

## Mitigating Employer Liability Risk Under Sex Assault Rule

By **Ashley Lynam, Jacob Sand and Tamara Adams** (August 21, 2025, 5:45 PM EDT)

The American Law Institute approved a controversial new provision of the Restatement of the Law Third, Torts, expanding vicarious liability to employers for certain sexual assaults that are committed by employees against third parties who are "particularly vulnerable."

The special rule, if adopted by the courts, would expand risk and exposure for employers across a host of industries.

### The New Rule

Approved during its May 19-21 meeting, the "Special Rule on Vicarious Liability for Sexual Assault" marks a significant departure from the traditional vicarious liability doctrine, which has historically declined to impose liability on an employer for the criminal conduct of its employees when the conduct clearly falls outside the course and scope of their employment.

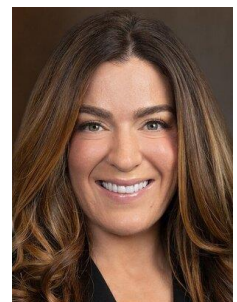
Courts have imposed vicarious liability for some criminal conduct where the employee's actions are intended to serve the employer's interests in some way, such as a speeding delivery driver.

However, a substantial majority of courts have declined to impose vicarious liability for sexual assault, which has been considered to be categorically outside the scope of employment and contrary to any employer's intended business purposes.

But according to the ALI reporters' introductory note on the special rule, the historical application of the vicarious liability doctrine has often left victims of sexual abuse without an avenue to financial recovery, as the perpetrators often end up in prison or being judgment-proof.

The special rule represents a divergence from the historical application that is driven by the perceived need for change to allow for recovery from employers, purportedly to deter bad actors, compensate victims and seek justice.

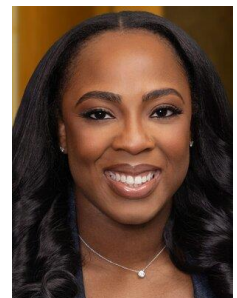
The special rule provides that "a factfinder may find an employer vicariously liable for its employee's sexual assault of a person" when certain conditions are met, including that:



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- The nature or conditions of the employee's job "create[] a reasonably foreseeable risk of sexual assault";
- The victim is "particularly vulnerable" due to factors such as age, mental capacity, disability, incarceration, medical need or similar circumstances;
- The employer "facilitates the sexual assault by providing the employee with substantial power, authority, or influence over the person"; and
- The assault must occur while the employee is "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."

### **The Authors' Reasoning**

The authors of the introductory note describe the special rule as having been created through the synthesis of various doctrinal hooks.

Among the hooks that the authors cite is the aided-by-agency test, which reasons that if the very existence of the employer-employee relationship in some way enabled the tortious conduct, vicarious liability should attach, rather than the standard scope-of-employment doctrine that focuses on the employee's intent to serve their employer.

The authors also point to the course-of-conduct test, seemingly expanding the scope of the already existing notice elements of traditional claims, to include instances where an employer should know of its employee's dangerous characteristics based on a combination of events.

The authors also reference other hooks that they say justify promulgating the new rule, without any further explanation of their relevance, including:

- The characteristic-risk approach, which imposes liability when certain job duties inherently carry particular risks;
- The foreseeability test, which assesses whether harm was reasonably predictable;
- The doctrine of nondelegable duties, which holds employers liable for certain responsibilities even if they are performed by others; and
- The Ellerth-Faragher doctrine under Title VII of the Civil Rights Act, which establishes employer liability for supervisors' harassment under specific conditions.

### **When the Special Rule Applies**

The special rule provides a nonexhaustive list of the types of employees and particularly vulnerable persons that have been cited in cases across the country to support the imposition of vicarious liability on employers in matters involving sexual assault.

The cited cases help to illuminate the bounds of who is considered to be a particularly vulnerable person. They include examples in a range of settings involving both perpetrator-employees, such as

police officers and nursing home caregivers, and victims, such as children and mentally or physically impaired nursing home patients.

In sum, the special rule attaches liability not where a sexual assault furthers an employer's business interests, as contemplated by the traditional rule, but rather when the nature of the employment itself places the employee in a relationship of power, access or control over a particularly vulnerable person.

Where the four aforementioned conditions of the special rule are met, vicarious liability strictly applies.

Importantly, the special rule explicitly excludes independent contractors from its application, and references the need for guardrails to avoid a "disproportionate burden on employers."

The special rule does not, however, provide any examples of such guardrails, or discuss any applicable defenses or actions that an employer could take to avoid strict liability for sexual assault committed by its employees.

### **Implications and Recommendations**

The special rule places healthcare, education, hospitality, entertainment and many other high-contact businesses at significant risk of being held vicariously liable for the criminal conduct of an employee, merely because the nature of the industry requires interaction with particularly vulnerable people.

Moreover, as a practical matter, the special rule would eliminate certain traditional defenses that are available for such companies by allowing a plaintiff to prevail, even where the employer-defendant met or exceeded the applicable standards of care, by imposing vicarious liability on the employer from the employee's conduct, rather than independently assessing whether the employer acted negligently.

The threat of increased exposure will require companies to consider the depth of their institutional understanding of the power dynamics between their employees and their customers, and take concrete actions to mitigate risk, including the following.

#### ***Commit to early evaluation and resolution.***

Conduct early and thorough investigations of any allegations in order to collect critical evidence, evaluate witness credibility, assess risks and inform settlement values.

Additionally, identifying potentially high-exposure claims early on may allow for resolution at lower values. Doing so will require robust initial fact gathering, but can stave off litigation.

While this may require investing more resources to handle prelitigation claims, given the overall increased exposure threatened by the new special rule, such an investment is more than justified.

#### ***Analyze contractual risk shifting.***

Employers will want to review any contract that places its agents in power, access or control over a particularly vulnerable person to make sure that the counterparty risks are appropriately assigned through indemnity and insurance provisions.

Where appropriate, employers may also want to consider whether certain roles could be structured as independent contractor relationships, as opposed to traditional employment, given that, in certain situations, this may shift liability for misconduct to the contracting party.

***Review insurance coverage.***

Confirm that your insurance policies adequately cover claims that are related to sexual misconduct, and ensure that you have a clear understanding of each policy's scope, exclusions, coverage limits, notice requirements, and any conditions affecting the duty to defend or indemnify.

***Enhance hiring practices and policy enforcement.***

Implement background checks and verify references, particularly for roles that involve power imbalances or contact with vulnerable populations.

Of equal importance, consistently enforce workplace policies through training, monitoring, prompt investigation of complaints and appropriate disciplinary action to reinforce a zero-tolerance approach.

***Improve surveillance and documentation practices.***

Where appropriate and legally permissible, enhance video surveillance in high-risk areas such as entrances, common spaces and areas with minors.

Further, ensure that footage is reviewed and securely stored for a sufficient duration in order to aid in internal investigations or any future litigation defense.

***Set aside contingency funds for legal challenges.***

Allocate dedicated funds to address potential legal exposure arising from sexual misconduct allegations, including for defense costs, settlements and judgments.

**Conclusion**

The special rule represents a significant and controversial shift in the vicarious liability doctrine, one that could materially increase employers' exposure in industries where employees work closely with particularly vulnerable individuals.

If adopted by the courts, it would narrow traditional defenses and strictly impose liability based on the nature of the employment relationship, rather than an employer's negligence.

It will be essential for employers to understand the power dynamics that are inherent in their operations, to strengthen safeguards around high-risk roles, and to ensure that contractual, insurance and policy frameworks are aligned to mitigate this expanded risk.

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