

Fair Chance Hiring: Vicarious Liability of Employers

By Vinidhra Vaitheeswaran

In certain circumstances, employers can be liable for the actions of their employees, when an employee does something that causes injury or harm within the scope of their employment. Note that this is distinct from liability for “negligent hiring”, where employers can be held liable for failing to conduct sufficient background checks for certain employees. While this is a concept in the United States, there are no cases in Canada where employers have been held liable for failing to conduct a criminal record check or for hiring someone with a criminal record.

However, employers can be vicariously liable for specific actions of their employees, when that action causes injury or harm, whether or not that employee has a criminal record. There are two broad categories in which employers are vicariously liable:

- when the act is authorized by the employer
- when the act is not expressly authorized, but the nature of the act is sufficiently connected to conduct that was authorized by the employer

The first category is intuitive: that an employer is liable for an employee’s conduct where that conduct was directed or authorized by the employer.

The second category is more common and can occur when:

- an employee is acting within the scope of their assigned duties but carries out those duties in a negligent or unlawful way
- an employee’s position has a materially increased risk of harm to a third party and the employee engages in misconduct – even if that misconduct is entirely outside the scope of their assigned duties

In the first scenario, the characteristics of the employee are irrelevant. The fact that an employee has a criminal record, for example, is irrelevant to

the question of vicarious liability. Where the employee commits a wrongful action and that wrongful action occurred within the scope of employment, employers are automatically liable. This can be as simple as a worker leaving a mop on the floor of a store, causing a customer to trip and be injured: the employer would be vicariously liable for the injury.

To reduce risk of liability, employers should have good practices for hiring, training, and supervision – and this includes engaging in Fair Chance Hiring. Employers should:

- ensure employees are qualified for the position;
- ensure employees are fully familiarized with their duties and responsibilities in the context of their employment; and
- ensure employees are adequately supervised.

In the second scenario, a wrong that is only coincidentally linked (e.g., time and place) to their employment would not justify vicarious liability. Vicarious liability is only appropriate where there is a significant connection between the creation or enhancement of a risk and the wrongful act. These are generally situations where an employee is put in a position of trust or power, has been given an opportunity by the employer to abuse that power, and does so (e.g., committing fraud while having responsibility over client assets or causing intentional harm while working with vulnerable populations). In many of these situations, employers are already obligated to or well-advised to conduct and review criminal record checks. Fair Chance Hiring ensures employers can do so without undue bias or stigma, and helps employers meet their obligations effectively and with greater confidence.



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