

EMPLOYEE SAFETY AND SECURITY: WORKPLACE VIOLENCE AND CONCEALED CARRY LAWS

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Workplace Violence

- Nearly 2 million people annually are the victims of violent crime at work
- 6.3% of **all** rapes occur at work
- 2.3% of **all** robberies occur at work
- 12.9% of **all** aggravated assaults occur at work
- 17.8% of **all** simple assaults occur at work
- Homicide was the fourth leading cause of all job-related deaths in 2013

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Cost of Workplace Violence

- \$121 billion annual cost to business:
 - Lost productivity
 - Legal expenses
 - Property damage
 - Diminished public image
 - Increased security
- Each year, 500,000 employees lose:
 - 1,175,000 work days
 - \$55 million in lost wages

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Sources of Workplace Violence

- A current or former employee attacks a supervisor or co-worker
- An employee attacks a customer
- A customer attacks an employee
- A third party attacks an employee

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Workplace Violence Legal Issues

- Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (“OSH Act”)
- State workers’ compensation laws
- Common law tort
- The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”)

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Workplace Violence as an OSH Act Issue

- As early as 1993, NIOSH issued an alert that the following factors may increase a worker’s risk of being a victim of work-related violence:
 - Exchanging money with the public
 - Working alone or in small numbers
 - Working late at night or early in the morning
 - Working in high crime areas
 - Guarding valuable property or possessions

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Workplace Violence as an OSH Act Issue

- In May 1992, OSHA issued an internal memo, stating that the Agency may utilize the OSH Act's general duty clause for violence in the workplace.
- The general duty clause (29 U.S.C. § 654(a)) requires that "[e]ach employer...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..."

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Workplace Violence as an OSH Act Issue

- To establish a general duty clause violation of the OSH Act, OSHA must prove 4 elements:
 - That there is a **hazard**;
 - That the hazard is **serious** in nature;
 - That the hazard is **recognized** in the employer's industry; and
 - That the hazard is **preventable**.

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Workplace Violence as an OSH Act Issue

- OSHA has issued several citations since late 1993 to employers for workplace violence.
- Liability has been determined on a case-by-case basis, *i.e.*, each case involves a fact-specific inquiry.

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Workplace Violence as an OSH Act Issue

- OSHA workplace violence guidelines
 - 2004: Guidelines for the healthcare industry
 - 2009: Guidelines for the night retail industry
 - 2010: Guidelines for Taxi and For-Hire Drivers

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Workplace Violence as a Workers' Compensation Issue

- Workplace violence becomes a workers' compensation issue when injured workers seek recovery against their employers for work-related violence.
- State workers' compensation laws generally provide the exclusive remedy for injured employees when the injury arose out of and in the course of employment.

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Workplace Violence as a Workers' Compensation Issue

- Intentional acts of violence by the employer or co-workers are not covered by workers' compensation, allowing the injured employee to sue for damages.
- However, the cases interpreting this exception differ greatly by locality.

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Workplace Violence as a Common Law Tort Issue

- There are a variety of common law tort theories for recovery in workplace violence situations:
 - *Respondeat Superior*
 - Negligent Hiring
 - Negligent Retention
 - Negligent Supervision
 - Duty to Warn
 - Voluntary Assumption of a Duty to Protect
 - Defamation

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Workplace Violence as an ADA Issue

- The ADA prohibits discrimination against “a qualified individual with a disability because of the disability...in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment” (42 U.S.C. § 12112(a)).

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Workplace Violence as an ADA Issue

- The ADA has a 3-pronged test for a covered disability. An individual has a disability if he/she:
 - has a physical or mental impairment that substantially limits one or more major life activities;
 - has a record of such a disability; or
 - is regarded as having such a disability.

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Workplace Violence as an ADA Issue

- “Emotional conditions” such as anxiety and depression which could lead to workplace violence may qualify as disabilities under the ADA.
- The ADA requires employers to provide reasonable accommodation to qualified disabled individuals.
- An employer is not required to employ a disabled individual when to do so would pose a “direct threat” to the individual’s own health or safety or the health or safety of others.

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Workplace Violence as an ADA Issue

- The “direct threat” affirmative defense:
 - The term “direct threat” means a significant risk of substantial harm that cannot be eliminated by reasonable accommodation.
 - Must be based on careful review of the individual’s **current** actual condition
 - Assessment must be based on a “reasonable medical judgment”

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Workplace Violence as an ADA Issue

- If an employer refuses to hire or fires a disabled individual because of a risk of physical harm to other employees or customers, it may be subject to a lawsuit claiming violation of the ADA.
- Varying results in relevant cases highlight the problems for employers who take adverse employment action against potential perpetrators of workplace violence.

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Concealed Carry Laws and the Workplace

- In 2013, Illinois became the last state to allow carrying firearms in public.
- “Sensitive” places are prohibited for concealed carry
- Property owners may prohibit concealed firearms
 - Must post signs “clearly and conspicuously”
- Parking areas are a safe harbor

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Concealed Carry Violence Potential

- In 2013, shootings were the most frequent manner of death in both homicides (80%) and suicides (47%)
- Homicide is the leading cause of death for women in the workplace
- Could an employer be liable if someone is injured as a result of a gun-related incident?

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Employee’s Right to Carry

- Some states have enacted “guns-at-work” laws
- Anti-discrimination provisions
 - Cannot refuse to hire or discharge someone who obtains a concealed carry license
- If “gun-free,” could an employer be liable for acts of violence that could have been prevented if weapons were permitted?

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Balancing Violence Potential and Right to Carry

- Prohibit employees from bringing weapons in the workplace as permissible by state law
- Consider an employee concealed firearms registration process
 - Note: some states prohibit employers from asking employees about firearms ownership
- States with “guns-at-work” laws provide immunity to employers that comply

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Workplace Violence: Preventive Measures

- The Hiring Process
 - Application should be comprehensive for employment history.
 - Inquiries into relevant convictions.
 - Gaps in employment history should be fully explored.

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Workplace Violence: Preventive Measures

- The Hiring Process
 - Disability-related inquiries and medical examinations are permitted under ADA after a conditional offer of employment is extended.
 - Background checks and verification of employment history are important for employer to establish “due diligence” in hiring. Also check Department of Motor Vehicles records of all drivers before hire.

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Workplace Violence: Preventive Measures

- Retention
 - Consider work rule requiring employees to promptly notify employer of any criminal convictions (including guilty or no contest pleas) for anything other than minor traffic violations.
 - Consider periodically checking DMV records of current drivers, e.g., annually on anniversary date.
 - Conduct post-accident drug and alcohol tests.

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Workplace Violence: Preventive Measures

- Develop a crisis plan for workplace violence.
- Train all employees:
 - To identify problems which may lead to violence;
 - To report all threats; and,
 - To handle threats and violence when they occur.
- Follow up and investigate all threats of violence.
- Implement and publish a rule that threats and violence are grounds for discharge.

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Workplace Violence: Preventive Measures

- Develop a policy for handling the unresponsive or uncooperative employee or third party.
- Provide adequate security alarms, lighting, surveillance and security personnel.
- Evaluate factors or situations present in the workplace that might place employees at risk of violence.

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Workplace Violence: Factors to Consider

- History of violence
- Pronounced physical changes such as change in health, hygiene and personal grooming
- Quarrelsome or threatening behavior toward others
- Becomes angry easily and often
- Continually speaks about violent movies or books

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Workplace Violence: Factors to Consider

- Drug abuse
- Psychological disorders such as paranoia, schizophrenia, borderline personality and anti-social personality
- Occupational or personal stress (e.g., family or romantic problems, financial problems, lay-off, discharge)

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