

How to Handle a #MeToo Moment: Legal, Language and Cultural Tips

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Background: As the #MeToo Movement continues, Chinese-owned companies in the U.S. and Chinese subsidiaries of U.S. companies are facing an increasing number of sexual harassment complaints from their employees. This Q&A aims to provide practical advice to these global players as to how to handle cross-cultural sexual harassment complaints from legal, language and cultural perspectives.

1. Question: What is the definition of sexual harassment under U.S. laws?

Answer: Sexual harassment is a form of sex discrimination which violates Title VII of the Civil Rights Act of 1964 (and its state law counterparts). The U.S. Equal Employment Opportunity Commission (EEOC) defines “sexual harassment” as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Sexual harassment complaints are not just about touching, feeling, groping or other conduct of a sexual nature, but they could also be caused by acts that are not overtly sexual but directed at individuals based on their gender, such as repeated sexist remarks or other behavior about women in general.

Even with the EEOC's definition of the term being posted on its website, what constitutes “sexual harassment” encompasses an extended range of behaviors. What exactly constitutes sexual harassment behavior is determined on a case-by-case basis. The investigator of a complaint about sexual harassment looks at the totality of the circumstances including: the relationship between the parties (e.g. *Are they co-workers or is it a supervisor/subordinate relationship?*), such as the nature of sexual advances (e.g. *Does it involve physical touching?*), the context in which the alleged incidents occurred, whether it is sufficiently “severe or pervasive” to create a “hostile environment” and whether it results in an adverse employment action.

The EEOC guidelines state “*employers are held liable for acts of sexual harassment in*

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the workplace where they know or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”

2. Question: How language and cultural differences further complicate things?

Answer: The boundary of acceptable and unacceptable behaviors in the context of sexual harassment is not clear-cut even under U.S. legal norms. For the U.S. operations of Chinese-owned companies, or Chinese subsidiaries of U.S. companies, language and cultural differences undoubtedly further complicate the work environment and blur the boundaries. Therefore, Chinese-owned companies in the U.S. and Chinese subsidiaries of U.S. companies should make sure their employees know what may constitute sexual harassment behavior under local legal and cultural norms. They need to know these so that they ensure that their own conducts comply with the law and so that they seek appropriate resources if they see conducts that is problematic. Those in authority may create liability for their employers by their actions (their own conducts) and inactions (failing to act when they should act.)

Some workplace behaviors that are not overtly sexual or harassing according to Chinese social norms may be viewed as sexual misconducts by a U.S. person. For example, commenting about an employee’s physical appearance, calling her/him a “beauty,” “blond” or “handsome,” and badgering an employee for a date or other interactions outside the workplace. Some practices that are socially acceptable in Chinese workplaces may be interpreted by U.S. employees as creating a “hostile work environment” that is gender-specific. Some examples include, the long-lasting practice in Chinese workplaces of asking female employees to pour tea or coffee at meetings, asking them to attend meetings with male clients even though the subjects of the meetings are irrelevant to their work, or making them accompany clients on unwelcomed sightseeing tours and shopping trips. An employer’s failure to take actions to stop its employees from repeatedly making offensive, suggestive, or otherwise inappropriate comments that one gender is inferior to another could also subject the employer to liability for sexual harassment/sexual discrimination under federal and state laws.

3. Question: How does an American company normally respond to a sexual harassment allegation?

Answer: Normally, a U.S. company, after receiving an initial report of sexual harassment in its workplace, would have its management work together with its human resources and/or outside counsel to determine whether a fact-finding investigation is necessary.

If a fact-finding investigation is necessary, it would be launched as soon as possible. The amount of time that it will take to complete the investigation will depend on the particular circumstance.

It may be necessary to undertake intermediate measures during the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes to avoid having the complainant and the alleged harasser interact, transferring the alleged harasser, or placing the alleged harasser on non-disciplinary

leave with pay pending the conclusion of the investigation.

A U.S. company employer would also ensure that those who conduct the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the investigator and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

4. Question: How should a Chinese-owned company respond to a sexual harassment complaint?

Answer: Based on our observation, there may be some unique considerations that Chinese-owned companies need to contemplate in handling a sexual harassment complaint about their U.S. operations. First, the U.S. team handling such a complaint may be subject to attempted influence or interference from the Chinese headquarters that is inconsistent with U.S. practice. In such circumstances, it is important to ensure that the individuals at the Chinese headquarters understand that by deviating from the local way of responding to such a complaint, the Chinese-owned company creates legal risk as well as other problems like low morale, employment turnover and a negative impact on work performance in general. Second, it is a key tenet of the investigative process to make sure that whoever investigates the complaint understands what constitutes sexual harassment under U.S. laws, has experience handling employee issues in the U.S., and is socially and organizationally distant from the complainant and the alleged harasser. Usually, a third-party professional team is found to be the best fit for the role of investigator. Third, to avoid misunderstanding or misinterpretation during the investigation, it is also helpful to have native Chinese speakers on the investigation team if the alleged harasser or the complainant is a Chinese speaker.

5. Question: Any other tips to prevent workplace sexual harassments?

Answer: As a general principal, any savvy business with global footprints should take steps to ensure that employees in its international operations (regardless of their nationalities, ethnicities, backgrounds and titles in the company) must respect and conform to local workplace norms as well as the company's overall policy, and should clearly communicate to its employees that any harassing conduct is not tolerated.

It would also be particularly helpful if a Chinese-owned company in the U.S. or a Chinese subsidiary of a U.S. company takes the following steps:

I. establishing a written sexual harassment policy, including an effective complaint/grievance process;

II. providing anti-harassment training to managers and employees, including expats and short-term visitors from the corporate headquarters; and

III. taking immediate, appropriate and professional action when an employee complains.

Additional tips about anti-harassment training to foreign employees working in the U.S. or with U.S. colleagues include:

I. providing examples of unacceptable behaviors, (e.g., *don't comment about a female colleague's physical appearance*);

II. stressing the importance of properly phrasing certain conversation to avoid misunderstanding, such as using "you look stylish" instead of "you are beautiful" as a compliment to your colleagues; and

III. creating the mindset of being mindful of possible cultural differences and respecting local customs.