RECENT TRENDS IN SEXUAL MISCONDUCT CLAIMS AND CLASS ACTIONS

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Since the increased attention on sexual misconduct claims and the "Me Too" Movement starting in approximately 2019, we have seen an increase in litigation and sexual misconduct claims throughout the country, and no industry, business, or association is immune. Given the scope and breadth of such claims, any organization must be aware of and alert to the possibility of lawsuits alleging sexual misconduct (which can include claims of harassment, abuse, assault or other inappropriate behavior or assertions of authority) and the use of the class action mechanism to bring and potentially resolve these cases.

Recently there have been number of high-profile class action cases involving sexual misconduct allegations, including the $215 million class action settlement of a 2018 class action against the University of Southern California involving claims of sexual abuse. (*See In re USC Student Health Center Litigation*, Case No. 18-cv-04258-SVW, C.D. Cal.) The settlement class included approximately 18,000 women -- all current or former female students who were seen or treated by a particular doctor at the student health center over a more than 26-year period, from 1989 to 2016. The University moved quickly to settle, likely because there was evidence of notice of complaints of sexually abusive behavior starting in 2000.

Another sizable sexual misconduct class action to watch is the recent case filed against McDonald's Corp. in April 2020. A class of female employees working at corporate-owned McDonald's in Florida allege pervasive sexual harassment throughout the company, a hostile work environment, and wide-ranging offenses including "groping, physical assaults, and sexually-charged verbal comments." The class seeks to represent female employees working at more than 100 restaurants and seeks $500 million in compensatory damages, plus punitive damages. (*See Fairley v. McDonald's Corp.*, Case No. 20-cv-002275, N.D. Ill.) This case is just

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getting started, but will be one to watch.

An interesting variation on these class actions are the multiple shareholder derivative lawsuits against Google's parent company Alphabet filed in January 2019 (and consolidated in August 2019) concerning the way the company and its directors and officers addressed sexual misconduct claims by employees against senior executives. The shareholders alleged the company engaged in a "pattern of concealment" to protect the interests of the company's executives, and the resulting misconduct, active cover-ups, and retaliation against those who sought to raise awareness about the misconduct damaged the company financially and reputationally. The parties reached a settlement in August 2020 and Alphabet agreed to establish a $310 million diversity, equity, and inclusion fund, as well as internal reforms and the adoption of additional corporate governance measures, such as eliminating mandatory arbitration and non-disclosure agreements. (*See In re Alphabet Inc. Shareholder Litigation,* Case No. 19-cv-341522, Superior Court of Cal., Santa Clara County). The settlement was filed with the court on September 25, 2020.

Of course, few cases have captured the public attention and media coverage as the recent claims concerning media mogul and producer Harvey Weinstein and the Weinstein Co. A class action was initially filed in 2017 alleging a pattern of sexual harassment and abuse. In June 2020, a settlement for $18.875 million was reached to resolve the pending class action as well as a lawsuit by the New York Attorney General. (*See Geiss, et al v. The Weinstein Co., et al.*, 17 cv 09554-AKH, S.D.N.Y.). However, the presiding judge denied preliminary approval of the settlement because he did not believe that the settlement would be "fair, reasonable, and adequate" as required by the Federal Rules of Civil Procedure. Of particular significance, the Court did not believe the proposed process for analyzing and distributing settlement funds (including the use of a Special Master with extensive discretion) was sufficient to ensure equitable treatment of class members. Specifically, the Court expressed concerns about "lumping" together women in the proposed class who experienced a range of alleged contact with Weinstein, from minor encounters to multiple assaults. The Court was also concerned that too much of the proposed settlement fund was going towards litigation expenses and not to victims.

While there are many reasons for organizations to be concerned about the risk of class actions, starting with the high costs of litigation, the complexity of defending such cases, and the high dollar figures associated with these settlements, there are benefits. In particular, resolving class actions can provide finality and a release of all future claims, as well as an end to the risk and fear of future litigation. Additionally, the per claimant payouts to the class may often be less than the payouts for individual settlements. But as described above in the Weinstein case, litigants must be careful to structure any class settlement carefully. It can be difficult to define a proposed class of sexual misconduct claimants where allegations and individual claims can range from inappropriate comments all the way to sexual assault.

As a starting point, an organization must be alert and mindful at the first instance of an allegation of sexual misconduct. We recommend reaching out to counsel at the outset, notifying authorities where appropriate, and commencing an immediate investigation. Your best course is to determine if there are concerns about a pattern and other similar claims as soon as possible. You do not want to be blind sided down the road, and immediate action and investigation from the beginning is the best way to protect your organization. If you can identify and halt alleged misbehavior before it becomes a pattern, you can prevent potential class actions before they start.