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Run, Hide, Fight: Managing the Risk of Workplace Violence

I. Knowing the Issues in Workplace Violence

Understanding Workplace Violence

Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers, and visitors. Homicide is currently the fourth-leading cause of fatal occupational injuries in the United States. According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI), of the 4,679 fatal workplace injuries that occurred in the United States in 2014, 403 were workplace homicides. Those fatalities are included in the almost 1.9 million workplace violent acts that occur annually. However, it manifests itself, workplace violence is a major concern for employers and employees nationwide.

The Law weighs in on Workplace Violence. Federal Rules

Workplace violence acts are governed by Federal law under the Occupational Safety and Health Administration (OSHA) Act. That statute requires that employers provide a workplace that is free of hazards to employees. Although there have been few reported OSHA-based legal claims in this field, it is quite possible that an employee could rely on safety statutes and argue the employer failed to maintain a violence-free workplace. For example, OSHA has developed guidelines and recommendations for taxi and livery drivers, late night retail establishments, health care and hospitals as well as social service workers.

For example, April 29, 2016 The U.S. Department of Labor's OSHA issued one serious and one "other than serious" violations to a residential health care facility for exposing employees to hazards related to workplace violence. The citations follow an October 2015 OSHA investigation by the agency's Omaha Nebraska Area Office that found agitated clients have bitten, scratched, kicked and thrown objects at staff members. The client's aggression exceeded the threshold of training workers had received to deal with potential violent clients and compromised their personal safety and ability to control the situation. A review of injury logs from January 2012 through November 2015, recorded 105 incidents of workplace violence at the facility.

Many of the OSHA guidelines are applicable to other industries as well. Employers may want to consider implementing some or all of OSHA's guidelines as such action may be a defense to potential claims of negligent retention.

State Statutes and Regulations for Workplace Violence

Various states in the US have already or are in the process of adopting workplace violence statutes and regulations. Early legislation to address workplace violence came from New York, California, Minnesota, Washington and Illinois. California's Workplace Violence Safety Act (being updated) is retrospective legislation that gives employers the ability to seek temporary restraining orders against perpetrators of workplace violence on behalf of their employees. The New York Workplace Violence Prevention Act represents legislation that seeks to prevent workplace violence before it occurs. The Illinois' Health Care Workplace Violence Prevention Act is representative of prospective workplace violence legislation that targets the health care industry. Florida's Convenience Business Security Act requires convenience stores to take certain safety steps to prevent violence, including installing safety and security devices such as cameras and drop safes. North Carolina, Massachusetts, and others are moving forward with their workplace violence laws.

In many cases these existing or proposed State laws are targeted at one or two specific industries but a much broader perspective is being discussed by state legislators. Employers will now have to provide detail plans for protecting their employees based on some of the proposed bills being introduced.

II. Identifying Types of Workplace Violence

The Categories

Incidents of workplace violence are routinely divided into four categories. Risk professionals and workers' compensation claims leaders should be able to ascertain these categories.

- An offense by a stranger to the employer or its employees. Many times these are of a criminal intent but not always. Usually the perpetrators are committing a crime and use a deadly weapon to further their cause. These crimes typically include some element of theft. Employees who are most at risk of criminal intent workplace violence are those who exchange cash with customers as part of their jobs, who work at night, or who primarily work alone. Eighty-five percent of all workplace violence homicides fall into this category.
- An offense by a customer or client of the employer. Some of the routine targets of customer/client workplace violence are school teachers, health care workers, social workers, hospitality and public transportation employees.
- An offense by an employee or former employee of the employer. This category of only makes up about seven percent of all workplace violence. Yet this is the type of workplace violence that is most prevalent in the news media. Since these incidents are most likely to involve workplace disputes, managers and supervisors are at a greater risk of being victims of this category of workplace violence.
- An offense by an individual who has a personal relationship with an employee who is the intended victim (such as a domestic dispute). Personal relationship workplace violence occurs when an employee has a personal relationship with the perpetrator of the violence. This category is typified by domestic violence that finds its way into the workplace. Perpetrators of

this type of workplace violence are typically not employees or former employees of the affected workplace. The majority of victims in this category of workplace violence are women.

In recent years, acts of Terrorism have also been identified as workplace violence. The 2015 shootings in San Bernardino, California intersected workplace violence and domestic terrorism. In this specific workplace act of violence, 14 people were killed and 22 others were seriously injured in an attack consisting of a mass shooting and an attempted bombing at the Inland Regional Center in San Bernardino, California. The committers, Syed Rizwan Farook and Tashfeen Malik, targeted their own fellow employees at a San Bernardino County Department of Public Health training event and Christmas party, of about 80 employees, in a rented banquet room. Farook was an American-born U.S. citizen of Pakistani descent, who worked as a San Bernardino health department employee.

The Three Types of Violent Employees or Perpetrators

The majority of acts of workplace violence come from three types of person. Some have a combination of the three but historically the individuals who commit these incidents have at least one of these behaviors.

- **Delusional or Paranoid.** Paranoid delusions may be odd and far-fetched (e.g. extraterrestrials from space are infiltrating the management ranks or are working following the employee home), or could actually be plausible (e.g. supervisors are colluding to assign less competent employees to leadership roles that will cause him or her to not get promoted). Due to this they can be demanding, arrogant, bullying and angry individuals. This may lead to taking action in a negative physical way at work.
- **Disgruntled.** All employees feel unhappy at work at some point. However, the constant disgruntled employee is not collaborative with fellow employees or supervisors, is routinely threatening to quit, demonstrates a negative attitude, has a penchant for bad mouthing the company and supervisors, and is openly passive aggressive. All of these and other traits can be found in potential disgruntled employees who have committed violence.
- **Domestic.** Over 75% of domestic abuse cases follow their victims to work. These can include harassment; threatening phone calls, texts, emails or notes; absenteeism because of injuries; threats to workplace managers or co-workers of spouses or domestic partners; love triangles and vandalism/property damage. One in every four women and one in 10 men will experience domestic violence in their lifetime, according to the Centers for Disease Control and Prevention (CDC). The US Department of Labor reports that victims of domestic violence lose nearly 8 million days of paid work per year in the U.S., resulting in a \$1.8 billion loss in productivity for employers.

III. Workers' Compensation and Workplace Violence

Is the Employee Covered? It Depends.

Employees typically receive workers' compensation for injuries (or their beneficiaries may receive death benefits) arising out of and/or in the course of their employment. Consequently, an employee injured at their place of employment from a workplace violence incident could be eligible for workers' compensation benefits in most cases. For example, if a manager is beaten

by a co-worker who is irate over how this manager treated him as an employee, this would normally be covered. The workers' compensation policy would respond as the trigger for the loss was that the attacker was driven by a work-related argument related to his job. However, if the boyfriend of a female employee, comes to the workplace and strikes his girlfriend, and therefore was not injured in the course of doing her job, nor were the injuries caused by something that is work-related, this would disqualify the workers compensation trigger to respond in most states.

Workers' Compensation Exclusivity also has to be considered in workplace violence cases. In general, an employee receiving workers' compensation benefits cannot also bring a claim for negligence against his or her employer. 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 specific 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.
- 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.

Other Considerations

Federal and some state family laws may entitle workplace violence victims (employees) to take time away from work without consequence. 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 their job. 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.

Employers need to also be cognizant that some states have laws which 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 in any way retaliating against employees who take time off from work to participate in judicial proceedings related to domestic violence, especially if it spills into the workplace.

IV. Active Shooter is the Ultimate Workplace Violence Act

Preparation

An average active shooting event is over in less than 6 minutes. Yet it can have a lifetime of change in the lives of the victims, the employees, the families, the community, and the company. In the United States, we average one active shooting event every week. Companies have to be prepared for the ultimate workplace violence scenario, not just risk management but all departments within the corporation.

While it may be impossible to predict when, or if, an active shooter will affect an organization and workplace, it is incumbent on employers to consider measures to prepare for and mitigate damage from an active shooter event. Developing, training employees and

practicing an active shooter emergency plan can further lessen the probability of harm and also act as a defense in the event of litigation or claims.

Risk Management for Workplace Active Shooter

A report titled, "Active Shooter Preparedness" by Everbridge (February 2016), found that even though U.S. companies are overwhelmingly concerned about violence and violent acts in the workplace, they remain unprepared. Out of 888 organizations surveyed about their corporate safety plans and the company's ability to manage an active shooter incident, only 21% felt that they were prepared. To prevent shooting violence, it is important to understand the threat within the company. Threats can come from the inside or the outside a company. Poor employee hires, lax discipline policies, negligent protocols in training, limited to no background screening of employees, contractors, and volunteers, as well as employees not feeling comfortable talking to Human Resources about domestic violence or abuse can lead to deadly violence. External threats can present themselves via ease of perimeter access, limited to no security, screening of visitors and service personnel, minimal security cameras and monitors, not engaging law enforcement to discuss "what if" and training employees to report suspicious persons on property.

Risk professionals will take the first step in the process by identifying the risks and threats of the active shooting scenario. Analyzing and prioritizing the threats will be the next step in the process. Step three is to find the resources internally and externally to control or mitigate the risks and exposures. This is the most visible step in the process. The next step is to determine the financial impact an active shooting or a workplace violence incident will cost the company. This step will look at insurance, self-funding, soft dollar costs, deductibles, lost wages, litigation, and missed financial opportunities, as well as claims management and workers' compensation. Finally, the active shooter risk process will take the administrative step in assuring monitoring, ongoing awareness, training, resources, Employee Assistance Program (EAP) and improving the process for prevention and response.

No corporation or organization wants to be faced with neither an active shooting situation nor the aftermath that follows. Media coverage will be robust and in many cases, will get it wrong. The families of those affected will want answers. Local, city and in some cases state officials will weigh in on the tragedy. Fellow employees will need counseling, as may the community. Having a sound plan and set protocols for the aftereffects of such an event is paramount and can determine if the entity will survive. Reputational recovery should be one of the highest priorities of senior management and be assisted by the risk and legal teams of the company in the event of an active shooter or any major workplace violence incident. Awareness, preparation, and response are the key elements for risk and claims professionals.