

Prepare to protect

How to manage your company's liability against litigation **Interviewed by Matt McClellan**

Facing litigation can be a nightmare for any company. Exposure to claims can not only ruin an organization's finances, but it can also ruin its reputation or even put it out of business.

"If your company loses the case, your customers may well decide to take their business to a competitor rather than be seen as tacitly supporting a rogue firm," says Thomas J. Azoni, senior partner with Secrest Wardle. "Keep in mind that recruiting and retaining the best talent becomes difficult if your company's reputation suffers as a result of bad publicity, or if your employees come to believe the case has merit."

Smart Business spoke with Azoni about the steps you can take to guard your company against the dangers of litigation.

How can businesses protect themselves from litigation exposure?

Most businesses view litigation as a problem for the legal or personnel departments. But the truth is, avoiding lawsuits — and winning them when they do occur — takes a concerted effort across the hierarchy of the company.

For example, if I am legal counsel for a person claiming to have been sexually harassed on the job, the first thing I will ask for is the production of all e-mails and text messages for groups of employees for a period of months or years. Electronically stored data on company-owned devices belongs to the company — there are no privacy rights there — and are discoverable in litigation. I'll know soon enough whether the company is being run like a fraternity or like a professional business organization.

Moreover, the failure to adequately maintain electronically stored information can expose a business to serious sanctions if and when litigation develops. There are significant penalties for the bad-faith management of information of this kind under both federal and Michigan law.

As a result, employees with a company laptop or cell phone have the potential to expose the company to a wide range of litigation, and companies must take control of the use of these devices or risk exposure to claims.



Thomas J. Azoni
Senior partner
Secrest Wardle

What other areas do companies need to look at?

Business leaders like to think that doing business with a handshake is the preferred method, particularly with established customers or suppliers. The problem with that approach is simple.

First, memories fade over time regarding particular aspects of a verbal agreement. Second, by avoiding a written contract, you ignore one of the most effective ways to protect the company from litigation exposure, that is, by including an indemnity provision and insurance requirement as part of the business arrangement.

Both are key components in managing risk and must be used together. It does your company no good to win a lawsuit against a subcontractor, for example, based on your well-drafted indemnity provision, only to find that your adversary doesn't have the money to pay the judgment.

Make certain that your company is an additional named insured on performance contracts wherever possible, and never try to draft an indemnity agreement yourself.

How can businesses guard against litigation involving personal injuries in the workplace?

The generally accepted hierarchy of preventing accidents is first to inspect and correct hazards. If that is not possible, then the hierarchy is to guard the hazard, and if that is not possible, to warn against the hazard. Warnings alone, however, are the weakest form of prevention because it is always an easy matter for the claimant to claim he didn't see or hear your warning.

Plus, there's an entire industry of experts available for hire to testify on both sides of the issue regarding the effectiveness of any given warning. It is better to fix the problem than to warn of its existence.

Are there other ways that a business can reduce its risk of litigation?

In a single word — training. Whether you are talking about the regular review of the safety procedures and protocols applicable to your workplace or annual training that highlights proper workplace conduct and personnel issues or just reminders regarding basic client service, a company will be well served if it consistently educates its employees in these areas.

What are the unanticipated consequences of litigation?

There is more to litigation than simply the direct financial cost of the case. Again, assume your company is involved in a lawsuit in which a former employee claims to have been sexually harassed.

In Michigan, there are no bright line limits to the number of discovery depositions that can be scheduled by the alleged victim's attorney or the number of documents that may need to be produced by your company.

Even a case of modest exposure could cost hundreds of work hours, all redirected to assisting in the defense of the case. <<

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