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## MANAGING THE POTENTIAL OF VIOLENCE IN THE WORKPLACE

By: Dan S. Cross

### I. Introduction.

- A. Violence in the workplace is a serious problem, and a often such violence is the result of domestic violence spilling over in to the workplace:
1. A 1992 Department of Labor study showed that assaults and homicide were the second leading cause of workplace injuries. [17% of workplace injuries are caused by assaults/homicides, whereas 18% of workplace injuries relate to motor-vehicles accidents.]
  2. A 1980-1985 study conducted by NIOSH found that the number one cause of death for women in the workplace is murder.
  3. Thirteen percent of stalking victims are former employers, according to Nicoletti-Flater Associates.
  4. A recent study by the National Institute for Occupational Safety and Health found that 750 workplace murders occur each year.
- B. All employee-related company policies should explicitly state that the safety of employees is the company's top priority.
1. Special attention should be paid to managing the risks to employees who work in isolated places, who handle money or who deal with the public.
  2. The liability of the company from a safety-first policy, from employees who have claims of defamation or emotional distress for example, is outweighed by the company's potential liability to injured third-parties and co-workers.
  3. All managers, including those newly hired or promoted, should be trained on the company's policy.

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4. All supervisors should be given some training on how to recognize and deal with workplace violence. [See II(E) below]
  5. All employees should be given a copy of the policy prohibiting workplace violence.
- C. A company policy on violence in the workplace should be make consistent with other employment-related company policies:
1. All prior policies relating to the violent behavior of employees should be voided and superceded.
  2. The consequences for violation of this company policy should be identified, i.e., an employee who violates the company policy on violence in the workplace may be subject to "discipline up to and including dismissal."
  3. The right, if any, of non-employees to be on company premises is an issue which must be resolved before creating a workplace violence policy.
  4. There should be a company policy, communicated to all employees, that employees have no expectation of privacy in their employment; the company should reserve the right to search employees and their voice mail, e-mail, desks, company- and personally-owned vehicles, possessions, lockers, etc.
  6. It is recommended that companies have a policy requiring both background checks and drug-tests as a condition of hire.
  7. As with all policies, a violence in the work place policy should have disclaimers stating that the policy is not a contract with employees and does not create any obligation on the company beyond what is required by law.

II. Responding to workplace violence.

- A. Use common sense; when in doubt, call "911." Employees should be counseled to make employee safety the first priority when dealing with workplace violence.
- B. Get the [allegedly] offending employee off of company premises immediately.
  1. Pay for a cab home if the employee does not have transportation.
  2. If warranted, collect the employee's company keys, access cards, etc.

3. Unless a clear violation of policy occurs, put the offending employee on a paid leave to reinforce the fact that the ensuing investigation will be objective, and that no decision about the employee's behavior has been reached before the conclusion of the investigation.
  4. Do not allow the employee to return to work until an informed decision has been made about how to resolve and handle the violent incident/behavior.
- C. Know in advance which company employees will be involved in responding to violent incidents, and define their roles.
1. The more serious the incident, the more likely that public relations, human resources, a lawyer or others should be involved in handling the situation.
  2. Regardless of the decision process, responsibility for the decision should rest with management personnel who are knowledgeable about the issues.
  3. How will the impact of workplace violence on victims and witnesses be handled.
  4. If at all possible, an investigation of the facts [however brief] should be conducted by someone outside of the impacted work group.
  5. Remember to notify governmental agencies, e.g., OSHA, as required.
- D. Again, common sense should prevail when responding to an incident of workplace violence:
1. The outcome of an incident of workplace violence should be a reasonable decision by management that covers the resulting issues with co-workers, victims and the offending employee(s).
  2. Management should be kept up-to-date on which company employees to call when workplace violence occurs; a single point of contact is preferable.
- E. Watch for common indicators of potential workplace violence, for example:
1. History of violent behavior.
  2. Fascination with weapons.
  3. Making of threats.

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4. Serious personal problems, e.g., divorce, death in the family, bankruptcy, etc.
  5. Extremely odd behavior, e.g., significant mood swings, violent outbursts, being a loner, paranoia, etc.
  6. Substance abuse.
  7. Sudden or serious deterioration of work performance.
- F. An investigation of a violence-in-the-workplace incident should be done, if possible, by someone outside of the work group, and should include:
1. Statements from all witnesses, the victim(s) and offending employee(s).
  2. A review of the personnel files of the employees involved, i.e., to check on prior discipline, medical issues, etc.
  3. Inquiries about other incidents of violence in the work group and with the employer, to evaluate any proposed course of action in light of prior decisions.
  4. If appropriate, information from local law enforcement about the offending employee.
  5. Information on the possible causes and effects of the workplace violence from the families of victims and of offending employee(s).
  6. Information gathered should include:
    - a. Name of threat maker and relationship to the employer.
    - b. Name of victim, or potential victims.
    - c. When and where the violent incident occurred.
    - d. What took place immediately prior to the incident.
    - e. The specific language of any verbal threat.
    - f. Description of physical conduct of a threatening nature.

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- g. Names of others involved besides alleged harasser and victim.
  - h. Description of the behavior of those involved.
  - i. How the incident ended.
  - j. Names, addresses and telephone numbers of witnesses.
  - k. History leading up to incident.
  - l. Events leading up to incident.
  - m. What happened after the incident.
- G. The violence in the workplace policy must be enforced consistently.
- 1. Those committing similar violations of policy should be subjected to similar discipline. Inconsistent enforcement of the policy could result in claims of wrongful termination or unlawful discrimination.
  - 2. For example, a good and stable employee who brings a new shotgun into the workplace to show it off should be terminated from employment if the company's policy is "no weapons on the premises," despite the employee's good record.
  - 3. The discipline imposed must be reasonable in relation to the offense.
- H. Some ongoing security measures to consider include:
- 1. Require visitors to check in with a receptionist or guard.
  - 2. Escort employees in potential danger to and from their transportation home.
  - 3. Move employees in potential danger to more secure work areas.
  - 4. Provide pictures of potential harassers to security and receptionist personnel.
  - 5. Install new or better lights in employer-controlled work areas and parking lots.
  - 6. Consider employee safety in design of new or re-modeled work spaces.

## III. Contents of Workplace Violence Policy.

- A. The more detailed the policy is about how to respond to incidents of workplace violence, the more likely there will be successful litigation by either a terminated employee or a victim of workplace violence based upon a claim that the company did not follow its own policy. Therefore, the policy should be to the point, and should contain no detailed procedures; just provide managers with "suggested guidelines" for responding to workplace violence.
- B. Define "violence" to include:
1. Written or verbal threats to hurt or kill someone.
  2. Threatening or menacing behavior.
  3. Fighting.
  4. Possessing a weapon. [See III(E)4 below]
- C. The policy should apply to:
1. All employees.
  2. Leased employees and employees of contractors.
  3. All visitors to company premises.
- D. Exceptions to the policy may need to be written into the policy. For example:
1. If some employees, e.g., security guards, are allowed to carry weapons, then that exception to a no-weapons policy should be in the policy.
  2. If "weapons" as a term is not intended to mean mace, pepper spray or other legal, personal defense items, then that too should be written into the policy.
- E. The policy should be written to cover all company-related areas and activities:
1. Company events, e.g., sales kickoffs, company picnics, etc.
  2. Company vehicles and personal vehicles when used for company business.
  3. All company property, which should include company-owned or -leased

property, surrounding areas such as sidewalks, walkways, driveways and parking lots which are under company control or are company owned.

F. The company policy should prohibit possession of any weapon on company premises or during performance of company business:

1. Weapons should be defined to include "licensed" and "concealed" weapons.
2. Weapons should be defined to all unlawful weapons, explosives regulated or restricted by law, all firearms, etc.
3. The no-weapons portion of the workplace violence policy should be posted at all entrances to company premises.

G. The policy should include a statement that safety is the responsibility of all employees, and that employees are responsible for making their personal safety and the safety of others a priority.

1. Companies should avoid the increased liability that results from efforts to assure employee safety while they live abroad or travel, i.e., let employees make their own travel and living arrangements.
2. The policy should require that all employees comply with the policy.
3. The policy should require that all employees report incidents of violence in the workplace to specifically identified employees.

IV. Employer Liability for Violence in the Workplace.

A. Federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678.

1. Covers workplace violence.
2. Inspectors have been instructed to use OSHA to cite employers for having unsafe work conditions where criminal activity endangers workers, See *Workplace Homicide: A Time for Action*, 38 Business Horizons 90 (March 1995).
3. Fines for failure to comply with OSHA can range from \$25,000 to \$75,000, depending upon the seriousness of the violation, and separate fines can be assessed for each infraction.

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- B. Vicarious liability, i.e., liability of employers for the act of their employees.
1. Employers are liable for the acts of their workers when the employer directs and controls the work, regardless of whether the worker is classified as an independent contractor, employee, or otherwise, Perkins v. RTD, 907 P.2d 672 (Colo. App. 1995).
    - a. An employee sells his or her time, and is subject to the right of the employer to monitor his or her movements and activities, and a worker who is paid for results only is typically not considered an employee, Grease Monkey, Infra.
  2. An employer is liable for the *violent* acts of its employees only when (a) the acts are committed within the course and scope of the employee's duties, Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), and (b) it is the intent of the employee to further the employer's interests, Grease Monkey International, Inc. v. Montoya, 904 P.2d 468 (Colo. 1995).
    - a. The "course and scope of employment" includes (1) acts which benefit the employer, Shandy v. Lunceford, 886 P.2d 319 (Colo. App. 1994), and (2) work which is incidental to or customary in the employer's business, Moses, Supra.
  3. An employer is also liable for the violent acts of its employees when the employer knew or should have known the employee is likely to subject third parties to an unreasonable risk of harm, Biel v. Alcott, 876 P.2d 60 (Colo. App. 1993).
- C. Employer liability for negligent hiring or retention of employees.
1. Where the employer is aware of an employee's propensity for violence and of a resulting, specific danger to another employee, the employer has a duty to warn the employee of the potential danger, Duffy v. City of Oceanside, 179 Cal. App. 3d 666 (1986).
  2. When the employer is aware of an employee's propensity for violence and fails to take reasonable measures to prevent injury to others, the employer can be held liable for injuries to others, Hoke v. May Department Stores, 891 p.2d 686 (Ore. App. 1995); Yunker v. Honeywell, Inc., 496 N.W. 2d 419 (Minn. 1993).
- D. As the owner or lessor of property, the employer has a duty to provide a safe



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environment. Businesses have the duty to exercise reasonable care for the protection of persons on the premises, and that duty includes taking reasonable measures to prevent foreseeable acts and to alleviate known dangerous conditions. Examples include:

1. A fast food restaurant could be held liable for injuries suffered by a patron during a robbery because evidence showed other nearby restaurants used guards, that restaurant had been robbed several times before and the risk of injury to someone during a robbery would be great, Lannon v. Taco Bell, Inc., 708 P.2d 1370 (Colo. App. 1985).
    - a. What duty the employer has depends on the foreseeability of the harm.
    - b. Liability of the employer is not absolute, the employer must take reasonable action to promote, not guaranty, the security of those in the workplace.
  2. Failure to replace a sick guard, leaving the premises unguarded, was the basis for an employer's liability in Schneider v. National R.R. Passenger Corp., 987 F.2d 132 (2d. Cir. 1993).
  3. An employee was raped twice in conjunction with two robberies within a two week period of time, and the employer was held liable for injuries to the employee because no additional security was put in place after the first robbery, Laird v. E-Z Mart as cited in *Workplace Violence*, 11 Labor Lawyer 171 (1995).
- E. The Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq.
1. Employees who are a direct threat of harm to themselves or others are not protected under the ADA. The risk must be supported by objective evidence and must be significant, specific and current, *EEOC Technical Assistance Manual*, pp. 10-11.
  2. Cases have held that employers have the right to terminate disabled employees for engaging in violent conduct, Hindman v. GTE Data Services, 4 AD Cases (BNA) 182 (M.D. Fla. 1995); Mazzarella v. U.S. Postal Service, 3 A.D. Cases (BNA) 232 (D. Mass. 1994).

V. Conclusion.

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- A. Consult with a professional about a company's individual risks of violence in the workplace and always clearly communicate with employees that safety comes first.
- B. Useful publications include: *Workplace Violence Shouldn't Be Ignored*, 10 I.E.R. Newsletter 8 (1995), Bureau of National Affairs; *Preventing Homicide in the Workplace* (NIOSH publication no. 93-109, 1993).
- C. Resources for additional information on workplace violence include: (1) the Center for the Study and Prevention of Violence, University of Colorado at Boulder, Institute of Behavioral Science, Campus Box 442, Boulder, CO 80309, (303) 492-1032; (2) "We Will Not Forget SAJE, Inc.," P.O. Box 650124, Austin, TX 78765, (512) 448-6972.
- D. A resource for travel safety for employees is a video entitled "Street Smarts" b J. J. Bittenbinder - 1 (800) 824-8889.

Dan S. Cross has represented clients in the field of labor and employment law since his admission to the practice of law in 1979. He is a cum laude graduate of Duke University (B.A. Public Policy Studies), and Mr. Cross is a graduate of the University of Denver College of Law. From 1990 to 1995, Mr. Cross was Senior Human Resources Counsel at U S WEST. He speaks regularly to human resources professionals and attorneys on employment issues such as drug-testing, employee discipline, and unlawful discrimination.

Dan Cross is now in private practice with Overton & Feeley, P.C. His practice emphasizes labor and employment law and litigation, and he represents both individuals and businesses. His multi-state experience includes labor negotiations, reductions in force, sexual harassment, wrongful terminations, employment discrimination litigation, and compliance with all labor and employment laws, including the FMLA, FLSA, ADEA, ADA, and Executive Orders for government contractors.

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