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## **Workplace Violence: A Guide to Preventing the Worst**

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Violence in the workplace, thankfully, is relatively rare. But when it occurs, it can lead to lawsuits, a traumatized workforce and serious losses in productivity and confidence. Businesses that want to protect their workers—and minimize legal risk—must develop a disciplined understanding of related laws, use that knowledge to institute safety measures, and enlist the entire company in a commitment to violence prevention.

Even as a rarity, violence touches a surprising number of workplaces—with chilling outcomes. According to a 2005 study by the U.S. Department of Labor, over 5% of all workplaces had experienced workplace violence in the previous 12 months. From 2004–2008, the U.S. Bureau of Labor Statistics reported a shocking annual average of 564 work-related homicides. And according to the New York State Department of Labor (NYS DOL), workplace violence is the leading cause of occupational death for women and the second leading cause for men.

Andrew W. Singer, Esq. (partner), supported by Jason B. Klimpl, Esq. (associate), visited TemPositions' HR Roundtable Series on Thursday, June 30, 2011 to share insights into preventing workplace violence. Companies must, Singer explained, institute appropriate, unambiguous safety protocols, keep an eye on workers—and carefully follow related workplace safety laws.

“It’s important to understand what laws touch upon workplace violence and what the employer’s obligations are in terms of providing safety,” he stressed. “Because if violence does occur, the consequences can be the most severe that we ever see in employment law.”

### **Workplace Violence 101**

The NYS DOL defines workplace violence as any “physical assault,” “threatening behavior” or “verbal abuse” that takes place in work-related locations. It may manifest as aggressive or intimidating behavior, harassment, obscene or threatening phone calls/emails, stalking, assault, rape or suicide.

The law considers a wide range of spaces to be work-related. These include corporate offices or factory floors, but also temporary workspaces, remote/satellite locations, training sites, parking lots and building lobbies (i.e., workplace “perimeters”) and client homes or businesses. The

routes that employees take to and from worksites may be considered part of their workplace. Even an open field where employees gather for a professional event may qualify.

The perpetrators of workplace violence can be equally varied. They may be current or former employees, co-workers or supervisors, customers/clients, an employee's family member or personal acquaintance (who may bring domestic violence into the workplace) and, broadly, any type of visitor. Visitors may include delivery personnel, landlords, building managers, contractors, repair personnel, etc.

### **Impact of Workplace Violence**

“Workplace violence has a tremendous impact on the workplace,” Singer warned. According to the NYS DOL, violence touches 500,000 workers every year, costing businesses 1,175,000 in lost workdays and \$55 million in lost wages. These same companies must contend with lost or diminished productivity, possible property damage, loss of clients or business, and tarnish to their public images. In some instances, of course, companies will also incur legal expenses.

Emotional after-effects can't be underestimated. It is stressful, Singer explained, to work in an environment where violence has taken place or is likely to take place. Employees may come to work in fear. Their morale may be low, and they may become less productive. Absenteeism and turnover can both be expected to rise. These effects may become severe if an incident occurs that workers believe was preventable.

Singer explained that there are many things that employers can do to keep these incidents to a minimum. Knowing—and abiding by—all related laws is an excellent starting point for maintaining a safe workplace.

### **Employers' Legal Obligations**

As in many areas of employment law, preventing and handling workplace violence requires compliance with many intersecting laws. The process can be complex, Singer acknowledged. First, it's important to understand each individual obligation that your company has to its workers in order to see how these obligations might combine.

#### Occupational Safety and Health Act (OSHA)

Congress passed the Occupational Safety and Health Act (OSHA) in 1970. This law requires employers to “furnish to each of [their] employees employment and a place of employment that are free from recognized hazards that are causing or likely to cause death or serious physical harm to [their] employees.”

“This duty is absolute,” Singer stated. Some statutes leave room for judges and juries to consider case-by-case circumstances. But OSHA firmly establishes that the employer is responsible for providing a workplace that is free of dangers, including workplace violence.

### Anti-discrimination Laws

Unsurprisingly, anti-discrimination laws provide employers with some opportunities to lessen the risk of workplace violence. Remember, Singer stressed, that the legal definition of workplace violence includes harassment, threatening behavior and verbal abuse. If a perpetrator's aggression is related to a victim's protected category status (their age, religion, gender, etc.), the company may have grounds to terminate the offender before violence occurs.

Among incidents of violence, these types of biases are not uncommon. "Usually, violence isn't random," Singer explained. "There's often some core hatred involved. It often relates to a victim's protected characteristic, and it increases the likelihood of behaviors that meet the DOL standard [for workplace violence]."

Acting quickly to put an end to discriminatory friction also provides a strong shield against liability. In New York City, workers need only prove they were treated "less well" than others on the basis of a protected class (a very low standard compared to federal and state laws) to state a discrimination claim. Companies may also be liable if they knew or "should have known" about hostilities based on a protected class in the workplace and did nothing to stop them.

That said, Singer warned, there are certain preventative steps that companies are not permitted to take. Workplace discrimination law protects victims of both domestic violence and stalking. Abusers/stalkers may come to the workplace, disrupt it and even threaten violence. But it is unlawful to terminate a worker solely on the basis of domestic abuse or stalking victim status.

### Negligent Hiring and Retention

The law requires employers to consider the future potential behavior of applicants prior to hiring. It's not always possible to predict what people will do, Singer conceded, but employers may be held "directly liable" if something in an applicant's history makes it reasonably foreseeable they may cause harm to others.

Singer offered the tragic 1988 case of *Haddock vs. City of New York* as an example of negligent hiring and retention. An applicant with a history of assault and rape convictions was hired to work at a city playground, where he subsequently raped a child. The city was found liable on the grounds that it should have foreseen the potential dangers in making the hire.

However, negligent hiring and retention theories do not permit employers to discriminate broadly against all applicants with criminal histories (see *Criminal Background Checks*, below). New York Correction Law Article 23-A provides a list of factors for employers to consider that may establish a "direct relationship" between past misconduct and the open position—and can help establish that an applicant poses "unreasonable risk."

The factors in Article 23-A include, among other things, how much time has passed since the conviction, the applicant's age at the time of conviction, the seriousness of the charge, any personal references the applicant may have provided (to affirm their moral rehabilitation), and—critically—the specific duties for which the applicant would be responsible if hired. Any past conviction(s) must relate directly to these duties for employers to establish a "direct relationship" or "unreasonable risk" that would render the applicant ineligible for the position.

In general, Singer counseled, don't overreact to past misconduct, and use common sense when determining a link. "If you're hiring a controller and the applicant has been convicted of embezzlement," that may be a direct link, he explained. "But if the applicant is 53 years old and was convicted of marijuana possession when he was 19, that just doesn't apply."

The law does afford companies some protections from negligent hiring and retention claims when they can prove good-faith efforts to make safe hires. If an employer can prove they made reasonable efforts to consider the Article 23-A factors, the worker's criminal history may become inadmissible in a negligent hiring case.

To earn these protections, the employer should draft a memo describing the efforts the company made to investigate the candidate, their responses to the list of factors in Article 23-A, and the reasoning behind their ultimate decision to make the hire. (Prepare this memo with care, Singer warned. Should you face a negligent hiring lawsuit, it will be your best protection in court.)

Some companies, of course, will choose not to hire applicants based on a "direct relationship" (between the open position and past misconduct) and a determination of "unreasonable risk." These companies must, by law, provide the applicant with a letter explaining why they were not hired within 30 days of the applicant's request.

Many employers are uncomfortable with this notification requirement, Singer noted. They fear that by raising the applicant's criminal past as an issue, they increase the risk of a suit, even when they have acted lawfully.

If you're unsure whether it would be more dangerous to hire or not hire—or to inform or not inform—speak with counsel. A skilled employment attorney can help determine which course of action is best for your company.

### Criminal Background Checks

Employers cannot bar applicants from being hired solely on the basis of past criminal convictions. The U.S. Equal Employment Opportunity Commission (EEOC) found that such bans have a disproportionate, negative impact on minority groups. An exception may be "a justifying business necessity," which Singer categorized as "extremely difficult" to prove.

The New York State Human Rights Law forbids employers from discriminating against applicants on the grounds of past arrest(s), a history of being accused of crimes, dropped charges or failed prosecutions. This is why, Singer explained, you may ask applicants whether or not they have ever been convicted of a crime on an application form, but you cannot ask about an arrest record. These laws are in place to protect the wrongfully accused, and they must be respected.

Today, many companies are saving money by conducting background checks on fewer candidates, later in the hiring process, and sometimes, only after making an offer. Singer recommended conducting searches earlier and performing them on all finalists. A sudden lack of interest following a background check, he explained, may be perceived as discrimination, even if the candidate's past indiscretions are unrelated to the decision not to hire.

It's important to note that dishonest applicants are not protected by anti-discrimination laws. If a candidate lies about their criminal record on an application form, the company is justified in refusing to hire them and is strongly supported by case law.

### Respondeat Superior

Some employees cause physical harm to others while acting within the scope of their duties. Under the doctrine of Respondeat Superior, an employer may be found liable for such crimes or torts committed by employees.

It's important to note that this liability is unrelated to blame, Singer explained. He offered the example of a bouncer at a bar. While performing a core duty of the position—removing a belligerent customer from the premises, for example—the bouncer may cause physical harm. The company is not considered negligent, but they may be vicariously liable for those injuries.

### Workers' Compensation

Workers' Compensation provides benefits to employees who suffer workplace injuries or illness. In most cases, these workers are entitled only to these benefits and are barred from suing their employers. But there are important exceptions to this rule, Singer explained. Workers can sue if they can prove "gross negligence" or establish that their employer engaged in "intentional misconduct" that resulted in the injury/illness.

Notably, Workers' Compensation doesn't protect companies against lawsuits filed by third parties. Customers, clients or other guests who come to the workplace and suffer harm can sue.

### Defamation

New York law protects supervisors and co-workers from liability when they say, in good faith, negative things about an employee in the course of evaluating their performance and/or discussing misconduct, up to termination. But these protections do not apply when such statements are made with malice.

Instances of workplace violence are emotional subjects, Singer warned, so the risk of defamation becomes very high. While workers can and must report incidents of harassment, abuse, intimidation and physical assault, they cannot defame the perpetrator as they do so.

To reduce instances of defamation, Singer recommended sharing employment information on a need-to-know basis and keeping employment records as private as possible. Information about employees' history (which may include criminal convictions) should be kept in secure files accessible by a small number of HR professionals. "What employees don't know, they can't keep in the back of their minds—or talk about," Singer explained.

## **Preventing Workplace Violence**

Once employers understand the full scope of the applicable laws, they can create their workplace violence prevention plan. They can institute policies that contain and diffuse workplace tensions

before they accumulate to violence. And in worst-case scenarios, they'll know what to do to protect their employees and their business from further harm.

### Assessing Risks

Singer recommended that companies begin by conducting a risk analysis. By taking a careful look at the workplace itself and reviewing a comprehensive history of workplace incidents, they can identify risk factors and begin to predict the situations that could escalate to violence.

“Depending on the type of business, different risk factors will come into play,” Singer explained. Contact with the public, particularly when money changes hands, constitutes a risk. There's risk involved in permitting employees to be in the workplace alone (and/or in small groups) or outside traditional business hours. Employees are also vulnerable in mobile workspaces like cars, or when required to work in remote or poorly-lit locations.

Some professions are more dangerous by nature. It's standard practice for security guards, for example, to work in isolated, high-crime areas and carry guns or other weapons. They rely on communication systems or alarms to summon help. If these systems are unreliable or impractical, or aid can't reach the location quickly, the inherent risks in these positions become even more substantial.

Lack of training on how to respond to potential violence is also a risk, Singer went on. Companies must ensure that members of their staff—particularly in supervisory positions—know how to behave in a violent or potentially violent situation. If a workplace lacks individuals with this training and temperament, that's another risk factor.

### Physical Precautions

Physical changes are the most straightforward to make, Singer explained, so start there. Your analysis will reveal your company's high-risk areas, so make adjustments to these spaces, or how they're used, to make them safer.

If money changes hands in your business, limit the amount of cash that is readily available and post signage informing visitors. Install better lighting in dark areas. Repair/install high-quality door locks, alarms and video surveillance (as permitted by law). Ensure that every worker has access to a reliable communication system and emergency contact information so they can summon help quickly.

As practical, limit access to the workplace outside of normal business hours, and be sure that employees who must enter and exit can do so safely. Don't expect or allow workers to do things like prop open doors to gain access or re-entry. Install a buzzer or punch-code system instead.

Establish relationships with local police and emergency responders. Post emergency contact information and the address of nearby emergency facilities.

### Policy Precautions

Next, Singer recommended, revamp your policies with preventing workplace violence in mind. Formalize your new guidelines by putting them in writing, in the employee handbook. And then enforce your policies consistently.

Assign a high-level executive to handle all responsibilities related to workplace violence—from implementing prevention methods to handling complaints and managing investigations. Encourage your workforce to come forward with safety concerns, and demonstrate a willingness to make changes based on employee recommendations.

Require employees to report any and all hostilities, from verbal attacks to aggressive behavior to actual assaults and injuries, to this high-level executive as well as their immediate supervisor(s). Any behavior that lies outside standard workplace decorum may be a warning sign that violence is brewing.

As Singer explained, involving a high-level executive in these matters sends a clear message to your workforce: the company takes the threat of violence seriously. It also helps ensure that upper management will be informed about volatile situations—so the company is less likely to suffer incidents it “should have known” were coming.

Provide conflict resolution training as a standard practice. Offer guidelines on what to do when, and then empower your workforce to act. “There have to be employees who really know how to sit two people down when they’re having a problem and help them work it out,” Singer stressed. “This is an incredibly important skill set.”

Establish behavioral guidelines for all work that must take place in remote locations or off site, and maintain consistent expectations across all your workspaces. For workers who must access the workplace alone, in small groups, or at unusual hours, prohibit unsafe practices like propping open doors or sharing alarm codes carelessly. Require all employees to carry identification. And as permitted by law, prohibit employees from carrying any kind of weapon.

Finally, schedule regular performance evaluations and consider offering employee assistance programs. If you stay in touch with your employees, you’re more likely to learn about problems before they become serious. The company may even be able to help.

### The Power of Observation

One of the most effective ways to prevent workplace violence is simple, Singer explained: observe your employees. Long before people become violent, a series of warning signs large and small represent opportunities for the company to take preventative action.

For each individual, normal behavior patterns may be quite different. But once you understand who your workers are and become truly familiar with their day-to-day habits and temperament, you’re in a better position to notice even the smallest changes—and investigate.

Look out for increased or unexplained lateness or absenteeism, an uncharacteristically sloppy appearance, emotional withdrawal or depression (becoming a “loner”), diminished productivity

and paranoia. Angry outbursts are a serious warning sign, as are violations of other company policies, threats, or comments that relate to weapons or violence of any kind.

Never ignore obsessive behavior, grudges, or workers who become defensive and refuse to cooperate with others. Pay close attention if anyone starts behaving like a victim, or claiming to be one. And give special attention to those employees who you know have a small support network.

It's important to remember, Singer stressed, that not all workplace violence stems from workplace-related issues. If a worker with a sunny personality suddenly becomes quiet, the cause may be a personal problem like a family conflict or financial issue. But all serious problems, regardless of origin, elevate stress levels and make violence more likely.

#### When the Worst Happens: Diffusing Violence

Even the best, well-intentioned measures may not prevent all workplace violence. When a situation deteriorates and violence is likely or has occurred, Singer explained, the most important thing to do is remain calm and prevent any further escalation.

Employees who have been trained in conflict resolution will be best able to step forward when tensions rise or an assault takes place. They must treat the situation patiently and express empathy for everyone involved. They must maintain a relaxed appearance and speak quietly. This professional may ask the aggressor to move to a quiet area to talk, while avoiding provocative body language and making absolutely no physical contact.

As tensions are being diffused, it's important for the mediator to point out any positives (e.g., "I'm glad you stopped when you did, now we can talk this over.") But even as the circumstances come under control, Singer warned, this mediator should never move too far away from any exits, for their own safety.

Finally, be ready and prepared to call the police. This option must be available to your workforce at all times.

#### Documenting Violence

Employers should document all instances of workplace violence. But always remember the many, many laws that come into play, Singer counseled. These records can help you evaluate your ongoing safety levels, identify risks and make improvements. But they may also be used against you if an aggressor decides to file a defamation or discrimination lawsuit.

In taking reports or fielding complaints about workplace violence, the company may learn about personal medical conditions, criminal records or other information that they are not permitted to consider in employment decisions. Again, workplace violence triggers high emotions. Workers may make impulsive statements that contain sensitive information.

Singer recommended documenting conversations by hand, carefully, and then drafting a memo addressed to counsel. By sending this record to an attorney for review, Singer explained, there is a better argument that it's protected by attorney-client privilege. Your attorney will likely ask

clarifying questions after reviewing the memo, and will guide you on how to finalize the document for the employee's file.

"The written record is the best defense an employer has," Singer explained. Though your memos, you can establish that the company knew there was a potential problem, took reasonable steps to address it, and made every effort to abide by the law and protect its workers. "You may not prevent the violence in every instance," he concluded. "But you protect yourself from additional harm."

### **Prevention: the Best Cure**

Navigating the many laws that govern workplace violence can be a challenge, Singer said in closing. But the alternative—doing nothing—carries incredible risk. Today, discrimination and other workplace-related lawsuits are being filed in unprecedented numbers. And companies who don't do everything they can to follow the law may make themselves ready targets for litigation.

The good news is that many cases of workplace violence can be prevented. Companies that understand their obligations, analyze their businesses, make common-sense changes and enforce no-nonsense policies can accomplish a great deal. They can help to shield their organizations from substantial legal risk—and make their company a safer place for every employee.

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