Legal Issues and Operational Risk Management for Workplace Violence and Active Shooter Situations

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Overview

The prevention of workplace violence has emerged as an important safety issue in and around hospitals, healthcare facilities, and off-site locations such as residential facilities. All are considered high risk with regard to workplace violence by the Occupational Safety and Health Administration (OSHA). For healthcare facilities and professionals to adequately prevent and manage workplace violence, implementation of proactive and ongoing violence prevention and intervention efforts is needed. Consideration of and, as applicable, compliance with the Federal OSH Act, OSHA guidelines, approved State OSH acts, state laws, state agency issued guidelines, common law principles, any collective bargaining agreement obligations, and emerging laws, guidelines, and regulations are among the myriad of legal issues that come to bear upon effectively managing this task. Moreover, workplace violence prevention is not exclusively within the purview of human resources, security, employee assistance, or management. It implicates all of these disciplines, and further, should involve those equipped to address legal issues. Multidisciplinary involvement is imperative, drawing on the knowledge, skills, and participation of all these stakeholders.

The Duty to Care

While healthcare workers are at an increased risk for workplace violence, they are also frequently in a key position to prevent violence. All healthcare providers, whether they are physicians, nurses, therapists, or staff, owe a duty to care for patients in varied contexts including such areas as treatment, exposure to infectious diseases, and even workplace violence. In many circumstances they carry the legal and ethical responsibility to warn others about the threat of violence. The nature and scope of the duty is vague; there may be conflicting duties – to patient, coworkers, self – and there is no real consensus on the duty to care, particularly on the extent to which healthcare workers must risk their lives.

A Position Statement adopted by American Nurses Association Board of Directors in 2006 on the duty generally is instructive in the contexts of active shooter and other workplace violence scenarios as well. It suggests that nurses must engage in critical thinking and ethical analysis, in an effort to differentiate between a moral obligation, or duty, and a moral option. It states that a duty (obligation) exists if all four of the following criteria are present:
• The patient is at significant risk of harm, loss, or damage if the nurse does not assist.
• The nurse’s intervention or care is directly relevant to preventing harm.
• The nurse’s care will probably prevent harm, loss, or damage to the patient.
• The benefit the patient will gain outweighs any harm the nurse might incur and does not present more than an acceptable risk to the nurse.

An active shooter scenario in highly dynamic, and ethical dilemmas can arise in ensuring the least loss of life possible. While every reasonable attempt to continue caring for patients must be made, in the event this becomes impossible without putting others at risk for loss of life, decisions must be made.

**Federal Law, Standards, and Guidelines**

While there is no federal law explicitly pertaining to workplace violence, the Federal OSH Act requires employers to comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved state plan. The Act's General Duty Clause requires an employer to provide workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm to employees (29 U.S.C. § 654(a)(1)). An employer also must comply with occupational safety and health standards under the OSH Act (29 U.S.C. § 654(a)(2)).

Employers are not strictly liable for workplace violence under the OSH Act; liability dependent upon the specific, unique facts, looking to what OSHA has done in enforcing the Act as guidance. OSHA has issued citations to employers it finds failed to provide employees with adequate safeguards against workplace violence when the DOL can prove:

• The employer failed to keep the workplace free from a hazard that employees were exposed to
• 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

Situations meeting this criteria have included failing to provide training and protection measures after a worker’s death; finding evidence of ongoing staff assaults by violent patients; and finding evidence of an incomplete hospital workplace violence program accompanied by evidence it had been ineffective in preventing assaults by violent patients.
The American National Standard for Workplace Violence Prevention and Intervention

The primary resource for ensuring compliance with the OSH Act and its General Duty Clause is the American National Standard for Workplace Violence Prevention and Intervention, which provides:

"No organization, large or small, public or private, for-profit or in the nonprofit sector, can assume that it will be immune to the wide range of disturbing, threatening, and violent conduct that falls within the broad definition of ‘workplace violence.’ All organizations ultimately carry a responsibility, both for humanitarian and legal reasons, to protect employees and others who interact with the workplace to the fullest practical extent by taking measures to detect threats at the earliest possible moment, engage in effective intervention through careful Incident Management, and mitigate consequences should violence erupt.”

The Standard requires identification and consideration of numerous factors, including and beyond the Federal OSH Act. Not following the Standard may be considered a violation of the General Duty Clause.

**ASIS/SHRM WVPI.1-2011**

4.2 Legal, Regulatory, and Contractual Requirements

An organization that chooses to adopt workplace violence prevention and intervention efforts shall identify and assess legal, regulatory, and contractual requirements that influence the scope of those efforts and the manner in which they should be carried out. The organization shall consider, among other requirements and recommendations:

- a) Applicable requirements and guidelines promulgated by the U.S. Department of Labor Occupational Safety and Health Administration (Fed-OSHA) related to workplace violence prevention. In particular, it should examine: (i) its duties under the “general duty” clause of the federal Occupational Safety and Health Act; and (ii) specific guidelines pertinent to health care and social service workers, and late-night retail establishments.

- b) Applicable requirements and guidelines established by state Occupational Safety and Health agencies related to workplace violence prevention. In particular, it should examine: (i) duties under applicable state “general duty” clauses; and (ii) specific industry guidelines and requirements promulgated by state agencies.

- c) Common law principles, and local laws and ordinances, that define required prevention efforts, such as (i) premises liability; (ii) respondent superior, (iii) negligence theories, and (iv) discrimination and harassment laws, where threats and violence are motivated by a protected characteristic.

- d) Any obligations under an applicable collective bargaining agreement.

The organization shall consider these requirements, and review them periodically to ensure currency with evolving laws, regulations, and contractual requirements.
OSHA Healthcare Industry Guidelines

Two guidelines, both available online, provide what OSHA refers to as the 5 building blocks for developing an effective workplace violence prevention program:

• Management commitment and employee participation
• Worksite analysis
• Hazard prevention and control
• Safety and health training
• Recordkeeping and program evaluation

State Requirements and Guidelines

In addition to compliance with the Federal OSH Act, duties under approved state “general duty” clauses, as well as state legislation where enacted, must be considered. Not every state has enacted workplace violence legislation, and where they have, scope and content vary.
Common Law Principles, Local laws, and Ordinances

Employers may face economic loss as the result of violence, and possible lawsuits and liability costs, in a number of ways. Some potentially applicable theories and laws include:

- Respondent Superior (employer responsible for the actions of employees performed within the course of their employment);
- Workers Compensation laws (employer responsible for job-related injuries);
- Negligence theories including negligent hiring, retaining a dangerous person, or failure to provide proper supervision, training, or physical safety measures;
- Civil rights, discrimination, and harassment laws, where threats and violence are motivated by a protected characteristic;
- Premises liability (responsible for maintaining a relatively safe environment).

Employers also face conflicting legal pressures from privacy, anti-defamation, and antidiscrimination laws limiting access to employee background info in pre-hire screening or post-incident threat assessment; threat of wrongful termination lawsuit; and the Americans with Disabilities Act effect on the ability to compel a worker to get counseling or treatment.

Employers should screen for applicants who may pose a risk of violence; obtain and
check job applicant’s references, inquire about gaps and frequent job changes, and inquire into criminal records if permitted by law, while remaining mindful of the applicable law.

**Obligations and Disciplinary Protocols Under Applicable Collective Bargaining Agreements**

Unions have a responsibility to protect their members' safety. This often leads union representatives to align with an employer in acting against a violent or threatening employee. In healthcare, education, and social services, unions are playing a key role in developing and implementing successful workplace violence prevention, intervention, and response programs. Industry guidelines and requirements, promulgated by state agencies and available online, include those from New Jersey Health Professionals and Allied Employees Union (HPAE), the American Nurses Association Model “State” Bill “The Violence Prevention in Health Care Facilities Act, and the NASW Guidelines for Social Worker Safety in the Workplace

**Staying Current and Comprehensive**

Employers must consider all these requirements, and review them periodically to ensure currency with evolving laws, regulations, and contractual requirements. Multidisciplinary involvement is a must, involving stakeholders from human resources, security, management, and EAP, as well as legal counsel so as ensure the organization is meeting legal requirements related to violence prevention, and properly navigates the legal issues that can arise during and following an incident.
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