

#MeToo and M&A Transactions

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The #MeToo movement, which has exposed and held accountable prominent executives, celebrities, and other public figures for inappropriate sexual behavior, has finally had repercussions in the transactional community. Increasingly merger and acquisition (M&A) agreements are including “#MeToo representations” and requiring social due diligence.

“#MeToo representations,” also referred to as “Weinstein Clauses,” are statements by a deal party (usually the target company) about its involvement in and response to allegations of sexual misconduct. These representations take the form of clauses requiring the target company and/or its equity owners to represent that (i) within a certain time period, no sexual harassment or assault allegations have been made against the target company’s senior employees or officers, (ii) the target company has not entered into any settlement agreements with regard to such behavior and (iii) the target company regularly reviews and investigates allegations of sexual harassment or other misconduct and takes corrective action that is reasonably calculated to prevent further improper action. Additionally, buyers are considering deal protections, such as escrow requirements or the right to claw back a portion of the purchase price, with regard to representations and covenants around sexual misconduct.

Moreover, while employment-related diligence has traditionally focused on items such as potential wage and hour violations, issues related to unions and collective bargaining, and benefits compliance, buyers are now taking a closer look at potential social and reputational risks associated with sexual harassment claims. This area of due diligence, often referred to as social due diligence, requires buyers to examine any documentation regarding past allegations, to hold discussions with executives and human resources, and to examine company culture, including policies and trainings surrounding sexual harassment.

M&A Best Practices

Buyers should request from the target company:

- Sexual harassment policies and training, including documentation of attendance by employees of such training;
- Human resource processes and reporting procedures for sexual harassment complaints;
- Any complaints of sexual harassment, specifically in relation to executives;

- Steps the target company has taken to combat sexual harassment;
- Internal investigation reports and outcomes regarding sexual harassment;
- Any agreements pertaining to the settlement of sexual harassment complaints;
- Data on employee voluntary and involuntary terminations; and
- Any disclosures made to State authorities relating to settlements of sexual harassment complaints; and
- Any agreements pertaining to the settlement of sexual harassment complaints.

Selling companies should similarly conduct pre-diligence before a sale or merger negotiation begins and:

- Review internal policies and practices when dealing with allegations of sexual harassment, including non-disclosure agreements, employment agreements and settlement agreements;
- Ensure that the company has complied with any requirements under state #MeToo legislation, including relating to settlement agreements of harassment and discrimination complaints and reporting requirements to state authorities;
- Ensure that all employees are up-to-date on anti-sexual harassment training and that such training has kept pace with changes in the law;
- Include language in employment agreements stating that sexual harassment and sexual misconduct constitutes “cause” for termination; and
- Ensure compliance with any requirements under State #MeToo legislation, including relating to settlement agreements of harassment and discrimination complaints and reporting requirements to State authorities.

Such pre-diligence will provide a company with an opportunity to uncover any potential issues with respect to sexual harassment and to mitigate such issues, if any.

The #Metoo representations and heightened due diligence in M&A transactions reflect the growing importance of transparency around and intolerance of sexual misconduct. With the changing landscape, both buyers and sellers must adapt the way they think about and respond to sexual harassment allegations in the context of corporate transactions.

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