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The New, #MeToo World: How to Protect Your Company, and Your Officers and Directors, Against Losses Arising From Claims of Sexual Misconduct and Other Workplace Harassment

With the viral #MeToo movement spreading across the country in the last several months, new, high-profile claims of sexual harassment and other workplace sexual misconduct seem to be reported on almost a daily basis. Stories like the bombshell allegations against CBS executive Leslie Moonves, Hollywood mogul Harvey Weinstein, and television personality Matt Lauer have garnered the most attention. But all employers—no matter the size or industry—have potential exposure to claims by employees and other third parties arising out of sexual misconduct allegations. Indeed, according to a 2016 report by the U.S. Equal Employment Opportunity Commission (“2016 Report”), “anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace.”¹ The 2016 Report also suggests that official reports of sexual harassment may be stymied and not representative of the true issue, as approximately 75% of individuals who reported harassment face retaliation of some kind.²

In many instances, claims alleging sexual harassment may allege wrongful conduct that has occurred for years. Thus, an increasing number of states are abolishing or lengthening the statutes of limitations applicable to sexual misconduct claims. As a result, with the rise of the #MeToo movement and increased awareness of the pervasiveness and differing forms of sexual harassment, companies may increasingly face claims alleging sexual harassment that occurred long ago.

Furthermore, exposure to claims arising out of sexual harassment and workplace discrimination have now become a board-level concern, as multiple companies, boards, and directors and officers, are facing derivative and securities lawsuits arising from the #MeToo movement. By way of example, in November 2017, Twenty-First Century Fox Inc. settled



derivative claims against Fox's officers and directors for \$90 million arising from the sexual harassment allegations surrounding Fox News Channel.³ Similarly, shareholders filed suit against the founder of Wynn Resorts, along with its board of directors alleging that they "disregard[ed] a sustained pattern of sexual harassment and egregious misconduct."⁴ If a lawsuit alleges that a director or officer allowed a culture in which sexual harassment or other discriminatory practices existed, a company may be required to indemnify that director or officer for those claims.

In the wake of this reality, an increasing number of companies are looking to insurance to protect against the losses associated with these claims. For example, last year, businesses in the United States spent approximately \$2.2 billion on insurance policies related to sexual harassment and other workplace discrimination claims.⁵ This number is expected to grow to at least \$2.7 billion by 2019.⁶ Indeed, one insurer reported a 15% increase in sales of employment practices liability ("EPL") insurance (the line that traditionally applies to discrimination or harassment claims) between fall 2016 and September 2017—the same time period as many, significant, high-profile allegations.⁷

Despite this increase in purchasing insurance coverage, though—at least in the case of Harvey Weinstein—insurers have been reluctant to accept coverage for the full loss associated with sexual harassment claims. Having been named in several lawsuits and criminal proceedings, Weinstein has tendered his losses to a variety of policies seeking, among other things, reimbursement of his defense bills. Since then, three insurers have sued Weinstein seeking declarations that they do not owe him coverage under the terms of the policies. More specifically, Chubb has filed suit in both New York⁸ and London⁹ seeking to avoid coverage. In the London lawsuit, Chubb has claimed, among other things, that Weinstein failed to disclose that he had settled certain matters arising from allegations of sexual assault and rape in the late 1990s and early 2000s.¹⁰ Chubb claims that, if it would have known about these settlements, it would not have insured Weinstein or would have provided different terms and conditions in its policies.¹¹ In the New York lawsuit, Chubb is seeking to avoid coverage by focusing, in large part, on the alleged intentional nature of Weinstein's acts, arguing that his actions "do not constitute an 'occurrence' or 'accident' under the policy, and that his actions trigger other exclusions such as the 'intentional acts' exclusion and exclusions for sexual assault and other misconduct."¹² Weinstein has filed a third-party complaint in that New York lawsuit against certain D&O and EPL carriers. Finally, Steadfast Insurance Co. (a carrier for Walt Disney Co., which owned Weinstein's Miramax film company) also filed suit against Weinstein on June 26,¹³ seeking a declaration that it does not have to provide coverage for Weinstein's defense costs under its EPL policy, claiming the policy does not cover "bodily injury" or criminal allegations.¹⁴ All of these lawsuits remain pending.

Although the issues surrounding Weinstein are just one example, they highlight a few important lessons. First, EPL insurance (the traditional line of coverage for workplace harassment) is not the only applicable line of insurance when a company or its employees are facing claims of sexual misconduct. Indeed, the claims and allegations in cases stemming from sexual misconduct can trigger a wide variety of coverages, as well as a variety of exclusions. Therefore, and second, it is important to carefully review and negotiate multiple kinds of insurance policies before claims of sexual harassment arise to ensure that there are no exclusions or other provisions that bar or limit otherwise available coverage. Finally, it is also crucial to consider the interplay of a wide variety of policies that may apply to claims arising from allegations of sexual misconduct to ensure that, when read together, there are no gaps in coverage. Below is a brief explanation of potential coverages that may apply to claims alleging sexual misconduct or harassment in the workplace, as well as some key exclusions and provisions to bear in mind when securing these policies.

POTENTIALLY APPLICABLE COVERAGES

- **Employment Practices Liability Insurance ("EPL"):** These insurance policies typically cover claims made by employees for alleged harassment or misconduct they experience at their workplace. Some of these policies may also cover claims against the company for alleged negligent retention / supervision, or may cover claims made by certain third parties (such as vendors).



- **Directors & Officers Insurance (“D&O”):** These policies typically provide coverage for certain claims against directors and officers of a company. For example, a lawsuit against a company’s directors and officers claiming that they breached their fiduciary duties to the company may be covered by D&O insurance. Additionally, some of these policies may provide coverage for the company for securities litigation or shareholder derivative suits.
- **Commercial General Liability Insurance (“CGL”):** These policies generally provide coverage for claims arising out of “personal injury,” which often includes defamation (a claim commonly seen in lawsuits involving allegations of sexual harassment). These policies also usually provide coverage for claims arising out of allegations for “bodily injury.”

TERMS AND EXCLUSIONS TO CAREFULLY CONSIDER

- **Exclusions for “bodily injury”:** These exclusions can be found in EPL policies and D&O policies. Thus, claims arising from allegations of rape or other physical acts of sexual misconduct that allege physical harm may trigger this exclusion. Additionally, these exclusions often use a broad definition of bodily injury, including emotional or mental injuries, and therefore may exclude claims that include allegations of emotional distress. Any exclusions in your policies should be carefully reviewed across lines of coverages and appropriately narrowed. Moreover, companies should seek “Securities Claims” carve-backs to potentially applicable exclusions in their D&O policies to ensure that these exclusions do not bar coverage for securities litigation arising out of sexual misconduct.
- **Exclusions for “expected or intended” injuries / “willful and intentional” misconduct:** “Expected or intended” exclusions are often seen in CGL policies, and typically bar coverage when the claimed injury was an intended or expected result of the actor’s conduct. Similarly, “willful or intentional” misconduct exclusions are often in D&O policies and exclude coverage for certain intentional acts. Moreover, some states limit insurance coverage for intentional acts. Therefore, these exclusions (or public policy) may work to bar coverage for an individual who is accused of sexual harassment, even if it covers that individual’s employer (or the employer’s directors and officers) for claims arising from that sexual harassment.
- **Exclusions relating to sexual misconduct or employment practices:** These exclusions may be found in both D&O and CGL policies, and may exclude coverage for certain claims arising out of allegations of sexual misconduct or other harassment in the workplace.
- **Retroactive date:** Because claims for sexual harassment or sexual misconduct may allege a pattern of misconduct that spans several years, or even decades, it is important to carefully consider any applicable retroactive date and try to push it as early as possible, or seek to avoid including a retroactive date in a policy.
- **Interrelated Claims Provisions:** These provisions can sometimes be drafted broadly and, if overly broad, may result in several claims being lumped together under one sublimit or one policy period, ultimately limiting coverage for otherwise covered claims.

The above policies and exclusions are just some examples of the types of issues that may arise for companies in the wake of sexual harassment claims. However, each company and each situation is unique. Reviewing your policies with coverage counsel and experienced brokers can help avoid some of the hidden traps in these policies and ensure the most potential coverage in the event of claims arising from sexual harassment allegations.



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¹ *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*, at 8, EEOC (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

² *Id.* at 16.

³ Johnathan Stempel, *21st Century Fox in \$90 Million Settlement Tied to Sexual Harassment Scandal*, REUTERS (Nov. 20, 2017, 6:02 PM), <https://www.reuters.com/article/us-fox-settlement/21st-century-fox-in-90-million-settlement-tied-to-sexual-harassment-scandal-idUSKBN1DK2NI>.

⁴ David Ferrara, *Wynn Resorts Shareholder Sues Company's Founder, Board*, LAS VEGAS REVIEW-JOURNAL (Feb. 7, 2018, 5:55 PM), <https://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-shareholder-sues-companys-founder-board/>; Colby Hamilton, *City Pension Funds Join Wynn Resorts Sexual Harassment Derivative Suit*, NEW YORK LAW JOURNAL (Mar. 26, 2018, 4:14 PM), <https://www.law.com/newyorklawjournal/2018/03/26/city-pension-funds-join-wynn-resorts-sexual-harassment-derivative-suit/>.

⁵ Danielle Paquette, *More Companies are Buying Insurance to Cover Executives Who Sexually Harass Employees*, WASHINGTON POST (Nov. 3, 2017), https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html?noredirect=on&utm_term=.aa06932dbb4c.

⁶ *Id.*

⁷ *Id.*

⁸ See *Fed. Ins. Co., et al. v. Harvey Weinstein*, No. 1:18-cv-02526 (S.D.N.Y. May 7, 2018).

⁹ See *Chubb European Grp. PLC v. Weinstein*, [2018] EWHC (Civ) (Eng.).

¹⁰ Richard Crump, *Chubb Widens Bid To Avoid Weinstein Coverage With UK Suit*, LAW360 (June 25, 2018, 8:30 PM BST), <https://www.law360.com/newyork/articles/1056775>.

¹¹ *Id.*

¹² *Id.*; Gavin Souter, *Chubb Denies Liability Coverage to Harvey Weinstein*, BUSINESS INSURANCE (Feb. 28, 2018 8:07 PM), <https://www.businessinsurance.com/article/20180228/NEWS06/912319543/Chubb-Ltd-denies-liability-insurance-coverage-to-disgraced-movie-mogul-Harvey-We>.

¹³ See *Steadfast Ins. Co. v. Weinstein*, No. 653179/2018, (N.Y. Sup. Ct. June 26, 2018).

¹⁴ Gene Maddaus, *Disney Insurer Seeks to Avoid Paying for Harvey Weinstein's Criminal Defense*, VARIETY (June 26, 2018, 11:04 AM PT), <https://variety.com/2018/biz/news/weinstein-lawsuit-disney-criminal-defense-fees-1202858221/>.