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WORKPLACE ISSUES

Violence in the workplace: balancing OSHA guidelines with ADA duties

by Barry Willoughby

The salutary goal of preventing or reducing violence in the workplace and the legitimate desire to prohibit discrimination against job applicants and employees with mental impairments requires employers to carefully balance difficult legal and public policy issues. Addressing the competing interests of reducing workplace injuries or death due to violence along with your responsibility to avoid unfair discrimination is no easy task.

OSHA workplace violence guidelines

Unfortunately, we live in a time when societal violence is a major concern in the workplace. We even have a term for an employee who becomes violent at work: "going postal." The rising tide of workplace violence has led the Occupational Safety and Health Administration (OSHA) to issue numerous guidelines in an effort to reduce the risk.

Workplace violence is covered under OSHA's "General Duty Clause" as well as guidance for specific high-risk industries, such as retail establishments, hospitals, and healthcare institutions.

Moreover, in January, the agency signaled its commitment to addressing the issue by releasing a directive for enforcement procedures involving occupational exposure to workplace violence.

Workers' comp and other employer liability

Employers may face claims under state workers' compensation law or third-party "tort" (personal injury) claims when employees are killed or injured while they're working. In Delaware, for instance, a claim for a workplace injury or death due to violence is compensable if the violence arose out of (or was otherwise motivated by) some aspect of the employment or if the nature of the work placed the employee at greater risk of an altercation or assault occurring.

In addition, you may face liability claims from third parties who suffer injuries or death as a result of employees' violent behavior. An injured third party will generally succeed on such a claim if he can show that you "knew or should have known" that the employee who caused the harm had a propensity for violence or you "negligently hired" the employee.

EEOC guidelines on psychiatric disabilities

On the other hand, the Equal Employment Opportunity Commission (EEOC) has issued guidelines to help prevent discrimination against employees or job applicants with mental impairments. The agency's guidelines on psychiatric disabilities require an employer to prove a "direct threat" of harm to its employees or to third parties before it can refuse to hire an applicant who may pose a danger in the workplace. That isn't an easy standard for the employer to meet.

The EEOC states that:

An employer may refuse to hire someone based on his/her history of violence or threats of violence if it can show that the individual poses a direct threat. A determination of "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job,

considering the most current medical knowledge and/or the best available objective evidence. To find that an individual with a psychiatric disability poses a direct threat, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. This includes an assessment of the likelihood and imminence of future violence.

The EEOC guidance also requires employers to make reasonable accommodations to enable employees with mental disabilities to meet workplace conduct standards. Fortunately, however, "zero-tolerance" policies governing workplace threats or violence are lawful. (For more on the guidelines, see "EEOC releases guidance on mental health conditions" on pg. 3 of our March 2017 issue.)

Recommendations and preventive measures

Balancing two important public-policy considerations is always difficult. As is often the case, the burden for resolving the conflict is placed squarely on the shoulders of employers. The following recommendations will help you formulate a response when an employee's conduct poses a danger in the workplace:

- Focus on any conduct that violates company policy rather than on the employee's status as an individual with a mental impairment.
- Adopt a zero-tolerance policy for violence and threats of violence.
- Implement a "no-weapons" rule in the workplace.
- Offer an employee assistance program that includes psychological counseling, treatment for drug and alcohol abuse, and help for victims of domestic violence.
- Enforce disciplinary standards consistently.
- Consider assisting a terminated employee with continuation of his benefits to ease his transition from the workplace.

Bottom line

Every HR professional is likely to face a point in her

career when she must make a true "Hobson's choice" (e.g., between terminating an employee who poses a threat in the workplace or accommodating a disability that may be behind the employee's threatening or dangerous behavior). There may be no easy answers, but advance planning and adopting clear policies are two essential steps toward effectively managing the risk of workplace violence before a crisis occurs.

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