Workplace Violence

by PLC Labor & Employment

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A Note describing the legal issues related to workplace violence. This Note addresses a private employer's duty to provide a safe working environment under the Occupational Safety and Health Act (OSH Act), liability for workplace violence under workers' compensation law and negligence theory, granting medical leave to workplace violence victims, employment references for employees with known violent tendencies and laws to consider when taking steps to minimize workplace violence, including the direct threat defense under the Americans with Disabilities Act (ADA).

According to the **Occupational Safety and Health Administration** (OSHA), two million employees are victims of workplace violence each year. Workplace violence is a violent act (physical assault or the threat of assault) directed toward a person at work or on duty. Workplace violence includes:

- Threats, such as:
  - verbal threats;
  - written threats; and

    - threatening body language.

- Physical assaults.
- Aggravated assaults, including rape and homicide.

Incidents of workplace violence can be divided into four categories:

- An offense by a stranger to the employer or its employees.
- An offense by a customer or client of the employer.
- An offense by an employee or former employee of the employer.
- An offense by an individual who has a personal relationship with an employee who is the intended victim (such as a domestic dispute).

This Note provides an overview of an employer's duty to provide a safe working environment, and in particular looks at:

- Various laws that can impose liability after an incident of workplace violence.
- Granting leave to victims of workplace violence.
- Employment references for employees with known violent tendencies.
- Laws to consider when taking steps to minimize workplace violence.

Unionized employers should be aware that this Note does not address the **National Labor Relations Act** (NLRA) or the potential impact of **collective bargaining** on employers' attempts to minimize workplace violence. Unionized employers must consult the NLRA and any applicable **collective bargaining agreement**.

Occupational Safety and Health Act Obligations

There is no federal law establishing a duty to prevent workplace violence against employees. However, an employer has a duty to provide a safe working environment under the federal **Occupational Safety and Health Act** (OSH Act), which regulates workplace health and safety (for more information, see *Practice Note, Health and Safety in the Workplace: Overview*). The OSH Act applies to employers either directly through federal OSHA or through an OSHA-approved state program. OSHA issues regulations under the OSH Act and enforces an employer's duties under the Act by:

- Conducting compliance inspections.
- Issuing citations for violations.

The OSH Act spells out an employer's duty to provide a safe working environment in two clauses:

- **Section 5(a)(1) (General Duty Clause).** This requires an employer to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees (*29 U.S.C. § 654(a)(1)*).
- **Section 5(a)(2).** This requires an employer to comply with occupational safety and health standards under the OSH Act (*29 U.S.C. § 654(a)(2)*).

OSHA has not issued any formal standards on workplace violence. However, OSHA has issued:

- Non-binding guidelines and recommendations for preventing workplace violence (see *OSHA Guidelines and Recommendations for Workplace Violence Prevention*).
- A directive on enforcement procedures for OSHA field offices to follow when investigating or inspecting workplace violence incidents (see *OSHA Directive on Investigating or Inspecting Workplace Violence Incidents*).

The General Duty Clause and Workplace Violence

Employers are not strictly liable for workplace violence under the OSH Act (see *Secretary of Labor v. Megawest Financial, Inc., 1995 WL 383233 (June 19, 1995)*) and OSHA has not issued any formal standards on workplace violence. However, OSHA can issue citations to employers for violations of the general duty clause (*29 U.S.C. § 654(a)(1)*).

To cite an employer for violating the general duty clause, the Secretary of the **Department of Labor** must prove all of the following:

- The employer failed to keep the workplace free from a hazard that employees were exposed to.
- The hazard is recognized.
- The hazard was likely to cause death or serious physical harm.
- There was a feasible and economically viable way to correct the hazard.

For more information, see *OSHA: Field Operations Manual*.

Whether an employer is liable under the general duty clause for an incident of workplace violence depends on the facts. For example, an employer may be required to take steps to minimize the risk of workplace violence if the risk of violence is a recognized hazard in that industry (such as the health care industry). For more information, see *OSHA Standard Interpretation, Schuller (12-10-92)*; *Melekos, 2006 WL 4093048 (09-13-06)*.

OSHA may issue citations to employers it finds failed to provide employees with adequate safeguards against workplace violence. For example:

- After a worker's death, OSHA cited a substance abuse treatment facility for not providing training to staff on how to respond to a threat or physical assault and for not having adequate measures to protect the staff from physical assault (see *OSHA cites The Renaissance Project in Ellenville, New York, 2011 WL 1319136 (04-07-11)*).
- After worker complaints, OSHA cited a psychiatric hospital after an inspection identified numerous instances of violent patients assaulting staff (see *OSHA cites The Acadia Hospital in Bangor, Maine, 2011 WL 262990 (01-28-11)*).
- After worker complaints, OSHA cited a hospital after an inspection showed the hospital's workplace violence program was incomplete and ineffective in preventing numerous assaults by violent patients (see *OSHA cites Danbury Hospital in Danbury, Connecticut, 2010 WL 2796444 (07-16-10)*).

For more information, see *Practice Note, Health and Safety in the Workplace: Overview: OSHA Citations* and *Employer Response*.

Unlike with OSHA standards, rules and orders, there is no federal criminal penalty for violating OSHA's general duty clause.

OSHA Guidelines and Recommendations for Workplace Violence Prevention

In 1996 OSHA issued general guidance to employers on workplace violence prevention. An employer is not required to comply with this guidance; instead, OSHA's guidelines are meant to be a resource for employers. OSHA explains:

- The OSHA 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 employer:
  - 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 later created guidelines and recommendations for preventing workplace violence in the following high risk industries:

- *Health care and social services*.
- *Late-night retail establishments*.
- *Taxi and car hire*.

OSHA Recommendations for Key Elements of an Effective Workplace Violence Prevention Plan

Employers are not required to comply with OSHA's guidelines and recommendations, but employers that follow them can use their compliance to defend against a claim that they breached the general duty clause.

OSHA recommends five key elements of effective workplace violence prevention:

- Management commitment and employee involvement.
- A worksite analysis of security.
- Hazard prevention and control.
- Safety and health training for employees and management.
- Recordkeeping and workplace violence prevention program evaluation.

(See *OSHA: Workplace Violence*.)

In particular, OSHA recommends employers institute several management steps, including, for example:

- Allocating sufficient resources to prevent violence.
- Developing a system of accountability for implementing a violence prevention program (such as creating a workplace safety team).
- Creating a zero-tolerance policy for workplace violence.

(See *OSHA: Workplace Violence*.)

OSHA created workplace violence training prevention programs for industries considered at high risk for workplace violence (see *OSHA: Health Care and Social Service Workers* and *OSHA: Late-night Retail Establishments*).

Employers should be aware that state law may impose requirements for workplace violence prevention. Some states require certain types of employers to take steps to prevent workplace violence. For example:

- A Connecticut law requires covered health care providers to establish a workplace safety committee, conduct a risk assessment, maintain records of incidents of workplace violence and develop a workplace violence prevention and response plan (*2011 CT S.B. 970 (NS)*).
- A Washington statute requires health care providers to develop a workplace violence prevention plan and provide workplace violence prevention training (*Wash. Rev. Code. §§ 49.19.005-49.19.070*). Employers that do not comply with Washington's law may be subject to penalties (*Wash. Rev. Code § 49.19.050*).
- Florida's Convenience Business Security Act requires convenience stores to take certain safety steps, including installing safety and security devices such as cameras and drop safes (*Fla. Stat. § 812.173*). Convenience businesses that violate the

law may receive a notice of violation from the Attorney General (*Fla. Stat. § 812.175*). Employers must provide proof of compliance to the Attorney General within 30 days after the notice of violation. If the violation continues, the Attorney General can impose a fine (*Fla. Stat. § 812.175*).

OSHA Directive on Investigating and Inspecting Workplace Violence Incidents

In September 2011 OHSA issued a directive for OSHA field offices that establishes procedures for reviewing incidents of workplace violence especially at worksites in industries considered at high risk for workplace violence incidents (see *OSHA: Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents*). In particular, the directive provides:

- Criteria for initiating inspections.
- Procedures for conducting inspections.
- Guidance for issuing citations or notices for workplace violence hazards. The directive includes the types of evidence necessary to establish each element of a general duty clause violation (see *The General Duty Clause and Workplace Violence*).

(See *OSHA: Enforcement Procedures for Investigating or Inspecting Workplace Violence*.)

For more information about OSHA inspections, see *Practice Note, Handling an OSHA Inspection* and *OSHA Inspection Checklist*.

Workers' Compensation and Workplace Violence

Typically, an employee injured by workplace violence cannot bring a claim against his employer based on a violation of the general duty clause of the OSH Act (see *General Duty Clause and Workplace Violence*). Instead, an injured employee's remedy will be under workers' compensation law (*29 U.S.C. § 653(b)(4)*).

Although, employers' obligations and employees' rights to receive workers' compensation are largely governed by state law, there are similarities among many states. Generally, all employees are covered by workers' compensation laws and independent contractors are not. However, some states exclude certain workers from coverage. For more information, see *Practice Note, Workers' Compensation: Common Questions: Which Employees Are Covered by Workers' Compensation Laws?*.

Employees can typically receive workers' compensation for injuries arising out of and in the course of their employment (compensable injuries). Therefore, an employee injured at the workplace in a workplace violence incident could be eligible for workers' compensation benefits. For more information about which injuries are compensable, see *Practice Note, Workers' Compensation: Common Questions: Which Injuries Are Compensable?*.

Workers' Compensation Exclusivity

In general, an employee receiving workers' compensation benefits cannot also bring a claim for negligence against his employer (see *Negligence Claims From Third-party Victims of Workplace Violence*). The exclusion of other remedies is called the exclusivity provision. Typically, an employee injured by workplace violence may be able to avoid the exclusivity provision if one of the following exceptions is recognized under state law:

- **Intentional tort theory.** If there was a known or suspected danger, an injured employee can argue that an employer's failure to prevent workplace violence was intentional and he should not be limited to workers' compensation benefits (for an example of a court's discussion of the intentional tort exception, see *Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 106, 639 A.2d 507 (1994)*).
- **Dual capacity doctrine.** If the employer was also the lessor of property, an employee's recovery may not be limited to workers' compensation under the dual capacity doctrine if the employer's status as lessor is unrelated to its status as employer (for an example of a court's discussion of the dual capacity exception, see *Sharp v. Gallagher, 95 Ill.2d 322, 328, 447 N.E.2d 786 (1983)*).

Negligence Claims from Third-party Victims of Workplace Violence

An injured employee may not be able to bring a negligence action against his employer unless an exception to the exclusivity provision of workers' compensation law applies (see *Workers' Compensation Exclusivity*). However, workers' compensation law does not limit a third party's (for example, a customer or vendor) negligence claims. In general, for an employer to be liable under a negligence theory, the third party (or injured employee if workers' compensation exclusivity does not apply) must demonstrate all four elements of common law negligence:

- The existence of a duty of care. Under common law, employers:
  - have a duty to protect employees from people with a known dangerous propensity (see *Roberts v. Circuit-Wise, Inc., 142 F. Supp. 2d 211, 214 (D.Conn. 2001)*); and
  - owe a duty of care to third parties the employees interact with in their employment (see *Tyus v. Booth, 64 Mich.App. 88, 92, 235 N.W.2d. 69 (1975)*).
- Breach of the duty. States differ as to whether violation of the OSH Act is admissible as evidence of negligence. However, most courts have held that violation of an OSHA standard is evidence of negligence, not negligence per se (see, for example, *Elliott v. S.D. Warren Co., 134 F. 3d 1, 4 (1st Cir. 1998)*).
- Causation.
- Harm.

An employer can be liable under several negligence theories if the employer breaches its duty of care (see *Negligent Hiring* and *Negligent Supervision and Retention*). Traditional defenses to negligence include:

- Unforseeable event.
- Superceding cause.

For example, an employer may argue that an individual's violent act was a superceding cause that negates the employer's negligence as the proximate cause of the injured party's injuries (see, for example, *McDonald's Corp. v. Ogborn, 309 S.W.3d 274, 292 (Ky. Ct. of Appeals 2009)*).

Negligent Hiring

Liability for negligent hiring is based on state law. In general, a claim of negligent hiring is based on an employer's breach of a common law or statutory duty to protect employees and customers from injuries caused by an employee whom the employer knows or should know poses a risk of harm to others (see *Restatement (Third) of Agency § 7.05 (2006)*).

Most states recognize negligent hiring claims. Generally, for an employer to be liable for negligent hiring, a plaintiff must show all of the following:

- The existence of an employment relationship.
- An employee is incompetent or unfit to perform the job.
- The employer had actual or constructive knowledge of the employee's incompetence.
- The employer's act or failure to act caused the plaintiff's injury.
- The negligent hiring was the proximate cause of the plaintiff's injury.
- Actual damage or harm resulted from the employer's act or failure to act.

(See, for example, *Linder v. Am. Natl. Ins. Co., 155 Ohio App.3d 30, 39, 798 N.E.2d 1190 (2003)*.)

For more information, see *Practice Note, Negligent Hiring, Retention and Supervision: Negligent Hiring*.

What Steps Can Employers Take to Minimize Negligent Hiring Claims?

An employer that neglects to check an applicant's references or contact the applicant's former employers may be liable for negligent hiring if the reference check would have revealed the applicant had a violent propensity. Employers must be mindful of federal and state anti-discrimination laws when screening for applicants who may pose a risk of violence (for

more information, see *Practice Notes, Discrimination: Overview* and *Recruiting and Interviewing: Minimizing Legal Risk*). In particular, employers should consider the following:

- **Inquire about gaps in history or frequent job changes.** Employers should review an applicant's employment application carefully and ask questions about any gaps in employment history. A gap in history could reveal an applicant was serving time for committing a violent crime.
- **Inquire into criminal records, if permitted by law.** **Equal Employment Opportunity Commission** (EEOC) guidance cautions against the use of arrest records in employment decisions under almost all circumstances. Although employers have greater leeway to consider conviction records, they should be familiar with the constraints outlined in the EEOC guidance, see *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. For more information, see *Practice Note, Background Checks and References: Criminal Records*. Some state laws impose additional requirements on access to and use of criminal background check information for employment purposes. For more information on state law requirements, see *Background Check Laws: State Q&A Tool*.
- **Obtain employment references.** It is good practice to obtain employment references from an applicant and document the information received. For more information about employment references, see *Practice Note, Background Checks and References: Employment References*.

Employers must use background checks and references appropriately, or they can face substantial legal and financial risks (for example, costly litigation or financial penalties). For more information about the types of informational inquiries employers can make see *Practice Note, Background Checks and References: What Types of Informational Inquiries Can Be Legally Made?*. Employers using a third-party service provider (also known as a consumer reporting agency) must follow the rules established by the **Fair Credit Reporting Act** (FCRA) (*15 U.S.C. §§ 1681-1681(x)*). For more information about an employer's obligations under FCRA, see *Practice Note, Background Checks and References: The Fair Credit Reporting Act and the Use of Third-party Providers*. For state law requirements, see *Background Check Laws: State Q&A Tool: Question 5* and *Hiring Requirements: State Q&A Tool*.

Excluding an Applicant Because of Safety Concerns (Direct Threat Defense under the Americans with Disabilities Act)

An employer may refuse to hire an applicant if the applicant poses a **direct threat** to the health or safety of himself, other people in the workplace or third parties (*42 U.S.C. § 12113(b)*). Employers can take advantage of the direct threat defense under the **Americans with Disabilities Act of 1990** (ADA) only if the individual poses a significant risk that cannot be reduced or eliminated by **reasonable accommodation**.

The assessment of whether a person poses a direct threat is based on reasonable medical judgment that may rely on either:

- Current medical knowledge.

- Best available objective evidence.

(*29 C.F.R. § 1630.2(r)*.)

To assess whether a person poses a direct threat, an employer should consider:

- The duration of the risk.
- The nature and severity of the potential harm.
- The likelihood that the potential harm will occur.
- How soon the potential harm may occur.

(*29 C.F.R. § 1630.2(r)*.)

For more information, see *Practice Note, Disability Accommodation under the ADA: Direct Threat*.

Negligent Supervision and Retention

Liability for negligent supervision and retention is based on state law. In general, an employer is liable for harm if it is negligent in any of the following activities:

- Selecting employees (see *Negligent Hiring*).
- Supervising employees.
- Retaining employees.

(*Restatement (Third) of Agency § 7.05 (2006)*.)

For example, if an employee commits an act against another employee after the employer was aware of the risk of danger, the injured employee may claim that the employer did not exercise reasonable care in supervising (see for example, *McDonald's Corp. v. Ogborn, 309 S.W.3d 274, 291 (Ky. Ct. of Appeals 2009)*).

To avoid liability for negligent supervision or negligent retention, an employer should:

- Draft and maintain a workplace violence policy that:
  - informs employees that threats or violent acts at the workplace are prohibited;
  - sets procedures for employees to report threats or violent acts; and
  - establishes a disciplinary procedure for employees who violate the policy.

For a sample policy, see *Standard Document, Workplace Violence Policy*.

- Promptly investigate any complaints of workplace violence and consider discipline, up to and including termination, if the complaint is substantiated.
- Draft and maintain a workplace safety plan and implement any necessary precautions if a threat against an employee is substantiated.

For more information, see *Practice Note, Negligent Hiring, Retention and Supervision: Preventative Measures During The Employment Relationship* and *Minimizing Workplace Violence Checklist*.

Employee Misconduct and Americans with Disabilities Act Considerations

Employers are permitted to implement workplace violence policies that include prohibitions on:

- Workplace violence.
- Threats of violence.

However, employers should exercise caution before disciplining or terminating an employee who engages in misconduct if he is suspected of having a mental disorder. The ADA protects qualified employees who have a serious mental or physical disorder (*29 C.F.R. § 1630.2(m)*). According to the EEOC, an employer can discipline an employee for violating a workplace conduct standard that is job-related and consistent with business necessity even if the misconduct was caused by a disability (see *EEOC: Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*). However, some courts have held an employer may be required to provide reasonable accommodation to an employee whose misconduct is caused by a disability unless it would be an undue hardship (see, for example, *Humphrey v. Memorial Hospitals Ass'n, 239 F. 3d 1128, 1139-40 (9th Cir. 2001)*).

If an employee's disability poses a direct threat to the health or safety of himself, other people in the workplace or third parties, an employer may be able to take advantage of the direct threat defense under the ADA if there is no accommodation available to negate the threat (see *Excluding an Applicant Because of Safety Concerns (Direct Threat Defense under the Americans with Disabilities Act)*). A speculative or remote risk is not sufficient (see *29 C.F.R. § 1630.2(r)*). For more information, see *Practice Notes, Disability Accommodation under the ADA: Direct Threat* and *Discrimination: Overview: ADA*.

Voluntary Assumption of Duty to Protect

If an employer contracts to provide security at the workplace or implements security measures, the employer may have assumed a duty to protect employees from criminal acts by third parties. Once an employer assumes a duty to protect, the employer must exercise the duty with reasonable care. An employer can be liable for physical harm resulting from the failure to exercise reasonable care if:

- The employer's failure to exercise reasonable care increases the risk of harm.
- The employer has assumed a duty to perform that is owed by another party.
- Harm is suffered because a person relied on the employer assuming the duty.

(*Restatement (Second) of Torts § 324(A) (1965)*.)

Employers that make statements in their handbooks about ensuring a safe workplace may have assumed a voluntary duty to protect (see, for example, *Vaughn v. Granite City Steel Division of National Steel Corp., 576 N.E.2d 874, 880 (Ill. App. Ct. 1991)*). Employers that make affirmative statements about workplace safety in their handbooks or to employees should be sure they have taken proactive steps, such as conducting a workplace safety analysis and implementing workplace safety policies and procedures. For more information, see *Minimizing Workplace Violence Checklist*.

Employment References for Employees with Known Violent Tendencies

An employer that is contacted for a reference regarding a past or present employee who has violent tendencies should check relevant state law. For more information, see *Background Check Laws: State Q&A Tool: Question 12*. An employer that gives a negative job reference may be sued for defamation by a former employee who does not receive a job offer if both:

- The employer warns a prospective employer about an employee with violent tendencies.
- The employer was mistaken about the individual (most courts recognize truth as a defense to a defamation action).

However, an employer that gives a neutral reference regarding an employee who poses a known danger can be liable for failure to warn (or negligent referral or misrepresentation, depending on the relevant state law) if an organization relies on the reference and hires an individual who then is involved in a violent incident.

For example, in *Jerner v. Allstate Insurance Company*, Paul Calden was employed by Allstate Insurance Company (*94-03822, 650 So. 2d 997 (Fla. Dist. Ct. App. 1995)*). During his employment with Allstate, Mr. Calden was observed behaving strangely, including making death threats to co-workers. Allstate terminated Mr. Calden after he was found carrying a gun to the workplace in his briefcase. Allstate provided Mr. Calden with a neutral letter of reference stating that he had voluntarily resigned because his position was eliminated in a restructuring. Firemen's Fund hired Mr. Calden based in part on Allstate's neutral letter of reference. After Firemen's Fund terminated him, Mr. Calden shot five supervisors who were involved in his firing, killing three of them. Family members of the victims sued Allstate for failing to disclose his true work history. The Florida appellate court held that there could be a cause of action against Allstate for misrepresentation. Allstate ultimately settled the case for an undisclosed sum of money.

Employers can take certain steps to minimize the risk of defamation or negligent referral claims, including:

- Drafting and maintaining an employment reference policy. For a sample policy, see *Standard Document, Employment Reference Policy*.
- Centralizing requests for references (for example, with the human resources department).
- Training employees responsible for giving references about the risk of defamation claims by former employees.
- Avoiding subjective statements or opinions based on dislike of the employee (for example, saying the former employee was a "terrible person") and providing information that is supported by documentation.
- Generally employers have a qualified privilege to communicate information about employees if the statement was made in good faith and communicated to those who need to know, such as prospective employers (see, for example, *Chapman v. Ebeling, 945 So. 2d 222, 228 (La. App. 2 Cir. 2006)*), but employers must check relevant state law. For more information, see *Background Check Laws: State Q&A Tool: Question 12*.

Granting Leave to Victims of Workplace Violence

Employers should be aware that federal and state employee leave laws may entitle workplace violence victims to take time away from work without penalty. The **Family and Medical Leave Act of 1993** (FMLA) gives covered employees the right to take an unpaid leave of absence from work for a serious health condition that prevents the employee from performing the essential functions of his job (*29 U.S.C. § 2612(a)(1)(D)*). A serious health condition is an illness, impairment or a physical or mental condition that involves:

- Inpatient care in a hospital, hospice or residential medical facility.
- Continuing treatment by a healthcare provider.

(*29 U.S.C. § 2611(1)*.)

If an employee has a serious health condition resulting from workplace violence, the employee may be eligible to take unpaid time off for medical help (*29 U.S.C. § 2612(a)(1)(D)*). For more information about the FMLA, see *Practice Note, Family and Medical Leave Act (FMLA) Basics: Employer's Notice Obligations* and *Employee Rights During and After FMLA Leave*.

In addition, some states have laws that allow domestic violence or crime victims leave from work to appear in court or obtain medical care or counseling. State law may also protect workplace violence victims by prohibiting employers from firing or retaliating against employees who take time off from work to participate in judicial proceedings. For more information, see *Leave Laws: State Q&A Tool*.