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Criminal Law in the Workplace

JACINTA EPTING

Neal & Leroy, LLC
Chicago

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I. [8.1] INTRODUCTION

This chapter examines criminal law and its specific application to the employment environment, particularly with respect to the termination of the employment relationship and potential lingering criminal liability. Section 8.2 below discusses the common types of employment relationships and their bearing on issues of criminal responsibility. Section 8.3 below discusses retaliation against employees reporting crime. Section 8.4 below addresses an employer's liability under the theory of "respondeat superior." Next, §8.5 below examines corporate liability for criminal acts, including the criminal responsibility of individual corporate officers, directors, and employees, and §§8.6 – 8.9 below discuss defenses to such liability. Section 8.10 below examines criminal liability that may attach to other business forms. Section 8.11 below examines the unique considerations of alleged criminal liability of government employees. Finally, §8.12 below includes a brief examination of whether state criminal law is preempted by federal law that has for its purpose the promotion of safety in the workplace.

II. [8.2] THE EMPLOYMENT RELATIONSHIP GENERALLY

On occasion, an employee will commit, or be suspected of having committed, a crime in the work environment or outside the work site. Whether the offending or suspected employee can be terminated and/or disciplined and the manner in which such termination or discipline is carried out depend on the type of employment relationship. An employment relationship "without a fixed duration is terminable at will by either party." *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 317, 106 Ill.Dec. 8 (1987). Employment relationships are presumed to be "at will." 505 N.E.2d at 317 – 318. "In Illinois, under the employment-at-will doctrine, employers may discharge, transfer or discipline employees for any reason or for no reason at all, as long as they do not violate clearly mandated public policy." *Vickers v. Abbott Laboratories*, 308 Ill.App.3d 393, 719 N.E.2d 1101, 1113, 241 Ill.Dec. 698 (1st Dist. 1999). Such policies include prohibited discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e, *et seq.*, prohibited conduct under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.*, and prohibited retaliatory discharge as discussed in Chapter 4 of this handbook.

It is important to note that antidiscrimination statutes will not protect employees who engage in criminal acts. Often, an employee who has committed a crime will allege that he or she was terminated based on racial discrimination by the employer. In *Franklin v. City of Evanston*, 384 F.3d 838 (7th Cir. 2004), the plaintiff was terminated by the City of Evanston following his arrest for possession of marijuana. The plaintiff, an African-American, alleged that his former employer discriminated against him because a similarly situated Caucasian employee was not discharged following his arrest for driving under the influence. The court found that the plaintiff and employee were not similarly situated because they had different supervisors, who utilized different disciplinary procedures. Additionally, the City of Evanston had previously decided not to discharge three African-American employees who had been arrested for driving under the influence. This "indicate[d] that, rightly or wrongly, the City simply treats DUI less harshly than the possession of marijuana." 384 F.3d at 847. Similarly, in *Jones v. City of Joliet*, No. 07 C 2691, 2010 WL 747695 (N.D.Ill. 2010), the court held that the plaintiff, an African-American firefighter who was terminated for committing retail theft from Walmart, failed to show that his employer showed preferential treatment to a Caucasian firefighter accused of a crime. Specifically, the charges against the Caucasian firefighter were dropped, but the plaintiff was convicted of a crime, which suggested that the community could not trust him.

In *Dauen v. Board of Fire & Police Commissioners of City of Sterling*, 275 Ill.App.3d 487, 656 N.E.2d 427, 212 Ill.Dec. 104 (3d Dist. 1995), a firefighter was terminated for the possession and use of cocaine after police searched his residence and found cocaine residue. At his hearing before the fire and police commissioners' board and in the circuit court, the firefighter argued that his termination violated the ADA. Specifically, the firefighter argued that he was protected under the ADA because immediately prior to the search he ended his drug use and sought counseling. The appellate court affirmed the trial court's decision and found that the "ADA does not prohibit an employer from discharging an employee who commits a crime or otherwise engages in improper conduct when the improper conduct, rather than the alleged addiction, is the reason for discharge." 656 N.E.2d at 431. See also *Phelan v. City of Chicago*, 226 F.Supp.2d 914 (N.D.Ill. 2002) (Caucasian employee failed to establish race discrimination when he was terminated following indictment for mail fraud and African-American employee was placed on administrative leave pending outcome of criminal indictment). For a detailed discussion of prohibited discrimination under Title VII and the ADA, see Chapter 2 of this handbook. For a detailed discussion of the tort of retaliatory discharge in Illinois, see Chapter 4.

Many employees, however, are not merely employed at will but are employees working under an employment contract. These include employees who are parties to an individual contract of employment, union members benefiting from a collective bargaining agreement, and less frequently those whose employment handbook or other policy statement create enforceable contract rights. *Duldulao, supra*, 505 N.E.2d at 318. In these situations, employers may be limited in their ability to discharge employees for the commission or suspected commission of criminal acts and may be required to provide the employee with a hearing and/or progressively discipline the employee.

When there is a contractual exception to the employment-at-will doctrine, the employees may argue that discharge is improper when there is an acquittal in the criminal proceeding. In *Magett v. Cook County Sheriff's Merit Board*, 282 Ill.App.3d 282, 669 N.E.2d 616, 218 Ill.Dec. 473 (1st Dist. 1996), the plaintiff was employed as a Cook County Corrections Officer and was charged with mob action. The employee was acquitted in the criminal proceeding. After the employee's acquittal, the employer commenced administrative proceedings, and the sheriff's merit board terminated the employee. The circuit court reversed the board's decision, but the appellate court determined that the board's decision was not against the manifest weight of the evidence. The plaintiff's acquittal in the criminal charge of mob action did not preclude the board from terminating the employee. Specifically, the administrative proceeding had a lower burden of proof, and the employee was not charged with mob action in the administrative proceeding. 669 N.E.2d at 620. For a detailed discussion of contractual exceptions to the employment-at-will doctrine, see Chapter 3 of this handbook.

Whether the employment relationship is at will or governed by the provisions of a contract, it behooves an employer not to take the occurrence or suspected occurrence of a crime by an employee lightly. Crime in the workplace can endanger the assets of the employer and co-employees and can also endanger the physical or emotional safety of co-employees and others in the workplace. For a detailed discussion of issues related to preemployment and employment-related investigation and testing of employees, see Chapter 12 of this handbook. Additionally, civil liability can, in some instances, attach for the negligent hiring or retention of a known criminal as an employee.

III. [8.3] RETALIATION AGAINST EMPLOYEE REPORTING CRIME

A corporation's concerns are not limited to an employee who has committed a crime. A corporation faces potential liability if it terminates an employee who reports a crime. It is common for employees to allege that their employers terminated them in retaliation for reporting a crime. In *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 880, 52 Ill.Dec. 13 (1981), the Illinois Supreme Court held that state law protects employees whose reports of criminal activity are supported by probable cause. In *Lang v. Northwestern University*, 472 F.3d 493 (7th Cir. 2006), the employee contacted the FBI alleging that her employer lied to the Federal Reserve Board in order to obtain a favorable bond rating and better terms for a loan. The employee's story, unbeknownst to her, was based on office gossip. The employee lost her job and filed a lawsuit in court alleging that her employer retaliated against her for speaking to the FBI. The court dismissed the employee's state-law claim of retaliatory discharge because Illinois law protects employees whose reports of criminal activity are supported by probable cause. Although an employee's report of criminal activity must be supported by probable cause, the fact that the employer's conduct may not be criminal is not determinative. See *Bourbon v. Kmart Corp.*, 223 F.3d 469 (7th Cir. 2000) (fact that employee may be mistaken in whether conduct was criminal is irrelevant under Illinois law).

IV. [8.4] EMPLOYER'S LIABILITY UNDER THEORY OF RESPONDEAT SUPERIOR

Employers face a potential for huge liability if an employee commits a criminal act. Under the theory of respondeat superior, an employer may be liable for the criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer. *Deloney v. Board of Education of Thornton Township, School District No. 205, Cook County, Illinois*, 281 Ill.App.3d 775, 666 N.E.2d 792, 798, 217 Ill.Dec. 123 (1996). As such, in most instances an employer is not liable for an employee's criminal acts because the employee's acts are not committed in the course of employment and are not committed in furtherance of the business of the employer. See *Stern v. Ritz Carlton Chicago*, 299 Ill.App.3d 674, 702 N.E.2d 194, 196, 234 Ill.Dec. 28 (1st Dist. 1998) (employer not liable under theory of respondeat superior for employee masseurs who allegedly sexually assaulted hotel guests); *Giraldi v. Lamson*, 205 Ill.App.3d 1025, 563 N.E.2d 956, 150 Ill.Dec. 829 (1st Dist. 1990) (school district and bus company not liable for bus driver who sexually assaulted student being transported to school); *Williams v. Hall*, 288 Ill.App.3d 917, 681 N.E.2d 1037, 224 Ill.Dec. 416 (1st Dist. 1997) (pizza employee acted outside of scope of employment when he drove his car to apprehend thieves who stole pizza boxes and therefore employer was not liable in wrongful death action). But see *Southport Little League v. Vaughan*, 734 N.E.2d 261 (Ind.App.Ct. 2000) (youth baseball league liable under theory of respondeat superior for employee who sexually assaulted minors).

Although an employer may be liable for an employee's criminal acts under the theory of respondeat superior, it has no affirmative duty to protect a customer from criminal acts. In *Strickland v. Communications & Cable of Chicago, Inc.*, 304 Ill.App.3d 679, 710 N.E.2d 55, 237 Ill.Dec. 632 (1st Dist. 1999), a customer alleged that she was sexually assaulted in her home by an employee of a cable company and sued the cable company for negligent hiring. The court stated that in certain instances, there is an "affirmative duty to protect a potential victim from the criminal acts of others . . . if the criminal act is reasonably foreseeable and the victim and defendant have one of the four

special relationships listed in section 314A of the Restatement (Second) of Torts (1977) (Restatement): (1) common carrier-passenger; (2) innkeeper-guest; (3) business inviter-invitee; and (4) voluntary custodian-protectee.” 710 N.E.2d at 59. The court stated that the general rule in Illinois is that a defendant employer does not have a duty to control the conduct of an employee to prevent harm to a third party. The court stated: “Absent direction from our supreme court or legislature, we decline to expand the affirmative duty of employers to protect customers from the criminal acts of employees beyond the scope of 314A of the Restatement or what the legislature has required by statute.” *Id.* Similarly, in *Graham v. McGrath*, 363 F.Supp.2d 1030 (S.D.Ill. 2005), the court held that a special limited relationship in §314A of the RESTATEMENT (SECOND) OF TORTS was not present and dismissed a lawsuit against the Catholic Archdiocese and its archbishop that it was independently liable in its negligent supervision of a priest who sexually assaulted a former parishioner.

V. [8.5] CRIMINAL LIABILITY OF CORPORATIONS

Any business may incorporate in Illinois under the Business Corporation Act of 1983, 805 ILCS 5/1.01, *et seq.*; the Medical Corporation Act, 805 ILCS 15/1, *et seq.*; the Professional Service Corporation Act, 805 ILCS 10/1, *et seq.*; or the General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.* Once the Secretary of State issues the certificate of incorporation, the corporate existence begins. It is the birth, so to speak, of a legal entity with many of the same powers possessed by an individual. Like an individual, a corporation can be held responsible for its criminal acts, and an individual may be responsible for the criminal acts of a corporation.

However, criminal prosecution of a corporation is statutorily limited. Section 5-4 of the Criminal Code of 1961 (Criminal Code), 720 ILCS 5/1-1, *et seq.*, describes the terms under which a corporation may be prosecuted, and §5-5 describes the conditions under which an individual may be accountable for the criminal acts of a corporation.

Section 5-4(a) provides:

A corporation may be prosecuted for the commission of an offense if, but only if:

(1) The offense is a misdemeanor, or is defined by Sections 11-20, 11-20.1 or 24-1 of this Code, or Section 44 of the “Environmental Protection Act,” [415 ILCS 5/1 *et seq.*] or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his or her office or employment and in behalf of the corporation, except that any limitation in the defining statute, concerning the corporation’s accountability for certain agents or under certain circumstances, is applicable; or

(2) The commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his or her employment in behalf of the corporation. 720 ILCS 5/5-4(a).

In substance, a corporation may be prosecuted only if the offense is a misdemeanor or is defined by §§11-20, 11-20.1, or 24-1 of the Criminal Code, §44 of the Environmental Protection Act, or

another statute that clearly indicates legislative intent to impose liability and the proscribed conduct is performed by an agent of the corporation while acting within the scope of employment and on behalf of the corporation. Further, a corporation may be prosecuted for any offense described in the Criminal Code or other applicable statute when the offense is committed by the board of directors or a high-ranking agent while acting within the scope of employment on behalf of the corporation.

In *McCaleb v. Pizza Hut of America, Inc.*, 28 F.Supp.2d 1043 (N.D.Ill. 1998), the court held that there was a legislative intent to impose liability on a corporation under the Illinois Hate Crimes Act, 720 ILCS 5/12-7.1(c). In that case, the African-American plaintiffs stated causes of action under 42 U.S.C. §1981 and the hate crime statute. The defendant argued that it was not liable under the hate crime statute because that statute applied only to a “person.”

Specifically, the court held:

The Illinois General Assembly has promulgated rules of statutory construction, see 5 ILCS 70, that are to be applied “unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute.” 5 ILCS 70/1. One of the rules provides: “ ‘Person’ or ‘persons’ as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals.” 5 ILCS 70/1.05. When the word “person” is used in a statute, it is construed as applying to corporations and bodies politic as well unless the context, language, or legislative history indicates otherwise. 28 F.Supp.2d at 1049.

When an individual performs a criminal act on behalf of a corporation, that person is legally accountable as though the conduct was in his or her own name or behalf. The individual is subject to the full penalties provided by law for the offense, even if lesser penalties may be authorized for the corporation.

However, for an individual to be guilty of such a crime, he or she must act in a manner that would lead to his or her guilt if acting on his or her own behalf and not for the corporation. *See, e.g., People v. Runner*, 266 Ill.App.3d 441, 640 N.E.2d 651, 203 Ill.Dec. 731 (4th Dist. 1994) (conviction reversed when defendant’s conduct in violation of former Illinois Purchasing Act not criminal if performed by one not subject to Act acting on his or her own).

Section 5-5 of the Criminal Code provides:

(a) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.

(b) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation. 720 ILCS 5/5-5.

However, there are some situations in which an individual officer or director will not be held accountable for the criminal act of a corporation. Illustrative is *People v. Bohne*, 312 Ill.App.3d 705, 728 N.E.2d 509, 245 Ill.Dec. 427 (1st Dist. 2000), in which the state charged both the offending corporation and its president with failure to file a use tax return arising out of the corporation's purchase of machinery (a Class 3 felony under 35 ILCS 105/10). The state sought to hold the corporate president liable under general theories of criminal accountability. The appellate court affirmed the trial court's dismissal of the indictment against the corporate officer, holding that the officer's failure to file when the offense was "so defined that [the officer's] conduct was inevitably incident to" commission of the offense. 728 N.E.2d at 510, quoting 720 ILCS 5/5-2(c)(2).

In the imposition of corporate liability for offenses characterized as "regulatory crimes," the intent of the legislature, in part, is to provide an inducement for high managerial officers to supervise the behavior of employees in order to avoid criminal conduct. The corporation may be held liable for the acts of its employees, and the employees are individually accountable for their own acts. The criminal conduct of a corporation, however, cannot be imputed to the individual in the absence of criminal activity on his or her part.

The liability of a corporation for more serious offenses as covered in §5-4(a)(2) of the Criminal Code is restricted to conduct by the board of directors or a high managerial agent. The impact of this restriction is to prevent criminal prosecution of a corporation unless someone in the control group participated in or performed the criminal conduct. In *People v. Universal Public Transportation Inc.*, 401 Ill.App.3d 179, 928 N.E.2d 85, 340 Ill.Dec. 366 (1st Dist. 2010), a corporation and its directors were charged with vendor fraud, theft, and money laundering. The appellate court held that the trial court correctly determined that the defendants of the corporation were de facto officers and that the defendants acted as "high managerial agents" within the scope of their employment of the corporation. Accordingly, the evidence was sufficient to convict the corporation of vendor fraud and theft because it would only act through its agents.

These restrictions do not in any way relieve the individual from criminal liability for his or her own acts. Direction of the criminal prosecution to the individual will generally be more effective in the enforcement of regulatory statutes. The difficulty is the identification of the purportedly guilty party. Nevertheless, the possibility of prosecution acts as a deterrent to criminal conduct by an individual. In those instances in which identification cannot be made, the recourse is against the corporation, and the only sanction is a fine in the amount specified in the statute defining the offense. 730 ILCS 5/5-9-1.

The effect of §5-4 on a civil action is demonstrated in *Morris v. Ameritech Illinois*, 337 Ill.App.3d 40, 785 N.E.2d 62, 271 Ill.Dec. 411 (1st Dist. 2003), in which an employee sued his employer, asserting claims for eavesdropping and invasion of privacy, arising out of the employer's investigating the employee's failure to work during work hours. The eavesdropping of which Morris complained is codified as a crime in Article 14 of the Criminal Code. In discussing the issue, the court, after quoting §5-4(a), stated:

[A] corporation can commit a misdemeanor through the acts of its agents, but it can commit a felony only through the acts of high managerial agents. Eavesdropping is a felony. . . . Therefore, Ameritech can be criminally liable for eavesdropping only through the acts of high managerial agents.

A high managerial agent is “an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.” . . . Barrett, who is not an officer of Ameritech, had no supervisory authority over any other Ameritech employee. Morris presented no evidence that Barrett formulated corporate policy. Thus, the evidence presented demands the conclusion that Barrett is not a high managerial agent of Ameritech. [Citations omitted.] 785 N.E.2d at 66.

Because the employee presented no competent evidence that Ameritech’s high managerial agents authorized the eavesdropping and because there was insufficient knowledge of the acts of an agent under the eavesdropping statute, summary judgment in favor of Ameritech was affirmed. 785 N.E.2d at 66 – 68.

The courts have occasionally invoked §5-4 when other statutes more properly govern the matter of a defendant’s liability for a crime. For instance, in *People v. Ward*, 302 Ill.App.3d 550, 707 N.E.2d 130, 236 Ill.Dec. 285 (1st Dist. 1998), the court cited §5-4 in support of its analysis of the sufficiency of the evidence to support a murder conviction. However, the facts of the case reveal that the defendant was a member of a street gang, not an agent, officer, or director of a corporation. 707 N.E.2d at 132. Moreover, the court’s discussion of the defendant’s guilt fits the elements of guilt under an accountability theory under §5-2 of the Criminal Code. 707 N.E.2d at 139.

It is not necessary that an indictment against a corporation set forth the basis of a corporation’s criminal responsibility in the indictment or information. In *People v. East-West University, Inc.*, 163 Ill.App.3d 44, 516 N.E.2d 482, 114 Ill.Dec. 327 (1st Dist. 1987), East-West University and three of its employees were charged in seven separate indictments with conspiracy to commit theft, theft, and forgery. “The forgery counts alleged that defendants, with the intent to defraud, knowingly made documents apparently capable of defrauding another in such manner that they purported to have been made with different provisions.” 516 N.E.2d at 483. The documents were generally described as “Basic Educational Opportunity Grants” and “documentation required to receive Illinois Board of Higher Education Grant funds.” *Id.* East-West University alleged that the indictment failed to properly charge the commission of a felony. More specifically, East-West argued that under §5-4(a)(2), the indictment was insufficient to charge it with a felony because it did not allege that the criminal acts were “authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.” 516 N.E.2d at 485. The court held that the “basis of a corporation’s criminal liability is a matter of evidence to be proved at trial and not an element of the offense which must be set forth in the charging instrument.” *Id.*

The process by which a corporation is charged with a criminal offense is the same that is used to charge an individual with a criminal offense. A misdemeanor is charged by filing a complaint (725 ILCS 5/111-2), a felony must be charged by an information, which is filed by the prosecutorial authority after a finding of probable cause at a preliminary hearing (725 ILCS 5/109-3), or an indictment may be returned by a grand jury (725 ILCS 5/112-1 through 5/112-7).

Both an individual and a corporation are entitled to counsel at the grand jury proceeding. Counsel’s role is limited to advising the client of rights. 725 ILCS 5/112-4.1. If an individual is the target of a grand jury investigation, that person may invoke the Fifth Amendment right against self-

incrimination; however, a corporation may not do so. Therefore, it is important to determine in which capacity the individual has been subpoenaed before the grand jury — target or agent of the corporation.

When a corporation is charged with a criminal offense, the requisite “mental state” is imputed to the corporation from its agents, managers, officers, or board of directors. The corporation has no mental state of its own; therefore, none can be imputed to the individual from the corporation. In order to prosecute a corporation successfully, one or more of the requisite mental states must be proved. The only exception to this occurs when the offense involves absolute liability. 720 ILCS 5/4-3. The four mental states recognized in Illinois are intent, knowledge, recklessness, and negligence. 720 ILCS 5/4-4 through 5/4-7.

The criminal offenses with which the corporation or individual may be charged are set out in the Criminal Code. The most commonly charged offenses are for death or great bodily harm, as well as property damage, public nuisance, and financial crimes. Additionally, criminal charges may be brought under any other state or federal statute enacted for the regulation of industry, the protection of the health and safety of the individual employee and the public, the protection of the environment, or any other purpose relating to the public, public lands, or commerce. The Illinois Compiled Statutes and the United States Code should be consulted for the specific offense that is charged. For example, in *People v. O’Neil*, 194 Ill.App.3d 79, 550 N.E.2d 1090, 141 Ill.Dec. 44 (1st Dist. 1990), numerous individual defendants and corporations were all charged with first-degree murder arising out of the death of an employee caused by cyanide poisoning. The court found several defendants guilty of first-degree murder and reckless conduct and two of the corporations guilty of involuntary manslaughter. 550 N.E.2d at 1091 – 1092. Analyzing §5-4 of the Criminal Code and the mental states required by the crimes involved, the appellate court ordered a new trial because the individuals’ murder convictions were legally inconsistent with their reckless conduct convictions, and the murder convictions were legally inconsistent with the corporate defendants’ convictions for involuntary manslaughter. 550 N.E.2d at 1101.

A broad range of regulatory statutes touch on most human endeavors and provide for criminal prosecution and sanctions, such as the Environmental Protection Act, 415 ILCS 5/1, *et seq.*; the Illinois Banking Act, 205 ILCS 5/1, *et seq.*; the Nursing Home Care Act, 210 ILCS 45/1-101, *et seq.*; and the Illinois Insurance Code, 215 ILCS 5/1, *et seq.* The application of the statutes will reach the large corporation as well as the small “mom and pop” corporation. The provisions and penalties are applied equally whether the corporation has a multibillion-dollar net worth or a net worth of two thousand dollars. The fines may differ, but the potential for incarceration remains the same.

It is important to advise the principals of corporations as to what specific statutes govern the type of business being operated. Corporate policy should be developed in accordance with the industry standards and the regulatory statutes. Such advice will assist the corporate client in avoiding criminal prosecution.

VI. [8.6] DEFENSES TO CRIMINAL LIABILITY

Every defense to a criminal offense set out in the Criminal Code (720 ILCS 5/6-1 (infancy), 5/6-2 (insanity), 5/7-1 (self-defense), 5/7-2 (defense of dwelling), 5/7-3 (defense of property), 5/7-11

(compulsion), 5/7-12 (entrapment), 5/7-13 (necessity)) and by common law may be asserted. Such defenses are affirmative in nature and must be disclosed to the prosecuting authority during the discovery process. Corporate clients must be advised of every aspect of the criminal process and about any defenses that may be available to them.

In addition to the defenses contained in the Criminal Code, certain exceptions, exemptions, or defenses may exist in the regulatory or other statutes under which the offense is charged. The corporation or individual may assert these defenses; it must be determined whether the defenses are affirmative in nature — that is, whether they must be disclosed to the state.

A. [8.7] Due Diligence

The section of the Criminal Code governing corporate responsibility for criminal conduct contains the defense of due diligence. 720 ILC 5/5-4(b). It should be noted that the burden of establishing due diligence is on the corporation.

Section 5-4(b) provides:

A corporation’s proof, by a preponderance of the evidence, that the high managerial agent having supervisory responsibility over the conduct which is the subject matter of the offense exercised due diligence to prevent the commission of the offense, is a defense to a prosecution for any offense . . . for which absolute liability is imposed. This Subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this Subsection.

A high managerial agent may expose the corporation to criminal liability and, conversely, may negate the criminal intent if it is established that due diligence was exercised to prevent the offense.

Due diligence must reflect the corporate policy, not just that of the individual. When there are state or federal guidelines, they should be incorporated into company policy. The company policy should reflect an overall concern relating to the adoption and implementation of policies and provide appropriate measures to enforce these policies with the imposition of penalties for violation by employees when warranted.

Due diligence, as defined by BLACK’S LAW DICTIONARY, p. 488 (8th ed. 2004), as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” Due diligence is not measured by an absolute standard but depends on the relative facts of the case. The “reasonable person standard” is used on a case-by-case basis, and the subjective intent of the individual is probative to the issue of due diligence only when that intent is manifested in observable and articulable action. The objective standard is applied to the facts to infer the presence or absence of due diligence. Due diligence begins with the adoption of appropriately conscientious corporate policy, continues with the implementation and enforcement of such policy, and ends with the proper training and supervision of employees to ensure that such policies are followed by employees at all levels.

In *State v. Steenberg Homes, Inc.*, 223 Wis.2d 511, 589 N.W.2d 668 (1998), the court found that the corporation could be charged with and convicted of homicide by negligent operation of a vehicle

because it failed to use due diligence. In *Steenberg*, an employee was driving a tractor-trailer truck when the trailer disconnected and killed two bicyclists. State and federal laws provided that safety chains be attached when a trailer was being pulled on a highway. Despite these regulations, the employer had no safety procedures in place to ensure that its employees used safety chains. The court found that the employer did not use due diligence to ensure that its employees properly coupled the tractor-trailers and attached safety chains, and the evidence was sufficient to convict the employer of homicide by negligent operation of a vehicle. 589 N.W.2d at 673 – 674.

B. [8.8] Foreseeability

A result that was not foreseeable by the corporation or its agents vitiates the requisite mental state for criminal liability.

If a result was not foreseeable, then intent, knowledge, recklessness, or negligence will be difficult if not impossible to establish. The totality of the facts and circumstances will be considered by the trier of fact in order to determine whether a result was foreseeable to the corporation or its agents. Again, this particular defense is determined objectively on a case-by-case basis using the reasonable person standard. *See People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980) (corporation not held criminally liable for homicide when explosion that caused death neither foreseen nor foreseeable); *Commonwealth v. Godin*, 374 Mass. 120, 371 N.E.2d 438, 443 (1977) (corporation should have been aware of “probable harmful consequences and loss of life” in storage of excessive fireworks in factory and was held criminally liable for homicide of three individuals).

C. [8.9] Established Policy

When a corporation has a clearly established policy that it rigorously enforces, the corporation may raise this policy as a defense.

If an employee violates the established policy without the knowledge of his or her superiors and the violation results in a criminal offense, then the corporation may assert these facts as a defense. Of course, the corporation must prove it had no knowledge of the specific conduct and had disciplined all such previous violations.

Although available, this defense is not generally successful. Even when acts were against corporate policy or express instructions, a corporation may be held criminally liable if such acts were for the benefit of the company. *United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985).

VII. [8.10] CRIMINAL LIABILITY OF BUSINESSES OTHER THAN CORPORATIONS

A sole proprietor, as an individual conducting business in a manner not prescribed by statute, is subject to criminal liability just as any individual is. Thus, a sole proprietor can be charged with and convicted of a crime when he or she possesses the requisite criminal intent and causes the prohibited result. The sole proprietor benefits from the protections that the United States and Illinois Constitutions afford and has access to any valid criminal defense. See *FEDERAL CRIMINAL PRACTICE* (IICLE, 2008).

The general rule that criminal guilt is personal applies to partnerships, and thus, in the absence of contrary legislation, neither a partnership nor its individual members bear criminal responsibility for the acts of another partner merely by reason of the partnership relationship. In the absence of personal participation in or knowledge of a criminal act, criminal liability will not attach to a partner. 68 C.J.S. *Partnership* §230 (2010). See also *United States v. Ansani*, 138 F.Supp. 454 (N.D.Ill. 1956). When, however, a partnership acts illegally with the knowledge of the partners, all are chargeable with criminal responsibility. 68 C.J.S. *Partnership* §230 (2010). When a partnership has engaged in criminal conduct, it is the offending partners individually who are indicted and not the firm. *People v. Stills*, 302 Ill.App. 302, 23 N.E.2d 822 (4th Dist. 1939).

It should be noted that the state's attorney is authorized to institute civil legal proceedings (including seeking an injunction that shuts down the operations of a business other than a corporation) to forfeit the charter or revoke the certificate of an offending business when the business is engaged in illegally causing other businesses to do business with the offending business. 720 ILCS 5/38-1, *et seq.*

VIII. [8.11] UNIQUE CONSIDERATIONS FOR ALLEGED CRIMINAL LIABILITY OF GOVERNMENT EMPLOYEES

Criminal acts of government employees present unique challenges for government employers. Specifically, a government employer investigating alleged criminal acts of a government employee must ensure that it protects the employee's rights against self-incrimination under the Fifth Amendment of the United States Constitution. In *Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002), the court stated that a "[government employer] has every right to investigate allegations of misconduct, including criminal misconduct by its employees, and even to force them to answer questions pertinent to the investigation, but if it does that it must give them immunity from criminal prosecution on the basis of their answers." 286 F.3d at 990 citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 53 L.Ed.2d 1, 97 S.Ct. 2132, 2136 (1977). However, the employer has no duty to advise the employee of his or her right against self-incrimination until the employee is asked specific questions. 286 F.3d at 991. As such, the employee has no right to skip an interview merely because he or she thinks the employer will ask questions that might be incriminating, because the employer may ask other questions and the employee might be advised that he or she can assert his or her rights under the Fifth Amendment without repercussions. In *Patrick v. City of Chicago*, 662 F.Supp.2d 1039 (N.D.Ill. 2009), the employee was arrested, while off-duty, for possession of crack cocaine. The employer's inspector general's office interviewed the employee to determine whether he had violated personnel rules. The court held that the employee, who failed to answer several of the inspector general's questions, failed to establish that his employer violated his Fifth Amendment rights when the employer advised the employee that any statements he made could not be used in a criminal proceeding.

As stated above, government employers must use additional safeguards to ensure that a government employee's constitutional rights are protected when investigating alleged criminal acts of the employee. However, government employees convicted of criminal acts could lose their right to receive pension benefits. In *Devoney v. Retirement Board of Policemen's Annuity & Benefit Fund for City of Chicago*, 199 Ill.2d 414, 769 N.E.2d 932, 264 Ill.Dec. 95 (2002), the Illinois Supreme Court stated that in cases concerning forfeiture of pension benefits, the question is "whether a nexus exists between the employee's criminal wrongdoing and the performance of his official duties." 769 N.E.2d at 936. In *Devoney*, the Illinois Supreme Court held that a former police officers federal mail fraud

conviction, relating to a scheme to defraud an insurance company, was a felony conviction “relating to or arising out of or in connection with his service as a policeman,” and thus his pension benefits were properly forfeited. The court held that “but for” the officers rank as lieutenant he would not have been able to participate in the scheme to defraud, and the officer had a long and unsavory relationship with another person in the scheme. 769 N.E.2d at 938 – 939. In *Katalinic v. Board of Trustees of Municipal Employees’, Officers’, and Officials’ Annuity & Benefit Fund*, 386 Ill.App.3d 922, 898 N.E.2d 243, 325 Ill.Dec. 510 (1st Dist. 2008), the plaintiff, previously employed by the City of Chicago as a deputy commissioner of street operations for the department of streets and sanitation, was convicted for mail fraud. The court held that the employee forfeited his annuity and other benefits because “but for” his position he would not have been able to commit mail fraud. However, in *Romano v. Municipal Employees Annuity & Benefit Fund of Chicago*, 384 Ill.App.3d 501, 894 N.E.2d 151, 323 Ill.Dec. 592 (1st Dist. 2008), the court reversed the trial court’s holding that an employee who pled guilty to federal mail fraud forfeited his annuity benefits because there was no evidence that “but for” the employee’s employment he would not have been selected to participate in a mail fraud scheme.

In other instances, courts have found that the “but for” test is merely one acceptable method, but not the only method of establishing a nexus between the crime and public employment required for forfeiture under the pension statutes. In *Bloom v. Municipal Employees’ Annuity & Benefit Fund of Chicago*, 339 Ill.App.3d 807, 791 N.E.2d 1254, 274 Ill.Dec. 843 (1st Dist. 2003), a former City of Chicago alderman entered a guilty plea of filing a false federal tax return. The former alderman applied for annuity payments from the pension fund. The pension board denied his request based on §8-251 of the Illinois Pension Code (40 ILCS 5/8-251) which provides that benefits shall not be paid to any person convicted of any felony relating to or arising out of or in connection with his service as a municipal employee. The circuit court and appellate court affirmed the pension board’s decision and found that there was a sufficient nexus or a clear and specific connection between the felony committed by the former alderman and his employment to justify the forfeiture of pension benefits.

The conviction of a government employee could result in forfeiture of all retirement benefits, including those earned in employment positions that were unrelated to the conviction. In *Ryan v. Board of Trustees of General Assembly Retirement System*, 236 Ill.2d 315, 924 N.E.2d 970, 338 Ill.Dec. 444 (2010), former Governor Ryan, who had been convicted on felony charges for conduct that arose in connection with his service as Secretary of State and Governor, argued that benefits he earned in his previous positions, including as a representative of the General Assembly and Lieutenant Governor, were not subject to forfeiture. The Illinois Supreme Court disagreed, and held that under the plain language of the applicable statutory provision, 40 ILCS 5/2-156, no benefits shall be provided under the General Assembly Retirement System to any person convicted of a felony relating to or arising out of or in connection with his or her service as a member.

IX. [8.12] PREEMPTION BY FEDERAL LAW

Occasionally, a corporation or its officers have argued that the federal Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, which has the purpose of promoting and ensuring workplace safety and provides for sanctions in the event its standards are violated, preempts state criminal law. In *People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 534 N.E.2d 962, 128 Ill.Dec. 517 (1989), the criminal indictment charged both a corporation and corporate officials with

aggravated battery and reckless conduct arising out of the exposure of workers to poisonous gas, among other substances, during the manufacturing process. The Illinois Supreme Court held that the Act does not preempt state criminal prosecution of companies and their officers or executives who kill or injure employees when a state does not have its own specific occupational health and safety plan.

X. [8.13] CONCLUSION

All business entities have an impact on commerce and the individual, both public and private. Criminal laws are enacted to protect citizens from harm and to ensure the flow of commerce. The corporation, partnership, or sole proprietorship has many of the same powers, duties, and responsibilities as the individual in society, and the best defense to criminal prosecution is to avoid it entirely. A properly managed business can accomplish this with comprehensive policy measures, appropriate supervision and regulation of employees, implementation and enforcement of its policies, disciplinary procedures for violations of policies, and thorough investigation and remediation of any violations to prevent infractions in the future. The prevention, detection, remediation, and defense of prosecution of crime in the workplace are vitally important aspects of the operation of any business.

