrutiny and warnings from regulators.

For example, recent allegations of sexual misconduct within law firms have prompted disciplinary proceedings by the Solicitors Regulation Authority and warnings to firms, including a March 2018 warning notice regarding the use of nondisclosure agreements in circumstances that may prevent the reporting of misconduct, and a statement in the SRA’s enforcement strategy guidance that sexual misconduct is among the types of allegations the SRA views as “inherently more serious than others.”

By way of further example, the U.K. accounting sector has faced a recent flood of media reports of workplace harassment, bullying and discrimination. In July 2019, the Financial Reporting Council sent a letter to the six largest audit firms ordering them to disclose their policies and procedures related to bullying and harassment, discrimination and alcohol or substance abuse, and indicating that the FRC intended to “establish a clear process for the regular reporting to the FRC of the level of non-financial conduct complaints and how those complaints are dealt with.”

The letter also clarified that firms are expected to “notify the FRC of incidents which could pose a threat to the reputation [of] the UK firm,” including “matters related to non-financial conduct.”

It seems that few sectors have been spared, as reports of sexual harassment and misconduct have also recently emerged at U.K. charities, universities, fashion, entertainment and information technology companies, and even within the U.K. Parliament.

Workplace sexual harassment is on the U.K. government’s agenda.

Tackling sexual harassment and misconduct has featured more highly on the U.K. government’s agenda in light of #MeToo revelations.

For example, the Women and Equalities Committee has called on regulatory and inspection bodies in health care, law, education and financial services to do more to tackle these issues, including by making it clear to those they regulate that sexual harassment is a breach of professional standards and will give rise to sanctions.

This recommendation was included in the committee’s report on sexual harassment in the workplace, which also urged the government to work with the Equality and Human Rights Commission to introduce a statutory code of practice tackling sexual harassment and impose a mandatory duty on employers to take proactive steps to prevent harassment.

In response, the government committed to working with the ECHR on a new code of practice and announced its intention to introduce legislation prohibiting the use of nondisclosure agreements to prevent individuals disclosing information about sexual harassment to the police, or to health care or legal professionals.

Moreover, the government has been analyzing responses to a recent consultation on legal reform in this area, which may lead to the introduction of further reforms.

Consider addressing workplace culture and sexual misconduct issues.

While this article focuses predominantly on the legal and regulatory risks for businesses that may arise from workplace culture issues and/or instances of sexual misconduct, other significant risks include damage to a company's reputation or brand (such as social media boycotts), as well as day-to-day business challenges including lower employee morale, decreased productivity, and difficulties with recruitment and retention.

In light of these significant risks and the mounting societal and regulatory pressure on businesses to create physically and psychologically safe workplaces, U.K. businesses should consider taking proactive action to protect against the risks posed by problematic workplace cultures.

Carrying out an internal review of policies, procedures and workplace culture before a problem arises can help a firm identify and address any symptomatic issues before they result in serious incidents. Where specific allegations of sexual misconduct do arise, it is important to conduct a well-designed independent investigation that is attuned to the legal, regulatory and reputational risks that may arise for both the company and its employees, while also taking into account the unique sensitivities and challenges that can arise in the context of sexual misconduct allegations.

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