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**DEFENSIVE MANAGEMENT:
MANAGING THE MANAGER**
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MANAGING THE MANAGER

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. Notably, Texas recently expanded the scope of sexual harassment claims to allow for such claims to be brought against managers and supervisors.

Outside the statutory scheme, however, there are a number of tort theories that may be brought against an individual actor (such as a manager or supervisor), 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 a 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 potentially 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 anti-discrimination statutes do not provide for individual manager liability including Title VII,¹ the Americans with Disabilities Act,² and the Age Discrimination in Employment Act.³ This is not true for anti-discrimination statutes in some states. In Texas, while the Texas Commission on

¹ *Alfaro v. St. Mary’s University*, No. SA-04-CA-1027-RF, 2005 WL 3144882, at *1 (W.D. Tex. Nov. 1, 2005); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 448 (5th Cir. 2002).

² *Wellington v. Tex. Guaranteed*, No. A-13-CA-077-SS, 2014 WL 2114832, at *4 (W.D. Tex. May 20, 2014).

³ *Alfaro*, 2005 WL 3144882, at *1; *Medina*, 238 F.3d at 686.

Human Rights Act⁴ generally does not provide for individual manager liability, Texas recently passed a new law that expands protections for sexual harassment claims, including that managers and human resource professionals are subject to individual liability for such claims.⁵

The Fair Labor Standards Act ("FLSA") expressly allows for personal liability to be imposed upon an individual meeting the definition of an employer: "any person acting directly or indirectly in the interest of an employer in relation to an employee."⁶ Courts have held that to be held personally liable under the FLSA, an individual must possess and exercise specific duties, such as hiring and firing employees, supervising or controlling work schedules and conditions of employment, and/or making pay decisions.⁷ Employers are liable for amounts found due as underpayment, an equal amount in liquidated damages and for attorneys' fees and costs. Willful violations are punishable by a fine of up to \$10,000, imprisonment up to six months or both.⁸ Additionally, a fine of up to \$1,100 can be imposed per violation for employers who willfully or repeatedly violate the minimum wage, overtime requirements or child labor laws.⁹

The definition of employer in the FMLA and FLSA are nearly identical. The FMLA defines an employer to include "any person who acts, directly or indirectly, in the interest of an employer."¹⁰ Further, the regulations promulgated under the FMLA evidence a very clear intent that the definition of the word "employer" be treated the same under the two statutes and that individuals be included.¹¹

The Immigration Reform and Control Act prohibits any "person or other entity" from knowingly hiring an unauthorized alien.¹²

B. Torts

Unlike the rather limited risk of individual liability pursuant to statutory claims, managers and supervisors can be individually sued under any applicable tort claim. Then the question flips to whether the employer entity is also liable. Generally, the employer is vicariously liable for the torts of its employees committed in the scope of their employment under a limited number of legal doctrines, *respondeat superior* being the most common.¹³ This is true even when the employee's tort was intentional and not specifically authorized by the employer as long as it was closely connected with the employee's authorized duties.¹⁴ When the individual's acts are not in the furtherance of the employer's business, but are motivated by personal gratification, turning aside from employment duties to pursue purely personal interests, the acts

⁴ *Alfaro*, 2005 WL 3144882, at *1; see also *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 686 (5th Cir. 2001).

⁵ See Tex. Lab. Code § 21.141.

⁶ 29 U.S.C. § 203(d); this same language applies to the Equal Pay Act.

⁷ *Foday v. Air Check Inc., N.D. Ill.*, No. 15-cv-10205 (Aug. 20, 2018).

⁸ 29 U.S.C. § 216(a).

⁹ 29 U.S.C. § 216(e)(2).

¹⁰ 29 U.S.C. § 2611(4)(A)(ii)(I).

¹¹ 29 C.F.R. § 825.104(d).

¹² 8 U.S.C. § 1324a(1).

¹³ *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 576–77 (Tex. 2002); *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999).

¹⁴ *Bruce*, 998 S.W.2d at 617.

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