



2018 Annual Conference
March 14-16, 2018
Houston, TX

The Rise in Workplace Violence: Practical Tips and Guidance to Avoid Devastating Consequences and Reduce Liability

Effective Workplace Violence Prevention Programs

Workplace violence has been defined by the Occupational Safety & Health Administration (OSHA) as any act or threat of physical violence, harassment, intimidation or other disruptive behavior, including from verbal and written threats, stalking, threatening bodily language and physical assaults directed toward a person at work or on duty. While federal law does not provide a duty for employers to prevent workplace violence against employees, the OSHA Act provides that employers have a duty to provide a safe working environment, and it specifically requires employers to provide a workplace free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to its employees.

Workplace violence has tripled over the last decade. According to OSHA, two million employees are victims of workplace violence each year. Employers can take steps to minimize the impact and effect of workplace violence, including instituting a zero-tolerance policy, providing guidance and training for supervisors and employees, effectively securing the work environment, and implementing a workplace violence prevention program.

The sources of workplace violence are both external and internal. The National Institute for Occupational Safety and Health (NIOSH) has divided workplace violence into four categories:

1. Criminal intent – the perpetrator has no legitimate relationship to the business or its employee(s).
2. Customer/client – the perpetrator has a legitimate relationship with the business (e.g. customer, client, patient, student, inmate) and becomes violent while being served.
3. Worker-on-worker – the perpetrator is an employee or past employee of the business who attacks or threatens other employees or past employees in the workplace.
4. Personal relationship – the perpetrator is not an employee or former employee of the affected workplace but has a personal relationship with the intended victim.

Due to the rise in workplace violence, it is imperative that employers take a proactive approach to control these risks and the associated exposure. When promoting workplace violence prevention, it is important to not only consider the direct consequences of workplace violence (tragic loss of life or serious injuries, physical and psychological impact felt by the victim, family, friends and co-workers, and potential lawsuits), but also the indirect consequences (interrupted operations, loss of productivity, rehiring and retraining of employees, loss of morale and employee turnover).

Employers should conduct internal security risk assessments annually and should also consider retaining an outside security expert, depending upon the industry or business. To reduce the risk and to maintain a safe workplace environment, employers should improve physical security of the workplace through the use of strategically placed cameras, controlled exits and entries, ample lighting, silent alarms, security guards, trained supervisors and employees, and a properly instituted workplace violence policy that identifies a course of action to be taken before law enforcement personnel arrive at the work site. A post-trauma plan should also be incorporated into the workplace violence prevention program so that all employees feel safe and have access to effective counseling and other grief assistance programs.

People Safety is an end to end strategy that is driven by "care" principles. It reflects any organization attitude toward team members and customer experience, and is an essential component of "Brand Value." It is a strategy driven by shared commitment to everyone's safety, starting from the first day at work via training, orientation, procedures, resources and support system, and shows itself as a culture of "keeping each other safe."

Defending Injuries Caused by Violence in the Workplace

The role of the workers' compensation system in workplace violence varies from state to state. Determining whether an incident arises out of the course and scope of employment is fact specific and is the exclusive remedy precluding an employee from filing other actions against the employer. However, there are exceptions to the exclusivity rule, including when the injury is intentionally self-inflicted, arises out of personal animosity or occurs as a result of the violation of a law. In all situations of workers' compensation violence, prompt, diligent and thorough investigation is critical, including establishing an effective and informed investigative team.

Generally, injuries that arise out of and during the course and scope of employment are compensable. In most states, it is the injured worker's burden to prove that he or she has suffered a compensable work injury, i.e., an injury occurring in the course and scope of employment and arising out of the employment. The fact that an injury occurs in the workplace does not automatically result in an award of workers' compensation benefits. Like many areas of the law, when an injury occurs at work, its compensability depends on the specific facts of each case.

A prompt, diligent and thorough investigation is critical to determine whether an injury is compensable and to develop defenses to the potential claim. A key element in an investigation is assessing the motivation of the individuals involved and whether the motivation is employment-related, personal to the employee, or neutral to the employee and his/her

employment. Identify the “who, what, why and where” facts of the incident. Gather cell phone surveillance and photos, secure statements, and obtain all devices, objects or other weapons used in the incident. This investigation should accurately determine whether the employee was at a place he or she might reasonably be expected to be while performing job duties and whether he or she was performing those duties or furthering the interests of the employer’s business when the incident occurred.

Liability Exposure and Third-Party Litigation

Now let’s look at other potential claims stemming from workplace violence incidents. The problem is real and continues to grow. Who is responsible for the consequences of violence in the workplace? Do employers have a duty to keep their employees and others in the workplace safe? Employers face a liability threat, which may be the most effective strategy for employees, but especially for third-party plaintiffs. Lawsuits are often brought by members of the public who are harmed by workplace violence. Several theories are available from tort law to regulatory law to hold employers accountable for workplace violence. Employers should take the threat of third-party litigation seriously, and preventative measures should be taken to curb behaviors and maintain a safer workplace environment.

Typically, an injured employee cannot allege a negligence claim against his or employer unless there is an exception to the exclusivity provision under workers’ compensation law (Work Comp Bar). This does not preclude a third party from alleging negligence. Employers are subject to claims for negligence from third parties, however, they must demonstrate the four elements of negligence: (1) duty of care under common law, (2) breach of duty, (3) proximate cause and (4) resulting harm. Did the employer (business) have a duty to protect employees from people with known dangerous tendencies, and did they owe duty of care to a third party within their premises? Do OSHA violations create evidence of negligence? Employers are held liable under multiple negligence theories if these duties are breached, i.e., negligent hiring and/or supervision. Common defenses to these theories are unforeseeable events and superseding causes. An individual’s violence was a superseding cause that negates an employer’s negligence as the proximate cause of a third party’s injuries.

Negligent hiring is generally based on an employer’s breach of a common law and statutory duty to protect employees and customers from an employee they know or should have known posed a risk to others. The injured party must show several things. For example, that there was an existence of an employment relationship, that an employee was incompetent or unfit for the job, that the employer had actual or constructive notice of the incompetence, that negligent hiring was the proximate cause of the injury, that actual damage resulted from an employer’s failure to act, etc. For an employer to be found liable for negligent supervision, they need to have erred in its selection of employees, supervising employees and retaining employees. An employer who is aware there is a risk of danger and does not exercise reasonable care in supervision could be found liable.

To avoid liability for negligent supervision, hiring and retention, an employer should maintain a workplace violence policy and establish procedures for those employees who violate the policy. Prompt investigation of any complaints is necessary, and discipline should be executed as appropriate if a complaint is substantiated.

If an employer assumes a duty to protect at the workplace, i.e., by providing security or implementing measures to maintain security, they could be deemed to have assumed a duty to protect employees, along with third parties, from injury and harm. A duty of reasonable care must then be exercised. If not, they may be held liable for physical harm for failing to provide or exercise reasonable care if doing so increased the risk of harm and harm is suffered because the injured party relied on the employer assuming the duty to protect. Making statements in the company handbook ensuring a safe workplace may create a voluntary duty to protect.

Plaintiffs can also sue employers under Agency Law, meaning the employer is automatically responsible for the employee's actions under the respondeat superior principle. So long as the employee's act was committed in the course and scope of employment and the act can be shown to be the cause of the plaintiff's injury, the employer is subject to liability.

As with every investigation, timely and thoroughness are vitally important. Prompt investigations into policy and procedures are crucial to assess potential issues and/or negligence in third-party claims and potential claims from employees outside of the exclusivity remedy doctrine.