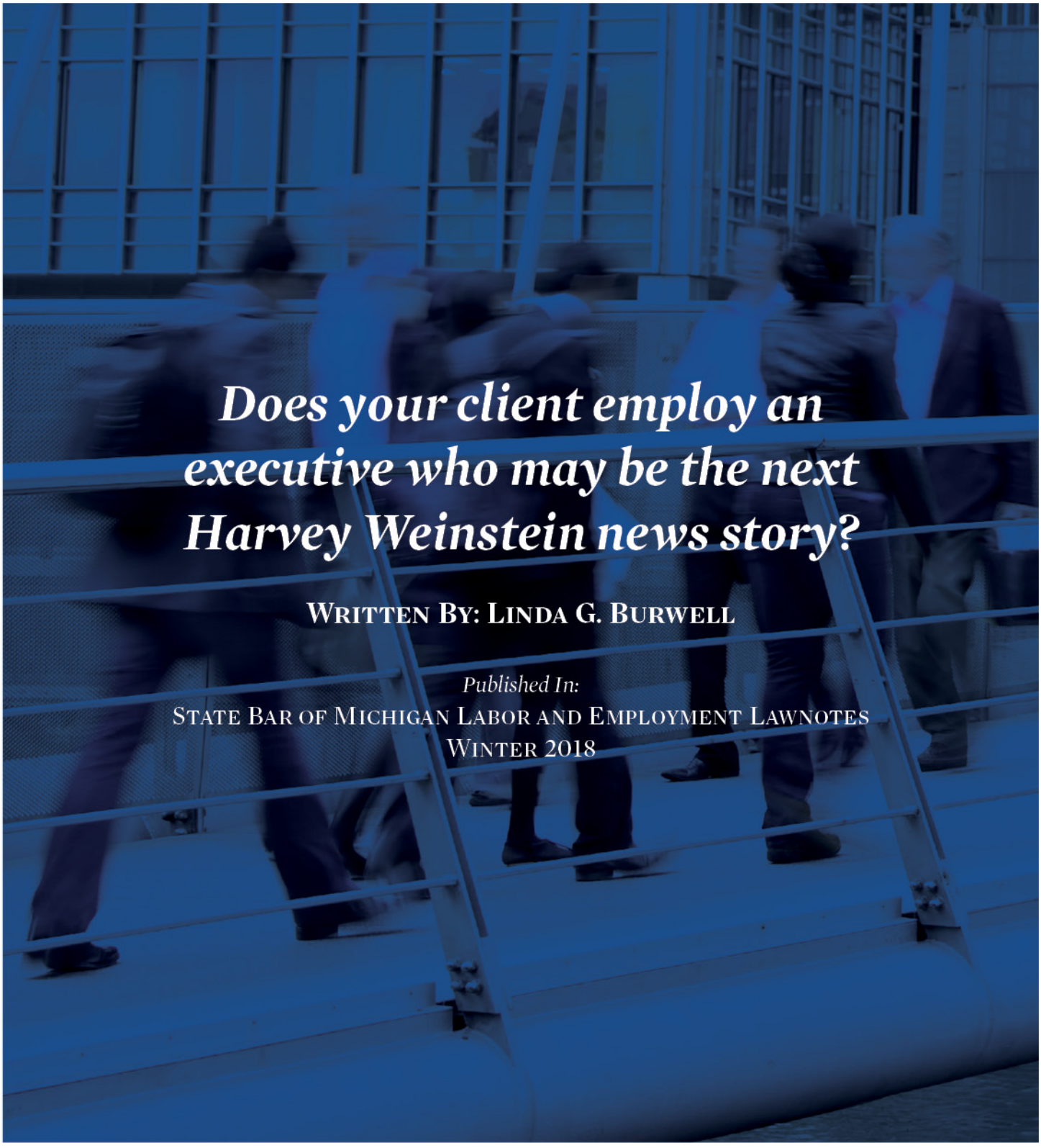

Does your client employ an executive who may be the next Harvey Weinstein news story?

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UNITED STATES SUPREME COURT UPDATE

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Enforceability of Class Action Waivers in Employment Arbitration Agreements

First on the Supreme Court's oral argument calendar this Term were the consolidated cases, *Epic Systems Corporation v. Lewis,* No. 16-285, *Ernst & Young LLP, et al. v. Morris,* No. 16-300, and *NLRB v. Murphy Oil USA, Inc., et al.*, No 16-307. The principal issue in these cases was the enforceability of a class or collective action waiver in an arbitration agreement between an employer and its employees.

The National Labor Relations Board took the position that such waivers violate employees' right to engage in concerted activity. The Justice Department, on the other hand, argued that the Federal Arbitration Act supports the enforceability of these provisions.

Employers have a significant interest in the enforceability of these clauses, especially considering the substantial expense they can incur defending, for instance, wage and hour collective actions brought under the Fair Labor Standards Act. Employees object to these clauses to the extent they restrict their ability to pursue, in a cost-efficient way, relatively small individual claims against their employers.

Court Hears Arguments on Procedural Questions

On October 10, 2017, the Supreme Court heard oral argument in *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658. The narrow issue in that case was whether a federal appeals court can grant an appellant an extension in excess of 30 days to file a notice of appeal. The petitioner argued that 28 U.S.C. § 2107(c) places no maximum limit on the length of an extension, provided the appellant files a timely motion to extend pursuant to FRAP 4(a)(5)(c) and can show excusable delay or neglect. The petitioner further argued that FRAP 4(a)(5)(c) is non-jurisdictional and can be waived or forfeited. The respondent argued that when Congress amended 28 U.S.C. §2107(c), it inadvertently excluded language stating that an appellant is not entitled to an extension in excess of 30 days. The respondent also argued that FRAP 4(a)(5)(c) is jurisdictional or, in the alternative, a mandatory claims processing rule, and that it cannot be waived or forfeited.

In *Artis v. District of Columbia,* No. 16-460, the petitioner had filed a federal lawsuit asserting both state and federal claims against her former employer. At the time of filing, there were two years remaining on the statute of limitations for the state claims. The federal court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state claims. 59 days after the federal court dismissed her claims, petitioner filed the remaining state law claims in state court. The respondent argued that the petitioner's state claims were time barred because more than two years had elapsed in the federal court and petitioner had not re-filed her state claims within the 30-day grace period granted by 28 U.S.C. § 1367(d). The petitioner argued that, because 28 U.S.C. §1367(d) provides for tolling of the statute of limitations while a state claim is pending in federal court, she had the remaining two years of the state statute of limitations, plus the 30-day grace period. The Supreme Court heard oral argument on this issue on November 1, 2017.

Dodd-Frank Definition of "Whistleblower"

On November 28, 2017, the Supreme Court will hear oral argument in *Digital Realty Trust, Inc. v. Somers*, No. 16-276. The sole issue in that case is whether the definition of "whistleblower" in the Dodd-Frank Wall Street Reform and Consumer Protection Act, includes employees who raise concerns within their company about possible security violations, even if they do not make a report to the SEC. The federal courts of appeals are split on this issue, with two courts holding that the definition includes employees who file only internal complaints with their employers, as well as those who file complaints with the SEC, and one court holding that the definition is limited to only individuals who make reports to the SEC. ■

DOES YOUR CLIENT EMPLOY AN EXECUTIVE WHO MAY BE THE NEXT *HARVEY WEINSTEIN* NEWS STORY?

Linda G. Burwell
National Investigation Counsel

Harvey Weinstein, Bill O'Reilly, Roger Ailes, Matt Lauer, John Conyers and Charlie Rose; what did they have in common? According to media reports:

1. They were very high-ranking individuals in positions of great power;
2. They had multiple accusers (in the case of Weinstein, there were more than 80);
3. There were multiple incidents that occurred over a long period;
4. The accusers claimed the behavior was accepted by the employer, if not overtly, then implicitly; and
5. The accusers claimed their claims were ignored, and/or they feared retaliation if they complained.

In other words, there appeared to be a culture, or at a minimum, powerful or complicit individuals, allowing this behavior to continue without adequate avenues for effective complaints.

As the media reports continue, companies will likely face more actions from current and former employees. Companies may also face actions from their shareholders, as demonstrated by Twenty-First Century Fox Inc.'s recent $90 million settlement of a shareholder derivative suit relating to Roger Ailes and Bill O'Reilly. The shareholders alleged that the company's management permitted a culture of sexual and racial harassment to permeate the company, causing financial and reputational harm to the company.

According to the EEOC, "The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture of respect in which harassment is not tolerated." *Promising Practices for Preventing Harassment,* https://www1.eeoc.gov//eeoc/publications/promising-practices.cfm?renderforprint=1. It is also true that many companies have sound policies and regular training programs in place, yet reports of harassment at the highest levels are still unfolding. The obvious question is why is there a disconnect between optimum corporate governance and reality? And, what can attorneys who advise those companies do about it?

One reason for the disconnect appears to be that when dealing with those at the very top of an organization, people may not know how, or may not be properly equipped, to respond when they see or learn about harassing behavior by a person in a position of power. This can be true even when

a company has a strong harassment policy, a clear complaint procedure and provides training to its employees. Thus, Boards of Directors, General Counsel, top executives and attorneys who advise them, are wise to examine their harassment policies as well as their own roles in this process. Are the policies as clear and as robust as they can be? Do they provide a clear and effective path to response and investigation when the claimed wrongdoer is a powerful executive?

The EEOC identified five core principles that it believes have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization. *Report of the EEOC's Select Task Force on the Study of Harassment in the Workplace,* https://www.eeoc.gov/eeoc/task_force/harassment/ index.cfm.

Recognizing that these are not legal requirements, the EEOC recommends that leaders ensure their organizations "have a harassment complaint system that is fully resourced, is accessible to employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees." *Promising Practices for Preventing Harassment, supra.*

It is not enough, however, to merely have a complaint system in place. According to the EEOC, *Effective and Accessible Harassment Complaint Systems,* focus on the individuals who are responsible for receiving, investigating and resolving complaints. A designated officer may or may not be the right person to lead a complaint response or an investigation, depending upon the identity or positions of the accused, and a number of other factors. In each given case, the company would be well served to address whether the right person is on point, possessing the following qualities/qualifications:

- Is well-trained, objective, and neutral;
- Has the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Takes all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Creates and maintains an environment in which employees feel comfortable reporting;
- Understands and maintains confidentiality; and
- Appropriately documents every complaint, from initial intake to investigation to resolution, uses guidelines to weigh the credibility of all relevant parties, and prepares a written report. *Promising Practices for Preventing Harassment, supra.*

The EEOC does not define what it means by individuals having the "authority, independence and resources required to receive, investigate and resolve complaints appropriately." There is no single right answer as to whom should receive, investigate and resolve complaints and they are generally not the same person. It is fact specific depending upon the issues at hand and each instance may be different. Factors to examine and questions to ask at the beginning of any investigation that may prove helpful, include:

- Is the investigator independent and objective?
- Can the investigator be impartial?
- Is the investigator in the chain of command?
- Is the investigator a "victim"?
- Will the investigator be a witness?
- Does the investigator have a vested interest, pre-existing bias or predetermined outcome?
- Will the investigator's assessment of credibility be second guessed by superiors or legal?
- Does the investigator (or witnesses) fear retaliation?
- Will there be attorney-client privilege issues to manage?
- How serious are the allegations?
- Is the alleged bad actor a high-level employee?
- Is the investigator experienced?
- Are there internal or external political pressures?
- Has the complainant hired an attorney?
- Is the investigator or decision maker too close to the alleged bad actor, complainant or witnesses?
- Is the company's regular counsel too close to the alleged bad actor, complainant or witnesses?

All the above factors should be regarded in a special context when the alleged wrongdoer is in a position of power. Moreover, a key element is the absence of fear of retaliation against both complainants and others involved in processing and investigating the complaint. This would seem to require strong and unequivocal messaging by the company to counter such fear if one complains or advances the complaint process against the icons and power brokers of an organization. Having multiple avenues for making a complaint including, perhaps access to people outside the linear chain of command (i.e.: outside counsel or board members) may alleviate this problem.

Confidentiality of the identities of both the complainant and alleged wrongdoer is also important. While it may not be possible to assure complete confidentiality or anonymity, companies are wise to take all steps possible to maintain confidentiality and anonymity to the extent possible. The case of *EEOC v. Day & Zimmerman NPS, Inc.*, Civil Action

(Continued on page 22)

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No. 3:15-cv-1416, 2017, U.S. Dist LEXIS 133918 (D. Conn, August 22, 2017) is instructive. In *Zimmerman*, the EEOC requested names and addresses of company employees who may have relevant information to a former employee's charge of disability discrimination. The company sent a letter to these employees to let them know they may be contacted by the EEOC. The letter also contained the name of the Charging Party, a description of his allegations, the medical restrictions on his ability to work, the accommodation he requested, along with the employee's right to decide if they wanted to talk to the EEOC and the name and contact information of the company's attorney. The EEOC filed suit claiming this letter constituted retaliation. The court denied summary judgment to the company stating that this letter could be retaliation since it might have a reasonable tendency to coerce or intimidate the Charging Party or other employees from providing information to the EEOC.

Likewise, in light of current events, it is clear that training could be key. Although the EEOC has not yet finalized its rules on harassment that it published in January 2017, it issued a *Press Release* launching a new "*Training Program on Respectful Workplaces.*"This was an outgrowth of the EEOC's Select Task Force on the Study of Harassment in the Workplace. Acting Chair Victoria Lipnic stated "Implementation of the Report's recommendations is key. These trainings incorporate the report's recommendations on compliance, workplace civility, and bystander intervention training. I believe the trainings can have a real impact on workplace culture…". https://1eeoc.gov//eeoc/newsroom/release/10-4-17.cfm?renderforprint=1. Coincidently, the EEOC issued its *Press Release* on October 4, 2017, the day before the Harvey Weinstein scandal broke. Congress, too, has reacted and recently passed a bill to require mandatory sexual harassment prevention and response training. *H. Res. 604,* November 2, 2017. The context of the recent news stories emphasize that there should be elements of training that focus on how to deal with complaints against persons in positions of power in the organization.

CONCLUSION

The daily revelations of alleged bad behavior by persons in positions of power suggest the need for greater awareness of, and greater commitment to, compliance by executive manage - ment and boards of directors. Review of complaint and investigation procedures, reporting channels and training, are all suggested. The consequences of non-compliance are escalating. ■

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