

A Guide to Employer Liability in Maryland:

Principles of Agency and Negligent Hiring

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The Homeless Persons Representation Project and the Job Opportunities Task Force prepared this guide to aid in eliminating employment barriers for ex-offenders. This document does not constitute legal advice to employers and is for informational purposes only.

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Employers want and need competent, reliable workers. They also want to make careful staffing decisions to avoid hiring someone who may put the company at risk of a lawsuit.

Employers may be liable for an employee's wrongful acts committed within the scope of employment. Employers may also be liable for an employee's wrongful acts committed outside the scope of employment, *if* the employer was negligent in hiring or retaining that employee.

While it is relatively rare for an employer to be sued successfully for negligent hiring in Maryland, liability issues are a reality that employers should understand and know how to manage. This guide seeks to realistically discuss the fact and fiction of negligent hiring and other theories of employer liability, to give employers a better understanding of the application of these legal principles, and to suggest some measures that employers can take to hire good workers *and* to minimize risk.

When Is an Employer Liable for an Employee's Behavior?

While determination of liability is a complex legal question, employers should be aware of potential liability in two specific areas:

1. *Respondeat Superior: Employee Actions On the Job*
An employer may be held liable for an employee's conduct when he is acting within the scope of his employment.
2. *Negligence in Hiring and Retention*
Even if an employee's conduct is outside the scope of employment, the employer may still be liable if the employer had knowledge, or should have had knowledge, that an employee was dangerous and might cause harm to others.

Awareness of these two areas of liability should help employers make sound hiring and staffing decisions.

Ways to Reduce Your Liability Risks

The last section of the guide details strategies for reducing liability risks. Some common sense strategies include:

- ✓ Checking an applicant's references.
- ✓ Verifying past employment.
- ✓ Having clear, written policies, ideally in the form of an employee manual, outlining prohibited actions while on the job.
- ✓ Understanding how to evaluate a criminal record on a case-by-case basis.

Liability for Employee Actions on the Job

Employers should be aware of potential liability for the actions of current employees, even where the employer used adequate care in hiring. The doctrine of *respondeat superior* refers to employer liability for an employee's work-related actions. Understanding the doctrine can help employers determine appropriate means for avoiding liability.¹

There are several common misperceptions about an employer's responsibility under *respondeat superior*. Despite these misperceptions, the following points are true:

1. Employers are not responsible for every act of an employee.
2. Employers are responsible under *respondeat superior* only if the employee is acting within the scope of his employment.

Determining the scope of employment is essential to determining liability under *respondeat superior*.

Establishing Employer Liability: The Basic Principles

To succeed in a lawsuit against an employer for an employee's actions on the job, an injured party must prove:

1. There was an employer/employee relationship, in which the employer had control over the employee's actions.²
2. The employee was acting within the scope of employment when he committed the wrongful act.³

In general, courts will consider only the nature of the employee's act, not the *character* of the employee, in determining whether the employer is liable.

Element One: Establishing the Employer/Employee Relationship

An employer is liable for the acts of an employee only if an employer/employee relationship existed at the time of the act. Merely hiring a worker does not establish such a relationship. The employer must have the right to exercise sufficient control over the worker's actions. The following factors are helpful in determining whether an employer/employee relationship existed:

- Whether an employee is on the regular payroll of the employer (not a contracted independent laborer).
- Whether the employer had control over the worker's daily schedule.

¹ This section discusses employer liability for criminal acts of the employee not involving discriminatory behavior. Situations involving discriminatory behavior are covered under various state and federal statutes and involve different theories of liability than those discussed here.

² *Globe Indemnity Co. v. Victell Corp.*, 208 Md. 573, 119 A.2d 423 (1956).

³ *Id.*

- Whether the employer had control over the details of the work, such as how the employee accomplished assigned tasks.
- The length of employment.
- Whether the work was a part of the employer's regular business.
- Whether the employer supplied the tools needed to complete the work.
- Whether the employer retained the right to terminate the employment.

Element Two: Establishing Whether the Act was within the Scope of Employment

The second element is whether the employee was acting within the scope of his employment or under the express or implied authorization of the employer. An act may fall within the scope of employment if:

- The conduct is of the kind included in the employee's ordinary employment duties. This may include acts that are incidental to the employment objectives.
- The employee committed the act to further the employer's business/benefit.
 - In most cases, intentional misconduct, including both criminal and non-criminal misconduct, will not be deemed to be within the scope of employment, since it is generally not for the benefit of the employer. However, if the employee is acting to further the employer's business/benefit, then the misconduct is within the scope of employment and the employer is liable.
 - There is a presumption that serious criminal misconduct is not within the scope of employment.
- The employer ratified the act.

Liability for Negligent Hiring and Retention

Under the Negligent Hiring and Retention Doctrine, employers must use care in selecting and retaining employees, and face civil liabilities if the lack of such care causes injury to a third party. Understanding the doctrine can help employers determine appropriate means for avoiding liability.

This section seeks to clarify a number of misconceptions about negligent hiring and retention. First, this doctrine can apply to any worker— whether he has a criminal background or not. Second, even if an employee has a criminal record and commits a crime or harms someone on the job, the employer is not automatically liable. An employer may be liable for negligent hiring or retention *only if* the item on the criminal record is germane to the job. **Courts generally will not base any finding of liability on the mere existence of a criminal record.**

Establishing Negligence in Hiring and Retention: The Basic Principles

To succeed in a negligent hiring or retention lawsuit, an injured party must prove **all** of the following:

1. The employer owed a duty of due care to the injured party.
2. The employer failed to provide this care.
3. The plaintiff suffered actual injury or loss.
4. The loss or injury proximately resulted from the employer's breach.

Element One: The Employer's "Duty of Due Care"

The first step is determining whether the employer owed a duty of due care to the injured party. Generally, an employer owes its employees the duty to provide a safe working environment. It also owes a general duty to any member of the public who would reasonably be expected to come into contact with employees.

Element Two: The Employer's Breach of Its Duty of Due Care

The second step is determining whether the employer breached, or failed to meet, its duty of due care. The complaining party must show that the employer knew, or should have known through a **reasonable investigation**, that the person hired and/or retained was potentially dangerous and capable of causing harm to others. It is important to note that Maryland courts have created a presumption that employers hire fit employees. Under this presumption, the courts will assume that the employer has acted properly in hiring and retaining the employee *unless (1) the complaining injured party can prove otherwise or (2) the work is such that hiring an unfit employee would result in a risk of serious harm to a third party.*

What is a reasonable investigation?

A Maryland court has held that ordinarily an employer is **not** required to conduct a criminal background check as part of a reasonable investigation.⁴ Such a requirement would depend upon the circumstances, such as the position sought to be filled. An employer is, however, required to conduct a reasonable inquiry into the applicant's background, including contacting

⁴ *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978).

the applicant's previous employers and checking the applicant's references.

More thorough background checks advised for sensitive positions:

Employers hiring for positions involving vulnerable populations (children and the elderly) or for positions in security or law enforcement should conduct more complete background checks. Courts have considered imposing additional investigative responsibilities beyond reference and previous employment checks on employers hiring for such positions.

Element Three: Actual Injury or Loss

The third step in determining negligent hiring liability is proving damages. The plaintiff must prove that he or she experienced actual harm or injury.

Element Four: The Employer's Breach Proximately Caused the Injury or Loss

The injured party must show that there is a connection between the harm suffered and the employer's failure to use reasonable care in hiring the employee. This element is the most difficult to prove. Maryland courts often use a three-pronged approach to ruling on this test:

A. *The employer's breach of the duty of due care resulted in the applicant being hired.*

An employer is liable only if, had it exercised reasonable care, it would have discovered information that would have precluded a reasonable employer from hiring or retaining the employee.

B. *The employee had a propensity for behavior that could cause harm.*

The court will consider whether the employee's criminal history made the harmful act foreseeable. For example, the court may look at:

- Whether the criminal history and subsequent injury are of a similar nature.
- The amount of time that has elapsed between the previous criminal behavior and the incident in question.

Note that Maryland courts have ruled that a history of drug use, by itself, is **not** enough to establish a propensity for violence.

C. *The employee's position enabled him or her to commit the wrong.*

The injured party must prove that the employee's position somehow enabled the wrongful act to occur. For example, if the employee's position gave the employee unique access to the victim, that position may have enabled the act.

Legal Theories of Negligence

There are a variety of different legal theories that may impose liability on an employer. Lawsuits based on negligence point to the importance of responsible staff management policies.

Negligent Hiring: The employer does not make adequate inquiries before hiring the employee.

Negligent Supervision: The employer properly hires an employee but fails to adequately supervise him or her.

Negligent Retention: After hiring, the employer learns an employee has a propensity to engage in misconduct that could cause harm, and improperly decides to keep the employee in his or her position.

Negligent Entrustment: The employer improperly gives an employee an object with which he should not have been trusted. In most cases these "dangerous instrumentalities" are cars entrusted to employees with a known history of motor vehicle violations, or other improper vehicle use.*

* See *Curley v. Gen. Valet Servs., Inc.*, 270 Md. 248, 311 A.2d 231 (1973).

Common Sense Ways to Minimize Employer Liability Risk

Employers can take common-sense measures to minimize their liability risk.

First, the employer should **conduct a reasonable inquiry into an applicant's background**. This step should include a written consent by the applicant to conduct the inquiry. Employers should keep a written record verifying that the employer checked the applicant's references and past employment. Such a record may include, but is not limited to, notes detailing persons called, responses, and dates. The employer should determine if, **based upon the nature of the job**, it is necessary to conduct a **criminal background check**.

Second, the employer should provide the employee with a **clear, written description of the employment duties**. Employers should be cautious in providing overly broad employment descriptions as that would expand the potential for acts to fall within the scope of employment.

Third, employers should **have clear, written policies for employees concerning prohibited actions while on the job**, such as use of physical force and use of drugs or alcohol. Although many of these policies may seem obvious, it is always best to have a written policy, preferably in the form of an employee handbook, signed and acknowledged by the employee. For small employers who may not have a formal employee handbook, a simple statement of company policies, signed by the employee, will suffice.

Fourth, the employer should implement a **uniform system of review** for all of its employees.

Fifth, the employer should immediately **investigate reports of misconduct** during employment. If the employee has engaged in misconduct, the employer should promptly take **corrective action**, which may include the termination of employment.

Employers should be mindful that although these suggestions are designed to assist in making informed hiring and retention decisions and minimize the risk of liability, they are not meant to substitute for specific legal advice. Employers are encouraged to consult with their legal counsel in formulating and implementing appropriate hiring and staff management policies.

The Bottom Line: Key Factors in Understanding and Avoiding Liability

In deciding whether to hire an applicant, a careful employer should conduct a reasonable inquiry into the applicant's background. The employer should check with the applicant's former employer and should contact the applicant's references.

If the employer learns that an applicant has a criminal record, the following should be considered in determining whether to hire:

1. The specific duties and responsibilities of the job sought, including peace-keeping duties or contact with vulnerable populations such as children, the elderly, or the disabled.
2. The nature and gravity of the offenses, and the bearing of the criminal history on the applicant's fitness for the duties and responsibilities of the job.
3. Whether the applicant's criminal record shows a propensity for violent behavior (convictions for assault, battery, sexual assault, or robbery).
4. Whether the applicant's criminal behavior was repetitive in nature (several incidents of the same type of behavior).
5. The amount of time that has elapsed since the applicant's criminal offenses.
6. Information concerning the applicant's rehabilitation and good conduct.
7. Laws and regulations relating to hiring individuals with a criminal history that indicates potentially harmful behavior for certain sensitive occupations. These jobs include certain occupations in schools, personal care aides, respite care workers, and staff in assisted living programs.

Is All of This Relevant to Your Business?

Yes! Since ***federal law prohibits blanket policies against hiring individuals with criminal records***, understanding how to deal with applicants with criminal records is essential for all businesses.

Federal Equal Opportunity Law discourages employers from having a company policy of denying employment to individuals with criminal records. Instead, employers should make an individual assessment about hiring for each applicant. The law provides three factors to consider: the nature and gravity of the offenses; the time that has passed since conviction or completion of the sentence; and the nature of the job sought.

Employers who are mindful of these considerations may reduce their risk of liability.