

the most determinative aspect of this relationship is whether the worker is deemed an employee or an independent contractor. A manager may prefer to label workers as independent contractors rather than employees for several reasons—for instance, to lower tax and benefits costs or to reduce exposure to liability. As noted earlier, however, the legal status of workers will be determined by the manner in which they are used, not by the label written into employment agreements.

Once a manager has hired an agent, he or she should carefully define the scope of the agent's authority. If the manager does not do this, the company may find itself bound by unanticipated contracts. For example, a manager might inadvertently give a purchasing agent the apparent authority to bind the business to a large purchase of supplies, above the actual needs of the business. A manager can help avoid scope-of-authority problems by making explicit, unambiguous statements to third parties that specify the limits on an employee's ability to enter into a binding contract. When using an employee or other agent to deal with third parties, a manager should also monitor transactions and business records, such as credit card bills, to avoid conduct that might legally ratify an otherwise unauthorized agreement entered into by the agent.

The manager should ensure that the work environment and the machines and other equipment used in the business are safe. He or she should also stress to the employees the importance not only of complying with the law, but also of being concerned about safety and ethical behavior. These concerns pertain primarily to the duties owed by employers to their employees. But employers may owe similar duties even to workers properly termed independent contractors, depending on where the independent contractor works and how much control the employer exerts over that work.

Finally, an employer should seek to minimize its potential liability for the wrongdoing of its workers. Because

the employer will be liable for employee torts committed within the scope of employment, a manager should attempt to decrease the risk of such vicarious liability by training employees to be careful and by defining the employees' scope of employment as narrowly as possible. It is also important not to set overly ambitious production targets or delivery deadlines that cause workers to rush unduly to complete the job. For example, after Domino's Pizza drivers caused several traffic accidents, the firm dropped its guarantee of pizza delivery within thirty minutes.²³

In light of an employer's potential liability under the aided-in-the-agency-relation theory for acts outside the scope of employment, managers should exercise particular care when giving an employee authority or an instrumentality (such as a company truck) that could be misused. Managers should ensure both that the employee is trustworthy and that any persons under the employee's control have the ability to complain to someone other than the supervisor. Because a company cannot avoid liability for injuries caused while it is engaged in an ultrahazardous activity, even if it is working through an independent contractor, managers should ensure that the company has adequate liability insurance. Finally, as discussed in Chapter 14, employers may be responsible for the criminal acts of employees. For example, if an employee violates an industry-related regulation during the normal course of employment, the employer could be held vicariously liable. In some situations, the supervising manager may be liable as well.

Although having a policy against illegal practices and conducting in-house training may not insulate the employer from civil liability for criminal acts of its lower-level employees, these steps can help to reduce the chance an employee will break the law in the first place. They also reduce the likelihood that punitive damages will be assessed against the employer.

23. GEORGE J. SIEDEL, *USING THE LAW FOR COMPETITIVE ADVANTAGE* 54–55 (2002).

A MANAGER'S DILEMMA: PUTTING IT INTO PRACTICE

TO DISCLOSE OR NOT TO DISCLOSE?

Danimark Investment Bank has decided to structure and market a new securities product to its clients. The securities are collateralized debt obligations (CDOs) directly tied to a reference portfolio of credit-card-backed securities (CCBS). CDOs are zero-sum investments, so one party's gain is always the other party's loss.

Anthony Karol is the managing partner responsible for the launch of the new securities. He knows that Danimark's client Nelipern & Co., a large hedge fund, will play a significant role in selecting the securities in the reference portfolio. Karol

also knows that the investors' interests in the portfolio will be adverse to Nelipern's interests. While Nelipern has shorted the equity of the CDOs (so Nelipern will make money if their value falls), the counterparties will hold a long position on the portfolio, so they will lose money if it performs badly. Does Danimark have a legal duty or an ethical obligation to disclose Nelipern's role in the selection process to potential investors? Is it enough if Danimark's marketing materials disclose that Nelipern helped select the portfolio, or should Danimark also disclose Nelipern's adverse interests in the



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