MED THREE INSURANCE GROUP

106 Front St. East Suite 303
Toronto, ON M5A 1E1
Main: 416.477.2353
Fax: 416.477.2399

HEALTHCARE EMPLOYER RISK
Part 1: Vicarious Liability

Employers are always vulnerable when it comes to the behavior and conduct of employees, agents or independent contractors. However, by being alert to the potential dangers and by taking proactive preventative measures, the risk of liability can be minimized.

This bulletin offers meaningful insight regarding the ways in which vicarious liability can arise and will arm the reader with actionable recommendations to minimize the risk of potential claims.

What is vicarious liability?

An employer (whether an individual or a corporation) will have vicarious liability for the conduct of employees.

Where an individual (wrongdoer) has wronged a client[1] and is found to be an employee, his or her employer will be held responsible for the misconduct because of the relationship between them. The liability is transferred to the employer even though it is not directly responsible for any wrongdoing. The rationale for imposing liability on the employer is because the loss is the result of inherent risks in the employer's operations.

When does vicarious liability transfer to an employer?

Where an employment relationship exists, employers can be held vicariously liable for the actions of their employees.

When determining whether an individual is an employee, the level of control the employer has over the individual’s activities will always be a factor. However, other factors to consider include

- Whether the individual provides his or her own equipment
- Whether the individual hires his or her own helpers
- The degree of financial risk taken by the individual
- The degree of responsibility for investment
- Management held by the individual
- The individual’s opportunity for profit in the performance of his or her tasks.

In most instances, the employment relationship between the organization or employer and the individual makes it clear that the organization or employer will be vicariously liable for the conduct of the individual. However, even when there is no direct employment relationship, circumstances may dictate that the organization or employer has a sufficient level of control to lead to a finding of vicarious liability. Under the principle of “ostensible agency”, if it is reasonable for a client to conclude that an individual is indeed an employee of the organization, because the individual has been given the appearance of being an employee (e.g., having a desk in the organization’s office), then the organization or employer will be held responsible.

[1] The term client includes patient and resident.

What kinds of employee conduct affect an employer?

The issue of vicarious liability only arises when the conduct of an employee results in harm to a client in the course of doing his or her job. Liability on the part of the employee can be found based on (1) their acts or omissions amounting to either negligence or an intentional tort, such as assault, (2) lack of knowledge or skill required for the performance of certain tasks, or (3) failure to adhere to systems put in place by their employer, such as policies and procedures.

Once the employee is found liable to a client, and an employment relationship has also been found, the employer is vicariously liable. There is no need to make a finding of wrongdoing on the part of the employer.

What can be done to minimize the risk of vicarious liability?

While the most prudent form of insurance is prevention, certain operational initiatives can be taken by the employer to minimize the risk of vicarious liability. These include the following:

- developing and implementing personnel policies relating to the hiring and supervision of workers;
- scrutiny of applicants through reference checks, criminal record checks (especially if the employee's duties will involve the handling of money, or contact with minors or other vulnerable clients) etc.;
- provision of ongoing education and training to employees;
- audits of practices and procedures;
- developing and implementing workplace discrimination and harassment policies and procedures;
- implementing policies which do not allow any single employee to have exclusive control over finances;
- being aware of changing spending habits of employees involved in the organization's financial operations; and finally,
- having comprehensive liability insurance in place.

PART 2 OF THIS SERIES WILL FOCUS ON THE HEALTHCARE EMPLOYER AND USE OF INDEPENDENT CONTRACTORS.

Josh Liswood
Partner
Miller Thomson
416-595-8525
mailto:jliswood@millerthomson.com