

Investigations, Compliance and Defense

Do Your ESG Disclosures Need Leveling Up?

Leading Video Game Company Faces SEC Investigation into Its Harassment and Discrimination Disclosures as It Reaches \$18 Million Settlement with EEOC

By: [Anne Cortina Perry](#), [Anthony S. Barkow](#), [Charles D. Riely](#), [Lori B. Day](#), [Tali R. Leinwand](#), and [Anna Windemuth](#)

Recent activity by two federal regulators underscores an increasingly obvious reality: when a company is confronted with harassment and discrimination complaints, government agencies will scrutinize its response and may bring enforcement actions. For months, video game maker Activision Blizzard (“Activision”) has been dealing with negative publicity and litigation relating to allegations that it allowed pervasive sexual harassment and discrimination to occur and failed to appropriately respond. Just two weeks ago, Activision confirmed that the US Securities and Exchange Commission (“SEC”) was investigating the sufficiency of its disclosures.^[1] In the latest news concerning the company, Activision publicly disclosed last week that it was resolving a case with the US Equal Employment Opportunity Commission (“EEOC”) by making an \$18 million payment to establish a victim fund.^[2] This client alert analyzes these developments, the other civil and regulatory issues faced by Activision, and discusses steps companies can take when confronted with harassment or other work conduct allegations.

SEC Investigation into Disclosures Related to Harassment and Discrimination Allegations

Two weeks ago, the company publicly acknowledged that the SEC has launched an investigation concerning Activision.^[3] According to an Activision spokeswoman and the Wall Street Journal’s review of relevant documents, the SEC has issued subpoenas to Activision and several of its senior executives, including its Chief Executive Officer Bobby Kotick.^[4] The agency is reportedly investigating whether Activision and its executives sufficiently disclosed allegations of workplace harassment and gender-based payment discrimination.^[5] The SEC is also interested in determining whether this information should have been shared earlier with investors and other parties.^[6] The agency has requested documents including minutes from Activision board meetings since 2019, the personnel files of six former employees, and separation agreements the company reached this year with staffers.^[7] The SEC has also sought Mr. Kotick’s communications with other senior executives regarding complaints of sexual harassment or discrimination by Activision employees or contractors.^[8]

\$18 Million Settlement with EEOC

Then, last week, the EEOC and Activision entered into an agreement (subject to court approval) that requires the company to pay \$18 million and enact a number of improvements^[9] to resolve a complaint the EEOC filed that day.^[10] These filings followed a three-year investigation by the EEOC, which found pervasive sexual harassment, pregnancy discrimination, and retaliation at the company.^[11] More specifically, pursuant to the settlement, without admitting liability, Activision agreed that it would (among other things): (a) create an \$18 million fund for victims of the company’s relevant conduct; (b) “upgrad[e] policies, practices, and training to further prevent and eliminate harassment and

discrimination in its workplaces” as well as provide “ongoing oversight and review” of its training programs, investigation policies, disciplinary framework and compliance by appointing a third-party equal employment opportunity consultant; and (c) hire or designate an internal equal employment opportunity coordinator to help implement the agreement.^[12]

Other Regulatory Action and Litigation Confronted by Activision

The news about activity from the SEC and EEOC only adds to other issues the company was already facing. First, in July, the California Department of Fair Employment and Housing (“DFEH”) sued Activision for sexual harassment and gender discrimination following a two-year probe.^[13] Shortly after the California agency filed its complaint, the company’s president, its top human resource executive, and its Chief Legal Officer stepped down.^[14] The agency also sued ten unnamed individuals whom it considers legally responsible for these injuries.^[15]

Second, in August, Activision investors filed a class action lawsuit against the company for allegedly violating the Securities Exchange Act of 1934 by issuing materially false or misleading statements about the company’s business.^[16] The lawsuit claims that Activision failed to adequately disclose or made misleading statements regarding the company’s “‘frat boy’ workplace culture,” the extent of harassment complaints, and the DFEH’s investigation, among other material information.^[17] Activision’s Chief Executive Officer and former Chief Financial Officers are personally named as defendants in the lawsuit.^[18]

Third, in September, news of the DFEH’s conclusions prompted a union supporting Activision employees to file a complaint to the National Labor Relations Board for intimidating workers and preventing them from organizing.^[19] Communications Workers for America alleges that Activision violated the National Labor Relations Act by preventing employees from discussing wages, hours, and working conditions, and by surveilling them, among other conduct.^[20]

Guidance for Companies and Executives

The multifarious inquiries Activision faces reflect a broader trend of growing regulatory and other stakeholder concerns about workplace culture and conduct. The addition of the SEC as an active player in investigating these matters confirms the necessity for companies to build and maintain strong compliance programs that are attuned to harassment and discrimination concerns and to take quick and appropriate action when such concerns surface.^[21] In particular, companies should:

- ***Maintain robust anti-harassment and anti-discrimination policies.*** To prevent harassment and discrimination from infiltrating work cultures in the first place, companies should ensure that they not only implement, but also reevaluate and maintain, effective anti-harassment and anti-discrimination policies. Ensuring that employees have access to designated personnel with relevant expertise charged with responding to their complaints in a confidential manner is also essential, as evidenced by Activision’s settlement terms with the EEOC.
- ***Ensure all required disclosures are made to investors.*** Public companies, of course, are required to provide investors updates about important facts that relate to their key personnel and litigation. As illustrated in the SEC’s interest in Activision’s response, the SEC is now focused on how public companies inform investors about material risks arising out of harassment allegations. To ensure these disclosures are made when harassment allegations arise, the first step is to ensure the relevant personnel at the company have sufficient facts to determine whether a disclosure is needed. Then, when the company does make disclosures, it is essential that it fully and appropriately discloses the relevant facts.
- ***Diligently retain documents and other potential evidence.*** Companies should think creatively about potential sources of evidence relevant to harassment allegations, including but not limited to emails, surveillance footage, text messages, internal chat applications, and social media

communications. Documenting the investigation by maintaining dated witness interview files and correspondence regarding any decision on a matter is essential.

- **Identify and assess all potential complaints, regardless of formality.** Companies should recognize that harassment reports come in various forms, including informal complaints from employees, reports from employees that a colleague has complained to them, or anonymous tips. BlackRock recently hired an external law firm to review company processes after anonymous accounts of sexual harassment and racial discrimination were reported by the press.^[22] All reports, regardless of their form, should be taken seriously and assessed for potential investigation.
 - **Ensure appropriate communication with the complainants.** Companies should ensure that complainants are appropriately informed regarding the status and thoroughness of the company's investigation into the concerns raised. Following up after an internal investigation to ensure the accuser is not experiencing or perceiving retaliation further protects that employee and helps mitigate the risk of retaliation claims against the company.
 - **Consider interim protective measures.** Temporarily changing the workplace conditions or reporting lines of particular employees or placing them on paid administrative leave may be necessary before an investigation is launched and throughout the investigative period.
 - **Thoroughly and promptly investigate the complaint.** Companies must both show the accuser that their complaint is being taken seriously and convey to the accused that a fair process will protect their rights. Companies should consider the allegation's seriousness, the reporting relationship between the accuser and the accused, and relevant levels of seniority in setting the investigation's scope. If the accused is a senior executive, for example, retaining outside counsel may be advisable to avoid potential claims that the investigation was biased. In the case of an in-house investigation, companies should ensure that their team includes those best positioned to conduct the investigation, taking into account factors like gender, age, and seniority. In addition, companies should consider using two interviewers to ensure multiple perspectives on a complaint and provide a corroborating witness to the interview.
 - **Interface with law enforcement if the allegation involves a crime or the accuser has made a criminal complaint.** Cooperation with law enforcement while remaining mindful of employee privacy concerns is essential. In some cases, law enforcement may be willing to assist a company's investigation by providing access to certain evidence like video surveillance of hotels and restaurants.
 - **Review the requirements of employment practices liability insurance.** Companies should be aware of the extent of any available insurance for the investigation and resolution of workplace culture claims and any requirements, such as notice to insurer, imposed by the policy.
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Contact Us



Anne Cortina Perry

aperry@jenner.com | [Download V-Card](#)



Anthony S. Barkow

abarkow@jenner.com | [Download V-Card](#)



Charles D. Riely

criely@jenner.com | [Download V-Card](#)



Lori B. Day

lday@jenner.com | [Download V-Card](#)



Tali R. Leinwand

tleinwand@jenner.com | [Download V-Card](#)



Anna Windemuth

awindemuth@jenner.com | [Download V-Card](#)

Meet Our Team

Practice Leaders

Anthony S. Barkow

Co-Chair

abarkow@jenner.com

[Download V-Card](#)

David Bitkower

Co-Chair

dbitkower@jenner.com

[Download V-Card](#)

Christine Braamskamp

Co-Chair

cbraamskamp@jenner.com

[Download V-Card](#)

Brandon D. Fox

Co-Chair

bfox@jenner.com

[Download V-Card](#)

Erin R. Schrantz

Co-Chair

eschrantz@jenner.com

[Download V-Card](#)

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- [2] See Press Release, Activision Blizzard, Activision Blizzard Commits to Expand Workplace Initiatives, Reaches Agreement with the EEOC (Sept. 27, 2021), <https://investor.activision.com/node/34481/pdf>.
- [3] Kirsten Grind & Sarah E. Needleman, WALL ST. J., SEC is Investigating Activision Blizzard Over Workplace Practices, Disclosures (Sept. 20, 2021), <https://www.wsj.com/articles/sec-is-investigating-activision-blizzard-over-workplace-practices-disclosures-11632165080>.
- [4] *Id.*
- [5] *Id.*
- [6] *Id.*
- [7] *Id.*
- [8] *Id.*
- [9] See Press Release, Activision Blizzard, Activision Blizzard Commits to Expand Workplace Initiatives, Reaches Agreement with the EEOC (Sept. 27, 2021), <https://investor.activision.com/node/34481/pdf>; Proposed Consent Decree, *US Equal Emp't Opportunity Comm'n v. Activision Blizzard, Inc.*, No. 2:21-cv-07682 (C.D. Cal. Sept. 27, 2021), ECF No. 11-1.
- [10] Complaint, *US Equal Emp't Opportunity Comm'n v. Activision Blizzard, Inc.*, No. 2:21-cv-07682 (C.D. Cal. Sept. 27, 2021), ECF No. 1.
- [11] *Id.* at ¶¶ 22-25.
- [12] Press Release, Activision Blizzard, Activision Blizzard Commits to Expand Workplace Initiatives, Reaches Agreement with the EEOC (Sept. 27, 2021), <https://investor.activision.com/node/34481/pdf>; Proposed Consent Decree, *US Equal Emp't Opportunity Comm'n v. Activision Blizzard, Inc.*, No. 2:21-cv-07682, at ¶¶ IV, IX, XII. (C.D. Cal. Sept. 27, 2021), ECF No. 11-1.
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- [15] Amended Complaint, *Dep't of Fair Emp't & Hous. v. Activision Blizzard, Inc.*, No. 21STCV26571, at ¶ 13 (Cal. Sup. Ct. Aug. 23, 2021).
- [16] Complaint, *Cheng v. Activision Blizzard, Inc.*, No. 2:21-cv-06240-PA-JEM, at ¶¶ 31, 48, 61 (C.D. Cal. Aug. 3, 2021), ECF No. 1.
- [17] *Id.* at ¶ 31.
- [18] *Id.* at ¶¶ 8-12.
- [19] Communications Workers of America, *Employees of Activision Blizzard File Unfair Labor Practice Charge Against the Gaming Company* (Sept. 14, 2021), <https://cwa-union.org/news/releases/employees-of-activision-blizzard-file-unfair-labor-practice-charge-against-gaming>.
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- [21] See generally Howard S. Suskin, *#Me Too: Legal and Practical Concerns for Companies and Boards*, FINANCIER WORLDWIDE (Sept. 2019), <https://www.financierworldwide.com/metoo-legal-and-practical-concerns-for-companies-and-boards#.YFuQ1pNKhTb>.
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