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C-suite employment contract clauses in the wake of Weinstein

By Timothy Van Dyck

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. The allegations tend to follow a pattern: an individual (usually male) in a position of power within an organization takes advantage of his position and engages in inappropriate sexual conduct toward an individual (usually female) over whom he has power, control or leverage.

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 investigate and address these complaints when they arise in the workplace. Ensuring that human resources staff are properly trained and equipped to respond to complaints of sexual harassment is obviously critical for all employers. But reliance on such reactive measures alone is no longer enough.

For one, employees may not want to go to HR or otherwise report issues internally out of fear of retaliation, embarrassment or a perception that HR and management will simply act to protect the corporation from liability and not necessarily to protect the employee's interests.

Employees may not even be aware that they were subjected to harassment or abuse until years later, after their employment has ended.

Even if issues are reported, employees may still feel that their complaints are not being handled fairly or adequately.

In its recent article "Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.," the New York Times reports that "[t]he recent outpouring of complaints from women about mistreatment in the workplace has included numerous accounts of being ignored, stymied or retaliated against by human resources units — accounts that portray them as part of the problem, not the solution."

Even HR departments themselves may feel powerless to properly address concerns of sexual harassment, particularly where a top executive is implicated. The reality is that even the most well-intentioned internal investigation and response procedure often cannot prevent claims of sexual harassment from embroiling the company in protracted litigation and a media firestorm.

The better practice, of course, is to avoid incidents that give rise to sexual harassment claims in the first place. Employers should take proactive and preventative steps to discourage harassment and other forms of discrimination from occurring.

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 (particularly those executives who represent the "face" of the organization), employers should consider including the following clauses in their executive employment contracts:

• "For cause" termination

When a company faces sexual harassment claims against an executive, termination of the executive ultimately may be the right step to take. But the company may then face breach of contract claims if it fails to discharge the executive in accordance with an employment agreement's termination clause.

Executive employment agreements typically list certain types of conduct that will justify immediate termination by the company. Review these clauses to ensure that they are broad enough to include termination when 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 determined by the company, as grounds for termination for cause.

• Stock claw-back

In addition to termination for cause, consider provisions that would hit the executive in the pocketbook, such as a clause requiring the claw-back 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 been 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 may 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. Companies that failed to take reasonable precautions to identify any history of harassment or abuse prior to hiring an executive could face liability for negligent hiring when a repeat offender strikes again.

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• 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 quite 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.

That aspect of Weinstein's contract became a PR nightmare in its own right, as the Weinstein Co. clearly appeared to be condoning his inappropriate behavior.

Needless to say, an executive employment contract should never contain provisions that could be perceived as condoning or tolerating unlawful behavior.

• An affirmative obligation that 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 when all of the executives find an excuse not to show up for a company-wide anti-harassment training seminar.

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.

Finally, companies should consider the role of contractual severance payments in light of the possibility of termination of executives accused of sexual harassment. Many executive employment contracts contain clauses allowing for termination of the agreement for any reason, i.e., without cause, in exchange for a severance payment to the executive.

In the event the company determines that an executive has engaged in inappropriate sexual harassment or retaliatory conduct, the advantage of such a clause is that the executive can be terminated quickly and cleanly, without risking a separate litigation over whether the reason for termination for cause was permissible under the agreement. Such a dispute could drag on and keep the scandal in the public eye even longer than the underlying harassment complaint.

Companies should be wary, however, of the optics of invoking such clauses. Generous severance packages for executives — which may total many times what lower-level employees earn in salary — paid out in the midst of accusations of sexual harassment, will likely be perceived as rewarding the executive's bad behavior and will be compared to the company's efforts to compensate the alleged victim.

Fox News generated a heap of bad publicity when it was reported that the news organization had paid Bill O'Reilly a severance package worth up to $25 million — nearly twice as much as it had paid out to settle claims of five women who claimed to have been victimized by O'Reilly during his career.

Companies would do better to draft strong agreements providing clear prohibition on sexual harassment and penalties for such conduct, as set forth above, not only to discourage such conduct from occurring at all, but also to empower the company to terminate executives for cause when it determines harassment has occurred.

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. MLW

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