Mergers & Acquisitions Alert: #MeToo Movement Gives Rise to Use of "Weinstein Clause" in M&A Transactions

Client Advisories

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Since allegations of serial sexual misconduct against former Hollywood producer Harvey Weinstein rocked the entertainment industry, the #MeToo movement has been a powerful force in exposing sexual harassment and assault allegations throughout the business world. Now the influence of the #MeToo movement has finally reached the transactional community with the increasing use of the so-called "Weinstein Clause" in M&A agreements, as well as in private equity investment documents.

While a "Weinstein Clause" (also referred to as a "#MeToo rep") can take various forms, such a clause typically requires the target company, and/or its equity owners, to represent that, within a certain time period, no sexual harassment or assault allegations have been made against the company's senior employees or officers, and that the target company has not entered into any settlement agreements with regard to such behavior. The increasing popularity of these clauses shows that M&A buyers are making an effort to avoid being blindsided with the potentially devastating financial and social consequences of officer sexual misconduct that target companies may have previously kept quiet.

Although the actual value of sexual harassment settlements tends to pale in comparison to other potential claims that may be disclosed in a large M&A transaction, the heightened societal visibility for such misconduct created by the #MeToo movement increases the risk of serious reputational harm associated with the existence of such claims. As a result, during M&A due diligence potential buyers must pay heightened attention to culture and employment practice issues at target companies. Where potential #MeToo risk exists, a buyer may want to consider including deal protections, such as escrow requirements, or even the right to claw back a portion of the purchase price, in the event that #MeToo related revelations have a negative impact on the target company's performance post-closing.

However, while a business buyer certainly wants to protect itself from reputational and financial harm associated with prior sexual misconduct engaged in by a target company's employees, the sensitivity of these

issues cannot be overlooked. Both the buyer and seller in an M&A transaction must give sensible consideration to the scope of the protections that are needed and, if needed, how such protections should be documented. Confidentiality issues and respect for the rights of the accuser and the accused, particularly if the truth of a claim has not yet been established, may make disclosure documentation tricky. Careful thought will also have to be given during document drafting as to how losses, particularly those attributable to "reputational harm", will be established and quantified if a "Weinstein Clause" is given but is later shown to be false.

Finally, if during due diligence or as a result of disclosures made by a target in relation to a Weinstein Clause or #MeToo rep a buyer becomes aware of harassment or other sexual misconduct issues, it must formulate an appropriate plan to address such issues. Simply ignoring them and hoping that they do not become public is risky from both a legal liability and societal reputation perspective in today's #MeToo environment.

If you are interested in learning more about "Weinstein Clauses" and other types of social due diligence transaction protections, or if you are seeking assistance with any other aspect of a merger, acquisition or investment transaction, please contact Brian M. McGovern, Esq. or Deborah A. Hays, Esq., or any other member of Archer's Business Counseling Group, in Haddonfield, N.J., at (856) 795-2121, in Princeton, NJ, at (609) 580-3700, in Hackensack, NJ, at (201) 342-6000, in Philadelphia, PA, at (215) 963-3300, or in Wilmington, DE, at (302) 777-4350.

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Related People

Deborah A. Hays

Partner

dhays@archerlaw.com

856.354.3089

Brian M. McGovern

Partner

bmcgovern@archerlaw.com

856.673.3923

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