



2021 Annual Conference
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Violence and Social Tension Lessons Learned

I. Define and Describe the Issue

Social tension and Violence in the workspace

Understanding that the increase in social tension can lead to violent confrontations and altercations in the workspace. Whether it be between customers or a customer or an employee or between two employees, the risk of injury, harm and legal exposure can be significant. Understanding the issue and the risks and the exposures from the perspective of risk managers, claims handlers and their attorney will be directly addressed using real life examples. The risk managers will discuss how social tension and the risk of violence on their premises is changed some of their procedures to prevent altercations, de-escalate the altercations that do occur and explain their perspective on these claims. The attorney will discuss how the differences in social tension that lead to violence can be limited before they happen.

Defining Social Tension

What is social tension? How does it lead to physical confrontations and altercations? The types of political messages people wear the controversial apparel that people wear can lead to conflicts with people who have opposing beliefs. Balancing the legal right of a person to where clothing with political or controversial messaging with a restaurant or retailers right not to support such messaging will be part of the analysis in this discussion. Does a restaurant have the right to prevent somebody wearing a controversial shirt in the restaurant? If so, who decides? How does a retail store handle the circumstance where the store requires its guests to wear facemasks, but the customer refuses?

What are the types of confrontations?

The confrontations that develop from the increased social tension, offensive political messaging or controversial apparel can be between two customers, a trespasser and a customer, an employee in a customer or an employee with another employee. Understanding these different types of possible sources of confrontation helps the risk manager and claims professional understand how to prevent the confrontations from happening and prevent exposure. The discussion will include what can be done by a restaurant or retailer to prevent social tension rising to the level of confrontations and altercations. This section will also discuss unwanted guests using the workspace.

II. How to Best Respond

A Look at the Response Options

When an altercation arises between customers or employees, understanding what response options are available and which have proven to be the most successful is critical. The responses to the confrontations must depend on who is involved, the location of the altercation and the level of the violence. Are employees involved? Is it only between customers? Where is the location of the altercation and where did it start? These facts must be considered by the staff member responding to the incident and plays a key role in the decisions.

What Response Options are the Most Successful?

The Risk Managers will look at those possible incident scenarios and discuss the most probable and effective responses to different circumstances. What responses have been found to be the most effective in ending or diffusing the conflict?

What Responses have been Effective in Diffusing or Deescalating the Conflict

After the analysis of what response options are available under the factual circumstances of the conflict, the next analysis is which of those options will be the safest and provide the greatest likelihood of a successful outcome. The experience of the Risk Managers and their counsel analyze the different factual scenarios and which of the options have proved to be the most successful in terms of ending or deescalating the conflict and resulted in minimizing claim exposures.

Who and When should you Engage in the Conflict?

Which Staff member should be engaged? The discussion also must include when a staff member should get involved and when should they not engage. Should law enforcement and/or security be called for the safety of the staff members and the customers as well as the combatants is also a very important consideration that must be

made. From the experience and perspective of the Risk Managers and their legal counselor, the analysis of who is the person or staff member best trained to handle the conflict and when that person should engage will be thoroughly considered with risk and legal considerations.

III. Best Ways to Train Your Team on How to Respond

What Training is Given to Staff members

There are multiple types of training available to Staff members. Deciding on the right training is part of determining your companies focus and goals. There is also the very real consideration of cost and employee time lost during the trainings. The general types of trainings offered to Staff members include Response Training, Sensitivity Training and De-escalation Training or a combination of all of these. The decision on which of these will serve your company best is an important decision. That decision can be based on the type of business operation, the volume of customer/patrons, the likelihood of in-person interaction, the experience and prior training of the Staff, the likelihood of conflicts or altercations, the local area, and the current social environment, among other considerations. As part of that decisions is who within the Company should attend the training. Should it be the employee trained in martial arts who has experience in "conflict resolution", but it may not be the best method for the Company? Should the training include all Staff or just the Managers. These considerations are all part of the preventing the escalation of violence in the workspace and avoiding legal claim exposures.

IV. What Are the Legal Claims/Exposures

Claim and legal exposures can arise from circumstances involving altercations between customers, a customer and an employee and an employee with another employee. These exposures are governed by negligence law, employment related practices law and workers compensation law. These claims can also expose the business to punitive damages under certain circumstances.

Customer v. Customer Altercation Exposures

The rise in social tension has led to an increase in altercations between customers for reasons that have nothing to do with the operation of the business. However, these altercations can result in exposure to the business for injuries sustained by one of the pugilist customers. The business liability can arise under the theories of negligence, including negligent failure to maintain the premises in a reasonably safe condition, failure to protect the customer/patron from acts of third persons and negligent failure to train the Staff members.

The general rule is that an owner or occupier of a business has no duty to protect an invitee/patron from criminal acts committed by third persons/other customers while on the business premises. However, liability for acts of third parties has been applied in circumstances involving hotels, clubs, supermarkets, retail stores, bars, social hosts,

banks, malls, gas stations, restaurants, parking garages and other areas where persons are invited on the premises for the purposes of doing business. See *Modern Tort Law: Liability and Litigation §38:14 (2d ed. 2020)*. The potential liability of a commercial establishment to a customer injured by another customer depends on the law in the jurisdiction where the businesses operating in where the injury occurs. However, most states recognize the legal liability of a business for their negligence in either doing something to prevent the altercation and injury or in failing to do something that they reasonably could have done to either prevent or stop the altercation and injury. See *34 A.L.R 2d 372*. A claim for liability rests on whether the business owner had a duty to protect the victim from the harm, whether they breached that duty and whether the breach of that duty caused the injury claimed. The business owners defense includes that there is no legal duty owed to this victim, that it was not reasonably foreseeable, that they reasonably exercised prudent care in protecting their customers/patrons from harm and/or the actions of the business owner was not the cause the claimed injuries. See *26 COA2d §1-63 (2020)*.

Customer v. Employee Exposures

Another source of liability to a business owner is when a customer has a physical altercation with an employee within the course and scope of his employment. Much of the liability exposure rests upon whether the employee was working at the time of the incident and whether their actions were in the furtherance of their job duties and responsibilities. The theories of liability under an employee versus customer incident are like the ones of customer versus customer however the liability also contains a direct basis of liability for the actions of an employee under the agency doctrine of *respondeat superior*. While some of the same defenses apply to these claims, the additional defense available would include that the employee was not acting within the course and scope of his employment or in furtherance of the business purpose and therefore the business is not liable for the employee's actions outside the business purpose. See *34 A.L.R 2d 372 §6-14*.

Employee v. Employee Exposures

Many employers have seen an increase in altercations or confrontations or just animosity between employees relative to their political, social, or environmental issues. Most of these never escalate, but some do. When an employee or multiple employees engage in behaviors that may be considered hostile or adversely affects the work environment, those behaviors can lead to liability to the employer under federal law. Many people have seen these types of claims related to sexual harassment or with the sexual orientation, but these claims also arise without any connection to sex or sexual orientation. If the claim involves any type of sexual discrimination, exposure is generally founded under Title VII of the Civil Rights Act of 1964 as well as under other federal and state law. However, there exists legal basis in labor law that permits an employee to sue their employer alleging hostile work environment for permitting an employee to

where apparel with expressive content that is offensive. The expressive workplace doctrine provides some protection to employers but requires them to balance the First Amendment rights with the employee's rights to be free from a hostile work environment. *The Expressive Workplace Doctrine: Protecting the Public Discourse from Hostile Work Environment Actions*, 15 UCLAELR 1. Title VII of the Civil Rights Act of 1964.

V. Limiting Your Legal Exposures and Extinguishing Claims

Limiting the legal exposure to business operators takes experience, knowledge of the business operations and the current law. Discussing how risk managers and their legal counsel use strategies to limit these legal exposures is of paramount value.

How Are Risk Managers Limiting their Exposures to these Claims?

Having institutional knowledge of the business operation and working closely with their counsel, risk managers can limit their exposure to these types of claims. From the creation of their policies and procedures to deal with workplace confrontations to implementing proper training protocols on how and when employees should engage will not only help prevent but will also limit legal exposure. Having the proper investigation, knowing the steps and efforts the business operator takes to prevent confrontations in altercations on their premises is vital to the defense of these claims. By limiting the exposures, early resolution strategies are more successful in the claims can be prevented or extinguished early in the claim process.