



GRAVES DOUGHERTY HEARON & MOODY

Personal Liability for Employment Law Claims: Could You Be on the Hook?

Business owners, corporate officers, managers, and supervisors typically do not have personal liability for employment law claims. However, in certain cases, these persons can be sued along with the company for damages resulting from alleged wrongful employment decisions.

Individuals who are sued and found liable are “jointly and severally liable” with the employer for the alleged violations, which means, for example, that an employee who was wrongly denied overtime pay can choose to sue either the employer or the individual responsible for the violation, or both. If the employee wins the lawsuit, the individual and the company are equally responsible for the damages awarded to the aggrieved employee.

FLSA and FMLA.

Both the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) allow for personal liability for certain persons involved in employment decisions. The basis for individual liability is found in the definition of “employer” under these laws. Under such definition, an owner, executive, supervisor, manager and “any other person who acts directly or indirectly, in the interest of an employer to any of the employees of such employer” may be held liable for a violation of the FLSA or FMLA.

Unfortunately for employers and individuals who meet the definition of “employer”, these are two of the laws that are the most difficult to understand and administer and correspondingly seem to be two of the most popular lawsuits for plaintiff’s lawyers to file. (Both laws allow for the recovery of attorneys fees if the plaintiff wins).

The majority of cases finding an individual to be an “employer” involve owners or corporate officers. However, some courts have found even managers with broad authority over personnel matters to be “employers”.

When Could You Have Liability?

- You have responsibility for FMLA or FLSA compliance. In other words, if you are responsible for enforcing the company’s attendance policy (FMLA) or pay and overtime policies or how employees are classified (FLSA) you could be sued under these laws.

- You are the employee's immediate supervisor or otherwise in her chain of command. Administrators such as HR managers may also be liable, depending on the degree of control and authority they exercise over the employee.
- You decide, have the responsibility to decide, or make the decision regarding leave for the employee, (FMLA) or you make the decision to take adverse action against the employee which the employee later claims is retaliation. (FMLA or FLSA)
- You are in a position of authority in the company or have general decision making authority with respect to the company's finances (or both) and you have either unreasonably classified a worker as an independent contractor or, regardless of whether you were involved in the initial classification, you do not reasonably believe that such worker is properly classified yet continue to treat such worker as an independent contractor.

Tax Liability.

In addition to personal liability under the FLSA and FLMA, business owners, corporate officers, managers, and supervisors could also have personal liability for failure to "collect, truthfully account for, and pay over" : (i) the employee's share of employment taxes associated with the compensation paid to a misclassified worker and (ii) the income taxes which should have been withheld and remitted to the US Treasury on such compensation.

Conclusion.

Although you cannot avoid employment lawsuits, you can be prepared to win such lawsuits by being a proactive employer.

Steps You Can Take Include:

- Make sure your employees are properly classified as exempt or non-exempt.
- Make sure you are paying your employees properly for all "working time", including paying overtime to non-exempt employees.
- If you use independent contractors, make sure they meet the test to be properly classified as a contractor rather than an employee.
- Listen to and investigate employee complaints or concerns -- if you ignore them, the employee may feel forced to seek outside help from an attorney or governmental agency.

- Get advice from competent employment law counsel before making tough employment decisions.

If you have any questions or concerns about these issues or any other questions on employment law matters, please contact **Susan Burton** at sburton@gdhm.com, 512.480.5738.

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