

# Solid HR policies help defend against litigation

By JANICE BULLARD PIETERSE

When Patrick Mendez lost his job as a supervisor for a Rochester electrical contractor, he suspected it was because he had complained about the company renegeing on pay promises.

Like many employees who believe they were treated unfairly, Mendez went to a lawyer. Now, almost three years later, a federal judge has certified the case for class action status, and Radeck Corp., one of Rochester's biggest commercial and industrial electrical contractors, could face more than \$12 million in back pay and damages.

While investigating Mendez's situation, his lawyer, Nelson Thomas of Dolin, Thomas & Solomon LLP, came across potential pay problems that could affect most or all of the company's 200-plus employees.

The Mendez case highlights what may be the biggest trend in employment litigation, area lawyers say. Employers can be vulnerable to costly lawsuits or settlements if they classify workers incorrectly as salaried when they should be paid by the hour or if they fail to pay required overtime.

"The violations are extremely common and they can result in huge liability for a company," Thomas says.

Still, discrimination lawsuits remain "the meat and potatoes" of employment litigation, says Daniel Moore of Harris Beach PLLC.

Moore and other local lawyers say they see many cases involving sexual harassment and age discrimination. And companies often are accused of violating the Americans with Disabilities Act or Family and Medical Leave Act.



Photo by Kimberly McKenna  
Daniel Moore of Harris Beach PLLC says proactive human resources policies are key to successful protection against employee lawsuits.

In any area of litigation vulnerability, companies can go a long way toward protecting themselves if they stay informed on fresh interpretations of laws and maintain strong human resources policies, experts say.

In the Radeck case, U.S. District Judge David Larimer has ruled that roughly 70 current and former employees are entitled to damages on some of their claims of overtime and other violations. Larimer also has certified the case as a class action and says some matters in the case can be resolved only at trial.

Lawyers at Harter, Secrest & Emery LLP, representing Radeck, are appealing the class action certification and have asked Larimer to set aside rulings in the workers' favor. Officials at Harter, Secrest & Emery decline to comment on the case.

One of the first things Thomas looks for when he gets a new case is the potential for overtime violations. Those violations typically involve either wrongly paying an employee a salary when the employee should be paid hourly, or paying people hourly but not paying them for all

of the time that they work.

"Employers are not really aware ... everyone is supposed to be paid hourly unless they fall into very narrow exemptions," Thomas says.

Those exemptions are for administrative employees who are not providing service to the public, professionals who hold a degree in the field in which they are working, executives who are supervising two or more people and outside salespeople who spend most of their time out of the office.

"It's not really a game of gotcha," Thomas says.

Rather, the point of the law is that it is better to have two people working 40 hours a week than one person working 80, he says.

Thomas' firm has grown from three to seven attorneys in five years dealing with a range of employment issues. He says the firm gets hundreds of calls each month. Many of those are from people who were fired and upset about the reasons for their job termination.

Many of them don't have a case, however, unless a company acted in a discriminatory way or violated a contract, Thomas says.

"You can fire people for the most unfair reasons in New York and there's nothing you can do about it," Thomas says.

But a company can go a long way toward mitigating potential legal problems with terminating an employee by making the termination fair, he says.

If a company gives sufficient, clear warnings and a dignified way for an employee to leave, Thomas says the employee is less likely to sue. Severance pay, for instance, is often a powerful reason for an

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employee not to sue.

"It's hard for an attorney to say, 'I'm going to do better for you after the fact,'" Thomas says.

Harris Beach's Moore says proactive human resources policies are key to successful protection against employee litigation. His practice focuses on discrimination suits, including harassment, sex and age discrimination and alleged violations of the Americans with Disabilities Act, as well as cases arising from federal wage and hour laws.

Moore has contributed a chapter to an employment law guide, "Dealing with Employee Lawsuits: Strategies for the Prevention & Defense of Workplace-Related Claims," published by Aspatore Inc. of Boston.

"If a company has a policy and procedure in place for handling harassment complaints, and if the complainant failed to utilize that procedure, or if the procedure was used and the complaint was properly addressed by the company, then there is a viable defense," Moore writes.

A similar "interactive" process under the ADA helps an employer avoid liability, he says.

"Companies should always invest in having human resources people who are

well-educated about the law and a company's corresponding obligations," Moore says.

Underberg & Kessler LLP's Paul Kenneally, the legislative representative for the Rochester chapter of the Society for Human Resource Management, says he advises employers to train employees at least once a year on issues such as preventing sexual harassment.

"The old-fashioned, overt discriminator is very rare," Kenneally says. "But the more subtle harassment in private is still out there."

"Even 'You look nice today'—many people would say that with purely innocent intention," he adds. "It's just not a good idea. It's unlikely that that alone would result in a verdict. But can that be part of something? Absolutely."

In recent age discrimination cases, Kenneally says, some courts have let lawyers argue that telling employees they are resistant to change or not technologically savvy may be construed as another way of telling them they are old.

"The job description is really, really crucial in these cases," he says. "You can't go about adding competencies to someone's job when they're suing you. There should be regular reviews, good HR practices—so people know where they stand."

Janice Bullard Pieterse is a Rochester-area freelance writer.