

(NOT SO) LIMITED LIABILITY: WHEN CORPORATE OFFICERS BECOME PERSONALLY LIABLE

This outline addresses many of the most common situations where individual liability can arise in the employment context for individual decision makers, directors, and officers of a corporation. It concludes with some best practices to be followed to minimize risk exposure for the individuals involved.

Perhaps the most common circumstance where individual liability can arise is sexual harassment, especially in the context of a supervisor-subordinate relationship. Given the serious nature of sexual harassment, any such circumstances must be handled appropriately.

I. SEXUAL HARASSMENT

- A. Definition of sexual harassment: Sexual harassment is defined by Michigan statute and federal regulations as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when any of the following is true:
 - 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
 - 2. An individual’s submission to or rejection of such conduct is used as the basis for employment decisions affecting him or her; or
 - 3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.
See MCL 37.2103.
- B. In both state and federal context, this applies to both traditional male-female, female-male, and same sex harassment. *Robinson v Ford Motor Co*, 277 Mich App 146 (2007); *Oncale v Sundowner Offshore Services*, 523 US 75 (1998).
- C. Two theories of harassment: **Quid Pro Quo** Sexual Harassment and **Hostile Work Environment**. State law recognizes a distinction between quid pro quo and hostile work environment sexual harassment.
 - 1. The Michigan Supreme Court has held that sexual harassment that falls into one of the first two categories (“submission to such conduct...” and “an individual’s submission”) above is known as

quid pro quo harassment, while the third category (“such conduct has...”) refers to hostile work environment sexual harassment. *Chambers v Tretco, Inc*, 463 Mich 297, 310 (2000).

It is worth noting that this distinction, while still present in federal caselaw, is increasingly ignored.

D. QUID PRO QUO HARASSMENT

1. Quid Pro Quo Harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual (such as not being hired, being fired, denying a raise, or losing a promotion). The largest number of these cases involve sexual harassment, typically by a supervisor toward a subordinate.

a) Elements of the offense:

(1) The employee was subjected to **unwelcome** sexual conduct or communications (including advances, requests for sexual favors, or other verbal or physical conduct) of a sexual nature;

i. Unwelcome: Can it be unwelcome if the complainant consents?

ii. The U.S. Supreme Court says harassment can be unwelcome even if the complainant consents. In *Meritor Sav Bank v Vinson*, a bank employee alleged that she had a relationship with her supervisor because she thought she'd lose her job if she did not comply. The Court commented that the employee's consent to a sexual relationship with her supervisor did not mean that the relationship was welcome. “The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in the sexual intercourse was voluntary.” But the Court also said that the teller's sexually provocative speech or dress

“may be relevant” in determining whether she regarded advances as unwelcome. 477 US 557 (1986)

iii. State law takes a different position. As a general matter, conduct and communications arising out of a consensual relationship (up to and including sexual activity) have been held as not sufficient to constitute “unwelcome” conduct or communication for purposes of proving a quid pro quo or hostile work environment claim. See, e.g. *Haseley v Kelley Svcs, Inc*, 2003 WL 22204743 at *4 (Mich App).

- b) The harassment was based upon the employee's sex; and
- c) As a result of the employee's reaction to the harassment, some aspect of the employee's employment was affected (compensation, benefits, status, conditions, privileges).

2. Employer's duty upon learning of harassment:

- a) If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate appropriate corrective action.
- b) Employer's liability for quid pro quo harassment: Strict liability (federal), preponderance of the evidence (state). *Quinn v Pipe & Piling Supplies (USA) Ltd*, 2010 WL 4226734 at *2 (WD Mich); *Chambers v Trettco, Inc, supra*.
- c) An employer can be held automatically liable for quid pro quo sexual harassment under both federal and Michigan law. See *Henson v City of Dundee*, 682 F2d 897 (11th Cir 1982) (holding employer strictly liable for actions of its supervisors amounting to sexual discrimination or harassment resulting in tangible job detriment to subordinate employee); *Champion v Nationwide Sec, Inc*, 450 Mich 702, (1996) (overruled on other grounds) (Civil Rights Act imposes strict liability on employers for quid pro quo sexual harassment committed by supervisory personnel); See also *Hamed v Wayne County*, 284 Mich App 681, 688-693 (overruled on other grounds) (holding same).

- d) Under federal law, the employer can oftentimes be held vicariously liable for hostile work environment sexual harassment. See *Faragher v City of Boca Raton*, 524 US 775 (1998); *Meritor Sav Bank, supra* (employers are not automatically liable for sexual harassment by their superiors, but absence of notice to an employer does not necessarily insulate that employer from liability).
- e) Under State law, the employer can be vicariously liable for quid pro quo harassment when the employer's employee uses supervisory authority to perpetrate harassment.

(1) Defeating strict liability

- a) As the US Supreme Court has explained, an employer can only defeat liability (in the quid pro quo federal context) by raising a specific defense outlined in the case of *Burlington Indus Inc v Ellerth*, 524 US 742, 761 (1998):

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence...The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm....”

E. Hostile Work Environment Harassment

- 1. Hostile work environment harassment occurs when an employee is repeatedly subjected to unwelcome sexual conduct (comments, actions) to the point that the harassment unreasonably interferes with the employee's work performance or creates an intimidating, hostile or offensive working environment.
- 2. Elements of the offense. Under Michigan law, to state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish all of these five elements:
 - a) the employee belonged to a protected group;
 - b) the employee was subjected to communication or conduct on the basis of sex;

- c) the employee was subjected to **unwelcome** sexual conduct or communication;
- d) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
- e) respondeat superior.

Radtke v Everett, 442 Mich 368, 382-83 (1993) (internal footnote omitted) (emphasis added).

- 3. Employer's duty upon learning of harassment. If it comes to an employer's attention that one of his supervisory employees is sexually harassing another employee, the employer is required to take immediate, appropriate action:

- a) Employer's liability for HWE harassment:
- b) Federal: "presumption of liability" but not strict liability. *Quinn v Pipe & Piling Supplies (USA) Ltd*, supra.
- c) State: Liability only if did not take prompt action to remedy the situation upon learning about the harassment.

- 4. Defeating Liability

- a) Federal: Under federal law an employer may show that they have "exercised reasonable care to avoid harassment and to eliminate it when it might occur." *Faragher*, supra at 805.
- b) State: "an employer may avoid liability [in a hostile work environment case] 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'" *Chambers v Tretco, Inc*, supra at 312.

F. Suggesting How to Prevent Sexual Harassment

- 1. Let employees know that sexual harassment of any form is not acceptable and will not be tolerated.
- 2. Create a written sexual harassment policy which includes a clear explanation of how employees can report sexual harassment and the consequences for employees engaging in harassment.

3. Be receptive to all complaints and observations. Don't merely dismiss an employee's concerns as over-sensitivity!
4. When and if you are notified of any potential harassment, immediately investigate the allegations fully, document the investigation and take appropriate corrective actions if necessary.
5. Once an investigation has begun, maintain confidentiality at all times.
6. Establish a complaint procedure that enables an employee to present a complaint to one of several designated employees, including individuals other than direct supervisors.
7. Make sure supervisors are trained to recognize harassment and intervene when appropriate. Supervisors should also know that they risk further discipline and potential legal liability for engaging in harassing behavior or failing to take appropriate action to stop it.
8. Communicate the results of the investigation and the decision to both the alleged victim and the alleged harasser.
9. Follow up with complainant to confirm that the problem has not recurred, if applicable.
10. Maintain thorough and up to date personnel records. This is the best safeguard against contrived allegations of discrimination and harassment.

G. Note: Managers are personally liable for their harassment of subordinates.

1. ELCRA defines discrimination based on sex to include sexual harassment. MCL 37.2103.
2. ELCRA defines "employer" as "a person who has 1 or more employees and includes an agent of that person." MCL 37.2201(a). Similar to definition of "employer" in Title VII, but our courts (unlike federal courts) do not read "agent" as a subset of "employer" but as a separate, liable entity.
3. *Elezovic v Ford Motor Company*, 472 Mich 408 (2005). This case overruled existing precedent that followed the federal model and applied a strict construction of the statutory definition of "employer." Court found that the supervisor could be personally liable under the ELCRA definition of "employer" because as a supervisor he was an "agent" of the employer at the time he engaged in harassment,

thereby exposing the corporate employer to liability. Supervisor can be personally liable, even if employer is not. Harasser does not need to be “functioning as an agent” when he commits the harassment for liability to attach.

4. Notably, liability does not apply to “co-workers” or peers.

Another inherently tricky circumstance is dealing with Family Medical Leave Act related issues. In Michigan, thus far the Courts have held that individuals cannot be held liable, but this could change in the future.

II. THE FAMILY MEDICAL LEAVE ACT (FMLA)

- A. There is a split among Courts which have addressed individual liability under the FMLA. Some Courts have held that individuals in positions of authority can be held liable in their individual capacities for FMLA violations.
- B. The courts have compared the FMLA to the Fair Labor Standards Act (discussed in more detail below), which imposes individual liability where a person has some control over the corporate purse strings. In the FMLA context, the analysis is whether the individual has the control over whether the employee may take leave.
- C. The FMLA creates rights of action for employees against “any employer” who violates the statute. The definition of “employer” under the FMLA includes “any person who acts, directly or indirectly, in the interest of any employer to any of the employees of such employer.” 29 CFR 825.104.
- D. There is a split among the federal circuit courts that have ruled on this issue. The Third, Fifth, and Eighth Circuits have all found that there can be individual liability for FMLA violations. The Sixth Circuit (which includes Michigan) and Eleventh Circuit, however, both maintain that there is no individual liability under the FMLA.
- E. Takeaway: Individuals are safe for now in Michigan, but that could change at any time, especially if the U.S. Supreme Court weighs in.

Individual liability can also attach in the context of alleged violations of the Americans with Disabilities Act and/or its Michigan counterpart. This relates to, for example, failure to provide reasonable accommodation to a disabled employee. If a court were to find the right degree of control existed, liability is a real possibility.

III. AMERICANS WITH DISABILITIES ACT / MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

A. ADA

1. The ADA does not provide for supervisor liability, only employer liability. *E.g.*, *Mason v Stallings*, 82 F3d 1007 (11th Cir 1996); *EEOC v AIC Sec Investigations*, 55 F3d 1276 (7th Cir 1995); *Montez v Romer*, 32 F Supp 2d 1235 (D Colo 1999); *Meara v Bennett*, 27 F Supp 2d 288 (D Mass 1998). This does not end the inquiry, however.

2. At least one case has held that an officer's involvement in the corporation may trigger ADA liability. See *Clackamas Gastroenterology Assocs, PC v Wells*, 538 US 440 (2003). In *Clackamas* the Supreme Court resolved a conflict in the circuits with respect to whether the shareholders and directors of a corporation are considered "employees" for purposes of satisfying the ADA's 15-or-more-employees applicability requirement. The Supreme Court rejected the approach of several lower courts and, as with other statutes, looked to the individual shareholder/director's control (master-servant relationship). The Supreme Court held that the "common law element of control" should be the "principal guidepost" in determining whether the shareholder or director acts independently and participates in managing the organization and whether the individual is subject to the organization's control. The Supreme Court adopted six factors from the EEOC Compliance manual to be applied by lower courts:
 - [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
 - [2] Whether and, if so, to what extent the organization supervises the individual's work;
 - [3] Whether the individual reports to someone higher in the organization;
 - [4] Whether and, if so, to what extent the individual is able to influence the organization;
 - [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

[6] Whether the individual shares in the profits, losses, and liabilities of the organization.

3. See also *De Jesus v LTT Card Serv*, 474 F3d 16, 21–24 (1st Cir 2007) (applying *Clackamas* approach to close corporation); *Fichman v Media Ctr*, 512 F3d 1157 (9th Cir 2008) (holding that directors of a nonprofit corporation were not employees based on the *Clackamas* factors)

B. MPDCRA

1. Under MPDCRA, owners of a business or members of management arguably are "persons" within the meaning of the Act, which is defined to include both an individual and an agent of the company. This includes supervisors. MCL 37.1103(h).
2. Although authority for imposing individual liability under the Michigan Act is somewhat questionable, a plaintiff may choose to sue under that statute rather than the ADA in those cases where judgment against an individual officer or agent is possible (i.e., the individual was particularly involved or committed the violation), where there is no otherwise colorable basis for supervisory liability under the ADA.

Another common source of claims is those brought under various state and federal Wage and Hour laws.

IV. WAGE AND HOUR

A. Fair Labor Standards Act – FLSA

1. FLSA has been held to impose personal liability on corporate agents for unpaid wages. This is the case in Michigan federal courts. See, e.g., *Dole v Elliott Travel & Tours, Inc*, 942 F2d 962, 966 (CA 6 1991).
2. Federal law, through the FLSA, requires "employers" (broadly defined in the statute) to pay federally regulated minimum wages and overtime compensation (*not* contractual wages). If the employer does not meet these obligations when due, the employees may recover (1) their wages or unpaid overtime compensation, and (2) an equal additional amount as liquidated damages unless the employer can show that the failure to pay was in good faith and it reasonably believed it was not violating the law. See 29 U.S.C. § 216(b).

3. Definition of employer: "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).
4. Scope: FLSA coverage is limited to federal minimum wage and overtime violations. The FLSA does not cover claims for immediate payment of contractual wages, accrued vacation pay and other accrued benefits to which employees may be entitled under state law.

B. WARN ACT

1. The WARN Act requires employers to give employees at least 60 days' notice of a plant closing or "mass layoff."
2. The WARN Act defines an "employer" to be "any business enterprise" employing 100 or more full time workers. 29 U.S.C. § 2101.
3. Federal courts have not read this language to extend liability for WARN Act violation to directors and officers, except when the plaintiffs could pierce the corporate veil, relying on alter ego theories of liability. See *International Union Auto, Aerospace & Agric Implemen Workers v Aguirre*, 410 F3d 297, 302–03 (6th Cir.2005).

C. Michigan Wage and Fringe Benefits Act

1. Michigan imposes individual liability for violations of state law wage and hour statutes. MCL 408.471(d) defines "employer" as "an individual, sole proprietorship, partnership, association, or corporation, public or private; this state or an agency of this state; a city, county, village, township, school district, or intermediate school district; an institution of higher education; or an individual acting directly or indirectly in the interest of an employer who employs 1 or more individuals."
2. Courts have the authority to impose individual liability if the circumstances warrant. See *In the Matter of 8 Complainants v. Bobbie Johnson, Richard Ries, and Cherokee Express, Inc., Jointly and Severally* (Applying FLSA analysis to determine if president of defunct corporation was individually liable for unpaid wages and fringe benefits, and determining that under the circumstances president was not liable).

3. Other states' laws vary, so if your business takes you to other jurisdictions be sure to check local law. Certain states, such as Illinois, New York, and Washington, have held that managers, directors and officers can be personally liable under those states' wage and hour statutes. New York even imposes criminal penalties on individuals when wages are not paid in violation of the statute.

Michigan has one of the strictest statutory schemes in the country pertaining to individual liability for unpaid taxes (of any kind) if a business fails to remit. The IRS has similar powers for federal taxes, although they are more limited.

V. TAXES

A. Michigan/State

1. The Michigan Department of Treasury has the authority to individually assess officers, members, managers, and/or partners for the liabilities of a corporation, limited liability company, limited liability partnership, limited partnership or a partnership under Michigan law for unpaid taxes. MCL 205.27a(5) states

"If a corporation, limited liability company, limited liability partnership, partnership or a limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure."

2. Following an entity's nonpayment of state taxes, Treasury begins the investigative process, culminating in the issuance of a "Letter of Inquiry" being sent to all individuals identified as being potentially liable for the corporate debt during the period in question. Note that at the time the Letter of Inquiry is issued, it is the understanding of the Department that the recipient may be liable for the billing/assessment, but no adjudication of such has been made at that time.
3. The recipient then has thirty days from the date on the Letter of Inquiry to submit documentation that proves he/she was not involved with the corporation, an officer of the corporation, or responsible for paying taxes/filing Michigan tax returns during the

relevant time period. We advise seeking assistance of counsel for responding to any Inquiry letter.

4. If no documents are sent in, or Treasury is not satisfied that they exculpate the recipient of the Letter, a bill will be sent for taxes due to the recipient. The bill notifies the person that the Department intends to hold them personally liable for the corporate taxes in question. The recipient may dispute the request within 60 days on the date on the bill for taxes due.
5. If the Department doesn't receive any payment, installment agreements, or an approved notice of appeal, the State of Michigan will send the file to collections, which can adversely affect the individual's creditworthiness and ability to borrow funds. Other possible consequences include garnishments of wages/accounts receivable, the placement liens on real or personal property, and active interception of state money being sent to the person (i.e., tax refunds).
6. Michigan has one of the toughest sets of individual liability standards in the country. Recent efforts to revise this law have not been successful in Lansing. Governor Snyder vetoed the last attempt to relax this liability in early 2014.

B. Federal Liability: The IRS has a similar process at the federal level for unpaid taxes.

1. Under Internal Revenue Code Section 7202, anyone required to collect, account for, and pay over to the IRS any tax is guilty of a felony, punishable upon conviction by fine of up to \$10,000, or imprisonment of up to five years, or both, for each offense.
2. The IRS will also assess the company's taxes due personally against the company's "responsible persons" which includes those individuals who controlled the company's available funds and used them to pay debts other than taxes, such as ordinary course of business.
3. "Trust fund recovery penalty" – this is the penalty levied by the IRS following a nonpayment of federal taxes. This is what is assessed against the responsible individuals.
 - a) INCLUDES: Federal income tax and Social Security tax withheld by the company from employees' wages but not paid to the Internal Revenue Service.

- b) DOES NOT INCLUDE: Employer matching Social Security tax, as well as penalties and interest accrued on the unpaid tax.
- 4. Statute of Limitations: 10 years to collect.
- 5. Mechanism: The IRS will place a tax lien all property owned by the responsible person at the time the trust fund recovery penalty is assessed, or acquired by the responsible person during the ensuing ten years. The IRS records notice of the Federal tax lien in the register of deeds' office of the county of the responsible person's residence.
- 6. Consequences: The tax lien may interfere with selling or mortgaging real property interests, can adversely affect creditworthiness, and will appear in employment background checks.
- 7. Not Dischargeable: A trust fund recovery penalty is not dischargeable in bankruptcy.

In line with the serious nature of occupational safety issues, individual liability can attach to various violations of occupational safety laws.

VI. WORKPLACE SAFETY: Occupational Safety and Health Act and Michigan Occupational Safety and Health Act

A. OSHA

- 1. General Duty: Under the Occupational Safety and Health Act (OSHA), employers must provide a workplace free from "recognized" hazards. A violation of this duty can lead to criminal sanctions in addition to civil penalties. An employer can also be exposed to liability under occupational safety and health regulations promulgated by the Secretary of the Department of Labor. Officers can be found personally liable.
- 2. OSHA provides for criminal sanctions when (1) the employer's willful violation of a standard, rule, order, or regulation has caused the death of an employee, (2) when the employer falsely represents its compliance with OSHA, or (3) when a person gives advance notice of an OSHA inspection.
- 3. OSHA imposes liability on an "employer" for violations. An "employer" is defined as "a person engaged in a business affecting commerce who has employees . . ." A "person" is defined as "one

or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 USC 652. This means that an individual can be liable as an “employer” for OSHA violations.

4. The OSHA Review Commission has thus far not recognized a corporate officer as an employer (unless, of course, the officer is the one committing the violations); however, at least one federal district court has concluded that the question of whether a corporate officer who was otherwise uninvolved in the violation in question was an “employer” under OSHA was for the fact finder to decide.
5. In *US v Cusack*, 806 F Supp 47 (DNJ 1992), the federal district court in New Jersey found that “an officer’s or director’s role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer” under OSHA. The court acknowledged that if the individual’s role was not substantial enough to raise him to the level of an employer, he could not be charged as a principal or an aider and abettor.
6. **Sixth Circuit Danger Zone:** In *Danis-Shook Joint Venture XXV v Sec’y of Labor*, 319 F3d 805 (6th Cir 2003), the Sixth Circuit held that an employer “knew” about a worksite safety violation because its worksite supervisor, who drowned during work at a wastewater treatment plant, was aware of his own safety violation. 319 F3d at 812. The court reasoned that “[b]ecause [he] was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to [his employer].” The Sixth Circuit is an outlier as most circuits do NOT impose a supervisor’s knowledge of an OSHA violation to the employer.

B. MIOSHA

1. Like OSHA, MIOSHA defines “employer” as “an individual or organization, including the state or a political subdivision, which employs 1 or more persons.” MCL 408.1005(2).
2. Supervisory violations of MIOSHA impugn the corporation, which may include directors and/or officers. See *People v Lanzo Const Co*, 272 Mich App 470 (2006).

One of the most commonly overlooked (and easily avoided) sources of individual liability for a corporate director or officer relates to management of retirement plans. Fortunately, the bulk of liability issues can be handled easily with correct planning and foresight.

VII. EMPLOYEE RETIREMENT INCOME SECURITY ACT/ERISA

- A. Employers are not required to set up employee benefit plans; however, if they do, certain fiduciary obligations arise and can attach to individual directors and officers, even if the corporation ultimately dissolves, closes down, or goes bankrupt.
- B. The Corporate form does not insulate corporate directors or officers from liability for actions taken as an ERISA fiduciary. Directors & Officers are ERISA fiduciaries “to the extent” they exercise:
 - 1. Discretionary control or authority over plan management;
 - 2. Discretionary authority or responsibility over plan administration;
 - 3. Any authority or control over management or disposition of plan assets.
 - 4. Authority to select and retain plan fiduciaries.

See ERISA § 3(21)(A), 29 U.S.C. 1002(21)(A); 29 C.F.R. 2509.75-8.

- C. Specific Fiduciary Duties:
 - 1. Duty of loyalty, ERISA § 404(a)(1)(A), 29 USC 1104(a)(1)(A).
 - 2. “Prudent person” obligation. ERISA § 404(a)(1)(B), 29 USC § 1104(a)(1)(B).
 - 3. Exclusive purpose obligation. *Kuper v Iovenko*, 66 F 3d 1447 (6th Cir 1995). This means that fiduciary may act to provide benefits to plan beneficiaries only.
- D. ERISA obligations are not dischargeable in corporate bankruptcy.
- E. Personal liability. The Department of Labor may pursue an ERISA plan fiduciary personally under §409 which provides that “[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of

such fiduciary which have been made through use of assets of the plan by the fiduciary ...

- F. Consequences. Even if the corporation closes or has no more assets, the Department of Labor can place liens on a fiduciary's personal property, garnish future income or offsets of a fiduciary's 401K account long after the company shut its doors.
- G. No indemnification. Even if a plan sponsor has adopted indemnification provisions in the plan's documents, such provisions are likely unenforceable. ERISA § 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."
- H. Possible methods of reducing risk for ERISA liability specifically:
 - 1. Obtain Fiduciary Liability Insurance or other appropriate coverage. Most D+O policies exclude ERISA claims.
 - 2. Remove directors and officers from investment or plan administration entirely, including day to day management or placement on committees.
 - 3. Delegate fiduciary duties in corporate documents to one specific non-director (and purchase insurance for that person).

The corporate form serves as a shield, but not always. If a corporation commits certain tortious conduct, the consequences of those actions can flow through to individual decision makers, directors, and officers.

VIII. TORTS

- A. A corporate officer is generally not liable for the corporation's torts simply by virtue of the office. Rather, liability only attaches to those corporate acts in which the officer personally or actively participates.
 - 1. Personally Committed. In *Warren Tool Co v Stephenson* (a case involving a suit against the former president and general manager of a corporation alleging that they inappropriately diverted corporate funds), the Michigan Court of Appeals stated that "[i]t is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort. *Warren Tool Co v Stephenson*, 11 Mich App. 274, 300 (1968).

2. Corporate Veil need not be pierced if personal participation. It is important to note that in order to find officers of a corporation personally liable the Plaintiff need not invoke the doctrine of corporate veil piercing. In *Attorney General v Ankersen*, the Michigan Court of Appeals specifically stated that “[w]e note that this is not a question of piercing the corporate veil. It is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation. *Attorney General v Ankersen*, 148 Mich App. 524, 557 (1986). The court, therefore, found that the defendant was personally liable as owner and operator of a corporation guilty of promulgating a nuisance and of violating the fire code.

B. Specific Torts (Common)

1. Torts to Land. In *Allen v Morris Bldg Co*, the Michigan Supreme Court found that a corporation’s president and majority stockholder had supervised operations which resulted in the flooding of neighboring land. As a result, the court ruled that the individual had “participated in the tort” and was liable along with the corporation itself. 360 Mich 214, 218 (1960).
2. Negligence. The Court of Appeals concluded in *Baranowski v Strating* that [w]hether defendant ... was acting on his own behalf or as an officer or agent of the corporation, he is personally liable for torts in which he actively participated, ... including negligence. *Baranowski v Strating*, 72 Mich App 548, 560 (1976). *Baranowski* involved assigning liability to owners/officers of a corporation for their negligence in not conducting soil boring tests prior to constructing a house.
3. Conversion. This doctrine of personal liability for corporate officers also applies to situations where a corporate officer participates in conversion, even when the conversion was for the benefit of the corporation and not that of the individual officer. See, e.g. *Warren Tool Co. v Stephenson*, 11 Mich App 274, 300-301 (1968), *Bush v Hayes*, 286 Mich. 546, 549-550 (1938), *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709 (1982), and *Citizens Ins. Co. of America v Delcamp Truck Center, Inc.*, 178 Mich App 570, 576 (1989).

In light of the foregoing areas of liability, below are some best practice pointers which, if utilized correctly, can help minimize or eliminate entirely many of the areas of risk described in this outline.

XI. BEST PRACTICES FOR AVOIDING LIABILITY

- A. Information and Documentation. Ensure that directors, officers, and individual decision makers have full information regarding subordinates' activities and possible exposure points for liability. This will give everyone sufficient warning to retain counsel to navigate through difficult decisions as may be necessary, which ultimately can lead to better decision-making, lessen the likelihood of costly mistakes, and minimize the individual's exposure to litigation.
- B. Know the law. Ignorance is no defense. It is your obligation to know the various areas of law applicable to your sphere of action, and you must stay up to date as the law changes.
- C. Use common sense. Does something seem complicated or thorny? Consult with counsel rather than trying to navigate alone.
- D. Implement effective supervisor training. Supervisors are the first line of defense against a possible claim given their regular interface with employees, so use best practices to ensure supervisors are acting appropriately towards employees and are trained to act professionally and in accordance with best management and corporate practices.
- E. Be consistent and audit often. If a policy (regarding any sort of workplace issue) is in place, enforce it without exception and continually monitor to ensure it is being followed.
- F. Director's and Officer's Liability Coverage. Make sure the corporation carries an appropriate kind and amount of D+O coverage. This will provide the directors and/or officers with coverage should a claim arise, regardless of whether the claim is meritorious.
- G. Employment Practices Liability ("EPL") Insurance. Individual decision makers who may find themselves in the crosshairs of potential claims should ensure they are covered under the company EPL policy and, if not, at least ensure they will be indemnified by the company should an issue arise if the decision maker is sued when acting on behalf of the employer.
- H. Indemnification. Ensure that, if possible, the corporate bylaws indemnify directors and officers against any and all claims or losses sustained as a result of negligence.