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New *McDonald's* Opinion Provides Directors a Playbook for Responding to “Red Flags” of Alleged Workplace Misconduct

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The Delaware Court of Chancery’s recent [opinion](#) in *In re McDonald’s Corporation Stockholder Derivative Litigation* provides a roadmap for directors confronted with allegations of employee misconduct. The opinion comes just over a month after Vice Chancellor Travis Laster’s first [opinion](#) in the same case, which held for first time that “oversight” duties extend to corporate *officers*, in addition to directors.

In *McDonald’s* Part II, the court determined that, although stockholder plaintiffs had successfully pleaded “facts supporting an inference that the Director Defendants knew about a problem with sexual harassment and misconduct at the Company,” *i.e.*, sufficient “red flags” to put the directors on notice that there was a problem at the company, the plaintiffs failed to proffer facts supporting “an inference that the Director Defendants failed to respond,” and thus dismissed the claims.

The opinion underscores that having appropriate risk-management systems is only the first step to fulfilling a board’s duties of oversight over the company, and that directors must also act in a considered and responsive manner when faced with reported problems within the company.

In *McDonald’s* Part II, the directors’ actions deemed sufficient included “work[ing] with Company management on a response that included (i) hiring outside consultants, (ii) revising the Company’s policies, (iii) implementing new training programs, (iv) providing new levels of support to franchisees, and (v) taking other steps to establish a renewed commitment to a safe and respectful workplace.” These proactive steps may be cited in future cases as examples of appropriate board-level responses to reported red-flag issues.

Specifically, among other things, the *McDonald’s* directors:

- engaged “the Rape, Abuse & Incest National Network (‘RAINN’) to advise the Company”;
- undertook a “holistic review of the Company’s training programs” and retained a legal compliance and consulting services company to help “assist the Company in providing training” for employees at all levels of the company on “how to establish and maintain a safe and respectful workplace”;
- instituted “[a]dditional crew, restaurant manager, and franchisee training on harassment, unconscious bias, and workplace safety”;

- established “a new, third-party managed hotline for employees at franchise restaurants to report complaints of any kind”; and
- ended “the Company’s previous policy requiring mandatory arbitration of harassment and discrimination claims as a condition of employment.”

Further, the *McDonald’s* court also underscored that red-flags claims need not concern “mission critical” risks, as is required for other oversight claims. But the court posited that, even if such a requirement exists, the risks at issue in *McDonald’s* qualify: “maintaining employee safety is both essential and mission critical”

for any company. The court stated that, “[t]o remain true to the fiduciary principle and build value over the long term, corporate fiduciaries must take care of the corporation’s workers,” and “[c]ompliance with labor and employment law is an essential corporate obligation.” Vice Chancellor Laster’s dicta indicates that directors could be found liable for failing to fulfill their oversight duties if they do not establish sufficient information systems alerting them to sexual misconduct, harassment, and other workplace safety issues, and take concrete steps to address reported problems within that area.

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