Workplace Violence

by Practical Law Labor & Employment

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This Note delves into the legal complexities surrounding **workplace violence**, focusing on a private employer's duty to ensure a safe working environment under the Occupational Safety and Health Act (OSH Act), potential liabilities under workers' compensation law and negligence theories, and granting medical leave to **workplace violence** victims. The document also examines employment references for employees with known **violent** tendencies and legal strategies to mitigate **workplace violence**, including the direct threat defense under the Americans with Disabilities Act (ADA). Citing key cases and OSHA directives, this Note offers a comprehensive overview of an employer's obligations and the legal ramifications of **workplace violence** incidents. It also highlights the nuances of workers' compensation exclusivity, negligence claims from third-party victims, and the implications of employee misconduct under the ADA. Additionally, the Note discusses state-specific **workplace violence** prevention laws, defamation risks in employment references, and the impact of COVID-19 on **workplace violence** dynamics.

According to the Occupational Safety and Health Administration (OSHA), **workplace violence** is a leading cause of fatal occupational injuries in the US and a major concern for employers and employees (see OSHA: **Workplace Violence**; see also Accident Search Results: **Workplace Violence**).

Workplace violence is a **violent** act (physical assault or the threat of assault) directed toward a person at work or on duty. It includes:

- Threats, such as:
  - verbal threats;
  - written threats; and
  - threatening body language.
- Physical assaults.
- Aggravated assaults, including rape and homicide.

Workplace violence incidents can be divided into four categories of offenses by:

- A stranger to the employer or its employees.
- A customer or client of the employer.
- An employee or former employee of the employer.
- An individual who has a personal relationship with an employee who is the intended victim (such as a domestic dispute).

This Note provides an overview of an employer's duty to provide a safe working environment, including:

- Various laws that can impose liability after an incident of **workplace violence**.
- Granting leave to victims of **workplace violence**.
- Employment references for employees with known **violent** tendencies.
- Legal considerations when taking steps to minimize **workplace violence**.

Unionized employers should be aware that this Note does not address the National Labor Relations Act (NLRA) or the potential impact of collective bargaining on employers' attempts to minimize **workplace violence**. Unionized employers must consult the NLRA and any applicable collective bargaining agreement.

Occupational Safety and Health Act Obligations

There is no federal law establishing a duty to prevent **workplace violence** against employees. However, an employer has a duty to provide a safe working environment under the federal **Occupational Safety and Health Act** (OSH Act), which regulates **workplace** health and safety (see Practice Note, Health and Safety in the **Workplace**: Overview). The OSH Act applies to employers either directly through the federal OSHA or through an OSHA-approved state program. OSHA issues regulations under the OSH Act and enforces an employer's duties under the OSH Act by:

- Conducting compliance inspections.
- Issuing citations for violations.

The OSH Act spells out an employer's duty to provide a safe working environment in two clauses:

- **Section 5(a)(1).** The **general duty clause** requires an employer to provide a **workplace** free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees (29 U.S.C. § 654(a)(1)).
- **Section 5(a)(2).** This requires an employer to comply with occupational safety and health standards under the OSH Act (29 U.S.C. § 654(a)(2)).

OSHA has not issued any formal standards on **workplace violence**. However, OSHA has issued:

- Nonbinding guidelines and recommendations for preventing **workplace violence** (see OSHA Guidelines and Recommendations for **Workplace Violence** Prevention).
- A directive on enforcement procedures for OSHA field offices to follow when investigating or inspecting **workplace violence** incidents (see OSHA Directive on Investigating and Inspecting **Workplace Violence** Incidents).

The General Duty Clause and Workplace Violence

Employers are not strictly liable for **workplace violence** under the OSH Act (see *Secretary of Labor v. Megawest Financial, Inc.*, 1995 WL 383233 (O.S.H.R.C.A.L.J. June 19, 1995)), and OSHA has not issued any formal standards on **workplace violence**.

However, OSHA can issue citations to employers for violations of the general duty clause (29 U.S.C. § 654(a)(1); *Cedar Springs Hosp., Inc.*, 2023 WL 9604921, at *31 (O.S.H.R.C.A.L.J. Dec. 22, 2023) ("**Workplace violence** is a hazard within the meaning of the OSH Act."). For example, see OSHA: News Release: US Department of Labor Cites Montefiore Medical Center for Inadequate **Workplace Violence** Safeguards for Employees.

To cite an employer for violating the general duty clause, the Secretary of the **Department of Labor** must prove all of the following:

- The employer failed to keep the **workplace** free from a hazard to which employees were exposed.

- The hazard is recognized.
- The hazard was likely to cause death or serious physical harm.
- There was a feasible and economically viable way to correct the hazard.

(See OSHA: Directive No. CPL 02-00-164, Field Operations Manual (Apr. 14, 2020); see also *UHS of Delaware, Inc.*, 2023 WL 2388069, at *2 (O.S.H.R.C. Feb. 28, 2023).)

Whether an employer is liable under the general duty clause for an incident of **workplace violence** depends on the facts and circumstances. For example, an employer may be required to take steps to minimize the risk of **workplace violence** if the risk of **violence** is a recognized hazard in that industry (such as the health care industry). (See OSHA Standard Interpretation (Dec. 10, 1992) and OSHA Standard Interpretation, 2006 WL 4093048 (Sept. 13, 2006).)

OSHA may issue citations to employers it finds failed to provide employees with adequate safeguards against **workplace violence**. For example:

- Following the death of a licensed practical nurse during a home visit, OSHA cited a home-based care provider for:
  - exposing home healthcare employees to **workplace violence** from patients who exhibited aggressive behavior and were known to pose a risk to others; and
  - not developing and implementing adequate measures to protect employees from the ongoing serious hazard of **workplace violence**.

  (OSHA News Release (May 1, 2024).)
- After a worker's death, OSHA cited a health care provider, which assigned "service coordinators" to clients to help them obtain care, because the company failed to address the risk of employees being attacked by mentally ill clients (2019 WL 1142920 (March 4, 2019)).
- After a worker's death, OSHA cited a substance abuse treatment facility for not providing training to staff on how to respond to a threat or physical assault and for not having adequate measures to protect the staff from physical assault (2011 WL 1319136 (Apr. 7, 2011)).
- After worker complaints, OSHA cited a psychiatric hospital after an inspection identified numerous instances of **violent** patients assaulting staff (2011 WL 262990 (Jan. 1, 2011)).
- After worker complaints, OSHA cited a hospital after an inspection showed the hospital's **workplace violence** program was incomplete and ineffective in preventing numerous assaults by **violent** patients (2010 WL 2796444 (July 7, 2010)).

For more information about OSHA citations to employers, see Practice Note, Health and Safety in the **Workplace**: Overview: OSHA Citations and Employer Response.

Unlike with OSHA standards, rules, and orders, there is no federal criminal penalty for violating OSHA's general duty clause.

OSHA Guidelines and Recommendations for Workplace Violence Prevention

OSHA guidance explains that:

- Courts have interpreted the general duty clause to mean that an employer has a legal obligation to provide a safe **workplace**.
- An employer is on notice of the risk of **violence** and should implement a **workplace violence** prevention program if the employer:
  - experienced acts of **workplace violence**; or
  - becomes aware of threats, intimidation, or other potential indicators that show the potential for **violence** in the **workplace** exists or has the potential to exist.

(OSHA: **Workplace Violence**.)

OSHA recommends that employers prevent or minimize the risk of **workplace violence** by:

- Allocating sufficient resources to prevent **violence**.
- Identifying risk factors, assessing their worksites, and identifying methods for reducing the likelihood of incidents occurring.
- Establishing a zero-tolerance policy toward **workplace violence** covering all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with employees.
- Having a well-written and implemented **workplace violence** prevention program that can be:
  - a separate **workplace violence** prevention program; or
  - incorporated into a safety and health program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all workers know the policy and understand that all claims of **workplace violence** are investigated and remedied promptly.

  (See, for example, Standard Documents, **Workplace Violence** Policy and Protocols for Responding to **Violence** or Threats of **Violence** at the **Workplace**; see also Practice Note, **Workplace** Safety and Health Programs.)
- Ensuring that all workers know the policy and understand that the employer investigates and remedies all claims of **workplace violence** promptly.
- Developing a system of accountability for implementing a **violence** prevention program (such as creating a **workplace** safety team).

- Implementing engineering controls, administrative controls, and training (see Standard Documents, **Workplace Violence** Prevention Training for Supervisors: Presentation Materials and **Workplace Violence** Prevention Training for Employees: Presentation Materials).

(OSHA: **Workplace Violence** and OSHA Fact Sheet: **Workplace Violence**.)

OSHA also recommends that employers develop additional methods as necessary to protect employees in high risk industries. OSHA has created guidelines and recommendations for preventing **workplace violence** in the following high risk industries:

- Healthcare and social services (see also OSHA: Worker Safety in Hospitals).
- Late-night retail establishments.
- Taxi and car hire.

An employer is not required to comply with this guidance, but OSHA's guidelines are meant to be a resource for employers. Employers that follow them can use their compliance to defend against a claim that the employer breached the general duty clause.

OSHA Directive on Investigating and Inspecting Workplace Violence Incidents

In January 2017, OSHA issued updated policy guidance and procedures for OSHA field offices to follow when conducting inspections and issuing citations related to occupational exposure to **workplace violence**, especially at worksites in industries considered at high risk for **workplace violence** incidents (see OSHA: Directive No. CPL 02-01-058, Enforcement Procedures and Scheduling for Occupational Exposure to **Workplace Violence**).

In particular, the directive provides:

- Criteria for initiating inspections.
- Procedures for conducting inspections.
- Guidance for issuing citations or notices for **workplace violence** hazards. The directive includes the types of evidence necessary to establish each element of a general duty clause violation (see The General Duty Clause and **Workplace Violence**).

For more information about OSHA inspections, see Practice Note, Handling an OSHA Inspection and OSHA Inspection Checklist.

State Workplace Violence Prevention Laws

Employers should be aware that state law may impose requirements for **workplace violence** prevention. Some states require certain types of employers to take steps to prevent **workplace violence**.

For more on state laws, see Practice Note, Workplace Violence Prevention State Laws: Overview and Quick Compare Chart: Workplace Violence Prevention State Laws.

Workers' Compensation and Workplace Violence

Typically, an employee injured by workplace violence, such as an assault, cannot bring a claim against his employer based on a violation of the general duty clause of the OSH Act (see The General Duty Clause and Workplace Violence). Instead, an injured employee's remedy is usually under workers' compensation law, unless an exception to workers' compensation exclusivity applies (29 U.S.C. § 653(b)(4); see Workers' Compensation Exclusivity).

Although employers' obligations and employees' rights to receive workers' compensation are largely governed by state law, there are similarities among many states. Generally, all employees are covered by workers' compensation laws and independent contractors are not. However, some states exclude certain workers from coverage. For more information on employee coverage, see Practice Note, Workers' Compensation: Common Questions: Employees Covered by Workers' Compensation Laws.

Employees can typically receive workers' compensation for injuries arising out of and in the course of their employment (compensable injuries). Therefore, an employee injured at the workplace in a workplace violence incident could be eligible for workers' compensation benefits. For more information about which injuries are compensable, see Practice Note, Workers' Compensation: Common Questions: Compensable Injuries.

Workers' Compensation Exclusivity

In general, an employee receiving workers' compensation benefits cannot also bring a claim for negligence against his employer (see Negligence Claims From Third-Party Victims of Workplace Violence). The exclusion of other remedies is called the exclusivity provision. Typically, an employee injured by workplace violence may be able to avoid the exclusivity provision if one of the following exceptions is recognized under state law:

- **Intentional tort theory.** If there was a known or suspected danger, an injured employee can argue that an employer's failure to prevent workplace violence was intentional and that the employee should not be limited to workers' compensation benefits (for an example of a court's discussion of the intentional tort exception, see *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994)).

- **Dual capacity doctrine.** If the employer was also the lessor of property, an employee's recovery may not be limited to workers' compensation under the dual capacity doctrine if the employer's status as lessor is unrelated to its status as employer (for an example of a court's discussion of the dual capacity exception, see *Sharp v. Gallagher*, 447 N.E.2d 786 (Ill. 1983)).

For more information about exceptions to workers' compensation exclusivity under state law, see Workers' Compensation Laws: State Q&A Tool: Question 11.

Employee Misconduct and ADA Considerations

Employers are permitted to implement workplace violence policies that include prohibitions on:

- **Workplace violence**.

- Threats of **violence**.

However, employers should be familiar with **Americans with Disabilities Act** (ADA) considerations and **Equal Employment Opportunity Commission** (EEOC) guidance on disciplining or terminating an employee who engages in misconduct if the employee is suspected of having a mental disorder. The ADA protects qualified employees who have a mental or physical disorder that meets the definition of a disability (29 C.F.R. § 1630.2(m)). According to the EEOC, an employer can discipline an employee for violating a **workplace** conduct standard that is job-related and consistent with business necessity even if the misconduct was caused by a disability. (See EEOC: Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.)

Some courts have held that an employer may be required to provide a **reasonable accommodation** to an employee whose misconduct is caused by a disability, unless it would be an **undue hardship** on the employer (see, for example, *Humphrey v. Memorial Hospitals Ass'n*, 239 F. 3d 1128, 1139-40 (9th Cir. 2001)). Other courts have held that an employee who makes serious and credible threats of **violence** against coworkers is not a qualified individual with a disability under the ADA (or in this instance, its Oregon equivalent) (see, for example, *Mayo v. PCC Structurals, Inc.*, 2015 WL 4529357 (9th Cir. July 28, 2015)).

If an employee's disability poses a **direct threat** to the health or safety of the employee, other people in the **workplace**, or third parties, an employer may be able to use the direct threat defense under the ADA if there is no accommodation available to negate the threat (see also Excluding an Applicant Because of Safety Concerns (Direct Threat Defense Under the Americans with Disabilities Act)). A speculative or remote risk is not sufficient (see 29 C.F.R. § 1630.2(r)).

For more information on direct threats under the ADA, see Practice Notes, Disability Accommodation Under the ADA: Direct Threat and Discrimination: Overview: ADA.

For more on mental disability considerations, see Practice Note, Mental Health Conditions in the **Workplace**: Mental Impairments Affecting **Workplace** Conduct or Safety.

Negligence Claims from Third-Party Victims of Workplace Violence

Elements of a Negligence Claim

An injured employee may not be able to bring a negligence action against his employer unless an exception to the exclusivity provision of workers' compensation law applies (see Workers' Compensation Exclusivity). However, workers' compensation law does not limit negligence claims from a third party (for example, a customer or vendor).

In general, for an employer to be liable under a negligence theory, the third party (or injured employee if workers' compensation exclusivity does not apply) must demonstrate all four elements of common law negligence, which are:

- The existence of a duty of care. Under common law, employers:
    - have a duty to protect employees from people with a known dangerous propensity (see *Roberts v. Circuit-Wise, Inc.*, 142 F. Supp. 2d 211, 214 (D.Conn. 2001)); and

    - owe a duty of care to third parties the employees interact with in their employment (see *Tyus v. Booth*, 235 N.W.2d. 69 (Mich. Ct. App. 1975)).

- Breach of the duty. States differ as to whether violation of the OSH Act is admissible as evidence of negligence. However, most courts have held that violation of an OSHA standard is evidence of negligence, not negligence per se (see, for example, *Elliott v. S.D. Warren Co.*, 134 F. 3d 1, 4 (1st Cir. 1998)).
- Causation.
- Harm.

An employer can be liable under several negligence theories if the employer breaches its duty of care (see Negligent Hiring and Negligent Supervision and Retention). Traditional defenses to negligence include:

- Unforeseeable event.
- Superseding cause.

For example, an employer may argue that an individual's **violent** act was a superseding cause that negates the employer's negligence as the proximate cause of the injured party's injuries (see, for example, *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 292 (Ky. Ct. App. 2009)).

Negligent Hiring

Liability for negligent hiring is based on state law. In general, a claim of negligent hiring is based on an employer's breach of a common law or statutory duty to protect employees and customers from injuries caused by an employee whom the employer knows or should know poses a risk of harm to others (see Restatement (Third) Of Agency § 7.05 (2006)).

Most states recognize negligent hiring claims. Generally, for an employer to be liable for negligent hiring, a plaintiff must show all of the following:

- The existence of an employment relationship.
- An employee is incompetent or unfit to perform the job.
- The employer had actual or constructive knowledge of the employee's incompetence.
- The employer's act or failure to act caused the plaintiff's injury.
- The negligent hiring was the proximate cause of the plaintiff's injury.
- Actual damage or harm resulted from the employer's act or failure to act.

(See, for example, *Linder v. Am. Natl. Ins. Co.*, 798 N.E.2d 1190 (Ohio Ct. App. 2003).)

For more information on negligent hiring, see Practice Note, Negligent Hiring, Retention, and Supervision: Negligent Hiring.

Steps Employers Take to Minimize Negligent Hiring Claims

An employer that neglects to check an applicant's references or contact the applicant's former employers may be liable for negligent hiring if the reference check would have revealed the applicant had a **violent** propensity. Employers must be mindful of federal and state anti-discrimination laws when screening for applicants who may pose a risk of **violence** (see Practice Notes, Discrimination: Overview and Recruiting and Interviewing: Minimizing Legal Risk).

In particular, employers should consider the following:

- **Inquire about gaps in history or frequent job changes.** Employers should review an applicant's employment application carefully and ask questions about any gaps in employment history. A gap in history could reveal an applicant was serving time for committing a **violent** crime.

- **Inquire into criminal records, if permitted by law.** EEOC guidance cautions against the use of arrest records in employment decisions under almost all circumstances. Although employers have greater leeway to consider conviction records, employers should be familiar with the constraints outlined in the EEOC guidance (see EEOC: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 and Practice Note, Background Checks and References: Criminal Records). Some state laws impose additional requirements on access to and use of criminal background check information for employment purposes. For more information on state law requirements, see Background Check Laws: State Q&A Tool and Ban-the-Box State and Local Laws Chart: Overview.

- **Obtain employment references.** It is good practice to obtain employment references from an applicant and document the information received. For more information about employment references, see Practice Note, Background Checks and References: Employment References.

Employers must use background checks and references appropriately, or they can face substantial and costly litigation and financial risks. For more information about the types of informational inquiries employers can make, see Practice Note, Background Checks and References: Types of Informational Inquires.

Employers using a third-party service provider (also known as a **consumer reporting agency**) must follow the rules established by the **Fair Credit Reporting Act** (FCRA) (15 U.S.C. §§ 1681 to 1681(x)). For more information about an employer's obligations under FCRA, see Practice Note, Background Checks and References: The Fair Credit Reporting Act and the Use of Third-Party Providers. For state law requirements, see Background Check Laws: State Q&A Tool: Question 5 and Hiring Requirements: State Q&A Tool.

Excluding an Applicant Because of Safety Concerns (Direct Threat Defense Under the ADA)

An employer may refuse to hire an applicant with a disability under the ADA if the applicant poses a direct threat to the health or safety of himself, other people in the **workplace**, or third parties (42 U.S.C. § 12113(b)). Employers can use the direct threat defense under the ADA only if the individual poses a significant risk that cannot be reduced or eliminated by reasonable accommodation.

The assessment of whether a person poses a direct threat is based on reasonable medical judgment that may rely on either:

- Current medical knowledge.
- Best available objective evidence.

(29 C.F.R. § 1630.2(r).)

To assess whether a person poses a direct threat, an employer should consider:

- The duration of the risk.
- The nature and severity of the potential harm.
- The likelihood that the potential harm will occur.
- How soon the potential harm may occur.

(29 C.F.R. § 1630.2(r).)

For more information on direct threats under the ADA, see Practice Note, Disability Accommodation Under the ADA: Direct Threat and Practice Note, Mental Health Conditions in the **Workplace**: Safety Risks and the Direct Threat Defense.

Negligent Supervision and Retention

Liability for negligent supervision and retention is based on state law. In general, an employer is liable for harm if the employer is negligent in any of the following activities:

- Selecting employees (see Negligent Hiring).
- Supervising employees.
- Retaining employees.

(Restatement (Third) Of Agency § 7.05.)

For example, if an employee commits an act against another person after the employer was aware of the risk of danger, the injured person may claim that the employer did not exercise reasonable care in supervising (see for example, *McDonald's Corp.*, 309 S.W.3d at 291).

To avoid liability for negligent supervision or negligent retention, an employer should:

- Draft and maintain a **workplace violence** policy that:
  - informs employees that threats or **violent** acts at the **workplace** are prohibited;
  - sets procedures for employees to report threats or **violent** acts; and
  - establishes a disciplinary procedure for employees who violate the policy.

  For a sample policy, see Standard Document, **Workplace Violence** Policy.
- Promptly investigate any complaints of **workplace violence** and consider discipline, up to and including termination, if the complaint is substantiated.
- Draft and maintain a **workplace** safety plan and implement any necessary precautions if a threat against an employee is substantiated (see, for example, Standard Documents, Protocols for Responding to **Violence** or Threats of **Violence** at the **Workplace** and **Workplace** Emergency Action Plan).

For more information on negligent hiring, retention, and supervision, see Practice Note, Negligent Hiring, Retention and Supervision: Preventative Measures During The Employment Relationship and Minimizing **Workplace Violence** Checklist.

Voluntary Assumption of Duty to Protect

If an employer contracts to provide security at the **workplace** or implements security measures, the employer may have assumed a duty to protect employees from criminal acts by third parties. Once an employer assumes a duty to protect, the employer must exercise the duty with reasonable care. An employer can be liable for physical harm resulting from the failure to exercise reasonable care if:

- The employer's failure to exercise reasonable care increases the risk of harm.
- The employer has assumed a duty to perform that is owed by another party.
- Harm is suffered because a person relied on the employer assuming the duty.

(Restatement (Second) Of Torts § 324(A).)

Employers that make statements in their handbooks about ensuring a safe **workplace** may have assumed a voluntary duty to protect (see, for example, *Vaughn v. Granite City Steel Division of National Steel Corp.*, 576 N.E.2d 874, 880 (Ill. App. Ct. 1991)). Employers that make affirmative statements about **workplace** safety in their handbooks or to employees should be sure they have taken proactive steps, such as conducting a **workplace** safety analysis and implementing **workplace** safety policies and procedures (see Minimizing **Workplace Violence** Checklist).

Employment References for Employees with Known Violent Tendencies

Defamation Risks

An employer that is contacted for a reference regarding a past or present employee who has **violent** tendencies should check relevant state law (see Background Check Laws: State Q&A Tool: Question 12). An employer that gives a negative job reference may be sued for **defamation** by a former employee who does not receive a job offer if the employer both:

- Warns a prospective employer about an employee with **violent** tendencies.
- Was mistaken about the individual (most courts recognize truth as a defense to a defamation action).

Employers can take certain steps to minimize the risk of defamation or negligent referral claims, including:

- Drafting and maintaining an employment reference policy. For a sample policy, see Standard Document, Employment Reference Policy.
- Centralizing requests for references (for example, with the human resources department).
- Training employees responsible for giving references about the risk of defamation claims by former employees.
- Avoiding subjective statements or opinions based on dislike of the employee (for example, saying the former employee was a "terrible person") and providing information that is supported by documentation.

Generally, employers have a qualified privilege to communicate information about employees if the statement was made in good faith and communicated to those who need to know, such as prospective employers (see, for example, *Chapman v. Ebeling*, 945 So. 2d 222, 228 (La. Ct. App. 2006)). Employers must check relevant state law regarding the existence and application of this privilege (see Background Check Laws: State Q&A Tool: Question 12).

For more on defamation, see Practice Notes, Defamation Claims in Employment and Defamation in Employment References State Law Chart: Overview.

Other Risks

An employer that gives a neutral reference regarding an employee who poses a known danger can be liable for failure to warn (or negligent referral or misrepresentation, depending on the relevant state law) if an organization relies on the reference and hires an individual who then is involved in a **violent** incident.

For example, in *Jerner v. Allstate Ins. Co.*, an unpublished decision, an employer terminated an employee after the employee, who was observed behaving strangely and making death threats to coworkers, was found carrying a gun to the **workplace** in his briefcase. The employer provided the terminated employee with a neutral letter of reference stating that the employee had voluntarily resigned because the position was eliminated in a restructuring. Another employer hired the terminated employee based in part on the first employer's neutral letter of reference. After the second employer terminated the employee, the employee shot five supervisors who were involved in the termination, killing three of them. Family members of the victims sued the first employer for failing to disclose the employee's true work history. The Florida appellate court held that there could be a cause

of action against the first employer for misrepresentation. The employer ultimately settled the case for an undisclosed sum of money. (No. 94-03822 (Fla. Cir. Ct. 1995).)

For more examples of these risks, see Practice Note, Reporting Criminal Activity of Employees.

Workplace Bullying

Assault claims are generally not actionable against employers by employees in the **workplace** because of the exclusivity of workers' compensation, unless an exception for intentional torts applies (see Workers' Compensation Laws: State Q&A Tool: Question 11). However, at least one court has recognized a claim of assault based on **workplace** bullying. The Supreme Court of Indiana upheld a jury verdict awarding $325,000 on a claim of assault when the defendant "aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him" (*Raess v. Doescher*, 883 N.E. 2d 790, 794 (Ind. 2008)). The employer defeated the intentional infliction of emotional distress (IIED) claim, but the court noted that **workplace** bullying can be the basis for an IIED claim under other circumstances. The court also permitted a jury instruction referring to **workplace** bullying.

In 2011, OSHA adopted a safety program for its own employees that included a **workplace** anti-bullying policy. The policy's stated purpose was to "provide a **workplace** that is free from **violence**, harassment, intimidation, and other disruptive behavior." Specifically, the policy prohibits OSHA employees from engaging in "threats, **violent** outbursts, intimidation, bullying, harassment, or other abusive or disruptive behaviors." (See OSHA Field Safety and Health Manual (OSHA Archive Document).)

For more information about **workplace** bullying and a sample policy and training, see:

- Practice Note, Bullying in the **Workplace**.
- Standard Document, **Workplace** Anti-Bullying Policy.
- Standard Document, **Workplace** Bullying Prevention Training: Presentation Materials.

Granting Leave to Victims of Workplace Violence

Employers should be aware that federal and state employee leave laws may entitle **workplace** **violence** victims to take time away from work without penalty. The **Family and Medical Leave Act of 1993** (FMLA) gives covered employees the right to take an unpaid leave of absence from work for a **serious health condition** (29 U.S.C. § 2612(a)(1)(D)). A serious health condition is an illness, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital, hospice, or residential medical facility.
- Continuing treatment by a healthcare provider.

(29 U.S.C. § 2611(1).)

If an employee has a serious health condition resulting from **workplace violence**, the employee may be eligible to take unpaid time off for medical help (29 U.S.C. § 2612(a)(1)(D)). For more information about the FMLA, see Practice Note, Family and Medical Leave Act (FMLA) Basics.

In addition, some states have laws that allow domestic **violence** or crime victims leave from work to appear in court or obtain medical care or counseling. State law may also protect **workplace violence** victims by prohibiting employers from firing or retaliating against employees who take time off from work to participate in judicial proceedings. For more information on employee leave entitlements under state law, see Leave Laws: State Q&A Tool.

For leaves of absence under the ADA and state anti-discrimination laws, see Practice Note, Disability Accommodation Under the ADA: Use of Sick Days and Leaves of Absence and Anti-Discrimination Laws: State Q&A Tool.

Workplace Violence and COVID-19

During the **COVID-19** pandemic, the **Centers for Disease Prevention and Control** (CDC) recognized that workers could face **violent** threats and acts when businesses implemented COVID-19 prevention policies and practices, particularly in retail, services, and other customer-based businesses (see CDC: Limiting **Workplace Violence** Associated with COVID-19 Prevention Policies in Retail and Services Businesses (Aug. 2020) (archived)).

The CDC provided guidance and strategies to employers for limiting **violence** towards workers that may result from:

- Requiring that employees and customers wear face masks.
- Asking customers to follow social distancing rules.
- Setting limits on the number of customers allowed in a business facility at one time.

These strategies included:

- Offering customers options to minimize contact with others and promote social distancing (for example, curbside pick-up).
- Posting signs letting customers know about policies for wearing masks, social distancing, and the maximum number of people allowed in a facility.
- Advertising COVID-19-related policies on the business website.
- Providing employee training on threat recognition, conflict resolution, nonviolent response, and other issues related to **workplace violence** response.
- Implementing steps to assess and respond to **workplace violence** (for example, reporting to a manager or supervisor on-duty, calling security, or calling 911).

- Remaining aware of and supporting employees and customers if a threatening or **violent** situation occurs.
- If staffing permits, assigning two workers to work as a team to encourage following of COVID-19 prevention policies.
- Installing security systems (for example, panic buttons, cameras, and alarms) and training employees on how to use them.
- Identifying a safe area for employees to go to if they feel they are in danger (for example, a room that locks from the inside, has a second exit route, and has a phone or silent alarm).

(CDC: Limiting **Workplace** **Violence** Associated with COVID-19 Prevention Policies in Retail and Services Businesses (archived).)

