DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

REDUCTION OF LEGAL RISKS

ASSOCIATED WITH WORKPLACE VIOLENCE

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I. INTRODUCTION

The consequences of an act of violence in the workplace are significant. Although the precise strategies may vary depending on the workplace, every employer should take steps to reduce this risk. Legal issues relating to workplace violence require employers to balance the sometimes competing goals of making the workplace safe while at the same time not exposing themselves to claims by those accused of violent conduct (for example, under the privacy and disability statutes). This outline identifies and discusses some of those key legal risks, and offers some suggested strategies for striking the correct balance.

II. LEGAL CLAIMS THAT COULD BE BROUGHT AGAINST EMPLOYERS BY VICTIMS OF VIOLENCE

Employers may be liable for workplace violence in a variety of ways. First, they may be directly liable for their own negligent conduct, such as by hiring a dangerous person who later commits an act of violence, or by otherwise failing to reasonably prevent foreseeable violence. Second, employers may be exposed based on their vicarious liability for employees acting on their behalf or with their delegated authority. Third, employers in some jurisdictions have a general duty to protect employees, even for wrongs committed by third parties. Many such claims are preempted by worker's compensation statutes, but the inconsistency of those rules from jurisdiction to jurisdiction and the exceptions create significant uncertainty about whether the risk of this type of claim will be covered by insurance.

A. Negligent Hire, Retention and Supervision

The common law of most states imposes on employers a duty of care in the selection of employees. A claim of negligent hire normally requires the plaintiff to prove (1) that the employer had actual or constructive notice that the employee could be dangerous, and (2) that the plaintiff was injured as a foreseeable consequence of the employer's decision to hire the employee. *See e.g. Senger v. U.S.,* 103 F.3d 1437 (9th Cir. 1996) (where truck driver assaulted by a postal worker, negligent hire claim established based on evidence of past violent acts of postal worker, even though postal service was not aware of those acts). Negligence may

be established when a violent act occurs after the employer fails to conduct a background check, which would have revealed a violent criminal record. *See e.g., Di Cosala v. Kay*, 450 A.2d 508, 514 (N.J. 1982)(hiring of employee who was known to use and possess guns).

The elements of a negligent retention and negligent supervision case are essentially the same as negligent hire; namely, that the employer knew or should have known that the employee was unfit, the employer failed to address the matter, and the plaintiff was harmed as a foreseeable result. *See e.g., Foster v. The Loft, Inc.*, 26 Mass. App. Ct. 289, 291 (1988). An employer acts at its peril if it continues to employ someone once being placed on notice that the person has a criminal record. *Haddock v. New York*, 553 N.E.2d (N.Y. 1990)(child raped by city employee successfully sues city for failing to fire employee after receiving notice of his criminal record). Notice of violent propensities may also be viewed as sufficient to trigger employer liability. *See e.g., Pittard v. Four Seasons Motor Inn, Inc.,* 688 P.2d 333 (N.M. Ct. App. 1984) (notice of prior violent and alcohol related acts sufficient notice to allow case to go to the jury where drunk hotel worker enticed a child staying at the hotel into a room and molested him).

B. Intentional Torts

Employers can be held vicariously liable for the intentional torts of their employees (as opposed to independent contractors) who act within the scope of their employment. Since it is rarely the case that someone is hired to intentionally injure another, courts have struggled to define "scope of employment" in this context. *See e.g., Wang Labs, Inc. v. Business Incentives, Inc.* 501 N.E.2d 1163, 1166 (MA 1986) (conduct of agent is within scope of employment if it (1) is of the kind he is employed to perform, (2) occurs substantially within authorized time and space limits, and (3) is motivated in whole or in part by a purpose to serve the employer.)

An employee acting solely within his personal interest acts outside the scope of employment. In contrast, someone who abuses the authority granted to him by the employer (even if he acts primarily for his own interest), or someone who engages in an act of violent frustration because his work is interfered with, may act within the scope of employment. *See e.g., Davis v. DelRosso*, 371 Mass. 768 (1977) (bar owner liable for bouncer who hits customer); *Worcester Ins. Co. v. Fells Acres Day School*, 558 N.E.2d 958, 967 (MA 1990).

In many states, suits for personal injury inflicted on an employee by a co-worker or manager acting within the scope of employment are preempted by the exclusivity provision of the worker's compensation act.

C. Employer's Duty to Protect Employees From Third Parties

Normally, in tort law, there is no duty to protect others from the violent acts of third parties, absent some special relationship that makes such violence foreseeable. A number of jurisdictions have held that the employer-employee relationship may in certain circumstances give rise to a duty to protect the employees from the criminal acts of third parties. *See, e.g., Lillie v. Thompson*, 332 U.S. 459, 462 (1947) (employer has duty to make reasonable provisions against foreseeable danger from intentional or criminal misconduct); *Morgan v. Bucks Assocs*., 428 F. Supp. 546 (E.D. Pa. 1977) (employer may

have duty to protect employee against foreseeable criminal acts of third parties); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 68 (Ct. App. 1977) ("an employer may be liable for mere failure to act to protect his employees from reasonably foreseeable criminal conduct"); *Ozment v. Lance*, 107 App. 3d 348, 352 (1982) (employer-employee relationship, plus reasonable foreseeability of possible criminal act, may give rise to duty of protection); *Thoni Oil Magic Benzol Gas Stations, Inc. v. Johnson*, 488 S.W.2d 355 (Ky. 1972) (in certain unusual circumstances employer may be liable for failure to protect employees against criminal acts of third parties); *Bartlett v. Hantover*, 9 Wash. App. 614, 621 (1973) ("[w]here the nature of the work is such that it exposes the employee to the risk of injury from the criminal acts of third persons, a jury question is raised as to whether the employer has been negligent in not foreseeing the risk of criminal acts and acting to protect

employees against the danger").

D. Federal Violence Against Women Act

The Violence Against Women Act ("VAWA") provides that:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U. S. C. § 1398 1 (a). The statute does not address whether an employer may be held vicariously liable for gender-motivated crimes committed by its employees. *See Grace v. Thomason Nissan,* 76 F. Supp.2d 1083 (D. Or. 1999) (where plaintiff alleged sexual assault by her supervisor; court held that to establish employer liability, she must prove that the person with "final policy-making authority" either committed the assault, ratified it or acted with deliberate indifference to it); *but see, Chase v. Genesis Consolidated Services, Inc*., 1999 WL 1327395 (D.N.H. Nov. 9, 1999)(unpublished)(there the court applies a more typical standard that requires a showing "that the corporation itself committed the crime through an agent or employee who was performing authorized acts, within the scope of his employment, and who was motivated at least in part to benefit the corporation.").

E. OSHA

Although the Occupational Safety and Health Act of 1970 ("OSHA") does not contain a specific provision or regulation regarding violence in the workplace, the agency has taken the position that an employer's failure to take steps to prevent or stop workplace violence can constitute a violation of OSHA's "general duty clause". 29 U.S.C. § 654. That provision states that employers are required to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees." Under that provision, the Secretary of Labor has the burden to prove: (1) the existence of a hazard, (2) that the employer or the industry recognized this hazard, (3) that the hazard was likely to cause serious physical harm, and (4) that there was a feasible method available to reduce or eliminate the harm.

In 1996, OSHA promulgated Guidelines for Workplace Prevention Programs for Health Care Workers in Institutional and Community Settings. Although the guidelines are not workplace standards, these guidelines may be looked to by OSHA investigators or considered when assessing employer liability under the "general duty clause." *But see, Secretary of Labor v. Megawest Financial Inc*., 17 OSHC 1337 (1995) (rejecting the Department of Labor's attempt to fine an employer for a violation of OSHA's general duty clause in connection with the employer's failure to take steps to prevent criminal assaults on employees by non-employees).

III. LEGAL CLAIMS THAT COULD BE BROUGHT BY EMPLOYEES

SUSPECTED OR ACCUSED OF VIOLENCE

A. Pre-employment Strategies

Employers should consider some or all of the following before hiring an applicant:

- Require applicants to submit written applications, and within the legal parameters, obtain information directly from the candidate and get consent to obtain information from third parties;
- Conduct background checks;
- Require pre-employment drug testing;

- Check references;
- Train recruiters;
- Establish a policy or procedure for consistently dealing with and responding to the information obtained.

Each of these strategies, however, carry the risk of claims from the suspected or accused, and therefore, must be administered in a way that is consistent with the law.

B. Pre-employment Legal Risks

1. Applications

Employers should of course obtain relevant information on applications, including information about past criminal convictions. Although state laws vary, most states allow employers to ask applicants directly whether they have been convicted (rather than charged) of felonies (rather than misdemeanors) within some defined period of time (such as the last five years). Applications which seek information outside the parameters of the particular state, such as requests for arrest records or sealed criminal records, are unlawful. The EEOC takes the position that a conviction should not serve as an automatic bar to employment, since to do so might create an adverse impact.

2. Criminal Background Checks and The Fair Credit Reporting Act

Most states have statutes and agencies that control the dissemination of this type of information directly to employers. Normally, there needs to be some registration and showing of need by the employer.

Employers may also wish to have an outside agency conduct criminal and other types of background checks; however, such background checks are subject to the Fair Credit Reporting Act ("FRCA"), 15 USC s1681a *et seq.*, as amended.

The FCRA creates obligations for those who obtain "consumer reports," including employers who obtain consumer reports on employees and applicants. Consumer reports include most types of reports that an employer may obtain from a third party concerning a job applicant if the employer pays a fee for the reports. For example, reports of conviction records, credit records, and driving records obtained from third parties for a fee are within the definition of "consumer reports." The FCRA also governs such reports obtained concerning current employees.

Before obtaining consumer reports, employers must provide applicants or employees with clear written notice of the intent to do so, and obtain a written authorization from the applicant or employee. Employers seeking "investigative consumer reports" -- which involve a more intrusive search into character and reputation obtained through personal interviews of relatives, friends and neighbors of the applicant or employee -- must provide additional notice and obtain additional authorization.

Before an employer takes adverse action against an employee or applicant based upon the information contained in a consumer report, the employer is required to provide the individual with a copy of the report, a summary of consumer rights as prescribed by the FTC. 15 U.S.C. § 168lb(b)(3). After the employer takes adverse action, the FCRA requires that the employer provide the contact information for the reporting agency, a statement that the reporting agency did not make the decision, a statement of the individual's right to obtain a free copy of the report from the reporting agency by making a request within 60 days; and a statement of the individual's right to dispute with the reporting agency the accuracy or completeness of any information in the report. 15 U.S.C. § 1681m(a). The notice required before and after the adverse action is duplicative, but the statute states that these steps must be followed.

3. Drug Testing

Employers may also attempt to limit workplace violence by screening job applicants for illegal drug use, or perhaps more logically, by conditioning job offers on the passage of a drug test. Under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), employers may conduct pre-employment drug tests. *See* 29 C.F.R. § 1630.16(c). Such pre-employment drug tests are also lawful under most privacy statutes and common law; however, drug testing is highly regulated, and should be carefully implemented.

4. Interviews and the ADA

If possible, train interviewers to observe and obtain information concerning employee behavior. For example, it is sometimes useful to ask a candidate to describe how he or she handled a dispute with a manager, or to describe a stressful workplace situation, and how it was handled.

Pursuant to the ADA, interviewers may not ask any question which is likely to elicit information about a disability, especially a mental disability. Rather, the questions must relate to the candidate's ability to perform the essential functions of the job. *See* 29 C.F.R. § 1630.13-14.

Post-offer medical examinations are also permitted under the ADA, but only if such examinations are job related and consistent with business necessity, required of all employees in the same job category, and the information obtained is kept as a confidential medical record. See 29 C.F.R. § 1630.14(b).

5. References

Obtaining references from past employers is an effective way to collect background information about a candidate. However, employers often are reluctant to provide information other than basic data such as dates of employment and titles. *See e.g. Bonnie W. v. Commonwealth of MA*, 419 Mass. 122 (1994) (past employer misrepresented employee's criminal record to new employer). Therefore, an employer seeking reference information should ask the applicant to sign a statement, perhaps as part of the application form, authorizing former employers to provide such reference information.

C. Strategies for Reducing the Likelihood of Violence and Responding to it Post-Employment

Employers should consider the following:

- Establish and follow a practice or policy of no tolerance for workplace violence;
- Identify a person or group of people who will rapidly respond to workplace violence;
- Offer Employee Assistance Programs ("EAPs");
- Conduct proper investigations or get help doing so, and make reasoned disciplinary decisions;
- Establish professional contacts (for example, with mental health professionals);
- Utilize internal security or external law enforcement;
- Think of creative and reasonable steps to protect employees.

D. Potential Legal Claims of the Accused

1. The ADA

If an employer focuses on and reasonably addresses an employee's violent conduct, and not the cause of that conduct, the employer will not normally run afoul of the ADA. *See e.g., Hamilton v. SBT,* 136 F.3d 1047, 1052 (5th Cir. 1998) (employer did not violate ADA by terminating employee who threatened a co-worker, where that conduct was purportedly due to post traumatic stress disorder). This approach leads the fact-finder to focus on the question of whether the terminated employee is "qualified" person, rather than on the more difficult showing of whether the employee caused a "direct threat."

The "direct threat" defense is available to employers claiming that the adverse employment action against a

qualified handicapped person was necessary to protect the safety of other employees, but the standard of proof is not easy to meet. The existence of a direct threat is determined, case by case, based on the duration, nature, severity, likelihood and imminence of the potential harm. 29 C.F.R. s1630.2(r). The EEOC requires an even more specific showing of danger.

2. Torts

a. Invasion of Privacy

Most states have privacy statutes, or common law, which prohibit unreasonable interference with employee privacy. This normally translates into a balancing of the employer's legitimate need for the information, as opposed to the employee's legitimate expectation of privacy. It is important to communicate with employees, normally through policies, to let them know that the employer may wish to conduct searches of work areas, lockers, computers, email and the like, and that employees should not expect such areas or communications to be private. Also, during an investigation of workplace violence, employers should not ask intrusive questions of employees that are unrelated to the investigation.

b. False Imprisonment

This claim normally results from a poorly handled investigation. To establish a false imprisonment claim, an plaintiff must show that he or she was unlawfully restrained without justification, and was aware of the confinement. *See e.g., Foley v. Polaroid Corp.*, 400 Mass. 82 (1987); *Lansburgh's Inc. v. Ruffin*, *372 A.2d 561 (D.C. Cir.1977) (no liability for reasonable investigation and interrogation by store's security officer of store employee suspected of falsifying sales slip).*

c. Defamation

To prevail, the employee must prove a publication (with the relevant degree of fault), a false and defamatory statement, which concerns the plaintiff, and results in damage. *See e.g., Mosrie v. Barry,* 718 F.2d 1151, 1161 (D.C. Cir. 1983). In many jurisdictions, employers have an absolute privilege for statements made in the course of a judicial proceeding, or as part of police investigations. Employers normally have a conditional privilege to give references to other employers about an employee, and that privilege is lost only if there is a showing of actual malice. *See e.g., Bratt v. IBM Corp.*, 392 Mass. 508, 515-516 (1984).

d. Malicious Prosecution/Abuse of Process

A malicious prosecution claim requires a plaintiff to show that a criminal complaint was instituted, that it was dismissed, that there was no probable cause to bring it and that it was motivated by an improper purpose. Abuse of process requires a showing that litigation is used for an improper purpose, which results in damages to the plaintiff.

e. Intentional Infliction of Emotional Distress

This tort requires a showing that the defendant intended to cause emotional distress, that the conduct was egregious, and that there was causation and damage. *See e.g., Hogan v. Forsyth Country Club*, 340 S.E.2d 116 (N.C. App. 1986) (supervisor allegedly touched employee, shouted profanities at her when she refused his advances, threatened her with bodily injury, advanced toward her with a knife).