



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Weinstein Scandal Highlights Employment Contract Questions

By **Lynne Bernabei** and **Michael Ellement**

According to reports, Harvey Weinstein's employment contract with The Weinstein Company allowed him to engage in repeated sexual assault and keep his job, as long as he paid settlements to accusers with his own money and paid the company fines for each violation of its code of conduct. The company recently terminated Weinstein's employment following a report that he harassed and assaulted multiple women over the last three decades, including company employees. Weinstein's contract raises important questions regarding contract enforceability and employers' responsibility to protect employees from sexual harassment, despite attempts to shift responsibility to employees.



Lynne Bernabei

Attorney David Boies negotiated the contract in 2015 on Weinstein's behalf. Boies confirmed in an interview with the New York Times that at the time the contract was negotiated, the company's board knew Weinstein had reached at least three previous settlements with women. Lance Maerov, the board member who handled the contract negotiations, acknowledged that he was told about Weinstein's previous settlements. Maerov said that he assumed they were to cover up consensual affairs, but it seems highly unlikely given Weinstein's reputation in the industry, and that any sophisticated board member would likely know these high-value settlements were intended to cover up Weinstein's misconduct.



Michael Ellement

The 2015 contract purportedly states that if Weinstein "treated someone improperly in violation of the company's Code of Conduct," he must reimburse the company for any settlement or judgment rendered against the company, and additionally, "pay the company liquidated damages of \$250,000 for the first such instance, \$500,000 for the second such instance, \$750,000 for the third such instance, and \$1,000,000 for each additional instance." Reports suggest that the contract goes on to say that as long as Weinstein pays the settlement and liquidated damages amount, the company would not take any disciplinary action against him, unless he were indicted or convicted of a crime, or had perpetuated some fraud against the company (and even then Weinstein has a right to mediation and, absent settlement, arbitration).

New York Attorney General Eric Schneiderman recently launched a civil rights investigation into whether the company violated state civil rights and New York City human rights laws in handling complaints of sexual harassment of employees. The centerpiece of that investigation will likely be Weinstein's contract. The reported terms provide strong evidence that the company was willing to disregard Weinstein's repeated sexual harassment, so long as Weinstein indemnified the company for his actions.

New York, like other state and federal civil rights law, prohibits employers from maintaining a "hostile environment" consisting of intimidation or physical violence of a sexual nature directed at an individual because of that individual's sex. Employers are strictly liable for harassment of an employee by an owner or high-level manager, which likely includes Weinstein, and are further liable for harassment by lower-level supervisors or employees if the employer was on notice of harassment

and refused to address the harassment.

Most employers attempt to limit their liability by instituting workplace policies that prohibit sexual harassment, and provide an opportunity for employees to report sexual harassment, so that the company can deal with the problem early and stop any problem that exists. Indeed, federal law (which could become relevant if any employees sue the company for violating their civil rights) recognizes that an employer may defend against a hostile work environment claim or limit damages by exercising reasonable care to prevent and promptly correct harassing behavior, such as by establishing an effective reporting policy. However, courts have held that a paper policy is, on its own, not enough to limit liability if the policy is ineffective. Rather, the employer must take reasonable measures to enforce the policy.

Here, far from enforcing a policy against sexual harassment, if these were in fact the terms of Weinstein's contract, the company effectively exempted Weinstein from its policy by agreeing not to discipline him for violations of its code of conduct so long as he made any required payments to victims and to the company. It agreed to this arrangement knowing that Weinstein had paid large settlements to women in the past. It also likely knew that Weinstein was likely to harass women in the future, so it put in an escalating liquidated damages provision that contemplates multiple future code of conduct violations. Moreover, any reporting policy the company maintained for victims was hollow — as an employee reporting Weinstein's misconduct had no hope that the company would stop the harassment since the company was contractually obligated to continue employing Weinstein so long as he satisfied the liquidated damages provision for each reported incident. Indeed in 2015, Lauren O'Connor, a Weinstein Company employee, wrote a detailed memo alleging persistent sexual harassment by Weinstein, but the company took no action against Weinstein. The reported terms of the contract and the company's actions are therefore strong evidence that the company approved of Weinstein's conduct and, in so doing, perpetuated a sexually hostile work environment for its employees.

Moreover, the company enforced a strict "code of silence," according to the New York Times. It forced employees to sign contracts that stated they would not criticize the company or its leaders in a way that could harm its "business reputation" or "any employee's personal reputation." Such workplace rules generally violate the National Labor Relations Act, and further support an argument that the company tried to bar employees from publicly raising allegations against Weinstein. Weinstein also reached confidentiality agreements with women who settled claims against him. Those agreements prohibited the women from speaking about the settlements or the events that led to their harassment or assault claims.

In a recently filed lawsuit against the Weinstein Company, actress Dominique Huett alleges Weinstein harassed and assaulted her during a 2010 meeting at a Beverly Hills hotel. She further alleges the company and its board of directors were aware of Weinstein's sexual misconduct at the time of the 2010 incident, and that the company knew previous allegations were subject to nondisclosure agreements or confidential settlements. Weinstein's contract is likely to play a critical role in her case, although she may face hurdles since she was not a company employee at the time of the alleged assault.

Law professors Daniel Hemel and Dorothy Shapiro Lund suggest in the Atlantic that shareholders may also bring suit against the company for mismanaging the situation — citing as evidence that the company agreed to the contract knowing that Weinstein settled harassment allegations with women in the past. The authors note that courts generally have held that corporate boards have no duty to monitor officers' personal affairs, but argue that Weinstein's persistent pattern of assault and harassment in a work setting may subject the board to legal liability.

In addition to supporting possible sex discrimination or shareholders' claims, it is also worth asking whether the reported terms of Weinstein's employment contract are enforceable, should he attempt to sue the company for breach for discharging him without adhering to the contract's mediation and arbitration provisions. In general, most states refuse to enforce contracts for an illegal purpose or contrary to public policy. Weinstein's contract appears to be for an illegal purpose — to allow Weinstein to continue his known pattern of sexual harassment and sexual assault of women, and permit the company to maintain a sexually hostile work environment without fear of financial repercussions.

Following the Weinstein revelations, states should bar corporate boards from offering contracts to top executives that tolerate or permit sexual harassment in the workplace, bar contracts that allow employees to escape discipline for unlawful conduct by paying their employer, bar workplace confidentiality rules that discourage employees from reporting sexual harassment or criminal actions, and establish liability for boards which turn a deaf ear to sexual harassment.

Lynne Bernabei is a partner and Michael Ellement is an associate at Bernabei & Kabat PLLC in Washington, D.C.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.