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Workplace Violence Prevention in the Age of the 'Active Shooter'

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The tragic mass shootings in Paris, Colorado Springs, and San Bernardino, in three successive weeks, have had global reverberations. They have also left employers grappling with questions as to what measures they should take—or are legally obligated to take—to keep employees safe from harm in the workplace. A recurring question posed over the last three weeks has been “should we conduct active shooter training?”

While the confluence of these three incidents has caused many to panic, mass shootings are sadly nothing new. The New York Times reported that there were 10 prior deadly rampages since 2012, with the number of deaths ranging from six to 26 people, and the number of wounded far greater.¹ A 2012 survey identified at least 73 mass shootings in the United States in the last three decades.² However, given the size of the United States, the odds of being the victim of a workplace shooting are statistically low.³ Thus, while employers should take prudent measures to protect workplaces, employers should not overreact or impose drastic measures that are disproportionate to the actual risk, are unnecessarily costly, or are likely to be ineffective.

Background

Under the federal Occupational Health and Safety Act (OSHA), all employers have a general duty to provide a safe workplace for employees, free from recognized hazards that cause or are likely to cause death or serious physical harm to employees.⁴ Although a few states have imposed specific obligations on a small segment of employers in particular industries, the vast majority of workplaces are governed only by the OSHA “general duty clause.”

1 Associated Press, *California Attack is latest in String of US Mass Shootings*, New York Times, Dec. 2, 2015, <http://www.nytimes.com/aponline/2015/12/02/us/ap-us-mass-shootings-glance.html>.

2 Mark Follman, Gavin Aronsen, and Deanna Pan, *A Guide to Mass Shootings in America*, Mother Jones, July 20, 2012, <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

3 U.S. Department of Justice, Federal Bureau of Investigation, *Workplace Violence – Issues in Response*, p. 12, prepared by Critical Incident Response Group National Center for the Analysis of Violent Crime (2002).

4 See 29 U.S.C. § 654(a)(1) (requiring each employer to “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”).

As demonstrated by the spate of mass shootings, some believed to be acts of terrorism, it is not possible to prevent all acts of violence that may affect employees. Nonetheless, in an effort to reduce risk and prevent undesirable occurrences, employers should have policies and practices in place to increase awareness and reporting of actual or potential incidents of workplace violence.

Workplace violence encompasses any conduct that is sufficiently severe, offensive or intimidating as to cause an employee to reasonably fear for his/her personal safety or the safety of his/her family, friends and/or property, such that employment conditions are altered or a hostile, abusive or intimidating work environment is created. This includes actual acts of violence such as shooting, hitting and other forms of physical abuse, as well as threats of violence, including surveillance and stalking.

While some instances of workplace violence are committed by employees, many are perpetrated by outsiders such as family members, spouses or partners, clients or strangers. And while many think of workplace violence as threatening conduct that only occurs in the workplace setting, workplace violence is actually much broader and also encompasses behavior that occurs outside the work premises—if the company determines that the incident may lead to an occurrence of violence at the company's worksite. This may include violent conduct or threats of violence by one company employee against another (such as an employee making threatening phone calls, sending menacing e-mails to a co-worker's home, or brandishing a weapon in the workplace), and threats or acts of violence occurring off the company's premises involving an employee of the company as a victim (such as a threat of violence by an estranged spouse or disgruntled customer).

Recommendations for Preventing Workplace Violence

Although three mass shootings in the same number of weeks could make it appear as though there has been a drastic increase in incidents of violence in workplaces and public places (which are also the workplaces of many), employers should not overreact. As stated above, there has been a steady stream of mass shootings and other violent acts in the workplace for decades, and yet such tragedies are statistically rare. Nonetheless, there are measured, time-tested steps that employers should take to increase awareness of, and consequently improve chances of preventing, violence in the workplace.

Employers are well-advised to adopt a "zero tolerance" workplace violence policy and to disseminate such policy to all employees. Key elements of such a policy include a statement of the company's commitment to maintaining a safe working environment free from violence and intimidation; a definition of workplace violence and illustrative examples; a description of the types of objects that will be deemed prohibited weapons; a statement encouraging employees to report any such behavior that makes them feel uncomfortable; the company's reporting procedure, which should include alternative persons to whom such behavior can be reported; the company's commitment to investigate promptly all reports of suspicious behavior and threats of violence; the company's discretion to implement the program in keeping with its commitment to maintaining a safe workplace; and the potential consequences should an employee be found to have engaged in behavior in violation of such policy. The mantra "if you see something, say something" will yield results if employees know that they can come forward and have their concerns promptly addressed, without fear of retribution. Many employers also choose to address domestic violence in the company's workplace violence policy. The workplace violence policy should be distributed in the same manner as the company's other important policies, such as equal employment opportunity and harassment avoidance. Like the equal employment opportunity and harassment policies, the workplace violence policy should be regularly reviewed with employees.

To further reinforce the company's zero-tolerance workplace violence policy, a company may wish to conduct periodic training of employees on how to spot potential workplace violence and take the appropriate action when confronted with a potentially violent or harassing situation. Much as a fire drill alerts employees to the steps they need to take in the event of a fire, live or computer-based workplace violence prevention training programs tend to reinforce employees' awareness of possible signs of workplace violence and the steps they should take when confronted with actual or threatened violent conduct.

As part of its workplace violence prevention program, each company should designate a management response team (MRT) to act as the frontline response to any occurrences or threats of violence in the workplace. Depending on the employer's size and organizational structure, the MRT might include representatives of senior management, human resources, security, and in-house legal counsel. An MRT might also include outside representatives such as threat assessment professionals, local law enforcement authorities, risk management professionals, and outside counsel. The MRT should develop an emergency response plan that anticipates how the employer will deal with an incident of workplace violence—including securing the workplace, contacting law enforcement, informing employees of the danger by alarms, emails, or

text messages, notifying families during and after an incident, dealing with media, and responding with any necessary crisis counseling and other measures in the aftermath of an incident.

In addition to developing and implementing a workplace violence program and designating an MRT, companies are also well-advised to conduct a comprehensive safety and security audit to identify and correct any gaps in security or possible unsafe conditions, such as malfunctioning security systems, broken locks, multiple sites of access, and poor lighting. Installation of deadbolts on doors could be an inexpensive precaution that may save many lives in the event of an attack. Creating “safe rooms” is an option that companies are considering with increasing frequency; these can involve great expense and it is recommended that a company with experience in design be consulted. Many companies conduct safety audits internally, often led by security or facilities departments; other companies engage the services of private security companies. As part of this safety initiative, employers should consider partnering with their local police departments; many precincts have community affairs officers available to assist. Indeed, in some municipalities, the police may offer security consultations as part of their community service initiatives.

To avoid the confusion evidenced in recent catastrophes, where employers were uncertain as to which employees were in the building at the time of an incident of violence, it may be advisable for companies to adopt a sign in/sign out system each time an employee enters and leaves the building. Employers should also require employees to update their personal information and emergency contact information at least annually, in the event that an emergency were to occur.

Finally, many companies try to avoid issues potentially associated with hiring violent employees by conducting background checks. However, while criminal background checks may provide invaluable information regarding whether an applicant is at risk of engaging in violent behavior in the workplace, employers must be mindful of applicable legal constraints under various federal, state and local laws. Pursuant to the federal Fair Credit Reporting Act, an employer that enlists a third party to perform background checks on a prospective (or current) employee, which the employer may use in connection with employment-related decisions, generally must provide prior notice to such person and obtain his/her consent. In addition, prior to taking any adverse action against such applicant (or employee) based on the results of a background check (including a decision to not hire or to terminate such individual), the employer must provide the person with a copy of the background check report and a summary of rights under applicable law. Employers also should be mindful that Equal Employment Opportunity Commission takes the position that the use of criminal background checks may result in adverse impact liability in violation of Title VII of the Civil Rights Act of 1964. Further, some states have enacted laws limiting employer use of conviction or arrest records, and others have adopted so called “ban the box” statutes prohibiting the employer from asking questions about conviction or arrest records until after a conditional offer of employment has been extended. Certain state laws have imposed detailed restrictions that must be followed to legally prohibit weapons in the workplace. An employer must therefore ensure that any action taken with respect to an applicant or current employee, or even when implementing new policies and procedures, does not run afoul of applicable law.

Active Shooter Training

The recent mass shootings and acts of terrorism have prompted many employers to inquire as to whether they are legally required to—and if not, whether they should—conduct active shooter training. Before rushing into this, employers should be mindful of certain considerations.

There is no general legal requirement that an employer conduct active shooter training. In general, employers are not security experts and lack the training and expertise to direct employees as to how to react when confronted with a gun in the workplace. Rather, it is only law enforcement officials and other government authorities who should be giving such directives. The potential consequences of a misstep can be both dangerous and costly. For example, if an employer advised employees during a training drill to run if ever confronted with an active shooter, and an employee is shot in the back while running from an assailant as directed, the employer could face possible liability on top of other tragic circumstances.

For employers who decide that they want to offer some type of emergency training as part of their workplace violence prevention program, there are a number of options. An increasing number of police departments offer active shooter and other such training, free of charge, to employers. The Department of Homeland Security has a wealth of resources offered to the public, including several excellent short training videos. One, entitled “Run, Hide, Fight,” uses actors to depict an active shooter in the workplace, while the narrator gives instructions regarding the best course of action for particular employees depending upon their location. An employer who chooses to incorporate one of these videos into its regular workplace violence training is well-advised to make it clear to employees that the recommendations are those of the Department of Homeland Security.

There are also a number of private companies that offer drills and other training to employees on how to react when faced with a shooter or other dangerous emergency situations. Employers should carefully vet the qualifications, training and references of such companies, and ensure that they carry adequate insurance in the event that any participant is injured. Proponents of such training believe that, like fire drills, having participants walk and talk through simulated situations creates innate responses when faced with an actual situation, which could save lives when instant reaction is critical. For example, during these exercises, emergency evacuation routes are identified and employees practice getting to them. These drills could also offer life-saving tips, such as making employees aware that certain rooms are always locked and that running to them could waste valuable time and result in an employee being trapped when unable to enter. Other drills using actors posing as shooters could force employees to decide, in a moment of panic, whether the best course of action is to run or to shelter in place, following which trainers can critique their actions in the safety of a classroom setting. Like any other emergency training, however, repeated training or refresher courses on a periodic basis would produce the best chance of retention.

Unfortunately, it is impossible to prevent incidents of workplace violence entirely. However, by implementing comprehensive procedures, educating employees on the necessity of recognizing and reporting threatening, suspicious or otherwise troubling conduct, and taking other preventive measures as outlined above, an employer is in a better position to recognize, confront and perhaps eliminate some of the risk of workplace violence.