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# Hitting Workplace Harassers Where It Hurts

Employers can hit sexual harassers hard—in the pocketbook—by using a variety of channels to claw back compensation and benefits from bad-acting employees.

By J. Mark Poerio | December 29, 2017



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Employers can hit sexual harassers hard—in the pocketbook. There are a variety of channels by which to claw back compensation and benefits from bad-acting employees. The smartest employers have for years aimed those threats at employees who violate noncompete and trade secret protections. Now, they may want to toughen up their benefit plans and stock awards, because routine harassment training may not have the in terrorem effect that could come through broad-based forfeitures and clawbacks.

As a general matter, employees who are terminated for “cause” will forfeit outstanding stock awards and nonqualified plan benefits, as well as any rights to severance and unpaid cash bonuses. By statute, bad actors could also forfeit Consolidated Omnibus Budget Reconciliation Act rights (assuming there has been gross misconduct).

Motivated employers may take an even more iron-fisted approach. Through amendments to plans and policies, they may place harassers at risk of having their employer recover bonuses paid in prior years, the gains from previously-exercised stock options, and/or restricted stock that was vested and settled in prior years. Even if past bonuses have been paid, or awards have been made without claw-back rights, they may become subject to those rights if the harasser accepts that risk as a condition set forth in a new award.

Any program of the kind described above is worth careful consideration (and drafting) in order to achieve its goals while avoiding unintended consequences. Here are a few notable substantive and procedural issues that come to mind:

### **Substantive Considerations**

The stakes are high for those at risk of being discharged for sexual harassment. As with any employee dismissal, a first step for employers involves assessing what compensation will be placed at risk. Existing plans, awards and employment agreements create contractual rights, but those are always capable of being amended by the parties. In view of recent events, employers may want to subject officers and directors to more exacting standards and risks, and may generally do so through unilateral action for future compensation. Employers will need to be aware of the anti-cutback rules applicable to tax-qualified retirement plans, as well as other compensation that could be protected by law, e.g., commission income and COBRA. Employers should consider whether plan and award amendments are able to avoid creating (or may limit the scope of) legally protected compensation and benefits, thereby putting more at risk from workplace misbehavior.

At the macro level, employers need to decide whether to target certain conduct for the most extreme remedies. For example, will the same risks that apply to harassers be available to the employer in response to violations of ethics and other policies? What about violations of noncompetition, nonsolicitation, and trade secret covenants? Clawback and forfeiture provisions are also worth examining to determine if look-back provisions should be unlimited in duration for clawbacks, should be confined to a period of years before the alleged misconduct, or should differentiate depending on the nature of the misconduct. For example, workplace harassment could result in an unlimited lookback while violation of a noncompete could trigger a forfeiture limited to a few years of incentive or other pay.

### **Procedural Considerations**

In the wake of highly publicized events, employers should be ready to hear from those who feel victimized from past workplace misconduct, in some cases based on bad events that occurred many years ago. From a process perspective, employers will need to be sensitive to all concerned, including those accused of harassment.

Employers should begin by reviewing their general approach to considering terminations for cause. Often there is room for improvement, with one question being whether different processes are desired for certain unusual allegations such as distant past misconduct. Another question involves how an employer will treat employees who resign—without admitting guilt—after being accused. Should their severance be automatically forfeited, or individually negotiated at the time?

There are many other questions for employers: Should they have discretion to terminate an alleged harasser for cause if the employer reasonably believes such conduct occurred, whether it actually did? If an accusation occurs, should pay above the salary threshold required to maintain exempt status be held in escrow by the employer, and then be paid only if the employer determines that the claim is without merit? Should the employer reserve rights to be indemnified for its damages and costs if a termination for cause results? Should the employer's plans and

employment agreements be revised to define “cause” to include a resignation that occurs at a time when the employer could have terminated the employee for cause? Finally, how should boards and compensation committees best pursue changes, from internal processes to discussions with affected employees, to public disclosures?

Although the foregoing lists of questions and considerations may seem comprehensive, they are intended merely to suggest the complex array of issues that employers should evaluate in order to move from well-intended responses to well-designed and communicated changes to their compensation structures. Due to the sensitivity of these issues for all affected, and the vagaries of state and federal laws relating to compensation, employers should involve informed legal counsel at an early stage in any process that unfolds. Otherwise, the law of unintended consequences may strike.

Recent press reports have publicized the difficulty of getting employees to pay attention to anti-harassment and other training sessions. Too often, those presentations are considered dry and ineffective (as the EEOC and others have reported). Imagine, however, a presentation that begins by highlighting the financial devastation that awaits those who harass. Of course, they should fear career and personal shame. But they should also be made to fear—and to recognize—the financial consequences that await.

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