

Keeping Work Safe and Sound – The Challenges of Preventing Workplace Violence

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Introduction

A former beer distribution center employee's August 3, 2010 shooting rampage in Hartford, CT, which resulted in the death of eight employees before the gunman turned the gun on himself, serves as a stark reminder of the realities of workplace violence. Over a period marked by similar tragedies, such as the fatal shootings at a U.S. Army base in Texas last November, it is not difficult to understand how workplace violence remains the third highest cause of occupational deaths in the U.S. each year. This alert addresses the legal issues associated with workplace violence and highlights certain safeguards employers may implement in an effort to combat violence in the workplace.

Conflicting Legal Issues Associated with Workplace Violence

The law imposes conflicting duties and obligations on employers seeking to curtail workplace violence. On one hand, employers who fail to take proactive measures to prevent workplace violence may incur legal liability under federal and state law (including state tort law). At the same time, employers should be mindful that other federal and state laws limit their ability to screen and eliminate applicants and employees who may pose a threat to the workplace.

While no federal law imposes an affirmative obligation on employers to enact policies prohibiting workplace violence, the general duty clause of the Occupational Safety and Health Act requires employers to maintain a place of employment that is “free from *recognized hazards* that are causing or are likely to cause death or serious physical harm to employees.”^[1] OSHA has relied on the general duty clause to issue citations to employers for failing to develop policies addressing workplace violence. Indeed, last month OSHA cited a hospital under the general duty clause for failing to protect its employees, after several were injured by violent patients.^[2] OSHA has never issued regulations or standards regarding workplace violence, but it has issued a number of voluntary guidelines and recommendations to assist employers in developing policies intended to prevent it. These include OSHA’s [2004 Guidelines for Preventing Violence for Health Care and Social Workers](#).

Employer liability for workplace violence also may arise under state tort law. Employee violence has given rise in certain instances to employer liability under a variety of tort theories, including: negligent hiring for failing to adequately examine an employee’s background prior to hiring;^[3] negligence in training and/or supervision;^[4] negligent retention for failing to take the proper action even though the employer became aware of problems during the course of employment,^[5] negligent termination for failing to take proper precautions in the method of termination of an employee, as well as for failure to provide a safe environment.^[6] It is worth noting that in some states, workers compensation is the exclusive remedy for employees injured by an act of workplace violence.

While it would seem that the most effective way to reduce workplace violence is for employers to conduct extensive background checks on all applicants and current employees, and to refuse to hire or retain an individual with a documented propensity for violence or a criminal record, taking this tack may actually expose an employer to liability under federal and state antidiscrimination laws.

The Americans with Disabilities Act, and similar state laws, pose a problem for employers attempting to screen for potentially dangerous applicants and employees. The ADA prohibits discrimination on the basis of a disability, whether actual or perceived, and may prevent or limit an employer's ability to make an employment decision based on an individual's propensity for violence stemming from an individual's mental illness. While the ADA precludes an employer from taking a preemptory action against an employee or applicant based solely on a presumption of mental or emotional instability, it does not prevent an employer from taking action where an employee threatens or engages in violent behavior. The Equal Employment Opportunity Commission has noted on several occasions that an employer can discipline an employee for threatened or actual violent behavior, so long as it would impose the same discipline on an employee without a disability.^[7] In addition, if an employer can show that an individual with a mental disability who has a violent background or violent outbursts associated with the condition poses a "direct threat," it can refuse to hire, or, in the case of an employee, terminate that individual's employment. We would caution, however, that the ADA's "direct threat" standard can, in certain situations, be extremely difficult for an employer to meet.^[8]

Criminal background checks often reveal important information about an individual's propensity for violent behavior. However, their use in employment decisions may, depending on the circumstances, violate Title VII of the Civil Rights Act (Title VII), because criminal background checks may disproportionately effect African-Americans and Hispanics, who are convicted of crimes at a higher rate than other races.^[9] Recently, the EEOC, as well as a number of plaintiffs' attorneys, have challenged employers' use of criminal background checks using Title VII's disparate impact theory, which provides that where a neutral screening device has a disparate impact, an employer must be able to show that its use is job-related and consistent with business necessity. The EEOC has filed lawsuits against a number of companies alleging that their use of criminal background checks is discriminatory^[10] and the agency has been expanding investigations and invoking its subpoena powers in order to determine whether other employers, background check policies violate Title VII.

Since criminal background checks are considered “consumer reports” under the Fair Credit Reporting Act (FCRA), employers who use third parties to conduct criminal background checks must ensure that they comply with FCRA.[\[11\]](#) In addition to these federal statutes, a number of states, including Hawaii, Kansas, New York, Pennsylvania and Wisconsin, have enacted laws restricting private employers’ ability to take adverse action based on a criminal record. For example, under New York law, an employer cannot deny employment based on a criminal conviction unless there is a direct relationship between the criminal offense and the specific employment sought, or the hiring or continuation of employment involves an “unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”[\[12\]](#) And just last week, Massachusetts enacted a new law that eventually will grant employers broader, Web-based access to criminal records, but which, beginning on November 4, will forbid employers from asking about any criminal record information on an initial written employment application.[\[13\]](#)

What Can Employers Do To Help Prevent Workplace Violence?

Mindful of the above issues, we offer the following suggestions for employers to help prevent workplace violence consistent with their corporate culture.

- **Institute a Workplace Violence Policy:** Develop a policy that clearly states that workplace violence is not tolerated, and an employee who engages in threatening, intimidating or violent behavior will be subject to disciplinary action, including termination. Employers should apply the policy consistently and document reasons for any deviation from the policy.
- **Develop a Comprehensive Violence Prevention Program:**
- Train all employees to recognize risk factors and what to do in the event of workplace violence;
- Educate all employees on available resources and procedures if they feel threatened at work;
- Train supervisors, human resources personnel, and security officers to look for “warning signs” such as changes in behavior and/or job performance, temper tantrums, disruptive actions, tardiness and/or absenteeism, disrespect for authority, increased complaining or sulking, a marked decline in personal hygiene, disrespect of authority, social isolation, expressed fear of persecution, losing control or doing harm to others, to name a few;

- Include a detailed response plan designed to minimize the severity of any incidents.
- **Remind Employees About Your Employee Assistance Program (EAP):** EAPs can be a great resource for troubled employees. Whether an employee has been identified as needing help, or has requested help, an EAP can provide assistance, including literature, and access to counselors and medical professionals.
- **Treat Claims of Discrimination Before They Escalate:** Remind managers and supervisors to promptly report all claims of discrimination or harassment to Human Resources and assist in expediting a response to the employee in need of help. Take appropriate remedial action if violations of your anti-discrimination policy are discovered, and ensure they are properly documented.
- **If You Use Criminal Background Checks to Screen Out Violent Behavior, Review Your Policy:** The legality of background checks is an emerging issue in employment law, and a hot-button topic for the EEOC as of late; so now may be a good time to review your criminal background check policies and practices to ensure that they are in compliance with federal and state laws.

As the recent events in Connecticut remind us, terminations of employment and other disciplinary actions cause emotional, and sometimes violent, responses and are often the trigger of workplace violence. To help prevent a disciplinary meeting from turning violent:

- Document problems and issues leading up to the discipline or termination, so as to not surprise the individual;
- Set up standard procedures for termination, and follow them on a uniform and consistent basis;
- Consider providing transition assistance such as counseling and outplacement services;
- Consider having security personnel present; and
- In the event there is a violent reaction to the discipline, the individual should be escorted off the premises. It may even be necessary to alert law enforcement authorities or to obtain a restraining order banning the individual from the workplace in the future.

For information on the effects of domestic violence in the workplace, please click here: [New York Amends Human Rights Law to Protect Victims of Domestic Violence](#)

Should you have any question or would like assistance in creating or reviewing your company's workplace violence policy or in reviewing your company's criminal background policy, please contact your Proskauer relationship lawyer or any Proskauer lawyer listed in this alert.

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[1] 29 U.S.C. 654(a)(1) (2004).

[2] See OSHA Region 1 News Release, July 16, 2010, U.S. Labor Department's OSHA cites hospital for inadequate workplace violence safeguards.

[3] See *e.g. Doe v. Schneider*, 667 F.Supp.2d 524, 531-32 (E.D.Pa. 2009) (finding that plaintiff stated a claim for negligent hiring against employer for ignoring warning signs and not investigating the background of an employee who sexually abused a child he had contact with because of his employment).

[4] See *e.g. Hansen v. Board of Trustees of Hamilton Southeastern School Corp.*, 551 F.3d 599 (7th Cir. 2008) (stating that Indiana recognizes claims for negligent hiring, supervision or retention of employee).

[5] See *e.g. Magill v. Bartlett Towing, Inc.*, 35 So.3d 1017, 1020 (Fla. App. 5 Dist. 2010) ("the negligent hiring and negligent retention theories of liability permit an injured plaintiff to recover damages against an employer for acts an employee committed outside the scope and course of employment").

[6] See *Francis v. Diamond International Corp.*, 1985 WL 4793 (Ohio App. Dec. 30, 1985) (court noted that it is possible for plaintiffs to state a claim under a negligence standard for injuries sustained by members of a management team that terminated an employee that then shot them in response).

[7] See EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities and EEOC Small Employers and Reasonable Accommodation Guide, Question 13.

[8] See *Id.*

[9] According to the United States Sentencing Commission, African-American and Hispanic individuals are convicted of crimes at higher rates than other races, in proportion to their population figures. United States Sentencing Commission, 2009 Annual Report, http://www.ussc.gov/ANNRPT/2009/Chap5_09.pdf

[10] See e.g. *EEOC v. Freeman*, 2009 WL 5082565 (D. Md. Sept. 30, 2009) (Complaint).

[11] 15 U.S.C. § 1681 *et seq.*

[12] N.Y. Correct. Law §§ 752-753; N.Y. Exec. Law § 296(16)..

[13] 2010 Mass. Acts c. 256, §101 (August 6, 2010), adding Mass. Gen. L. c. 151B, §9½. The new Massachusetts law overhauls the Criminal Offender Record Information (CORI) system, directing that the system be moved to an Internet-based system that will grant public access to some CORI, and employer access to a broader array of CORI than is available under current law.

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