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- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

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reach the personal assets of the owner, unless the plaintiff can “pierce the corporate veil,” by showing, for example, disregard of the corporate form and treating the company assets as personal assets. However, under individual liability for decision-makers provides a direct path to the owner’s personal wealth.

Despite this disappointing news other aspects of the *Elezovic* decision are quite helpful. First, the actual employer, Ford Motor Company, escaped liability in the case despite plaintiff’s claim that the alleged harasser (“Bennett”) exposed himself to her. En route to ruling that the plaintiff did not sufficiently show that the employer was placed on notice of the hostile environment, the Supreme Court made several points that will be helpful in the defense of future harassment claims:

- Telling two first-line supervisors in confidence that Bennett exposed himself to her does not place the employer on notice of the harassment, because asking supervisors to keep plaintiff’s complaint in confidence is a waiver of the right to place the company on notice and start an investigation. (See: Workplace Chronicle, December, 2002: “Employers Should Always Document Any Requests to Hold Off On Investigating Harassment” available at our website);
- Letters sent by her psychologist and attorney complaining of “harassment,” without specifying sexual harassment, does not put the employer on notice that illegal conduct is occurring.

The point made in the first bullet compliments another established defense in Michigan: That the complaints of harassment must be made to “higher management,” which the courts define as “someone in the employer’s chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing and disciplining the offensive employee.” *Sheridan v Forest Hills Pub. Sch.*, 247 Mich App 611 (2001). ■



Staffing Company Liability For Acts Of Temps Injuring Customers?

Most employers know that most personal injury lawsuits by employees are barred by the exclusive remedy provision of the Michigan Workers’ Disability Compensation Act. Companies using leased or temporary staff should know that if a “temp” is injured while on duty, Michigan’s “labor broker” cases generally provide that the temporary employee will also be treated as the customer’s employee for purposes of the exclusive remedy provision. *Currie v. National Metal Processing, Inc.*, 2003 WL 22902857 (Mich App 2003)

Labor broker cases usually present the dual employer or co-employer situation. In these cases, the employee typically has a “legal” or “actual” employer against whom there is no question that a personal injury suit is barred by the exclusive remedy provision, and the question is whether a second entity can also be classified as an employer under the statutory bar. Michigan courts use the “economic reality” test in making this determination. Historically, the courts examined a multitude of factors. However, in *Currie*, the often expressed rationale has now

devolved into a simple truth: Because the customer provides all funds that make up the worker's compensation, the economic reality is that the customer pays the temp's wages and benefits. When this is the case, the temporary employee cannot sue the customer for personal injuries.

However, what if the shoe is on the other foot, and the customer who seeks to sue the staffing company because of some act of the temp resulting in injury? This prospect arises in a variety of circumstances: The temporary employee crashes a hi-lo into a machine, causing damage; "Bob" from the accounting temp firm makes a mistake that results in huge tax penalties, another office temp embezzles funds, a disgruntled temp assaults or even murders a key employee causing consequential damages in the form of lost deals and profits. In all of these circumstances, the customer firm would likely consider suing the "deep pockets" staffing firm for the machine damage, tax penalties, embezzled funds or lost profits. Usually, an employer is automatically liable for the acts of its employee within the scope of employment. This general rule is known as *respondeat superior* liability.

However, in Michigan, suing the staffing company for damages caused by a temp would generally be a lost cause. For *respondeat superior* cases, Michigan uses a different test, where the employer is liable only if it exercised "day-to-day control or supervision of the employee's specific work activities." *Hoffman v JDM Associates*, 213 Mich App 466, 473 (1995) In the vast majority of cases, staffing companies recruit, interview and submit candidates to a customer, and, if the candidate is acceptable, hire and assign them to the workplace, where the candidate works under the customer's supervision. In these situations, *Hoffman* clearly applies, and the staffing company is not legally responsible for the acts it does not supervise. In a minority of cases, the staffing firm places its own "site supervisor" into the customer's facility. When that is the case, one must inquire: Does the site supervisor merely attend to the temporary staff's employment issues, such as wage increases, scheduling, vacations, benefit questions, etc? If so, *Hoffman* would still control.

However, some site supervisors monitor the quality of the services rendered to the customer. This situation begins to look more like "outsourcing," where the vendor assumes responsibility for the success of the workers' endeavor. In a competitive market, it is not unusual for these lines to be blurred. However, staffing companies and their customers should know that when the staffing company supervises the "temps" and exercises day-to-day control over their activities, the staffing company may become legally liable for their mistakes or intentional acts causing damage.

Arbitration and Time Limitation Guidelines

The Michigan appeals court has recently restated guidelines for drafting employment policies for contractual arbitration and time limits. In *Hicks v EPI Printers*, -- N.W.2d --, 2005 WL 839502, the court dismissed a sexual harassment complaint because the "Employment Policies" in effect required the case to begin within one year -- instead of the normal three-year time period.

An arbitration policy is not enforceable when it is not a binding contract. *Heurtebise Reliable Bus Comp*, 452 Mich 405, 413 (1996)(the policy specified it did "not create any employment or personal contract, expressed or implied.").

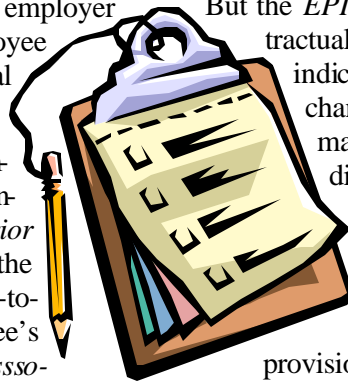
But the *EPI Printers* manual was found to intend contractual terms, even though the manual's terms indicated the provisions could be expected to change. The employer's right to modify the manual and the at-will nature of employment did not render the manual unenforceable.

Factors the court looked for included: (1) both parties were bound unless and until the policy was changed; (2) changes had no retroactive effect; (3) the arbitration provision was spelled out in detail; (4) the policy was spelled out in **BOLDFACE** type; (5) a severability clause reflected the understanding that the manual was meant to be enforceable; and (6) the employee signed a receipt for the manual which included a specific reference to arbitration. ("I understand that any dispute, matter, or controversy as set forth in [the arbitration section], shall be settled by arbitration.")

The court was convinced the central issue in enforcement was whether the parties intended an agreement, not how formalistic the agreement was. When the manual's receipt was read together with the manual's detailed arbitration provision "both documents straightforwardly described what to expect in terms of dispute resolution by arbitration."

Next, the court addressed whether the sexual harassment claim was barred after one year. Rejecting the argument that the policy did "not expressly prohibit filing suit after one year," and the "limitation is unreasonable," held the policy "intended the one-year statute of limitations for arbitration" and was reasonable.

A time limit policy is reasonable if: (1) the claimant has



sufficient opportunity to investigate and file an action, (2) the time is not so short as to work on practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. Six month periods of limitations, under appropriate circumstances, can be reasonable. However, courts will review these limitations subject to “*heightened judicial scrutiny*” meaning that the waiver must be “*knowing, intelligent and voluntary.*”

The practical effect of this ruling is that employers are on notice that outdated employment manuals and revision procedures may be inadequate to compel enforcement. Sophisticated employers realize that good employment practices require continuing review of policies and procedures. This is an excellent opportunity. Please call if you have questions. ■

Workplace Smoking Ban Takes Effect in Wayne County

On June 15, Wayne County became the fifth Michigan county to ban workplace smoking, following Chippewa, Ingham, Genesee and Washtenaw counties. The ordinance does not include Detroit and exempts bars, restaurants, casinos and other gaming venues.

The ordinance obligates Wayne County employers to post no smoking signs and implement a no-smoking policy. The ban extends to business vehicles and to the first six feet surrounding a covered facility. Under the ban, existing smoking rooms can be maintained but health inspectors must sign off on them to make sure they are properly ventilated. First time offenders will receive a warning. Thereafter, offenders will be subject to a \$100 fine. Offenders can be fined \$500 for each subsequent violation. ■

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