

New law expands liability for employee misconduct

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In brief

- Virginia law now allows employer liability for intentional employee misconduct
- Applies when victims are vulnerable under state definitions
- Legal standard includes four-part test for employer negligence
- Impacts industries like health care, caregiving, and assisted living

A recent amendment to a state law potentially widens employers' exposure to personal injury and wrongful death liability.

Effective as of July 1, the amendment to HB 1730, under Virginia Code 8.01, allows employers to be held vicariously liable for intentional or wrongful acts of an employee.

The statute specifies a four-prong test in which a plaintiff must show that the employee's tortious conduct occurred while they were "reasonably likely to be in contact with the vulnerable victim," and their conduct directly resulted in personal injury or death.

Under the second prong, a plaintiff must also show the employer failed to exercise reasonable care to prevent the employee from intentionally harming the vulnerable victim or control the employee, resulting in an unreasonable risk of a vulnerable victim suffering personal injury or death due to a wrongful act.

Prongs three and four require evidence that "the employer knew or should have known of the ability to control the employee" and that "the employer knew or should have known of the necessity and opportunity for exercising such control over the employee."

Attorneys say the new measure is especially pertinent for employers that serve vulnerable victims, as defined by the law. That group includes patients of health care providers, non-emergency medical transportation companies, assisted living facility residents, massage clients, and the personal representatives of deceased vulnerable victims.

The language of HB 1730 also includes "person under a disability" as defined in state code. That group includes infants and incapacitated persons, including those under the protection of a guardian or conservator and other individuals who are unable to defend their legal or property rights or manage their estate.

Legislative background

According to a 2024 article in The Richmond Public Interest Law Review, “recent decisions by the Supreme Court of Virginia have significantly redefined the circumstances under which a principal may be held liable for intentional torts committed by its agents and threaten to eviscerate the vicarious liability doctrine as to such acts altogether.”

The court’s decisions, the authors assert, would essentially make employers immune from liability for torts committed by their employees regardless of the circumstances.



Now, when it comes to ‘vulnerable plaintiffs’ as defined in the statute, the burden is on employers.

— Mike Hollingsworth, Alexandria

Del. Karrie Delaney, D-Fairfax, was the bill’s chief patron. She said the inspiration for HB 1730 came after learning about an incident in Prince William County. In that case, a nurse assaulted a bedridden patient on the job but the employer could not be held responsible for the nurse’s actions, despite the worker’s duty to care for the patient.

“As a former sexual assault crisis counselor who has spent my legislative career advocating for survivors of these crimes, I was horrified to learn that Virginia’s own Supreme Court has spent the last six years undoing centuries of case law and depriving victims of legal recourse,” Delaney stated. “HB 1730 restores Virginia to place where survivors get their day in court and preserves the longstanding ability to make sure that those in positions of power over vulnerable people are held accountable.”

Todd Leeson, the chair of Gentry Locke’s employment law practice group, who is based in Roanoke, said the new law has “been a little bit under the radar for employment law practitioners.”

He said that’s likely because the bill came before the General Assembly as a response to the sexual assault of patients in health care settings.

This new law goes much further on when an employer could be liable.

— Todd Leeson, Roanoke

At a recent Virginia employment law conference with 250 lawyers in attendance, Leeson said the new law wasn't a topic of much discussion.

Still, Leeson said HB 1730 is a noteworthy development in employment law.

One reason is because he anticipates that the plaintiffs' employment bar may try to use the new law to its advantage.

While the measure isn't intended to address regular workplace interactions, Leeson said plaintiffs' attorneys may use it to pursue cases beyond the statute's intended realm.

"Think of a sexual harassment situation," he said. "The law is pretty well defined in terms of when an employer could be liable."

An employer with a sexual harassment policy in place that can show they responded to a complaint will have an affirmative defense.

But with the new statute, he thinks such a claim could play out differently — and beyond the spirit of the new law. One way that could happen, Leeson said, is the plaintiff's counsel could point to the reasonable contact part of the law and then assert that the plaintiff and the accused work together in the same location in the same office.

"This new law goes much further on when an employer could be liable," Leeson said. "So, my hope is that it is narrowly interpreted, that it would not come into play into normal workplace interactions between employees. In my view, a subordinate employee is not a vulnerable victim under this law."

Question on contact

Evan St. John, an attorney at Bean Kinney & Korman in Arlington, said the statute is laudable given that the spirit of the law is to empower victims to seek justice. At the same time, he said, it also raises questions.

St. John said the statute's language "has a lot of wiggle room," and thus it remains to be seen if courts interpret it strictly or broadly.

"For example, in the test that's included in the statute, it says that you have to show that the employee's tortious conduct occurred while the employee was reasonably likely to be in contact with the vulnerable victim and such contact proximately caused his personal injury," St. John said.

That raises the question, he said, of "what does it mean to be 'reasonably likely to be in contact with the victim?' What does 'in contact' mean? Does that mean in the same room with them? Does it mean going to be in the same building as them? Does it mean actually touching them?"

If a janitor works throughout a building, does that meet the threshold of reasonably likely to be in contact with a vulnerable victim? St. John asked.

“In my opinion, I don’t know that that means they’re reasonably likely to be in contact with them,” St. John said. But, he added, that question will likely be interpreted by the courts.

St. John said the third and fourth prongs of the test are also likely to face court interpretation. Those prongs do not “help make a clear framework for determining liability in my mind,” he said.

When the new law is applied for the first time, St. John said it remains to be seen if judges interpret it strictly or liberally.

Liability shifts

St. John, who regularly represents employers, said the tendency is “to not rock the boat and terminate people if they believe the person is litigious or angry or likely to bring a claim.”

But with the new statute, St. John said employers may want to reconsider slow roll terminations and move more quickly to terminate problematic employees.

“If you’re in an industry that’s dealing with vulnerable victims, I think and/or hope that employers will maybe give slightly less latitude in trying to retrain people from whom they see problematic behavior and just sort of pull the plug a little bit quicker, because in the meantime, they may be subject to some of this liability,” he said.

St. John said the justice system tends to shift liability to parties that are more able to shoulder costs — an employer for example — even if they’re not fully to blame for an egregious act. As a result, he said he expects that cases under the amended statute will probably be high damage-low likelihood events.

With that possibility, St. John said, employers may see higher insurance premiums to attempt to mitigate the risk of potentially catastrophic damage awards.

According to Alexandria lawyer Mike Hollingsworth, “under the traditional respondeat superior doctrine, employer liability for intentional sexual assaults by employees was extremely narrow and usually rejected as a matter of law unless it occurred simultaneously with some job-related task. It was not enough that the assault was related to the task.”

“But now, when it comes to ‘vulnerable plaintiffs’ as defined in the statute, the burden is on employers to prevent such harm to the vulnerable class of people,” Hollingsworth said.

“Liability now turns on whether the employer exercised reasonable care to prevent or control foreseeable harm to ‘vulnerable victims.’” Going forward, Hollingsworth said, nursing homes,

for example, should anticipate the risks inherent in a caregiving environment and demonstrate that they've taken steps to prevent potential abuse.

Although Hollingsworth focuses on medical malpractice, he says he runs into the issue frequently when nursing home or assisted living patients are assaulted.

"These facilities have no problem putting policies in place. But they have huge problems in actually following them. Maybe that will change to a degree with this statute," he said.