

VIOLENCE IN THE WORKPLACE

§ 30.1

I. RECENT TRENDS & DEVELOPMENTS

§ 30.1.1

A. INTRODUCTION

The weakening of the U.S. economy in 2008 amplified the challenges facing American employers. Analysts predict that incidents of workplace violence could potentially increase through 2009 and 2010 as U.S. workers attempt to cope with changing work conditions.¹ As the recession in this country continues, and corporations of “all industries and sizes” continue with “unprecedented layoffs,” some employees will lose their jobs, homes, retirement savings, benefits, and job security, while other employees will continue working with increased pressure to perform and an overall feeling of day-to-day uncertainty.² This “perfect storm of stressful conditions,” combined with recently passed legislation in states such as Florida, Georgia, and Louisiana, allowing employees to bring weapons to the workplace, could result in extreme tragedy.³ More than ever before, employers will increasingly be called upon to implement plans and solutions to protect their workforce and workplace.

§ 30.1.2

B. THE SCOPE OF THE PROBLEM OF WORKPLACE VIOLENCE

While discrete instances of workplace violence have received substantial notoriety through the media in recent years, the widespread frequency of violence in today’s workplace continues to surprise many American employers. An astounding 20% of all violent crime in

¹ Ross Arrowsmith, *Stress of Weak Economy May Increase Workplace Violence*, WORKPLACE VIOLENCE NEWS, Nov. 30, 2008, available at <http://www.workplaceviolencenews.com/2008/11/12/stress-of-weak-economy-may-increase-workplace-violence/>.

² *Id.*

³ *Id.*

the United States occurs in the workplace, injuring more than two million workers annually.⁴ Although the “typical” act of workplace violence does not involve a fatality, approximately 500 fatalities still do occur in the American workplace annually.⁵ Additionally, a recent Department of Labor survey indicates that over 50% of all employer establishments with 1,000 or more workers reported an incident of violence in the preceding 12-month period.⁶ In stark contrast to these findings, however, less than 30% of American workplaces have implemented formal policies or procedures to address job-related violence, and only 20% of private industry employers provide preventative training.⁷ Researchers have attributed this “gap,” at least in part, to a pervasive “lack of awareness of the scope and importance of the problem” and a denial of the potential for workplace violence “until a tragic, violent event occurs.”⁸

Notably, “violence” in the workplace includes behavior encompassing much more than on-site physical attacks. The National Institute for Occupational Safety and Health broadly defines *workplace violence* as including not only “physical assaults and threats of assault,” but also verbal violence including verbal abuse, hostility, and harassment.⁹ A *workplace* is also broadly defined to encompass any location — either permanent or temporary — where an employee performs any work-related duty including the building, parking lots, surrounding fields, clients’ homes, and the roadways to and from work assignments. In a recent national survey, more than 40% of American workers reported being victims of violence in one or more of these contexts.¹⁰ These statistics and broad definitions are not, however, meant to suggest that actual physical assaults are disappearing from the core workplace. Indeed, in the same survey, roughly 6% of workers reported actually being physically assaulted at work, including being slapped, kicked, or attacked with a weapon.¹¹

With respect to the most severe form of physical violence, the overall number of workplace homicides has decreased nearly 50% since 1994.¹² As mentioned above, however, researchers are quick to point out that this downward trend is unlikely to continue. Even in light of the decreasing overall number of workplace homicides, certain industries and demographic groups remain uniquely at risk of job-related homicide. For example, of the 105 work-related deaths of first-line supervisors and managers of retail sales workers in 2005, 70% were classified as homicides. By comparison, homicides accounted for only 41% of the

⁴ Dana Loomis, *Preventing Gun Violence in the Workplace*, Connecting Research in Security to Practice (CRISP) Report Commissioned by the ASIS International Foundation, Sept. 8, 2008, *available at* <http://www.asisonline.org/foundation/guns.pdf>.

⁵ *Id.*

⁶ BUREAU OF LABOR STATS., U. S. DEP’T OF LABOR, SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, at 1 (2006), *available at* <http://www.bls.gov/iif/oshwc/osnr0026.pdf>.

⁷ *Id.* at 3.

⁸ NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, WORKPLACE VIOLENCE PREVENTION STRATEGIES & RESEARCH NEEDS § 2.1.

⁹ *Id.* § 1.2.

¹⁰ Julia Thomson, *47 Million Americans Are Victims of Workplace Aggression*, Jan. 18, 2006, <http://dailynews.mcmaster.ca/story.cfm?id=3767> (citing a survey conducted by Aaron Schat, assistant professor at the DeGroote School Business at McMaster University in Canada).

¹¹ *Id.*

¹² BUREAU OF LABOR STATS., U.S. DEP’T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2005, at 2 (2006), *available at* <http://www.bls.gov/news.release/pdf/cfoi.pdf>.

123 work-related deaths of police officers in that same year.¹³ Homicides also represented 24% of all workplace fatalities among women, as compared to 9% among men, although men suffered a disproportionately large share (93%) of all fatal workplace injuries.¹⁴ Finally, according to the Department of Labor, nearly 78% of all workplace homicides were caused by shootings.¹⁵ The total cost of all workplace violence is now estimated to exceed \$120 billion annually, up from just \$4.2 billion in 1992.¹⁶

What likely gets lost in a review of these statistics is the often palpable — and highly costly — negative after-effects that an incident of job-related violence or aggression can levy upon a workplace. As one researcher put it:

Exposure to aggressive behavior at work is associated with a wide range of negative consequences for individuals and organizations, including negative work attitudes [and] reduced well-being The fact that such a large percentage of the American population has experienced workplace aggression demonstrates the need to address it.¹⁷

In their roles as employers, states such as New York have recognized this urgent need to protect government workers by enacting legislation that requires most public employers to assess risks of workplace violence, and develop a plan of action to prevent it from occurring.¹⁸ Legislation of this kind should only further encourage private employers to do the same. As terror and violence increasingly dominate the newspaper headlines, employer preparedness for, and responses to, workplace crises must also withstand increased scrutiny.

Many advocates and legislators are focusing their efforts at decreasing aggressive, yet perhaps less physically violent, behavior among employees. Such behavior has become known as *workplace bullying* and has received increasing attention in the past several years. The Workplace Bullying Institute defines *workplace bullying* as “repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: verbal abuse, offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating, [or] work interference (sabotage) which prevents work from getting done.”¹⁹ A 2007 nationwide survey of employees revealed that approximately 37% of American workers (54 million) have been bullied, and overall, 49% of workers have been affected by workplace bullying when including witnesses to bullying.²⁰ Moreover, the same survey indicated that bullying is up to

¹³ BUREAU OF LABOR STATS., U.S. DEPT. OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992-2005, at 14 (2006), available at <http://www.bls.gov/iif/oshwc/cfoi/cfch0004.pdf>.

¹⁴ BUREAU OF LABOR STATS., U.S. DEP’T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2005, at 12.

¹⁵ *Id.* at 7.

¹⁶ See *Thirteen State Legislatures Have Considered Workplace Gun Laws Since Oklahoma Firings*, 58 Daily Lab. Rep. (BNA), Mar. 27, 2006, at AA-1 (citing research from the Brady Center).

¹⁷ *Nearly Half of American Workers Experience “Workplace Abuse,”* VITABEAT, Jan. 26, 2006, available at [http://www.vitabeat.com/nearly-half-of-american-workers-experience-workplace-abuse/f/1906/\(quoting](http://www.vitabeat.com/nearly-half-of-american-workers-experience-workplace-abuse/f/1906/(quoting) Aaron Schat, assistant professor at the DeGroot School of Business at McMaster University in Canada).

¹⁸ *Gov. Pataki Signs Workplace Violence-Prevention Bill*, 112 Daily Lab. Rep. (BNA), June 12, 2006, at A-14 (discussing N.Y. Senate Bill S.6441 and N.Y. Assembly Bill A.9691).

¹⁹ The Workplace Bullying Institute provides numerous resources for employers, in addition to a proposed legal definition of this phenomenon at <http://bullyinginstitute.org/education/bbstudies/def.html>.

²⁰ *Id.*

four times more prevalent than any other type of harassment.²¹ Not surprisingly, although there are currently no laws to directly protect against such behavior, 64% of the employees surveyed felt they should be able to bring a lawsuit against both their organizations and the supervisors themselves for such treatment.

Since 2003, 14 states have considered anti-bullying legislation, including California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Vermont and Washington.²² All of the states, excluding Nevada, have introduced various versions of the Healthy Workplace Bill, model legislation drafted by the Workplace Bullying Institute. As an example, the previously introduced Vermont bill will again be formally considered in early 2009, and would “make it an unlawful employment practice to subject an employee to an abusive work environment, provide that an employer may be liable in such situations, provide for enforcement by a private right of action, and provide for injunctive relief and damages.”²³ Nevada legislation, however, broadly proposes that all on-the-job harassment be illegal, and that discrimination and/or harassment on the basis of personal appearance be redressable.²⁴ Finally, in 2008, the Indiana Supreme Court recognized workplace bullying when it upheld a lower court’s ruling that a surgeon was liable for intentional infliction of emotional distress (IIED) and assault for screaming, swearing at, and advancing upon a coworker.²⁵ Importantly for employers, the Court held that the term “workplace bullying,” is “an entirely appropriate consideration” in determining the issues of assault or IIED.²⁶ Accordingly, the passage or rise of such legislation and litigation could dramatically impact employer responsibility for employee behavior and is likely to meet with vehement opposition from business groups.

§ 30.1.3

C. THE PROLIFERATION OF WORKPLACE GUN LAWS

The 2002 firing of several Oklahoma paper mill workers for possessing firearms in their vehicles sparked a firestorm across a number of state legislatures that continues today. Following the firings, however, Oklahoma’s legislature responded by amending the Oklahoma Self-Defense Act in 2004 to ban employers from establishing “any policy or rule that has the effect of prohibiting” its employees from “transporting and storing firearms in a locked vehicle” in company parking lots.²⁷ As of 2008, nearly 20 states have attempted to follow Oklahoma’s lead in establishing laws that would grant employees the right to have guns on an employer’s premises if maintained in the gun-owner’s locked vehicle. As of 2008,

²¹ *Id.*

²² Workplace Bullying Institute, *Legislative Change Statistics*, Oct. 13, 2008, available at <http://bullyinginstitute.org/education/legislativecampaign.html>; see also Valerie Miller, *State Senator Proposes Bill on Bullying*, LAS VEGAS BUS. PRESS, Oct. 13, 2008, available at http://www.lvbusinesspress.com/articles/2008/10/13/news/iq_24385036.txt.

²³ Workplace Bullying Institute, <http://www.bullyinginstitute.org>.

²⁴ Valerie Miller, *State Senator Proposes Bill on Bullying*, LAS VEGAS BUS. PRESS, Oct. 13, 2008, available at http://www.lvbusinesspress.com/articles/2008/10/13/news/iq_24385036.txt.

²⁵ See *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008).

²⁶ *Id.* at 799.

²⁷ OKLA. STAT. tit. 21, § 1290.22 (amended Mar. 2004).

only about half of these states — Alabama, California, Missouri, New Hampshire, Utah, Virginia, and Wisconsin — have been able to prevent such legislation from passing.²⁸

The other half of these states now permit employees to store guns in their vehicles at work — although no state currently allows employees to bring guns into the workplace. For example, Alaska passed a bill in 2005 similar to Oklahoma’s stating that legal gun-owners may maintain firearms in their locked vehicles even when on property where the property owner forbids them.²⁹ On April 15, 2008, Florida passed a law permitting Florida residents with a concealed handgun permit to store firearms in their vehicles at work.³⁰ The broadly written Florida law also prohibits employers from discriminating against employees, customers, or invitees.³¹ Similarly, on May 14, 2008, Georgia passed a law prohibiting employers from preventing employees and customers from storing guns in their vehicles on the employer’s property.³² Louisiana passed its version of this law on July 2, 2008.³³ Kansas, Kentucky, Michigan, Minnesota, and Mississippi have similar laws, and numerous other states are certain to be developing their respective versions.³⁴

The effect of such prohibitions on employer policies regarding workplace violence is plainly evident. Thus far, an Oklahoma federal district court ruled that state laws banning such employer policies were entirely preempted by the Federal Occupational Safety Health Act (“Fed-OSH Act”).³⁵ The court determined that not allowing employers to pass such prohibitions was a violation of an employer’s general duty under the Fed-OSH Act to protect workers from “recognized hazards that are causing or are likely to cause death or serious physical harm.”³⁶ The court opined that the laws were in direct defiance of an employer’s attempt to promote safety in the workplace. A Florida district court analyzing the same the Fed-OSH Act argument in 2008, however, rejected the Oklahoma court’s decision, and upheld the law prohibiting employers from developing policies to restrict employees from storing guns in workplace parking lots.³⁷

Finally, one other consideration in this brewing debate is how the U.S. Supreme Court’s decision in *District of Columbia v. Heller* will impact the proliferation of these laws.³⁸ The Supreme Court generally held that the Second Amendment confers an individual the right to keep and bear arms and that statutes banning handgun possession in the home violated the Second Amendment.³⁹ There is little doubt that employers will face increased challenges with these laws as they continue to be refined and analyzed by the courts. This underscores the

²⁸ The 2006 bills that were defeated are: California Assembly Bill 1912; Missouri House Bill 1752; New Hampshire House Bill 1389; Utah Senate Bill 24; Virginia House Bill 162; and Wisconsin Senate Bill 403 (vetoed).

²⁹ See Alaska House Bill 184.

³⁰ FLA. STAT. § 790.251 (2008).

³¹ *Id.*

³² GA. CODE ANN. § 16-11-135 (2008).

³³ LA. REV. STAT. ANN. § 292.1 (2008).

³⁴ KAN. STAT. ANN. § 75-7c11; KY. REV. STAT. ANN. § 527.020(4); MICH. COMP. LAWS ANN. § 28.425n; MINN. STAT. ANN. § 624.714; MISS. CODE § 45-9-55.

³⁵ *ConocoPhillips Co. v. Henry*, 26 Individual Empl. Rts. Cas. (BNA) 1205 (N.D. Okla. 2007).

³⁶ *Id.*

³⁷ *Florida Retail Ass’n v. Attorney Gen. of Fla.*, No. 4:08cv179-RH/WCS (N.D. Fla. Jul. 29, 2008).

³⁸ 128 S. Ct. 2783 (2008).

³⁹ *Id.*

importance of revising and/or implementing workplace violence and weapons policies before tragedy strikes.

§ 30.1.4

D. HANDLING ALLEGATIONS OF EMPLOYEE VIOLENCE OUTSIDE OF THE WORKPLACE

When an employee has been charged with committing a violent crime outside the workplace, employers may feel that they are faced with a dilemma. Does the employer retain the employee and risk incurring liability under a negligent hiring or negligent retention theory, or, alternatively, under the general duty set forth by the Fed-OSH Act that an employer must maintain a safe workplace?⁴⁰ Or, does the employer suspend or discharge the employee, thereby courting the possibility of a discrimination suit, violation of some other state statute, or liability for back pay if the charges are dismissed or the employee is acquitted?

A recent arbitration decision, *Fluor v. Hanford*,⁴¹ unsympathetically exposes the dilemma that employers may experience when facing an employee's off-duty misconduct. There, an arbitrator awarded back pay to an employee who had been suspended without pay for nearly five months under a "just cause" provision in the applicable collective bargaining agreement. The employee had been charged with second-degree assault for aiming a gun at his wife during a domestic dispute. After the charges were dropped months later, the employee returned to work and filed a grievance alleging that the company did not have "just cause" to suspend him without pay despite his admissions that he had indeed pulled out a gun during the argument with his wife. The employer argued that either its Fed-OSH Act obligations to provide a safe workplace, its reasonable concern for negligent retention liability, or its understandable disdain for the employee's actions all militated in favor of a finding of "just cause." The arbitrator disagreed, holding that the employer was required to show "some meaningful nexus between the off-duty conduct and the employee's employment." To conduct this inquiry, the arbitrator weighed such factors as the severity of the employee's conduct, his record and tenure, and whether the conduct would impede the other employees' ability to do their jobs. The arbitrator held that the company had not shown a sufficient nexus, and applied the general rule that "an employer may not discipline employees for off-duty conduct."⁴²

§ 30.1.5

E. DISCRIMINATION BY REFUSING TO REINSTATE EMPLOYEE DUE TO HISTORY OF VIOLENCE

In a recent Ninth Circuit case, *Josephs v. Pacific Bell*,⁴³ Pacific Bell was held liable under the ADA for refusing to reinstate a former in-home technician after it learned of a history of arrests for violent crimes and a two and one-half year stay in a mental hospital. The employee, Josephs, had been convicted approximately 15 years prior of misdemeanor battery

⁴⁰ See 29 U.S.C. § 654(a)(1).

⁴¹ 122 Lab. Arb. Rep. (BNA) 65 (2006) (Gaba, Arb.).

⁴² *Id.* at 70.

⁴³ 432 F.3d 1006, 1017 (9th Cir. 2006).

of a police officer and, near the same time, had been acquitted by reason of insanity of the murder of his quadriplegic friend. Josephs lied on his job application, stating that he had never been convicted of a crime, and was subsequently discharged. The employee grieved the discharge and, while the grievance was pending, had the misdemeanor conviction expunged from his criminal record. Although he had no further criminal convictions, Pacific Bell went against its past practice and refused to reinstate Josephs. While the dissenting judge echoed the common sense sentiment that the company should not be required to send an employee it reasonably believes is dangerous into customers' homes, the majority held that the jury properly determined that the evidence did not support the employer's argument that Josephs was unqualified to perform the job because of his criminal history.⁴⁴

§ 30.1.6

F. WORKERS' COMPENSATION STATUTE PREEMPTS SUIT BY SEXUAL HARASSMENT VICTIM

In what has been described as a novel ruling, the Nevada State Supreme Court recently held in *Wood v. Safeway, Inc.*,⁴⁵ that employees who are sexually assaulted at work, during regular work hours, and while performing job duties, may not sue their employers for any resulting injuries. Instead, the court held that such victim's exclusive remedy must fall under the Nevada worker's compensation statute. In *Wood*, a mentally handicapped female employee was barred from suing her employer after she was sexually assaulted in the store by a janitor on three separate occasions. In rendering its decision, the court adopted the following test: "the sexual assault falls within the [workers' compensation statute] if the nature of the employment contributed to or otherwise increased the risk of assault beyond that of the general public."⁴⁶ As the victim's only contact with her assaulter was through her employment, her assault satisfied this test. On the other hand, if "the animosity or dispute which culminates in the assault is imported into the place of employment from the injured employees' private or domestic life," the same assault would not be covered by the workers' compensation statute unless "the animosity" is "exacerbated by the employment."⁴⁷ This same test has so far been adopted by Georgia, Kansas, South Carolina and Texas, although the Nevada court's rigid application in such an egregious context is certain to raise eyebrows.

§ 30.2

II. OVERVIEW OF THE PROBLEM OF WORKPLACE VIOLENCE

The National Institute for Occupational Safety and Health (NIOSH) defines *workplace violence* as any physical assault, threatening behavior, or verbal abuse occurring in the workplace. A workplace may be any location, either permanent or temporary, where an employee performs any work-related duty including, but not limited to, the building and

⁴⁴ *Id.*

⁴⁵ 121 P.3d 1026, 1034 (Nev. 2005); see also *Nevada High Court Clarifies Circumstances for Sexual Assault Coverage by Benefits Act*, 206 Daily Lab. Rep. (BNA), Oct. 26, 2006, at A-9.

⁴⁶ 121 P.3d at 1034.

⁴⁷ *Id.*

surrounding perimeters, such as parking lots, field locations, clients' homes, and traveling to and from work assignments.

The Bureau of Labor Statistics' Census of Fatal Occupational Injuries reports that assaults and violent acts accounted for 15% of all workplace fatalities in 2007. Of these deaths, 610 have been classified as homicides, — a more than 10% increase from 2006. Homicide was the third leading cause of workplace death in 2007, accounting for more fatalities than fires and explosions, exposure to harmful substances, being struck by an object, and non-highway transportation accidents. While men suffered a disproportionately large share (92%) of all fatal workplace injuries, women were three times more likely than men to be the victim of a workplace homicide.⁴⁸

§ 30.2.1

A. EMPLOYERS' DUTIES & LEGAL OBLIGATIONS

§ 30.2.1(a)

Fed-OSH Act Requirements & Guidelines

The federal Occupational Safety and Health Act ("Fed-OSH Act" or the "Act") contains a general duty clause which requires employers to provide their employees with a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees."⁴⁹ The Occupational Safety and Health Administration ("Fed-OSHA") has used this General Duty Clause to encourage employers to take steps to prevent injury to employees. As discussed below, Fed-OSHA has also developed guidelines that focus on preventing workplace violence in health care and social service operations, as well as in the late-night retail industry. Fed-OSHA has noted that it will continue to issue citations for workplace violence under the General Duty Clause where criminal activity endangers workers.

A 2005 Fed-OSHA compliance directive explains how Fed-OSHA investigates workplace fatalities. The 2005 directive supersedes a previous directive issued in 1996 and the significant changes include identifying appropriate training for Fed-OSHA personnel who conduct investigations, articulating specific witness interview procedures, and clarifying Fed-OSHA jurisdiction with respect to "incidents of national significance." As with its predecessor, the 2005 directive aims to streamline and consolidate Fed-OSHA's fatality inspection procedures to ensure uniform processing of serious cases. Specifically, Fed-OSHA must determine whether a fatality occurred, whether safety and health regulations were violated, whether the violations contributed to the fatality, and whether the employer knowingly violated the safety and health standards. Criminal penalties may be imposed against an employer that is convicted of willfully violating a Fed-OSHA standard, rule, or order when the violation caused the employee's death. Family members of the victim will be contacted early in the investigation to obtain information about the incident. The Fed-OSHA Area Director must obtain abatement information from the employer and "an assurance that appropriate safety and health programs have been put in place to prevent the hazards from

⁴⁸ BUREAU OF LABOR STATS., U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES 2007 CHART PACKAGE, *available at* <http://www.bls.gov/iif/oshcfoi1.htm#charts> (last visited Dec. 3, 2008).

⁴⁹ 29 U.S.C. § 654(a)(1).

recurring.” States with their own safety and health programs are encouraged to follow the Fed-OSHA directive but are not required to do so.⁵⁰

§ 30.2.1(a)(i)

Fed-OSHA Fact Sheet: Workplace Violence

In 2002, Fed-OSHA published a brief, two-page Fact Sheet entitled *Workplace Violence*. Although the information it addresses is discussed in greater detail in other Fed-OSHA publications, the Fact Sheet is a convenient resource for an employer in search of initial direction in creating policies and procedures to prevent or limit violence in the workplace.

The Fact Sheet suggests establishing a zero-tolerance policy toward workplace violence by or against employees. It also recommends that employers ensure that all employees know the policy and understand that claims of workplace violence will be investigated and promptly remedied. In addition, the Fact Sheet provides tips for employees to protect themselves, such as alerting supervisors to concerns about safety or security, and carrying minimal amounts of cash.

§ 30.2.1(a)(ii)

Guidelines for Health Care Institutions

In 2004, Fed-OSHA revised its guidelines for violence inflicted by patients or clients against health care and social service workers.⁵¹ Despite these guidelines' specific application to the health care industry, they are useful for all employers and should be reviewed for ideas on how to prevent workplace violence. Fed-OSHA states specifically that the guidelines are not a new standard or regulation and that they are advisory in nature only. Nevertheless, the guidelines hold the potential for actual, rather than merely theoretical, significance because they purport to rely on the General Duty Clause for enforcement authority. The guidelines state: “Employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it.”

The guidelines recommend a violence prevention program comprising five main components:

1. management commitment and employee involvement;
2. worksite analysis;
3. hazard prevention and control;
4. safety and health training; and
5. record keeping and program evaluation.

⁵⁰ OSHA INSTRUCTION CPL 2.137.

⁵¹ *Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers*, OSHA Publication No. 3148-01R (2004), available at <http://www.osha.gov/publications/osha3148.pdf> (last visited Dec. 3, 2008). Because the components of an effective program also apply to the prevention of workplace violence, these five components are similar to the *Fed-OSHA's Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*, discussed in greater detail in § 30.2.1(a)(iii) below.

According to Fed-OSHA, these guidelines are particularly useful to health care and social service workers because of several unique risk factors they face, including:

- The prevalence of handguns and other weapons among patients, their families or friends.
- The increasing use of hospitals by police and the criminal justice system for criminal holding cells and the care of acutely disturbed, violent individuals.
- The increasing number of acute and chronically mentally ill patients now being released from hospitals without follow-up care, who have the right to refuse medicine and who can no longer be hospitalized involuntarily unless they pose an immediate threat to themselves or others.
- The availability of drugs or money at hospitals, clinics and pharmacies, making them likely robbery targets.
- Situational and circumstantial factors such as unrestricted movement of the public in clinics and hospitals; the increasing presence of gang members, drug or alcohol abusers, trauma patients, or distraught family members; long waits in emergency or clinic areas, which lead to client frustration over an inability to obtain needed services promptly.
- Low staffing levels during times of specific increased activity such as meal times, visiting times and when staff is transporting patients.
- Isolated work with patients during examinations or treatment.
- Solo work, often in remote locations, particularly in high crime areas, with no back up or means of obtaining assistance.
- Lack of training for staff in recognizing and managing escalating hostile and assaulting behavior.
- Poorly lit parking areas.

Additionally, in 2002, NIOSH, a research arm of the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention, issued a publication entitled *Violence: Occupational Hazards in Hospitals*.⁵² The publication addresses types of violence common to hospital settings, their sources, and the risk factors that may be unique to hospitals. The publication explains that violence in hospitals is often different from violence in other workplaces because it results from patients and families who feel frustrated, vulnerable, and out of control. In terms of prevention strategies, the publication focuses on the need for an appropriate environmental building design and administrative controls, while also providing a list of safety tips for hospital workers.

§ 30.2.1(a)(iii)

Guidelines & Statutes for Late-Night Retail Establishments

Statistics indicate that workers in the late-night retail industry face a higher risk of workplace violence than workers in virtually any other industry. Responding to these increased risks, in 1998 Fed-OSHA adopted recommendations to help prevent crime in late-night retail

⁵² DHHS (NIOSH) Publication No. 2002-101 (2002).

establishments.⁵³ The states of Florida, New Mexico and Washington have also enacted statutes or regulations to address the problem. These state laws are addressed further below in Part III of this chapter.

Fed-OSHA's Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments are aimed at helping retail employers design, select and implement prevention programs based on the specific risk factors present in their workplaces. The Recommendations specifically state, however, that they are not intended to establish a legal standard of care with respect to workplace violence and do not impose any new legal obligations or constraints on employers.

The Recommendations consist of five basic elements from which an employer can construct a violence prevention program tailored to its specific needs. The five components include:

1. *Management commitment and employee involvement*: management and employees should work together to structure and operate a violence prevention program. For example, management should create and disseminate a policy expressly disapproving of workplace violence, and employees should participate by developing procedures to minimize risks of violence in daily business operations.
2. *Worksite analysis*: perform in-depth analysis, which is designed to identify common risk factors in retail establishments; determine existing and potential hazards for workplace violence; review records that may shed light on the magnitude and prevalence of the risk of workplace violence; evaluate the effectiveness of any existing security measures; and institute a system of periodic safety audits.
3. *Develop measures to protect employees*: outline previously identified risks of injury and violent acts and implement violence prevention strategies, engineering controls, administrative and work practice controls, and post-incident response evaluation programs.
4. *Training and education*: provide all employees with education and training regarding the potential security hazards and the procedures for protecting themselves and their coworkers.
5. *Evaluate the workplace violence prevention program*: develop procedures to maintain records of injuries, illnesses, incidents, hazards, corrective actions, and training. Encourage management to communicate lessons learned from the evaluation process to all employees and to discuss changes in the program during regularly scheduled meetings.

In addition to the above five basic components of an effective violence prevention program, the Recommendations include several practical resources for use by employers, including a sample workplace violence *Factors and Controls Checklist*, an incident report and suspect description form, sources of assistance, and a comprehensive Fed-OSHA office directory.

⁵³ *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*, OSHA Publication No. 3153 (1998), available at <http://www.osha.gov/publications/osha3153.pdf> (last visited Dec. 3, 2008).

Although they do not carry the weight of a regulation or new standard, the Recommendations suggest that employers implement one or more, or all, of the following:

- Improve visibility by providing adequate lighting and installing mirrors.
- Keep signs and shelves low.
- Install drop safes and signs stating that little cash is kept on hand.
- Conduct video surveillance.
- Provide silent and personal alarms.
- Establish emergency procedures, including communication systems, training and education.
- Restrict customer access by reducing store hours and closing portions of the store.
- Take precautions when going to remote, isolated spots such as garbage areas and outdoor freezers.
- Lock doors not in use.
- Increase staffing during high-risk periods.
- Install bullet-resistant enclosures.

§ 30.2.1(a)(iv)

Guidelines for Taxi & Livery Drivers

In May 2000, Fed-OSHA published a fact sheet entitled *Risk Factors and Protective Measures for Taxi and Livery Drivers*.⁵⁴ Citing statistics from the National Institute for Occupational Safety and Health (NIOSH) and the Department of Justice, the publication noted that taxi drivers are 60 times more likely than other workers to be murdered while working. Further, only two other professions, police and private security guards, experience higher levels of nonlethal assault.

Fed-OSHA identified several factors that put drivers at risk. These include working with the public, with cash, alone, at night, and in high-crime areas. To reduce the risks encountered by drivers, Fed-OSHA recommended several safety measures be taken. Some of the safety measures may not prevent injury but are intended to speed response time when an incident occurs. Many of the recommendations involve utilizing technology to reduce the risk of violence, including the use of global positioning systems, in-car surveillance cameras, silent alarms, caller ID to help trace the location of fares, and open-microphone radios. Fed-OSHA also recommends using cashless fare collection systems such as debit and credit cards to discourage robbers.

The *Risk Factors and Protective Measures for Taxi and Livery Drivers* was not intended to create a legal standard of care. While the fact sheet is intended to apply to taxi and livery drivers, all employers should consider technology-based solutions in preventing workplace violence.

⁵⁴ OSHA Nat'l News Release (May 9, 2000).

§ 30.2.1(a)(v)

Guidelines for Emergencies

In 2001, Fed-OSHA revised its booklet entitled *How to Plan for Workplace Emergencies and Evacuations*.⁵⁵ The publication addresses various types of workplace emergencies, including civil disturbances and workplace violence resulting in bodily harm and trauma.

Fed-OSHA suggests that employers brainstorm worst-case scenarios for their business. Once potential emergencies are identified, an employer is in an appropriate position to determine, in advance and with logic, how to appropriately protect itself and its employees from harm or further harm. Proper considerations include determining how to alert employees to an emergency, developing evacuation policies, procedures and routes, accounting for employees, planning for rescue operations, providing medical assistance and training employees.

Although not all of the suggestions in the booklet will apply to every employer, to best be prepared, an employer should be aware of the various kinds of emergencies most likely to affect them before they happen.

The booklet does not alter or determine compliance responsibilities as described in the Fed-OSHA standards and in the Fed-OSH Act itself.

§ 30.2.1(a)(vi)

U.S. Office of Personnel Management (OPM) Guidelines

Another federal government agency, the U.S. Office of Personnel Management (U.S. OPM), has produced a guide titled *Dealing With Workplace Violence-A Guide For Agency Planners*.⁵⁶ The guide is a product of the Interagency Working Group on Violence in the Workplace, a multidisciplinary group of federal government professionals formed by the U.S. OPM in response to the growing problem of workplace violence in the public sector, particularly the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. The guide was updated after the terrorist attacks on September 11, 2001 and the subsequent bio-terrorist anthrax attacks.

The U.S. OPM guide is intended to assist those responsible for establishing workplace violence initiatives at government agencies. It introduces a process for developing an effective workplace violence program and guides an agency's planning group through the basic steps of developing programs, policies and prevention strategies. The guide discusses three basic steps for workplace violence programs, which include program development (forming a planning group), development of a written policy, and prevention techniques and identification measures. When an incident of workplace violence occurs, the guide proposes a six-step program:

1. fact finding and investigation;
2. threat assessment;
3. employee-relations considerations;

⁵⁵ OSHA Publication No. 3088, available at <http://www.osha.gov/publications/osha3088.pdf> (last visited Dec. 3, 2008).

⁵⁶ OPM Publication No. OWR-09, available at http://www.opm.gov/Employment_and_Benefits/WorkLife/OfficialDocuments/handbooksguides/WorkplaceViolence/index.asp (last visited Dec. 3, 2008).

4. employee assistance program considerations;
5. workplace security; and
6. organization recovery following an incident.

The U.S. OPM recommends that employees know how to report incidents of violence or threatening or disruptive behavior and that they be provided with quick reference emergency numbers to use during a crisis or emergency.

The guide also presents a set of case studies to use in analyzing agency needs, planning programs and training, and to provide practical tips in responding to workplace violence. Finally, the guide provides an extensive list of federal government and nongovernment workplace violence and prevention resources.⁵⁷

§ 30.2.1(b)

Negligence Theories

In addition to the Fed-OSH Act's General Duty Clause, employers may be subjected to liability for acts of workplace violence based on various negligence theories, including: *negligent hiring*; *negligent training*; *negligent supervision*; *negligent retention*; *negligent recommendation or misrepresentation*; and other *general common law duty* theories.

§ 30.2.1(b)(i)

Negligent Hiring

The tort of *negligent hiring* is based on the principle that an employer has a duty to protect its employees, customers, and the general public from injuries caused by employees whom the employer knows, or should know, pose a risk of harm to others.⁵⁸ The duty is breached when an employer fails to exercise reasonable care in ensuring that its employees and customers are free from risk of harm from unfit employees. Thus, an employer may be found negligent in selecting an applicant for employment if, for example, the employer failed to contact the applicant's former employers or to check references, and where such an investigation would have demonstrated that the applicant had a violent propensity or was otherwise unfit for the job.

Many state courts have recognized the tort of negligent hiring and have placed the burden on employers to investigate applicants to prevent the risk of violent acts directed at employees and others.⁵⁹ Negligent hiring liability can be based on violence that occurred outside the

⁵⁷ For additional information, visit <http://www.opm.gov> (last visited Dec. 3, 2008).

⁵⁸ Because negligent hiring is a tort committed by the employer itself, some courts have suggested that an employer may be liable for injuries caused by temporary workers. *See Doe v. Bradley Mem'l Hosp.*, 2003 Conn. Super. LEXIS 2447 (July 24, 2003) (finding issue of fact as to whether hospital was liable for negligently hiring a temporary nurse's aide).

⁵⁹ *See, e.g., American Multi-Cinema, Inc. v. Walker*, 605 S.E.2d 850, 855 (Ga. Ct. App. 2004) (finding sufficient evidence to support jury finding against employer for negligent hiring); *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 600-01 (Okla. 1999) (discussing facts necessary for plaintiff to show in support of negligent hiring and negligent supervision claim); *Underwriters Ins. Co. v. Purdie*, 145 Cal. App. 3d 57 (1983); *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316 (Colo. 1992); *Kelley v. Baker Protective Servs., Inc.*, 401 S.E.2d 585 (Ga. Ct. App. 1991) (employer satisfied duty of ordinary care by investigating security guard's criminal and employment records); *Fallon v. Indian Trail Sch.*, 500 N.E.2d 101 (Ill. App. Ct. 1986); *Western Stone Co. v. Whalen*, 38 N.E. 241 (Ill. 1894) (finding that master has a

scope of employment. The proper focus generally is not whether the employee was acting within the scope of employment, but whether, in view of the employee's known characteristics, his or her violence was reasonably foreseeable by the employer. As a result, negligent hiring and negligent retention liability may exist even where respondeat superior liability does not.⁶⁰

Employers should take steps to protect against incurring liability for negligent hiring, including the following:

- Carefully review all information on employment applications and resumes prior to hiring an applicant.
- Question applicants about any gaps in the individual's employment history (such gaps could be due to the individual's serving time for violent crimes).
- Contact every prior employer to verify dates of employment and positions held. Obtain from prior employers information such as the applicant's reliability, honesty and tendency to engage in violence.
- Document investigative and screening efforts and all information received from prior employers and references, even if efforts to obtain such evidence have proven unsuccessful.
- Do not offer an applicant employment until the screening process is complete.
- Employment applications should advise the applicant that omissions, misrepresentations, or falsification of information will result in the rejection of the applicant or termination of employment.
- Consider performing background checks, including criminal record checks, on all applicants or on all applicants for particular positions.⁶¹

duty to exercise ordinary and reasonable care in the employment and careful selection of employees); *Medina v. Graham's Cowboys, Inc.*, 827 P.2d 859 (N.M. Ct. App. 1992); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967); *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397 (Tex. 1934), *disapproved on other grounds in Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987); *Hays v. Houston & G.N.R. Co.*, 46 Tex. 272 (1876). *But see McDorman v. Texas-Cola Leasing Co., LP, L.L.P.*, 288 F. Supp. 2d 796 (N.D. Tex. 2003) (employer has a duty to the public to employ competent drivers, but such duty does not require an independent investigation into the employee's nonvehicular criminal background); *Mulloy v. United States* 937 F. Supp. 1001, 1008 (D. Mass. 1996) (applying Illinois law, employer does not have a duty to assure all persons that its employees will not injure them at any time, whether on or off the job); *Mendoza v. City of L.A.*, 66 Cal. App. 4th 1333 (1998) (City of Los Angeles was not liable for the shooting of a woman by her fiancé, an intoxicated off-duty police officer); *Roman Catholic Bishop v. Superior Court*, 42 Cal. App. 4th 1556 (1996) (church with no prior knowledge of priest's unfitness was held not liable for his sexual abuse of a female minor); *Peek v. Equipment Servs., Inc.*, 906 S.W.2d 529, 534 (Tex. App.-San Antonio 1995, *no writ*) (perpetrator's employer was not liable, as the violent act was the result of personal animosity brought about by the delusion that the customer's officer and his Mafia associates were out to destroy the perpetrator); *Butler v. Hurlbut*, 826 S.W.2d 90 (Mo. Ct. App. 1992) (imposing duty to search the applicant's past criminal record was unreasonable in the particular circumstances of the case); States have also ratified statutes outlining an employer's duty to its own employees and customers with respect to hiring and retention. *See, e.g.*, GA. CODE ANN. § 34-7-20.

⁶⁰ *See TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807 (Ga. App. Ct. 2003).

⁶¹ Some states have enacted statutes creating a presumption that an employer is not liable for injuries to a third party caused by an employee's intentional acts under a negligent hiring theory, if the employer

Employers should also be cognizant of federal and state laws that severely restrict preemployment inquiries, investigations and testing. Specifically, the Fair Credit Reporting Act (FCRA)⁶² places restrictions on background checks done by third parties.⁶³ In addition, many states strictly limit the extent to which employers may investigate and use prior criminal records in making hiring decisions. For example, California Government Code section 6254 prohibits the release of arrest records for commercial purposes. The constitutionality of the restrictions imposed by this state statute was recently upheld by the U.S. Supreme Court.⁶⁴

§ 30.2.1(b)(ii)

Negligent Training

Courts in certain circumstances have also recognized a cause of action for an employer's *negligent training* of its employees that results in injury to a third person. For example, California courts have recognized that a medical university owes a duty to patients who are under the care of residents to see that the residents receive proper training and supervision.⁶⁵

§ 30.2.1(b)(iii)

Negligent Supervision & Retention

Some courts may also recognize the theory of *negligent supervision*, under which an employer may be held liable for failing to exercise reasonable care in supervising an employee who threatens violent conduct.⁶⁶ For example, the Texas Supreme Court held that the employer of a visibly intoxicated employee has a duty to restrain the employee from causing harm to third parties.⁶⁷ A finding of negligent supervision rests on whether the claimant can establish that the employer failed to exercise ordinary care in supervising the employee and that negligence proximately caused the claimant's injuries.⁶⁸ Liability for negligent supervision also may extend to an employer's failure to control the actions of

conducted a background check which failed to reveal information calling into question the employee's suitability for employment. *See, e.g.*, FLA. STAT. ANN. § 768.096.

⁶² 15 U.S.C. § 1681.

⁶³ *See* Chapter 19 of THE NATIONAL EMPLOYER[®] for more information on the FCRA.

⁶⁴ *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (restricting access to arrestees' addresses not an infringement on free speech).

⁶⁵ *County of Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300 (1981); *see also Kemp v. Rouse-Atlanta, Inc.*, 429 S.E.2d 264 (Ga. Ct. App. 1993) (recognizing a cause of action for an employer's negligent training of its employees that resulted in injury to a third person); *Roberts v. Benoit*, 605 So. 2d 1032 (La. 1991) (recognizing the claim of negligent training where a sheriff's department negligently failed to train employees who carry weapons regarding the proper use of the weapons); *Delaney v. University of Houston*, 835 S.W.2d 56 (Tex. 1992) (employer may be liable for negligently implemented company policies and consequently failed to prevent a violent act).

⁶⁶ *See, e.g., Dias v. Elique*, 276 Fed. Appx. 596, 598 (9th Cir. 2008) (discussing Nevada law regarding negligent supervision and dismissing claim); *Bradley v. Guess*, 797 P.2d 749 (Colo. Ct. App. 1989), *rev'd on other grounds, Seaward Constr. Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991); *Degenhart v. Knights of Columbus*, 420 S.E.2d 495 (S.C. 1992). Maine, for one, does not recognize this tort. *Mahar v. Stonewood Transp.*, 823 A.2d 540 (Me. 2003).

⁶⁷ *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983) (liability based on the fact the employer sent home a visibly intoxicated employee who killed two women in an automobile accident on the way home).

⁶⁸ *See Mueller by Math v. Community Consol. Sch. Dist. 54*, 678 N.E.2d 660 (Ill. App. Ct. 1997); *Young v. Lemons*, 639 N.E.2d 610 (Ill. App. Ct. 1994).

off-duty employees while on the employer's premises.⁶⁹ Similar to a claim of negligent supervision, an employer may also be exposed to liability for *negligent retention* when the employer is aware, or should be aware, that an employee is unfit, but fails to take action such as investigating, discharging, or reassigning the employee.⁷⁰ As with negligent hiring claims, an employer need not have actual knowledge of the employee's lack of fitness to be held liable for negligent retention; only constructive knowledge is required for liability to attach.⁷¹

§ 30.2.1(b)(iv)

Negligent Recommendation or Misrepresentation

Courts across the United States have also held that an employer may be liable for *negligent recommendation or misrepresentation* for providing a positive reference for a problem employee. For example, a Pennsylvania court held that a school that previously employed a perpetrator may be liable when it informed another school that the employee's performance was satisfactory, even though the employee had resigned because of sexual misconduct toward a student.⁷²

California courts have also noted that, even absent a duty to provide information, the information that is provided by the employer must be true, and the employer must not suppress or misrepresent facts within its knowledge.⁷³

Employers should exercise extreme caution in providing references for employees with violent tendencies. Although no court has yet ruled that prior employers must disclose violent tendencies to other employers, this issue has resulted in minimal litigation. Employers who consistently follow a policy of providing no references or neutral references — *i.e.*, merely

⁶⁹ See generally *Foradori v. Captain D's, L.L.C.*, 523 F.3d 477 (5th Cir. 2008) (affirming jury finding of negligent supervision where an off-duty restaurant employee physically assaulted a restaurant patron in the parking lot, resulting in the patron's quadriplegia).

⁷⁰ See, e.g., *Ekokotu v. Boyle*, 2008 U.S. App. LEXIS 20308, at *12 (11th Cir. Sept. 24, 2008) (dismissing negligent retention claim under Georgia law because underlying claim of discrimination and retaliation failed as a matter of law); *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725 (D. Minn. 1994); *TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807 (Ga. App. Ct. 2003); *Bryant v. Livigni*, 619 N.E.2d 550 (Ill. App. Ct. 1993), *appeal denied*, 631 N.E.2d 705 (1994); *Bates v. Doria*, 502 N.E.2d 454 (Ill. App. Ct. 1986); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 421 (Minn. Ct. App. 1993). *But see Brown v. Brown*, 739 N.W.2d 313 (Mich. 2007) (employer not liable for rape of employee by coworker as coworker's crude comments did not put employer on notice of propensity to commit rape).

⁷¹ See *Harvey Freeman & Sons, Inc. v. Stanley*, 378 S.E.2d 857 (Ga. 1989); see also *G.G. v. Yonkers Gen. Hosp.*, 858 N.Y.S.2d 11, 12 (App. Div. 2008) (liability for negligent retention requires that employer be "on notice" of employee's propensity to commit the alleged acts); *Bumpus v. N.Y.C. Transit Auth.*, 951 N.Y.S.2d 591, 591 (App. Div. 2008) (necessary element of negligent retention is that "employer knew or should have known of the employee's propensity for the conduct which caused the injury").

⁷² *Doe v. Methacton Sch. Dist.*, 880 F. Supp. 380 (E.D. Pa. 1995). See also *Jerner v. Allstate Ins. Co.*, No. 93-0-9472 (Fla. Cir. Ct. 1995) (unpublished) (punitive damages available against violent perpetrator's prior employer for failure to disclose in a letter of recommendation that perpetrator was terminated for bringing firearm to work). *But see Francioni v. Rault*, 518 So. 2d 1175, 1177 (La. Ct. App. 1988) (when former employer was asked for dates of employment, its duty to furnish accurate employment history of former employee who had embezzled did not encompass the risk that the former employee would murder his coworker at a subsequent job).

⁷³ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); see also *Davis v. Board of County Comm'rs of Dona Ana County*, 15 Individual Empl. Rts. Cas. (BNA) 740 (1999).

confirming a former employee's name, dates of employment, and position — minimize their risk of future liability.

§ 30.2.1(b)(v)

General Common Law Duties

Notably, some courts have also suggested that the “common-law imposes upon all employers the duty to maintain a safe workplace — including the specific duty to maintain a workplace where employees are free from assaults by coworkers or third parties.”⁷⁴ Such a duty would require an employer to take all reasonable precautions to avoid workplace violence.

§ 30.2.1(c)

Other Potential Sources of Liability

§ 30.2.1(c)(i)

Duty to Warn

Courts may recognize a duty by an employer to warn employees who are the targeted victims of workplace violence. Such a duty may arise from judicially created public policy. For example, the California Supreme Court held in *Tarasoff v. Regents of the University of California* that when a psychotherapist determines that a patient presents a serious danger of violence to another person, the psychotherapist has a limited duty to break the confidentiality of the professional relationship and make reasonable efforts to communicate the threat to the targeted victim and also to a law enforcement agency.⁷⁵ If the psychotherapist cannot communicate with the intended victim(s), the psychotherapist must make reasonable efforts to inform others likely to notify the victim(s).

Courts in many other states that have considered the issue have followed the *Tarasoff* decision and imposed a duty to warn on psychotherapists in similar factual circumstances.⁷⁶ Citing *Tarasoff*, one New York appellate court has declared that the privilege ends where public peril begins.⁷⁷

As courts around the nation increasingly impose liability for negligence in hiring and retaining employees who commit violent acts in the workplace, the potential is ripe for courts to extend the same reasoning to impose liability on employers that negligently fail to warn victims being targeted by their employees.

⁷⁴ *Knutson v. Sioux Tools, Inc.*, 990 F. Supp. 1114 (N.D. Iowa 1998) (citing *Daniels v. Thistledown Racing Club, Inc.*, 659 N.E.2d 346, 348 (Ohio Ct. App. 1995)); *Brooks v. National Convenience Stores, Inc.*, 897 S.W.2d 898, 902 (Tex. App. – San Antonio 1995, no writ).

⁷⁵ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); see also *Brown v. Smith*, 2001 Conn. Super. LEXIS 2227 (Aug. 7, 2001).

⁷⁶ See, e.g., *Kaminski v. Fairfield*, 578 A.2d 1048 (Conn. 1990) (recognizing that “in the proper factual circumstances” the common law might impose a duty upon custodians to protect foreseeable third parties from their wards’ conduct); *McIntosh v. Milano*, 403 A.2d 500 (N.J. Super. Ct. 1979) (holding that the estate of a murder victim had a viable cause of action against a psychiatrist whose patient had committed the killing if it could be shown that the patient’s conduct in therapy sessions was somehow predictive of his intent to commit the murder); *Rea v. Pardo*, 522 N.Y.S.2d 393 (N.Y. App. Ct. 1987); *MacDonald v. Clinger*, 446 N.Y.S.2d 801 (N.Y. App. Ct. 1982); but see *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925 (1998) (holding that a school district did not have a duty to protect nonstudents from the conduct of students off of school grounds).

⁷⁷ *People v. Bierenbaum*, 748 N.Y.S.2d 563, 581 (N.Y. App. Ct. 2002).

§ 30.2.1(c)(ii)

Respondeat Superior

The doctrine of *respondeat superior* may be used to impose obligations on employers under an employment or agency relationship. Under this doctrine, an employer may be vicariously liable for violent acts committed by its employees or agents within the scope of their employment, even if the employer is not directly responsible for the conduct. As a general rule, an employer is liable under *respondeat superior* for injuries to another that proximately result from an employee's acts done within the scope of employment.

For example, in California, employers may be liable for an employee's torts committed within the scope of employment even if the employee's torts are willful, malicious or criminal.⁷⁸ The employer is not liable, however, for actions that lack a causal link to the employee's work.⁷⁹ Employers generally are not liable for conduct committed outside the course and scope of employment.⁸⁰

§ 30.2.1(c)(iii)

Intentional Infliction of Emotional Distress

Employers should be aware that they may be subject to claims for intentional infliction of emotional distress (IIED), which generally has four elements: (1) intentional or reckless conduct; (2) conduct that is extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. In 2004, the U.S. Court of Appeals for the Fourth Circuit held that an employer could be liable for IIED where it knowingly allowed the violation of a protective order held by an employee.⁸¹ In *Gantt v. Security USA*, the plaintiff employee had informed her employer that she obtained a protective order against her former boyfriend. The employee's supervisor, who was aware of the restraining order and that the employee's former boyfriend had spoken of killing her, assigned her to an unsecured post and permitted the estranged boyfriend to approach where she was stationed. The former boyfriend then kidnapped the employee at gunpoint, assaulted her, and raped her. The court found that while summary judgment was appropriate as to the IIED claims arising out of the plaintiff-employee's abduction and rape, because her supervisor did not intend to impose those injuries on the plaintiff, the IIED claim arising out of her assignment to an unsecured post raised a material fact issue as to whether the supervisor intended to inflict the emotional distress the plaintiff might suffer from talking to the former boyfriend.

⁷⁸ See, e.g., *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358 (Cal. 1995) (employer liable for willful, malicious or criminal action committed within scope of employment); *Mark K. v. Roman Catholic Archbishop*, 67 Cal. App. 4th 603, 609 (1998). In Connecticut, an employer may be liable for willful or negligent tortious conduct. *Absher v. Flexi Int'l Software, Inc.*, 2003 U.S. Dist. LEXIS 6089 (D. Conn. Mar. 31, 2003).

⁷⁹ A California court of appeals held that a restaurant was not liable under the *respondeat superior* theory for the death of a motorist who was rear-ended by an employee on the way home from a night shift. *Depew v. Crocodile Enters., Inc.*, 63 Cal. App. 4th 480 (1998).

⁸⁰ See, e.g., *Juarez v. Boy Scouts of Am.*, 81 Cal. App. 4th 377, 394 (2000) (sexual molestation falls outside of course and scope of employment); but cf. *Clark v. Pangan*, 998 P.2d 268, 272 (Utah 2000) (intentional tort not necessarily outside the course and scope of employment).

⁸¹ *Gantt v. Security USA, Inc.*, 356 F.3d 547 (4th Cir. 2004), cert. denied, 543 U.S. 814 (2004).

§ 30.2.1(c)(iv)

Agency Liability

Employers must also be cognizant of liability that may arise under general agency principles for a violent employee's assault or battery against persons in the workplace or persons who otherwise come in contact with the employee during the course of employment. Assault and battery are typically charged in cases where there has been some other alleged physical contact by the violent employee, including sexual harassment.⁸²

§ 30.2.1(c)(v)

Contractual Obligations

Employers may have other obligations to employees stemming from employment contracts and agreements implied in law. Except in special circumstances, it is unlikely that employers will expressly contract to provide employees with a workplace free from harm or violence by other employees or third parties. In some states, however, contractual obligations can arise even in the absence of written or express agreements. In California, for example, the state supreme court recognizes that an implied contract may be inferred from the language in a company's policy manual or employee handbook.⁸³ Employees or third parties could use company policies addressing workplace safety as the basis of a suit against the company for violation of an implied contract.

Under the implied contract theory, an employer that has a broad unlawful-harassment policy could be alleged to breach an employee's rights if the harassment engaged in by employees results in a hostile work environment. The U.S. Supreme Court has recognized the viability of such a hostile-work-environment theory in sexual harassment situations.⁸⁴ By analogy, one could argue that the theory applies where an employer has a policy on unlawful harassment but fails to abate the causes leading to a hostile work environment or fails to curtail the harmful activities of employees which cause injury to others.

§ 30.2.1(c)(vi)

Public Policy

An employer may be exposed to liability for conduct that is found to violate a fundamental public policy of a particular state. An employee who complains about unsafe working conditions or refuses to work in an unsafe work environment and is terminated may be able to state a tort claim against the employer for wrongful termination in violation of public policy. In recent years, several states have allowed terminated employees to recover tort remedies, including punitive damages, from their employers, notwithstanding the at-will nature of the employment relationship or the terms of an employment agreement, where the termination violates fundamental principles of public policy.⁸⁵

⁸² See *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530 (4th Cir. 1991), *abrogation on other grounds recognized in Leach v. Northern Telecom, Inc.*, 141 F.R.D. 420, 426 (E.D.N.C. 1991).

⁸³ *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *but cf. Peterson v. First Clayton Bank & Trust Co.*, 447 S.E.2d 63, 66 (Ga. Ct. App. 1994) (implicit contractual provision can be found only where provision is necessary to effect full purpose of contract and is clearly within contemplation of parties).

⁸⁴ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

⁸⁵ See, e.g., *Prince v. Rescorp Realty*, 940 F.2d 1104 (7th Cir. 1991) (wrongful discharge claim upheld where plaintiff discharged in retaliation for reporting that his employer had rendered inoperative a

At least some courts recognize that there is an explicit public policy requiring employers to take reasonable steps to provide a safe and secure workplace.⁸⁶

§ 30.2.1(d)

Leave for Victims of Domestic Violence

In 1994, the U.S. Congress passed the Violence Against Women Act.⁸⁷ The Act provided a federal civil remedy for the victims of gender-motivated violence. While not aimed specifically to combat workplace violence, some plaintiffs used this statute to sue fellow employees who committed nonconsensual touching or kissing, assault, rape or other acts of violence. In 2000, the U.S. Supreme Court declared section 13981 of the Violence Against Women Act unconstitutional. Accordingly, employees may no longer use this Act as a basis upon which to sue their coworkers for gender-based violence.

Many state statutes provide for leaves of absence for victims of domestic violence to seek or obtain medical attention, victim services, legal assistance, or other actions to ensure their safety. See § 30.3.4 of this chapter for a discussion of some of those statutes.

In summary, employers have broad common law and statutory duties to employees and third parties. Whether such obligations are provided by special statutory provisions, contracts or other legal doctrines, it is clear that these duties are implicated whenever an employer is faced with workplace violence.

§ 30.2.2

B. THE RIGHTS OF THE ALLEGED PERPETRATOR

While employers must take measures to protect potential victims of workplace violence, employers must also consider the rights of alleged perpetrators and be aware of potential claims and liability that could arise when protective actions are taken. For example, employers could face liability based on an alleged perpetrator's claims of defamation, wrongful discharge, constitutional violations, discrimination, and others.

fire-suppression system in the high-rise apartment building where he was employed as an engineer); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the employee, and policy must be fundamental, substantial, and well established at the time of the discharge); *Bleich v. Florence Crittenton Servs. of Balt.*, 632 A.2d 463 (Md. Ct. Spec. App. 1993) (teacher at a private residential and educational facility for troubled adolescent females, terminated allegedly for notifying state authorities about the danger posed to staff and residents by “gangs” at the facility, stated a claim for wrongful discharge in violation of public policy); *Hirsovescu v. Shangri-La Corp.*, 831 P.2d 73 (Or. Ct. App. 1992) (plaintiff discharged because he disclosed, in good faith, information about dangerous conditions and potential physical abuse of residents to a representative of the Oregon Mental Health & Developmental Disability Services); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (as “narrow exception” to employment-at-will doctrine, employee may maintain cause of action for wrongful discharge where sole reason for discharge was employee’s refusal to perform an illegal act carrying criminal penalties).

⁸⁶ *Mastropetre v. H. Bixon & Sons*, 2003 Conn. Super. LEXIS 2275 (Aug. 7, 2003); *City of Palo Alto v. Service Employees Int’l Union*, 77 Cal. App. 4th 327 (1999).

⁸⁷ 42 U.S.C. § 13981.

§ 30.2.2(a)

Defamation

Where an employer warns employees of an individual's violent tendencies, the employer could be found liable for *defamation* if the employer mistakenly believes that the perpetrator is violent. Defamation occurs when a statement that is communicated to another individual is false, unprivileged, and causes injury.⁸⁸ Regardless of whether the statement is oral (slander) or written (libel), the employer might be held liable for falsely characterizing an employee as violent.

Even if an employer's statements are erroneous, however, the employer may be protected if the warning was privileged. A qualified privilege protects a statement where it was made with a good faith belief in the statement's truth, where the statement serves a legitimate business interest, and where it was published only to those individuals who needed to know of the risk.

§ 30.2.2(b)

Wrongful Discharge

An employee accused of having violent tendencies; who is terminated for such violent tendencies could file a *wrongful discharge* suit against the employer if the employee disputes the employer's characterization.

An employer should take steps to minimize both the threat of violence and the risk of a wrongful discharge suit or grievance. For example, before a threat or actual act of violence occurs, the employer should review its employee handbook and/or personnel policies to ensure that they do not contain statements that could be interpreted as creating an implied contract that would preclude the employer from immediately terminating an employee who makes a threat or acts violently in the workplace, such as language restricting an employer's ability to suspend, transfer, demote, or take other disciplinary action against a perpetrator of workplace violence. The employer should also consider disciplinary measures, such as suspension, and should encourage resignation, where appropriate, to ease tension, reduce the risk of violence, and avoid potential wrongful discharge claims.

§ 30.2.2(c)

Constitutional Claims

Various federal and state constitutional provisions may protect alleged perpetrators. For example, the California Constitution provides all individuals with a constitutional right to privacy.⁸⁹ In Georgia an employee's privacy rights are protected by the state constitution, as well as by case law recognizing the tort of invasion of privacy.⁹⁰

A government employee may argue that his speech is protected as constitutional activity. The federal Constitution and many state constitutions guarantee freedom of speech.⁹¹ Despite the

⁸⁸ See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984).

⁸⁹ CAL. CONST. art. I, § 1.

⁹⁰ See, e.g., *Jarrett v. Butts*, 379 S.E.2d 583 (Ga. Ct. App. 1989).

⁹¹ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); CAL. CONST. art. I, § 2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.").

broad wording of the California constitutional right of free speech, some courts have held that the free-speech right does not extend to the private sector.⁹²

A government employee may also claim that the employer's imposition of discipline violates the employee's due process rights. Courts have held that public employees' interests in their employment constitute a property right protected by the due process clause.⁹³

Although Fed-OSH Act's General Duty Clause obligates an employer to investigate any threats of violence in the workplace to protect other employees and customers, the employer must ensure that it conducts its investigation legally and with the least intrusion possible. For a more extensive discussion of privacy issues, see Chapter 19 of THE NATIONAL EMPLOYER®.

§ 30.2.2(d)

Discrimination

Alleged perpetrators of workplace violence also may assert *discrimination* claims against employers based on the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. The ADA and related state statutes prohibit employers from discriminating against “qualified individuals” with physical or mental disabilities. The Rehabilitation Act protects individuals from being fired by certain employers solely because of their disabilities. However, an employer is not required to make a reasonable accommodation under the ADA or the Rehabilitation Act for a worker who commits or threatens to commit violent acts—*i.e.*, a worker who poses a “direct threat” to the health and safety of others.⁹⁴

The general rule is that an employer may fire an employee in response to the employee's violent or threatening behavior, even if the behavior was precipitated by a mental illness.⁹⁵ An employer may also define as a qualification for any job that “an individual shall not pose a

⁹² *Feminist Women's Health Ctr. v. Blythe*, 32 Cal. App. 4th 1641 (1995), *cert. denied*, 516 U.S. 987 (1995).

⁹³ *See, e.g., Skelly v. State Pers. Bd.*, 539 P.2d 774 (Cal. 1975).

⁹⁴ *See Jarvis v. Potter*, 500 F.3d 1113, 1124-25 (10th Cir. 2007) (affirming dismissal of discrimination claims where plaintiff, by virtue of his posttraumatic stress disorder, posed a direct threat to other employees); *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (affirming dismissal of ADA claims based on direct threat defense where employee suffered from schizophrenia and threatened to kill coworker); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997) (holding that the ADA allows an employer to discipline or discharge a nondisabled employee whose relative or associate poses a direct threat to the employer's workplace); *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351 (7th Cir. 1997) (finding that an employee diagnosed with major depression and a delusional disorder was not fired because of her mental illness in violation of the ADA, but rather because she threatened to kill another employee); *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996) (stating that an employee's termination did not violate the Rehabilitation Act because the employee was discharged after he attempted to fire an assault rifle inside a bar); *Sullivan v. River Valley Sch. Dist.*, 20 F. Supp. 2d 1120, 1127 n.3 (W.D. Mich. 1998) (stating the ADA does not protect employees who threaten other employees); *Poff v. Prudential Ins. Co. of Am.*, 911 F. Supp. 856 (E.D. Pa. 1996) (finding that an employer did not violate the ADA when it fired an employee who had a hip disability and was blind in one eye, since the discharge was caused by the employee's violent outbursts, not his disability). Indeed, one court awarded an employer attorneys' fees after it successfully defended a lawsuit brought by an employee who was fired after he pistol-whipped and threatened to kill a man. *Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549 (D. Nev. 1997). The court held that “[a]ggravated battery with a deadly weapon constitutes egregious misconduct for which employees are responsible regardless of any alleged disability.” *Id.* at 1555.

⁹⁵ 42 U.S.C. §§ 12111(3), 12113(b) (codifying the “direct threat” defense); *Palmer*, 117 F.3d at 352.

direct threat to the health or safety of [the individual himself or] other individuals in the workplace.”⁹⁶ Whether an individual poses a *direct threat* is determined by analyzing: (1) the duration of the risk posed; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.⁹⁷

If an employee does not pose a direct threat, however, the employer should thoroughly assess and consider all of the circumstances to determine whether the person is a “qualified individual” with a disability and whether a reasonable accommodation can or should be made in each instance. If possible, the employer should obtain the cooperation and participation of the disabled individual and his or her physician. Each decision should be made according to its proper context and, if necessary, after obtaining input from legal counsel and physicians.

§ 30.2.2(e)

Tort & Civil Rights Claims

Employees accused or suspected of workplace violence also have filed various tort and civil rights claims in response to employers’ preventative actions. In addition to the constitutional privacy claims discussed above, an employee could, for example, also file a tort claim for invasion of privacy. Tort privacy claims include intrusion into private affairs, public disclosure of private facts, placing the employee in a false light, and others.⁹⁸ The degree to which courts recognize such torts varies by state.

The employer often has a qualified privilege to investigate and address issues that are of legitimate concern to the employer, including the safety of workers and customers.⁹⁹ As long as the employer’s investigation is justified by a legitimate concern and is undertaken in good faith, a court is apt to conclude that the employer’s investigation of the alleged perpetrator does not result in liability for invasion of privacy.

Where a third party, such as a customer or client, interferes with the employment relationship between an employer and employee, the employee may be able to state a tort claim against the third party for intentional or negligent interference with contractual relations or prospective economic advantage. For example, where a third party insists that an employee who is believed to have violent propensities be terminated, the employee may be able to establish a claim against that third party for interference with contract. A defendant may succeed in defending against such a claim by establishing that the interference was justified to protect an interest more important than the employee’s interest in the contract. A defendant who induces a breach of contract by lawful means is justified, and therefore privileged, if the objectives advanced by the interference are more important than the interest interfered with. Where the third party is interfering with the employee’s employment in order to protect the safety of an individual and the third party is not acting with an improper intent, a court will likely conclude that the interference was justified.

Finally, it is possible that an employee terminated for making violent threats may assert a civil rights claim under United States Code title 42, section 1983 against a private employer for that employer’s involvement in the criminal prosecution of the employee. Section 1983 is

⁹⁶ See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002); see also *Den Hartog*, 129 F.3d at 1088, citing 42 U.S.C. § 12113(b) and 29 C.F.R. § 1630.15(b)(2).

⁹⁷ 29 C.F.R. § 1630.2(r).

⁹⁸ See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 117 (5th ed. 1984).

⁹⁹ See *id.*

aimed at state action and state actors. As a consequence, it generally provides no remedy for individuals victimized by private party conduct. However, private actors may align themselves so closely with either state action or state actors that their conduct may be held to violate section 1983. Thus, private sector employers should take note that excessive intervention or attempts to control criminal prosecutions of employees may result in a court finding that the employer is sufficiently aligned with the state so as to be held liable for a civil rights violation. Private employers should cooperate to the fullest extent with the police and district attorney's office but should not try to control the public proceedings.

§ 30.2.3

C. THE SPECIAL ROLE OF THE CRIMINAL JUSTICE SYSTEM

Depending on the state and locality, an employer may be able to encourage local law enforcement officials to pursue criminal law sanctions against an individual who engages in workplace violence. Although local law enforcement will be familiar with the possible criminal laws on which to rely, employers may want to be aware of the basic categories of criminal laws that may be applied to a perpetrator of workplace violence.

§ 30.2.3(a)

Anti-Stalking Laws

According to a 1998 National Institute of Justice study, more than 1.4 million Americans (approximately 1 million women and 400,000 men) are stalked each year. Stalking can be considered a category of workplace harassment and violence. Employees may be subjected to *stalking* by: (1) another employee; (2) a nonemployee who is the current or former romantic partner of the employee; or (3) a nonemployee that has had little or no prior contact with the targeted employee. Stalking behavior is not characteristically confined to the workplace and will also likely involve acts outside the workplace against the employee.

Stalking has been defined by psychologists and some state legislatures as having three components:

- a course of conduct in which there is a repeated pattern of following or harassing another person;
- making a threat to harm or acting in a threatening manner; and
- intent to cause harm or distress.¹⁰⁰

As a result of numerous incidents in which individuals obsessively followed, harassed and—in some instances—killed others, every state has enacted laws prohibiting stalking or harassment. Most states classify first time stalking offenses as misdemeanors with penalties up to one year in prison and a \$1,000 fine, but repeat offenders may be subject to much more severe penalties.

The point at which a stalking act becomes a criminal violation may vary. For example, in North Carolina, the victim or a third-party designated by the victim must inform the perpetrator to stop stalking the victim before the protections of the stalking law can apply.¹⁰¹

¹⁰⁰ See, e.g., CAL. PENAL CODE § 646.9.

¹⁰¹ *State v. Ferebee*, 529 S.E.2d 686 (N.C. 2000).

§ 30.2.3(b)

Cyber-stalking

In August 1999, in response to a request from former Vice President Gore, the U.S. Attorney General published *Cyberstalking: A New Challenge for Law Enforcement & Industry*,¹⁰² a report exploring the nature of cyber-stalking, analyzing the adequacy of current federal and state laws, and recommending ways to improve efforts against cyber-stalking. According to this study, one in 12 women and one in 45 men have been stalked at some time in their lives.

Cyber-stalking refers to use of the Internet, e-mail, or other electronic communications devices to “stalk” another person — whereas traditional “*stalking*” refers to engaging in repeated harassing or threatening behavior (such as following a person, appearing at a person’s home or workplace, making harassing telephone calls, or leaving written messages or objects) that places the victim in reasonable fear of death or bodily injury. Roughly 20% of states have enacted statutes to specifically address cyber-stalking, while a number of other states have expanded their traditional stalking and harassment statutes to cover cyber-stalking.¹⁰³

Two federal statutes — the Federal Domestic Violence and Stalking Act¹⁰⁴ (prohibiting interstate stalking) and the Federal Obscene or Harassing Telephone Calls Statute¹⁰⁵ (prohibiting use of the phone or other telecommunications device to stalk or harass) — provide further protections against cyberstalking.

Employers should treat an employee’s complaint of cyber-stalking with the same gravity as a complaint of traditional stalking. In addition, an effective electronic communications policy will help minimize the potential for an employee to use work computers to stalk fellow employees or members of the public.

§ 30.2.4

**D. SPECIAL ROLE OF THE CIVIL COURT SYSTEM:
RESTRAINING ORDERS**

§ 30.2.4(a)

Purposes of Restraining Orders

Restraining orders serve two major purposes — to prohibit specific conduct by the perpetrator and to order the perpetrator to stay away from the victim. The first purpose of prohibiting specified conduct typically includes prohibiting the perpetrator from making physical contact with the victim, conducting surveillance of the victim, following the victim, telephoning the victim, and blocking the victim’s movement. The second purpose of ordering the perpetrator to stay away from the victim usually includes a requirement that the perpetrator stay a

¹⁰² Available at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm> (last visited Dec. 3, 2008).

¹⁰³ For a review of the cyberstalking, stalking, and harassment statutes of every state, see <http://www.ncvc.org/src>.

¹⁰⁴ 18 U.S.C. § 2261A.

¹⁰⁵ 47 U.S.C. § 223.

specified distance from the victim, the victim's residence, the victim's work, and the victim's children's schools or places of child care.

§ 30.2.4(b)

Types of Restraining Orders

Victims of workplace-related harassment or threats of violence now have two different types of restraining orders that they can pursue in many states. An individual employee may obtain a civil-harassment restraining order that prohibits specified conduct by the perpetrator and orders the perpetrator to stay a certain distance away from the victim. For example, to persuade a court to grant a civil harassment temporary restraining order under California law, the victim must show specific facts, including: (1) a knowing and willful course of conduct; (2) which requires more than one act directed at a specific person; (3) which seriously alarms, annoys, or harasses the person; (4) which serves no legitimate purpose; (5) which would cause a reasonable person to suffer substantial emotional distress; and (6) which actually causes emotional distress to the victim.¹⁰⁶

In some, but not all states, another option is for the employer to seek a temporary restraining order or injunction to protect against threats or harassment at work.¹⁰⁷ In Arizona, an employer may obtain an injunction to protect itself or any employee or other person on the employer's property. Such an injunction may effectively prohibit the defendant from going near the employer's property or contacting the employer or individual employees while they are at work.¹⁰⁸

As a slightly diverse example, Indiana law allows an employer to obtain an injunction against a person on behalf of an employee to prohibit further violence or threats of violence only if the employee has already suffered violence or threats of violence by the person at work. The Indiana law specifically states that it does not expand, diminish, alter, or modify the duty of an employer to provide a safe workplace.¹⁰⁹

§ 30.2.4(c)

Steps for Obtaining a Temporary Restraining Order & Injunction

Once the individual victim or the employer has decided to pursue a restraining order, several steps must be completed before the petition seeking the restraining order and other legal papers are filed with the court. While the particulars for this process vary by state, to illustrate, an employer in California should follow the process described below.

The employer's first step is to interview the victim and determine the facts surrounding the violent or harassing incident. The interviewer should be either a manager experienced in investigating such incidents or legal counsel for the employer. The interviewer should obtain all the facts necessary to support the elements that must be proven to obtain the desired type

¹⁰⁶ CAL. CIV. PROC. CODE § 527.6.

¹⁰⁷ See, e.g., ARIZ. REV. STAT. § 12-1810; ARK. CODE ANN. § 11-5-115; CAL. CIV. PROC. CODE § 527.8; CO. REV. STAT. § 13-14-102; GA. CODE ANN. § 34-1-7; IND. CODE § 34-26-6; NEV. REV. STAT. §§ 33.200-33.260; N.C. GEN. STAT. § 95-260; R.I. GEN. LAWS § 28-52-2; TENN. CODE ANN. §§ 20-14-101 to -109. Similar statutes have been proposed in Florida (S.B. 200 108th Reg. Sess. (Fla. 2006)) and New Jersey (A.B. 1512 212th Legis. (N.J. 2006)).

¹⁰⁸ ARIZ. REV. STAT. § 12-1810.

¹⁰⁹ IND. CODE § 34-26-6.

of restraining order. When interviewing the victim, information regarding the perpetrator should also be gathered, including the perpetrator's home address and home phone number; work address and work phone number; typical work hours; physical description; and vehicle description.

The second step is to interview any corroborating witnesses. It is often helpful in convincing the court to issue the temporary restraining order to have other individuals confirm that the incident in fact was as egregious and terrifying as the victim believes it to be. Alternatively, interviewing other witnesses may uncover important facts that negate the need to seek a temporary restraining order.

The third step is to draft the papers that will be filed with the court and which will persuade the court to issue a temporary restraining order. Due to the inevitably emotional nature of the incident giving rise to the need to obtain the temporary restraining order — as well as the need to obtain the temporary restraining order quickly — it is recommended that legal counsel familiar with this process and with the unique rules of the jurisdiction be used to minimize stress and confusion otherwise inherent in the process. The Judicial Council of California has approved forms to be used when obtaining injunctions prohibiting harassment. Using the proper forms helps avoid delays in filing the papers with the court clerk.

After the legal papers are drafted, the fourth step is to meet with the victim and other witnesses to review and sign the papers. Because the affidavits or declarations are signed under penalty of perjury, factual accuracy is critical. After obtaining signatures, the documents are taken to the appropriate court to obtain the judge's signature.

After the legal papers are delivered to the victim and to the appropriate police departments, the perpetrator must be served with the legal papers, the signed court order, and other documents as specified by law. Because the protection should be as complete as possible before the perpetrator is notified that the victim has initiated legal proceedings, the perpetrator should not be served with the documents until after the victim and police have received copies.

Finally, a process server or a sheriff should be hired to serve the perpetrator. A party to the action (the individual or employer seeking the temporary restraining order) cannot serve the perpetrator. Because many perpetrators try to avoid service, attempts to serve the legal papers on the perpetrator should begin as soon as the victim and the police departments have received their copies of the papers.

To obtain a long-term injunction (generally three years in California), the victim or other witnesses must testify in court as to the required elements summarized above. Once the judge grants and signs the three-year restraining order,¹¹⁰ the restraining order must be delivered to the victim and to the appropriate police departments. Some counties have developed abbreviated procedures for notifying the Sheriff's and police departments.

¹¹⁰ Because the court will often sign the injunction immediately after hearing evidence (if the evidence supports granting the order) the injunction should be prepared before the court hearing and should request the same protection as the court granted in the temporary restraining order.

§ 30.2.5

E. SPECIAL LIABILITY CLAIMS INVOLVING THIRD PARTIES

§ 30.2.5(a)

Liability to Nonemployees for Conduct of Workers & Third Parties

In some states, such as California, an employer may be shielded from most employee claims resulting from injury or death on the job, because workers' compensation provides the exclusive remedy for occupational injuries. However, employers may incur substantial liability to the survivors of employees, or even to nonemployees, for actions of perpetrators whose violent conduct could have been prevented.

Liability in these circumstances is premised on negligence or on the breach of contractual or implied duties that inure to the benefit of victims or, by extension, to their families. Parent and subsidiary corporations may also be held liable for negligence.¹¹¹ The following cases illustrate these points and demonstrate the seriousness of the problem caused by violence in the workplace, even where a company is not the victim's or the perpetrator's employer.

In May 1999, a jury awarded nearly \$8 million to families of two workers killed at an Asheville plant where a fired employee shot three former coworkers and left another wounded. That morning, the fired employee purchased an M-1 carbine at a local pawn shop and drove to the plant carrying it and a semi-automatic pistol he had purchased and registered with the police department five weeks earlier. The gunman had been fired two days prior to the killings, after having been suspended for fighting with coworkers. An Employee Assistance Program (EAP) psychologist, who performed a threat assessment, concluded that the employee would accept termination without becoming hostile. This assessment proved wrong and the fired employee now stands convicted of three counts of first-degree murder and has been sentenced to death.

In January 1994, the owner of a frozen-yogurt shop and the owner of a shopping mall in Austin, Texas, where the shop was located, agreed to pay \$12 million to the parents of four young girls. Two of the four victims worked in the store where they were murdered during a 1991 robbery. The civil suit, which alleged inadequate security by the defendants, was settled.

In 1993, a Texas court of appeal held that a Houston fast-food restaurant could be liable for the death of a customer who was shot and killed while waiting in the drive-thru line of the restaurant. The customer was attacked by three men attempting to steal her car.¹¹²

The remedies available to plaintiffs under situations similar to the above examples, in which millions of dollars were awarded, include damages for emotional distress occasioned by negligently caused injuries to the victims.

¹¹¹ *Brooks v. National Convenience Stores, Inc.*, 897 S.W.2d 898 (Tex. App.—San Antonio 1995, no writ).

¹¹² *Midkiff v. Hines*, 866 S.W.2d 328 (Tex. App.—Houston [1st Dist.] 1993, no writ).

§ 30.2.5(b)

Other Potential Sources of Third-Party Liability

In suits by visitors against employees working on the premises, a number of courts have wrestled with whether to hold the owner of the workplace premises liable for negligence based on an employee's criminal activity. Generally, to establish negligence the plaintiff must show that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of the injury suffered by the plaintiff. Courts have long recognized a landlord's duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of precautionary measures. Increasingly, injured persons are alleging that this duty requires landowners to provide a workplace free from violence.

Numerous federal and state courts have attempted to define the scope of the property owner's duty to protect individuals who work on the premises. These courts have emphasized that the *foreseeability* of the criminal activity is a key factor in determining the property owner's duty to safeguard the employees of companies located on the premises.¹¹³

Certain industries or organizations may be susceptible to third-party claims based on their special relationships with the public. Public transit authorities in California, for example, are required to use the "utmost care and diligence" and must protect passengers when they know, or should know, that an assault is about to occur.¹¹⁴ Security companies may also be found liable for negligence when it is reasonably foreseeable that an employee could cause harm to another person.

Liability may also arise in certain jurisdictions under the *voluntary assumption theory* when employers voluntarily or contractually assume a duty to protect employees from the harmful acts of third parties. An employer may assume a duty, for example, when it contracts to provide security, or actually implements security measures, but nonetheless fails to protect its employees.¹¹⁵ Employers who elect to implement security measures at their facilities must also ensure that these measures are adequate to protect their employees.¹¹⁶

¹¹³ See, e.g., *Arceneaux v. KMart Corp.*, 1995 U.S. Dist. LEXIS 11943 (E.D. La. Aug. 11, 1995); *Habich v. Crown Cent. Petroleum Corp.*, 642 So.2d 699 (Ala. 1994); *Knauss v. DND Neffson Co.*, 963 P.2d 271 (Ariz. Ct. App. 1997); *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); *Rosenbaum v. Security Pac. Corp.*, 50 Cal. Rptr. 2d 917 (Cal. Ct. App. 1996); *Clement v. Peoples Drug Store, Inc.*, 634 A. 2d 425 (D.C. 1993); *Guerrero v. Memorial Med. Ctr. of East Texas*, 938 S.W.2d 789 (Tex. 1997); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19 (Tex. 1993).

¹¹⁴ See *City & County of San Francisco v. Superior Court*, 36 Cal. Rptr. 2d 372 (Cal. Ct. App. 1994).

¹¹⁵ See *Slager v. Commonwealth Edison Co., Inc.*, 595 N.E.2d 1097 (Ill. App. Ct. 1992) (finding company liable for the death of a worker who was killed when an employee struck his car with a picket sign, causing him to swerve into the path of an oncoming truck).

¹¹⁶ See *Vaughn v. Granite City Steel Div. of Nat'l Steel Corp.*, 576 N.E.2d 874 (Ill. App. Ct. 1991) (employee was shot and killed in the employer's parking lot and the employer's security was found to be grossly inadequate); but see *McBeth v. TNS Mills, Inc.*, 458 S.E.2d 52, 56 (S.C. Ct. App. 1995) (jury verdict for defendant affirmed after decedent employee was stabbed in employer's parking lot).

§ 30.3

III. STATE SURVEY OF WORKPLACE VIOLENCE SAFETY STANDARDS

§ 30.3.1

A. STATE OSHA REQUIREMENTS & GUIDELINES

Nearly half of the states and two territories have taken the initiative to develop their own OSHA guidelines, programs and training materials. Research indicates that there are 27% to 35% fewer deaths in states that have their own job safety plans than in states overseen only by the federal agency (“Fed-OSHA”).¹¹⁷ Six illustrative state guidelines are discussed below, and web site addresses to all of the state and territorial agencies are provided at the end of this section.

§ 30.3.1(a)

California (Cal-OSHA)

California requires every employer to establish an Injury and Illness Prevention (IIP) Program, designed to ensure the safety and security of employees.¹¹⁸ The IIP Program must be effective and in writing. On March 30, 1995, the California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH) adopted revised guidelines for workplace security (guidelines).¹¹⁹

To provide guidance to employers, DOSH’s guidelines divide workplace violence into three categories:

Type I: The perpetrator has no legitimate business relationship with the workplace and enters the workplace in order to commit a robbery or other criminal act.

Type II: The perpetrator is either the recipient or object of a service provided by the affected workplace or the victim (*e.g.*, a current or former client).

Type III: The perpetrator has employment-related involvement with the workplace.

¹¹⁷ *States With Own Safety, Health Programs Have Fewer Fatalities, Professor’s Study Says*, Daily Lab. Rep. (BNA) No. 205, Oct. 24, 2006, at A-12.

¹¹⁸ CAL. CODE REGS. tit. 8, § 3203 (2007).

¹¹⁹ DOSH is the agency responsible for *enforcement* of the Cal-OSHA regulations. CAL. LAB. CODE §§ 142, 6307, 6308 (2007). DOSH does *not* have authority to adopt occupational safety and health regulations except in limited circumstances. Cal-OSHA regulations can be adopted only by the California Occupational Safety and Health Standards Board. CAL. LAB. CODE §§ 142.3, 6305(a) (2007). Thus, the DOSH guidelines are *not* regulations and cannot be enforced as such. However, DOSH’s enforcement authority is quite broad, and the IIP regulations, which *were* adopted by the Standards Board, are open-ended and can be viewed as addressing *any* workplace hazard. *See* CAL. LAB. CODE §§ 6307, 6401.7; CAL. CODE REGS. tit. 8, § 3203.. Although potentially unenforceable, the guidelines provide good advice to employers with regard to preventing workplace violence and protecting the safety of employees and others in the workplace.

The DOSH guidelines suggest that every employer perform an initial assessment to identify workplace security factors that may contribute to the risk of violence in the workplace. The guidelines stress that employers must consider each type of workplace violence and adapt the IIP Program to address their vulnerability to the particular risks associated with their workplace. DOSH provides several guidelines and/or requirements for each type of violence it has identified. For example, according to DOSH, employers who are at a high risk of Type I violence must provide training in crime awareness, assault and rape prevention, defusing hostile situations, and knowing what steps to take during an emergency. DOSH's position is that controlling workplace access and facilitating communication are important considerations for employers at a high risk of Type II violence. With respect to Type III violence, where the perpetrator ordinarily has some relationship to the workplace, DOSH suggests that employers establish a clear antiviolence policy, apply the policy consistently and fairly, and provide appropriate supervisor and employee training in workplace violence prevention.

DOSH issued a revised final edition of its Model IIP Program for Workplace Security on March 15, 1995. The Model Program notes that no California employer is required to use it. However, DOSH's model program provides a simple format to help California employers respond to the complex problem of workplace violence. The model is not designed to be utilized "as is" but should be tailored to each particular workplace depending on the security hazards the employer faces. For this reason, employers should analyze the potential risk of violence on their premises and determine the program that will be most appropriate.

"Guidelines" and "Models" appear to be suggestions rather than legal requirements. The DOSH guidelines and model program are indeed intended to provide assistance to employers and give companies a sense of what DOSH will look for in reviewing a company's security plan. However, a guideline or model can become a *de facto* regulation, and deviation from it may expose an employer to liability.

In 2002, DOSH issued a *Guide to Developing Your Workplace Injury and Illness Prevention Program*, designed to help employers improve workplace protection for their employees. The Guide is intended to provide guidance for employers, not to proscribe requirements.¹²⁰

On May 1, 1996, DOSH implemented a policy and procedure (P&P) on dual-employer liability.¹²¹ Although the P&P is not binding on the Cal-OSH Appeals Board (the agency that serves as the judicial arm of Cal-OSHA and hears employer appeals), the P&P is likely to be followed by DOSH. Prudent employers should be aware of and should follow the guidelines.

The most common dual-employer situation is one involving a temporary help agency or an employee leasing company that provides an employee to work under the supervision and control of another company. In such circumstances, the company supplying the employee is the *primary employer* and the company supervising the employee at the worksite is the *secondary employer*. Under the P&P, a secondary employer is liable for any safety and health hazard when: (1) a contingent employee is exposed to a Cal-OSHA violation; and (2) the secondary employer exercised supervision and control over the employee. The circumstances in which a primary employer will be cited for safety and health violations are far broader and

¹²⁰ The Guide can be found at http://www.dir.ca.gov/dosh/dosh_publications/iipp.html.

¹²¹ California Department of Industrial Relations, Division of Occupational Safety & Health, Policy & Procedures Manual C-1D, issued May 1, 1996. This policy and procedure can also be found at <http://www.dir.ca.gov/DOSHPol/P&PC-1D.html>.

more complex. Generally, a primary employer may be cited when there is employee exposure to a violation, even if the primary employer has no significant involvement with the worksite.

Although the P&P does not address workplace violence specifically, the rules may be extended to apply to violence. Temporary agencies and employers who use temporary employees should review these policies both for safety violations and for workplace violence issues.

On January 1, 2000, DOSH's standards on the enforcement of employer safety responsibilities on multiemployer worksites became effective. California Labor Code section 6400(b) provides that at multiemployer worksites, citations may be issued to any of the following: the employer whose employees were exposed to the hazard, the employer who actually created the hazard, the employer who was responsible for safety and health conditions at the worksite, or the employer who was responsible for correcting the hazard.¹²² The most common multiemployer worksite is a construction site, where owners, general contractors and subcontractors may share obligations. In the construction context, property owners may be held responsible for workplace hazards even if they did not create them and even if their employees were not exposed to the hazards. Although multiemployer worksites are most common in the construction context, the regulations also apply to nonconstruction worksites.

The multiemployer regulations are designed to fill a gap between the DOSH standards and the Fed-OSHA standards, which previously addressed multiemployer situations. However, it is unclear at this time whether the "hazard" referred to in the statute will include incidents of workplace violence.

DOSH has also issued guidelines for health care and community service workers.¹²³ In addition to environmental factors identified by Fed-OSHA, DOSH's Guidelines point to work practices of concern such as decreased staffing at meal times and visiting hours, performing job duties at night, and working in areas where the employee is physically isolated from other employees. The Guidelines fall into two broad categories: (1) general provisions and program development; and (2) specific work setting requirements, which include engineering controls, work practices, personal protective measures, and individualized training (based on the type of worksite). Program elements include a worksite analysis and hazard prevention and control. The Guidelines further provide that engineering and administrative controls will depend in large part on the type of facility. For example, "panic buttons" are recommended in psychiatric hospitals, whereas personal hand-held alarms may be more appropriate for home and field community service workers to use. More specific details for various health care and social service settings are laid out in the Guidelines. Finally, the DOSH Guidelines highlight that training and evaluation are critical parts of reducing violence in health care settings.

§ 30.3.1(b)

Georgia

Although Georgia does not have a state equivalent to the Fed-OSH Act, the Georgia code places a duty on employers to provide a safe place to work. Therefore, an employer could be exposed to liability for failure to eliminate violence from the workplace.¹²⁴ This statutory duty

¹²² CAL. LAB. CODE § 6400(b) (2007).

¹²³ See DOSH's *Guidelines for Security & Safety of Health Care & Community Service Workers*, available at http://www.dir.ca.gov/DOSH/dosh_publications/hcworker.html (last visited Dec. 7, 2008).

¹²⁴ See GA. CODE. ANN. § 34-2-10 (2007).

does not make the employer an absolute guarantor of its employees' safety; rather, the employer is under a duty to exercise ordinary care in making an effort to provide a reasonably safe place to work.¹²⁵

§ 30.3.1(c)

Hawaii OSH

In October 2001, the Hawaii Department of the Attorney General promulgated a workplace violence manual that provides guidance to employers on preventing violence in work environments.¹²⁶ The manual cites the Fed-OSH Act's General Duty Clause as requiring employers to provide employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm."¹²⁷ The manual states that this duty includes "inspecting the workplace to discover and correct a dangerous condition or hazard in the workplace and to give adequate warning of its existence."¹²⁸

The handbook discusses practical steps to deal effectively with workplace violence. First, employers should consider developing a program and a written policy statement, as well as training on how to recognize and prevent violence. In the event of actual violence, the employer should thoroughly investigate the facts and assess the threat. It should consider the impact on employees when determining the appropriate treatment for an offending employee. The manual also attaches practical checklists, worksheets, and recommended response procedures.

§ 30.3.1(d)

Minnesota (MNOSHA)

Minnesota has a state Occupational Safety and Health program ("MNOSHA") administered by the Minnesota Department of Labor and Industry (DLI), which is responsible for compliance program administration, conducting enforcement inspections, adopting standards, and operating other related OSHA activities. The program also provides employers, upon request, with consultation services to prevent workplace accidents and diseases by identifying safety and health hazards.

The mission of the Minnesota program is to ensure that every worker in the State of Minnesota has a safe and healthful workplace. This involves applying a set of tools provided by MNOSHA, including standards, development, enforcement, compliance assistance, training, and education to assist employers in complying with this mission. MNOSHA operates a loggers' safety education program, a workplace violence prevention program, and a safety grants program.¹²⁹

A study by MNOSHA, *Workplace Violence: Are You At Risk?*, identifies several sources of internal violence, including understaffing, heavy workload, excessive overtime, intimidation,

¹²⁵ *Smith v. Ammons*, 188 S.E.2d 866, 867 (Ga. 1972).

¹²⁶ State of Hawaii Dep't of the Attorney General, Crime Prevention and Justice Assistance Division, *WORKPLACE VIOLENCE: PREVENTION, INTERVENTION & RECOVERY* (Oct. 2001). The manual can be found at http://hawaii.gov/ag/cpja/quicklinks/workplace_violence (last visited Dec. 7, 2008).

¹²⁷ *Id.* (citing section 5(a)(1) of the Occupational Safety and Health Act).

¹²⁸ *Id.*

¹²⁹ Information about Minnesota's programs is available at <http://www.doli.state.mn.us/mnosha.html> (last visited Dec. 7, 2008).

and rigid management styles. Recommended strategies for dealing with these stressors include providing training, establishing zero-tolerance policies, improving communication between workers and management, and establishing an Employee Assistance Program to assist workers. The same study identified a number of ways to minimize the risk of violence initiated by strangers: keep windows cleared, improve lighting, keep minimal cash on site, use security guards, alarm systems, metal detectors and security cameras, and have safe rooms for employees to use in an emergency.¹³⁰

§ 30.3.1(e)

Oregon OSHA (OR-OSHA)

Under its general duty clause, Oregon law, like federal law, requires employers to maintain a safe workplace.¹³¹

The Oregon Occupational Safety & Health Division (“OR-OSHA”) developed Guidelines that provide recommended steps on reducing the hazards of workplace violence. The Guidelines briefly discuss pertinent legal issues and employers’ legal obligations in Oregon and set forth a Six-Step Workplace Violence Prevention Program. Although employers should customize the program to suit their particular workplace, the suggestions contained in the Guidelines are sufficiently general to be adopted and tailored for various employment situations.¹³²

Step One of the program involves forming a committee that will develop the program.

Step Two is to conduct a risk assessment and review security. This entails examining past incidents of reported violence, reviewing OSHA logs, and surveying all workers to determine the extent of unreported violence. Reviewing security involves assessing existing policies and determining the need to modify existing security measures, such as better lighting, security cameras, or door locks.

The Third Step in the program is to develop a written policy, which should include preemployment screening, termination and layoff procedures, and ground rules for acceptable behavior.

In Step Four, the employer is encouraged to adopt a training program for employees of all levels. The training program should be designed to provide workers and managers with knowledge of applicable policies and procedures.

Step Five suggests creating a crisis-response plan, which includes an internal plan for communicating emergencies, incident report procedures, incident response procedures, and follow-up procedures to inform employees about what has happened and how it is being handled. These follow-up procedures are crucial for alleviating anxiety among workers and reducing misinformation. Employers should also consider, as part of Step Five, establishing a threat-management team. This team is often composed of representatives from the company’s security department, human resources, legal or medical service providers, external psychologists, or threat-assessment experts. The team’s duties may include managing the

¹³⁰ This study is available at <http://www.doli.state.mn.us/wvprisk.html> (last visited Dec. 7, 2008).

¹³¹ OR. REV. STAT. § 654.010-015 (2006).

¹³² These Guidelines, as well as all others, are available at <http://www.orosha.org> (last visited Dec. 7, 2008).

violence prevention program, as well as providing guidance concerning liaisons with outside assistance, planning for media relations, or otherwise managing operations after the crisis.

The Final Step in the Program is for the employer to test and improve its violence prevention plan. The plan should be reassessed every year, and should include, for example, analyzing trends and surveying employees.

The OR-OSHA Guidelines also provide a helpful list of consultative, enforcement, training, and technical resources that are available to employers, as well as some important do's and don'ts for dealing with potentially violent individuals.

§ 30.3.1(f)

Washington (WISHA)

The State of Washington Industrial Safety and Health Administration (WISHA) has developed a guidebook, *Workplace Violence: Awareness and Prevention for Employers and Employees* ("Guidebook"), to help employers and employees recognize acts of workplace violence, take steps to minimize and prevent them, and respond appropriately if they occur.¹³³ The Guidebook specifically states that the recommendations are voluntary and do not impose mandatory obligations on employers. Employers are encouraged to incorporate the information provided into an accident prevention program, a separate workplace violence prevention program, or an employee handbook.

The WISHA Guidebook discusses four types of workplace violence, including violence by strangers, violence by customers or clients, violence by coworkers, and violence by personal relations. It sets forth potential prevention measures for each category.

With respect to violence by strangers, the Guidebook focuses on the retail store industry and sets forth numerous risk factors and potential preventative measures. High-risk factors include working with money, working in isolation, operating at night, and providing poor visibility into the worksite and poor lighting outside. The Guidebook suggests preventative measures such as training, posting signs stating that cash registers contain minimal cash, leaving a clear, unobstructed view of cash registers from the street, and maintaining adequate outside lighting, among others.

The second type of workplace violence, involving violence by customers or clients, often arises in the social work or health care context. The Guidebook discusses potential risks, including working in isolation, working after hours, and dealing with violent customers. The Guidebook recommends that employers conduct a hazard assessment and take preventative measures, including controlling access to the worksite, providing a communication system to alert security, eliminating easy access to potential weapons, and providing good client referral and assistance programs.

The third category involves violence by coworkers. The Guidebook focuses on the potential of retaliation by an employee recently disciplined for poor performance. In this case, risk factors include high stress in the workplace, lack of appropriate management protocols for disciplinary actions, lack of appropriate supervisory training, and individuals with propensities toward violence. To avoid such a scenario, the Guidebook recommends adopting and enforcing a policy of no tolerance for workplace violence, adopting management policies

¹³³ These guidelines are available at <http://www.lni.wa.gov/Safety/Topics/AtoZ/WPV> (last visited Dec. 7, 2008).

for layoffs and disciplinary actions, providing access to employee assistance and counseling services, and providing adequate security personnel on site.

The fourth category is violence by personal relations. The Guidebook gives the example of an attack on an employee by her distraught ex-husband. In this scenario, risk factors include an individual with a history of violent or threatening behavior, the lack of controlled access to the worksite, and the lack of a communication policy regarding restraining orders. The Guidebook sets forth numerous potential preventative measures, including training to respond to domestic violence, policies on handling and preventing violent situations, restraining orders, controlled access to the worksite, and effective reporting and notification procedures.

In addition to these recommendations regarding the prevention of specific instances of violence, the Guidebook also sets forth the suggested elements of a workplace violence prevention program. The Guidebook suggests a seven-step program consisting of: (1) management commitment and employee involvement; (2) hazard assessment; (3) hazard prevention and control; (4) training and instruction; (5) reporting procedures; (6) record keeping; and (7) evaluation. Attached as an exhibit to the WISHA Guidebook is a “Sample Workplace Violence and Prevention Program” that includes numerous sample forms and program checklists. Littler Mendelson also produces a handbook on employer safety, workplace violence, and domestic violence in the workplace, which is used at seminars for State of Washington employers. The course and the corresponding materials provide an overview of WISHA, the responsibilities of employers, managers, and supervisors under WISHA, a discussion of workplace violence recognition and prevention, and a review of the issue of domestic violence in the workplace. Seminar participants discuss real-life safety and health issues, including issues involving violence in the workplace, and learn about their obligations under the law.

The State of Washington has also passed a workplace violence law to address hazards specific to workers in the health care industry.¹³⁴ The law approaches addressing the problem with three prongs: (1) a workplace violence protection plan; (2) violence protection training; and (3) record-keeping requirements. The plan, which health care employers were required to implement by July 1, 2000, is required to address security considerations such as the physical attributes of a health care setting, staffing (including security staffing), personnel policies, first aid and emergency procedures, reporting violent acts, and employee education and training. Implementing the plan requires a violence assessment risk based on five years of the employer’s own historical data. The annual violence protection training must address general safety procedures, including personal safety procedures, the violence escalation cycle, violence-predicting factors, obtaining patient history from a patient with violent behavior, verbal and physical techniques to deescalate and minimize violent behavior, strategies to avoid physical harm, restraining techniques, and the appropriate use of medications as chemical restraints. The training must be provided to all employees within 90 days of hire. Finally, the law requires that each health care setting keep a record of any violent act against an employee, patient, or visitor occurring in the health care employment setting.

In 2001, WISHA promulgated a related Regional Directive entitled *Workplace Violence Prevention in Health Care*.¹³⁵ The directive applies to all WISHA enforcement and consultation activities involving workplace violence in health care settings. The directive provides interpretive guidance, and discusses special enforcement and consultation protocols.

¹³⁴ WASH. REV. CODE § 49.19.005-070 (2007).

¹³⁵ WISHA Regional Directive 5.7: *Workplace Violence Prevention in Health Care*, Department of Labor & Industries, WISHA Services (2001).

The directive explains that although the law may not cover nursing homes and other health care employers, general WISHA requirements apply to those entities. The directive also details how employers will be cited for various violations of the law.

§ 30.3.1(g)

*Contact Information for State Occupational Safety Offices*¹³⁶

State	Agency	Website
Alaska	Dep't of Labor & Workforce Development, Labor Standards & Safety Division	http://www.labor.state.ak.us
Arizona	Industrial Commission of Arizona, Division of Occupational Safety & Health	http://www.ica.state.az.us/Divisions/osha/safety_health_compliance.html
California	Dep't of Industrial Relations, Division of Occupational Safety & Health	http://www.dir.ca.gov/DOSH/dosh1.html
Connecticut*	Dep't of Labor, Division of Occupational Safety & Health	http://www.ctdol.state.ct.us
Hawaii	Dep't of Labor & Industrial Relations, Division of Occupational Health & Safety	http://hawaii.gov/labor/hiosh
Indiana	Dep't of Labor, Occupational Safety & Health Division	http://www.in.gov/labor/iosha
Iowa	Iowa Workforce Development, Division of Labor Services	http://www.iowaworkforce.org/labor/index.html
Kentucky	Dep't of Labor, Occupational Safety & Health Program	http://www.labor.ky.gov/osh
Maryland	Division of Labor & Industry, Occupational Safety & Health	http://www.dllr.state.md.us/labor/mosh.html
Michigan	Dep't of Labor & Economic Growth, Occupational Safety & Health	http://www.michigan.gov/dleg/0,1607,7-154-11407---,00.html
Minnesota	Dep't of Labor & Industry	http://www.doli.state.mn.us/mnosha.html

¹³⁶ This table reflects contact information for states that have occupational safety and health plans that have been approved by the U.S. Department of Labor Occupational Safety and Health Administration. Those states indicated by an (*) have state-approved plans which cover only public sector (state and local government) employment.

State	Agency	Website
Nevada	Division of Industrial Relations, Occupational Safety & Health Administration	http://www.dirweb.state.nv.us
New Jersey*	Dep't of Labor and Workforce Development, Labor Standards & Safety Enforcement	http://lwd.dol.state.nj.us/labor/index.shtml
New Mexico	Environment Dep't, Occupational Safety & Health Bureau	http://www.nmenv.state.nm.us/OHSB_Website/ohsb_home.htm
New York*	Dep't of Labor, Division of Safety & Health	http://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_INDEX.shtm
North Carolina	Dep't of Labor, Occupational Health & Safety Division	http://www.nclabor.com/osha/osh.htm
Oregon	Dep't of Consumer & Business Services, Occupational Safety & Health Division	http://www.orosha.org
Puerto Rico	Puerto Rico Dep't of Labor & Human Services	http://www.osha.gov/dcsp/osp/stateprogs/puerto_rico.html
South Carolina	Dep't of Labor, Licensing & Regulation, Occupational Safety & Health Administration	http://www.llr.state.sc.us/Labor/osha/index.asp
Tennessee	Dep't of Labor & Workforce Development, Occupational Safety & Health Administration	http://www.state.tn.us/labor-wfd/tosha.html
Utah	Labor Commission, Division of Occupational Safety & Health	http://www.uosh.utah.gov
Vermont	Dep't of Labor & Industry, Occupational Safety & Health Administration	http://www.state.vt.us/labind/vosha.htm
Virgin Islands*	Virgin Islands Dep't of Labor, Division of Occupational Safety & Health	http://www.osha.gov/dcsp/osp/stateprogs/virgin_islands.html
Virginia	Dep't of Labor & Industry, Division of Occupational Safety & Health	http://www.doli.state.va.us
Washington	Dep't of Labor & Industries, WISHA Services Division	http://www.lni.wa.gov/wisha
Wyoming	Dep't of Employment, Occupational Health & Safety	http://wydoe.state.wy.us/

§ 30.3.2

**B. SPECIAL INDUSTRY-SPECIFIC WORKPLACE VIOLENCE
STATUTORY PROTECTIONS**

§ 30.3.2(a)

The Florida Convenience Business Security Act

The State of Florida enacted the Florida Convenience Business Security Act (the “Act”) to combat violence directed at late-night convenience stores.¹³⁷ The Act requires that convenience businesses that primarily sell gasoline, groceries, or both and that are open between 11:00 p.m. and 5:00 a.m. be equipped with certain security measures, including security cameras, a drop-safe or other devices to restrict access to cash receipts, lighted parking, a notice stating the cash register contains \$50 or less, and window signs that allow a clear and unobstructed view from outside the building. The Act also requires that every convenience store maintain a silent alarm to law enforcement or private security agencies, unless an application for an exemption is made to and granted by the attorney general.

The Act also provides that if a murder, robbery, sexual battery, aggravated assault, aggravated battery or kidnapping occurred since July 1, 1989, and the crime arose out of the operation of the store, the business must implement additional security measures specified in the statute. The business owner may file for an exemption from the security measures if, after implementing and maintaining them, none of the criminal acts specified in the statute occurred during a period of at least two years.

§ 30.3.2(b)

The Washington State Late-Night Retail Worker Crime Protection Standards

The Washington Administrative Code includes Late-Night Retail Worker Crime Protection standards, which require late-night retail establishments to implement detailed employee training programs and specified engineering design features.¹³⁸ Employers are required, for example, to provide crime prevention training as part of an accident prevention program, and training on security policies and procedures. The standards also obligate employers to configure window and door displays to provide clear views from the inside, to provide adequate outside lighting, and to install drop-safes or comparable devices on the premises.

§ 30.3.2(c)

The New Mexico Convenience Store Standards

Effective June 1, 2004, the New Mexico Administrative Code requires *convenience stores* (defined as stores selling convenience goods with or without gasoline) to be equipped with exterior lighting, a VHS or digital security system, a security alarm for the store, panic alarms for each employee that notify the police or a private security company when activated, and a depository or other safe.¹³⁹ On a monthly basis, the security system of the stores must be

¹³⁷ FLA. STAT. §§ 812.173-175 (2007).

¹³⁸ WASH. ADMIN. CODE § 296-832-100 (2007).

¹³⁹ N. M. CODE R. § 11.5.6 (2007). Compliance with the new code provisions was required within 90 days of its effective date, or on August 31, 2004. N. M. CODE R. § 11.5.6.21 (2007).

inspected, and all inspection reports and documentation of repairs must be maintained for at least two years.

The Administrative Code also requires crime prevention and safety training for employees upon hire, to be reviewed at least every three months. The training must cover: (1) an overview of the potential risk of assault; (2) operational procedures, such as cash handling rules, designed to reduce risk; (3) proper use of security measures and engineering controls the employer has adopted; (4) behavioral strategies to defuse tense situations and reduce the likelihood of violence; (5) specific instructions on how to respond to a robbery and how to respond to attempted shoplifting; and (6) emergency action procedures to be followed in the event of a robbery or violent incident. Employees must sign an acknowledgment form indicating when they received the training, which the employer is required to maintain. Current employees must be trained within 90 days of the effective date of the regulation.

New Mexico's new code provisions require convenience stores to post signs indicating that there is a safe in the store to which employees do not have access, that there are active security alarm and surveillance systems, and that there is a limited amount of cash in the register. The store may not have more than \$50 in the cash register at any time.

Convenience stores open between the hours of 5:00 p.m. and 5:00 a.m. in New Mexico must take at least one of the following additional security measures: (1) have at least two employees at the store, or one employee and on-site security personnel; (2) provide controlled access area enclosed by transpired bullet-proof materials; or (3) provide a bullet-proof pass through window restricting the service counter area. Alternatively, the employer may choose to close the store and prohibit all sales transactions, although it may allow employees to perform duties such as store stocking, maintenance and cleaning. If the employer chooses this option, it must post conspicuous signs on all entrances stating that the store is closed.

§ 30.3.2(d)

The New Jersey Violence Protection in Health Care Facilities Act

The Violence Protection in Health Care Facilities Act was signed into law on January 3, 2008, and requires certain health care facilities in New Jersey to establish violence prevention programs to protect health care workers.¹⁴⁰ Covered facilities are required to establish violence prevention programs that must include: a committee to address violence prevention, annual training, "personnel sufficiently trained to identify aggressive and violent predicting factors and the ability to appropriately respond to and manage violent disturbances," documentation of violent acts committed against employees at work, and a post-incident response to provide support to employees effected by workplace violence (e.g., an Employee Assistance Program (EAP)).

§ 30.3.3

C. WORKPLACE VIOLENCE POLICIES ADOPTED BY CITIES

Increasingly, cities and towns of various sizes have taken affirmative measures to address workplace violence in an effort to safeguard city workers. These measures are sometimes used and articulated as a challenge to private employers doing business in those cities.

¹⁴⁰ N.J. Pub. L. 2007, ch. 236.

Pursuant to the Seattle Municipal code, the city of Seattle prohibits violence against Seattle's employees, customers, clients and visitors to its workplaces. The city's personnel director is required to implement a Workplace Violence Prevention Program, to designate a coordinator of the program, and to compile information to evaluate the program. In its workplaces, St. Paul, Minnesota prohibits *violent behavior*, defined as the use of physical force, harassment or intimidation, or abuse of power or authority where the impact is to control by causing pain, fear, or hurt. As recently as June 7, 2006, New York Governor George Pataki signed a bill into law to reduce the risk of workplace violence for public employees. The bill requires public employers with 20 or more employees to assess risk and develop and utilize a written plan of action to prevent workplace violence.¹⁴¹

Other cities that have adopted policies toward preventing workplace violence include Boston, Massachusetts; Camden, New Jersey; Colorado Springs, Colorado; Hartford, Connecticut; Riverside, California; and Milwaukee, Wisconsin.

Additionally, cities and states around the country are beginning to focus on anti-bullying policies for the workplace. Since 2003, a number of states have introduced bills to prohibit bullying in the workplace, including: California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Vermont, and Washington.¹⁴²

§ 30.3.4

D. PROTECTION FOR VICTIMS OF VIOLENCE

It is estimated that domestic violence results in an estimated 8 million missed days of work each year in the United States, but only about 4% of employers provide training on the subject.¹⁴³ Several bills were proposed at the federal level in 2008 designed to address this matter. Suggested measures include providing job-protected leave under the Family and Medical Leave Act to victims of violent crime and domestic violence (and their immediate family members) and creating employer liability for negligent conduct resulting in a gender-motivated crime committed on an employer's premises.¹⁴⁴

Additionally, in recent years, several states have passed, or attempted to pass, legislation allowing employees to take leaves of absence on account of violence, including domestic violence. Illinois' Victims' Economic Security and Safety Act (VESSA)¹⁴⁵ requires employers of 50 or more employees to allow employees to take up to 12 weeks of unpaid leave per year for legal action, medical attention, counseling, victims' services or relocation.

Colorado requires employers of 50 or more to allow an employee to take up to three days of unpaid leave to protect himself or herself from domestic abuse, stalking, sexual assault, or

¹⁴¹ *Gov. Pataki Signs Workplace Violence-Prevention Bill*, Daily Lab. Rep. (BNA) No. 112, June 12, 2006, at A-14.

¹⁴² The legislative history of all proposed bills is available at <http://www.workplacebullyinglaw.org> (last visited Dec. 7, 2008).

¹⁴³ *Domestic Violence Spills Into Workplace, But Senate Witnesses Disagree on Solutions*, Daily Lab. Rep. (BNA) No. 74, Apr. 18, 2007, at A-1.

¹⁴⁴ H.R. 5845, 110th Cong. (2008); H.R. 6927, 110th Cong. (2008).

¹⁴⁵ 820 ILL. COMP. STAT. ANN. 180/1-180/999 (2007).

any other crime whose underlying factual basis includes domestic violence.¹⁴⁶ An employee is deemed to be protecting himself or herself under the act by seeking a civil protection order, obtaining medical care, seeking legal assistance or securing his or her home. To take advantage of this leave provision, employees must first exhaust other available leave and must have worked for the employer for at least one year.

As compared to the Illinois and Colorado statutes, Maine's provisions for employment leave for victims of violence are broader in some ways and narrower in others.¹⁴⁷ They provide that an employer must grant "reasonable and necessary leave from work," with or without pay, for court proceedings, medical services, or other services to remedy a crisis caused by domestic violence, sexual assault or stalking. The leave must be needed because the employee or his or her child, parent, or spouse is a victim of violence, assault, sexual assault, stalking, or other offense that would support an order for protection under Maine law.

In California, employers with 25 or more employees must allow an employee who is a victim of domestic violence to take time off from work.¹⁴⁸ California's Victims of Domestic Violence Employment Leave Act states that an employee may take unpaid time off from work (or use available vacation or personal time) to:

- seek medical attention for injuries caused by domestic violence;
- obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence;
- obtain psychological counseling related to an experience of domestic violence; and
- participate in safety planning and take other actions to increase safety from future domestic violence, including temporary or permanent relocation.¹⁴⁹

An employer who discharges, retaliates or discriminates against an employee taking time off pursuant to this provision may have to reinstate that employee and is liable for all lost wages and work benefits. Moreover, an employer who willfully refuses to rehire or restore an employee who has utilized such leave may be guilty of a misdemeanor.¹⁵⁰

The California Penal Code provides that before a detained person, who has gone to the workplace of a party subject to a domestic violence protection order, may be released on his or her own recognizance or on bail for an amount other than the amount contained on the bail schedule, he or she must have a court hearing.¹⁵¹

Rhode Island's Victim's Economic Security and Safety Act provides employment protection for victims of crimes to be absent from work to attend court proceedings related to the

¹⁴⁶ COLO. REV. STAT. § 24-34-402.7 (2007).

¹⁴⁷ ME. REV. STAT. ANN. tit. 26, § 850 (2007).

¹⁴⁸ Additionally, no employer covered by the California Labor Code may discriminate or retaliate against a victim of domestic violence for taking time off from work to obtain or attempt to obtain legal relief, such as a restraining order or injunction, to help ensure the health, safety, or welfare of the victim or his or her child. CAL. LAB. CODE § 230 (2007).

¹⁴⁹ *Id.* § 230.1.

¹⁵⁰ CAL. LAB. CODE § 230.

¹⁵¹ CAL. PENAL CODE § 1270.1 (2007).

crime.¹⁵² The Act provides employment protection for victims of crimes to be absent from work to attend court proceedings related to the crime. Leave may be unpaid, or the employee may choose to use or an employer may require the employee to use accrued paid vacation, personal leave or sick leave. An employer may limit the leave if it creates an “undue hardship” to the employer’s business. Rhode Island also prohibits discrimination against an employee or applicant based on seeking or obtaining a protective order, or refusing to seek or obtain a protective order.¹⁵³

North Carolina law prohibits an employer from discharging, demoting, disciplining, or denying a promotion to an employee who takes “reasonable time off” from work to obtain or attempt to obtain a protective order or other relief under the state’s domestic violence law.¹⁵⁴ An employee who is absent to seek such relief must follow the employer’s usual time off policy or practices. If the employer generally requires advance notice of absences, the employee must provide advance notice unless there is an emergency. Employers may require the employee to provide documentation showing the reason for the absence.

Many other states have statutes that provide that employers may not fire or retaliate against employees who take time off from work to participate in judicial proceedings, including those addressing violence.¹⁵⁵ In total, about one third of states have enacted legislation providing

¹⁵² R.I. GEN. LAWS § 12-28-13 (2007). The law applies to employers with 50 or more employees.

¹⁵³ *Id.* § 12-28-10.

¹⁵⁴ N.C. GEN. STAT. § 95-270a (2007).

¹⁵⁵ *See, e.g.*, ALA. CODE § 15-23-81 (2007) (allows victim to respond to subpoena to testify in criminal proceeding or participate in reasonable preparation for a criminal proceeding); ALASKA STAT. § 12.61.017 (2007) (allows victim to respond to subpoena and to attend court proceedings to give testimony); ARIZ. REV. STAT. § 13-4439 (2007) (allows victim to be absent to appear at criminal court proceeding); ARIZ. REV. STAT. § 8-420 (allows victim of a juvenile offense to be absent to appear at court proceeding); ARK. CODE ANN. § 16-90-1105 (2007) (allows victim to be absent to attend or participate in a criminal justice proceeding); COLO. REV. STAT. § 24-4.1-303(8) (2007) (allows victim or victim’s family member to respond to subpoena to testify in criminal proceeding or to assist in preparing for a criminal proceeding); CONN. GEN. STAT. § 54-85b (2007) (allows employee to attend court or participate in police investigation for crime against employee or employee’s minor child); CONN. GEN. STAT. § 54-85d (2007) (allows employee to attend criminal court proceedings of case in which the employee’s parent, spouse, child or sibling was a homicide victim); DEL. CODE ANN. tit. 11, § 9409 (2007) (allows victim to respond to a subpoena, participate in trial preparation, or attend trial proceedings as reasonably necessary to protect the victim’s interests); FLA. STAT. ANN. § 92.57 (2007) (allows victim to respond to subpoena without penalty); GA. CODE ANN. § 34-1-3 (2007) (allows employee to respond to court order without penalty); HAW. REV. STAT. ANN. § 621-10.5 (2007) (allows employee to respond to subpoena, testify, or attend court as a prospective witness); IND. CODE 35-44-3-11.1 (2007) (allows employee to respond to subpoena); IOWA CODE § 915.23 (2006) (allows employee to serve as witness in criminal case); MD. CODE ANN. CTS. & JUD. PROC. § 9-205 (2007) (allows employee to respond to subpoena or attend a proceeding that he or she has a legal right to attend, as defined by Maryland law); MASS ANN. LAWS ch. 268, § 14B (2007) (allows victim or subpoenaed witness to attend criminal proceedings); MICH. COMP. LAWS SERV. §§ 780.762 and 780.790 (2007) (allows victim leave to give testimony in court); MINN. STAT. § 611A.036 (2007) (allows employee to be absent to give testimony in court as victim or witness); MISS. CODE ANN. § 99-43-45 (2007) (allows victim to respond to subpoena or participate in reasonable preparation for court proceeding); MO. REV. STAT. § 595.209(1)(14) (2007) (allows a witness, victim, or victim’s immediate family to respond to a subpoena or to participate in preparation for a criminal proceeding); MONT. CODE ANN. § 46-24-205(3) (2005) (allows victim or a member of the victim’s family to participate in, prepare for, or attend a criminal proceeding); NEV. REV. STAT. ANN § 50.070 (2007) (allows witness or person summoned to appear as a witness to testify); N.Y. PENAL LAW § 215.14 (2007) (allows victim or witness to attend criminal proceeding); N.D. CENT. CODE § 27-09.1-17 (2007)

various levels of protection for victims of domestic violence or their families from being negatively impacted at work.¹⁵⁶

The New York City Human Rights laws make it unlawful for an employer in New York City to refuse to hire, penalize, discharge, or otherwise discriminate against an individual because of the actual or perceived status of the individual as a domestic violence victim.¹⁵⁷ The New York City Administrative Code defines *domestic violence victim* broadly, as a person who has been subjected to “acts or threats of violence,” committed by:

- a current or former spouse;
- a person with whom the victim shares a child in common;
- a person who is cohabiting with or has cohabitated with the victim;
- a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim; or
- a person who is, continually has, or at regular intervals lived in the same household as the victim.¹⁵⁸

In addition, domestic violence victims receiving medical treatment or therapy for physical or psychological effects may be covered under the Administrative Code’s provisions regarding disability.¹⁵⁹

The National Center for State Courts has published a Resource Guide for Workplace Domestic Violence, which outlines laws and legislation, provides guides and forms, and suggests initiatives and prevention programs.¹⁶⁰ It also provides general information for employers about the relationship between domestic violence and the workplace. Additionally, the Corporate Alliance to End Partner Violence, a coalition of 120 companies, has created a website that provides research on domestic violence, best practice tips to help employers respond effectively, sample workplace policies, and training materials.¹⁶¹

Four states have recently enacted legislation addressing leave for victims of violence in general. In 2005, Minnesota expanded its statute governing leave from work for victims of

(allows employee to serve as witness); OHIO REV. CODE ANN. § 2930.18 (2007) (allowing victim, victim’s family, or victim’s representative to assist in preparing for a criminal proceeding or to participate in a criminal proceeding, in response to a subpoena, if attendance is reasonably necessary to protect the interests of the victim); 18 PA. CODE § 4957 (2007) (allows employee to testify as witness or victim of a crime); S.C. CODE ANN. § 16-3-1550 (2006) (allows victim and witness to respond to subpoena); UTAH CODE ANN. § 78-11-26 (2007) (allows employee to respond to a subpoena); VT. STAT. ANN. tit. 13, § 5313 (2007) (allows victim, victim’s family member, or victim’s representative to respond to a subpoena); VA. CODE ANN. § 18.2-465.1 (2007) (allows employee to respond to summons or subpoena and attend future proceedings as required by court in writing); WIS. STAT. § 103.87 (2006) (allows employee to respond to subpoena for criminal case or juvenile justice case); WYO. STAT. ANN. § 1-40-209(a) (2007) (allows victim or witness to respond to a subpoena).

¹⁵⁶ See, e.g., HAW. REV. STAT. § 378-72 (2007); ME. REV. STAT. tit. 26, § 850 (2007).

¹⁵⁷ N.Y. CIV. RIGHTS LAW § 8-107.1(2) (2007).

¹⁵⁸ *Id.* § 8-107.1(1)(b).

¹⁵⁹ See *id.* §§ 8-102(16), 8-107.

¹⁶⁰ The Resource Guide is available at <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=FamVio&guide=6> (last visited Dec. 14, 2007).

¹⁶¹ The CAEPV website is available at <http://www.caepv.org>. (last visited Dec. 14, 2007).

violence. Under the 2005 statute, an employer must allow an employee victim (or an employee that is the spouse or next of kin of a victim) reasonable time off from work to attend criminal proceedings related to the victim's case.¹⁶² An employer may not retaliate against an employee for taking reasonable time off for such purposes. Previously, Minnesota law prohibited retaliation against victims or witnesses because they had been subpoenaed or requested by a prosecutor to attend court for the purpose of giving testimony.

Effective January 1, 2006, New Hampshire enacted the Crime Victim Employment Leave Act, which requires an employer to allow an employee who is a victim of a crime to leave work to attend court or legal or investigative proceedings associated with the prosecution of the crime.¹⁶³ An employer may not retaliate against an employee who is a victim of a crime because the employee exercises his or her right to leave work. The employer may limit the leave provided under the law if the employee's leave creates an "undue hardship" to the employer's business.

Kansas allows employees time off for medical attention, domestic violence services, and court appearances related to domestic violence or sexual assault without employer recourse.¹⁶⁴ An employee will only need to provide his or her employer with reasonable notice, and no adverse action may be taken against an employee who provides documentation within 48 hours of the unscheduled absence. The employee may use accrued paid leave, or if none is available, no more than eight days of unpaid leave per year.

Oregon requires employers to grant unpaid leave to workers who need time to seek legal help, pursue a court order, or move out of a home as a result of domestic violence.¹⁶⁵ The law applies to employers with six or more employees, and employers may limit leave time if it would create an "undue hardship" on the business. Additionally, the leave must be "reasonable," and employees may choose to use accrued vacation leave or other paid leave.

§ 30.3.5

E. THE SPECIAL ROLE OF WORKERS' COMPENSATION CLAIMS IN WORKPLACE VIOLENCE

§ 30.3.5(a)

Employer's Liabilities Under Workers' Compensation—Models from Selected States

The role of the workers' compensation system is significant in workplace violence. In general, an employee who is injured by violence in the workplace is limited to recovering workers' compensation benefits. However, the rules vary from state to state. In California, for example, in order for an employee's injury to be compensable under the workers' compensation statutes, the injury must not only be sustained in the course of employment (during the performance of service) but also must arise out of the employment.¹⁶⁶ If these requirements are met, the workers' compensation system generally provides the exclusive

¹⁶² MINN. STAT. § 611A.036 (2007).

¹⁶³ N.H. REV. STAT. ANN. §§ 275:61 *et seq.* (2007).

¹⁶⁴ KAN. STAT. ANN. § 44-1132 (2007).

¹⁶⁵ S.B. 946, 2007 Leg., 74th Sess. (Or. 2007).

¹⁶⁶ CAL. LAB. CODE § 3600 (2007).

remedy for injuries sustained by an employee during the employment relationship, and the worker will be precluded from seeking other civil claims against the employer.¹⁶⁷ This section provides a brief review of different types of events and injuries that may be compensable under the workers' compensation statutes, including assaults, psychiatric injuries, emotional distress, and an employer's willful misconduct.

An *assault* in the workplace is compensable under California's workers' compensation laws where the subject matter of the dispute leading to the assault involves the work itself, or the work brought the injured employee and the perpetrator together and created the conditions and relations that resulted in the altercation.¹⁶⁸ However, an assault at work that is purely personal and unrelated to the employment is not compensable under the workers' compensation scheme.¹⁶⁹ The workers' compensation laws do not prevent an employee from stating a cause of action against an employer for the intentional acts of a coworker if the employer knew of the behavior and failed to take corrective action.¹⁷⁰

Georgia courts interpret "in the course of" and "arising out of" employment broadly enough that workers' compensation is often the exclusive remedy available to a victim of workplace violence. In *Maxwell v. Hospital Authority*, the Georgia Court of Appeals found that an employee was injured within the "scope of her employment" when she was raped, beaten and robbed in an employee parking lot after her shift ended.¹⁷¹ The injuries were deemed to have occurred "in the scope of her employment" because the victim was required to walk to her car unescorted in the early morning hours several times a week. Therefore, her recovery was limited to workers' compensation benefits and she could not maintain a negligence cause of action against the hospital. In another unfortunate case out of Georgia, a pizza delivery driver pulled over in response to a vehicle with a flashing blue light. The driver of the other car doused him in gasoline and set him on fire, causing second and third degree burns over his body. The Georgia Court of Appeals, following *Maxwell*, held that workers' compensation was the plaintiff's only recourse as he was acting "in the course of" his employment when he pulled over to offer the other driver assistance.¹⁷²

Colorado law provides immunity from civil liability to the employer and employee when the tortfeasor and victim are both acting in the course of their employment. The rule of immunity operates even if the tort is intentional, such as an assault.¹⁷³ However, not all intentional torts committed by employees against coworkers fall within the workers' compensation bar.¹⁷⁴

Some states continue to attempt to restrict an employee's ability to receive workers' compensation benefits for psychiatric injuries unless the employment relationship was a substantial factor in the causation. For example, California law requires an employee to demonstrate by a preponderance of the evidence that the actual events of employment were

¹⁶⁷ CAL. LAB. CODE §§ 3600, 3602(b)(1) (2007).

¹⁶⁸ 1 HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES & WORKERS' COMPENSATION §§ 4.50-4.51 (rev. 2d 1992).

¹⁶⁹ *Rogers v. Workers' Comp. Appeals Bd.*, 218 Cal. Rptr. 662 (Cal. Ct. App. 1985).

¹⁷⁰ See *Hart v. National Mortgage & Land Co.*, 235 Cal. Rptr. 68, 75-76 (Cal. Ct. App. 1987).

¹⁷¹ 413 S.E.2d 205, 207 (Ga. Ct. App. 1991).

¹⁷² *Hulbert v. Domino's Pizza, Inc.*, 521 S.E.2d 43, 46-47 (Ga. Ct. App. 1999).

¹⁷³ *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).

¹⁷⁴ See *In re Question Submitted by the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988) (listing three categories of intentional torts according to connectivity to the employment), *rev'd by Tolbert v. Marietta Corp.*, 858 F.2d 1479 (10th Cir. 1988).

“predominant” as to all of the combined causes of the psychiatric injury. However, an employee whose psychiatric injury resulted from “being a victim of a violent act or from direct exposure to a significant violent act” need only establish by a preponderance of the evidence that actual events of employment were a “substantial cause” of the injury, which means at least 35% - 40% of the causation was due to the actual events of employment.¹⁷⁵

In order to be compensable in Texas, the psychiatric injury in question must be the result of a qualified accidental injury, traceable to a specific time, place and cause, which is incurred during activities furthering the employer’s business. Generally, anxiety over reprimands, transfers, promotion decisions, and other general anxiety related to a job are not considered accidental injuries incurred in furthering the employer’s business and are not considered compensable mental trauma claims under the Workers’ Compensation Act.¹⁷⁶

In *Popovich v. Irlando*, the Supreme Court of Colorado held that a plaintiff’s claims against her coworkers for intentional infliction of emotional distress were not barred by coworker immunity.¹⁷⁷ The court stated that to the extent plaintiff recovered workers’ compensation benefits from the employer, the recovery should not be duplicated. In *Kirk v. Smith*, the federal court in Colorado held that a tort claim for assault and outrageous conduct against a supervisor resulting primarily in mental and emotional distress, as distinguished from the physical incapacity to perform job duties, was not barred by the Workers’ Compensation Act.¹⁷⁸

An employer’s willful attack on an employee is not a risk or a condition of employment, so an employer’s intentional assault on an employee is compensable under California’s workers’ compensation law and may also be redressed in a civil action for damages.¹⁷⁹ Furthermore, where an employee acts as the employer’s agent in harming another employee, the employer can be liable for damages in a civil action.

The Illinois Supreme Court has held that the Workers’ Compensation Act bars certain state tort claims against employers.¹⁸⁰ The Illinois Workers’ Compensation Act contains an exclusivity provision dictating that an employee has no “common law or statutory right to recover damages from the employer . . . or its agents or employees” for accidental injuries incurred in the course of employment.¹⁸¹ Illinois courts recognize exceptions to workers’ compensation exclusivity when the employee proves that the injury was not accidental, did not arise from his employment, was not suffered in the course of his employment, or is not compensable under the Workers’ Compensation Act.¹⁸² Employees must show a specific intent to injure on the behalf of the employer in order to avoid workers’ compensation exclusivity.

¹⁷⁵ CAL. LAB. CODE § 3208.3(b) (2007).

¹⁷⁶ TEX. LAB. CODE ANN. § 408.006 (2007); *see also Duncan v. Employers Cas. Co.*, 823 S.W.2d 722 (Tex. App. – El Paso 1992, no writ).

¹⁷⁷ 811 P.2d 379 (Colo. 1991).

¹⁷⁸ 674 F. Supp. 803 (D. Colo. 1987).

¹⁷⁹ *See Magliulo v. Superior Court*, 121 Cal. Rptr. 621 (Cal. Ct. App. 1975) (employer hit a waitress and threw her to the floor while at work).

¹⁸⁰ *Collier v. Wagner Castings Co.*, 408 N.E.2d 198 (Ill. 1980).

¹⁸¹ 820 ILL. COMP. STAT. ANN. 305/5(a) (2007).

¹⁸² *Bercaw v. Domino’s Pizza, Inc.*, 630 N.E.2d 166 (Ill. App. Ct. 1994); *see also Meerbrey v. Marshall Field & Co., Inc.*, 564 N.E.2d 1222 (Ill. 1990).

Illinois courts have held that claims for negligent infliction of emotional distress may be preempted by the Workers' Compensation Act. For instance, the plaintiff in *Small v. Chicago Health Clubs, Inc.* alleged, among other things, that the employer "created a hostile environment where gender-based discrimination was permitted and encouraged."¹⁸³ The plaintiff alleged negligent infliction of emotional distress because the employer failed to take appropriate steps to prevent the continued harassment. The court found that her negligent infliction claim was preempted by the Workers' Compensation Act because the Act contains an exclusivity provision which bars an employee from bringing a common law suit for an accidental injury arising out of and in the course of employment which is compensable under the Act.

In Texas, a workplace injury including an assault, will be compensable under the workers' compensation scheme unless: (1) "the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment;" or (2) the injury was a result of "the employee's willful attempt to injure himself or to unlawfully injure another person."¹⁸⁴

There is an exception in Texas for wrongful death cases, and this allows recovery for exemplary damages where an employee's death was caused by an employer's gross negligence or intentional act.¹⁸⁵ *Gross negligence* is defined as more than momentary thoughtlessness, inadvertence, or error of judgment. "It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected."¹⁸⁶ Where this exception was relied upon in the context of workplace violence, wrongful death lawsuits involving very large damage claims have been reported.

In the context of workers' compensation claims, the Texas Supreme Court has defined an *intentional act* as one where the actor (the employer's agent) actively desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it.¹⁸⁷ Thus, an employer's liability for intentional conduct should be rare in the context of workplace violence when an employee or third party causes the violence. For example, in one workplace violence case, the court determined that in order for the employer to be held liable for a gross negligence or intentional tort claim, it would have to be assumed that the employer hired the aggressor with the desire or substantially certain belief that the aggressor would attack and injure the victim.¹⁸⁸ However, an employer does risk tort liability where the employer is aware of a danger to an employee and fails to act to prevent it. Thus, if an employer has knowledge that an employee is the victim of domestic violence and that the employee is being threatened at work, the employer may be liable for failing to protect the employee from harm while at work.¹⁸⁹

¹⁸³ 843 F. Supp. 398, 400 (N.D. Ill. 1994).

¹⁸⁴ TEX. LAB. CODE ANN. § 406.032 (2007).

¹⁸⁵ *Id.* § 408.001(b).

¹⁸⁶ *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994).

¹⁸⁷ *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985).

¹⁸⁸ See *Prescott v. CSPH, Inc.*, 878 S.W.2d 692, 695 (Tex. App.-Amarillo 1994, *writ denied*); see also *Horton v. Montgomery Ward & Co., Inc.*, 827 S.W.2d 361 (Tex. App.-San Antonio 1992, *writ denied*).

¹⁸⁹ *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH. L. REV. 139 (2000).

§ 30.3.5(b)

Workers' Compensation & the Perpetrator

An employee who commits a violent act in the workplace, and who sustains injury during the course of a violent act, may or may not be entitled to workers' compensation benefits. For example, California workers' compensation law bars recovery of benefits in the following circumstances: (1) where the injury is intentionally self-inflicted; (2) where the employee willfully and deliberately causes his or her own death; (3) where the injury arises out of an altercation in which the employee is the initial physical aggressor; or (4) where the injury is caused by the commission of a felonious act by the injured employee or of a crime which is punishable as specified in California Penal Code section 17(b) (addressing offenses that can be either misdemeanors or felonies) for which the employee has been convicted. The above-stated exceptions to recovery are likely to prevent the perpetrator of a violent act in the workplace from recovering workers' compensation benefits for injuries sustained to himself or herself during the course of the violent act.

§ 30.4

IV. PRACTICAL RECOMMENDATIONS FOR PREVENTING WORKPLACE VIOLENCE

§ 30.4.1

A. SUMMARY OF LITTLER'S SEVEN-STEP PRACTICAL PLAN ON WORKPLACE VIOLENCE

In response to the growing phenomenon of workplace violence and the growing legal obligations imposed on employers to control violence, Littler Mendelson has developed a practical seven-step approach (Seven-Step Plan) for preventing and addressing workplace violence. While these recommendations are weighted in favor of policy and protection from legal liability, we also include recommendations based on the work of trauma experts and security consultants.¹⁹⁰ The Seven-Step Plan also incorporates some of the guidelines for employers published and compiled by the International Association of Chiefs of Police.¹⁹¹ A summary of Littler's Plan is provided below.

Step One: Develop a Management Team

The first step in Littler's Seven-Step Plan is to make preventing and controlling workplace violence a priority and to form a management team to develop, review, and implement policies dealing with violence in the workplace. The top levels of management must be aware that the problem of workplace violence is growing and is still having devastating effects on employees and on employers' operations. Management must recognize the problem and make it a priority to attempt to control it. One of the most tangible methods of establishing this as a priority is to designate a management team and task it with responsibility for: (1) identifying

¹⁹⁰ See, e.g., C. Hatcher & S. White, *Violence & Trauma Response*, in OCCUPATIONAL MEDICINE: STATE-OF-THE-ART REVIEWS, Vol. III, No. 4, 677-94 (Handley & Belfus, Inc., Phila. Oct.-Dec. 1988).

¹⁹¹ See *Combating Workplace Violence*, GUIDELINES FOR EMPLOYERS & LAW ENFORCEMENT, report provided by IACP's Private Sector Liaison Committee (1995).

and implementing a preventative plan; and (2) being available to deal with incidents as they arise.

Step Two: Implement Education & Training Program

The second step is to conduct an education and training program regarding early warning signs of potentially violent behavior, the steps to follow to de-escalate violent situations, and the methods of responding to and investigating incidents of workplace violence. Under the direction of the management team, supervisors should receive education in and guidelines for preventing violence in the workplace. Experts agree that a potential violent felon in the workplace is likely to be a loner, often angry, paranoid, depressed and fascinated by weaponry. The individual may be undergoing a private stressful situation, such as a death or divorce in the family, which is compounded by workplace difficulties.

Supervisors and managers should be instructed in how to deal with individuals who exhibit early warning signals of violence. When investigating a complaint, the employer must take threats of violence seriously. Do not assume that a disgruntled employee is merely “venting” or “blowing off steam.” The employer should also assure the reporting employee that he or she has acted appropriately and will not be subject to retaliation, and that a thorough and prompt investigation will occur.

If possible, prior to discussing the matter with the employee, the management response team should be convened. The possibility of using outside consultants to assist in the interview process can be evaluated.

The employee should be asked for suggestions to minimize the risk of a violent act occurring. At the conclusion of the investigation, if appropriate, the employer should report back to the complaining party its conclusions as well as any planned affirmative steps to control the situation.

In addition to training supervisors, employers should have a “zero tolerance” workplace violence policy, which is distributed to all employees. Employers should also consider training employees regarding the signs of potential workplace violence, and how employees should respond. Both the “zero tolerance” policy and the training should emphasize the need for employees to report unusual behavior or suspected violence, with assurances that: (1) such reports will be promptly investigated and, if warranted, action taken; and (2) the reporting employee will not suffer retaliation for good faith reports.

Step Three: Increase Security Measures

The third step involves increasing security measures and developing a cooperative relationship with local law enforcement authorities. Employers should have in place a comprehensive plan for maintaining security in the workplace. Many employers have developed this as part of an injury and illness prevention program; other employers, based on their location or the nature of their industry, long ago implemented tight security measures to prevent outsiders from having access to the employer's facilities. These plans should be reviewed with special attention to the potential of violent behavior on the part of former employees, current employees, or other individuals who may carry domestic violence into the workplace. In addition to physical changes in the employer's environment designed to increase employee safety, policies should be reviewed to ensure that they are consistent with and promote the employer's basic program for addressing and preventing workplace violence. Finally, the employer should establish a relationship with the local police and sheriff's department well in advance of any incident. Local law enforcement may prove to be an

excellent source for obtaining information on experiences of other companies in the area and of suggestions about possible security precautions to take.

Step Four: Develop Response Procedure

The fourth step entails developing crisis procedures for responding to an incident of workplace violence. No matter how effective the management team is in educating managers and supervisors in detecting early-warning signals of possible violent behavior and in defusing threatening situations, there are no guarantees against workplace violence. Some of the nation's most responsible employers, who have sophisticated procedures for preventing violence, have nonetheless experienced occasional incidents of workplace violence. Accordingly, the planning process demands the development and practice of crisis procedures in preparing for incidents of workplace violence.

Step Five: Use Judicial Resources

The fifth step is to consider using the courts to prevent and redress incidents of workplace violence. State law may provide a procedure for obtaining a court order that prevents an alleged perpetrator from gaining access to the intended victim. In addition, most states provide legal avenues for the detention and psychiatric evaluation of perpetrators of violence if there is probable cause to believe that the perpetrator is dangerous to himself or others.

Although employers often distribute photographs of a dangerous employee after obtaining a restraining order or after threats are made, circulating such photographs creates a risk of potential claims of invasion of privacy and defamation. State statutes may also prohibit circulating photographs. To reduce the risk of liability, an employer should not provide photographs of employees or former employees to third parties without consulting with counsel. If photographs are distributed to personnel, those employees receiving photographs should be instructed not to release the photographs to third parties and not to have them in public view.

Step Six: Prescreening & Consistent Enforcement of Workplace Policies

Step six is to prevent workplace violence through the use of proper prescreening, consistent enforcement of workplace rules, and employee assistance programs or other health care resources. Increasingly, employers face an obligation to investigate an employee's propensity for violence prior to offering employment. The case law in this area has been generated under the tort of negligent retention and is discussed in this chapter. Establishing procedures for background investigation and considering the use of screening tests are essential parts of the overall plan to minimize workplace violence.

An employer may even be held liable for failing to perform applicant background checks and employee investigations. As previously discussed, current statutory and common law sources of liability include negligent hiring and retention, negligent failure to warn intended victims, breach of an implied contract or covenant of good faith and fair dealing, occupational safety and health acts, intentional or negligent infliction of emotional distress, assault, battery, and equal employment opportunity laws.¹⁹² Aside from the liability issues, employers are likely to gain significant benefits from conducting applicant background investigations. The practical

¹⁹² For further discussion of these issues, see the discussion of *Employers' Duties & Legal Obligations* set forth above in § 30.2.1.

benefits of such investigations include verifying abilities, skills, qualifications, reliability, and honesty. Careful screening of applicants through background checks also serves to maximize the employer's investment of resources in hiring and training new employees and to reduce the likelihood of litigation concerning terminations. For a complete discussion of applicant background checks, see Chapter 19 of THE NATIONAL EMPLOYER®.

Another important element of this step is for the employer to inform its employees of what it considers unacceptable behavior. A model policy prohibiting workplace threats and violence should be developed and implemented after careful review by legal counsel. The employer's disciplinary procedures, their consistent application, and the willingness to consider alternative solutions, such as employee assistance programs, may decrease the likelihood of workplace violence. Normally, proper and consistent application of effective policies results in an earlier detection of inappropriate behavior and sends a consistent message that such conduct will not be tolerated.

The employer should consider using health care and other resources to provide support for employees. With medical care costs rising, it is increasingly important for employers to be knowledgeable about the resources available to their employees and, where necessary, to guide the employees to make effective use of available health care programs. To cope with the trauma of a crisis situation, employers should consider arranging for trauma specialists to be available to work with the management response team and the occupational physicians in assisting to restore the work function. In less threatening situations, employers should consider using the company's Employee Assistance Program (EAP), if one is available. Counseling can be obtained from these programs on an individual basis and, by special arrangement, on a group basis. Employees can be assured that the treatment is confidential and will not become a part of an employee's personnel records.

Finally, employers must consider their obligations when asked for recommendations about former employees involved in threats and violent conduct at work. Several courts have held that where supervisors do not remain silent when asked for recommendations about their former employees, they owe a duty of reasonable care, both to third parties and to prospective employers. Given this precedent, some legislatures are considering the conditions under which employers are privileged or immune from liability for providing the employment history of a former or current employee. In 2004, Minnesota enacted such legislation.¹⁹³

Step Seven: Establish Clear Communication Channels

The final step in the Littler Seven-Step Plan involves establishing clear internal and external lines of communication to avert and respond effectively to crisis situations. In this step, the management team should establish an internal emergency hotline and instruct personnel to report all incidents of workplace violence. The emergency hotline should not be a replacement for calling 911. Employees should be instructed that in serious emergencies they should call 911, followed by the company hotline. The person staffing the hotline must have ready access to telephone numbers to contact appropriate representatives in the management team.

The crisis response plan must provide for the establishment of a corporate command center that will serve as the communications hub to direct the actions of the company as they relate to the crisis. The chain of command within and among the management team members must

¹⁹³ MINN. STAT. § 181.967. Arkansas law also addresses liability for disclosure of employment records. ARK. CODE ANN. § 25-19-105(c).

be clearly established and arrangements must be made to ensure unimpeded communication among them. Alternates for each team member should be designated in case the member is injured or is otherwise unavailable to carry out his or her functions. These procedures will facilitate communications among company management, employees, victims' families, vendors, customers, and the public.

Finally, the employer must carefully consider how information is disseminated to the media. A widely publicized corporate crisis can often be detrimental to the reputation and goodwill of a company. Preplanning on the part of the employer can greatly assist in protecting the employer's reputation, can affect how the media understands the crisis, and ultimately will safeguard the company against potential liability.

§ 30.4.2

B. THE SPECIAL ROLE OF PSYCHOLOGY, SECURITY & LAW ENFORCEMENT IN ADDRESSING WORKPLACE VIOLENCE

As the Littler Seven-Step Plan indicates, employers should use a variety of measures to combat workplace violence. They should consider the causes of workplace violence and utilize available security and law enforcement resources to prevent it.

Psychological factors are relevant in determining whether particular individuals are more prone to workplace violence than others. For example, psychologists may assist in performing threat assessments to assist an employer in identifying and managing the risks of targeted violence. These assessments often are of the utmost importance for properly evaluating and controlling perpetrators.

§ 30.5

V. ESSENTIAL TOOLS FOR PREVENTING WORKPLACE VIOLENCE

Workplace violence encompasses a broad range of events, many of which can happen in any workplace. This section, which provides practical tools for preventing workplace violence, is intended as a guide. Any plan developed by an employer using these guidelines should be tailored to the organization's specific situation. Employers should be careful not to assume obligations that they would otherwise not be required to assume.

The primary purpose of a plan is to prevent loss of life or harm to employees. No employer can prevent all incidents of workplace violence. However, employers can minimize risks by planning ahead and acting swiftly at the first signs of violent behavior. In addition, the existence of a plan can be used as a shield in lawsuits alleging that the company has failed to take steps to prevent workplace violence. Even more importantly, if adopted and followed, a plan can be used as a sword in lawsuits alleging that the company failed to comply with its own procedures and policies.

§ 30.5.1

A. SAMPLE WORKPLACE VIOLENCE POLICY**Workplace Violence Policy¹⁹⁴*****Purpose***

The Company is concerned about the well-being and personal safety of its employees and anyone doing business with the Company. The Company consequently has adopted this zero-tolerance policy which strictly prohibits workplace violence. Acts of violence and/or threats of violence, whether expressed or implied toward individuals in the Company workplace, are prohibited and will not be tolerated. All reports of incidents will be taken seriously and will be addressed appropriately. This policy defines prohibited conduct, as well as general procedures and potential responsive steps in the unfortunate event that workplace violence occurs despite these preventive measures.

Scope

This prohibition against threats and acts of violence (including domestic violence) applies to all persons involved in the operation of the Company, including but not limited to, Company personnel, contract and temporary workers, and anyone else on Company property.

Definition of Workplace Violence

Workplace violence is any conduct that is severe, offensive or intimidating enough to make an individual reasonably fear for his/her personal safety or the safety of family, friends or property. Examples of workplace violence include, but are not limited to, threats or acts of violence or behavior that causes a reasonable fear or intimidation response and that occurs:

- on Company premises, no matter what the relationship is between the Company and the perpetrator or victim of the behavior; or
- off Company premises, where the perpetrator is someone who is acting as an employee or representative of the Company at the time, where the victim is an employee who is exposed to the conduct because of work for the Company, or where there is a reasonable basis for believing that violence may occur against the targeted employee or others in the workplace.

Examples of conduct that may be considered threats or acts of violence under this policy include, but are not limited to, the following:

- Threatening physical or aggressive contact directed toward another individual or engaging in behavior that causes a reasonable fear of such contact.
- Threatening an individual or his/her family, friends, associates or property with physical harm or behavior that causes a reasonable fear of such harm.

¹⁹⁴ The policies provided are samples only and do not constitute and are not a substitution for consultation with legal counsel. The law in this area constantly changes and must be reviewed before implementing any policy of this regard. These sample policies should not be implemented or executed except on advice of counsel.

- Intentional destruction or threat of destruction of the Company's or another's property.
- Harassing or threatening physical, verbal, written or electronic communications, including verbal statements, phone calls, emails, letters, faxes, website materials, diagrams or drawings, gestures and any other form of communication that causes a reasonable fear or intimidation response in others.
- Stalking. Stalking is defined as a pattern of conduct over a period of time, however short, which evidences a continuity of purpose and includes physical presence, telephone calls, emails and any other type of correspondence sent by any means.
- Veiled threats of physical harm or intimidation or like statements, in any form, that lead to a reasonable fear of harm or an intimidation response.
- Communicating an endorsement of the inappropriate use of firearms or weapons of any kind.
- Possessing weapons of any type, whether licensed or not, and particularly firearms. The only exception is local, state, and federal law enforcement officers acting in the line of duty. Weapons, include, but are not limited to:
 - any firearm, loaded or unloaded, assembled or disassembled, including pellet, "BB" and stun guns;
 - knives (and other similar instruments) other than those present in the workplace for approved work purposes or for the specific purpose of food preparation and service;
 - any switchblade knife;
 - brass knuckles, metal knuckles, and similar weapons;
 - bows, cross-bows and arrows;
 - explosives and explosive devices, including fireworks, ammunition and/or incendiary devices;
 - throwing stars, nun-chucks, clubs, saps, and any other item commonly used as, or primarily intended for use as a weapon;
 - self-defense chemical sprays (mace, pepper spray) in canisters or containers larger than two ounces;
 - any object that has been modified to serve as, or has been employed as, a dangerous weapon.
- Domestic violence. Domestic violence is defined as a pattern of coercive tactics carried out by an abuser against an intimate partner (the victim) with the goal of establishing and maintaining power and control over the victim. These coercive tactics can be physical, psychological, sexual, economic and/or emotional. Where the abuser's tactics include any of the above-described conduct on Company premises, this policy applies. Where such tactics include any of the above-described behaviors off Company premises, this policy applies where the abuser is someone who is acting as an employee or representative of the Company at the time, where the victim is an employee who is exposed to the conduct because of work for the Company, or where there is a reasonable basis for believing that

violence may occur against the victim or others in the workplace. The term “intimate partner” includes people who are legally married to each other, people who were once married to each other, people who have had a child together, people who live together or who have lived together, and people who have or have had a dating or sexual relationship, including same sex couples.

No-Violence Policy

Any employee who commits workplace violence will be subject to disciplinary action up to and including termination of employment and will be directed to stay away from Company property. Violators may also be subject to criminal prosecution.

Additionally, where an employee is convicted of a crime of violence or threat of violence under any criminal code provision, the Company reserves the right to determine whether the conduct involved may adversely affect the legitimate business interests of the Company, and as a result may implement corrective action up to and including discharge. Any employee convicted of such a crime must report the conviction to the Company absent a court order to the contrary. Failure to do so is a violation of this policy and subjects the employee to disciplinary action, including termination from employment.

Procedures for Reporting

In the event that an employee believes that a threat or act of violence has been made against that employee or others, the employee should report the details immediately to his/her supervisor, site manager and/or Security and Human Resources at **[insert applicable telephone #s]**.

Another option for reporting concerns (either anonymously or using your name and contact information) is the **[Company Hotline, at ____]**.

A 9-1-1 call may be appropriate first, in the good judgment of the employees or managers involved. Under this policy, decisions may have to be made quickly to prevent a threat from being carried out, a violent act from occurring, or a life-threatening situation from developing. Nothing in this policy is intended to prevent quick action to stop or reduce the risk of harm to anyone, including requesting immediate assistance from law enforcement or emergency response resources.

Failure to report any threats or acts of violence in violation of this policy is itself a violation of this policy, and may subject any employees involved to discipline, up to and including discharge.

Retaliation against anyone for reporting an actual or suspected violation of this policy in good faith will not be tolerated and will subject the individual engaging in the retaliation to discipline, up to and including termination. Any complaints about retaliation may be reported in the same manner as violations of this policy are to be reported.

What to Expect From [the Company]

All reported incidents of violence and threats of violence will be taken seriously and investigated. The Company will decide whether its workplace violence policy has been violated and whether preventive or corrective action is appropriate. The Company may consult with law enforcement authorities or other resources as it deems appropriate, and may require a fitness for duty examination or other professional assessment through providers chosen by the Company to determine whether a perpetrator presents a threat to himself or herself or others in the workplace. If a violation of this policy occurs, the Company will take appropriate preventive and corrective action, up to and including termination.

Threat Response Team (TRT) — At the Corporate level, the Company has created a TRT that consists of senior management staff appointed by the CEO or COO. Each Company facility will have a site TRT. The membership of the site TRT will consist of the following: Senior Site Management, Director of Corporate Security/Facilities and/or Manager of Corporate Security, Senior Site Human Resources representative, and the Manager of the affected department. Outside support services, such as local public safety officials, EAP, threat specialists, and local municipal officials will be involved as dictated by each situation. If warranted, Corporate Security and/or Human Resources will notify members of the site or the corporate TRT concerning any given situation. In such circumstances, this team will evaluate the current situation or incident for assessment and planning purposes.

Company Expectations of Targeted Employees

Stay Away Orders

The Company reserves the right to seek stay away orders against any person who violates this policy to the fullest extent allowed by law. In such situations, the Company has an interest in assisting any employee who reports proceedings to obtain a stay away order, including one that may apply to the workplace. Employees of the Company who are targeted by the perpetrator may be asked to work with the Company to obtain such an order against that individual. Likewise, employees who have previously sought a stay away order against a perpetrator and/or are protected by an existing stay away order *must immediately*:

- Notify the company of the existence of any such order and provide a copy of the order.
- Notify the company of any violations or attempted violations of the order.
- Notify the company of any changes to the order.
- Notify the company of the order being lifted.

Confidentiality and Safety

These provisions on workplace violence are intended to protect the safety of all employees, and are in no way intended to infringe on an employee's privacy. The primary goal of these guidelines is to encourage an open, ongoing dialogue with the affected employee, and those within the Company who need to know, so that the Company can take reasonable steps to protect workplace safety. The Company's goal is to handle all situations with the utmost sensitivity to the particular situation, while meeting the goal of workplace safety and security.

Avoiding Endangerment

Unfortunately, victims of violence sometimes choose to be uncooperative with their employers' attempts to protect them and other employees. For instance, victims may decide not to tell their employers about threatened or actual domestic violence that may follow the employee into the workplace, or they may engage in behaviors that either provoke or continue the threat of such violence. These behaviors can include simply not reporting a known threat or act of violence that poses a threat in the Company's workplace or by sending "mixed messages" to the perpetrator about whether to stay away, provoking behaviors designed to agitate the perpetrator, or inappropriate contact with the perpetrator when a stay away order is in place. These behaviors by the victim endanger not only the victim, but also others in the workplace. In such situations, the Company reserves the right to take corrective action against the uncooperative victim, up to and including termination. This aspect of the Company's

policy is not designed to punish the victim, but is necessary to protect all employees from the increased threat posed by endangering behavior.

Search Policy

The Company reserves the right to conduct workplace inspections at anytime, with or without notice, for purposes of enforcing this policy, including searching:

- outer clothing, packages, handbags, briefcases, backpacks, lunch bags, boxes, and/ or other containers being taken in or out of the Company's buildings, or to or from the Company's grounds;
- vehicles parked on Company property (owned, leased or occupied), or company-owned vehicles;
- all workstations, computer files, book shelves, lockers, desks, credenzas, file cabinets, store rooms and other areas.

Any refusal to permit an inspection upon request may result in disciplinary action, up to and including termination of employment. The discovery of any violation of any other Company policy as a result of such a search may also result in disciplinary action, up to and including termination of employment. Any illegal activity discovered during an inspection is subject to referral to the appropriate law enforcement authorities.

§ 30.5.2

B. DOCUMENTATION

In addition to implementing a no-violence policy, employers should document all reports of workplace violence incidents. Employers should document the report of the incident, any subsequent investigation and employer action, including disciplinary action. A sample incident report form follows.

Sample Incident Report

From: John Montgomery

Date: January 12, 2009

On January 12, at approximately 3:45 p.m., I announced to my division that quality control was going to increase their monitoring of us. One of my direct reports, Carl Reynolds, seemed especially upset and called this "spying." I invited him to talk privately. We went directly to my office; only the two of us were present, and the meeting lasted about 10 minutes.

In this meeting, Carl stated that he thought the new management was applying too much pressure and that people were going to "crack."

I told him that I thought that maybe he was overreacting, and that this was not such a big deal. At that time, Carl rose from his chair and moved towards me, leaning over my table, only a few inches from my face. I felt threatened by Carl's behavior. Before he left, Carl stated, "If they keep it up, something's gonna happen, someone's gotta take responsibility for this."

