

(Not So) Limited Liability: When Corporate Officers Become Personally Liable

Agenda

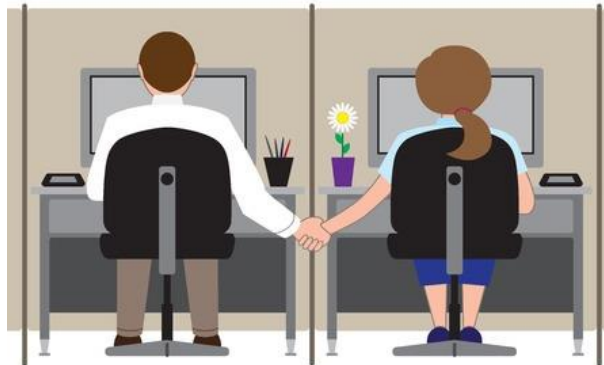
- Common areas of liability
- Discussion of elements of each
- Best practices for risk avoidance

Sexual Harassment

- Michigan defines sexual harassment by statute as:
“*unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when any of the following is true:
 1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 2. an individual's submission to or rejection of such conduct is used as
 3. the basis for employment decisions affecting him or her; or
 4. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an 'intimidating, hostile, or offensive working environment.
- In both the federal and state contexts, this applies to opposite and same-sex harassment.

"Unwelcome"

- The conduct in question must be unwelcome or uninvited.
- The tricky situation of a consensual workplace relationship
 - Consent might negate the “unwelcome” element of sexual harassment under the law, but this is decided on a case by case basis.



"Quid Pro Quo"

Consists of:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual (such as not being hired, being fired, denying a raise, or losing a promotion).

The largest number of quid pro quo sexual harassment cases involve actions taken by a supervisor toward a subordinate.

Employer's Duties and Liabilities: Quid Pro Quo Sexual Harassment

DUTY:

Immediate corrective action required once informed

LIABILITY:

Employer: Strict (federal), strict (state)

Harasser: Strict (federal), strict (state) – and *personal liability for the employee*

Strict liability can be defeated, however, under certain circumstances.

Hostile Work Environment Sexual Harassment

Hostile work environment harassment occurs when an employee is repeatedly subjected to unwelcome sexual conduct (comments, actions) to the point that the harassment unreasonably interferes with the employee's work performance or creates an intimidating, hostile or offensive working environment.

Employer's Duties and Liabilities: Hostile Work Environment Sexual Harassment

DUTY:

Immediate corrective action required once informed, either
actually or constructively

LIABILITY:

A rebuttable “presumption of liability” (federal), limited (state)
(only if failed to take prompt, appropriate remedial action after
notice of the harassment).



Family Medical Leave Act

- FMLA creates right of action for employees against “any employer” who violates the statute. The definition of “employer” under the FMLA includes “any person who acts, directly or indirectly, in the interest of any employer to any of the employees of such employer.”
- Sixth Circuit (MI) does not define individuals as “employers” but other circuits do!

Wage and Hour / FLSA

- Fair Labor Standards Act
 - Supervisory liability for unpaid wages
 - Definition of employer: "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).
 - Scope: FLSA coverage is limited to federal minimum wage and overtime violations.

Wage and Hour / WARN Act

- WARN Act
 - Requires employers of a certain size (>100 employees) to provide at least 60 days' notice when a plant is closing or mass layoff is occurring
 - Federal courts have not assigned individual liability for violations of WARN Act provisions except under limited circumstances

Wage and Hour / MI Wage and Fringe Benefits Act

- MI Wage and Fringe Benefits Act
 - “Employer” includes individuals.
 - MI Courts *can*, but *usually don't*, impose liability on corporate officers. The analysis is one of control over the corporate affairs.
 - Other states have statutes imposing direct liability on supervisors and/or corporate officers, and sometimes even criminalize violations.

Taxes – State

- Individual officers, members, managers and/or partners of a corporation, LLC, partnership can be personally assessed with unpaid taxes of a corporation *of any kind*
- One of the strictest schemes in the country
- State can garnish wages, intercept tax refunds, and engage in other collection activities

Taxes - Federal

- The IRS has 10 years to assess the company's taxes due personally against the company's "responsible persons" which includes those individuals who controlled the company's available funds and used them to pay debts other than taxes, such as ordinary course of business. Done via tax lien
 - **INCLUDES:** Federal income tax and Social Security tax withheld by the company from employees' wages but not paid to the Internal Revenue Service.
 - **DOES NOT INCLUDE:** Employer matching Social Security tax, as well as penalties and interest accrued on the unpaid tax.

ERISA

(Employee Retirement Income Security Act)

- Lots of thorny issues with respect to ERISA
- ERISA imposes specific fiduciary duties on plan managers
- Best practice: insulate directors and officers!
- The plan manager can be found individually liable if breached fiduciary duties.



Disabilities (ADA/MPDCRA)

- Supreme Court: Key focal point of analysis should be how much control the individual/officer had over the situation where an alleged violation took place. If sufficient control, may assign individual liability
- MI Courts do not generally impose individual liability



Workplace Safety (OSHA/MIOSHA)

- Under OSHA (federal), generally corporate officers are not helped personally liable for violations committed by others in the organization. However, at least one court has held that whether the officer *should be* responsible is a question for the judge/jury.
- Sixth Circuit impugns knowledge of safety violations by a supervisor to the company
- MIOSHA liability can reach the individual directors or officers, if circumstances permit assigning liability to them.

Torts

- Key is personal and active participation; otherwise, potential plaintiff must successfully pierce the “corporate veil”
- Specific torts which may result in individual liability:
 - Torts to land
 - Negligence
 - Conversion



Best Practices

- Information and Documentation
- Know the law
- Use common sense
- Implement effective supervisor training
- Be consistent and audit often



Best Practices (continued)

- Director's and Officer's Liability Coverage
- Employment Practices Liability ("EPL") Insurance
- Indemnification

Questions?

