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Effective Tactics for Handling Harassment Claims Involving Executives: The First 48 Hours

I. Liability for Executive Level Harassment Claims

Understanding the Current Climate

The impact on a company from a sexual harassment claim against an executive are well known: the often loss of productivity and loyalty of the claimant, out-of-pocket costs from an award, negative publicity, and the overall erosion of internal morale and a once positive company culture. Moreover, litigation can present little or no upside for a company, with a major broker and insurance carrier recently reporting the average cost alone to defend an employment practices liability claim as $150,000.

The current climate in sexual harassment litigation goes beyond shifts in thinking on how to cut costs. In an article in February 2018, by the *Harvard Business Review*, the allegations against Harry Weinstein are described as a moment when the "dam broke" and cites statistics where 87% of Americans now favor zero tolerance of harassment. As companies shift away from private settlements with claimants and focus increasingly on disciplining abusers instead, how companies, including risk managers, in-house counsel, outside counsel and liability carriers respond to harassment claims from the outset is critical.

Goals for the First 48 Hours

Companies know that waiting to respond to a harassment claim against an executive is not an option. The claimant may still be in a tenuous position, the abusive conduct may be ongoing and involve other individuals and the whispers may be spreading through the rank and file, already eroding a once positive company culture. Moreover, talent tends to chase management and opportunity; once a company's leader is revealed as an abuser,

a company's core talent may soon question whether they are following the right leadership in their own career paths.

As an initial step, all companies must immediately define the team that is responding to the situation. Typically, this will include general counsel, head of human resources or risk management and outside counsel. Each member of the team should have clear roles defined, whether it is to oversee and complete an internal investigation, evaluate potential liability and exposure or to put relevant directors, officers and insurers on notice of the claim. At minimum, the team needs to put in place a process that addresses the following:

- Acknowledge receipt of the complaint and assure the complainant that it is being taken seriously and will be investigated immediately;

- Implement and maintain a litigation hold to immediately preserve all potentially relevant documents, electronically-stored information (email, text, instant messages, phone logs, metadata associated with electronic documents, etc.), and potentially affected electronic devices and company property; explain the investigation process and confidentiality obligations to the complainant, as well as establishing appropriate expectations for future communications from the company;

- Determine the scope of, script, and conduct the investigation, including explaining relevant company policies and confidentiality obligations within the scope of the investigation;

- Serve as a management witness and scribe for the interviews of all witnesses involved in the investigation;

- Evaluate the results of the investigation and determine the appropriate course of action for remedial measures, if any; and

- Implement and communicate to complainant and appropriate personnel the findings of the investigation and any remedial action, including issuing public statements, if applicable.

Once these roles are firmly in place, it is essential that the company establish the parameters of a bullet-proof investigation. A key component of every investigation is identifying all possible issues, witnesses and sources of potential evidence. While scripting out specific questions for witnesses is not always necessary or possible, it is a good idea to outline the topics to be covered consistently with all witnesses based on the allegations in the complaint. It is also imperative to cover with all witnesses the company's expectations and any applicable policies regarding confidentiality of the investigation, cooperation with the investigator, honesty, and strict prohibition of retaliation in any way.

Implementing the Proportionate Corrective Action

In most circumstances and at minimum, an accused should be placed on paid administrative leave pending the results of the investigation to preserve the status quo as much as possible and avoid the creation of additional allegations. The company should prepare a written notice to the accused explaining the ground rules of the leave period, including a no-contact order with anyone other than the person leading the investigation, immediate surrender of the accused's company devices pending the investigation, strict confidentiality of the fact of and allegations within the investigation, and an acknowledgment that the accused may consult with legal counsel during the leave period.

After interviewing all witnesses, including the complainant and the accused, and reviewing all collected sources of physical evidence, the investigator should prepare a draft investigation report that includes a summation of the witness testimony, the investigator's analysis of credibility, relevant content of any documentary evidence, and recommended remedial action that may be warranted, either individually or company-wide. The investigator should then obtain legal advice before finalizing the investigation report, which will become the cornerstone of any future defense should the complainant file suit.

Finally, the company should develop a plan of communication to explain the investigation findings and remedial action where appropriate, to ensure that the company follows up with the complainant, accused and all witnesses involved. With a high-level accused, the company may also need to partner with its public relations contact to develop a press release or other public statement reflecting the appropriate level of gravitas and commitment to a harassment-free workplace.

At every step of the way, it will be important to consult with legal counsel for advice; however, outside counsel must remain walled-off from the substantive investigation itself to ensure the preservation of attorney-client privilege and prevent outside counsel from being converted into a fact witness. To the extent that the company wishes to have an attorney as part of the investigation team, separate "investigation" counsel should be retained in anticipation of any future defense testimony that may be needed.

III. Anticipating Litigation

Employment litigation practitioners are well-versed in the potential conflicts that may arise when retained to represent a company in defense of allegations against an executive. Outside counsel's role on behalf of the company needs to be made clear to the accused executive from the outset to ensure there is no future confusion about the entity represented. In-house and outside counsel need to explore these issues and set appropriate expectations before getting underway in the first 48 hours.

Insurance is critical and all carriers need to be put on timely notice of the complaint. Ignoring the potential for litigation and missing a reporting deadline can be costly. A member of the team needs to be tasked with putting EPL carriers and D&O policies on written notice within the first 48 hours and if not, the reasons for not doing so need to be fully understood by all involved.

IV. Understanding How a Complaint Will Influence Future Claims

While effectively resolving an internal harassment complaint may end immediate risks of exposure and impact on business operations, future claims may still be impacted. The matter of *Pantoja v. Anton*, 198 Cal. App.4th 87 (2011), review denied (Aug. 9, 2011), is illustrative. In this case, a former employee brought an action against her employer for sex harassment and discrimination and race discrimination, resulting in a special jury verdict for the employer and appeal by the employee following the denial on a motion for new trial. On appeal, the employee successfully argued that evidence that the employer harassed others outside the employee's presence was relevant to the issue of the employer's discriminatory intent. Although using the phrase well before its current connotation and in the context of evidence, the court held that "me too" evidence in the "form of harassing activity against women employees other than the [employee]" should have been heard by the jury. Notably, in so holding, the court expressly distinguished the prohibition of such "me too" character evidence under California Evidence Code section 101, stating the rule bars such evidence when it was unknown to a plaintiff at the time of the harassment and is offered to prove a defendant's propensity to harass, as compared to the instant case when it was offered to prove an ultimate issue of intent.

Beyond future evidentiary concerns, even oft used confidentiality provisions in settlement agreements may be losing their teeth. The current news cycles are replete with former claimants either ignoring such provisions in order to tell their story or making direct challenges to the enforceability of such provisions on their face. The growing perception of instability in these provisions is yet another reason for companies to weigh carefully the risks of retaining an accused executive when there is even a remote possibility of other existing claims against the executive or that the executive will not respond to corrective action.