

Insurance Coverage in the Post-Weinstein Era

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With new headlines involving sexual harassment and other inappropriate sexual conduct continuing to emerge on a daily basis, insurance coverage for claims that might emerge is something every company should consider.

Recently, media reports have discussed settlements of shareholder derivative claims against members of the boards of directors and other senior executives of public companies. These settlements illustrate both the type of corporate liability that can ensue from allegations that a company turned a blind eye to, or otherwise failed to prevent, sexual misconduct allegations, causing financial and reputational harm to the organization, and the critical role insurance can play in protecting companies and their executives against such claims. While reports indicate that one or more of the settlements is being funded entirely from insurance proceeds, it is unclear whether the settlement proceeds will be coming from D&O insurance or EPLI insurance, or both. D&O insurance is intended to cover corporate mismanagement claims but typically contains some form of employment practices liability exclusion. EPL insurance is intended to cover employment practices liability claims but may not cover management liability claims arising from allegations of sexual harassment. This creates a potential gap in coverage that could have serious consequences.

D&O and EPLI policies are not standard and contain different wording and exclusions.

WHAT TO DO?

In this environment, it behooves corporate management of every company to understand the scope of insurance coverage for sexual harassment and management liability claims and to ensure that appropriate coverage is in place without coverage gaps.

Here is what policyholders should do: comprehensively review all relevant corporate insurance programs to determine what coverage is in place for sexual harassment claims of any variety, and for claims arising from corporate actions that might be necessary in the wake of an issue or claim, such as claims of wrongful termination and defamation.

Policies to be reviewed should include CGL, EPL, D&O and E&O.

Determine whether coverage gaps exist and if so, consider enhancing coverage to ensure proper protection.

Understand what needs to happen in terms of notice to insurers in the event of a claim or knowledge of circumstances that might lead to assertion of a claim.

And be aware of the potential for coverage before agreeing to any payments or settlements that might preclude or limit coverage.

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