

## VC and PE firm codes of conduct

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Recent events at certain venture capital (VC) firms in Silicon Valley have brought into focus the importance of VC and private equity (PE) firms adopting codes of conduct that explicitly address personal and sexual harassment, both within the firm itself and in respect of interactions between firm representatives and entrepreneurs at current or potential portfolio companies. Existing codes of conduct may address, in detail, topics such as conflicts of interest, inappropriate gifts or business entertainment expenses, and political activity. However, there may be crucial gaps concerning inappropriate conduct where, for example, a code of conduct does not comprehensively address sexual harassment or where it does not extend to persons (such as founders and entrepreneurs) who may not be employees of the firm itself.

VC and PE firms should proactively adopt enhanced codes of conduct or supplementary written policies with clearly defined rules regarding personal and sexual harassment, and delineate and enforce consequences for anyone in breach of those rules.

### Clarity and transparency

A comprehensive written code of conduct will help in the following ways:

- Eliminate genuine or perceived “grey areas” regarding what is and is not considered acceptable behaviour by individual members of the firm, establishing behavioural expectations and fostering an atmosphere where respect for all individuals is a core value.
- Provide a tangible basis upon which to take action in the event of alleged inappropriate conduct. No one should be surprised when they face consequences for their actions. As well, the firm may be in a more favourable legal position with respect to imposing discipline on firm members if there is a clear policy to rely on.
- Demonstrate to limited partner investors and entrepreneurs alike that the firm takes its role in the ecosystem seriously. When investors invest in a VC or PE fund, or a company accepts funding from one of these funds, they are entering into a business partnership with that fund that is based on trust. Every fund should be striving to enhance trust with its business partners and to send a clear signal that breaches of trust will not be tolerated.

### Managing risk

In many Canadian jurisdictions, including in the two largest provinces of Ontario and Québec, there are important statutory obligations requiring employers to have policies and programs in place concerning workplace harassment, including sexual harassment. These

policies must apply to employees of the PE or VC firm and, for statutory compliance and in order to address other risks, should set out processes for complaints and investigations.

In addition to the strong internal reasons for comprehensive codes of conduct and internal policies set out above, firms should understand that they may not be immune from legal liability in a situation where an entrepreneur alleges sexual harassment or other mistreatment at the hands of a firm member. For example, in Ontario, a VC or PE firm found to improperly condone or permit sexual harassment between its employees and other business partners could be vicariously liable for breaches of the *Human Rights Code* for discrimination on the basis of sex with respect to either the provision of services or the right to contract. While human rights legislation varies from province to province, a right to sue for the tort of harassment has also started to be recognized at common law. In one recent case in the employment context, the plaintiff was awarded \$100,000 as a result of sexual harassment and the employer's failure to properly investigate her complaints.

## Conclusion

A strong code of conduct governing the firm and its employees in respect of their personal interactions with all stakeholders on behalf of the firm should be the baseline for any VC or PE firm doing business in Canada.

Osler's fully integrated team can provide customized, comprehensive service offerings to firms in proactive, preventive risk management on these issues. We regularly:

- conduct compliance reviews to identify high-risk issues for potential problematic business practices and advise on solutions;
- conduct reviews and assessments of a company's internal complaint handling protocols, compliance policies and programs;
- review, draft and advise on policies, codes of conduct and internal procedures; and
- provide proactive litigation risk assessment to any specific fact scenario.

Should the need arise, we are also uniquely positioned to advise on, oversee and manage internal investigations.

VC and PE firms must proactively address the issue of sexual harassment in the workplace. In light of the unavoidable personal harm and reputational damage that such inappropriate conduct causes, the best investors, entrepreneurs and founders rightly expect that the firms they work with demonstrate their active commitment to addressing this important issue. In addition, there is a tremendous organizational cost associated with an environment that negatively affects the recruitment and retention of critical talent.