
Workplace Violence & Employer Liability

Philip D. Dickinson

Attorney

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Introduction

Homicide is the second leading cause of death to workers in the United States. It accounted for 1,071, or 16 percent, of worker fatalities in 1994. Moreover, in 1993, nearly 21,300 workers were reported injured in non-fatal assaults in the preceding 12 months. These figures were collected by the U.S. Department of Labor's Bureau of Labor Statistics and represent only the tip of the iceberg.

These statistics do not include threats of physical violence. They do not include fights or assaults that involve no significant injury or which, for one reason or another, go unreported either by a victim or their employer. They also include few, if any, of the thousands of claims filed each year for sexual or other discriminatory harassment. Those claims can include allegations of rape, physical assault, and a wide range of threatening or aggressive behavior. Finally, customers, clients, and other outsiders also are victims of workplace violence.

Let's clarify our terms. The National Institute for Occupational Safety and Health (NIOSH) offers these definitions of "workplace" and "workplace violence"—

Workplace — Any location, either permanent or temporary, where an employee performs any work-related duty. This includes, but is not limited to, the buildings and the surrounding perimeters, including the parking lots, field locations, clients' homes, and traveling to and from work assignments.

Workplace Violence — Any physical assault, threatening behavior or verbal abuse occurring in the work setting. It includes, but is not limited to, beatings, stabbing, suicides, shootings, rapes, near suicides, psychological traumas such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as being followed, sworn at or shouted at.

News headlines focus on sensational acts by "disgruntled" workers and terrorists. These possibilities must be considered by today's employer. However, there are other causes of workplace violence. About half of the fatalities occur at convenience stores, groceries, and other small retail establishments, with robbery being the usual motive. Nearly two-thirds of nonfatal assaults take place at nursing homes, hospitals, or residential care facilities or involve other social services. Although men account for 82 percent of the fatalities, women comprise 56 percent of the victims of nonfatal assaults. Here are typical causes —

Assaults at work cost an estimated 1,750,000 lost work days and \$55 million in lost wages annually.

By Employees

- Adverse employment decisions
- Job stress
- Job disputes with co-workers
- Personality conflicts with co-workers
- Problems in family or personal relationships
- Financial stress
- Influence of drugs or alcohol
- Other emotional or mental problems

By Outsiders

- Larceny and sexual assault crimes
- Domestic violence and jealousy
- Stalking and other obsessive behavior
- Moral or political protests
- Customer or client frustration
- Patient behavior
- Influence of drugs or alcohol
- Other emotional or mental problems

Besides the personal suffering, assaults at work cost an estimated 1,750,000 lost work days and \$55 million in lost wages annually. The mental anguish and emotional distress stemming from incidents of harassment and threats no doubt add substantially to those dollars. Factoring in the cost of lost productivity, legal expenses, increased security costs, and other items, a U.S. Department of Justice survey speculated that the annual economic cost of workplace violence for employee and employer runs into the billions of dollars.

Duty to Provide a Safe Workplace. Federal and state job safety laws require employers to make reasonable efforts to provide a safe workplace. This duty may include steps to reduce the risk of violence. The federal Occupational Safety and Health Administration, California's Division of Occupational Safety and Health (DOSH), and other state agencies are beginning to issue guidelines for health care operations, night retail establishments, and employers in general. These guidelines are designed to help employers fight violence, but they also raise the prospect of OSHA citations if the problem is ignored.

Employers also may be liable for negligence if they fail to exercise ordinary care to avoid potential violence. Violence by employees can create liability for negligent hiring, retention, supervision, or training if their conduct was reasonably foreseeable. Employers and business property owners also face potential liability for failing to address an increased risk of violence from the outside, such as a threat of night-time assaults or robberies in a high-crime area. Workers' compensation laws cover some workplace injuries due to violence, but not all. The rules vary from state to state.

Federal and state job discrimination laws compel employers to implement anti-harassment policies and to take prompt action when harassment occurs. Sexual, racial, and other forms of harassment can lead to liability for compensatory and punitive damages. In addition, a new federal law may expose employers to liability for gender-motivated violence.

Background Checks Help, but Restrictions Apply. Conducting background checks on job applicants is one weapon in the employer's anti-violence arsenal. A thorough check may weed out someone with a history of violence or behaviors often associated with a heightened potential for violence. Criminal history information, credit reports, and job references can provide important information. Substance abuse testing, psychological tests, and sharp interviewing also can be useful tools, not merely to avoid workplace violence, but to hire effective, productive employees.

Negligent hiring cases suggest that a failure to conduct an adequate background check may provide a basis for liability if something does happen. Criminal background checks often are required for specific jobs that involve working with children or caring for others. On the other hand, there can be legal roadblocks. Title VII and state EEO laws limit an employer's legal right not only to ask about arrests without convictions, but also to make decisions based on criminal records that are not job-related. The Americans with Disabilities Act limits the ability to make pre-employment inquiries relating to a person's mental health. And, private sector employers are not allowed to submit job applicants to polygraph tests.

Background checks and preemployment tests also involve balancing an employer's need to know with individuals' protection from defamation or intrusions into their privacy. Many states recently have enacted "job reference immunity" laws designed to encourage companies to provide good-faith references to prospective employers without fear of libel suits. However, whether these statutes really change the rules is debatable.

Employers Can Monitor Conduct at Work. Employers have a right to control the workplace. They can regulate access to the jobsite with security guards, physical barriers, identification requirements, and high-tech surveillance techniques. They also have broad discretion to search work areas in response to suspected employee misconduct and to monitor workers' telephone and E-mail communications. Employers also can be ready to enforce criminal laws against threats and violence, and to assist threatened employees in getting protective orders. California now allows employers to petition for civil orders to enjoin workplace stalking.

Suspects also have rights, however. Policies on searches and monitoring should be clearly communicated to avoid liability for privacy or wiretap violations. Work rules prohibiting violence, harassment, fighting, and weapons also should be clearly stated and enforced evenly. In many states, employees have a legal right to carry concealed weapons at work unless a no-weapons policy exists. If management "shoots from the hip" without investigating or investigates unwisely, the accused could sue the employer for invasion of privacy, defamation, false imprisonment, wrongful discharge, breach of contract, or job discrimination.

Create a Battle Plan. Employers should have a comprehensive plan to reduce the potential for violence. Create a threat assessment team to analyze the risks present at the work site and then to develop and implement a program to respond to those risks. In addition to physical modifications to facilities and administrative controls, training of supervisors and employees on violence-related issues is essential. A crisis management team also should be in place to respond effectively when an incident does occur. OSHA and California's DOSH have issued recommendations on what should be in a plan.

About the Author

Philip D. Dickinson is an attorney and legal writer residing in Libertyville, Illinois. His professional background includes 25 years with CCH INCORPORATED as a law editor and Group Managing Editor for information services on labor and employment law, and human resources management. In these roles, he provided content and editorial supervision for the CCH Labor Law Reports, Employment Practice Guide, and Labor Arbitration Awards series, as well as various publications on the Fair Labor Standards Act. He also guided the design, creation, and editing of CCH Human Resources Management, Human Resources Management on CD-ROM, and Accommodating Disabilities: A Business Management Guide.

Mr. Dickinson also is the author of “Employee Privacy Rights & Wrongs” and “Hiring Smart: How to Conduct Background Checks” in M. Lee Smith’s series of *HR Executive Special Reports*. His other published works include, “Florida Employment Series: Age Discrimination, Disability Discrimination and Sexual Harassment” for Miranda Press, and “Employment Discrimination: Quick Answers to Everyday Questions” for CCH.

Admitted to practice in Maryland, Mr. Dickinson holds a J.D. from The George Washington University National Law Center in Washington, D.C., and an A.B. in History from Franklin & Marshall College in Lancaster, PA. Mr. Dickinson and his wife, Mary, are proud parents of two wonderful and talented children.

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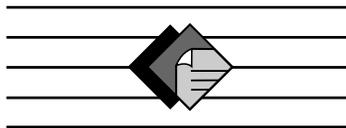
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Workplace violence is a serious threat affecting around 2 million Americans each year. Additionally, around 703 Americans per year lose their lives due to workplace violence. This number has decreased by 8% since 2014. The Occupational Safety and Health Administration has guidelines for dealing with workplace violence. And you have rights if you are injured by workplace violence. Employers can reduce the likelihood of violence in the workplace by assessing their work site. There is currently no official OSHA standard for workplace violence. But, the Occupational Safety and Health Administration has released guidelines for dealing with workplace violence. For example, OSHA recommends guidelines for violence protection programs at night retail establishments. Workplace violence exposes employers to legal liability under various theories. Potential extensions of existing law that may be sources of liability are discussed below to assist employers in understanding possible claims. The discussion, however, should not be taken as an acknowledgment of the validity of such untried theories. Requirements of the Federal Occupational Safety and Health Act. Although the law in this area is still developing, an employer who learns that a current or former employee has threatened violence against another employee may have to take certain preventive steps under Employer liability for failing to take appropriate action in preventing workplace violence can be substantial. Potential liability exists under a number of legal theories. Most states, including Georgia, also impose employer liability for workplace violence pursuant to state common-law theories of negligent hiring or retention, respondeat superior, failure to warn (with regard to prospective employer recommendations), and premises liability. For purposes of this article, we focus on those theories—negligent hiring, retention or supervision, respondeat superior, and failure to warn—that concern the employer-employee relationship.