Preventing and Coping with Workplace Violence

Scott A. Wilson

Homicide is the third leading cause of death on the job. "An estimated 1,400 people are murdered at work in the United States annually . . . (and) as many as 7,000 fatal work-related injuries occur each year as well," according to a National Traumatic Occupational Fatality Study.

A case in California illustrates the impact of workplace violence. On August 3, 1990, a 20-year-old woman was stabbed to death by a co-worker at the entrance of the winery where they were both employed. The assailant had been fired because of bad work habits. He also had a criminal record indicating that he was a dangerous person, but the temporary agency that assigned him to the winery allegedly failed to check his work references. A jury awarded to the victim's survivors $5.5 million in damages against the temporary agency that had hired her murderer.

Workplace violence can have devastating consequences. No employer, including agricultural employers, is immune from these conflicts.

Legal Considerations for the Employer

The law with respect to the liability of employers is still evolving. 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 the Federal Occupational Safety and Health Act (Fed-OSHA) and its state counterparts. Such acts generally require employers to provide a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees." The best way for the employer to avoid liability under the Act would be to address workplace security and to include in its safety program training on violent situations.

Negligent hiring, supervision, and retention. The tort of negligent hiring is based on the principle that an employer has a duty to protect employees and customers from injuries caused by employees whom the employer knows or should know pose a risk of harm to others. An employer may be found to have breached this duty by hiring an unfit applicant when, for example, the employer neglected to contact the applicant's former employers or to check references, and such an investigation would have revealed that the applicant had a violent propensity or was otherwise unfit for the job.
Courts may also recognize the theory of negligent supervision as a basis for an employer's liability, for example, when one employee alleges that the employer should have taken reasonable care in supervising a second employee who has threatened the first with violent conduct. Another theory of employer liability is "negligent retention." Where an employer does not realize an applicant's violent tendencies at the time of hiring, but later discovers that he or she is prone to violence yet still retains the employee, the employer may be liable under this theory for harm the employee causes to another. [Employers may have other obligations to employees under contractual theories for harm caused by workplace violence.]

**Obligations stemming from public policy.** An employer is prohibited from discriminating or retaliating against employees who express concerns about unsafe working conditions, such as threats of violence in the workplace. In California, an employee who feels that he or she has been discriminated against or terminated for expressing such concerns or for refusing to work under hazardous conditions may bring a claim against the employer.

Employers may also have some obligations stemming from statutory provisions. Under the California Corporate Criminal Liability Act, individual managers and corporations may be criminally liable for failing to disclose concealed hazards. The civil liabilities that a California employer may incur from failing to abide by some statutory duty or other legal obligation can be substantial. For example, an employer in California may be liable for punitive damages in a tort action for the conduct of an employee that is the result of malice, fraud, or oppression, if the employer had notice of the unfitness of the worker and employed him or her with a conscious disregard for the safety of others.

**Applicability of Workers' Compensation in Workplace Violence Cases**

**Employers' liabilities under workers' compensation.** The role of the workers' compensation system is significant in workplace violence but varies from state to state. In California, as in most states, for an employee's injury to be compensable, it not only must be sustained in the course of employment (during the performance of service) but also must arise out of the employment. Stated another way, an assault is compensable where the subject matter of the dispute leading to the assault involves the work itself or where the work brought the injured employee and the perpetrator together and created the situation that resulted in the altercation. Under such circumstances, workers' compensation is generally the exclusive remedy, and the worker is precluded from filing other civil claims against the employer.

For example, where employment places the victim in a location where he or she is shot by a bullet intended for another individual, the victim's exclusive remedy is the Workers' Compensation Act. An employee may file tort claims, however, for an injury resulting from intentional conduct by the company against the worker, for an injury caused by a co-employee's willful and unprovoked physical act of aggression or intoxication, or for an injury caused by a co-worker acting outside the scope of employment.

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 workers' compensation and may also be redressed in a civil action for damages. 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 fact that an injury occurs in the workplace does not establish that it is compensable. An injury that grows out of a personal grievance between the victim and a third party is not considered to arise out of the employment if the assault occurred merely by chance during working hours at the place of employment or if the employer's premises did not place the injured employee in a peculiarly dangerous
position. Where a third party intentionally injures the employee because of some personal motivation, there must be some work connection to establish compensability. Although injuries resulting from purely personal animosity unconnected with the employment are generally not compensable, the injuries may be held compensable if the employment increases or contributes to the risk of the assault, e.g., a situation where the assailant intends to injure the employer by committing a violent act against an employee.

**Workers' compensation and the perpetrator.** An employee who commits a violent act in the workplace, and who is injured while committing that act, may or may not be entitled to workers' compensation benefits. California workers' compensation law bars recovery of benefits in the following circumstances:

- Where the injury is intentionally self-inflicted;
- Where the employee willfully and deliberately causes his or her own death;
- Where the injury arises out of an altercation in which the employee is the initial physical aggressor; or
- Where the injury is caused by the commission of a felonious act or of a crime for which the employee has been convicted.

The third exception bars recovery only when the injured employee was the initial physical aggressor, who is not necessarily the person making the first physical contact. Accordingly, if two employees are injured during a fight, only the employee who is the "initial physical aggressor" will be barred from recovering workers' compensation benefits.

**Practical Action for Employers**


- Littler 1: Make preventing and controlling workplace violence a priority, and form a team of key employees to develop, review, and implement policies dealing with violence.
- Littler 2: Talk with employees and supervisors about early warning signs of potentially violent behavior and steps to be followed in responding to and investigating an incident of workplace violence.
- Littler 3: Increase physical security measures, and develop a relationship with local law enforcement authorities.
- Littler 4: Develop crisis procedures for responding to an incident of workplace violence.
- Littler 5: Consider the use of the courts to prevent and redress incidents of workplace violence.
- Littler 6: Make efforts to prevent workplace violence by properly prescreening employees, consistently enforcing workplace rules, and using an employee assistance program and medical care resources.
- Littler 7: Establish clear internal and external lines of communication to avert and respond effectively to crisis situations.

**Make preventing workplace violence a priority.** Any serious program for addressing workplace violence must begin with the establishment of a priority on recognizing workplace violence as a problem
and developing a practical response. To establish this priority, an employer should form a team of key employees and give the team responsibility for developing a preventive plan as well as for being available to deal with incidents that may arise.

First, the team should assess the seriousness of the problem of workplace violence in the enterprise's particular industry and area. Second, the team should assess the employer's readiness for dealing with workplace violence. This assessment will range from a review of the security measures to the training of supervisors and lower-level management in diagnosing early warning signals of potential employee violence. If the operation has an injury and illness prevention plan, as required in some states, the plan may guide assessment of readiness to deal with workplace violence. Third, the team should become advisors to the employer on workplace violence. Meeting this responsibility requires an understanding of the psychology of workplace violence, familiarity with other employers' experiences with workplace violence, and basic knowledge of the legal obligations.

Fourth, the team can serve as a liaison with specialized resources from the community. It should be able to bring in appropriate legal assistance and to reach out to counseling groups, law enforcement, and even influential community groups. Fifth, the team should be responsible for educating employees about workplace violence. Finally, the team must be responsible for developing an action plan to deal with an incident when it arises.

**Guidelines for supervisors.** Under the direction of the management team, supervisors should receive education and guidelines for the prevention of violence in the workplace.

- Early warning signals

According to Dr. Hatcher, there is a definite pattern of escalation leading to violent behavior, and individuals give clues when they test their boundaries. Supervisors should be aware of the following clues:

  - Ominous threats - such as "bad things are going to happen" to a certain person or "that propane tank in the back could blow up easily."

  - Threatening actions - such as intimidation of others or attempts to instill fear in co-workers. Menacing gestures and flashing of concealed weapons in the workplace could be ways of testing reactions to their conduct.

  - Bizarre thoughts - such as perceiving that the world is falling apart or expressing a highly overstated sense of entitlement to a promotion that was denied.

  - Obsession - which is likely to be expressed by holding a grudge against a co-worker or supervisor or, in some cases, a fascination with an unrequited romantic interest.

Supervisors should be trained to spot these telltale signs. Employees should be encouraged to report any threat by a co-worker to their supervisors, who can further investigate the situation.

- Investigating complaints

The employer must take threats of violence seriously and should not assume that a disgruntled employee was merely blowing off steam. The employer should assure any complaining worker that reporting the
incident was the proper thing to do. Additionally, the employer should assure the employee that a prompt, thorough investigation will occur and should ask him or her for any suggestions on minimizing the risk of a violent act.

For example, an employee reporting that her spouse had threatened to kill her at work prompted a California employer to move the employee's office to the second floor of the building. When the husband arrived at the workplace and began searching through the offices for her, there was time for a prewarned security force to detain the husband until law enforcement authorities could be summoned. The husband was later charged with carrying a concealed weapon and enjoined from entering the employer's property.

In conducting an investigation, the employer should interview the person who made the report to obtain such information as: (1) who made the threat; (2) against whom the threat was made; (3) the specific language of the threat; (4) any conduct that would substantiate the belief that the person making the threat intends to follow through on it; (5) names of any witnesses to the alleged conduct; (6) the time and place of the incident; (7) threats or violent conduct by the alleged perpetrator before this incident; and (8) any other information that could help the employer to perform an investigation and to prevent the threat from being carried out or violent conduct from occurring in the workplace.

After beginning the investigation and determining that the threat is genuine and a violent act is perhaps imminent, an employer may decide to suspend the potential perpetrator with or without pay, pending conclusion of the inquiry. If it is necessary to meet with other witnesses to determine whether the threat is genuine, the employer should do so immediately. As quickly as possible after interviewing the person reporting the incident and any witnesses that person has named and after documenting all of the interviews, the employer should decide how to approach the accused.

Undoubtedly, fairness requires that the suspect's side of the story be told. However, the employer might take appropriate security measures before meeting with this individual. If the threat is against a specific supervisor, for example, another supervisor should discuss the issue with the threatening employee. Under no circumstances should an employer ask a supervisor who is the intended victim to conduct the investigation or the interview. Where the allegation of a threat is believed to be genuine, the interview may be conducted by a specialist and in the presence of company security personnel or, in unusual circumstances, local police officers. Involving the police often underscores to the alleged perpetrator the seriousness of the threat and may subsequently help in convincing the court to grant a restraining order. During such an interview, the employer should normally not communicate any conclusions regarding who was believed, but rather receive the alleged perpetrator's side of the story.

When discussing the threat with the alleged perpetrator, the employer should take care to minimize the possibility of a lawsuit by that person based on the investigation. For example, threatening an employee with criminal prosecution if he or she refuses to come to the office to discuss the incident could constitute the tort of false imprisonment. It is important, however, to make an attempt to hear the alleged perpetrator. A balanced investigation may not only yield pertinent information but also be evidence of good faith, if it becomes necessary to defend against a wrongful discharge or other suit evolving from the eventual termination of the employee. The tone of the discussion should be nonconfrontational and designed merely to obtain the alleged perpetrator's side of the story. His or her feeling that the interviewer is trying to understand another side of the story could aid the investigation and reduce the likelihood of a violent response. Of course, once serious violence has occurred and an arrest and criminal prosecution are likely, an interview with the alleged perpetrator may have lower priority or be substantially delayed.
Following the investigation, the employer should report to the complaining party on the conclusion as well as any planned affirmative steps to control the situation. In finalizing such a report, the employer should consider how it would appear if 12 months later the alleged perpetrator attempted to shoot the complaining party. If the report demonstrates that all the reasonable steps were taken, the employer has very likely met its obligation even if subsequent violence occurs. On the other hand, if the employer makes very weak preventive responses, a subsequent event such as a shooting could open the door to legal liability.

**Security of the work environment.** Employers should have in place a comprehensive plan for maintaining security. Many employers have developed such a plan as part of an injury and illness prevention program. Others, based on their locations, have long ago implemented tight security measures to deny outsiders access to company facilities. The employer should establish a relationship with local police and sheriffs' departments well in advance of an incident. Local law enforcement agencies may prove to be an excellent source of information on experiences of other companies in the area, as well as suggestions on possible security precautions.

**Crisis procedures.** The planning process demands the development of crisis procedures in the event of an incident of workplace violence. In general, the employer should inform employees with a need to know of alleged threats of death or serious bodily injury. The speed with which these threats are communicated will vary with the circumstances. An immediate threat of death may not allow for the thorough investigation that would normally precede a report being issued by the employer. Additionally, the employer should limit its communication to those employees who need to know. Further communication could be viewed as an abuse of the qualified privilege that otherwise protects the employer from liability for defamation should the alleged perpetrator be able to establish that he or she did not make the threat or engage in the unacceptable conduct.

On the other hand, the employer must ensure that all possible victims are warned of the risk so that they can take reasonable precautions. Where the threat is against the company as a whole, the employer should warn all potentially affected employees. Courts are likely to permit an employer's statement to potential victims, because courts have permitted employers to release the results of investigations of employee misconduct. At the same time, care must be taken to make such communications in a manner that does not unduly frighten employees.

**Use of the courts.**

- **Restraining orders**

An important component of plans to control workplace violence is to review the types of legal relief that may be available to an employer. State law may provide a procedure for obtaining a court order that prevents an alleged perpetrator from gaining access to the intended victim. Such an order does not guarantee that violence can be prevented but offers a preventive step to reduce the risk of violence occurring. Where such provisions exist, the court probably has authority to order the perpetrator not to telephone or make other contact with the intended victim, as well as to stay a specified distance away from the victim and from the victim's residence and place of work. These stay-away orders have the benefit of allowing the intended victim to contact the police to have the perpetrator arrested before violent behavior actually occurs.

- **Detention for psychiatric evaluation**
Another legal avenue available in most states is to detain the perpetrator for psychiatric evaluation. In California, Welfare and Institutions Code section 5150 authorizes a peace officer and certain professional persons to detain an individual for up to 72 hours for evaluation and treatment in a county-designated facility if there is probable cause to believe that the individual poses a danger to others or to him or herself. To justify detention under section 5150, facts must be known by the peace officer, or designated professional, that would lead a person of ordinary care and prudence to believe, or to have a strong suspicion, that the person to be detained is mentally disordered and dangerous.

Prescreening employees and enforcing rules.

- Preemployment screening practices

There are several steps that employers should take to protect themselves against liability for negligent hiring. For example, an employer should carefully review all information on employment applications and résumés before hiring an applicant. The employer should also question the applicant about any gaps in his or her employment history that could represent time served for violent crimes. Further, the employer should contact each prior employer to verify dates of employment and positions held. The employer should also request from prior employers such information as the applicant's reliability, honesty, and tendency for violence. The employer should document its investigative and screening efforts. The employer should not offer an applicant employment until the screening process is completed. Finally, employment applications should advise the applicant that misrepresentations or false information will result in denial or termination of employment. Employers are cautioned to consult with counsel before establishing procedures for background investigations.

- Consistency in enforcing workplace rules

Notwithstanding an employee's good personnel record, supervisors should not make special accommodations to anyone who threatens others or who has shown a propensity for violence. Part of taking threats and violent behavior seriously requires a certain measure of discipline on the supervisor's part. Instead of terminating the employee on the spot, supervisors should evaluate the situation and seek advice from an occupational physician or employment counsel, if needed. If immediate action is required, a suspension or administrative leave until a proper investigation can be completed may be the best course of action.

Conclusion

Incidents of workplace violence should not be ignored. The magnitude and increasing frequency of such incidents should be sufficient warning to employees and employers alike that they are not immune from this calamity.