

EXECUTIVES AND MANAGERS BEWARE

YOU CAN BE PERSONALLY LIABLE FOR EMPLOYMENT DECISIONS

BY ROBERT J. HAURIN

Many officers, managers and supervisors believe that they cannot be held personally liable for employment related claims brought by employees or former employees. However, this belief is often erroneous. In many cases, individuals can be sued along with the employer for money damages resulting from numerous employment decisions. This article highlights some of the laws that can result in individual liability to corporate officers, managers and supervisors.

The Federal Fair Labor Standards Act (“FLSA”) and Federal Family Medical Leave Act (“FMLA”) provide that individuals may be held liable for certain employment related decisions. It should also be emphasized that the FLSA and FMLA are strict liability statutes. Thus, no wrongful intent is required and individuals can be liable for honest mistakes made under these laws.

Under the FLSA and FMLA an “employer” includes an individual executive, officer, manager and supervisor and other individuals who act directly or indirectly in the interest of an employer and therefore may be held liable for their acts. What does this mean in laymen terms? Simply put, an individual who, for example, makes a determination under the FLSA that a particular employee is exempt from the overtime provisions of that law can be held personally liable to that employee if it is later determined that the individual is not exempt and must be paid 1.5 times their regular rate of pay for all hours worked in excess of forty (40) hours in any workweek. Similarly, an individual who denies a request for FMLA leave based upon an innocent belief that an employee does not have a serious health condition may also find himself or herself on the wrong end of an FMLA claim.

The situations described in the immediately preceding paragraph provide only examples of what can go wrong when FLSA and FMLA decisions are made. These statutes are among the most complex and difficult to administer. Thus, those individuals who have authority to make personnel decisions must ensure compliance with these laws. To avoid potential liability, it is crucial to obtain all possible information concerning the matter; review company policies and thoroughly document all information that forms the basis for the decision.

Some courts have also held that there may be individual liability under the Equal Pay Act. The Equal Pay Act prohibits discrimination in wages based upon sex. In essence, the Equal Pay Act requires equal pay for equal work among the sexes. Like the FLSA and FMLA, intent is not a required element of an Equal Pay Act claim - - it is a strict liability law. Thus, if it is determined that a man and a woman perform the same job, but the man is paid more, an individual could potentially be liable for, among other things, the differential in pay.

Most federal anti-discrimination statutes including Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act do not permit claims against individuals. However, the Civil Rights Act of 1866 (“Section 1981”) and many state anti-discrimination laws including the New Jersey Law Against Discrimination and Pennsylvania Human Relations Act do permit suits against individuals for engaging in discriminatory conduct. Section 1981, enacted right after the end of the Civil War, prohibits discrimination based upon race and national origin in contracting—including employment contracts of all kinds. In the Civil Rights Act of 1991, Congress expressly affirmed that Section 1981 applies to employment cases, giving employees the right to bring race discrimination actions against employers under Section 1981 for wrongful termination. This also applies in to cases involving at-will employment relationships.

Section 1981 is particularly troublesome because it can subject an individual decision maker to unlimited damages for intentional discrimination based upon race and national origin. For example, punitive damages may be awarded in a Section 1981 case when the decision maker is shown to be motivated by an evil intent or when he or she acts with reckless or callous indifference to the plaintiff’s federally protected rights. In the public sector, individuals may be liable under Section 1983 of the Civil Rights Act of 1871 as well.

Under the Employee Retirement Income Security Act (“ERISA”), there can be personal liability for alleged breaches of fiduciary obligations with regard to the administration of pension and welfare plans. Certain corporate actions that affect plan assets can and will be held to be fiduciary functions under ERISA. The persons undertaking those acts, even if they believe they are acting as an agent of the corporation, may face personal liability.

To avoid personal liability, officers and directors should be sensitive to any transaction that has any direct effect on plan assets or on the rights of plan participants. Officers and directors should be insured for fiduciary liability. The standard directors’ and officers’ liability insurance typically does not cover claims against officers and directors in their capacity as ERISA plan fiduciaries.

Likewise, under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), there can be personal liability. Such liability may attach for a simple mistake in handling a routine duty such as advising a departing employee of his or her rights to continue health care coverage under an employer’s group plan. And the damages for such a mistake can be significant. For example, an individual can be assessed a fine of \$100.00 per day for each day that they fail to provide a COBRA notice to each qualified individual. After only two months, the fine will be \$6,000.00 for one mistake involving one qualified employee.

Other federal laws such as OSHA, HIPPA and the Immigration Reform and Control Act can also result in personal liability under the appropriate circumstances. In addition many state laws can result in personal liability to officers and managers. For example, under Pennsylvania’s Wage Payment and Collection Law, individuals can be liable for failing to timely pay wages to employees. This statute also provides for the recovery of liquidated damages and attorneys’ fees.

Tort claims in the employment context can also result in individual liability. Such claims include, but are not limited to, defamation, infliction of emotional distress, wrongful discharge, negligent hiring and retention, assault and battery and false imprisonment.

As an example, a claim for defamation can result in an employment setting when a manager or officer makes a false statement about an employee and the statement injures the reputation of the employee. This kind of claim can arise when misleading information is provided to a prospective employer seeking a reference for a job applicant.

Wrongful discharge claims can be another source for imposing liability even in states that recognize the at-will doctrine. Throughout the country, more exceptions to the at-will doctrine are being recognized by the courts. In Pennsylvania, it is unlawful for an employer to terminate an employee for reasons that violate the public policy of the Commonwealth. For example, terminating an employee for serving on a jury can form the basis for a wrongful termination suit in Pennsylvania for which the decision maker may be exposed to individual liability.

Although individuals can be held liable for many employment decisions, steps can be taken to avoid such liability:

1. Know the law. HR personnel should be well versed in labor and employment law and be a resource to line management. If you are unfamiliar with the law or the matter may lead to litigation, consult outside counsel who specialize in labor and employment law for employers. Remember that ignorance of the law is not a defense.
2. Ensure that the organization has current and adequate HR policies and procedures.
3. Train supervisory personnel in EEO compliance and harassment in the workplace.
4. Organizations should have well publicized complaint and grievance procedures.
5. Thoroughly document all employment decisions.
6. Enforce HR policies on a uniform and consistent basis.

7. Consider whether the organization has adequate insurance for officers and managers and whether employment practices liability insurance is appropriate.

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