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Avoiding Workplace Violence

The risk of workplace violence continues to present challenges and concerns for employers and employees. In a 2005 survey reported by the Bureau of Labor Statistics, nearly 5% of the 7.1 million private industry business establishments in the United States had experienced an incident of workplace violence in the year preceding the survey. 50% of the largest establishments surveyed (employing 1000 or more workers) reported an incident of workplace violence. Violent acts at work can have a range of adverse effects on the workplace, from the severe (physical injury) to the less dramatic, but equally significant, like lost productivity. An employer's challenge is balancing a moral or legal obligation to protect its workforce with its need to comply with the legal requirements governing employment relationships. For global employers, this dilemma is further complicated by a multi-jurisdictional legal backdrop.

hired an individual to perform year-end financial audits, that worker would be engaged in the company's core business.

The Legal Balance for A Safe and Sound Workplace

1. An Obligation of Safety. Most countries impose on employers a statutory obligation to provide a safe workplace that impose civil and criminal penalties for violations of health and safety standards. In the United States, the Federal Occupational Safety and Health Act (Fed-OSHA) requires that employers provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Fed-OSHA includes an employer obligation to take all steps reasonably necessary to protect the life, safety and health of employees. Many individual states in the U.S. have similar legislation.

In addition, most jurisdictions have some form of workers' compensation scheme that provides remedies to employees injured in the course and scope of employment. Physical and non-physical injuries, such as stress claims, from foreseeable workplace violence could be covered by such legislation.

"Common law" also may impose safety obligations on an employer. In many countries an employer has a common law duty to maintain a safe workplace. In several states in the U.S., courts have allowed common law tort claims such as negligent hiring or failure to warn, holding that an employer has an obligation to warn employees of foreseeable risk. Similarly, courts have allowed claims for negligent retention where an employer is or should be aware of an employee's tendency toward violence and fails to take action such as investigation, discharge or reassignment, in order to prevent injury to others.

In addition, many jurisdictions recognize an implied term in the employment relationship requiring that employers take reasonable care of employees' safety. Failure to prevent workplace violence could be

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construed as a breach of this contractual term. If an employer's breach of this term is sufficiently serious, it may force the employee to resign giving rise to a constructive discharge theory.

2. Protections Afforded the Threatening Employee. The employer's safety obligation must be balanced against the protections afforded employees under privacy, slander or discrimination laws. Virtually every country provides protection from inaccurate statements regarding an individual posing a threat for violence. Further, many countries have discrimination laws that protect, among others, individuals suffering from mental disabilities. In the United States, an employer is prohibited by the Americans with Disabilities Act ("ADA") from discriminating against "qualified individuals with physical or mental disabilities." Many individual states have similar legislation. Employers must therefore be mindful that employee misconduct could be attributed to a psychological disorder. Potentially, an employee suffering an adverse employment action as a result of his workplace violence could argue that the employer relied on his actual or perceived mental disability in taking the adverse action. Further, if an employee makes a threat of violence, that behavior could alert an employer of the need to provide that employee with a "reasonable accommodation". While the relevant laws do not protect unacceptable performance or behavior or require an employer to accommodate an employee who endangers the health or safety of others, an employee may not be terminated or otherwise disciplined because of his or her disability.

How to Protect Your Workplace

You can reduce the risk of workplace violence and of litigation with the existence and enforcement of a well-defined, legally sound policy and practice for screening and supervising employees and thoroughly investigating any threat to employee safety. While we cannot provide an exhaustive list, here are some suggestions:

1. Pre-Employment Inquiries and Conduct. Employers should use applications that inquire about work history, reason for leaving prior positions, and prior supervisors. The application should ask about criminal convictions, but generally employers only should rely on a conviction where it relates to the employment position. Employers should reserve the right to deny employment or terminate an employment relationship based on misrepresentation or omission of any information. Employers should contact the individual's references and prior supervisors and document these contacts even if no or little information is disclosed by the prior employer. Employers should consider conducting background searches, which in many jurisdictions means complying with legal pre-requisites that may be extensive, including separate documentation and notification of rights under various consumer protection laws. In conducting background searches and in the maintenance of all employment records, the employer should be careful to abide by confidentiality provisions and data privacy laws in each jurisdiction.

At the interview stage, employers should look for gaps in work history that could indicate dishonesty or prior employment problems. Employers are prohibited from requiring job applicants to undergo any medical or psychological test prior to making an offer of employment. A post-offer/pre-employment medical or psychological examination may be required if job-related and consistent with business necessity, and all entering employees in the same classification undergo such an examination. Similarly, once employment has commenced, examinations and disability-related inquiries may be made consistent with business necessity. Disability inquiries and examinations are fraught with legal pitfalls for employers and counsel should be consulted whenever employers consider such measures.

2. Post Hiring Measures. Employers should create, maintain and follow a policy and practice against workplace violence that:

Prohibits absolutely violence and threats of violence;

Encourages reporting threats of violence or violent acts;

Prohibits employees from bringing weapons to the worksite, unless required for their position;

Takes each complaint of violence seriously and provides for a full investigation and prompt and appropriate responsive action.

Prohibits the use of e-mail, voice-mail or other company property as a vehicle for violence or threat of violence, and advises employees that there is no reasonable expectation of privacy in that company property;

Trains managers to recognize the warning signs of workplace violence;

Offers counseling to employees.

Employers also should conduct regular performance reviews. By so doing, employers can identify performance and dissatisfaction problems early and provide guidance on improvement. Also, employers can isolate performance problems as just that, without inadvertently relying on an employee's mental state as a reason for adverse action.

Employers should at least informally establish an emergency response team trained in responding to acts of violence. Employers should rely on specialists in risk assessment when responding to investigative findings, and develop relationships with law enforcement agencies, mental health professionals and security forces.

Employers regularly should audit security systems, for example lighting and access to the worksite and parking lots. No monitoring devices or methods should be implemented without consultation with counsel to ensure compliance with monitoring laws in the relevant jurisdiction.

3. Considerations at the time of termination. Workplace violence often occurs in response to adverse employment action, like termination. Employers should employ 'face-saving' measures such as low profile counseling or terminations when the workforce is lightest. Exit interviews provide a source of feedback, allow the airing of grievances and expose violence risks. Where an employee discloses great resentment toward the company, security measures may be necessary such as escorting the employee from the workplace. Where the company is in a position to arrange for outplacement services, this may assist the employee in transitioning.

In most jurisdictions, an employee threatened by violence may seek a restraining order prohibiting contact by the allegedly violent individual. In a few limited jurisdictions like California, companies may obtain restraining orders to protect both the threatened employee and the workplace. In most jurisdictions, actions exist for civil or criminal trespass against individuals who visit the workplace without a legitimate right. Each of these remedies should be discussed with an expert in workplace violence to ensure that such action would not escalate the risk.