

## EMPLOYER LIABILITY

# WHEN OUTSIDE INDIVIDUALS HARASS STAFF

EMPLOYERS GENERALLY understand their obligations when harassment comes from supervisors or co-workers. The risk becomes less clear when the offender is a customer, vendor or other outsider, but the legal exposure does not disappear.

While federal statutes like Title VII of the Civil Rights Act do not explicitly address third-party harassment, the Equal Employment Opportunity Commission and most federal courts apply a negligence-based framework.

That means the focus is on what the employer knew and how it responded. Once an employee reports harassment, an employer's defense weakens considerably if it fails to act.

Courts have largely settled on a practical standard that if an employer knew or should have known about third-party harassment and failed to take prompt, appropriate action, it can be held liable for allowing a hostile work environment to persist. If the employer takes retaliatory action, they could be liable for retaliation as well.

### What third-party harassment looks like

Third-party harassment is akin to harassment by a supervisor or coworker and must typically be tied to a protected characteristic such as race, sex, age, disability or religion to constitute a legal liability.

Common examples include:

- Derogatory jokes, slurs or offensive comments,
- Pressure for dates or sexual favors,
- Verbal abuse, ridicule or name-calling,
- Threats, intimidation or aggressive behavior,
- Display of offensive images or materials, or
- Physical harassment or unwanted contact.



In some cases, the harassment is tied to business leverage. For example, a client may imply that they won't sign a contract unless an employee tolerates inappropriate behavior.

### Why employer response is critical

The key legal trigger is notice. If harassment is obvious or reported and the employer does nothing or takes weak, ineffective action, it may be viewed as tolerating the conduct.

Courts and regulators expect employers to take "reasonably calculated" steps to stop the harassment. That does not mean every incident creates liability, but inaction often does.

Employers also face added risk if they appear to prioritize business relationships over employee safety, such as excusing misconduct from a high-revenue client.

### Steps you can take in advance

- Extend anti-harassment policies to explicitly cover third parties.
- Train managers to recognize and escalate third-party misconduct.
- Provide employees with clear means of reporting harassment.
- Encourage prompt reporting without fear of retaliation.
- Investigate all complaints quickly and document findings.
- Include anti-harassment provisions in vendor and client contracts.

### What to do when a complaint is made

When an employee reports third-party harassment, employers should act immediately:

- Acknowledge the complaint and ensure the employee feels safe.
- Conduct a prompt, impartial investigation.
- Limit or end employee contact with the offending individual.
- Reassign accounts or adjust job duties where appropriate.
- Follow up to confirm the behavior has stopped.
- Document every step taken.

Depending on severity, appropriate action may range from asking a customer to stop to terminating a business relationship or involving security or law enforcement.

**The bottom line:** Employers cannot control every outsider's behavior, but they are expected to control how their organization responds. Ignoring the problem is often what creates liability.

### EPLI insurance

Finally, your organization should consider purchasing employment practices liability insurance, which may cover legal fees, settlement and judgment costs in harassment cases. Give us a call to learn more about this important insurance.