

Individual liability

How executives and managers are vulnerable

INTERVIEWED BY JAYNE GEST

Michael J. Torchia, a managing member at Semanoff Ormsby Greenberg & Torchia, LLC, gave a seminar to executive clients on individual liability several months ago. “Even if some supervisors knew they had liability under a statute or two,” he says, “seeing their actual exposure to 12 or 14 statutes shocked them.”

“I don’t think business owners have any clue how vulnerable they are to being sued under various employment statutes,” Torchia says.

This exposure is prevalent in areas like discrimination cases, and wage and hour claims which include unpaid overtime, exempt and non-exempt employees, and independent contractor status.

Smart Business spoke with Torchia about individual liability and strategies for protection and avoidance.

How are executives vulnerable to individual liability?

Many state and federal statutes explicitly state an employee has a right to relief against the employer and an individual. Some simply define ‘employer’ to include certain individuals. Examples include the Pennsylvania Wage Payment and Collection Law; Fair Labor Standards Act; Family and Medical Leave Act; Pennsylvania Human Relations Act; Pennsylvania Whistleblower Act; Immigration Reform and Control Act; and COBRA. There are also common law court cases allowing an individual to be sued under a variety of claims such as intentional infliction of emotional distress and defamation. Although incorporation helps shield individual assets — as opposed to, for example, a sole proprietor — the corporate veil does not protect individuals here because the statutes specifically allow action against them.

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How far into management is the risk?

Generally, if an executive, manager or supervisor is considered a decision maker when it comes to employee issues, especially with regard to compensation, benefits or termination, there could be individual liability. In some organizations, that could be those at the ‘C’ level, president or vice president, but in others a secondary or middle manager could be individually liable.

What about executives who say, ‘I was following orders’ or ‘It was unintentional’?

‘Just following orders’ or ‘company policy’ may help, but is not an absolute defense. And whether the improper act was or wasn’t intentional is only relevant if the statute requires proving intent, bad faith or a knowing violation.

So, how can executives protect themselves?

At a minimum, managers, supervisors and executives should make certain they have adequate insurance. There are a variety of policies for individual exposure, such as employment practices liability, directors and officers, fiduciary liability, and errors and omissions. There are also lesser known policies that cover, for example, inadvertent disclosure of private information.

Another factor is asset protection. In Pennsylvania, assuming the executive is not already named in a lawsuit or under

imminent threat of a claim, which could result in a fraudulent transfer claim, assets can be protected by putting a house, cars and bank accounts in joint names with a spouse. If not married, executives may consider increasing contributions to retirement accounts, which are not usually subject to collection.

How can executives and their companies avoid problems in the first place?

Training and education for managers, supervisors and executives — especially your decision makers — is key. They need to know how to handle all aspects of their supervisory duties, such as hiring, discipline, firings and employee complaints.

The company’s written policies should be consistent with the manager training and what is actually done day to day. Policy review and training should occur at least every three years, and sooner if there is turnover or changes in the law. Seminars and in-person training for middle managers is routinely overlooked or disregarded as unnecessary, but that it is one of the most important steps a company can take.

Most often decision-making executives, managers and supervisors are not trying to violate the law. However, with authority to bind the company, they can unknowingly cause liability to themselves or the business. ●