



## Handling Misconduct By (Someone Else's) Employees

Insights

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In “Legally Blonde,” Reese Witherspoon’s hairdresser catches the eye of her crush, the sexy delivery driver. In spite of starting with an awkward misfire with the hairdresser smacking the delivery driver in the nose, the plan ultimately works and the two are seen together as a happy couple by the end of the movie. Unfortunately, in the real world, relationships between employees and vendors can result in legal liability much the same way as relationships between coworkers. Happy couples become unhappy couples creating an environment ripe for bickering, gossip, and harassment.

Vendor’s employees also present risks in arenas outside of harassment. Any type of misconduct in which they engage, whether theft, threats of violence, or simply not doing their jobs to the expected level, must be addressed. Retail managers do not have the time and labor to go behind vendor employees and restock a poorly stocked shelf. They cannot ignore shoplifting by vendors any more than they can ignore shoplifting by customers. Likewise, any sort of threat of harm requires action to prevent a workplace violence incident.

The natural reaction to any vendor employee issue is to notify the vendor of the problem and perhaps demand they assign a different employee to service the store. “Their employee, their problem,” is the idea. But what many managers do not realize is that errors and miscommunications in reporting vendor employee misconduct can result in liability from the vendor’s employee.

Even accurate truthful communications can bring lawsuits. Employees who lose their jobs because of such reports can sometimes sue the reporting party under tort law for claims such as defamation and intentional interference with a contract. On the other hand, failing to address vendor employee misconduct can create liability from your own employees.

Given these potentially competing concerns, is there a way you can craft a policy for handling vendor misconduct that allows you to comply with your obligations to your own employees while minimizing the risk of a third-party suit? The answer is yes.

### Obligations To Your Own Employees

An employer’s obligation to misconduct by a vendor’s employees arises most often in the obligation to provide a work environment free from harassment and discrimination. The regulations under Title VII explain “An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or

supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”

The EEOC “will consider the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.” Thus, under the EEOC’s standards, an employer is liable if it had the means to end the harassment and failed to do so.

Your potential liability here mirrors that of liability for coworker non-supervisory harassment. As one court explained, “[T]he employer accrues liability not because of the actual acts of harassment, but because it had the ability to end the harassment but failed to do so. Viewed in that light, the identity and the employment status of the harasser is immaterial; the relevant issue is whether the employer subjected its employee to a hostile working environment.” An adequate response will likely involve notifying the vendor.

Retailers also have duties under OSHA to protect employees from acts of violence. This stems from OSHA’s general duty clause requiring employers to provide employees a safe place to work. Confrontations between retail employees and vendors may occur in situations where a retail employee challenges the vendor’s employee on issues such as the count of product brought into the store or the adequacy of the stocking of the product. When you know that a confrontation occurred you must address the situation the same way you would address notice of harassment.

A retailer also expects its employees to perform their own jobs in the time given. This expectation can be greatly hindered when vendors who are responsible for stocking their own product or delivering product in a certain way fail to carry out those responsibilities. Store managers cannot properly manage labor hours in their stores if a vendor’s employee is creating additional work. Usually the manager has no tool to correct the situation short of reporting it to the vendor.

Finally, all retail employees are expected to take appropriate actions to reduce shrink from both external and internal sources. Vendor’s employees, who are in the store often and become familiar with it, have a potentially heightened opportunity to steal, since store employees tend to ignore them. Carrying out the employer’s policies on shoplifting and theft is just as important when the perpetrator is a vendor’s employee. Barring a suspected thief from the store is an easy course of action for the manager. But doing so requires notifying the vendor of the need to have a new employee make the deliveries.

Thus, virtually every case of complying with obligations to employees and managing store issues created by vendor employees requires reporting the matter to the vendor.

### **Potential Causes Of Action By Vendor Employees**

But accusing anyone of theft, harassment, or even simple poor performance, usually results in a strong denial and the individual wanting to clear his name. This becomes particularly acute when the accusation costs someone their job. Individuals look for a target to blame. So when a retailer

the decision costs someone their job. Individuals look for a target to blame. So when a retailer reports to its vendor that the vendor's employee has engaged in misconduct, and that employee is fired, the chances of the employee lashing back at the retailer are high.

The two most common claims brought in this scenario are defamation and intentional interference with a contract. In order to prove defamation, under the standard used in most states, the vendor's employee must establish that the retailer 1) made a false statement, 2) with malice, that 3) caused the individual damages. Malice can be inferred when the allegedly false statement accuses the employee of a crime. So if a retailer tells a vendor that its employee stole, and the employee as a result is fired, that statement can form the basis of an action for defamation.

The same scenario could also give rise to a claim for intentional interference with a contract. The elements of a claim for intentional interference with a contract are that one 1) intentionally and improperly interfered, 2) with a contract between another and a third person, 3) inducing the third person not to perform the contract, 4) resulting in damages.

A key element of this claim is that the conduct allegedly interfering with the contract must itself be wrongful, either as an independent tort or because it was taken for no purpose other than to harm the individual. The independent wrong normally is the claim that the retailer defamed the employee in its communications with the vendor or was trying to get rid of the vendor's employee on account of a protected characteristic such as race or age.

### **Developing A Policy For Reporting Vendor Misconduct**

There is no question that every type of vendor misconduct described above demands some action by the employer. Not only is it the right thing to do, failing to do so can lead to liability from its own employees. In most cases, an effective way to prevent future problems from a vendor's employee is simply to instruct the vendor that the problem employee is barred from the store thereby eliminating the possibility for repeat problems.

But from the vendor's perspective, an employee who cannot make all the stops on a route is a logistical nightmare requiring other employees to do the work. Thus, when reporting misconduct to a vendor, understand that by your action, a good chance exists that the employee will be fired; thus the report must be handled correctly to minimize the risks of suit by the vendor's employee.

The key to both defamation claims and intentional-interference claims is the presence of malice or wrongful conduct on part of the retailer. One type of evidence courts have accepted as establishing malice is that there was no reasonable basis for believing the employee did what was reported. This is shown with evidence that a conclusion was reached arbitrarily without any investigation. To defend against these claims, requires that care be exerted before reporting misconduct that will likely cost an employee his or her job.

There are several steps you can put into place to reduce these risks. First, only employees who have the discretion to terminate one of your own employees should be communicating with the vendor. If your store managers cannot terminate store employees, they should not be in a position to make

your store managers cannot terminate store employees, they should not be in a position to make communications that could result in the vendor's employee being fired. Second, employees who might communicate with vendors on other matters, such as orders, need to be trained to report vendor employee misconduct internally, not to the vendor.

Finally, employees who will be communicating with the vendor need to take the same care with these communications as they would with the decision to terminate an employee. That means an investigation should be conducted and, where appropriate, statements and pictures should be taken. If other evidence exists, such as surveillance tapes or paper records, these should be segregated and maintained. Even when it is appropriate to tell a vendor that their employee is barred from the store, never suggest to the vendor how it should handle the problem employee – even if the vendor asks. All communications between the two companies should be documented and retained in a separate file.

Using these procedures can help protect your store from lawsuits – no matter which direction they come from.

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