

# **Diligencing Culture and Conduct Risk: Practical Checklists for Assessing Bullying, Harassment, and Retaliation Patterns; Integrating Findings into Price, Structure, RWI, and Covenants**

# Learning Objectives

By the end of this session, you will be able to:

1. Identify indicators of bullying, harassment, retaliation, and bias in diligence and culture data.
2. Apply ethical and professionalism standards to investigate fairly while protecting privilege and privacy.
3. Integrate culture findings into valuation, deal structure, RWI, and covenants with measurable accountability.
4. Navigate key U.S. and cross-border legal constraints (whistleblower, labor, privacy, disclosure).
5. Design governance and oversight that promotes psychological safety and avoids chilling protected activity.

# Why Culture Diligence Matters (Ethics and Deal Value)

- Culture failures drive legal, financial, and reputational risk.
- Ethical duties: impartial fact-finding, confidentiality, avoidance of bias.
- Deal levers: price adjustments, escrows, specific indemnities, earnouts, RWI scope, post-close covenants.

# Risk Taxonomy and Definitions

- Bullying vs. harassment vs. discrimination vs. retaliation.
- Psychological safety as a leading indicator.
- Distinguish severity (substantiated vs. alleged) and pervasiveness (isolated vs. systemic).

# Hypothetical 1: Founder-Led Target with Concentrated Complaints

Facts: Target is a 700-person, founder-led software company with 30% YoY growth. Formal complaint volume is low (6 complaints over 24 months), but regretted attrition is 22% in engineering and 18% in sales (industry peers ~12%). External reviews and exit interviews allege intimidation by two senior managers (“fear-based feedback,” “public shaming on Slack”). Training completion is 98%, yet the platform team shows no promotions of women or underrepresented groups in the last 18 months despite internal applicants. Compensation is market, but performance ratings are compressed at “meets.”

Prompt: What could be the issues here?

# Hypothetical 1: Founder-Led Target with Concentrated Complaints

Issues: Distinguishing a hard-driving culture from bullying; interpreting low complaint volume amid high attrition; assessing retaliation risk without formal findings; determining whether promotion stagnation reflects bias or pipeline.

# Complaints and Investigations: Signals to Test

- Volume/trend by type; substantiation rates; cycle time; corrective action closure.
- Intake design (anonymity, independence); vendor vs. in-house.
- Patterns by location/manager; repeat actors; outcomes consistency.

# Workforce Analytics: Equity and Retention Clues

- Attrition and regretted loss by function/manager/tenure.
- Promotion and ratings distribution; pay equity analyses and remediation.
- Training effectiveness (behavior change, not just completion).

# Hypothetical 2: Public Company with Prior Headline

Facts: Two years ago, a NASDAQ-listed target faced national media reports alleging a senior executive engaged in harassment. The executive resigned; the company announced an “independent review” and “comprehensive remediation.” Current proxy and 10-K contain generic human capital disclosures without metrics. Audit committee minutes reference a “special matter” spanning three meetings but provide limited detail. Investor relations insists the issue is closed. The RWI underwriter signals a likely exclusion for culture claims unless enhanced diligence is provided.

Prompt: What are the issues here?

# Hypothetical 2: Public Company with Prior Headline

Issues: Verifying that remediation occurred and is effective; assessing successor-liability optics; determining whether disclosures meet securities law expectations given known trends; negotiating RWI scope.

# Ethics/Professionalism: Bias-Aware Investigations

- Impartiality: structured interviews and standardized rubrics.
- Avoid stereotyping and victim-blaming; trauma-informed techniques.
- Scope: preserve privilege, define investigator independence, and document fairness.

# Privilege, Privacy, and Documentation

- Privilege/work product planning; in-house vs. outside counsel roles.
- Data privacy, minimization, retention schedules; legal holds.
- Write-ups: fact vs. opinion separation; need-to-know distribution.

# Safety and Physical Environment

- OSHA logs, citations, near-miss culture; shift quotas and incident linkage.
- Safety committee independence and budgets.
- Intersection with harassment/retaliation in frontline settings.

# Hypothetical 3: PE Exit After Professionalization

Facts: A PE-backed portfolio company implemented respectful code review guidelines and empowered a safety committee after a prior OSHA citation and an internal engineering climate survey that showed low psychological safety. Over 18 months, regretted attrition fell from 24% to 13%, production defects dropped 18%, and near-miss reporting increased (a positive indicator of speak-up culture). Diversity metrics improved modestly, but one plant still shows gender disparities in promotions. The prospective buyer requests verification and fears “window dressing.”

Prompt: What are the issues here?

# Hypothetical 3: PE Exit After Professionalization

Issues: Distinguishing durable culture change from paper programs; verifying causation vs. correlation; addressing residual hotspots without penalizing transparency.

# Translating Findings to Price and Structure

- Pricing: reductions, special escrows, remediation reserves.
- Structure: earnouts tied to culture KPIs (attrition, promotion equity, safety).
- Specific indemnities for known claims; leadership conditions.

# RWI: Underwriting Reality

- Common exclusions: harassment/retaliation and known issues.
- Enhanced diligence requests; bring-down of culture reps.
- Sublimits/deductibles; interplay with D&O and employment practices coverage.

# Covenants and Board Oversight

- Conduct risk covenants: investigation quality, hotline independence, anti-retaliation audits.
- Oversight: board/observer dashboards; immediate notification protocols.
- Timelines: 90/180/365-day remediation milestones; third-party assurance.

# Cross-Border Considerations

- EU Whistleblower Directive; GDPR constraints on hotline/investigation data.
- Works councils: consultation/consent; documentation expectations.
- UK Equality Act and sector conduct rules (e.g., financial services).

# Hypothetical 4: EU Add-On with Hotline Spikes

Facts: Buyer is acquiring a German warehouse/logistics add-on (1,200 employees). Over 8 weeks, the whistleblower hotline shows 36 anonymous harassment-related reports in one site's night shift. Local HR characterizes this as a "cultural misunderstanding." Prior outside counsel did a verbal-only review; no written report exists. The works council has challenged management's attempt to discipline a shift supervisor, citing process defects and lack of consultation. Safety data show a 25% increase in near-misses after the introduction of aggressive pick-rate quotas.

Prompt: What are the issues here?

# Hypothetical 4: EU Add-On with Hotline Spikes

Issues: GDPR-compliant access to investigation data; adequacy and independence of investigations; works council consultation obligations; whether to sign or delay; potential linkage between quotas, safety, and harassment.

# Professional Responsibility Emphasis (Recap)

- Impartiality; avoidance of bias; structured methods.
- Confidentiality, privilege, and privacy by design.
- Safeguards against retaliation and chilling effects.
- Documentation of fair, proportional decisions.

# Whistleblower and Labor Guardrails

- SOX/Dodd-Frank, SEC whistleblower protections.
- NLRA Section 7: confidentiality and non-disparagement limits; recent NLRB positions.
- Avoid policies and deal terms that chill protected activity.

# Jurisdictional Map (United States)

- Federal: Title VII retaliation/harassment baseline; OSHA anti-retaliation.
- Key states: CA FEHA; NY Human Rights Law; NDA and arbitration limits; training mandates.
- Public company overlays: human capital disclosures; clawbacks; board oversight.

# Take-Home Templates (Overview)

- Culture & Conduct Diligence Checklist (buyer-side).
- Respectful Code Review Guidelines.
- Safety Committee Charter.
- Investor Oversight Framework.
- Deal-Term Integration Matrix.

# Q&A and Key Takeaways

- Key takeaways: triangulate data; align ethics with deal mechanics; operationalize via covenants and dashboards.
- Resources: templates and checklists included in materials.

# Template A: Culture & Conduct Diligence Checklist

- Governance: board oversight; reporting cadence.
- Reporting/Investigations: hotline independence; protocols; substantiation/cycle times.
- Workforce: attrition, promotion, pay equity; training effectiveness; survey data.
- Safety: OSHA logs; near-miss culture; committee independence.
- Litigation/Claims; Labor/Whistleblower; Disclosures; Cross-border; Management 360s.

# Template B: Respectful Code Review Guidelines

- Purpose: focus feedback on artifacts; ban belittling and sarcasm.
- Process: two reviewers for critical changes; rotation; constructive phrasing examples.
- Behavior: “describe, don’t ascribe”; anti-retaliation; KPI linkage.
- Measurement and integration into onboarding and audits.

# Template C: Safety Committee Charter

- Mandate: health, safety, and psychological safety; non-retaliatory reporting.
- Composition: cross-functional, employee-elected members; independence.
- Responsibilities: incident review, root cause, training; disclosure controls alignment.
- Meetings/records; annual effectiveness KPIs.

# Template D/E: Investor Oversight + Deal-Term Matrix

- Oversight: quarterly dashboards; immediate notification for high-severity allegations.
- Accountability: comp linkage to culture KPIs; external investigations for defined categories.
- Guardrails: NDA/non-disparagement/arbitration compliance; anti-retaliation clarity.
- Matrix: map finding severity/confidence to price, indemnities, covenants, and RWI posture.

# Diligence Data Sources and Red Flags (Overview)

- Documents: policies, complaint logs, investigation outcomes, settlements, board minutes.
- People: management interviews, skip-levels, whistleblower channels, counsel-to-counsel.
- Metrics: attrition, promotion, pay equity, survey scores, safety incidents, legal spend heat maps.