Employer Responsibility

Chapter 7
Business Owners Shoulder Responsibility for Employed Drivers

Q.: My company owns several motor vehicles that are sometimes used by my employees. Is the business responsible for all accidents involving these vehicles?
A.: An employer’s responsibility for the operation of a vehicle by an employee is determined by the principle known as respondeat superior (literally, “the superior must answer”). Respondeat superior means that an employer should be responsible for the negligence of an employee if the employee’s actions fall within the course and scope of the employment.

Q.: Aren’t all acts performed by an employee during work hours done in the course and scope of the employment?
A.: No. An employee can stray from the scope of employment, and under such circumstances, the employer may not be responsible for the employee’s negligence. For instance, a vehicle may be given to an employee with the understanding that he/she will make a delivery and then return directly to the business place. If the employee strays from the delivery and takes the vehicle to perform a personal errand, the employer may not be found responsible for the employee’s negligence while on the errand. For instance, if, after making the work delivery, the employee leaves the city to visit his/her out-of-town mother, the employer will not be responsible for the negligent operation by the employee during the unauthorized trip.

Q.: What if I allow my employees occasionally to use a vehicle to drive to lunch?
A.: Usually, an employer is not responsible for this kind of trip if the employer is not gaining a special benefit from the employee’s use of the vehicle. If, however, the employee is on call during the lunch period, the employer may be found responsible for the employee’s negligence. Similarly, if the employee has been instructed by the employer to pick up lunch for other employees, the trip may be determined to be business-related because it benefits the employer and the business.

Q.: If I require my employee to drive the vehicle home at night so I don’t have to pay for parking, what is the extent of my responsibility?
A.: Since the employee is required to drive the vehicle to and from work, the employer is responsible for the employee’s negligence in the operation of the vehicle during those trips to and from work. Taking the vehicle home and then back to work is part of the employee’s regular duties. The employer would not, however, be responsible for any personal trips the employee might take in the vehicle during the employee’s off hours.
**Q.: What if the employee lets someone else drive the car? Is the business liable?**

**A.:** An employer who does not give the employee permission to allow another to operate the vehicle usually will not be found responsible for the negligence of the non-employee.

**Q.: What if I allow an employee to use the company vehicle for his or her own purpose even though I know the employee is a poor driver?**

**A.:** Liability for an accident involving an employee in these circumstances would not have anything to do with the employer/employee relationship. Instead, a person giving permission to the unsafe driver to operate a vehicle can be found responsible for the negligence of the employee on a theory of “negligent entrustment.” A person who allows another to use a vehicle when he or she knows that the driver is incompetent or inexperienced can be held responsible for that driver’s negligence.

**Q.: If I allow an employee whom I know to be a good driver to operate the business vehicle on that employee’s personal errand, will I be found responsible for the employee’s negligence on that trip?**

**A.:** No. Because the vehicle is being used outside of the business relationship, the principle of *respondeat superior* does not apply. The employer is not responsible for non-business-related acts of an employee. Furthermore, if the employer knows the employee to be a good driver, the theory of “negligent entrustment” does not create a basis for liability. An employer is not negligent when giving a good driver access to a vehicle. Mere ownership of a vehicle does not create any liability for the independent actions of another.

**Q.: Even if the business might be liable for an employee’s negligent driving, doesn’t that employee also have responsibility?**

**A.:** Yes. The negligent employee is also accountable for his or her own negligent acts. Any lawsuit or claim brought by the injured party will likely be brought against both the employer and the employee. Upon learning that a claim is brought, both the employer’s insurance carrier and the carrier for the employee should be advised of the claim to determine whether or not more than one insurance policy applies to the claim.

—by Lynn A. Lazzaro, a Cleveland-area attorney in private practice.
Know the Extent of Your Responsibility for Employees’ Injuries

**Q.: I own a business where my employees are occasionally injured on the job. Am I directly responsible for their injuries?**

**A.:** Generally, no, as long as you comply with the Ohio Workers’ Compensation Law. Participating employers have created and maintained a state fund by paying workers’ compensation premiums to the State of Ohio. The Bureau of Workers’ Compensation administers the fund, and an employee who is injured in the course of his or her employment may apply for and receive benefits out of the fund from the Bureau of Workers’ Compensation. That employee may not make a claim directly against the employer. The two-fold purpose of this system is to insulate participating employers against employees’ claims for injuries, while providing benefits to injured employees from an independent fund regardless of fault of either employer or employee.

**Q.: Are there any situations where I might still be liable to my injured employee?**

**A.:** Yes. You may be held responsible if you do not comply with the Ohio Workers’ Compensation Law. Also, you may be liable even if you do comply with that law, but have injured your employee by committing an “intentional tort.”

**Q.: What is an “intentional tort?”**

**A.:** An employer commits and intentional tort against an employee when the employer: 1) specifically desires to injure the employee; or 2) knows that injury to the employee was certain or substantially certain to result from the employer’s act and, despite this knowledge, still required the employee to work under the dangerous conditions.

An example of the first type of intentional tort might be the employer’s purposefully activating a punch press in a factory when he sees the employee’s hand actually in the press—which comes down to injure the employee’s hand as the employer intends.

The second type of intentional tort might apply if a worker sustains injury when his fork lift collides with a concrete-filled steel post, provided the employer knew that this post’s location in the middle of a heavily traveled driveway was a hazard, the post served no purpose, there had been previous accidents involving fork lifts hitting the post, and the employer did nothing about the post but still required the employee to work in that hazardous situation.
Insurance

Q.: Will the commercial general liability policy I carry on my business cover an intentional tort claim that might be brought by my employee?

A.: This depends on the language of the policy, and upon a court’s interpretation of that language. Many commercial policies contain provisions which specifically exclude “intentional torts” from the employer’s insurance coverage. Some Ohio courts have said the words “intentional torts” mean legally what they say—that they pertain to both definitions of “desired injury” and “substantially certain to result in injury”—and that therefore, the employer is not insured against an employee’s claim under either circumstance. Other courts have said the words “intentional torts” do not specifically refer to injuries “substantially certain” to occur, and thus the insurance company has excluded coverage under the first definition, but has provided coverage under the second definition. In July 2003, the Supreme Court of Ohio held that a commercial general liability insurance policy that excludes coverage for bodily injury to an employee arising out of or during the course of employment does not provide coverage for an employer’s liability for “substantial-certainty” intentional torts.

Recently, some insurance companies have begun including coverage in their policies for “intentional torts” and “substantially-certain-to-occur” injuries, and have charged a higher premium for this coverage.

Employers should review their current commercial liability policies with their insurance agents and with their attorneys to determine if full coverage exists for such claims.

Q.: I have heard that the workers’ compensation benefits are available only for an employee’s physical injuries. Can an employee therefore sue my business for purely psychological injuries?

A.: Yes. The workers’ compensation laws allow compensation only for bodily injuries. They do not, however, prevent an employee who has suffered purely psychological injuries as a result, for example, of a robbery at her employer’s business, from bringing legal action against her employer for negligence.

-by Jack L. Neuenschwander, a partner in the Piqua firm of McCulloch, Felger, Fite & Gutmann Co., LPA.
Spousal and Child Support Issues Affect Business Owners

Q.: I am a happily married business owner, but I just received paperwork ("withholding notice orders") instructing me to withhold child support and spousal support each time my employee receives a paycheck. I’ve also been instructed to send the money withheld to the county Support Enforcement Agency for distribution to the employee’s ex-spouse. Who needs this extra paperwork! Can I ignore the order and/or terminate the employee?

A.: No. You must read the orders carefully and you must comply with the orders. There is an address and phone number on the orders of the Support Enforcement Agency to which you may direct any questions you may have. If you fail to withhold income in accordance with the provisions of the notices and orders you receive, you may have to pay the accumulated amount that you should have withheld, and/or you may be found guilty of contempt of court, and/or you may have to face other penalties, including fines. Also, if you fire, refuse to hire, or discipline any employee because support withholding has been ordered, you will be subject to legal penalties, including responsibility for funds that should have been forwarded and fines.

Q.: Can’t my employee just arrange to pay the spousal and/or child support directly to his or her ex-spouse?

A.: Generally, the employee does not have a choice. The law generally requires that where the “payor” (in this case, your employee) is employed, the withholding process will be used. Also, any support paid directly between the spouses generally will not be counted as payment of the support obligation, but will be considered “a gift.” The withholding process provides an orderly and accountable way to ensure that support is paid in a timely manner. Spousal support, but not child support, may now be paid directly to a former spouse. Still, if a court order requires wage withholding, the employee does not have the option to pay spousal support directly to the former spouse.

Q.: I received withholding paperwork for an individual who performs services for my business in an independent contractor capacity. This person is not an employee, so we don’t withhold taxes from her paycheck, and she receives a 1099 tax form rather than a W-2 form. Do I have to withhold and forward support for this individual?

A.: No. If this person truly is an independent contractor, she should be considered as “self-employed,” and she will need to set up an account at a financial institution from which the support payments can be withheld and forwarded.
If you receive withholding paperwork for an individual who you believe to be an independent contractor, however, do not just ignore the paperwork. Rather, you need to immediately contact the Support Enforcement Agency, the individual’s attorney, and/or your own business attorney in order to clarify the situation.

**Q.: If I receive withholding orders for more than one employee, do I have to forward a separate check for each one?**

**A.:** You can combine all of the payments into a single check to the Child Support Enforcement Agency. However, the check should be accompanied by a written list of names, social security numbers, case/support order numbers, and the amount withheld for each of your employees.

**Q.: I have several employees in the process of ending their marriages. How can I be supportive without becoming involved in the intimate details of their domestic relations dilemmas?**

**A.:** Divorce is a difficult lifestyle change even in the most amicable of circumstances. Encourage your employees to consult professional legal counsel and the counsel of a mental health professional to guide them through this difficult time. Many group health insurance policies have resources for these circumstances. You can direct your employee to these resources to keep from becoming too involved. Your employees occasionally may need to be absent from work to attend court hearings, depositions, mediation sessions, and/or appointments with attorneys or counselors.

Your employees may need your assistance in gathering information regarding their salary history and benefits because full disclosure about financial matters is required by the court. Sometimes, a business may be joined as a party to the divorce, and/or may receive a retraining order, and/or may be required to provide information directly to opposing counsel or the court. If this happens, you may wish to consult with either your employee’s attorney or your own attorney to learn more about your rights and responsibilities.

–by Laura S. Zeldin, a Columbus attorney; updated by Pamela J. MacAdams, a partner in the Cleveland firm, Morganstern, MacAdams & DeVito Co., LPA.
Who Has Responsibility for Ice and Snow Injuries?

Q.: I own a house and my business owns several real estate properties. I am concerned about business and personal responsibility for slip-and-falls on ice and snow which might occur on those properties. Can I or my business be found liable?

A.: Not unless you are found to be “negligent,” or fail to exercise “ordinary care.” Ordinary care is judged by what a reasonable and prudent person would have done under the same circumstances.

Every person has a duty to look out for his or her own safety. A business or individual may also have a duty to look out for the safety of others. This duty can come about by written agreement or by law. Before an injured person can recover damages, that person must show that something the business owner or individual did or failed to do caused the injury. The person must also show that the business or individual “owed a duty” to that injured person.

Q.: If someone slips and falls on ice or snow naturally covering the sidewalk outside my house, can I be held responsible for that person’s injuries?

A.: Almost certainly not. People walking on ice and snow in front of your house presumably know that they might slip and fall. Ice and snow are natural hazards in Ohio’s climate. Because snow or ice accumulations are often sudden, it would be impractical to hold responsible every homeowner who failed to clear his or her sidewalk.

Q.: What if a customer slips on ice and snow in the parking lot of my company’s store?

A.: It has long been the law in the State of Ohio that a land or business owner does not ordinarily have a duty to remove natural accumulations of ice and snow. This is true even if the person injured is a customer of the business being visited. Furthermore, the business owner does not have a duty to warn customers of any dangers associated with ice and snow on the sidewalks, walkways or parking area. The reason is that, in Ohio’s climate, ice, snow and temperature changes are expected hazards. The courts have found that it is impossible and impractical to place a duty upon a land or business owner to anticipate and at all times correct for these natural occurrences.
**Q.: Can the business owner ever be found responsible for a customer’s slip-and-fall on ice and snow?**

**A.:** Sometimes. Everyone who has seen an Ohio winter knows the dangers of ice and snow. All customers on a business property in the winter, therefore, must take responsibility for protecting themselves from these dangers. Usually, the business owner has had no part in creating the danger that causes injury to the customer. A business owner cannot insure the safety of all persons coming onto his or her property.

However, when a business owner creates a greater danger than was brought about naturally, then the business owner may be found liable for any injuries and damages which result. For instance, perhaps a property owner knows of a broken gutter and allows it to spill water onto a sidewalk in front of the entrance to his or her building. The water freezes and forms an unnatural ice accumulation. In such a case, the owner may be held responsible for this negligence because the ice condition arose artificially due to a gutter that the building or business owner should have repaired.

**Q.: What if my company’s building is an apartment building? Does the company as a landlord have a greater duty than the other business owners to clear ice and snow from sidewalks for the tenants?**

**A.:** Landlords have no greater duty than any other business owner to remove natural accumulations of ice and snow from common walkways and structures unless they have an agreement or provision in the lease agreement that requires the removal. Like other business owners, a landlord will be found responsible if his or her negligence creates a condition which is unnatural. Washing down an entranceway to a building on a sub-zero day would be an example of negligence causing an unnatural accumulation.

**Q.: If, by agreement with tenants, the owner of a strip mall agrees to keep sidewalks and passageways open and clear of ice and snow, would that agreement mean the owner/landlord could be held responsible for a slip-and-fall of a tenant or visitor?**

**A.:** Possibly. An individual or an entity (such as a business) can be held responsible for injuries which occur when that individual or entity has assumed a duty by agreement to keep sidewalks, parking lots and entrances open. When the individual or business owner/landlord takes on that duty, he or she must take “reasonable measures” to ensure that the job is performed. However, the law does not expect the area to be kept totally free and clear. Rather, the law expects the individual or entity assuming the duty to make “reasonable efforts” to keep the area clear. No amount of maintenance can totally insure against injury and damage.
Q.: What if the slip-and-fall occurs on a public sidewalk in front of the business and the city has an ordinance instructing all landowners to keep their sidewalks free and clear from snow and ice accumulation? Is the business responsible for all slip-and-falls which occur on the public sidewalk?

A.: No, not as a result of the ordinance. Although the owner of a property does not own the public sidewalk, the ordinance may require that sidewalks be kept free from snow accumulation and open to the public. This is for the convenience of the city. This does not mean that the business owner is liable for injuries resulting from his or her failure to remove the snow and ice. The ordinance does not create a basis for liability. Rather, the ordinance usually creates a penalty for failure to clear the sidewalk in a reasonable time. Typically, the city would fine the business if it failed to comply with the law.

–by Lynn A. Lazzaro, a Cleveland-area attorney in private practice.
Individual Supervisors May Be Liable for Violation of Discrimination Laws

Q.: One of my company’s supervisors recently asked me if she could be held liable if an employee should bring a suit claiming discrimination. What should I tell her?
A.: Ohio discrimination laws make it unlawful for an employer to discriminate in hiring, firing, and terms and conditions of employment on the basis of race, color, religion, ethnicity, national origin, gender, disability (handicap) or age. According to the Supreme Court of Ohio, the concept of “employer” includes not only the entity that employs a person, but also individuals who make (or sign off on) the employment decisions affecting an employee. In short, if a supervisor’s action (or inaction) adversely affects an employee, both the supervisor and the employer may be held liable.

As a result of the Supreme Court’s decision, you can expect that discrimination suits have been and will be brought against not only the employer company, but also individual defendants ranging from corporate officers to line supervisors. Multiple defendants compound defense costs, and may mean a company will need to hire different law firms to represent different employees who have been sued. If the employer has a policy indemnifying the named supervisors or an agreement requiring the employer to defend and pay damages assessed against an employee, then it may be possible to consolidate the various legal defenses so that they can be handled by one law firm. However, the interests of the employer and the supervisor(s) may not be the same. For example, a supervisor may claim to have been acting pursuant to an “unwritten policy” of the employer, a position which the employer denies, but which makes it liable. Conversely, the employer may have a claim against the supervisor. In either case, the individual supervisor must be represented by separate counsel.

Q.: Does my company’s liability insurance for employee lawsuits cover my supervisors?
A.: It’s not likely that such coverage extends to individual supervisors. Unless the supervisors have an indemnification agreement with the employer, they will be required to hire and pay their own lawyer(s), unless they have their own insurance coverage (which is unlikely). However, insurance policies should always be reviewed to determine if any coverage applies.
Q.: What should I do?
A.: Employers (including officers, managers and supervisors) should do the following:
1) review insurance coverage and determine what actions are covered and excluded;
2) conduct periodic training of all management employees to educate them on company policies and procedures, the restrictions imposed by employment laws, and management techniques to lawfully address employee issues;
3) review and improve their documentation of employment-related decisions;
4) review whether, and to what extent, individual managers and supervisors are, or should be, indemnified for employment decisions; and
5) define the chain of commands and clarify through written job descriptions the scope of authority of each management position.

–by Linda C. Ashar, an attorney in the Avon law firm of Wickens, Herzer, Panza, Cook & Batista.