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EMPLOYMENT LAW STRATEGIST

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Workplace Violence

By Daniel J. McGravey and Amy C. Lachowicz

According to the Occupational Safety and Health Administration (OSHA), approximately 2 million employees are victims of workplace violence each year. Eighteen percent of violent crimes are committed at the workplace, and roughly 800 workplace homicides occur each year. Between January 2009 and July 2015, there were 133 mass shootings in the workplace and shootings account for 78% of all workplace homicides. Violence in the workplace must be a top concern for employers, as no organization is immune from workplace violence and no organization can completely prevent it. As tragic events like the December 2015 San Bernardino Inland Regional Center shooting massacre, which occurred at a holiday party, illustrate — workplace violence can occur at any place and any time.

Definition, Causes and Costs

Workplace violence includes verbal and written threats (direct or indirect) and threatening body language, harassment, stalking, intimidation or other threatening disruptive behavior that occurs at the worksite, including physical assaults. Threats can be delivered in person, or through letters, phone calls, texts, social media or e-mail. Workplace violence comes from both internal sources, including supervisors, co-workers, contractors, vendors and service providers, as well as external sources, including applicants, customers, criminals, former employees, present and past friends, and family members.

The costs to employers from incidents of workplace violence can be both staggering and hard to define. Just one event can have cascading and rippling effects for years. Aside from the immediate and tragic loss of life or physical and psychological repercussions felt by the victim and family, friends and co-workers, there will likely be a loss of productivity and

employee morale will undoubtedly suffer. The harm to morale and the increase in anxiety, stress and grief is difficult to measure, but nonetheless very real.

Other consequential damages may include the diversion of management resources, increased security costs, and increased workers' compensation and personnel costs. On top of these expenditures and the amorphous reputational harm sure to be suffered, employers may also face expensive legal liabilities for their acts or omissions.

Federal Law

There is no federal law establishing a duty to prevent workplace violence against employees. However, the Occupational and Safety Health Act (the OSH Act, administered by OSHA), which applies to almost all employers, requires a company to provide employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. Section 654(a)(1)). This so-called general duty clause is interpreted by OSHA to mean that an employer has a legal obligation to provide a safe workplace. An employer is on notice of the risk of violence and may be required to implement a workplace violence prevention program if the company has experienced acts of workplace violence; or becomes aware of threats, intimidation or other potential indicators that show the potential for violence in the workplace exists or has the potential to exist.

OSHA may issue citations to employers that fail to provide adequate safeguards against workplace violence. To cite an employer for violating the general duty clause, the secretary of the Department of Labor (DOL) must prove that: 1) the employer failed to keep the workplace free from a hazard that employees were exposed to; 2) the hazard is recognized; 3) the hazard was likely to cause death or serious physical injury; and 4) there was a feasible and economically viable way to correct the hazard. For example, OSHA may cite hospitals where patients continue to assault staff despite worker complaints.

How to Prevent Employer Liability

Employers may face liability for workplace violence under common-law theories as well. If an employer fails to exercise reasonable care over employees to prevent foreseeable injuries, that employer may face liability. However, what is foreseeable has spurred much discussion and controversy. An employer could be liable for negligent hiring if it knew or should have known that an employee was dangerous or unfit to perform his or her duties. Arguably, an employer could be negligent by failing to conduct a basic background check that would have disclosed a violent history. Similarly, after an employer has actual knowledge of an employee's violent behavior, that employer may face liability for negligently supervising or retaining the employee if the employer fails to take reasonable safety precautions and an employee, customer or vendor is injured.

Where an employee injures another employee, the employer's exposure may be limited by workers' compensation law. If an employee is injured in an assault that is related to the employment, the employee may be limited to workers' compensation benefits, and prevented from arguing a common-law negligence theory against the employer. However, if a clearly private dispute manifests itself in the workplace, the employee may be able to pursue a common-law negligence claim. Or, a worker injured by violence may be able to avoid the exclusivity of workers' compensation law by arguing that there was a known or suspected danger and the employer's failure to prevent the violence was intentional.

Workers' compensation law does not limit a third party's (for example, a customer or vendor) negligence claims under a theory of negligent hiring, supervision or retention. Recovery under these theories would include the difficult-to-measure "pain and suffering" component.

The prudent employer and counsel should take several steps to minimize the dramatic impact and effect of workplace violence.

Zero Tolerance Policy

Employers should implement and publish a zero tolerance policy toward aggressive or violent behavior in the workplace. While no policy can guarantee safety, it can be effective in reducing violence and is essential to the company's defense if violence does occur. Any workplace-violence policy must cover all employees, patients, clients, visitors, contractors and anyone else who may come into contact with company personnel. The policy should articulate that company resources may not be used to threaten, stalk, or harass anyone at or outside of the workplace. The policy should require the immediate reporting of indirect or direct threats of violence and promise safety to those making the report without fear of reprisal or retaliation.

Employees should be required to promptly inform the employer of any protective or restraining order listing the workplace as a protected area. The company should support victims of intimate or direct partner threats or violence with referral to the company's employee assistance program. A comprehensive policy will provide for the prompt and thorough investigation of all reports and confidentiality (to the extent possible) for the employee making the report. Witnesses, informants and targets should be interviewed immediately, reports should be memorialized, and actions taken without delay.

Disciplinary procedures should allow for the immediate suspension of employees suspected of workplace violence pending the outcome of the investigation and disciplinary action up to and including discharge for violation of the policy. Tip lines to report — even anonymously — suspicious behavior or threats can be effective in disrupting workplace violence. Obviously, any policy must be enforced consistently.

Manager Training

Supervisors and managers should be trained to identify behavioral characteristics that are warning signs for workplace violence, including employees who do not accept criticism and express anger and blame others for their own poor performance; unexplained increase in absenteeism; increased and severe mood swings and noticeably unstable or emotional responses; frequent loss of temper; personality conflicts with co-workers; increasing dialog about problems at home, including marital, family or financial struggles; increase in unsolicited comments about violence, firearms and violent crimes; increased use of alcohol or illegal drugs; exhibiting signs of depression and withdrawal; and experiencing a traumatic event.

Supervisors and managers should also be taught conflict resolution skills.

Background Checks

Performing background checks to identify someone with a history of violence or behavior associated with a heightened potential for violence can be effective in avoiding workplace violence altogether.

Reference Checks

Employment references should be required, methodically checked by the employer, and documented in the applicant's file.

Interviews

Interviewing skills should be refined to avoid hiring violent workers in the first place. The candidate's employment application should be carefully reviewed and any gaps in employment history, or frequent job changes, should be thoroughly evaluated. These factors could be probative of violent tendencies.

Crisis Management Plan

Employers should develop a workplace safety plan in advance to respond to an observed or reported event of workplace violence. Further, increasing physical security by requiring photo identification, coded card keys and guard services should be considered. Employers may entertain inviting a law enforcement officer to tour their physical facility and offer suggestions.

How to Conduct A Termination

A soon-to-be discharged employee should not be antagonized, and the employment termination should be conducted at the end of the day with access to the physical building

being cut off immediately. The discharged employee should be given a brief chance to “vent” before being escorted back to his or her desk to quickly retrieve personal items with appropriate security — or immediately escorted from the building with the return of personal items being arranged later.

Employee Assistance Programs

Employee assistance programs — offered as a benefit to employment — can allow employees a chance to discuss their problems privately and confidentially and to obtain counseling.

Conclusion

Employers must prepare for workplace violence by taking measured steps to diffuse the likelihood of violence occurring. Often, simple but thoughtful planning and an investment in preventative measures can help avoid litigation exposure and foster a safer workplace for employees.

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