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Client Alert: C-Suite Employment Contract Clauses Companies and their Boards Must Consider in the Wake of Weinstein

BY TIMOTHY P. VAN DYCK • NOVEMBER 17, 2017

The Harvey Weinstein scandal has struck a nerve in American society and empowered individuals to speak out about sexual harassment and retaliation in the workplace. The nation appears to be at a tipping point, with revelations of sexual harassment allegations against politicians, celebrities, and executives now hitting the news almost daily. In the age of social media, claims of harassment against executives and other employees can quickly create public relations nightmares for companies and their boards. Indeed, depending on the seriousness of the allegations and the publicity surrounding them, a company's very survival can be on the line.

Employers must be prepared to take swift action to address these complaints when they arise in the workplace and, better yet, to take proactive steps to discourage harassment and other forms of discrimination from occurring in the first instance. One such step that employers can take right now is to revisit their executive employment agreements to ensure that they specifically and appropriately address the repercussions of harassing or retaliatory conduct in the workplace.

Whether at the beginning of the employment relationship or through an amended agreement with existing executives, employers should consider including the following clauses in their executive employment contracts:

- **“For Cause” Termination:** Executive employment agreements typically list certain types of conduct by the employee that will justify immediate termination by the company. Review these clauses to ensure that they are broad enough to include termination where the company (and not a court of law) determines that the executive has engaged in harassment or retaliation. Instead of relying on more general terms such as “misconduct,” consider adding a clause specifically identifying harassment (sexual or otherwise) and retaliation as grounds for termination for cause.
- **Stock Clawback:** In addition to termination for cause, consider provisions that would hit the executive in the pocket book, such as a clause requiring the clawback of stock options if the company determines that the executive has engaged in harassment or retaliation.
- **Representation of No Prior Claims:** Particularly upon the hire of a new executive, consider having the individual provide a representation or warranty that he or she has not been the subject of, or found guilty of, any prior claims of harassment, assault, or retaliation. The clause should indicate that discovery of a failure to disclose such a prior material claim will be considered grounds for immediate termination for cause. These types of clauses are particularly important now, where headlines show executives being called out on misconduct that occurred many years, and in some instances, decades ago.
- **Reimbursement of Expenses:** Consider adding a clause requiring the executive to reimburse the company for the amount of any settlement or judgment reached, plus all legal fees and costs associated with investigation or

litigation, if the company determines that the executive engaged in harassing or retaliatory conduct. Note that such a clause should be enforced in connection with a termination for cause: Harvey Weinstein's employment contract, for example, has been rightly criticized for containing a provision requiring reimbursement of expenses for harassment complaints (plus a penalty on each occasion) which, as long as paid in full, "cured" the misconduct and allowed the employment relationship to continue.

- **An Affirmative Obligation the Executive Participate in Anti-Harassment Training:** Executives need to know that they set the tone for the rest of the organization. There is nothing more telling than a company-wide anti-harassment training seminar where all of the executives find an excuse not to show up. On the other hand, having executives not only present for, but actively participating in, such training shows all employees that they take the issue seriously and expect the rest of the workforce to do so as well. As such, companies should consider including a contractual clause mandating that the executive participate in any and all company-wide anti-harassment training and that there be financial penalties for failing to do so.

While there is no magic formula for ensuring that a company's C-suite executives will behave themselves in the workplace, there are some very concrete steps organizations can take to minimize the risk that their reputations become tarnished by the bad acts of one of their executives. And the time to consider implementing those steps is now.