

2018 IFA

LEGAL SYMPOSIUM

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Our Officers and Employees Have Liability?

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Overview

- Acts of unlawful harassment and related employment claims
- Employee wage claims
- Piercing the corporate veil in other ways
- Personal liability for breach of duties, breach of contract and other business torts
- Violation of antitrust laws applicable to “no hire” and related agreements

Harassment & Related EE Claims

- Some states impose individual liability for acts of harassment, discrimination and/or retaliation based upon protected status.
- Protected status can include:
 - Sex, gender, gender identity, gender expression, race, color, ancestry, national origin, religion, creed, disability, age, sexual orientation, marital status, medical condition, and military veteran status.

Harassment & Related EE Claims

- States imposing individual liability in some form include:
Arkansas, California, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia.

Harassment & Related EE Claims

- Tort claims available in states where individual liability not imposed by statute:
 - Negligent and intentional infliction of emotional distress
 - Disparagement
 - Assault
 - Battery

Harassment & Related EE Claims

- Unique problems for franchisors
 - Plaintiff / enforcement agency incentive to sue deep pocket
 - “Joint employer” liability
 - Franchisor representatives as alleged bad actors

Harassment & Related EE Claims

- Unique problems for franchisors
 - Acts of the well-intentioned franchisor-employee can demonstrate a right or assumption of control over franchisee
 - Perverse impact on harassment and discrimination prevention efforts

Employee Wage Claims

- Federal and state wage statutes define “employer” broadly
 - FLSA definition of “employer” includes “any **person** acting directly or indirectly in the interest of an employer in relation to an employee....” 29 U.S.C. § 203(d).
- Individual officers and employees potentially liable for non-payment of wages

Employee Wage Claims

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Employee Wage Claims

- Ownership interest not required
- A corporate employer's bankruptcy may not discharge individual liability for unpaid wages.
- Individual criminal liability possible under federal and some state laws

Employee Wage Claims

- Unique problems for franchisors
 - Plaintiff / enforcement agency incentive to sue deep pocket
 - “Joint employer” liability

Immigration Laws

- Officers and employees can face criminal liability for immigration regulation violations
- For ICE's purposes, "employer" means anyone in the hiring chain

Piercing the Corporate Veil

- “Responsible Corporate Officer” Doctrine:
 - Permits a corporate officer **without knowledge of or involvement** in a subordinate’s illegal conduct to be held **criminally liable** where the officer, by reason of his/her position in the corporation, **had the responsibility and authority either to prevent or promptly to correct**, the criminal violation **but failed** to do so

Piercing the Corporate Veil

- “Responsible Corporate Officer” Doctrine:
 - Particularly important for officers in organizations which must comply with:
 - Health and welfare regulations
 - Environmental regulations

Piercing the Corporate Veil

- “Responsible Corporate Officer” Doctrine:
 - Best defense – Regulation not within area of responsibility
 - Other possible defenses –
 - Officer had no way to prevent the violation
 - Officer took extraordinary care to prevent such a violation
 - RCO encourages officers to be focused on compliance efforts

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under the Exchange Act:
 - A person who “controls” another person found liable for securities fraud under the Exchange Act, is liable as a control person unless the he/she acted in good faith and did not directly or indirectly induce the violation.

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under the Exchange Act:
 - Persons holding significant decision-making authority vulnerable.
 - Prosecution often turns on direct involvement in/knowledge of violation
 - Courts split over whether actual showing of control person’s culpable participation required or merely power to control

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under state franchise statutes
 - Several state franchise statutes also create control person liability.
 - Provisions patterned after securities laws

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under state franchise statutes
 - States with such laws include: California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Washington and Wisconsin.

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under state franchise statutes
 - Franchisor’s officers and/or employees may be liable for violations of the applicable franchise act.
 - Includes conduct related to registration, disclosure and franchise sales.

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under state franchise statutes
 - Typically, must show officer/employee materially aided in the violation
 - Lack of knowledge is usually a defense

Piercing the Corporate Veil

- “Control Person” Liability:
 - Liability under state franchise statutes
 - Increases leverage in disputes with franchisors.
 - E&O policy may not be enough
 - Training and compliance programs in the area of franchise sales important

Piercing the Corporate Veil

- Officer Liability for Wrongful Acts
 - Liability for officer's own torts or acquiescence in other's torts
 - Did officer participate in, authorize, direct, or permit a wrong to be done?
 - Does officer have knowledge of and acquiesce in a wrong?
 - Personal benefit to officer not necessary to prove liability

Breaches & Business Torts

- Officer's Fiduciary Duties
 - Duty of Loyalty
 - Must act in the best interest of the corporation and its shareholders
 - Must act in good faith
 - Must refrain from conduct that would injure the corporation and its shareholders or deprive them of profit or advantage

Breaches & Business Torts

- Officer's Fiduciary Duties
 - Duty of Loyalty – Examples of Breach
 - Conflicts of interest
 - Self-dealing
 - Disclosure of confidential information
 - Misappropriation of corporate opportunities

Breaches & Business Torts

- Officer's Fiduciary Duties
 - Duty of Care
 - Officer must act in same manner as a reasonably prudent person in their position would
 - Must inform him/herself of all material information reasonably available before making a business decision

Breaches & Business Torts

- Officer's Fiduciary Duties
 - Duty of Care
 - Can rely upon experts
 - Business judgment rule typically a defense

Breaches & Business Torts

- Employee's Duty of Loyalty
 - Less stringent than officer's duty of loyalty
 - Must act in good faith
 - Must not take actions inconsistent with employer's best interests

Breaches & Business Torts

- Employee's Duty of Loyalty
 - Examples of breaches include:
 - Misappropriation of trade secrets and other confidential information
 - Usurpation of corporate opportunities
 - Misuse of company assets

Breaches & Business Torts

- “Faithless Servant” liability
 - “Faithless servant” two different standards in play:
 - *Standard 1*: Defined by the contract of service pursuant to which they are made:
 - Employee is “faithless” when misconduct and unfaithfulness substantially violates the contract of service

Breaches & Business Torts

- “Faithless Servant” liability
 - “Faithless servant” two different standards in play:
 - *Standard 2*: Employee is faithless where engaged in conduct that rises to the level of a breach of a duty of loyalty or good faith

Breaches & Business Torts

- “Faithless Servant” liability
 - “Faithless servant” not entitled to compensation during the period of faithlessness
 - Even if the services were beneficial to employer
 - Even if employer suffered no provable damage
 - Must disgorge compensation and benefits paid or provided to them during period of faithlessness

Breaches & Business Torts

- Breach of Contract
 - Confidentiality agreements
 - Restrictive covenants (non-competes, customer non-solicits, employee non-solicits)
 - IP assignment agreements
 - Non-disparagement agreements

Breaches & Business Torts

- Business Torts
 - Theft of trade secrets
 - Unfair competition
 - Conversion
 - Fraud and misrepresentation (intentional and negligent)
 - Disparagement (including trade disparagement)
 - Tortious interference with contract
 - Tortious interference with prospective economic relations

Violation of Antitrust Laws

- October 2016, DOJ and FTC antitrust guidance for HR professionals and others involved in hiring and compensation decisions
- Targets agreements regarding terms of employment with firms that compete to hire employees

Violation of Antitrust Laws

- Sharing information with competitors regarding terms and conditions of employment dangerous
- Exchanging competitively sensitive information is evidence of an implicit illegal agreement

Violation of Antitrust Laws

- Violative agreement can be:
 - Written or unwritten
 - Formal or informal
 - Spoken or unspoken
- Individual officers/employees exposed to criminal and/or civil liability

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