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MANAGING THE MANAGER
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MANAGING THE MANAGER

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In spite of adopting all the appropriate policies for legal compliance, employers still wind up getting sued in employment lawsuits based upon the acts and omissions of their managers/supervisors. By better managing its management, an employer can better manage its risk. This article provides suggestions on how such a goal might be accomplished in three steps: I) Capture their attention; II) Train them; and III) Hold them accountable.

I. CAPTURE THEIR ATTENTION

While most managers are aware that the company may be sued by a disgruntled employee or former employee, few recognize the significant risk that they too will be named a defendant in the suit. Recognition of this possibility tends to heighten consciousness. It also raises a number of awkward questions. "Won't the company's attorney represent me too?" "If there ends up being a judgment against me, the company pays it, right?" Unfortunately, there is no easy answer to these questions and typically not ones that can be given in advance of the specific circumstances arising. Outside the protection afforded by the Worker's Compensation Act, there is little comfort.

Most of the employment law statutes giving rise to a private cause of action by employees narrowly define the "employer" to include the employing entity and not the individual director, manager or supervisor. However, there are a few statutes that have broader definitions pursuant to which a responsible individual may be held personally liable.

Outside the statutory scheme, however, there are a number of tort theories that may be brought against an individual actor, and then the employer entity is added to the claim under a vicarious liability theory. It is within this context that tension may develop between the entity and the individual over factual issues such as whether the alleged misconduct was within the course and scope of employment. This triggers an ultimate need for separate legal counsel and varying degrees of cooperation in the defense of the underlying claims.

Once an individual manager or supervisor becomes better educated as to the risk of having to secure and pay for separate legal counsel, as well as the risk of individual liability, there is a realization that the employer entity and the individuals in management are closely aligned in their interest in preventing employment litigation.

A. Statutes

The traditional federal and Texas anti-discrimination statutes do not provide for individual manager liability including the Texas Commission on Human Rights Act,¹ Title VII,² the Americans with Disabilities

¹ *Alfaro v. St. Mary's University*, No. SA-04-CA-1027-RF, 2005 WL 3144882, at *1 (W.D. Tex. Nov. 1, 2005); see also *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 686 (5th Cir. 2001).

² *Alfaro*, 2005 WL 3144882, at *1; *Smith v. Amedisys, Inc.*, 298 F.3d 434, 448 (5th Cir. 2002).

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