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Workplace violence: a legal perspective

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Workplace violence presents one of the greatest challenges an organization can face. Poised at the intersection of corporate oversight and law enforcement's purview, threats and violence that affect the workplace generate a wealth of concerns for management. Chief among them lies the question of legality and liability. As it grapples with the security, management, and purely human aspects of the problem, an organization faced with threatening misconduct and violence must examine, too, what it can and should do from a purely legal standpoint.

The question of an organization's legal responsibilities vis-à-vis workplace violence newly arises in the context of a post-9/11 environment. Awakened to volatility in the larger world and propelled by a sense of increased vulnerability to the violent manifestations of social ills, on whatever scale, many organizations have placed an urgent priority on workplace security. Some organizations concerned with security have reacted by tightening access control or taking other limited steps to guard against terrorist acts. Others, though, have responded more broadly by examining the events or circumstances that pose a more likely risk to safety and assessing the actions the organization can or should take to mitigate those risks. These organizations have developed an understanding of the full breadth of behaviors and circumstances that can threaten or disrupt the workplace. In addition to practical and management considerations, they have become familiar with the many legal obligations tied to efforts to prevent and manage threatening misconduct and violence.

Organizations who embark on the latter task quickly find that no one law exists to provide a clear road map to legally-necessary management action in the face of workplace violence. Instead, a complement of occupational health and safety statutes and a multitude of legal theories emerging from cases nationwide collectively define the boundaries of an organization's obligation to prevent and manage workplace violence.

This article provides a legal perspective on workplace violence. It surveys the legislation, regulations, and judicial decisions that together help shape what an

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organization must do—and indeed how far it must go—to safeguard employees and others from violence. What emerges is a cautionary tale for any organization tempted to take a back seat on workplace violence. Administrative guidelines requiring workplace violence prevention and innumerable legal theories advanced throughout the country have produced a collective call to organizations not only to properly respond to pressing threats from violence but also to consider responsible steps to prevent violence in the first place.

Occupational health and safety agencies meet the new challenge of workplace violence

Long-concerned with threats to employee safety from such traditional dangers as toxic fumes, heavy equipment, and countless other hazards the US Department of Labor's Occupational Safety and Health Administration (Fed-OSHA) and its state counterparts increasingly have turned their attention to workplace security since the 1990s. As statistics revealed a shocking incidence of employee injuries from assaults, homicides, and other criminal acts—and as more traditional dangers were abated—Fed-OSHA and state occupational health and safety agencies began to examine means to encourage organizations to safeguard employees from a newly recognized threat: violence.

Collectively, occupational health and safety agencies at the federal and state levels have responded in three general ways in meeting the challenge of workplace violence: (1) by enforcing the general duty clause in cases involving violence, (2) by implementing guidelines directed at specific industries that suffer disproportionately from certain forms of violence, and (3) by promoting—in some cases—comprehensive workplace violence prevention programs for all places of work.

The “general duty clause” and the fundamental obligation to maintain a safe workplace

The “general duty clause” of the US Occupational Safety and Health Act of 1970 requires employers to provide a place of employment that is “free from recognizable hazards that are causing or likely to cause death or serious harm to employees” [1]. In 1992, Fed-OSHA issued a memorandum interpreting the General Duty Clause to include an obligation by employers to guard against recognized hazards from violence. Between 1993 and 1995, Fed-OSHA issued citations to eight private businesses and three federal government agencies for violating the General Duty Clause due to their failure to prevent or abate foreseeable violence [2].

An administrative decision in 1995 brought into question the exact reach of OSHA's power to enforce the general duty clause in cases involving violence. In *Megawest Financial, Inc.*, the OSHA Review Commission vacated a citation issued against a property management company whose employees were threatened and assaulted by irate tenants. The Commission reasoned that, irrespective of the company's previous encounters with violence, the violence in question did not rise

to the level of a foreseeable, or recognized, hazard within the meaning of the General Duty Clause [3]. This decision dampened OSHA's enforcement of the General Duty Clause in cases involving violence. While OSHA's commitment to encouraging employer responsiveness to workplace violence remains clear [4], its exact mandate for citing employers under the general duty clause for failing to address possible violence is an open question.

State counterparts to the federal Occupational Safety and Health Act contain versions of the federal general duty clause. The California Occupational Safety and Health Act of 1973 imposes a broad obligation on employers to "furnish employment and a place of employment that is safe and healthful for the employees therein" [5]. As occurred at the federal level, some state occupational health and safety agencies expressly have interpreted their state's general duty clause as applying to violence, leading to regulatory activity in the workplace violence arena.

The special question of workplaces with significant exposure to serious forms of violence

While no workplace is immune to threats and violence, some industries have garnered focused attention due to their heightened exposure to serious forms of violence. Night-retail establishments, healthcare settings, and taxicabs all have earned reputations as "at risk" for violence. OSHA and state occupational health and safety agencies have responded to the dangerous realities of these industries by issuing regulations or guidelines aimed at encouraging employers to mitigate the risk for violence.

In 1998, OSHA issued voluntary guidelines affecting night-retail establishments and the healthcare and social service industries. After considerable industry debate, OSHA published advisory documents that require employers in those industries to implement a full workplace violence prevention program that includes a risk analysis conducted by a threat-assessment team, specified administrative controls, training, and record keeping [6].

State efforts mimic those at the federal level. Washington and Florida have enacted regulations or statutes directed at night-retail establishments that focus on employee training regarding safety, security, and crime-avoidance procedures, and on environmental controls, such as cash-handling practices and lighting [7]. State guidelines also have targeted the healthcare industry, whose workers frequently are assaulted. For instance, in 1993, California's Department of Industrial Relations, Division of Occupational Safety and Health (Cal-OSHA) published guidelines to assist the healthcare and community service industries to implement a workplace violence prevention program that some facilities are required to implement by the state's health and safety statutes [8]. Washington also has issued directives requiring healthcare facilities to implement workplace violence prevention plans [9].

Comprehensive programs for all workplaces

Some states have moved beyond requirements for specific industries and have created general guidelines for all workplaces. In addition to its industry-specific

regulations, California has issued comprehensive guidelines for violence prevention targeted at employers generally. In its voluntary *Guidelines for Workplace Security*, prompted in part by a high-profile office shooting in San Francisco, Cal-OSHA requires all employers to conduct a risk assessment to determine the level of danger from four identified sources of violence: thieves and other strangers who enter the workplace to commit a crime; customers, patients, and others who have received a service from the organization; current or former employees; and family members or acquaintances of employees. If the assessment fails to exclude a potential for violence, the guidelines require employers to implement a workplace violence prevention program as part of its broader Injury and Illness Prevention Program mandated by the California Labor Code and relevant regulations [10].

Washington also has interpreted legislation mandating comprehensive safety programs in all workplaces to require employers to take steps to prevent reasonably foreseeable acts of violence [11].

What these efforts say about an employer's responsibility to manage and prevent workplace violence

Despite ongoing discussion and occasional controversy about the substance and force of these workplace violence prevention guidelines—and of federal and state OSHA's proper role in assessing and enforcing an employer's responsibility in the face of violence—the above guidelines express an intent by occupational safety agencies to assist and in some measure scrutinize employer violence prevention efforts. Potential broad obligations under federal and state “general duty clauses”, together with published workplace violence prevention guidelines, should encourage employers to conduct a risk assessment and to implement a prevention program tailored to the level and nature of risk that the organization faces from potential violence.

Traditional legal theories and the workplace violence arena

In addition to legislative and administrative mandates for workplace violence prevention, numerous legal theories shape the nature and limits of an employer's responsibility to prevent and manage on-site threats and violence. Judicial decisions emerging nationwide address a myriad of factual scenarios involving violence at work: a customer killed by an employee; an employee assaulted by a client; a woman raped by a co-worker; a patient violated by a doctor; and so forth.

Although requirements facing an employer vary from state to state and even from jurisdiction to jurisdiction, judicial pronouncements spell out two basic duties for employers: (1) take responsible steps to prevent violence that is deemed legally foreseeable or reasonably predictable, and (2) properly manage threatening and violent incidents that fully come to light.

Litigants typically advance several theories in an attempt to hold employers and property owners responsible for acts of workplace violence. As a result, defendants in such cases often experience legal vulnerability on multiple fronts. Legal theories that have been advanced in workplace violence litigation include the following.

Premises liability and the failure to secure the workplace

Employees, customers, and passersby harmed by assaults, shootings, and other violent acts at the hands of employees and third parties have asserted claims of premises liability in their effort to hold business or property owners accountable. Litigants in these cases contend that the owners failed to take responsible steps to protect against reasonably foreseeable violence, usually by failing to implement physical or environmental measures that can help prevent or mitigate on-site violence.

By its very scope, the theory of premises liability provides a broad umbrella to people who seek reparation for on-site violence, and jury awards can loom large. One study examining 1086 cases reported between 1992 and 2001 of assault and battery, rape and sexual assault, homicide, and other violent crimes occurring in such diverse establishments as retail stores, bars, restaurants, hotels, and apartment buildings, found that 13% of awards or out-of-court settlements fell between \$500,000 and \$1 million, 10% totaled between \$2 and \$5 million, and 8% exceeded \$5 million [12].

In assessing liability under claims of premises liability, courts apply a traditional negligence analysis to determine whether the business or property owner failed to take reasonable steps to prevent injury from violence. This negligence analysis considers such factors as: Did a special relationship exist between the owner and victim, giving rise to a duty to protect the victim from violence? Was the violent act legally foreseeable? If so, did the owner take reasonable preventive steps? If no steps were taken, did that failure legally cause the injury in question?

Courts typically have permitted claims of premises liability when the business or property owner failed to take reasonable preventive steps, even though violence was reasonably foreseeable [13]. In Montana, a jury in 2000 awarded a Payless ShoeSource employee \$1.5 million based on claims that the retailer had failed to take security measures, such as ensuring adequate staffing, that arguably could have protected the employee from a violent attack [14].

Some courts have suggested that property owners bear an affirmative duty to investigate the potential for violence (i.e., to discover criminal acts being committed or likely to be committed on their premises) [15].

Some courts that seemingly are concerned with the potential broad reach of claims of premises liability have attempted to limit a property or business owner's liability to instances in which the foreseeability, or predictability, of on-site violence was high and was marked by a history of previous similar violent acts; [16] the alleged negligence was directly and definitively responsible for the injuries in question; [17] and the injury occurred on the premises as opposed to on an adjacent property that arguably is under the control of the property owner.

Courts interested in limiting the broad reach of claims of premises liability have dismissed claims by a customer who was assaulted on a public street adjacent to the business owners' premises and claims against a property owner that were brought by a tenant whose son was killed by gunfire on a street adjacent to the property [18].

Despite these limitations, premises liability still provides wide latitude for victims of violence, including employees and on-site visitors, to seek damages from business and property owners for criminal acts that arguably should have been foreseen and prevented.

Indirect liability for the acts of a dangerous employee

Respondeat superior emerges as another commonly asserted claim in cases of workplace violence. Under this traditional legal theory, an employer can be held indirectly, or vicariously, liable for the dangerous act of an employee when the act falls within the course and scope of employment. Liability attaches even if the criminal act was unauthorized or not foreseeable. Because an employer's vicarious liability extends beyond the lawful, authorized acts of employees (at least when the acts fall within the scope of employment), this theory presents the troublesome specter of significant liability to employers for injuries resulting from employee violence.

Courts apply various, and not altogether consistent, tests in determining whether an act falls within the course and scope of employment. Generally speaking, courts examine whether the violence in question is at least broadly incidental to the employer's enterprise and is foreseeable in the sense that the conduct is not so unusual given the nature of the employee's duties that it would be unfair to hold the employer accountable for it [19]. Some courts look to whether the act occurred in the furtherance of a business interest [20]. Other courts categorically have declined to hold employers liable for the violence of employees, reasoning that such acts by their nature promote a personal, rather than business, interest and fall outside the course and scope of employment.

Courts have declined to impose liability on an employer in the following cases:

When a security guard raped a woman, the court held that the rape was the "independent bi-product" of the employee's "aberrant decision" and not conduct fairly attributable to his job.

When a gas station attendant assaulted a customer, the court considered this violence unconnected to the attendant's duties.

When a radio announcer sexually assaulted a young listener off of the premises, the court held that the assault was impelled by personal motives and was not work related.

When a sheriff engaged in lewd and physically offensive conduct, the court held that the behavior could not be considered typical of or broadly incidental to the operation of a county jail.

When an employee raped a co-worker, the court held that this wrongdoing was “purely personal in nature” and did not further the employer’s interest [21].

Despite limits set by some courts to respondeat superior liability in cases of workplace violence, other courts applying a variety of tests, have extended liability in at least three general factual circumstances involving employee violence: (1) when the employee’s violent act was connected in some way to a pursuit of the employer’s interests or engendered by the employment; (2) when the employee’s violence arose from a dispute over the performance of the employee’s duties; and (3) in cases involving sexual assault, when the employee held a unique position of trust over the victim by virtue of the offender’s employment.

An employee’s violence has engendered employer liability in the following cases:

- When a bartender assaulted a patron in an attempt to stop a fight
- When a union steward assaulted a union member who had spoken out against a strike
- When an employee assaulted a co-worker who mistreated a third employee
- When an employee truck driver beat a motorist with a wrench during a dispute over the employee’s driving on a company job
- When an employee of a general contractor threw a hammer at a subcontractor during a dispute over a construction procedure
- When a mental health counselor became involved sexually with a client
- When a deputy sheriff threatened to rape a motorist
- When a National Guard recruiter engaged in sexual misconduct with applicants
- When a police officer raped a detainee [22]

Claims of respondeat superior can generate significant liability for an employer, who, despite clear policies governing employee conduct and the application of responsible preventive measures, can be held accountable for assaults, rapes, and other wrongdoings by a troubled, and violent, employee.

Negligent hiring, retention, and supervision and an employer’s failure to screen out or remove dangerous employees

An employer who successfully avoids liability under principles of respondeat superior can face liability under alternate legal theories that are focused on the employer’s failure to meet standalone legal obligations. Whereas claims of respondeat superior focus on an employer’s indirect liability for the wrongdoing of employees, claims of negligent hiring, retention, and supervision focus on an organization’s direct liability for its own failure: the failure to screen out potentially violent job applicants and to properly supervise, discipline, and terminate employees who present a potential threat. By focusing on the employer’s actions (or wrongful inaction), claims of negligent hiring, retention, and supervision erode the limited protection that an employer has under respondeat superior principles.

Theories of negligent hiring and retention arise most commonly in cases in which the employer failed to perform a pre-hiring background check that would have exposed an employee's violent past or failed to terminate an employee with known violent propensities. In the following cases, courts have permitted claims of negligent hiring:

- An off-duty Army private with a previous record of serious violent crime murdered another officer's wife.
- A bar employee with previous convictions for assault and battery, intent to commit rape, and kidnapping assaulted a customer.
- A hotel employee who was known to become violent when intoxicated sexually assaulted a guest.
- A supermarket manager who had engaged in an unprovoked attack in the past severely beat a 4-year-old boy in the supermarket parking lot.
- A laundromat employee with a history of burglary and molestation severely beat a customer.
- A supervisor repeatedly raped a co-worker, allegedly with the employer's constructive or actual knowledge [23].

Courts have permitted claims of negligent supervision in which proper supervision would have exposed the employee's on-the-job wrongdoing [24]. As with other legal claims, employer liability can be staggering, particularly when the employer can be faulted for placing a vulnerable person in harm's way. In the following cases, courts (and juries) seemed willing to impose liability for negligent hiring when an employer placed others in harm's way:

- A Massachusetts jury awarded \$26.5 million to a man with cerebral palsy who had been stabbed by a healthcare company's employee during the provision of at-home care. The jury found that a routine background screening would have revealed the employee's six past felony convictions [25].
- A jury awarded \$1 million each to two families after an employee of a carpet cleaning company murdered two people. In this case, a background screening would have revealed the employee's record of violent crime [26].

Though courts in these and other cases send a clear message that employers should attempt to screen out or remove persons with a violent past, other courts have questioned how far that duty should be carried out. Some courts have held that background checks are not always necessary, especially if employment calls for minimum contact with other people [27]. Other courts have held that a past criminal record does not and should not automatically preclude employment [28]. Some courts have pointed to the difficulty of interpreting a criminal record or have declined to extend liability in cases in which the past criminal record exposed the possibility of violence rather than a true violent propensity [29]. Other courts have attempted to limit employer liability by applying strict standards of

causation that trigger liability only if the employer's failure to conduct a background check definitively led to the plaintiff's injuries [30].

Notwithstanding stated attempts to limit the reach of an employer's liability under these claims, attention remains focused on responsible efforts by employers to select and supervise employees. Many states have enacted legislation requiring criminal background checks in certain industries, such as schools, day-care centers, and nursing homes.

Ultimately, jury verdicts, judicial pronouncement, and legislative efforts suggest that employers who want to minimize liability for employee violence should undergo a substantive hiring process; with certain sensitive positions, should consider the benefits of performing a pre-hiring criminal background check within legal limits [31]; should employ responsible policies to screen out employees with past convictions for violent crimes [32]; adequately should supervise employees, especially those who regularly interact with a vulnerable public; and should move quickly to discipline or terminate employees who commit or threaten violence on the job.

Sexual harassment laws and the question of gender-driven violence

At times, workplace violence raises sexual harassment implications. When an employee's violence is driven by gender, such as with rape and other sexual assault, a company can find itself fighting an uphill battle in insulating itself from the strict liability often imposed by sexual harassment laws at the federal and state levels.

To trigger liability under sexual harassment laws, the assault as a general matter must have grown out of the employment relationship, though it need not have occurred strictly on the premises. Employers have faced the prospect of significant liability for rapes and other sexual assaults tied to work-related activities:

Faced with charges of sexual harassment, a New York hospital in April 2003 agreed to pay \$5.4 million to several dozen female employees who claimed that an employee physician physically and verbally had abused them during preemployment medical examinations [33].

In a case that has garnered national attention, a federal appellate court held that a major airline could be held liable under sexual harassment laws for the drug-induced rape of a female attendant by a male flight attendant during a layover in Rome [33].

In another federal appellate case, the court held that an employer was liable, under sexual harassment laws, when a prospective client drugged and raped a female sales representative after a sales meeting at a Starbucks coffeehouse [34].

These cases raise troublesome implications for employers, who may encounter strict liability for an employee's violent acts that fall within the rubric of sexual harassment. Such strict liability raises the ante on adequate employee screening

and monitoring and on the swift and effective handling of all sexual harassment complaints.

Failure to warn employees about potential violence

Federal and state occupational safety statutes require employers to warn employees of latent dangers. At least one state imposes severe criminal liability on employers who fail properly to inform employees of concealed dangers that could lead to death or severe physical injury [35]. In addition to these statutory obligations, a common law duty generally exists to warn employees of on-the-job dangers.

Although occupational health and safety laws have not been interpreted to impose a clear obligation to warn employees about potential violence or to define situations in which a warning might be required, one case should encourage employers to consider means to responsibly inform employees of threatened violence, at least when the threat is specific and directed to an identifiable victim.

A California appellate court held that a jury could decide whether an employer was obligated to warn a female employee that a co-worker, who had taken a personal interest in her, had been treated in a psychiatric hospital and was on parole for a sex crime. The co-worker kidnapped and killed the employee, resulting in a wrongful death action. In so holding, the court reasoned that the female employee's previous complaint of sexual harassment by the co-worker, coupled with the company's knowledge of his criminal past, should have alerted the company that he posed a potential threat, giving rise to a duty to warn [36].

Ultimately, although an employer's duty to warn employees of potential violence needs further definition, broad principles governing an employer's responsibility toward employees, and purely ethical considerations, should encourage employers faced with specific threats to identifiable victims to consider means to responsibly warn employees in an effort to avert, or mitigate, injury.

Negligent referral and the duty to warn prospective employers

Out of concern for potential defamation claims from disgruntled former employees or a genuine interest in protecting confidential employment information, many employers refuse to provide substantive information about an employee to prospective employers who call for a reference check. Although company policies permitting the disclosure solely of "name, rank, and serial number" to a prospective employer creates no issues in many circumstances, it can generate a significant ethical dilemma—and potential liability—when an employee has been dismissed because of threats or violence.

Reference checks prompt an ethical or legal quandary in two basic situations. When an employee has been dismissed because of threats or violence, many employers want to share that information with a prospective employer out of ethical compulsion; however, a desire or need to protect confidential employee information, or a concern with a potential legal action brought about by the employee,

dissuades the employer from doing so. A partial answer to this common dilemma has taken the form of employer lobbying, which has resulted in the enactment in 35 states of legislation immunizing employers who, in good faith, give accurate reference information to prospective employers [37].

Reference checks can produce problems when an employer provides positive information about an employee while withholding negative information about threats or violence that had led to discipline or termination. In California, the employer in this situation can be held liable for failing to warn the prospective employer of the employee's past misconduct.

The California Supreme Court ruled that employers who reveal substantive positive information during a reference check are required to give the whole truth rather than potentially misleading half truths about the fitness of a former employee. In that case, the court upheld a tort claim based on a school district's failure to inform a prospective employer of the employee's past sexually inappropriate conduct. The employee, who was hired based on what appeared to be unequivocally positive recommendations, later sexually assaulted a student [38].

In California, this judicial proclamation has prompted employers to rethink their referral policies. Ethical considerations reasonably should prompt all employers to reexamine their referral policies in an effort to strike a legal and ethical balance between preserving confidential employee information and warning potential employers of violent employees [39].

Mismanaging threats to safety

Whereas the previously mentioned theories focus on an employer's failures to prevent violence, other theories focus on the mismanagement of efforts to address threatening circumstances that have come fully to light. Actions taken by employers to address threats and violence generate a minefield of additional legal considerations, and even the most well-intentioned and proactive company may find itself saddled with substantial liability engendered by a misstep.

Legal considerations that come into play with respect to the proper management of an incident include the following:

Discrimination: When a company fails uniformly and responsibly to apply a workplace violence prevention policy, it may face allegations of discrimination [40].

Americans with Disabilities Act: An employer who hastily fires an employee who, though exhibiting behavior perceived as threatening actually may have a psychologic disability, may encounter legal obligations and liability under the federal Americans with Disabilities Act and related state laws [41].

Invasion of privacy: An employer who, even in a laudable effort, refers a potentially threatening employee to psychologic counseling but fails to protect confidential information may be held liable for an invasion of privacy [42]. Issues of privacy occur in a myriad of situations that often are

encountered as employers move to address a reported incident (eg, physical searches of desks and lockers for weapons, efforts to conduct a psychologic threat assessment, efforts to uncover other personal information to fully assess a potential for violence).

Wrongful termination: An employer who terminates an employee because of a reported threat or violent act without properly conducting an investigation or gathering sufficient basis for the termination may be faced with claims of wrongful termination.

Violation of rights under a collective bargaining agreement: At times, an employer who swiftly terminates an employee who has engaged in violence or threatening conduct is cited for violating the disciplinary procedures provided by a collective bargaining agreement.

These and other cases make clear that efforts to manage threatening situations often are at odds with the competing legal interests that employers must negotiate carefully as they deal with workplace violence.

Legal trends in the arena of workplace violence

The previously described legal pronouncements and the heightened awareness regarding the potential for violence in the workplace have transformed workplace violence from a law enforcement matter into a clear-cut employment law and management issue. Increasingly, organizations have gained an understanding of the breadth of behaviors—whether or not technically criminal—that can jeopardize on-the-job safety and disrupt a workforce. An increasing number of organizations have learned their basic legal responsibilities in the face of conduct that can put employees and others at risk.

Progress in the area of workplace violence, from a legal and organizational standpoint, has taken several forms since the 1990s, suggesting the following continued trends.

Workplace violence prevention and management programs

Although organizational responsiveness to workplace violence still requires significant improvement, progress has been made through the increased adoption of workplace violence prevention and management programs. Large, small, public, and private organizations have learned that a well-constructed workplace violence prevention program can help prevent incidents, mitigate liability, and enable an organization to better manage all forms of threatening misconduct. Such programs have multiple components and are interdisciplinary, consisting of such elements as a workplace violence policy, a specially trained incident response team, response protocols, training, and a wide array of preventive practices. These programs aim to increase the reporting of troublesome behavior to successively higher levels of management, prepare the organization to effectively handle reported threats and

violence, and ensure that matters are carried to a successful resolution, as a legal and practical matter.

Corporate use of restraining orders

California and eight other states (Arizona, Arkansas, Colorado, Georgia, Indiana, Nevada, Rhode Island, and Tennessee) have passed legislation enabling employers to seek restraining and other stay-away orders against third parties and employees who pose a threat to the workplace. Although not a panacea, such restraining orders can serve as an effective tool to mitigate the risk for violence.

Reference checking legislation

As noted in the previous sections, the adoption of legislation that insulates employers who disclose, in good faith, accurate information regarding an employee who was discharged because of threatening or violent behavior has helped to reassure employers who otherwise would have hesitated to inform a prospective employer of such information. A total of 35 states have adopted this legislation.

Management–union interface

Awareness and education has led some management and union groups, who often are at odds with each other, to realize their common ground when it comes to workplace violence. Future progress may be marked by increased collaboration in developing prompt and responsive disciplinary and termination protocols that are appropriate for situations involving employees who threaten or hurt others in the workplace.

Summary

A sense of denial regarding the potential reach of violence into the corporate sanctum has hampered organizational action around this significant problem at times. A series of influences since the 1990s—including the increased frequency of workplace violence events, research revealing the full breadth and scope of workplace violence, and global events that have heightened concerns for safety—have driven a greater understanding regarding a need by management, as a legal and practical matter, to responsibly address the question of threats and violence that can jeopardize the workplace.

Even if organizations initially are motivated solely by a fear of liability, those that develop preventive approaches to workplace violence often quickly recognize broader benefits. Codes of conduct that, in addition to prohibiting violence, emphasize a need for courtesy and respect among employees help to promote a positive and productive work environment. Viable mechanisms for reporting threats often give employees a sense of voice in their work environments. Training

that enables management to promptly and effectively manage disruptive behavior can abate violence and protect an organization's most valuable assets: positive employee morale, undisrupted productivity, and a public image that communicates a concern for employee safety. Organizations that at first might approach workplace violence strictly from a legal standpoint (eg, seeking legal justification for efforts to implement a workplace violence program) often find that the many practical and human considerations that render effective and proactive management are added values on many fronts.

References

- [1] Occupational Safety and Health Act, 29 USC § 654 (1970).
- [2] Barish RC. Legislation and administrative regulations addressing workplace violence. (citing Cynthia L. Attwood, Associate Solicitor for Occupational Safety and Health, US Department of Labor, Criminal Violence in the Workplace, May 13, 1992; OSHA Integrated Management Information System).
- [3] Megawest Financial, Inc. 1995 OSHARC LEXIS 80.
- [4] See, for instance, OSHA's industry-specific guidelines discussed below.
- [5] California Occupational Safety and Health Act, Cal Lab Code § 6400 (1973).
- [6] See United States Department of Labor. Occupational Safety and Health Administration, Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers (OSHA Publication 3148, 1998); Recommendations for Workplace Violence Prevention Programs for Late-Night Retail Establishments (OSHA Publication 3153, 1988).
- [7] Late night retail worker crime protection. Washington Administrative Code §§ 296-832-100, et seq. (2002); Convenience Business Security Act, Title 46, Florida Statutes, Crimes, §§ 812.1701, et seq. (2002).
- [8] See Cal-OSHA Guidelines for Security and Safety of Health Care and Community Service Workers (1993); Cal. Health & Safety Code §§ 1257.7 and 1257.8.
- [9] Code of Washington, 49.19.020 (1999, revised).
- [10] See Cal-OSHA Guidelines for Workplace Security (revised March 30, 1995); Cal-OSHA Model Injury and Illness Prevention Program for Workplace Security (March 1995); Cal. Lab. Code §§ 6307 and 6401.7; 8 Cal. Code of Regs. § 3203.
- [11] Barish RC. Legislation and administrative regulations addressing workplace violence. (citing "Violence in the Workplace," Regional Directive 5.05, Washington Industrial Safety and Health Services Agency, January 14, 1997).
- [12] Anderson T. Laying down the law: a review of trends in liability lawsuits, security management. Oct 2002, at 46 (citing recent study by Liability Consultants, Inc.).
- [13] See, for example, *Onciano v. Golden Palace Restaurant, Inc.*, 219 Cal. App. 3d 385, 395 rev. den. 1990 Cal. LEXIS 2755 (1990) (holding that customers assaulted in restaurant parking lot could assert premises liability claim against restaurant owner); see also *Ann M. v. Pacific Plaza Shopping Center, et al.*, 6 Cal. 4th 666, 673 (1993) (discussing the basic duty, determined in part by balancing the foreseeability of harm against the burden of the duty imposed, by a property owner to take reasonable steps to secure premises against third-party violence likely to occur in the absence of precautionary measures).
- [14] *Onstad v. Payless ShoeSource*, 3 P.3d 38 (2000) (affirming jury verdict).
- [15] See, for example, *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 807 (1984).
- [16] See, for example, *Ann M. v. Pacific Plaza Shopping Center, et al.*, 6 Cal. 4th at 678-79 (1993) (employing a balancing test and holding that, the greater the burden of providing the proposed security measures, the higher the degree of foreseeability that must exist before a duty to provide those measure will be imposed).

- [17] See, for example, *Saelzler v. Advanced Group 400*, 25 Cal.4th 763 (2001) (holding that a plaintiff asserting a premises liability claim must establish, by non-speculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures); *Nola M. v. University of Southern California*, 16 Cal. App. 4th 421, 437, rev. den. 1993 Cal. LEXIS 5067 (1993) (holding that abstract negligence unconnected to the injury in question will not support liability).
- [18] See, for example, *Balard v. Bassman Event Security, Inc.*, 210 Cal. App. 3d 243, 247 (1989); *Medina v. Hillshore Partners*, 40 Cal. App. 4th 477, 485 (1995).
- [19] See, for example, *Aaron v. New Orleans Riverwalk Assoc.*, 580 So. 2d 1119, 1121 (La. App. 1991), cert. den. 586 So.2d 534 (1991) (stating that, in determining whether an employee was acting in the course and scope of employment, the employee's conduct must be so "closely connected in time, place and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business"); *Oslin v. Minnesota*, 543 N. W. 2d 408, 413 (Minn. App. 1996), rev. den., 1996 Minn. LEXIS 231 (1996) (holding that the test of vicarious liability is not whether the conduct was authorized or forbidden, but whether it fairly could have been foreseen from the nature of the employment and the duties relating to it).
- [20] See, for example, *Ernest v. Parkshore Club Apartments Ltd. Partnership*, 1993 US Dist. LEXIS 10758 (N. D. Ill. 1993) (explaining that, under the doctrine of respondeat superior, "an employer may be liable for the negligent, willful, malicious and even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer"); but see *Oslin*, supra, 543 N. W. 2d at 414 (noting that Minnesota courts had rejected standard that imposes vicarious liability solely where the employee's conduct was done in furtherance of the employer's interests); *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal. 4th 291, 297 (1995) (stating that California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or in part, by a desire to serve the employer's interests).
- [21] See, respectively, *Maria D. v. Westec Residential Security, Inc.*, 85 Cal. App. 4th (2000), rev. den. 2001 Cal. LEXIS 1192 (2001); *Slaton v. B&B Gulf Service Center*, 344 S. E. 2d 512, 513 (Ga. App. 1986); *Doe v. WTMJ, Inc.*, 927 F. Supp. 1428, 1435 (1996); *Farmers Ins. Group, Inc. v. County of Santa Clara*, 11 Cal. 4th 992 (1995); *Aaron v. New Orleans Riverwalk Assoc.*, 580 So. 2d at 1121 (La. App. 1991), cert. den. 586 So.2d 534 (1991).
- [22] See, respectively, *De Rosier v. Crow*, 184 Cal. App. 2d 476, 480 (1960); *Caldwell v. Farley*, 134 Cal. App. 2d 84, 90 (1955); *Sullivan v. Matt*, 130 Cal. App. 2d 134, 141 (1955); *Fields v. Sanders*, 29 Cal. 2d 834 (1947); *Carr v. Wm. C. Crowell Co.*, 28 Cal. 2d 652, 654 (1946); *Simmons v. US*, 805 F. 2d 1363, 1368-71 (9th Cir. 1986); *White v. County of Orange*, 166 Cal. App. 3d 566, 571-72 (1985); *Turner v. Louisiana*, 494 So. 2d 1292, 1295-96 (La. App. 1986); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121-22 (La. App. 1979); but see *John R. v. Oakland Unified School District*, 48 Cal. 3d 438 (1989), reh'g den., 1989 Cal. LEXIS 1733 (1989) (rejecting claim that sexual molestation of student during a school-sponsored program was connected sufficiently to teacher's employment to warrant school district's vicarious liability, because the teacher's job placed him in a position of trust that enabled the molestation).
- [23] See, respectively, *Mulloy v. US*, 937 F. Supp. 1001, 1014 (Mass. 1996); *Foster v. The Loft, Inc.*, 526 N. E. 2d 1309, 1312 (Mass. App. 1988), rev. granted, 403 Mass. 1102 (1988); *Pittard v. Four Seasons Motor Inn*, 688 P. 2d 333, 340 (N. M. App. 1984); *Bryant v. Livigni*, 619 N. E. 2d 550, 556 (Ill. App. 1993), app. den., 154 Ill. 2d 557 (1994); *Perkins v. General Motors*, 911 F. 2d 22, 32 (8th Cir. 1990), cert. den., 499 US 920 (1991).
- [24] See, for example, *Simmons v. US*, 805 F. 2d 1363, 1371 (claim for negligent supervision may be sustained where employer, through adequate supervision, would have learned of employee's misconduct); *John R. v. Oakland Unified School District*, 48 Cal. 3d 438 (1989), reh'g den., 1989 Cal. LEXIS 1733 (1989) (student sexually assaulted by teacher was permitted to pursue claim of negligent hiring and supervision).
- [25] *Ward v. Visiting Nurses Association and Trusted Health Resources*, No. 94-429997H, Massachusetts.

- [26] *Grave v. Rainbow International Carpet Dyeing & Cleaning Co.*, No. 91-3616-CA-J, Florida (1994); *McKishnie v. Rainbow International Carpet Dyeing & Cleaning Co.*, No. 91-3617-CA-J, Florida (1994).
- [27] See, for example, *Connes v. Molalla Transport System*, 831 P. 2d 1316, 1321 (Colo. 1992) (trucking company had no duty to perform a background check of nonvehicular convictions because long-haul driver has no more than incidental contact with people); *Garcia v. Duffy*, 492 So. 2d 435, 441-42 (Fla. App. 1986) (employer had no duty to make independent investigation of job applicant's background where applicant sought position that involved only incidental contact with the public).
- [28] See, for example, *Yunker v. Honeywell, Inc.*, 496 N. W. 2d 419, 422 (Minn. App. 1993) (holding that a policy deterring employers from hiring workers with a criminal record would "offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community"); *Ponticas v. K.M.S. Investments*, 331 N. W. 2d 907, 913 (Minn. 1983) (remarking that duty to perform check of job applicant's criminal record would contravene policy in favor of rehabilitation of past offenders).
- [29] See, for example, *Patton v. Southern States Transportation*, 932 F. Supp. 795, 801 (S. D. Miss. 1996), *aff'd* 136 F.3d 1328 (1998) (stating that the mere possibility of violence, as opposed to a violent propensity, is insufficient to sustain a negligent hiring claim).
- [30] See, for example, *M.L. v. Magnuson*, 531 N. W. 2d 849, 858 (Minn. Ct. App. 1995) (dismissing claim of negligent hiring because a reasonable investigation would not have revealed employee's violent past); *Ort v. Estate of Stanewich*, 92 F. 3d 831, 837 (9th Cir. 1996), *cert. den.*, 117 S. Ct. 950 (1997) (dismissing claim of negligent retention because police officer's on-the-job record of excessive force and unwarranted violence in arrest and detention did not render his brutal attack, torture, and murder of a detainee foreseeable); *Patton v. Southern States Transportation*, 932 F. Supp. 800 (S. D. Miss. 1996), *aff'd* 136 F.3d 1328 (1998) (dismissing claim of negligent hiring because truck driver's previous conviction for possession of a firearm and cocaine did not evidence a propensity toward violence that rendered his assault of a co-worker foreseeable); *Doc v. Capital Cities*, 50 Cal.App.4th 1038, 1054 (1996), *rev. den.*, 1997 Cal. LEXIS 1130 (1997) (dismissing claims of negligent hiring and retention because casting director's use of serious mind-altering drugs did not give sufficient notice of his potential for a violent sexual assault against an aspiring actor).
- [31] California does not permit employers to use in its hiring process information concerning arrests that did not lead to conviction and concerning the applicant's referral to and participation in a pretrial or post-trial criminal diversion program. Cal. Lab. Code § 432.7.
- [32] The policy should strike a thoughtful balance between the needs of the organization to prevent violence by excluding from its employment potentially violent persons, and a societal interest in facilitating the rehabilitation and reintegration of people who have been convicted of crimes.
- [33] *New York Times*, April 10, 2003. *Penny Ferris v. Delta Airlines*, 277 F.3d 128 (2001), *cert. den.*, 123 S.Ct. 110 (2002).
- [34] *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (2001).
- [35] See, for example, California Corporate Criminal Liability Act, Cal. Penal Code § 387 (1989), which holds corporations and managers criminally liable for knowingly failing to inform employees in writing of a known "serious concealed danger" that could result in death or great bodily harm. The maximum penalty for each violation of the provision is 3 years in state prison, \$25,000 for each manager and \$1 million for the corporation, or both.
- [36] *Duffy v. City of Oceanside*, 170 Cal.App.3d 666, 675 (1986).
- [37] States that have enacted reference-checking bills include Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.
- [38] See *Randi W. v. Muroc Joint Unified School District*, 14 Cal.4th 1066 (1997); but see *Moore v. St. Joseph Nursing Home*, 459 N. W. 2d 100, 102–03 (Mich. App. 1990) (holding that the "great

- societal interest” in protecting confidentiality of employment records outweighs any purported duty of employer to warn prospective employers of former employee’s violent propensities).
- [39] See, for example, Adler R, Pierce E. Encouraging employers to abandon their “no comment” policies regarding job references: a reform proposal. *Washington and Lee Law Review* 1996.
- [40] See *Moodie v. Federal Reserve Bank*, 862 F. Supp. 59, 63 (S.D.N.Y. 1994), *aff’d* 58 F. 3d 879 (1995) (noting that a company’s failure to apply its workplace violence policy uniformly and in a nondiscriminatory fashion could support a Title VII claim); *Ward v. Bechtel Corp.*, 102 F.3d 199 (5th Cir. 1997) (noting that employer’s reasonable handling of a workplace violence complaint could preclude claim of hostile environment under Title VII).
- [41] The Americans with Disabilities Act prohibits discrimination against persons with psychiatric disabilities. Although the act does not cover persons who present a “significant risk” of “substantial harm” to others because of their disability, the act and Equal Employment Opportunity Commission guidelines clarify that a company must base its threat assessment on the most current medical knowledge or best-available objective evidence. Employers who terminate or deny employment to persons based on fears generated by speculation, stereotypes, or myths about mentally ill individuals may be held liable for violating the act.
- [42] See *Pettus v. E. I. Du Pont De Nemours & Co.*, 49 Cal. App. 4th 402, *reh. den.* 50 Cal. App. 4th 328B; *rev. den.*, Cal LEXIS 7258 (1996) (holding that employer’s access to confidential information related to a psychiatric examination of an employee, conducted after the employer learned of perceived threats of violence by the employee, seriously interfered with employee’s right to privacy).