

Tips For Avoiding Business Litigation

By Patrick C. Tinsley, Esq.

In the movie *WarGames*, the American military's supercomputer, Joshua, repeatedly simulates global thermonuclear warfare until discovering the futility of it all, observing, "A strange game. The only winning move is not to play." The same can almost always be said of litigation. For a multitude of reasons, the best way to win a lawsuit is to avoid it from the beginning.

First, litigation is costly, both in dollars spent and time wasted. Unsurprisingly, in a 2015 survey of chief legal officers, costs rank as management's number one concern.¹ The cost of defending (and ultimately resolving) a lawsuit, even one with dubious merit, can be prohibitive. Nationwide, small and midsize businesses faced with employment lawsuits spend an average of \$125,000 – and 275 days – to settle them.² Those costs can vary considerably, of course, depending on the nature of the lawsuit and the forum in which it is brought. In Massachusetts, the average cost of settling a complaint filed with the Massachusetts Commission Against Discrimination was a little more than \$32,000 in 2014.³ MCAD cases are notorious for their longevity, however, with many complaints hanging over an employer's head for three or even four years before reaching a final outcome, causing significant distractions and lost productivity to the business.

Second, litigation is risky and often brings with it the possibility of catastrophic loss. One MCAD case from 2014 resulted in damages for the plaintiff/employee in excess of \$350,000 and an award of attorney fees just short of \$420,000 – on top of the employer's costs for defending the suit, almost certainly also a six-figure number.⁴ A business's potential liability in defective product cases routinely exceeds \$1 million, with one recent plaintiff's verdict in Massachusetts reaching as high as \$130 million.⁵ A botched merger and acquisition can create still greater exposure, as illustrated by Boston Scientific's agreement to settle litigation brought by Johnson & Johnson for the sum of \$600 million.⁶ Even that figure pales in comparison with the potential liability that can arise when an employee blows the whistle on unlawful business practices. Vanguard, the

largest mutual fund company in the United States, is currently grappling with numerous federal and state actions alleging that it owes a staggering \$35 billion in taxes, interest, and penalties.⁷

Third, litigation is unpredictable and the outcome is always uncertain. In order to adapt to future market conditions and continue meeting customer demands, businesses must plan carefully. Litigation can be extremely disruptive to a five- or ten-year plan, however, leaving serious doubts about the company's financial health and even its survival as a going concern. "Bet the company" litigation is common, and not every company will come out on the winning side.

Fourth, litigation can generate bad publicity. Many documents filed in connection with lawsuits become a matter of public record, and news outlets routinely scour court dockets in search of scandalous stories. Even a company that has strong arguments on the merits may find its reputation destroyed in the "court of public opinion." For businesses whose value is largely a function of intangible assets such as brand equity, name recognition, and customer goodwill, getting tangled up in a high-profile lawsuit can create a "no win" situation.

For those reasons, among others, the most prudent business strategy is to avoid litigation whenever possible and to minimize the costs and risks whenever it is not. The following tips can help a business reduce its exposure to potential claims.

1. HAVE A LAWYER REVIEW YOUR CONTRACTS.

This may seem obvious, but as seasoned litigators will attest, it is not unusual for businesses to operate on the basis of self-drafted or form contracts that they signed without involving corporate counsel. Do-it-yourself contracts tend to create more problems than they solve by inaccurately identifying the parties, relying on vague and undefined terms, neglecting to capture important aspects of the agreement between the parties, and failing to provide remedies in the event of a failure to perform. Obtaining legal advice in connection with drafting a contract will help minimize disputes down the road.

¹ http://www.altmanweil.com/dir_docs/resource/e377d935-7263-4031-b25d-57dbc4d9d16d_document.pdf.

² <http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf>.

³ <http://www.mass.gov/mcad/docs/annual-reports/2014-annual-report.pdf>.

⁴ *MCAD and Lulu Sun v. University of Massachusetts, Dartmouth*, 36 MDLR 85 (2014).

⁵ *Reckis v. Johnson & Johnson*, 471 Mass. 272 (2015).

⁶ <http://www.bizjournals.com/boston/blog/bioflash/2015/02/boston-scientific-settles-7-2b-lawsuit-by-johnson.html>. Although one might think that litigation at least paid off for the plaintiff in this case, consider that Johnson & Johnson is the same company that was hit with the \$130 million judgment.

⁷ <http://www.newsweek.com/vanguard-whistleblower-tax-dodge-complaint-400901>.

2. UTILIZE ALTERNATIVE DISPUTE RESOLUTION.

Litigating claims in court, where an adverse party can avail itself of robust discovery techniques, abundant opportunities for motion practice, and ultimately appeal rights, is typically the most expensive and slowest method of resolving a dispute. It is also the most public way for that dispute to play out. To mitigate those risks, businesses should seek legal advice on the best way to incorporate alternative dispute resolution into their contracts. Contract clauses requiring the parties to mediate their claims before seeking relief in court – and limiting the remedies available to them if they do end up in litigation – can provide both the means and the motivation to reach out-of-court settlements that are swift, cost-effective, and private. Likewise, binding arbitration clauses can expedite a final outcome by limiting discovery and appeal rights.

3. BE PROACTIVE BY TRAINING YOUR STAFF.

Two of the most common sources of litigation against employers are discrimination/harassment claims and wage-and-hour actions that allege the employee was not paid minimum wage or worked unpaid overtime. Employment-based claims are particularly hazardous for employers because the applicable statutes make certain corporate officers personally liable and allow aggrieved employees to recover multiple damages and attorney fees. Many businesses attempt to avoid such claims by setting clear written policies regarding appropriate workplace conduct and timekeeping practices. That makes good sense, but having policies is not enough; the employees tasked with carrying out those policies must be trained in the best practices for doing so. Businesses should make a habit of training their staff on an annual basis to ensure that their conduct policies and compensation models are compliant with the current state of the law and are implemented consistently. Investing company resources in training programs will help protect against potentially ruinous employment claims. An ounce of prevention truly is worth a pound of cure.

4. DO YOUR HOMEWORK.

It was recently reported that the Boston Red Sox quietly ended their pursuit of a Cincinnati Reds pitcher after their background research revealed his involvement in a violent domestic dispute. The Los Angeles Dodgers, by contrast, reached an agreement in principle to trade for the pitcher before news of the alleged episode broke, sending the organization scrambling to unwind the deal and control the damage. Contrary to what common sense would suggest, businesses often proceed with care and caution where the stakes are comparatively low, while rushing headlong into decisions that involve significant company resources. Whether your business is considering a joint venture, structuring an incentive plan for key employees, or preparing to launch a new product, it is vitally important to carry out due diligence that is commensurate with the risk. There are always traps lurking for the unwary business that leaps before it looks. Before embarking on a bold new course of action, engage legal counsel to evaluate the potential pitfalls and craft a strategy for navigating them successfully.

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