



POTENTIAL INDIVIDUAL LIABILITY FOR CLAIMS IN THE WORKPLACE

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Why should an individual care?

- Personal assets at risk
- Personal expense to defend
- Could influence employer to terminate rather than ratify

Why should an employer care?

- Potential liability if conduct is in course and scope of employment
- Potential liability if employer is negligent in allowing conduct
- Potential liability if ratify individual conduct

Why should a plaintiff's attorney care?

- Individual may have more assets than employer
- Potential leverage on employer
- Potential basis for claim that might not otherwise exist

Legal Theories

- Tort
- Interference with Contract
- Statutes

Torts (potential individual liability even when acting for employer)

- Negligence
- Assault/Battery
- Fraud
- Conversion

Interference with Contract

- Commercial
- Employment
 - “Insider” liability

Statutes

- No claim against individual under
 - Title VII (race, gender, color, national origin, religion)
 - ADEA (age, over 40)
 - ADA (disability)
- All define employer as entity employing more than specified number of persons

Civil Rights Acts of 1866 & 1870, 42 USC 1981

- Contract/employment – race
- Intentional conduct

Civil Rights Act of 1871, 42 USC 1983

- action under color of law, not just derivative liability
- qualified immunity unless action violates clearly established law

FLSA

- defines “employ” as “suffer or permit to work”
- defines “employer” as a person or entity “acting directly or indirectly in the interest of an employer in relation to an employee”
- individual liability for unpaid wages and overtime

FMLA

- “Employer” defined as entity employing 50 or more persons
- BUT also includes “person who acts, directly or indirectly in the interest of an employer to any of the employees of such employer”
- individual liability where individual has supervisory authority and responsible in whole or in part for violation

Copyright and Trademark infringement

- Individual liability for active, knowing participation
- Copyright - vicarious liability & contributory infringement

26 USC 6672(a)

- failure to withhold and pay to the IRS amounts owed by employees for federal taxes/social security withholding (trust fund taxes)
- Individual liability for 100% penalty if “responsible person” who willfully failed to pay
- “Responsible person” function of status, duty, and authority – authority to pay debts – sign or direct
- Willful – voluntary, conscious (not bad motive or evil intent) – can show by paying others instead

So, what to do?

- Recognize exposure
- Determine that you are insured under employer's liability policy
- Do not act beyond course and scope of duties
- Do base actions on legitimate business needs