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Is the Safety On or Off?
OSHA Takes Aim at Workplace Violence

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Introduction

Over the last few years, several states have enacted or are attempting to enact, legislation that allows employees to possess firearms on an employer's premises, typically in their locked vehicle in the parking lot. Safety professionals and their counsel have often balked at the idea of such laws, given the potential to increase violent situations in the workplace, which could implicate General Duty Clause obligations under Section 5(a) of the OSH Act. Indeed, legal challenges that OSHA preempts such laws have thus far failed. In these challenges, counsel argued the commonsense position that, if an employer has an obligation to provide a workplace free from recognized hazards that may cause death or serious injury, then allowing weapons on the premises runs afoul of that Section 5(a) duty. The frustration over this concept is underscored by OSHA's recent Directive to issue General Duty Clause violations for outburst of workplace violence.

All of this brings to a head several competing legal duties and obligations and a potential landmine for the safety professional. Thus, our paper begins with the simple premise that OSHA recognizes workplace violence as a potential safety hazard and, thus, we will explore the new OSHA Directive and the concepts that could create liability under the OSHA Act if a safety professional fails to act appropriately on warning signs of propensity to commit a violent act. This necessarily dovetails into two related topics. First, what additional liabilities exist for failing to confront a situation that could subject harm to those in the workplace for the violent or dangerous acts of an employee? The concepts of negligent supervision or negligent retention are state law torts that may be implicated if a safety professional fails to appropriately respond to someone who is acting irrational or under the influence of drugs or alcohol. Second, what if a person's irrational behavior is due to a medical condition such as they may assert certain rights to accommodation under the Americans with Disabilities Act (ADA)? How should safety professionals act, given the convergence of these issues to ensure liability is minimized?

Survey of State "Guns at Work" Laws

Before addressing how to respond given the state law negligence and ADA issues, we review how businesses are to adhere to the General Duty Clause in light of these blossoming "guns at work" laws. We explore and survey these existing and proposed laws and attempt to navigate a consistent path of how to deal with their potential contradictory implications under OSHA's General Duty Clause and other legal obligations.

Overview

About one-third of all state legislatures have enacted what are commonly known as "guns at work" or "parking lot" laws.[1] The purpose of "guns at work" laws is to prohibit employers from banning their employees from storing firearms and ammunition in their vehicles at work. The vast majority of "guns at work" laws were passed in the last three to four years, a trend stemming in part from a 2008 Supreme Court ruling that struck down Washington D.C.'s sweeping handgun ban.[2] While these laws vary from state to state, the following excerpt from Mississippi's statute captures the crux of "guns at work" laws:

> Except as otherwise provided in subsection (2) of this section, a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area.[3]

Proponents of "guns at work" laws assert rights guaranteed by the Second Amendment of the U.S. Constitution as justification for the laws.[4] Those opposed to "guns at work" laws consider them an infringement on private property rights and preempted by federal OSHA laws regulating workplace safety. These conflicting viewpoints have been weighed and evaluated by at least three federal courts to date, with each (eventually) finding that the laws were enforceable and not preempted by any federal law, including any OSHA Acts or regulations. These decisions are discussed in greater detail below.

Degrees of Severity

"Guns at work" laws vary in degrees of severity and breadth. Florida's statute is one of the most "severe" in the country (from an employer's perspective).[5] In Florida, employers are prohibited from banning any employee, independent contractor, volunteer, customer, or other business invitee from storing a firearm in a locked vehicle on company property.[6] Employers are also prohibited from making *any* form of inquiry, either verbal or written, as to whether an employee or invitee has a firearm in their vehicle and, of course, searching such a vehicle without

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[1] Florida, Indiana, Kentucky, Louisiana, Minnesota, Oklahoma, Alaska, Arizona, Georgia, Idaho, Kansas, Michigan, Mississippi, Nebraska, Ohio, Utah, and Texas have all enacted some form of the "guns at work" laws described herein.

[2] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[3] MISS. CODE ANN. § 45-9-55 (2011).

[4] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." U.S. CONST. amend. II.

[5] FLA. STAT. § 790.251 (2012).

[6] *Id*. at § 790.251 4(a).

permission.[7] Finally, no Florida employer may condition employment on or terminate an employee for keeping a firearm in his/her car.[8]

On the other end of the spectrum is Georgia's "guns at work" law. Similar to Florida's law, the Georgia statute begins by prohibiting employers from establishing a policy that allows employers to search the locked vehicles of employees or invited guests on company parking lots.[9] Employers are also prohibited from conditioning employment on an agreement that a prospective employee will not bring a firearm to work in their vehicle.[10] Where Georgia's statute begins to differ from Florida's statute is the extensive list of exceptions that follow the main provisions.[11] Most notably, the aforementioned provisions do not apply to a secure parking area that restricts public access through the use of a gate, security station, security officers, or other means.[12] As long as an employer provides a secure lot, that employer may both condition employment on an employees' agreement not to bring firearms into the parking lot, as well as search an employee's vehicle, as long as they do so on a uniform and frequent basis.[13] In terms of severity, the majority of "guns at work" laws fall somewhere between Florida and Georgia.

Employer Immunity

Most states' "guns at work" laws provide immunity to employers for any injuries or deaths that come as a result of their compliance with the law. Essentially, the laws recognize that an employer cannot be required to both allow firearms on their property and also held liable for the harm that those very firearms may cause when used improperly. Florida's law states, "A public or private employer is not liable in a civil action based on actions or inactions taken in compliance with this section."[14] Other states specifically provide immunity from criminal charges as well.[15] Some states have also included provisions that "guns at work" laws do not expand or create any additional duty of care on the part of the employer.[16] Employers who oppose "guns at work" laws argue that civil or even criminal immunity is relatively insignificant in terms of the overall financial, emotional, and psychological damage that can come as a result of workplace violence.

Exceptions

Most "guns at work" laws provide for a number of exceptions to the main provisions. These exceptions vary from state-to-state but some major exceptions are listed below:

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[7] *Id*. at § 790.251 4(b).

[8] *Id*. at § 790.251 4(c).

[9] GA. CODE ANN. § 16-11-135(a) (2011).

[10] *Id.* at § 16-11-135 (b).

[11] Florida's "guns at work" statute contains exceptions as well, but they are far less expansive.

[12] *Id.* at § 16-11-135 (d)(1).

[13] *Id*.

[14] FLA. STAT. § 790.251(5).

[15] GA. CODE ANN. § 16-11-135(e).

[16] FLA. STAT. § 790.251(5)(c).

Secure Parking Lots: As mentioned above, some states have included an exception to an employee's right to store a firearm in their vehicle for parking lots that are secured or have limited public access.[17] This exception makes sense, given the underlying policy behind "guns at work" laws: employees should have the right to protect and defend themselves not only at home, but in other potentially vulnerable areas, including parking lots at work. A parking lot that is secured by an access gate, security guards or other means reduces the risk of an employee's need to defend themselves in the parking lot. The Arizona legislature recognizes the secured lot exception but also requires employers to provide a "temporary storage area" where employees can leave their firearms before work and immediately retrieve them when they leave to return home.[18] The logic behind this requirement is that, even if a parking lot is secure, an employee still has the right to bear arms and protect themselves on their commute to and from work and if they can't keep their firearms in their vehicle, they must be provided with some other safe place to put them.

Industry-Specific Exceptions: Certain types of employers are often exempted from "guns at work" laws because of the nature of the industry or business they are in. For example, some states have excluded schools and prisons.[19] Chemical producers, nuclear power plants, and buildings associated with U.S. national defense and homeland security are other industry-specific exceptions.[20]

Licensing and Permit Requirements: Almost all states with "guns at work" laws require that the employee, customer, or invitee must have otherwise met all the state's requirements for carrying a firearm.[21] An employee, customer, or invitee who does not have the required license or permit is not entitled to any of the protections of the laws. However, most states do not give guidance to employers on how they are to determine whether the possessor of the firearm has a valid license or permit. This is particularly difficult in states like Florida, where any form of inquiry as to whether the employee has a firearm in their vehicle could potentially be a violation of state law.

Company-Owned Vehicles: "Guns at work" laws in some states only apply to vehicles that are privately owned.[22] These laws typically provide that a motor vehicle owned, leased, or rented by a public or private employer, or the landlord of a public or private employer, are not subject to the laws.[23]

Legal Challenges to "Guns at Work" Laws

As could be expected, employers were not inclined to sit quietly on the sidelines while state legislatures passed "guns at work" laws. Many employers believe they not only have a right, but a duty, to create and enforce safety policies they feel are in the best interest of their employees and

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[17] *See, e.g.*, ARI. REV. STAT. ANN. § 12-781(c)(3) (2011).

[18] *Id.* at § 12-781(c)(3)(c).

[19] TEX. LAB. CODE § 52.062(2)(B) (2012); KY. REV. STAT. ANN. § 237.106(5)(b) (2011); FLA. STAT. § 790.251(7).

[20] FLA. STAT. § 790.251(7).

[21] KY. REV. STAT. ANN. § 237.106(1).

[22] FLA. STAT. § 790.251(7)(f).

[23] *Id.*

customers based on the General Duty clause of the Occupational Health and Safety Act of 1970 ("OSH Act").[24]

The Employers' Short-lived Victory: ConocoPhillips Co. v. Henry

In *ConocoPhillips Co. v. Henry*, Oklahoma businesses sought to enjoin the enforcement of state laws that held employers criminally liable for prohibiting employees from keeping firearms in locked vehicles on company property.[25] The employers asserted various constitutional claims; most significantly, that the state laws were preempted by federal law, namely, the OSH Act.[26] The employers argued that a category of preemption known as *conflict preemption* applied to the "guns at work" laws at issue. Conflict preemption occurs when it is impossible for a private party to comply with both state and federal legal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[27] The employers argued that they could not furnish a place of employment free of recognized hazards causing death or serious injury (as required of them under the General Duty clause) while simultaneously allowing their employees to bring firearms and ammunition onto company property.[28] The district court agreed with the employers, finding the amendments to the state laws that created the provisions at issue to be preempted by the OSH Act's General Duty clause and overall purpose.[29] The court found that gun-related workplace violence is a recognized hazard under the General Duty clause, and that the amendments in question impermissibly conflicted with the employers' ability to comply with the General Duty clause, thereby thwarting Congress' overall intent in passing the OSH Act.[30] The employer's victory in district court was short-lived, however, as the decision was soon reversed by the U.S. Court of Appeals for the 10th Circuit in *Ramsey Winch, Inc. v. Henry*.[31]

A Change of Course: Ramsey Winch, Inc. v. Henry

Reversing the lower court's decision in *ConocoPhillips*, the Court of Appeals in *Ramsey Winch* first analyzed whether workplace violence is actually a "recognized hazard" under the General Duty clause. In coming to the conclusion that it is not, the Court of Appeals relied heavily on the fact that, while recognizing workplace violence as a threat to employee safety, OSHA has expressly declined requests to promulgate a standard banning firearms from the workplace.[32] The Court also noted that there was no indication in OSHA's guidelines, website, or citation history of an attempt by OSHA to keep firearms away from the workplace.[33] Finally, the Court considered a

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[24] The General Duty clause of the OSH Act states, in relevant part, that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C.S. § 654 (LexisNexis 2011).

[25] 520 F. Supp. 2d 1282 (N.D. Okla. 2007).

[26] *Id*. at 1295.

[27] *Id.* at 1328.

[28] *Id*.

[29] *Id*. at 1330.

[30] *Id*.

[31] 555 F.3d 1199 (10th Cir. 2009).

[32] *Id.* at 1206.

[33] *Id*.

decision from 1995, where an administrative law judge threw out an OSHA citation issued to an apartment complex for failing to take steps to prevent violent acts by residents.[34] The administrative law judge determined that violent acts by residents were not a recognized hazard under the General Duty clause because they arise "not from the processes or materials of the workplace, but from the anger and frustration of people."[35] Interestingly, the Court gave no consideration to the numerous citations OSHA issued for workplace violence in the years prior to 1995. Having determined that workplace violence was not a "recognized hazard" under the General Duty clause, the Court of Appeals next considered the "overall purpose and objective" of the OSH Act.[36]

The Court of Appeals also disagreed that the amendments in question "thwart the overall purpose and objective of the OSH Act," summarily dismissing the lower court's analysis.[37] According to the Court of Appeals, the OSH Act is not meant to interfere with states' exercise of police powers to protect their citizens.[38] Because the Amendments do not conflict with any OSHA standards and the amendments are not "occupational standards" (as they regulate workers as members of the general public) the Court determined that they do not thwart the purpose of the OSH Act and to enjoin the state from enforcing them would interfere with Oklahoma's police powers.

Florida Weighs in: Florida Retail Fed'n, Inc. v. Attorney General of Florida

In the time period between *ConocoPhillips* and *Ramsey Winch*, the United States District Court for the Northern District of Florida weighed in on the legality of Florida's "guns at work" law.[39] Aside from an error in drafting that caused some employers to be treated differently than others, with no rational basis for the distinction, Florida's law was upheld. As mentioned above, Florida has one of the more severe and expansive "guns at work" laws in the country from the perspective of employers. Once again, the court was asked to decide whether the OSH Act preempted a state law prohibiting employers from keeping firearms off of their property. The court identified two reasons, "each of which would be sufficient standing alone," why the OSH Act did not preempt Florida's "guns at work" statute.[40]

Similar to the analysis in *Ramsey*, the court started by focusing on the fact that OSHA has not created a standard to address employees bringing firearms to work. The fact that OSHA has not promulgated a standard addressing this area is significant because Congress has explicitly authorized states to act on worker safety issues to which no federal standard applies. The OSH Act provides in relevant part:

> Assertion of State standards in absence of applicable Federal standards. Nothing in this chapter shall prevent any State agency or court from asserting

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[34] *Id*. (citing *Megawest Fin., Inc.*, No. 93-2879, 1995 OSAHRC LEXIS 80 (May 8, 1995)).

[35] *Id*.

[36] *Id*. at 1207.

[37] *Id*.

[38] *Id.*

[39] *Fla. Retail Fed'n, Inc. v. AG of Fla.*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

[40] *Id*. at 1298.

> jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.[41]

The district court considered this clear evidence that the OSH Act does not preempt state laws in areas where there is not a specific OSHA standard in place.

Second, the court considered the plaintiffs' contention that the General Duty clause of the OSH Act covers firearms at work. The court reasoned that if the failure to ban guns was indeed a violation of the General Duty clause, then all businesses would have an affirmative duty to ban guns at work, which clearly was not the case, according to the court. Based on these two separate arguments, the court found that the Florida legislature acted within its constitutional authority when it afforded workers a statutory right to have a gun secured in a vehicle in their employer's parking lot.

The Future of "Guns at Work" Laws

As a growing number of states pass "guns at work" laws, chances are we have not seen the last of legal disputes in this area. Although continuing to decline the opportunity to create a standard covering guns at the workplace, OSHA has recently increased its efforts to regulate in the area of workplace violence. A new directive issued on workplace violence (described in detail below), along with a recent string of citations for workplace violence under the General Duty clause, indicate that OSHA intends to be involved in combating workplace violence from this point forward.

In both *Florida Retail* and *Ramsey Winch*, the courts relied heavily on the fact that OSHA has not enacted a specific standard that bans employees from bringing firearms onto company property. In fact, as pointed out by the court in *Ramsey Winch*, OSHA has expressly declined requests to create such a standard. In defense of "guns at work" laws, legislatures will no doubt argue that now, more than ever, given OSHA's awareness of the numerous "guns at work" laws and the courts' reasoning in upholding them, if OSHA wanted to preempt in this area, it would have done so by now. While the courts in *Florida Retail* and *Ramsey Winch* did not expressly say so, every indication is that an OSHA standard prohibiting employees from bringing firearms to work would preempt a state law allowing the same. That OSHA has continued to decline what looks like an open invitation to regulate in this area provides fuel to states' argument that OSHA is either unwilling or unable to promulgate a standard banning employee firearms on company property. However, other action taken by OSHA contradicts the notion that they want no part of regulating workplace violence, providing both encouragement and confusion to employers.

OSHA passed a new directive, effective September 8, 2011, entitled *Enforcement Procedures for Investigating or Inspecting Workplace Violence* (the "Directive"). The Directive establishes that employers can be found in violation of the General Duty clause for failing to reduce or eliminate serious recognized hazards *including workplace violence.*[42] This Directive seems to end the debate on whether workplace violence is a "recognized hazard" under the General Duty clause. While OSHA citations for workplace violence date back as far as 1993, the ALJ's decision in *Megawest* all but eliminated citations for workplace violence under the General

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[41] 29 U.S.C.S. § 667(a) (LexisNexis 2011).

[42] OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, CPL 02-01-052, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE (2011).

Duty clause for over ten years.[43] However, in recent years, OSHA has once again begun to issue citations for failure to prevent workplace violence, issuing at least 10 since 2010. The Directive is in accordance with that trend. As there is no specific standard regulating workplace violence, the only argument for OSHA preemption is that workplace violence is a "recognized hazard" under the General Duty clause. Because of the recent increase in citations for workplace violence, along with the new Directive, the employers' argument for OSHA preemption of "guns at work" laws under the General Duty clause is significantly stronger now than it was when *Ramsey Winch* or *Florida Retail* were decided.

While the Directive provides backing for employers' argument for OSHA preemption of "guns at work" laws, until those state laws are actually found to be preempted, the Directive only increases confusion on how to comply with federal and state law simultaneously. As described in further detail below, the Directive encourages inspectors to focus on whether an employer "recognized, either individually or through its industry, the existence of a potential workplace violence hazard" and the availability to employers of "feasible means of preventing or minimizing such hazards" when determining whether to conduct an investigation and issue a citation.[44] If an employer recognizes a high risk of potential violence (say, for example, they are in one of the high-risk industries listed in the Directive or have had previous incidents of workplace violence) and believes prohibiting firearms from company property is the best way to minimize such a risk, it may be impossible for the employer to comply with OSHA's General Duty clause and a state "guns at work" law at the same time. That employer would have knowledge of a high risk of workplace violence and a feasible means of abatement of the risk, making them a prime target for an inspection and citation if workplace violence were to occur. However, taking steps towards eliminating the risk of violence may lead to that employer violating its state's "guns at work" law. This is the very scenario that the doctrine of conflict preemption was designed to prevent. Employers, like individuals, cannot be asked to weigh two conflicting laws and choose which to comply with.

OSHA's New Directive on Workplace Violence

Purpose

On September 8, 2011, OSHA's *Directive for Enforcement Procedures for Investigating and Inspecting Workplace Violence Incidents* went into effect. The purpose of the Directive is to establish procedures and overall guidance for OSHA field officers to apply in inspections in response to incidents of workplace violence.[45] OSHA issued the Directive with the intent that it guide OSHA field officers in developing workplace violence cases and the provide ways OSHA Area Offices can assist employers in addressing the issue of workplace violence.

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[43] *Megawest Fin., Inc.*, No. 93-2879, 1995 OSAHRC LEXIS 80 (May 8, 1995).

[44] OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, CPL 02-01-052, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE at § VI.

[45] *Id*. at § I.

Scope

The Directive applies to inspections or investigations conducted by OSHA officials either: (1) in response to a complaint, referral, or fatality involving an incident of workplace violence, particularly when it stems from a workplace in industries identified as high-risk; or (2) as part of a programmed inspection at worksites that are in industries with a high occurrence of workplace violence or where the hazard has been identified as existing.[46] High-risk industries include healthcare, social service settings, and late-night retail establishments. The scope of the Directive is not meant to exclude any other incidents of workplace violence that are uncovered during any programmed inspection. The Directive explicitly states that it is not meant to require an OSHA response to every complaint of workplace violence or every reported fatality resulting from workplace violence. Rather, the Directive is meant to offer guidance on when OSHA should make an initial response or issue a citation. OSHA has identified four different forms of workplace violence:

1. **Criminal Intent:** Violent acts by people who enter the workplace to commit a robbery or other crime, or current or former employees who enter the workplace with the intent to commit a crime;
2. **Customers/Clients/Patients**: Violence directed at employees by customers, clients, patients, students, inmates, or any others to whom the employer provides a service;
3. **Co-Worker:** Violence against co-workers, supervisors, or managers by a current or former employee, supervisor, or manager;
4. **Personal:** Violence in the workplace by someone who does not work there, but who is known to, or has a personal relationship with, an employee.[47]

The Directive focuses on categories #1 and 2 of workplace violence; generally, an inspection will not be conducted for complaints or incidents of workplace violence in categories #3 or 4.

The Burden on Employers

When considering whether to initiate an inspection and/or issue a citation for failure to prevent workplace violence, the Directive instructs OSHA officers to focus on evidence that: (1) the employer knew of, either individually or through its industry, the potential for workplace violence; and (2) whether there are feasible abatement methods to address the hazard.[48] By instructing inspectors on what evidence is relevant in a workplace violence investigation, OSHA has indirectly provided employers with guidance as to what steps they need to take to avoid an inspection or citation.

Risk Assessment

The Directive instructs inspectors to focus on evidence showing an employer had knowledge, either individually or through industry recognition, of a risk for workplace violence.[49] Accordingly, employers should regularly evaluate the risk of workplace violence at their jobsites. To establish individual knowledge of a risk of workplace violence, inspectors will typically focus on complaints that have been made by employees or customers and past incidents of violence

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[46] *Id*. at § VII.

[47] *Id*. at § X (B).

[48] *Id*. at § VI.

[49] *Id*. at § VI.

(whether or not they were reported to OSHA). Therefore, the burden is on employers to document any incidents of workplace violence or "near misses" that would indicate a potential for future violence. Employers should also implement a system for taking any complaints or concerns from customers and employees regarding risks of workplace violence. Complaints should always be taken seriously and investigated. An employer's subjective belief that they "didn't think the employee was serious" or "didn't feel like there was a need to investigate a complaint" will not prevent an employer from being considered "on-notice" of a risk when OSHA conducts an investigation.

Employers operating businesses in high-risk industries will likely be deemed to have knowledge of a risk for workplace violence whether or not they have had any previous incidents or complaints. An employer with no reason to believe there is any risk of workplace violence at their business could still have knowledge of a high likelihood of workplace violence based on the industry they are in. Therefore, employers have the burden of assessing not only their individual risk of workplace violence but also the level of risk in their entire industry.

Feasible Means of Abatement

Along with employer knowledge, OSHA inspectors have been instructed to focus on whether there are feasible means of abatement of workplace violence risks.[50] OSHA recognizes that not all incidents of workplace violence, or any workplace accident for that matter, are preventable. However, any reasonable steps that an employer can take to reduce the risk of workplace violence should be taken. This could be as simple as replacing burnt-out light bulbs to avoid dimly lit areas or checking locks on doors and windows. By the time OSHA conducts its assessment of whether there are measures an employer can take to reduce the risk of workplace violence, it is probably too late. Employers must be proactive in identifying and implementing feasible means of abatement.

Employer Liability for Workplace Violence

Workplace violence is fraught with potential liability for employers. Employers are trapped between statutory requirements and must consider as well traditional common law tort principles in dealing with workplace violence.

Employer Duties under the ADA

While the OSHA Workplace Violence Directive attempts to hold employers liable for acts of workplace violence, the Americans with Disabilities Act (ADA) requires that employers accommodate workers with mental disabilities. Moreover, employers can also be liable for breaching their duty of care in hiring, retaining, and/or supervising employees.

Overview of ADA and Mental Disorders

In general, the ADA, as recently expanded by the ADA Amendments Act of 2008 (ADAAA), prohibits discrimination on the basis of a disability (whether actual or perceived) or a record of disability. The ADA regulations define a disability as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record or history of such an impairment; or (3) being regarded as having such an impairment. *See* 29 C.F.R. §1630.2(g).

Prior to the passage of the ADAAA, courts extensively analyzed whether an individual's mental condition qualified as a protected disability under the ADA. However, the ADAAA

[50] *Id*.

requires that courts shift their focus away from the ADA "gateway" requirement—whether the plaintiff can show they are disabled—to whether discrimination actually has occurred and an employer's obligations to accommodate a person with a disability.[51] Accordingly, mental and psychological disorders will typically be treated as "disabilities" under the ADA. Mental disabilities may include any mental or psychological disorder, such as an intellectual disability, thought disorders (schizophrenia and psychosis), mood disorders (bi-polar disorder), organic brain syndrome (brain injury), emotional illnesses, anxiety disorders, panic disorders, and learning disabilities. *See* 29 C.F.R. §1630.2(h).

Reasonable Accommodation

The ADA requires employers to provide reasonable accommodations to individuals with disabilities who are otherwise "qualified" for the job, unless making the accommodation poses an undue hardship for the employer. *See* 42 U.S.C. § 12112(b)(5)(A), 29 C.F.R. § 1630.2(p). Thus, employers must take reasonable steps to accommodate employees with psychiatric or emotional problems but are not required to modify performance standards for people with psychiatric disabilities. Employers, however, may ask for reasonable documentation from a health professional when a worker requests an accommodation for a psychiatric disability. Once it is determined that a worker has a covered disability, employers should engage the employee in an "interactive process" to determine an appropriate accommodation. *See* EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities.

The EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities provides number of possible accommodations for workers with psychiatric disabilities:

- *Physical changes to the workplace*. Room dividers, partitions, or other soundproofing or visual barriers between workspaces may accommodate employees who have limitations in their ability to concentrate.
- *Workplace policy modifications*. Modifying leave or attendance policies by granting an employee time off from work or an adjusted work schedule for medical appointments could serve as an appropriate reasonable accommodation.
- *Adjustments in supervisory methods*. Supervisors can adjust the way they communicate assignments or instructions by delivering information in the form that is most effective for a particular employee (e.g., conversation or email). They also can provide additional training or arrange for the use of modified training materials, and they can provide increased structure and guidance to enable an otherwise qualified employee to function effectively.

In addition, if the nature of an effective accommodation is not apparent, the guidance states that mental health professionals "may be able to make suggestions about particular accommodations and, of equal importance, help employers and employees communicate about reasonable accommodation."

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[51] Specifically, the "Purposes" section of the ADAAA states its expectation that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 29 C.F.R. §1630.2(j)(1)(i), (iii); *see also* 29 C.F.R. app. §1630.2(j)(1)(iii) ("[T]he Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question.").

"Direct Threat" Exception

Since the ADA protects employees with mental impairments that meet all the requirements of the Act, it is possible that the ADA could protect potentially violent employees whose violence is caused by their mental impairment. However, even if the employee is protected by the ADA, the ADA allows employers to screen out workers with disabilities who pose a "direct threat" to others in the workplace. 42 U.S.C. § 12113(b); *see also Palmer v. Circuit Court of Cook County*, Ill., 117 F.3d 351, 352 (7th Cir. 1997) (stating that the ADA "does not require an employer to retain a potentially violent employee"). The ADA defines direct threat as a "significant risk to the health or safety of others" that cannot be eliminated by a reasonable accommodation. 42 U.S.C. §12111(3).

The EEOC regulations require that a direct threat determination be an individualized assessment of the employee's present ability to safely perform the essential functions of the job, based on current medical knowledge and/or the best available objective evidence. In making such a determination, employers must consider: (1) the duration of the risk; (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. *See* 29 C.F.R. §1630.2(r).

According to EEOC's Guidance on the ADA and Psychiatric Disabilities, employers may exclude individuals with a psychiatric disability from employment if they pose a direct threat, but they must identify the specific behavior that poses a direct threat. The EEOC guidance provides a few examples of valid and invalid uses of a direct threat defense based on psychiatric disability:

- *Side effects of medication*. Employers may not deny employment to individuals taking medication that may affect coordination or concentration, unless the side effects are considerable and the position involved is a safety-sensitive job that requires acute coordination.
- *Suicide attempts*. In most circumstances, a person who has attempted suicide does not pose a direct threat at work. For example, if an employee who has attempted suicide asks to return to work after receiving treatment, and the treating physician states the employee can safely return to work and perform essential functions of the job, the employee does not pose a direct threat.
- *Threats of violence*. Employers may refuse to hire individuals who have a history of violent behavior or have made threats of violence if those incidents support a conclusion that the individuals pose a significant risk of substantial harm. For example, if an employer learns that a job applicant was fired for threatening co-workers in a previous job and has received no medical treatment since his termination, a refusal to hire the applicant may be valid. However, such a determination should be based on an individualized assessment, considering all relevant medical and objective factors.

<u>Common Law Tort Liability Related to Workplace Violence</u>

When dealing with a potentially unstable employee, employers must balance the ADA's requirement that employees with mental disabilities be protected with a host of common law tort theories. Employers may be held liable for the acts of their employees under two theories: *vicarious liability* and *direct liability*. Under vicarious, or strict liability (*respondent superior*), the employer is generally not held responsible unless the employee's violent actions are in furtherance of the employer's business purposes and in the course and scope of that business. If the "course and scope" test is met, then the employer is liable without regard to whether the

employer's actions contributed to the harm. The direct liability theory is different; even if the employee's action is outside the course and scope of employment, the employer is responsible for the employee's actions if it failed to exercise control or take action to prevent foreseeable injuries. The direct liability theories holding an employer liable for an employee's violent acts are negligent hiring, negligent supervision, and negligent retention.

Respondeat Superior

Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment. Restatement (Second) of Agency § 219(1). Accordingly, employers may be vicariously responsible for incidents of workplace violence if the violent act is committed by an employee in the course and scope of employment. Whether an action falls within the course and scope of employment, however, depends upon the particular facts and circumstances of each case. Typically, courts view intentional wrongdoings as falling outside the course and scope of employment. Thus, employers are typically not vicariously liable for their employees' intentional torts, such as battery or assault. Nonetheless, courts have found circumstances where an employee's intentional actions may give rise to vicarious liability if the actions somehow arose out of employment. *See, e.g., In Country Roads v. Witt*, 737 S.W.2d 362 (Tex. App., Houston [14th Dist.] 1987, no writ) (holding a night-club-employer liable under a theory of *respondeat superior* where one of its doormen beat a patron with his fist, while the patron was restrained by two other doormen).

Negligent Hiring, Retention, and Supervision

Even where an employee's violent actions are outside the scope of employment, employers may be held liable for such actions. Negligent hiring, retention, and supervision claims are based on an employer's own negligence, rather than on vicarious liability. *See, e.g., Underwriters Inc. Co. v. Purdie*, 145 Cal. App.3d 57, 68-69 (Cal. App. 1983). While the specific elements of negligent hiring, retention, and supervision vary by state, such claims are analyzed in essentially the same way as other negligence claims and require a showing of: (1) a duty, (2) a breach of that duty, and (3) damages that are proximately caused by the breach. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). This cause of action is articulated in the Restatement (Third) of Agency as follows: "A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." Restatement (Third) of Agency §7.05(1). While negligent hiring, retention and supervision claims are frequently asserted together, as alternative theories of liability, these causes of action are distinguishable (in most jurisdictions).

First, negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness (or dangerous propensities). In these cases, courts analyze whether the specific danger that ultimately manifested itself (e.g., sexual assault and battery) reasonably could have been foreseen at the time of hiring. *See Malicki v. Doe*, 814 So.2d 347 (Fla. 2002) (citing *Van Osdol v. Vogt*, 908 P.2d 1122, 1132-33 (Colo.1996)). The issue of liability often focuses upon the adequacy of the employer's pre-employment screening. However, what constitutes reasonable pre-employment screening "depends on the risk of harm inherent in the employment – [t]he greater the risk of harm, the higher the degree of care necessary to constitute ordinary care." *Rivers v. Poisson*, 761 A.2d 232, 235 (R.I. 2000). For example, in *Ponticas v. K.M.S. Investments*, the Minnesota Supreme Court imposed a high duty on landlords to investigate the competency and reliability of their employees, since such employees would be provided with a passkey allowing admittance to

tenants' homes. *See* 331 N.W.2d 907 (Minn.1983). In contrast, in *Steppe v. K-Mart Stores*, the court found that Kmart did not have a duty to conduct a background check on its store employees. 737 N.E.2d 58 (Ohio App. 8th Dist. 2000). In that case, a Kmart employee, who was sexually assaulted by a co-worker, claimed that Kmart was negligent for failing to investigate the co-worker's criminal background, which included a "juvenile adjudication for assault." The court found Kmart's pre-employment screening sufficient given that he "was referred for employment by his mother, a long-term employee and successful Kmart employee; he denied that he had any felony convictions in his job application and he denied that he had been convicted of any offense other than a minor traffic violation in his application for a fidelity bond."[52]

Second, negligent retention occurs when, during the course of employment, the employer becomes aware, or should have become aware, of problems with an employee that indicated the employee's unfitness (or dangerous tendencies), and the employer fails to take further action such as investigation, discharge, or reassignment. The focus in these cases is often whether the employer was on notice of the employee's violent tendencies and what, if anything, the employer did to address or remedy the situation. For example, in an unusual case, *Yunker v. Honeywell*, the Minnesota Supreme Court affirmed summary judgment for the plaintiff on her negligent retention claim. 496 N.W.2d 419 (Minn. 1993). In that case, Honeywell twice employed Randy Landin ("Landin"). Landin's initial employment with Honeywell ended because he was imprisoned for strangling to death a Honeywell co-worker. Upon his release from prison, Honeywell rehired Landin as a custodian. Landin then began harassing and threatening the plaintiff, a female co-worker at Honeywell, and ultimately shot and killed her. The plaintiff (through her trustee) asserted multiple claims against Honeywell, including a claim for negligent retention.[53] In finding for the plaintiff, the court held that Honeywell owed a legal duty to the plaintiff because it continued to employ Landin after his troubled behavior in the office, including harassing outbursts and scratching "one more day and you're dead" on the plaintiff's locker. Third, negligent supervision allegations arise when an employee injures another because the employer improperly trained, supervised, or failed to discipline the employee. For example, in *Estate of Arrington v. Fields*, the employer was held liable for negligently supervising its security guard, who shot another individual, where the employer issued the security guard a handgun without proper training. 578 S.W.2d 173 (Tex. App.—Tyler 1979, writ ref d n.r.e.).

[52] The court also stated that the co-worker's prior conviction for assault would not have put Kmart on notice that the coworker had a propensity for sexual harassment or sexual assault.

[53] The plaintiff also asserted a negligent hiring claim against Honeywell, but the court rejected the claim for two reasons: (1) Honeywell did not breach a legal duty to the employee by hiring Landin because the specific nature of his employment—a custodian whose job involved limited contact with the public or co-workers—did not create a foreseeable risk of harm; and (2) public policy reasons favor rehabilitation of individuals with criminal backgrounds and require that employers hire ex-felons (and not be automatically held liable for hiring an individual with presumed "dangerous propensities").

Conclusion

The increasing number of “guns at work” laws, combined with OSHA’s recent focus on regulating workplace violence by way of the General Duty clause, results in one thing: confusion for employers. When it comes to addressing workplace violence, the employer’s objective would seem to be clear and straightforward: minimize violence at the workplace by all reasonable means available. However, “guns at work” laws require employers to factor an individual’s right to bear arms into the equation. Employers must tip-toe in a mine field of federal and state law, often believing they are forced to choose which laws to comply with and which to violate. Adding to the confusion are laws that could create liability if an unstable individual is negligently retained. However, if this person claims to be disabled, additional hurdles must be cleared under the ADA. Our legal system is designed to avoid these types of internal debates. Employers and individuals alike are asked to decide on a daily basis what is morally right or wrong, but they are not supposed to be asked to decide on their own what is or is not legal. In the area of workplace violence, employers are not being provided with that guidance. Contradictory messages from state legislatures with “guns at work” laws and OSHA have left employers scratching their heads when it comes to workplace violence prevention.