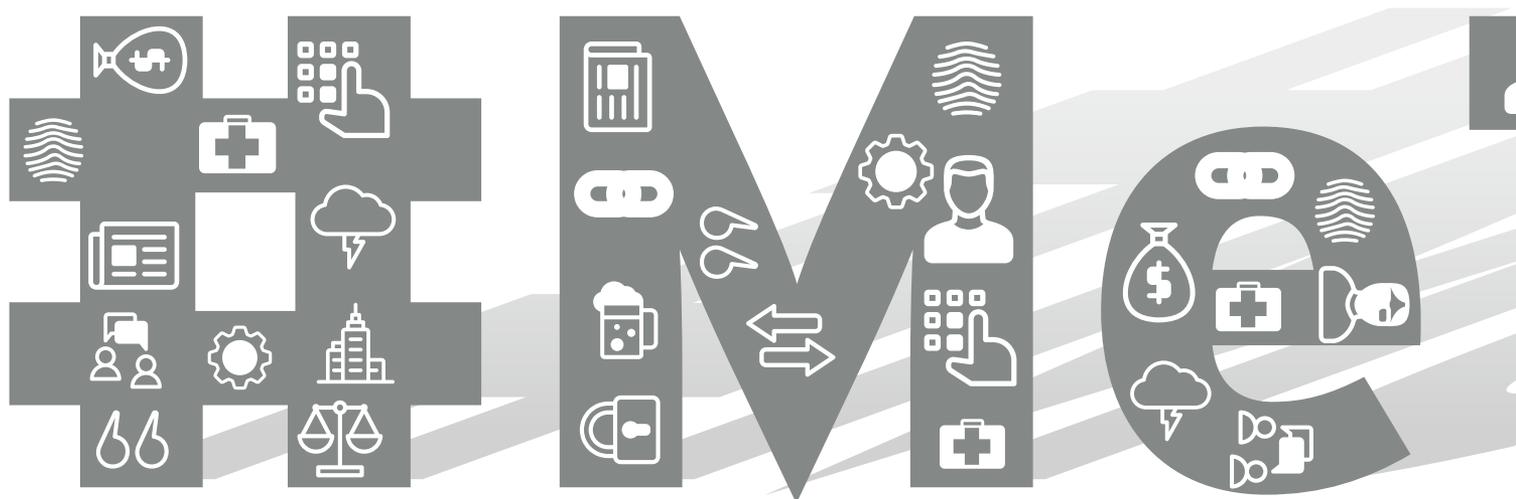


5 Strategies for In-house Counsel to Enhance Their Organization's Workplace Culture in the Era of



CHEAT SHEET

- *Clear guidelines.*
An effective, clearly delineated EEO policy can go a long way in helping promote an organization's values and its commitment to a healthy, positive work environment.
- *Conduct a survey.*
Evaluate whether your organization really implements their gender equity policies or is just paying "lip service." Examine policies relating to parental leave, salary breakdowns, and opportunities for advancement for female employees.
- *Open-door policy.*
In-house counsel, supervisors, and human resources professionals should always avail themselves to employees who are unsure about employment matters that may affect them directly.
- *Highlight the attributes.*
Business leaders need to build and promote a positive workplace culture. By keeping this high on the list of priorities, in-house counsel can both give their organizations a competitive edge and reduce liability risk.

The #MeToo era has incited a reckoning of workplace culture. The movement encourages, and sometimes compels, employers to examine their handling of harassment complaints and issues of equality for women and historically under-represented minority groups. The movement to stop harassment confronts a workplace culture that took root decades ago when few women were in leadership roles and sexual harassment and sex discrimination often went unaddressed.¹ The #MeToo movement challenges established norms and seeks to usher in a new set of standards for the modern workplace. The recent spike in sexual harassment complaints filed within organizations is a testament to the power of the movement to encourage employees to voice their concerns.²

By Jordan Ellis and Kathryn Brown



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What is workplace culture? To find out, one must look beyond the history, mission, and purpose of an enterprise as stated on its website or in printed brochures. Clues about workplace culture lie in an organization's policies, the questions asked of applicants during job interviews, the criteria used to assess employee performance, the office layout, the conversations around the water cooler, the interactions between employees and management, and what employees share during exit interviews, to name just a few examples. Workplace culture is reflected in the behaviors, assumptions, and structures that guide the way people interact within an organization.

Workplace culture — as experienced on the inside and perceived from the outside — can symbolize the values of the enterprise to prospective and current employees as well as to customers and investors alike.³ Fostering a workplace culture that prizes openness, inclusiveness, and responsiveness builds a strong employment brand. Conversely, and as recent headlines show, mere allegations of a toxic work environment can tarnish an organization's brand, driving down morale, productivity, and retention, not to mention share prices.

In-house counsel are positioned to play a leading role in advancing a positive workplace culture for their organizations. Unlike outside counsel, whose involvement in workplace matters often is limited to addressing discrete claims or counseling on specific issues, in-house counsel have the opportunity to leverage their inside knowledge and relationships to influence workplace culture proactively.

By following the strategies below, in-house counsel can help reduce their organizations' exposure to harassment, discrimination, and retaliation claims, while at the same time helping their organizations achieve their business goals.

1. Maintain a robust EEO policy and live by it

Every organization should have an equal employment opportunity (EEO) policy that prohibits unlawful discrimination, harassment, and retaliation by or toward its employees. Yet a policy that amounts to a series of "thou shalt nots" is not likely to be effective. An EEO policy should be viewed not just as a compliance tool, but also as a mechanism for conveying the organization's values and its commitment to a positive work environment.

Accordingly, an EEO policy should not speak in generalities. It should identify specific examples of behaviors that amount to unlawful discrimination, harassment, or retaliation and are therefore prohibited. An EEO policy should also explain what type of

conduct is *not* unlawful. For instance, employees should know that a manager is not engaging in unlawful harassment by providing critical feedback to an employee about his or her performance or occasionally complimenting an employee's appearance. Likewise, employees should understand that the prohibition of retaliation in an EEO policy does not immunize an employee from legitimate disciplinary action simply because he or she has raised a concern of inappropriate conduct in the past.

An EEO policy should also go beyond what is unlawful to address conduct that may not rise to legal liability but is nevertheless unacceptable. A policy that prohibits only what is unlawful misses the opportunity to articulate what the organization wants its workplace culture to look like and leaves an organization vulnerable to the argument that any violation of the policy is tantamount to admitting liability.

Moreover, it is essential that an EEO policy have a clear procedure for employees to report concerns. While no organization wishes to be on the receiving end of complaints, it benefits employers to have the opportunity to resolve issues internally and at an early stage, before outside counsel, government representatives, or the media get involved. An EEO policy should identify at least two alternative channels to address concerns, such as human resources and the employee's supervisor. It is also beneficial to offer employees an avenue to request a second review



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if they are dissatisfied with the initial handling of their EEO complaint. Providing robust internal mechanisms for responding to employee concerns builds trust, reduces the likelihood that employees will seek recourse externally, and creates a strong record for the organization if the employee pursues litigation about their concerns.

An EEO policy should also explain what will happen after a complaint is received. The policy should state that complaints will be investigated promptly, thoroughly, and impartially and that confidentiality will be maintained as much as possible. It should also state that, if appropriate, prompt corrective action, proportionate to the conduct at issue, will follow the investigation of the complaint.⁴ Examples of such corrective action may include termination of employment or lesser forms of discipline, such as a written warning, as well as formal one-on-one coaching to clarify expectations of appropriate behavior.

When implemented effectively, an EEO policy can be a potent shield against employment law claims. For example, if an employee files a harassment lawsuit before taking advantage of the employer's internal reporting procedure, the employer may prevail in the lawsuit by asserting the *Faragher-Ellerth* defense, so named for a pair of Supreme Court decisions.⁵ This defense requires an employer to show that: (1) it exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to use any preventive or corrective opportunities available, or to avoid harm otherwise.

Yet, effective implementation of an EEO policy is easier said than done. It is one thing to promise that the workplace will be free of inappropriate conduct and that all complaints will be taken seriously and investigated, but quite another thing to live by those promises. Organizations have a responsibility to follow through on

the commitments promised by their EEO policy. In-house counsel can play a vital role in ensuring that their organization allocates sufficient resources to implement their EEO policy. This includes staffing an appropriate number of human resources personnel to respond to complaints and, if needed, supplementing those efforts with a qualified outside vendor.

Finally, in-house counsel should ensure that there are periodic audits to evaluate whether the organization is practicing what it preaches in its EEO policy. Analyzing complaint data, surveying employees, reviewing investigation protocols, and verifying whether similar instances of misconduct are treated with similar consequences are examples of actions that can be taken to vet the effectiveness of an organization's EEO policy. Whether in-house counsel will lead such an audit — or instead serve in a consultative role to an outside auditor — is a critical decision point. Where counsel is involved (whether in-house counsel or outside counsel), it is especially important for the audit to be designed in such a manner as to protect the analyses and findings of the audit under the attorney-client privilege and work-product doctrines.

2. Ensure that all employees receive regular, high-quality EEO training

In-house counsel can play a leading role in ensuring that all employees, from C-suite executives to rank-and-file employees, receive EEO training. EEO training should be treated as a key component of employees' professional development and an employer's harassment prevention strategy.⁶ Making an investment in training that is designed to prevent EEO claims can also help a company avoid the far more substantial costs and disruption associated with defending EEO claims.

In-house counsel can make sure that EEO training is delivered regularly, not just at the beginning of an individual's

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employment. Furthermore, in-house counsel must ensure that the instructors are qualified and that the organization maintains documentation of the material presented and the attendance of employees.

In a growing number of jurisdictions, training on workplace harassment and other EEO issues is not just a smart move: It is mandatory. In 2018 alone, legislatures in Delaware, California, Illinois, the District of Columbia, New York state, and New York City passed laws requiring some form of anti-harassment training in those jurisdictions. Around the United States, state and local bodies are considering similar legislation.

EEO training should be more than a listening exercise. An interactive training session, preferably with a live instructor, provides a forum for employees to ask questions and gain a practical understanding of the boundaries between appropriate and inappropriate conduct. For the content to resonate with employees, the training should be tailored to reflect the dynamics of the particular industry or worksite.

Mindful of the lessons of the #MeToo movement, EEO training should make clear that no employee is “above the law” and that neither an

employee’s job title nor reputation as a top revenue generator will immunize them from the consequences of violating the organization’s EEO policy. Just as importantly, the training should emphasize due process protections, such as explaining that no employee will be presumed “guilty” based on accusations alone.

EEO training is essential for supervisors, given that, as company representatives, their conduct could be binding on their organizations. While all employees should be encouraged to follow a “see something, say something” approach, supervisors especially need to have a clear understanding of their responsibility to step in early when they see or learn about behavior that may violate the company’s policies and to report concerns that come to their attention, directly or indirectly.

Supervisors also need to understand that they have a responsibility to prevent a culture of actual or perceived punishment against those who express concerns about the workplace. The reality is that many employees hesitate to report concerns because they fear that they will not be believed, or that they will be professionally and socially ostracized for doing so.⁷ Through EEO training, organizations can make supervisors aware that their treatment of employees who raise concerns sets the tone for how employees — and in the worst-case scenario, a judge or jury — will actually regard the organization’s commitment to protecting against discrimination, harassment, and retaliation.

Organizations also should not overlook the benefit of training supervisors on how to manage those who report to them. An employee’s performance is often at issue in EEO lawsuits. Where an employer defends against an EEO claim by contending that the plaintiff’s unsatisfactory performance motivated the adverse employment decision, the defense collapses if the plaintiff’s supervisor did not properly

document the performance issues. Thus, it is incumbent on employers to ensure that supervisors receive training in communicating and documenting performance issues honestly, timely, and effectively.

With regard to executives and senior leaders, EEO training presents an important opportunity to remind them about their role in fostering an inclusive work environment. For example, anecdotal evidence suggests that some male executives are now reluctant to mentor, give assignments to, or take business trips with female colleagues out of fear that doing so will make them the target of EEO claims.⁸ EEO training provides an opportunity to demonstrate why these types of practices may unwittingly revive the “old boys’ club” mentality and are a losing strategy for avoiding lawsuits. Excluding colleagues from professional opportunities based on their demographic characteristics may actually constitute discrimination and create liability for their organizations.

3. Assess your organization’s commitment to gender equity

Many organizations tout their commitment to gender equity, but there is often a gap between what employers say and how employees perceive their employers’ efforts.⁹ According to one recent study, 20 percent of employees surveyed said their employer’s commitment to gender diversity feels like lip service. Only 60 percent of employees surveyed believe their employer would investigate a complaint of sexual harassment fairly.¹⁰

In-house counsel should evaluate whether their organization has a similar gap between its messaging about gender equity and employees’ perceptions. Having such a gap does not mean that the organization has acted with discriminatory intent. Rather, a gap should propel an organization to take a deeper look at its workplace culture. To this end, in-house counsel should

evaluate the substance of their organization's policies and ask whether the actions and decisions that happen on the ground among employees, supervisors, and human resources personnel are consistent with those policies.

Parental leave is one example of where an organization may have a "gap" to address. As the EEOC has explained, employers may unknowingly perpetuate gender stereotypes in their parental leave policies by providing different amounts of leave to men and women to bond with newborn or adopted children (putting aside the separate amount of time women may need for medical reasons to recover from childbirth or related medical conditions). The EEOC takes the position that these types of policies not only send the message that only women can be primary caregivers, but the disparate treatment of men might also be considered unlawful sex discrimination.¹¹ In-house counsel should evaluate whether their organization's parental leave policy and other leave policies have any such flaws.

Beyond written policies, an organizational stigma against parental leave can have serious repercussions. No employee, regardless of gender, should be made to feel that they will "look bad" or be treated differently if they take the full amount of leave available to them under the company's policy. If there is a stigma surrounding parental leave, employers can expect claims from male and female employees alleging that their careers suffered unfairly after taking, or seeking, parental leave.¹²

In-house counsel should examine whether their organizations use consistent messaging about parental leave for men and women; whether and for how long eligible employees use parental leave; whether supervisors have the resources to manage business needs while employees are on leave; and whether employees are supported upon returning from leave. Additionally, in-house counsel can

play an important, supportive role in building a strong workplace culture by championing an inclusive mindset among senior business leaders and supervisors about taking and returning from parental leave. Given the challenges new parents face and the business need for organizations to retain their talent, in-house counsel can advocate for their organizations to invest in supporting new parents, such as offering more lactation spaces for breastfeeding employees or access to back-up childcare resources.

In-house counsel should also be alert to the ways in which organizational structures, such as promotion criteria and distribution of key assignments, may create unequal pathways to advancement for women.¹³ By way of example, research shows that employers often promote female employees based on their track record, but promote men based on their perceived potential.¹⁴ In-house counsel have the opportunity to study and recommend changes to their organization's institutional structures to "bake in" values of equity and inclusion.

Keep in mind that employers should not focus only on gender issues. The same reasons for rooting out gender bias apply to rooting out bias based on employees' race, ethnicity, religion, disability, or membership in other protected groups.

4. Promote informed employment decisions by being available to internal stakeholders

In-house counsel, supervisors, and human resources professionals each have a unique skillset and perspective to contribute to decisions affecting employees in an organization. When these stakeholders communicate regularly, the organization is better equipped to minimize the risks associated with making employment decisions while enhancing employee engagement.

In-house counsel should develop strong working relationships internally

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so that human resources professionals and supervisors in the organization view them as trusted advisors and informed business partners. Making personal connections with colleagues goes a long way toward fostering these relationships. In-house counsel should make an effort to visit their employer's various worksites and check in regularly with human resources and management there to keep up-to-date on developments in the business and be in a position to advise proactively on potential legal issues.

It is also important for in-house counsel to make themselves available to their colleagues in human resources or management positions to discuss issues at an early stage. Of course, it is not practical for in-house counsel to be involved in every employment decision. Ensuring that supervisors and human resources personnel know when to seek legal advice is the key. Through the working relationships that in-house counsel develop, they can educate and empower colleagues to spot the types of issues that could present risks to their organization and anticipate when they may need legal input.

A classic case occurs when a supervisor decides to terminate an employee for unsatisfactory performance. Even if the motive for the termination is legitimate, the decision could come

under attack based on information that was not even on the supervisor's radar. For example, if the termination happens soon after the employee requested medical leave with human resources, the timing alone can prompt an employee to allege that the termination is retaliation for asking to take leave. Decisions made in silos thus expose an organization to legal risk.

When in doubt, supervisors and human resources personnel should be encouraged to seek input from in-house counsel before taking action with respect to personnel matters. By encouraging an open dialogue about the legal and business implications of a proposed decision, in-house counsel promote collaboration among stakeholders for the benefit of the entire organization.

In participating in these discussions, in-house counsel need to make their roles clear. For purposes of protecting the attorney-client privilege and avoiding potential misunderstandings, in-house counsel should give an *Upjohn* warning¹⁵ at the outset of the discussion, stating that they represent only the organization. Likewise, in-house counsel must be careful not to mix legal advice to the organization — which is afforded the protection of the attorney-client privilege — with business advice to the organization, which is not.

5. Encourage business leaders to model and promote a positive workplace culture

In-house counsel also have a prime opportunity to make the case to business leaders that a positive work environment is not just in vogue, it is a business imperative.

It is often said that the tone is set at the top. The messaging and behavior of senior leaders is an important element of workplace culture.¹⁶ When senior leaders act in a way that is incongruent with an organization's stated intent to maintain an equitable workplace, such as by turning a blind eye to demeaning conduct by "rainmaker" employees, the organization loses credibility in the eyes of employees, business partners, and occasionally, the media.

In practice, this means it is critical to encourage leaders to allocate sufficient resources — time, money, and personnel — to advancing the organization's EEO goals. Given that the path to executive leadership roles requires building solid relationships of trust with current leaders, it also means demonstrating the importance of providing opportunities to employees of a variety of backgrounds at all stages of the corporate pipeline, starting with an organization's recruiting practices.¹⁷

In-house counsel can highlight to senior leaders how the legal and business benefits of an equitable workplace

ACC EXTRAS ON... Sexual harassment prevention

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Sample Forms, Policies, and Contracts

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culture work in tandem. When employees feel comfortable in their work environment, they are more likely to stay in the organization and put forth their best efforts to drive business results. A high rate of employee retention goes beyond minimizing hiring costs. It also preserves institutional knowledge and business relationships and creates goodwill — which is key to building the organization's brand. While a positive workplace culture does not immunize an employer from EEO claims, a negative workplace culture makes an employer an easy target for such claims, in addition to increasing attrition, reducing morale, and jeopardizing business goals.

Workplace culture is dynamic. Thus, building and maintaining a respectful work environment requires sustained commitment not just from senior leaders, but from everyone in an organization. By keeping workplace culture top of mind, in-house counsel can give their organizations a competitive edge while also reducing the risk of liability. **ACC**

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