As the pace and emotional pressures of everyday life impact employees at home and in the workplace, a distressing and tragic trend is occurring—employees are unable to control their emotions at work and violence erupts toward co-employees, customers or third parties. The unfortunate statistics show that homicide is the number one cause of death for women in the workplace and the third overall cause for men and women combined. This trend is expected to increase in times of economic uncertainty, especially as employees face the prospect of lay-offs and corporate reorganizations in many industries.

No employer wants such incidents to occur. Ironically, however, as employers struggle to avoid these potential legal liabilities through creation and enforcement of employment policies, they are met with a host of federal and state laws which may protect certain employee conduct. More importantly, since an employer has no objective “litmus test” for predicting which employee may become violent under particular triggering circumstances, there is no fool-proof way to effectively eliminate the hazard. This brief will discuss factors which must be considered to anticipate, avoid and respond to this threat, including the potential use of and restrictions on fitness for duty (FFD) evaluations.

Causes of Violence
While many incidents of workplace violence appear to be random and unpredictable, most commentators agree that such incidents are predictable and result from the interaction of two dynamics:

- **Personal Factors** – numerous factors occurring in the employee’s personal life, including marital problems, prior history of physical or mental impairments, drug or alcohol abuse or the same circumstances occurring to a member of the employee’s immediate family.
- **Workplace Factors** – interacting with real or perceived factors occurring in the workplace which simultaneously impact the employee, such as potential layoffs or reductions in force, lack of career opportunity, unequal or unfair opportunities for training, benefits, overtime, or harassment by co-employees.

Fortunately for our society and the workplace, most employees are able to control their emotions when these two dynamics collide and somehow deal with their day-to-day side effects. However, since no employee will typically announce in an unambiguous manner to the employer that he or she is no longer able to maintain an emotional balance when dealing with these dynamics and that a sudden and potentially violent physical or emotional outburst is going to occur, the employer cannot conveniently schedule a police, medical, security, or other intervention to preempt such event. In order to have any reasonable chance of predicting and avoiding workplace violence, the employer (through its supervisors) must become more sophisticated in observing, identifying and understanding the signs and symptoms that frequently telegraph that these dynamics are at work and may be about to overwhelm the employee’s ability to cope in a rational manner. Once these signs and symptoms are identified, the employer must take action, which may include a FFD evaluation.

Conflicting Employer Duties

**A. Employer Obligations**

Every employer has a legal duty to prevent violence, and the underlying behavior which may generate it, based upon several different areas of Federal and State law. Perhaps the most well known duty arises out of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which requires an employer to protect its employees against all forms of workplace harassment (e.g., sexual, racial, color, religious, national origin) which may create a hostile or offensive workplace environment. Frequently, employee violence is triggered by such harassing type behavior, which causes the victim (or the victim’s spouse or relative) to react to the harasser, and sometimes to innocent co-employees or bystanders, with a reflexive anger in the form of verbal outbursts or even physical acts. The same anti-harassment rules apply under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.
Under the Federal Occupational Safety and Health Act, 29 U.S.C. § 650 et seq., an employer is required to protect employees against “recognized” workplace safety and health hazards which are likely to cause serious injury or death. OSHA has identified workplace violence as such a hazard, particularly in the health care, retail and taxicab industries. The agency has issued citations with monetary penalties alleging that employers have failed to develop appropriate workplace violence policies. OSHA has also issued guidelines that can be useful in developing such programs, which can be found at its website: www.osha.gov.

In addition to the federal laws, most states have developed liability doctrines under common law, based upon a negligence theory, where an employer may be held liable for the violent acts of an employee if the employer:

- **Negligently hired the employee** – failed to investigate the employee’s work history to determine if there was prior violent conduct;
- **Negligently supervised the employee** – failed to warn or discipline an employee who engaged in threatening conduct;
- **Negligently trained the employee** – failed to provide training to employees regarding prohibited conduct which may give rise to violence and the consequences of engaging in such conduct; or
- **Negligently retained the employee** – failed to terminate an employee who engaged in acts or threats of violence.

**Preventive Action Workplace Violence Policy**

Against this potential liability minefield, an employer must develop an effective written workplace violence policy which must be communicated to all employees if it hopes to have any defense against these potential claims. At a minimum, the written workplace violence prevention policy should include the following elements:

- A stated management commitment to protecting employees against the hazards of workplace violence, including both physical acts and verbal threats;
- A statement that the employer has a “zero tolerance” policy toward threats or acts of violence and will take appropriate disciplinary action against employees who engage in such conduct;
- A list of means and methods for employees to notify the employer of perceived threats of violent acts in a confidential manner;
- An established way to promptly investigate all such threats or violent acts;
- A description of consistent, firm discipline for violations of the policy; and
- An established team of qualified individuals (e.g. human resources, risk managers, legal, medical, security) either within the company or readily available third parties, to respond to a potential or actual incident.

Provide training to managers and employees to identify signs and symptoms of employee behavior which may predict potential violence, such as erratic behavior, employee comments regarding homicide or suicide, provocative communications, disobedience of policies and procedures, presence of alcohol, drugs or weapons on the worksite or physical evidence of employee abuse of alcohol or drug use, which should be reported to the
employer. Consider establishing an Employee Assistance Plan (EAP) to provide assistance to employees who may be experiencing mental or emotional stress before an act of violence occurs.

**Threat Assessment**

In the typical situation, a co-employee or supervisor either observes or learns of questionable, threatening or outright bizarre employee verbal or physical behavior either on or off the workplace which creates a concern, and sometimes a palpable fear, that the employee is about to engage in some type of activity that may result in injury to the employee himself (suicide) or to other employers (threats, hostile acts). The frightened or concerned co-employee or supervisor brings this information to the employer and asks management to address such problems.

Hopefully, the employer has a written workplace violence policy and managers have been trained to be receptive to receiving and responding to this disturbing information from employees. At this stage, the employer must begin an expedited process to focus on this information and commence the preliminary process of assessing whether there may be a threat, and if so, what response, if any, is necessary or appropriate. This response may include a FFD evaluation to be discussed below.

**Caution:** a word of caution is in order at this stage before proceeding with this process. Because of the heightened sensitivity in the media to spectacular and tragic workplace violence incidents, many employers feel compelled to engage in a lightning strike, knee-jerk reaction by immediately terminating or imposing significant discipline upon the questionable employee. Such vigilante-like justice may eventually be found to have no foundation when the subsequent management investigation reveals the proper context in which the conduct or comments occurred that the conduct or comments were ambiguous or misquoted; or, worse yet, that the threat complaints made against the employee were fabricated by other employees for an ulterior purpose. If so, the potential for employment-related litigation is substantial.

**Fitness for Duty Evaluation Options**

Once the employer has received information that an employee has engaged or threatened to engage in physical or verbal conduct which has the potential to cause physical or emotional harm to co-employees or third parties, the employer must make a determination as to what action should be taken. Obviously, if the conduct is sufficiently egregious, there is no need to consider a FFD evaluation and termination or other severe discipline will be warranted.

The use of a FFD evaluation typically arises when the employee’s conduct raises the following issues:

- Does the employee pose a direct threat to the safety of the employee, a co-employee or a third-party who is related to the business?

The employer who is confronted with these questions has several potential options for obtaining an FFD evaluation, within limitations, under the following laws:

- **Americans With Disabilities Act (ADA)**
- **Family and Medical Leave Act (FMLA)**
- **Federal and State Worker’s Compensation Acts**

The application, scope and limitations of these laws are both complementary and conflicting, which requires very careful analysis before seeking an FFD evaluation. As evidenced in this article, the hazard of workplace violence involves numerous potential liability issues under federal and state law. If the employer chooses to follow the recommendations set out above, it can substantially reduce such liability if an incident were to occur.

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