



2023 Hospitality & Retail Practice Group Seminar

January 25-27, 2023

Workplace Violence

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Introduction

In the last decade, violence in the workplace has become tragically common. When acts of violence occur within the workplace, it is common for employees to levy accusations against their employer for failing to prevent the incident. Preventing violence in the workplace is one of the most important issues employers face, but addressing this issue is not simple. Employers have conflicting legal obligations and duties that inhibit their ability to take certain proactive measures to prevent violence in the workplace. They must comply with a variety of laws that govern employment and hiring practices, while also ensuring that their employees are safe and protected while at the workplace. This creates a dilemma for employers, as they are forced to balance the rights of an individual employee or prospective employee with their responsibility to protect their employees. This balancing act is a delicate one, but there are proactive steps an employer can take to prevent workplace violence while limiting liability if violence does occur. The best practices will be fact-specific and depend on the particular circumstances of each employer. But ultimately the analysis of liability may come down to what the employer knew and when it knew it, or should the employer have known it.

Pre-Employment Screening

Implementing pre-employment screening measures is one way for employers to effectively prevent workplace violence. During the screening process, employers attempt to screen out applicants based on prior conduct, criminal background and bad references.

There are a variety of techniques employers can use to screen prospective employees. Some techniques are more common than others (i.e., submitting an applicationⁱ and attending an interview), and some are particular to certain types of employment (i.e., integrity or personality tests). The background check is a screening technique that is inexpensive and provides important insight relating to a prospective employee's propensity for violence. The background check gives the employer an opportunity to review the prospective employee's criminal record, educational background, financial history, work history, social media pages, and even their medical history. This allows an employer to identify prospective employees with a history of unlawful or undesirable conduct, which may indicate a propensity for violence. Nevertheless, employers must ensure that the information is obtained in a manner that complies with both state and federal law.

The American's with Disabilities Act ("ADA")

The ADA limits an employer's ability to ascertain information about a prospective employee's mental history. Under the ADA, an employer is not permitted to question a prospective employee about mental illness, history, or treatment unless the questions are specifically tailored to the prospective employee's ability to perform a particular job function. The ADA also prohibits an employer from deciding not to hire a prospective employee based exclusively on the belief that mental illness or history will make them unstable and more inclined to commit acts of violence in the workplace. However, if an employer is able to show that the prospective employee has a violent history or background related to the mental illness and poses a "direct threat" to others, then the employer can decline to hire the prospective employee without running afoul of the ADA.

Fair Credit Reporting Act ("FCRA")

When employers use a third-party to run background checks for prospective employees, the employer must ensure they are complying with the FCRA. If a background check (criminal records or history) is performed by a third-party, then the employer must comply with the FCRA. Contrary to the name, which references credit issues, the FCRA is not limited solely to background checks involving an individual's credit score or credit. The FCRA

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regulates employer's use of these reports, and requires employer's notify prospective employees as to whether a background check will be conducted during the screening process. If the employer uses the background report in deciding not to hire a prospective employee, then they are required to make an additional notification to the prospective employee to comply with the FCRA.

California provides additional rights for employees. California Civil Code section 1786 addresses employers and third-party screeners. California employers which seek a prospective employee's credit report is also regulated by the Consumer Credit Reporting Agencies Act (CCRAA) found at California Civil Code section 1785. The Investigative Consumer Reporting Agencies ACT (ICRAA) is codified at California Civil Code sections 1786.10 to 1786.40. The CCRAA generally concerns credit worthiness, but the ICRAA generally concerns consumer character.

Title VII of the Civil Rights Act

In recent years, there have been many lawsuits filed against employers alleging that their use of criminal background checks violates Title VII of the Civil Rights Act. Specifically, the employees allege that criminal background checks are discriminatory because they have a disproportionate effect on certain race groups that tend to have higher criminal conviction rates. To rebut these allegations, employers must be able to prove that a background check of a prospective employee is being used for a job-related purpose and is consistent with business practices.

During Employment – Maintaining a Safe Work Environment

It is not possible to filter out all potentially violent people through pre-employment screening. Some applicants may not have a history of questionable behavior or show signs of having violence tendencies during the pre-employment process. Also, some employees may develop violent tendencies or behaviors sometime during the course of their employment. For these reasons, it is important for employers to adopt and implement policies and practices to combat violent or potentially violent conduct in the workplace.

Listed below are proactive measures employers can implement to prevent violence in the workplace. If an employer implements these measures, they will be in a far better position to defend themselves in any lawsuit arising from workplace violence. The essential measures an employer should take are as follows:

- Implement a policy that specifically lists what type of conduct is not acceptable and assign oversight and prevention responsibilities to appropriate staff and management members.
- Implement a policy that makes clear that workplace violence by or against employees of the company will not be tolerated, and those who engage in such conduct will be subjected to disciplinary action. If necessary, the employer will alert law enforcement of the violent conduct that has been reported.
- Implement a policy that requires all incidents, threats, or concerns of workplace violence to be reported, and makes clear that each and every claim will be taken seriously. The policy should also set forth reporting guidelines for employees who observe or are subjected to workplace violence and should make clear that all reports will be investigated thoroughly and promptly.
- Educate employees on warning signs of violent conduct or tendencies, and ensure they are familiar with the policies and procedures for reporting any violence they observe or are subjected to.
- Require all employees to participate in a violence training program that educates them on what conduct is unacceptable, what to do if they are subjected to or observe violent conduct, the process and procedures for reporting violent conduct, and the protocol to be followed if a violent incident is to occur. Employees should also learn how to recognize warning signs that indicate someone has a propensity to engage in violent acts.

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- Designate management and staff members to review the employer's written policy concerning workplace violence so that it can be improved and updated on an annual basis.
- Encourage employees to utilize the Employee Assistance Program ("EAP").
- Allow employees who are eligible under the Family and Medical Leave Act ("FMLA") to take unpaid leave to deal with serious mental or emotional health issues.
- Hire security staff and install electronic or physical security devices.

Employer's Liability for Workspace Violence

Employers are subject to liability for damages for injuries that are caused by their employees under various tort theories. These include, but are not limited to, the following: assault and battery, negligent hiring, negligent retention, negligent supervision and respondeat superior.

Negligence Claims

Basic Principles

- An employer risks liability for the torts of employees it knew or should have known the employees present a danger to others.
- Negligent hiring and negligent retention may exist concurrently - the employer may potentially be liable for both torts.
- Direct liability: The employee's alleged wrongful acts need not be in the scope of employment – broader than respondeat superior liability.

Negligent Hiring

Employers have a common law duty to exercise reasonable care in selecting and hiring employees. An employer breaches this duty by hiring an unsuitable person for a position that involves an unreasonable risk of harm to others.

Negligent Retention

When an employer knows or should know of a current employee's incompetence, negligence, or unfitness for a position, the employer has a duty to respond appropriately.

Negligent Supervision

This claim arises by an employer's failure to improperly supervise employees to avoid foreseeable risks of harm to others. It generally requires that the employer had a duty to supervise the harming party, that the employer negligently supervised the harming party, and the negligence was the proximate cause of the other parties' injuries.

Assault and Battery

Assault

To establish the tort of assault, the plaintiff must prove that the defendant performed an act intended to cause either harmful or offensive contact with another person which creates in that other person's mind a reasonable apprehension of an immediate battery.

Battery

The tort of battery is "an unwanted touching which is neither consented to, excused, nor justified."

Respondeat Superior – Vicarious Liability

Under the doctrine of respondeat superior, an employer may be liable for acts or omissions by an employee that cause injury to another person. Respondeat superior only imposes liability on employers for acts committed by an employee within the scope of employment.

Occupational Safety Health Administration (“OSHA”) Sanctions

The general duty clause of the Occupational Safety and Health Act provides that “[e]ach 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[.]” Employers who breach this general duty are subject to OSHA sanctions.

Privacy and/or Defamation Claims

In an effort to protect its workforce, employers in some states can also subject themselves to privacy claims and/or claims for defamation, depending on how information is circulated within its workforce. These privacy laws that exist in different states can restrict an employer in terms of what information it can obtain either before or during employment.

Title VII Claims

For obvious reasons, certain workplace violence (i.e., sexual assault and/or rape) can certainly result in related claims of strict liability and/or liability based on negligence under Title VII for sexual harassment.

Worker’s Compensation

Worker’s compensation claims often arise from workplace violence situations. In some states, worker’s compensation claims can act as a bar to other claims but that is very specific to each state’s law.

ⁱ California employers are governed by California’s Fair Chance Act, also known as “Ban the Box,” (California Government Code section 12952), which ensures workers with conviction records are fairly considered for jobs.