Workplace Violence – Legal Obligations & Avoiding Liability



Safety Management Tools – Liability

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To counter the threat of workplace violence, many companies have adopted a so-called “zero tolerance” policy. Zero tolerance has appeal because it’s a claim to the moral high ground and makes a company feel like it’s taking a real stand. But is it really a practical solution? This article will answer that question. We’ll start by examining the law of workplace violence; more precisely, we’ll discuss how OSHA and Canadian OHS laws regulate workplace violence as a hazard.

What the Law Requires

Workplace violence and harassment have been around a long time. But it’s only been in the past couple of decades that people have become aware of the problem. This accounts for the relative absence of specific violence protections in workplace safety laws.

OSHA & Workplace Violence

Many states have adopted laws requiring employers to protect employees against the threat of workplace violence. There’s no specific OSHA standard on workplace violence. But employers are still having an OSHA obligation to guard against workplace violation.

The basis of that obligation is the so-called OSHA general duty clause (Section 5(a)(1) of the OSHA statute) which requires employers to provide workers a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” OSHA has expressly stated that failure to protect against workplace violence may be considered a violation of the general duty clause [OSHA Interpretation Letter, 2/10/92].

Canadian OHS Laws & Workplace Violence

Canadian workplace violence law follows the same basic pattern as its neighbor to the south. Many provinces—Alberta, British Columbia, Nova Scotia, Prince

Edward Island and Saskatchewan—have adopted specific OHS regulatory requirements covering workplace violence. Federal OHS laws also include workplace violence regulations. And Quebec has a regulation banning not only violence but psychological harassment in the workplace.

Like the OSHA statute, all of the provincial OHS acts contain a "general duty clause" requiring employers to take all reasonable precautions to protect workers' health and safety. And, like OSHA, the provincial regulatory agencies have interpreted the general duty clause to cover the hazard of workplace violence.

Workplace violence is considered a hazard subject to occupational health and safety regulation either expressly or directly via application of the so called "general duty" clause in OSHA and OHS statutes.

But the failure to protect employees against violence in the workplace can also lead to liability under other laws. Let's look at five of them.

1. **Negligence**

   Under tort law, every person has a duty to use reasonable care to protect against foreseeable risks. Failing to prevent an incident of workplace violence could lead to negligence liability to the extent that the employer saw or should have seen the incident coming. Trial lawyers use two main negligent theories to hold employers responsible for workplace violence:

   Negligent Hiring: If the person who engages in violent behavior had a record of attacks, the employer may be held liable for hiring him in the first place. **Example:** A rental car employee rapes a co-worker. The rental car company hadn't checked his background before hiring him. If it had, it would have discovered that the man had served three years in prison for an armed robbery conviction. The jury found the company guilty of negligence and awarded the victim $750,000.

   Negligent Retention: If the attacker has engaged in previous incidents of violence with co-workers or customers, keeping him on the payroll may lead to negligence liability for subsequent attacks. **Example:** A railroad worker shoots his supervisor in the kneecap after being reprimanded for eating during his shift. The worker had made threats against other co-workers but hadn't been disciplined. The supervisor sued the company for negligently retaining the employee and won $3.5 million [Smith v. Amtrak, 865 F.2d 467 (2d Cir. 1987)].

2. Vicarious Liability

A worker who engages in workplace violence might be considered an agent of the employer for whom the employer is legally responsible. This is called vicarious liability, or to use the legal term, respondent superior.

3. Breach of Contract

In Canada, some courts have held that employers have an implied contract to treat workers with respect and dignity, so they can do their job. A victim of workplace violence might be able to claim an employer violated this

contractual duty.

4. Discrimination

The U.S. and Canada protect employees against discrimination in the terms and conditions of employment based on race, ethnicity, gender, religion, disability, family status and national origin. Canada and a few U.S. states also ban sexual preference discrimination. If victims of violence are members of a minority protected by the EEOC/human rights laws, they might be able to claim that the employer's failure to protect them against violence was illegal discrimination. **Example:** If an employee is subjected to threats or attacked because he's Muslim, he could argue that the employer's failure to protect him was discrimination.

5. Infliction of Mental Distress

U.S. and Canadian employers are under a duty to safeguard employees against not only physical but psychological violence. Thus, harassment and intimidation can be the basis of liability even if nobody actually touches the victim. If the complained-of conduct is "outrageous", the victim can sue the employers for intentional infliction of mental distress. **Example:** For three and a half years, a Canadian supervisor, a large man with a loud voice, bullies a smallish employee he knows to be mentally frail. He spews insults and threats like "I'll bash your head in," occasionally brandishing a hammer for effect. The employee has a mental collapse and sues the company for infliction of mental distress. She wins $35,000 [R. v. Boothman, [1993] 3 F.C. 381 (Fed. T.D.).

Let's now focus on what employers can do to manage the risks of violence and the liability to which it may lead.

How to Comply

First of all, it's important to note there are still some employers who don't recognize workplace violence as a problem or believe that "it can't happen to them." Even employers who've gotten past the denial stage have struggled to come up with effective policies and safeguards.

Employers typically use a "zero tolerance" policy to combat workplace violence. Zero tolerance generally means that workers who commit or threaten workplace violence will be subject to immediate and automatic dismissal with no second chances. Zero tolerance puts workplace violence outside the company's normal progressive discipline system. In other words, under zero tolerance, workers who engage in workplace violence get fired immediately even for a first offense. This signals that the company considers workplace violence more serious than other offenses.

Is Zero Tolerance Enforceable?

Few would argue with the logic of treating workplace violence more severely than other infractions. But adopting a zero-tolerance policy isn't necessarily a no-brainer. One of the biggest obstacles is fear of antagonizing the union. In addition, "there's a widespread perception among employers, especially in

unionized workplaces, that most arbitrators try to strike down disciplinary actions against workers, wherever possible, even when the discipline is for a serious infraction," notes a Chicago attorney.

"This is pure myth," the attorney says. In fact, courts and arbitrators will sustain discipline if they think it's necessary to protect workers. In the words of one arbitrator: "An employer made aware of physical violence and threats of physical violence has little alternative but to take all disciplinary steps up to and including discharge, to protect its staff from acts tantamount to workplace terrorism."

It's not hard to find cases from all parts of the U.S. and Canada upholding the immediate firing of employees for engaging in workplace violence:

U.S. Example: It was OK to fire a postal worker for "pointing his fingers, making gunshot noises and threatening to `shoot all of the white rednecks." The fired worker also threatened his supervisor and said that his "entire body was a weapon." A psychiatrist evaluated him and pronounced him "physically unfit for duty" and the employer's duty to accommodate him "ended when he made threats," the court said [McRae v. Potter, 2002 U.S. App. LEXIS 18853 (7th Cir.)].

Canadian Example: An Alberta company can fire an employee for pointing a pike pole at a co-worker's nose and threatening to "wring his scrawny neck," given the company's "obligation, moral and statutory, to maintain a safe workplace" [Weyerhauser Canada v. IWAW, Local 1-207, 2000 A.G.A.A. No. 65 (1998)].

Zero Tolerance: Easy to Adopt, Hard to Enforce

Theoretically, a zero-tolerance policy is enforceable, provided that firing an employee is necessary to protect others in the workplace. But as a practical approach for combating workplace violence, it has its limitations. Simply put, zero tolerance may be too inflexible to implement.

Zero tolerance is a rigid policy that works best in the most serious cases of workplace violence involving physical assault. After all, it's hard to defend giving employees who attack co-workers a second chance. The problem is that workplace violence often takes more subtle forms including threats and verbal/mental abuse. The severe penalties provided by zero tolerance may be too harsh for these offenses, especially if they occur on an isolated basis.

In addition, there may be mitigating circumstances or reasons that if they don't justify at least explain an employee's violent behavior. For example, maybe the employee was acting in self-defence or just engaging in horseplay. A company should be free to consider all these things when deciding what to do and should not be boxed in by a zero-tolerance policy.

Example

A pipe worker picks up a piece of iron pipe and swings it at a fellow crew member's head stopping at the very last second. Everybody realizes it's a joke, albeit a stupid and dangerous one. The company thinks the worker should be warned and perhaps suspended for the prank but considers termination too harsh. After all, the worker has had a stellar record to this point. But the zero-tolerance policy calls for immediate termination of workers who engage in or threaten violence against other workers. So, the company must choose between

ignoring the policy and ignoring the offense.

It might seem easy for a company to simply ignore the policy and give the worker a break. But that could lead to unforeseen legal consequences: Letting one worker get away with an offense undermines the legitimacy of a zero-tolerance policy and makes it harder to enforce on future occasions. “Consistency of enforcement is one of the key factors a court or arbitrator looks at in deciding whether to support a disciplinary action,” explains a Chicago attorney.

Solution: How to Tailor a Workable Policy

All employers need to recognize workplace violence is a safety issue and adopt a plan to manage it. The first step is to ban violent behavior. Two things to do:

Avoid Knee Jerk Zero Tolerance. Don’t make termination automatic. You should give yourself leeway to investigate all the circumstances and impose whatever disciplinary action you consider appropriate *up to* termination.

Define Violence. Your workplace violence policy should clearly describe the forms of behavior that you consider unacceptable. Many people associate workplace violence with the use or threat of physical force. But the problem is much broader than that. It includes bullying, harassment, intimidation, affronts to dignity and the creation of a hostile or poisonous work environment. It also includes a wide array of conduct including acts, gestures and verbal comments.

Conclusion

We’re not suggesting for a moment that you exercise leniency with employees who engage in acts of workplace violence. Zero tolerance isn’t just right-headed; it’s right. What we are suggesting is that workplace violence is often subtle and may take different forms. It can be a sledgehammer or a fly swatter. To combat workplace violence effectively, your policy must be flexible enough to address both—as well as all of the other variations in-between.