

The Regulation of Employers' Workplace Violence Prevention Programs Under OSHA's General Duty Clause

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Last week, Gillian had the distinct pleasure of attending the ABA Occupational Safety and Health Law Meeting in sunny and beautiful San Juan, Puerto Rico. The meeting included more than a dozen presentations and panels on workplace safety put on by management and union lawyers, OSHRC Commissioners, the Solicitor of Labor's office, safety professionals, administrative law judges, and others. The three days of discussions provided a wealth of important information on compliance with government safety regulations, including valuable insight into where the DOL is focusing its initiatives in the coming year. Workplace violence prevention is near the top of that list, with a particular focus on employers in the healthcare industry, and remarks by the Commissioners discussing a new opinion on the subject helped to illuminate what DOL enforcement efforts in that arena may look like.

First, some background on the Occupational Safety and Health Act ("OSHA") enforcement. Under OSHA, the DOL issues detailed regulations for workplace safety using its rulemaking authority, and is empowered to conduct investigations and issue citations for an employer's failure to comply with those regulations. In instances involving a workplace hazard that is not covered by a specific regulation, the Secretary of Labor can issue a citation under Section 5(a)(1) of OSHA, referred to as the "general duty clause" (29 U.S.C. § 654(a)(1)). The general duty clause is a gap-filler provision of OSHA that requires employers to keep their workplaces "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." Although this clause gives the Secretary some leeway to regulate workplace safety even in the absence of specific regulations, enforcement power under Section 5(a)(1) is limited by the constitutional concept of fair notice.

Understanding this background makes it clear why the Secretary's recent focus on workplace violence prevention is particularly interesting –no specific OSHA standard on workplace violence prevention exists, but employers are still expected to abate workplace violence hazards. The DOL announced in January 2017 that it would begin the rulemaking process on a workplace violence prevention standard, although it has not yet taken steps to do so. Congress has proposed numerous bills that would require the DOL to promulgate a specific workplace violence prevention standard under OSHA in recent years, including the [Workplace Violence Prevention for Health Care and Social Service Workers Act, H.R. 1309](#), introduced in the House just last month. However, as yet, no standard exists. Unless and until the DOL issues regulations, it is left to enforce employer's obligations to prevent workplace violence under the general duty clause, leaving employers in the awkward position of understanding that the agency is focused on workplace violence prevention, but can offer no specifics about employers' obligations in that area.

For this reason, the recent decision issued by the Occupational Safety and Health Review Commission ("OSHRC") is a key case of first impression on the Secretary's power to issue citations for Section 5(a)(1) violations involving workplace violence. [Secretary of Labor v. Integra Health Management Inc., OSHRC Docket No. 13-1124](#), 2019 WL 1142920 (Mar. 4, 2019). *Integra Health* involved an employer providing in-home services to clients with mental health and other issues. In December 2012, an Integra employee was stabbed to death by a schizophrenic client during a home visit. After conducting an investigation, the DOL issued a citation alleging that Integra "violated the general duty clause of [OSHA] because its employees were exposed to the hazard of being physically assaulted by members with a history of violent behavior." *Id.* at *4. Integra unsuccessfully contested the citation, which was affirmed by the OSHRC Administrative Law Judge. Integra then appealed to the panel of OSHRC Commissioners, arguing that (1) the hazard was not "recognized" by Integra or the industry generally; (2) there were no feasible abatement measures that would have materially reduced the hazard; and (3) OSHA does not cover the "risk of criminal assaults upon employees by third parties." *Id.* On appeal, the three Commissioners unanimously affirmed the citation (although not for unanimous reasons, with each issuing his or her own opinion).

The decision came out the day before the ABA Conference in San Juan, and the Commissioners each addressed their take on the case during a panel discussion. Commissioner Attwood, who wrote the majority opinion, rejected Integra's argument that violence done by a third party was "inherently resistant to prediction" and therefore could not be classified as "recognizable" under the law. Commissioner Attwood remarked that Integra had work rules and training materials that addressed the possibility of violence by clients, and encouraged employees to gather critical history on their clients from clergy, family, and community members in order to screen clients for potential violent behavior. Integra's Vice President testified that it was necessary for Integra to instruct employees on how to identify dangerous clients, given they worked with a mentally ill population. In the face of this evidence, Commissioner Attwood remarked Integra could not claim that the hazard of workplace violence was not a "recognized hazard" in this field. (This reasoning begs the question as to whether she would have had the same opinion if Integra had made no attempts whatsoever to address workplace violence).

Commissioner Sullivan, who joined in Commissioner Attwood's opinion and also wrote his own concurrence, remarked that he agreed that Section 5(a)(1) had been violated in this instance, but that he limited the ruling to the very specific facts present here. In his remarks, Sullivan pointed out that the general duty clause was being "parsed extensively" in the majority opinion, illustrating the major problem with the general duty clause – that it is too vague and open to interpretation, and therefore that it does not provide clear notice of employers' obligations. Chairman MacDougall, who also issued her own concurrence, worried that *Integra Health* was a case where "bad facts create bad law." Chairman MacDougall was particularly concerned about extending the general duty clause to situations where the employer cannot exercise control over the hazard, noting that the Secretary has been attempting to expand the reach of the general duty clause for years.

While the defense bar must continue to watch the Secretary's use of the general duty clause in the workplace violence context, employers should not be overly alarmed by the *Integra Health* opinion. The Commission made clear, in the written opinions and in their conference panel remarks, that *Integra Health* is a narrow and fact sensitive ruling, and the general duty clause is still subject to constitutional limitations. However, employers in the healthcare and social work industries may want to consider checking the Secretary's suggestions for abating workplace violence hazards, which include (i) creating a written workplace violence prevention program with mandatory reporting requirements; (ii) identifying clients with violent behavior/histories (including via criminal background checks); (iii) clearly communicating behavioral histories/recent violent incidents to any employee who could potentially be exposed; (iv) creating and implementing double coverage (buddy system) when necessary to deal with a potentially violent client; and (v) providing all staff with a reliable way to summon assistance when needed, including while on a home visit. The Secretary has now successfully argued that at least some of these are reasonable and feasible measures to create a material reduction in the hazard of workplace violence, and therefore these measures can provide guidance to what employers' obligations are under Section 5(a)(1) until further regulations on workplace violence prevention are issued.

If your business or organization has any questions or concerns regarding this decision, or how you can work to prevent workplace violence, please reach out to the authors or to any member of Proskauer's Labor and Employment department for assistance.

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