

Insight

IN-DEPTH DISCUSSION

JUNE 16, 2016

When Tragedy Strikes: How Employers Can Assist Employees Affected by Mass Shootings and Disasters

BY MARK PHILLIS, JEAN SCHMIDT, JILL LOWELL, GREG GREUBEL, KEVIN KRAHAM, DANTON LIANG, AND ANTHONY HALL

In the early morning hours of June 12, 2016, 49 innocent people lost their lives in a mass shooting in the Pulse nightclub in Orlando, Florida. This mass shooting, the deadliest in U.S. history, has shaken the Orlando community, particularly members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ), and Latino/a communities of Orlando.

This Insight aims to provide a guide to employers on ways they can support their employees whose lives were touched by this tragedy. Its basic principles will also apply when incidents of workplace violence occur or a natural or manmade disaster strikes.

Leave and Other Benefits for Affected Employees or their Family Members

Employers are encouraged to reach out to affected employees to make them aware of the leave and other benefits they offer, including, e.g., health insurance benefits, services from an Employee Assistance Program (EAP), time off under the Family and Medical Leave Act (FMLA), life insurance, short- and long- term disability insurance, bereavement leave, etc. Because employees may be using medical benefits, information on whom to contact regarding claims should also be communicated to the employees and their families and made available via the employer's intranet. Because many of the victims and their families are Latino/a, whose first language may not be English, employers may want to provide information in both Spanish and English.

FMLA - Employees who were victims of the attack and are unable to work and employees who have family members who were injured in the attack may be eligible for up to 12 weeks of unpaid, job-protected FMLA leave. Employers should ensure they notify potentially eligible employees of

their right to take FMLA leave if the employer has notice of the employee's serious health condition or that of a family member. Employers should remember that caring for a family member includes providing both physical and psychological care.¹

Because the communities most directly affected by this tragedy are the LGBT, Latino/a, and immigrant communities, who may have more non-traditional or multi-generational family structures, employers should ensure they carefully consider the family relationships that may be involved when assessing a leave request. For example, an employee may take FMLA leave to care for a child for whom the employee stands "*in loco parentis*." According to the FMLA regulations, a person stands in loco parentis if he or she has day-to-day responsibilities to care for and financially support a child. A biological relationship is not required.²

ADA - Employees who are physically or emotionally injured as the result of the shooting may be entitled to reasonable accommodation under the Americans with Disabilities Act (ADA). It would not be unusual for employees who were victims or relatives of victims to develop conditions such as post-traumatic stress disorder (PTSD). The Job Accommodation Network, a free service provided by the US Department of Labor's Office of Disability Employment Policy (ODEP), has development resources and suggestions on ways that employers may accommodate employees who suffer from PTSD.³

EAP - Many employers have an EAP, an employer-sponsored service designed to assist employees in getting help for their personal or family problems, including mental health issues or financial or legal concerns. EAPs often provide assessments and referrals to employees to provide them with the support they need. These programs can be very effective when employees have experienced a traumatic event. Employers that do not yet have an EAP may wish to consider offering one through or in addition to their health insurance coverage.

Expansion of Leave - Even if an employer's policies (or practices) do not allow non-medical leaves of absence, employers may wish to grant additional leave to affected employees under these extraordinary circumstances. While strict adherence to leave policies is the conservative and prudent management approach for employers in normal operating circumstances, when tragedy strikes, employers should consider being flexible and considerate by expanding or at least temporarily relaxing otherwise restrictive existing leave policies. This is particularly true with respect to extending bereavement leaves and providing leave to victims and their families who may not be covered by the FMLA or disability leave.

Time Off to Donate Blood - In the wake of the shooting, Florida medical organizations have called for citizens to donate blood. While there is no law in Florida/Orlando requiring employers to allow employees to take time off to donate blood, employers may want to consider offering that benefit.

What Should the Company Do If an Employee Died?

Payment of Wages Due to Deceased Employee - Under Florida law, wages, reimbursement for travel expenses, reemployment assistance or unemployment compensation owed to a deceased employee may be paid directly to the employee's surviving spouse or, if there is no spouse, to the employee's children if the children are over the age of 18. If there are no children, payment may go to the employee's mother or father. Florida law does not require any particular documentation to establish next of kin.

1 29 C.F.R. § 825.124.

2 29 C.F.R. § 825.122(d)(3). In 2010, however, the DOL issued Administrator's Interpretation 2010-3, in which it states that, to attain in loco parentis status, the employee can either be: (1) responsible for the child's day-to-day care; or (2) financially responsible for the child. Further, the DOL states that, to prove in loco parentis status, an employee need only provide his or her employer with a simple statement "asserting the requisite familial relationship." For a discussion of this Administrator's Interpretation, see James Smith, Gavin Appleby, and Jeffrey Moyle, [Who's Watching the Kid? The Department of Labor Expands the FMLA Definition of a Son/Daughter for the Purposes of Child-Related Leaves](#), Littler Insight (Jun. 27, 2010).

3 See Accommodation Ideas for Post-Traumatic Stress Disorder, available at <http://askjan.org/media/post.htm>.

COBRA - If the employee covered his or her dependents on the company's health insurance plan, employers should remember to send COBRA notices to each of the dependents who were covered under the plan.

Life Insurance - Employers may want to ensure that the designated beneficiary of any company-sponsored life insurance policy held by the employee is aware of the coverage and is provided with the information he or she may need to file a claim for benefits.

What Else Might Employers Consider?

Nondiscrimination and Harassment - In the wake of current events, it is important for employers to reinforce their policies prohibiting discrimination and harassment against applicants and employees based on any protected characteristics including sexual orientation, gender identity, national origin, race and religion.⁴ Hiring selections and terms and conditions of employment cannot be based on protected characteristics. Employers should remind employees that verbal conduct, such as derogatory comments, slurs and threats of violence; visual conduct, such as derogatory posters and drawings; and physical conduct, such as assault or unwanted touching, are strictly prohibited. Employers should educate their employees that just because something is said on television or the radio or published in a newspaper or magazine does not make it appropriate for the workplace.

Workplace Violence - In light of this tragedy and other recent mass shootings, employers may want to consider what they can do to ensure their workplace is safe, particularly with respect to firearms. There are several things an employer can do to create a safer 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; 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.
- Employers may create employee policies that limit the right of employees to bring firearms on the employer's property, subject to state law. In Florida, employers may bar employees from carrying any firearms into any employer facility and other areas beyond the parking lot. However, employees are permitted to bring lawfully-possessed firearms onto employer property when the firearms are locked inside, or locked to, a private motor vehicle and when the employee is lawfully in the area.⁵
- Employers may want to review and update safety and security measures to deal with the risk of violence associated with the presence of guns on company property and prepare a response plan in the event that violence erupts.
- Employers may want provide training on workplace violence and safety. For employers who decide that they want to offer some type of emergency "active shooter" 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

⁴ Under federal law, Florida law and a City of Orlando Ordinance, employers generally are prohibited from discriminating against employees on the basis of sex, race, color, national origin, and religion, among other characteristics. The City of Orlando, which covers employees working within the city limits, also expressly prohibits discrimination and harassment based on an individual's sexual orientation actual or perceived gender.

⁵ Fla. Stat. § 790.251.

Department of Homeland Security has a wealth of resources offered to the public, including several excellent short training videos.⁶

Philanthropic or In-Kind Support – Employers, particularly those with operations in Orlando, may find that employees are looking for ways to help the victims. Employers may wish to consider making a philanthropic donation to one of the funds that have been established to support the victims and the affected communities.⁷ Employers may also want to provide information to their employees on ways they can provide financial support to the victims since employees may be asking how they can help.

Conclusion

Employers are not helpless in the face of this tragedy. By taking simple, concrete steps, they can help employees, their families, and the broader community.

6 For a longer discussion of workplace violence prevention, see Terri Solomon, *Workplace Violence Prevention in the Age of the 'Active Shooter'*, Littler Insight (Dec. 11, 2015).

7 Equality Florida has contracted with the National Center for Victims of Crime's Compassion Fund and established a fund to support victims and their families. Donations can be made through a GoFundMe page <https://www.gofundme.com/PulseVictimsFund> or through or through the Compassion Fund, <http://nationalcompassionfund.org/>. Orlando Mayor Buddy Dyer announced the formation of the OneOrlando Fund, <http://www.oneorlando.org/>. It will support nonprofits supporting the victims and their families, the LGBTQ, Latino/a and faith communities, and other initiatives that may arise out of the tragedy.