

Workplace Violence - Be Prepared

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Recent publicity surrounding the various problems caused by violence in our society has forced employers to focus on the specific issue of violence in the workplace. According to a recent report issued by the Bureau of Justice Statistics of the United States Department of Justice, approximately 40% of the victims of non-fatal workplace violence knew the offender. Approximately 2/3 of the victims were males and almost 70% were between the ages of 25 and 49. Homicide was the second leading cause of death in the workplace, with more than 1000 murders each year.

Employers can be held liable, either directly or vicariously, for the violent acts committed by their employees against other employees or third parties. Employers also can be liable for the injuries suffered by their employees as a result of the violent acts of non-employees. But, more importantly, violence reduces productivity and affects employee morale, and causes poor attendance.

For a number of reasons then, employers have an interest in this subject and should not ignore it in the hopes that violence will never visit their company. There are measures which a company should take to reduce the risk of an incident occurring or if one should occur, to reduce its potential responsibility for the incident. An employer should not wait for an act of violence to occur to fashion a response. It is too late then, and much of the damage has been done.

Prevention

The Hiring Process. An employer can and should take all the steps available to protect against future workplace violence, beginning with the interview and hiring process. An employer must be aware of the limitations on inquiries an employer may make into an applicant's medical history, credit history, criminal record, and psychiatric background. These limitations are based upon the Americans With Disabilities Act ("ADA"), the Fair Credit Reporting Act ("FCRA"), and local statutes.

All job applicants should be required to complete a written employment application. Prior to a personal interview, the employer should review the application, looking for items of concern that can be discussed with the applicant, including gaps in employment, inconsistencies and unanswered questions. After applicants complete the application, they should be personally interviewed. If an applicant lies and you have notes, you will have a record of your pre-employment inquiry. At a minimum, after obtaining a release or authorization, all references should be contacted. Prior employers should be asked about the applicant's reasons for leaving, eligibility for rehire, ability to perform the job functions and other pertinent questions.

There are services which will investigate a candidate's criminal record, employment history and financial history. Depending upon the extent of the investigation, the charge may be rather modest compared to the potential savings down the road. An employer who uses credit or other background checks when making decisions about hiring, promoting or firing employees must comply with applicable sections of the FCRA when using consumer reporting agencies to perform these credit and background checks. See our November 1998 Employment UPDATE in which we discussed the steps an employer must take in conducting such investigations.

Some companies also conduct psychological testing of applicants. These tests are controversial, with some questioning their reliability and whether they are an unreasonable intrusion upon the applicant's privacy and other rights. There are few cases where these tests have been challenged, and thus their legality is still uncertain. However, a company considering the use of such testing should, at the least, investigate thoroughly the reliability of the tests it proposes to use before implementing a testing program.

On the Job. Every employer should have a policy of zero tolerance for violence. While few would disagree with this statement, enforcement is more difficult. Such a policy means that all employees, including valuable ones, must be disciplined if they engage in workplace violence. Needless to say, the discipline must be consistent.

Identifying potential problems ahead of time, monitoring the situation and finding solutions is crucial in stopping workplace violence before it occurs. An employer should encourage the reporting of all incidents, no matter how small, of harassment or questionable conduct. Employers should encourage employees who believe something will happen to report such concerns. The company must then promptly investigate and take disciplinary action, if appropriate. Simple mediation efforts may be sufficient in many situations.

Warning signs for employees with a potential for violence include: substance abuse, depression, paranoia, severe stress, etc. Identifying the profile of persons who have potential for violence is much easier than determining which specific individual poses this risk. While initial

interviews and background checks as well as personal observation in the workplace may be helpful, an employer (or its manager) is often left with only suspicions. Generally, the employer cannot discipline on the basis of such suspicions, nor can the employer usually obtain a psychological evaluation of a current employee unless there is a reasonable suspicion that the employee poses a "direct threat."

Supervisors and employees should be educated to look for signs of potential problems, e.g. employees with serious personal problems; periods when reductions in force are being implemented; when a workforce is under a heavy workload. When these circumstances exist, management must be particularly sensitive to the risk of violence occurring and extra security precautions may be necessary. Supervisors must also be trained on how to deal with violent or potentially violent persons, at least until professionals are brought in to deal with the problem. Supervisors should be cautioned against combative, confrontational styles of management that could prompt a violent outburst. Protocol should be set for the company so that if a situation arises, it can be dealt with immediately and efficiently.

If an employee arrives at work under the influence of alcohol or illegal drugs, or engages in workplace violence caused by the use of alcohol or drugs, including prescribed medication, an employer must take appropriate disciplinary action, including termination, consistent with the company's policies. Alcoholism and drug addiction for which an individual has been or is being rehabilitated are considered disabilities and/or handicaps under the ADA and NJLAD, and employers cannot inquire about or consider such conditions when making hiring, discipline or termination decisions. However, current use of illegal drugs or intoxication on the job are not protected. Employers may ask direct questions about current drug use or the use of alcohol while working, and take action as a result of such use. Similarly, post-offer testing for current drug use is permissible under the ADA or NJLAD.

Liability

Companies may be sued by the victims of workplace violence, e.g. non-employees who get hurt by the rampaging employee, and co-employees who are injured. In the case of non-employees, the violence may take place off the company's premises but while the employee is on business.

These types of claims often pit the employer against sympathetic claimants who are innocent victims. Not surprisingly, courts and juries look for ways to award the claimants money even if responsibility seems questionable. This is despite the traditional rule of law that one is not responsible for the criminal actions of others as long as one did not aid and abet the misconduct. Thus, the best defense to these claims is to prevent the violence from occurring in the first place.

Generally, employers have been held liable for the violent actions of their employees when the employer has acted negligently, thereby permitting the violence to occur (i.e. "direct liability"), and sometimes, vicariously liable for the actions of employees or others even when the company's conduct was not negligent and did not directly cause the misconduct (i.e. "vicarious liability"). Failure to take protective and preventative steps can often result in liability for an employer due to negligence, while taking them can shield an employer from liability (or minimize its potential liability) even if workplace violence occurs.

An employer may be held vicariously liable for the tortious acts of its employees; i.e., the employer is liable as master for the acts of its employees causing personal injury to others as, for example, in the case of an automobile accident. Some courts apply this rule to acts of workplace violence regardless of whether the employer has acted negligently or done anything wrong. Ostensibly, the rationale is that the employee was in the course of his employment duties when offensive conduct took place and, as a result, the employer should bear responsibility.

Typically, an employer is held liable for the conduct of its employees which occurs within the scope of his/her employment, i.e., work which the employee was hired to perform within the rules established by his employer. Traditionally, employers were not liable for the intentional torts or crimes of their employees because such conduct was considered outside the scope of their employment. However, this rule has been eroding as some courts have expanded the liability of employers for such conduct when the employee is on the job.

When the injured person is a co-employee, his/her remedy is generally for workers' compensation benefits. There is an exception for an intentional wrong by the employer but the burden is a heavy one requiring the plaintiff to show the employer acted with deliberate intention and with knowledge of the likelihood of injury to the plaintiff, so as to permit the incident to have occurred.

The Department of Labor has started attempting to use the Occupational Safety and Health Act ("OSHA") as a means to protect workers from workplace violence, under OSHA's General Duty Clause, which mandates that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." To establish a violation of the General Duty Clause, the Secretary of Labor must establish that (i) a hazard existed, (ii) the employer or its industry knew the hazard existed, (iii) the hazard was likely to cause death or serious bodily harm, and (iv) a feasible abatement method existed. There are no published written opinions in this area, as the cases have all been settled.

Conclusion

Many managers think that workplace violence will never occur at their company. However, it need only happen once to cause a crisis (and liability), and it can happen to you. While no program for prevention is perfect, a company that works to prevent workplace violence from occurring is much less likely to face such a crisis. A word to the wise should be sufficient.

For further information on this topic, please contact Michael K. Furey at 973-538-0800 or mfurey@riker.com. Nothing in this newsletter should be relied upon as legal advice in any particular matter.

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