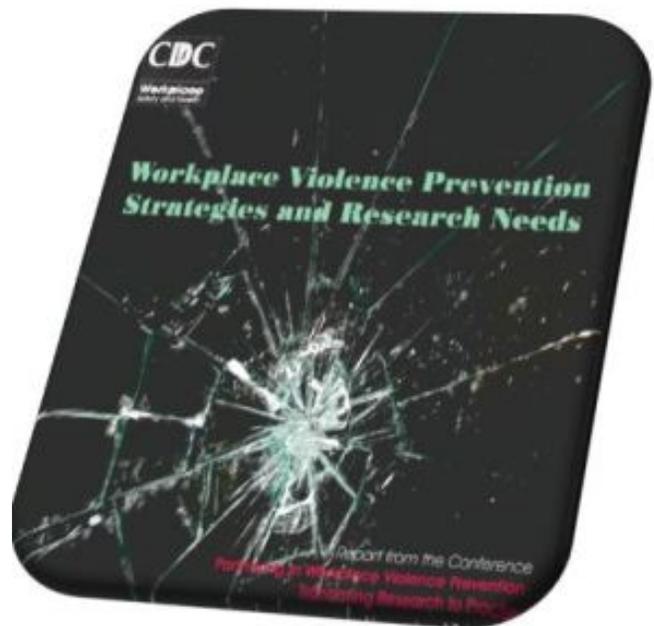


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Workplace Violence: Employer Liability in Virginia and Potential VOSH Penalties

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Workplace violence has become a serious issue for employers throughout the United States. In the wake of the recent mass shootings that occurred in San Bernardino, CA and Hesston, KA, both of which occurred at least in part at an employer's workplace, it is important for employers to be aware of the potential for violence in the workplace and ways in which it can be prevented. Although these two incidents may not have been foreseeable or preventable, these incidents will nevertheless bring more attention to this issue, including by litigants and regulators.



Workplace violence can be categorized in three ways:

1. Violence by an employee;
2. Violence by a stranger; or
3. Violence by a known third party.

Depending on the facts of each incident, an employer may be faced with a lawsuit and/or a regulatory

investigation and enforcement action. In Virginia, the law generally shields employers from liability for physical harm caused to employees or customers by the violent acts of co-employees or third parties. However, even if an employer evades civil liability, employers may still be subject to an investigation by the Virginia Department of Labor and Industry, and incur significant civil penalties.

Given the potential for both a civil suit and a government investigation, employers should implement workplace policies and programs that help keep the workplace safe and free of workplace violence. This article details the potential legal liabilities and penalties employers may incur from workplace violence incidents, and provides guidance on how prevent such incidents or liabilities from occurring.

Vicarious Liability for Employee Conduct

Under the doctrine of *respondeat superior*, an employer is liable for the tortious acts of its employees if the employees were performing their employers' business and acting within the scope of their employment when the tortious acts are committed. When an employer-employee relationship exists, the burden is on the employer to prove that the employee was not acting within the scope of his employment when he committed the violative act. The test of liability is not the motive of the employee in committing the violative act, but whether the act was within the scope of the duties of employment in execution of the service for which the employee is engaged.

Generally, an act is within the scope of employment if:

1. It was expressly or impliedly directed by the employer, or is naturally incident to the business; and
2. It was performed, even if mistakenly or ill-advisedly, *with the intent to further the employer's interest*, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business.

This analysis, established by the Virginia Supreme Court, creates a rebuttable presumption of employer liability as long as a plaintiff can demonstrate an employee-employer relationship. Although an employer may demonstrate that an employee was not acting within the scope of his employment, if evidence leaves the question in doubt, it becomes an issue to be determined by the jury. Virginia courts have been reluctant to resolve scope of employment issues pre-trial, because that is generally an issue of fact for the jury to decide.

Negligent Hiring and Negligent Retention

An employer also risks liability for its employee's violent acts if the employer knew or should have known that the employee was a danger to others. An employer may be liable for negligent hiring for failing to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Negligent retention is a distinct cause of action in Virginia, for circumstances in which an employer knew or should have known of an employee's incompetence, negligence, or unfitness for a position. The federal and state courts in Virginia differ with regard to the necessary elements of a negligent retention claim. Unlike the Virginia state courts, the federal courts require a showing of "physical injury"; generally not an issue in workplace violence cases.

Violence by Third Parties

Employers may be liable to an employee or customer injured by a third party, if the employer knew of the danger or it was reasonably foreseeable. Because an employer has a duty to guard against the foreseeable intentional or criminal conduct of others, an employer may be personally liable if the employer knew of the danger posed by a specific or general reasonably foreseeable outside threat. Virginia courts have traditionally stated that assaultive criminal behavior by unrelated third persons is not reasonably foreseeable, but prior known incidents of violence may be sufficient to raise an issue of fact for a jury to decide.

The Exclusivity Rule of the Virginia Workers Compensation Act

Employers are generally not liable to their own employees for workplace violence where the injury arises out of and in the course of the employees' employment. Personal injury claims are generally preempted by the Virginia Workers' Compensation Act (VCWA), which provides the employees' sole and exclusive remedy against their employers for injuries arising out of their employment.

To the extent that an employee's injury does not come within the ambit of the Act, however, the employee's common-law remedies against his employer are preserved. An injury is only covered by the VWCA if the injury satisfies both the "arising out of" and the "in the course of" prongs of the statutory requirements of compensability. With regard to the "arising out of" prong, Virginia courts apply an "actual risk" test to determine whether a particular injury satisfies these statutory requirements rather than the "positional risk" test – where simply being injured at work is sufficient to establish compensability.

Under the "actual risk" test, an injury only comes within the VWCA if there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done. If an assault is personal to the injured employee and not directed against him as an employee or because of his employment, Virginia courts have held that the resulting injury does not arise out the employment, and the VCWA exclusive remedy does not apply.

VOSH / OSHA Implications

In addition to the potential civil liability that employers face, Virginia Occupational Safety and Health Administration (VOSH) may also cite and fine employers for workplace violence violations. Virginia's federal OSHA-approve State Occupational Safety and Health Regulatory Plan has adopted the majority of the federal OSHA standards, and VOSH's enabling legislation also includes a catch-all provision like federal OSHA's General

Duty Clause. Virginia employers should be aware that workplace violence incidents could spark an investigation by VOSH, and potentially lead to significant fines and penalties under the agency's catch-all requirement to provide a workplace free of recognized serious hazards.



Workplace violence has become a hot button enforcement issue for OSHA during the Obama Administration, citing employers under the OSH Act's General Duty Clause for employers who do not do enough (in OSHA's eyes) to protect their employees from foreseeable violent acts. OSHA's General Duty Clause requires employers to provide employees with a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm. This obligation (and related potential liability) is open-ended because it is designed to protect employees in situations where there are no established regulations.

VOSH likewise does not have a specific regulation or even any general guidance regarding workplace violence. However, federal OSHA has issued numerous guidance documents for employers to consider (and implement) to address the threat of workplace violence. Specifically, OSHA encourages employers to implement written workplace violence prevention programs, conduct extensive training to recognize, diffuse or respond to escalating violent situations, and assess the workplace for unique violence risks. OSHA has relied heavily on these guidance documents in issuing citations, and essentially treat the guidance as though it was a mandatory safety and health standard, rather than just instructive.

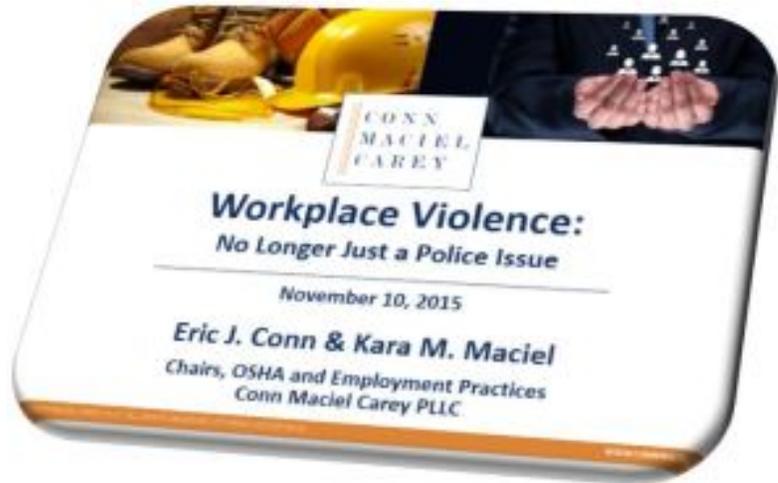
Considering nearly 10 percent of all workplace fatalities result from intentional violent acts, employers will likely see an increase in workplace violence regulatory enforcement.

Measures to Mitigate Workplace Violence

There are several ways in which employers can mitigate the potential for violence in the workplace. Employers should begin by reviewing OSHA's [guidance](#) regarding workplace violence – some of which is specifically related to certain industries such as the healthcare and late-night retail industries. In light of OSHA's increased emphasis on workplace violence issues, employers should review their violence prevention programs or policies

and update them accordingly. Workplace violence assessments should be conducted periodically to help employers improve their workplace violence prevention programs. Employers can conduct visual observations of the workplace and issue employee questionnaires to identify potential hazards. A careful review of recent incidents can also help identify the potential gaps in an employer's workplace violence program.

Training and educating employees on workplace violence issues should also be provided on a routine basis. Training programs focused on topics such as workplace violence, domestic violence, and robbery deterrence help educate employees about the hazards they may face in the workplace, how to prevent protect themselves and co-workers, and how to respond to workplace violence incidents. Finally, employers should make sure that managers and supervisors are vigilant in the workplace. Ensuring that managers and supervisors are focused on resolving employee issues in the workplace before it escalates to violence should be a priority for employers.



For further information regarding an employer's legal obligations and the regulatory and legal risks related to workplace violence, review Conn Maciel Carey's recent [webinar](#) on workplace violence issues presented by [Kara M. Maciel](#) and [Eric J. Conn](#).