#MeToo reaches merger transactions with Weinstein Clause

In this article, Oklahoma City Attorney Erica K. Blackstock discusses the "#MeToo" movement and the Weinstein Clause as they relate to requirements in buying and selling companies.

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What is the #MeToo movement and how did it start?

In October 2017, The New York Times published an article detailing decades of sexual misconduct by film producer Harvey Weinstein. The scandal ultimately left Weinstein disgraced, his film studio bankrupt and victims of sexual harassment and assault emboldened. The #MeToo movement ensued, wherein victims tweeted (or otherwise went public with) their experiences, which highlighted the prevalence of such

misconduct in the workplace. As a result, the chickens have come home to roost for many predators in power. This means, among many other things, companies must adapt and prepare for the potential PR and legal nightmare that necessarily follows misconduct allegations against employees, particularly those having influence over compensation, promotions/demotions and workplace culture. One way we see the #MeToo movement in the doldrums of corporate paperwork is through what is becoming known as the "Weinstein Clause" in merger and acquisition agreements.

What is a Weinstein Clause?

When a company is sold or merged, the selling company is typically required to make a litany of representations to the buyer concerning the status of the selling company. A Weinstein Clause is a representation made by the selling company where the seller promises that none of the selling company's employees is the subject of allegations of sexual misconduct. In its broadest form, a seller represents that no allegations of sexual harassment or misconduct have been made to the company against any individual in his or her capacity as an employee of the company or any of its affiliates. Usually, if a seller makes a false representation, the buyer can sue the seller for all damages resulting from the breach.

How do sellers negotiate Weinstein Clauses in M&A transactions?

Just like any representation in an M&A (merger and acquisition) transaction, sellers will try to limit the scope of the representation by adding knowledge qualifiers (ex: to the seller's knowledge, there are no sexual harassment or misconduct allegations), defining or reducing the look-back period (ex: the seller represents that there have been no allegations in the past five years) and minimizing the number or type of employees subject to such allegations (ex: the seller represents that there have been no allegations against

executive level employees). In addition, the lawyers on both sides will probably spend time negotiating the definitions of "sexual harassment" and/or "sexual misconduct," as such terms are open to interpretation and, therefore, ambiguity. After the representation itself is determined, if the seller is aware of any such allegations, the seller will try to negotiate an exception to the representation and describe the allegations on a schedule attached to the agreement. In this case, the seller is essentially saying, "except for that one time, which buyer is going to overlook, there have been no allegations of sexual harassment/misconduct."

Why should people care?

The Weinstein Clause itself will probably not have a noticeable impact on the viability or essential terms of M&A transactions. And most people will probably never lose sleep over how broadly or narrowly any Weinstein Clause is negotiated. However, everyone is affected by companies (some more directly than others), and most companies are led by individuals who have power and influence over other employees. The emergence of the Weinstein Clause is indicative of a broader social change. The Weinstein Clause provides evidence that sexual harassment and misconduct by such individuals is not tolerated, safe and respectful company cultures matter, and victims of sexual harassment and misconduct ought to be protected.

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