EMPLOYER LIABILITY FOR EMPLOYEE ACTIONS

by Charles A. Horowitz

Under Minnesota law, employers may be legally responsible for the conduct or even misconduct of their employees. The law of employer liability, however, is not a model of clarity and consistency. This article is intended to serve as a broad overview of this subject, to assist business owners who may be threatened with litigation arising from employee activities.

An employee working in the state has a statutory right to a legal defense and indemnification by the employer if sued for actions undertaken "in the performance of" work duties, unless he or she has engaged in "intentional misconduct," "willful neglect" of duties, or "bad faith." Other exceptions apply, most notably where the employee is subject to a contract or agreement governing indemnification rights. As an initial matter, therefore, it would behoove any employer to consult with legal counsel to determine the need for an agreement governing indemnification. The outcome of such an analysis will naturally depend on the nature of the risk involved in the position, as well as the anticipated need to control such a potential lawsuit. An employee who requests but is denied a legal defense might (for example) provide damaging testimony against the employer that could lead to the employer being sued in its own right. In addition to its own legal defense costs and damages that a jury might award, the employer even may be taxed with payment of the legal fees of the party filing suit. This can happen if the lawsuit arises under a statute allowing for such a recovery or involves interference with contract, usually where a former employer sues based on a claimed breach of a noncompetition agreement.

A second scenario of employer liability is the common law doctrine of "*respondeat superior*." In Minnesota, an employer may be liable for torts committed by employees in the course and scope of employment. This usually means during the employee's regular work hours and place of employment. An additional requirement is that the actions giving rise to the lawsuit are "foreseeable" as a matter of law, in light of the risks posed by the employee's job duties. Minnesota law in this regard is all over the map, making predictions exceedingly difficult to make. Courts have held, for instance, that it is "foreseeable" that a psychologist or group home counselor will inappropriately touch a client in a sexual manner, but that it is not "foreseeable" that a teacher or clergyman will inappropriately touch a student or parishioner. Other "foreseeable" examples include: (1) apartment caretaker assault on tenant; (2) assault of store owner by delivery person; and (3) sexual abuse by day care worker. Other "unforeseeable" examples include: (1) employee misappropriation of trade secrets; (2) apartment caretaker dropping knife injuring child; (3) road rage by truck driver; and (4) pastor accidentally shooting parishioner. Similarly, the Federal District Court in Minnesota earlier this year held that, for purposes of a federal constitutional claim arising from a police officer's excessive use of force during an arrest, it is "foreseeable" that a police officer will commit an assault against a criminal suspect, thereby allowing a *respondeat superior* claim to proceed against the municipal employer.

Thirdly, an employer under federal and state law may be legally responsible for acts of sexual harassment and discriminatory conduct based on race, gender, religion, age, national origin, disability and, under state law, sexual orientation, undertaken by supervisory and sometimes

even rank-and-file employees. To avoid legal exposure based on such conduct, employers large and small should establish a mechanism for reporting a suspected violation and, upon receiving notification, swiftly investigate and take steps necessary to prevent its recurrence.

Finally, it bears noting that actions of managerial and other high-level employees undertaken in their official capacities may legally bind companies. The same applies to corporate officers and directors. By statute, officers and directors of for-profit and non-profit companies in Minnesota are entitled to a legal defense and indemnification, subject to exceptions similar to those applicable to employees.

To summarize, it is critical that any employer doing business in Minnesota carefully consider the legal risks that may arise due to employee actions capable of harming a customer, patron or, if the employee is arguably subject to a prior noncompete, a business competitor. This should begin by putting in place proper insurance coverage, which may require a special rider or endorsement to your CGL policy, as well as D&O, E&O or employment practices coverages. In addition, it may be advisable to consult with legal counsel to avoid the pitfalls of costly, and avoidable, litigation. The employment lawyers at Mansfield, Tanick & Cohen, P.A. are available to guide you through this tricky area of law and help you to protect your business.

Charles Horowitz is a partner at Mansfield, Tanick & Cohen, P.A., and member of its Employment Practices group. He is a litigator with a wide range of experiences in employment law (representing employers and employees), insurance law, shareholder disputes and class actions.