

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

December 2008

Volume 17, Number 8

Allison D. Balus, Editor

Workplace Violence: Is Your Company Prepared?

In response to the current financial situation, employers are expressing legitimate and substantiated concerns over the possibility of workplace violence. With increases in lay-offs, concerns about job stability, economic downturns, and the holiday season, employers and employees alike are concerned about increases in workplace violence. According to the National Crime Victimization Survey (NCVS), an average of 1.7 million violent crimes occur annually in the workplace. In fact, according to the NCVS, workplace violence accounts for approximately 18% of all violent crime.

Perpetrators and Victims of Workplace Violence

Perpetrators and victims of violence can have many faces. The perpetrator could be a stranger with criminal intent, clients or customers who feel as if they have been

wronged, or family members or significant others of the clients or customers. The perpetrator could also be a former or current employee, supervisor, or manager or family members or significant others of the employee, supervisor, or manager. Victims could be employees, customers, clients, visitors, vendors, or contractors.

Potential Liability

Employers could encounter a broad range of legal liability for workplace violence, including: negligent hiring, negligent supervision/retention, common law negligence, workers' compensation, and OSHA fines. From a potentially violent employee, the employer could face a lawsuit claiming defamation, invasion of privacy, disability discrimination, and, in the case of a unionized workforce, issues with the collective bargaining agreement or unfair labor practice charges.

Indicators of Potential Workplace Violence

Employers can greatly decrease the chances of workplace violence by identifying potential perpetrators. Employers should train their employees, supervisors, and managers how to spot someone who is a possible perpetrator of workplace violence.

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Employers and their employees should look for the following behavior to predict and prevent workplace violence:

- Identify individuals who act inappropriately or aggressively through their intimidating, harassing, bullying, or belligerent conduct.
- Watch for individuals making inappropriate references to guns or knives or even possibly bringing a weapon to the workplace.
- Identify individuals who have numerous repeated conflicts with customers, co-workers, or supervisors.
- Be aware of individuals making threats or statements about harming someone, showing a fascination with incidents of workplace violence, indicating approval of the use of violence to resolve a problem, or making statements concerning desperation over family, financial, or other personal problems.
- Recognize when someone has a substance abuse problem with either drugs or alcohol.
- Identify extreme changes in someone's normal behavior, including stress and/or depression.

Approaches to Preventing Workplace Violence

There are three general approaches to preventing workplace violence: Environmental, Administrative/Organizational, and Behavioral/Interpersonal. It is appropriate for employers to use some variation of all three general approaches to preventing workplace violence.

With the environmental approach, an employer should ensure that its facilities have adequate inside and outside lighting, secured entrances and exits, and possibly security hardware, including turnstiles, key cards, smart cards, or biometric systems.

Security guards may also be appropriate in some workplaces. One consideration for an employer considering security guards is whether armed versus unarmed security guards would be appropriate at its facility. Another possibility for employers is to have specialized customer or client meeting rooms away from where their employees typically work. Employers may also want to consider metal or explosive detectors.

The next approach, Administrative/Organizational, requires an employer to have different programs and policies in place. For example, when hiring, an employer needs to corroborate the information on applications and resumes, because many contain intentional misstatements of material facts. Employers should also conduct background investigations including, for instance, criminal history, education, previous jobs, and references. When procuring information from a "consumer reporting agency," employers must provide notice and obtain authorization from the employee before procuring any background information and provide notice to the employee if relying upon the information obtained in making an employment decision. An employer's failure to comply could result in liability.

An employer should have a Threat Assessment Team comprised of at least one representative from Human Resources, one from Security, one from the facilities/operations department (someone who will know the exits), and an executive. Employers should also have an Employee Assistance Program ("EAP") and promote its EAP so that employees know about its existence and resources.

As for policies, employers should have policies addressing workplace violence policy, harassment, and weapons (*i.e.* whether concealed weapons are permitted

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on the employer's property). Employers may also want to consider having an e-mail monitoring policy, including notice to employees that e-mail messages are not private and may be subject to monitoring, and a phone use policy, again providing notice to employees that the employer may monitor employees' calls for quality control purposes. Lastly, when terminating an employee, consider the possibility of a violent response and plan ahead. This plan should necessarily include a script of what the representative will say to the employee and possibly the presence of a security guard.

The final approach, Behavioral/Interpersonal, requires some training of both employees and supervisors/managers. Employers should train its employees to consider the possibility that workplace violence could occur. Violence in the workplace can happen anywhere. Employees should be aware of this possibility. Employers should train its staff to anticipate, recognize, and respond to potential violence in the workplace, including how to use de-escalation and personal security techniques. Employers should also train its staff on how to report violent, inappropriate, disruptive, or threatening behavior. Employers should train its supervisors and managers on how to create a positive work culture that supports employees and develop skills for displaying compassion and concern for employees, including understanding the employer's EAP. Most importantly, employers should train its supervisors and managers on how and when to discipline employees. Workplace violence can likely occur at the time of termination or when an employee is receiving discipline.

Conclusion

Given the state of our economy, the possibility of increased lay-offs, and employees' heightened concern over their

financial well-being, it is possible that the number of violent crimes in the workplace will increase over the next year. During these uncertain and risky times, employers should be aware of the legal minefield of workplace violence, especially given the legal ramifications and the decrease in productivity that could result from workplace violence. When in doubt about what to do about workplace violence issues, contact an attorney for assistance.

Quinn H. Vandenberg

New Rule Requires Federal Contractors to use "E-Verify"

Starting January 15, 2009, certain federal contractors and subcontractors will be required to use "E-Verify" to ensure that employees are eligible to work in the United States. E-Verify is a free, Internet-based system operated by the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), in partnership with the Social Security Administration ("SSA"), that enables employers to verify employment eligibility by checking the information provided on an employee's Form I-9 against records contained in the SSA and USCIS databases. The rule applies to solicitations issued and contracts awarded after January 15, 2009.

Contracts. In general, the E-Verify requirements apply to prime federal contracts with a performance period of longer than 120 days and a simplified

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acquisition threshold of over \$100,000, as well as related subcontracts for services or construction valued over \$3,000. The requirements also apply to indefinite-delivery/indefinite-quantity contracts modified after January 15, 2009, if the remaining period of performance extends past July 15, 2009, and the amount of work or number of orders expected under the remaining performance period is “substantial.” The requirements do not apply to contracts that include only “commercially available off-the-shelf” items (or minor modifications thereto) and related services.

Employees. The requirements apply to employees working in the United States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Employers must use E-Verify for all newly hired employees and all existing employees that are “employees assigned to the contract,” *i.e.* those directly performing work under the contract. Employers may verify their entire workforce (new hires and existing employees), including those that are not assigned to the contract.

Timelines. Employers not yet enrolled in E-Verify have 30 days from the date the contract is awarded to enroll. Those employers then have 90 days from the date of enrollment to initiate verification inquiries for existing employees who are assigned to the contract and to begin using the system to verify newly hired employees. After the 90-day “phase-in” period, employers must initiate verification inquiries for each newly hired employee within three business days after the employee’s start date and must continue to use E-Verify for all new hires throughout the contract’s performance period. Employers already enrolled in E-Verify must initiate verification of newly hired employees within three business days of their start dates. Those employers then

have 90 days from the date the contract is awarded to begin using E-Verify for existing employees who are assigned to the contract.

Employers that choose to verify their entire workforce must initiate the E-Verify query for each employee within 180 days.

MOU Requirements. To use E-Verify, employers must sign a Memorandum of Understanding (“MOU”) with the SSA and the DHS in which they agree to certain requirements. Some of these requirements include:

- **Posting Notice.** Employers must post a notice provided by the DHS indicating their E-Verify participation and an anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. The postings must be in a prominent place and clearly visible to prospective employees and all employees who are to be verified through the system.
- **Using Photo Identification for Form I-9.** The identity documents used for verification purposes for the Form I-9 (so-called “List B” documents) must contain a photograph (unless an accommodation applies).
- **Recording Verification Number on Form I-9.** Employers must record the case verification identification number on the employee’s Form I-9 or print a copy of the transaction record and retain it with the Form I-9.
- **Nonconfirmation Notices.** If the SSA or the USCIS is unable to verify information presented by the employee, it will issue a “Tentative Nonconfirmation Notice.” When this occurs, the employer must provide the employee a written notice, called a “Notice to Employee of Tentative Nonconfirmation.” If

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the employee chooses to contest the nonconfirmation notice, the employer must provide the employee a second notice, called a “Referral Letter,” which contains information about resolving the nonconfirmation and contact information for the SSA or the USCIS. The employee then has eight federal government workdays to visit an SSA office or call the USCIS to initiate the process of resolving the discrepancy.

- **Notifying DHS.** An employer must notify the DHS if it continues to employ any employee for whom it has received a final nonconfirmation, and the employer is subject to civil penalties of \$500 to \$1000 for each failure to notify the DHS. If an employer continues to employ an employee after receiving a final nonconfirmation, and the employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it knowingly employed an unauthorized alien in violation of the Immigration and Nationality Act.
- **Unauthorized Use.** Employers may not use E-Verify for pre-employment screening of job applicants, support of any unlawful employment practice, or any other use not authorized by the MOU.
- **Periodic Visits by DHS and SSA.** Employers must allow the DHS and the SSA to make periodic visits for the purpose of reviewing E-Verify-related records such as the Form I-9. Employers must also allow the DHS and the SSA to conduct interviews of employees hired under the program.

that their Form I-9s are in good shape given the potential for audit. Employers may also need to adjust their personnel record-keeping systems to be able to record the E-Verify status of any new hires and employees assigned to the contract to ensure that all employees that must be verified through the system actually are.

Alison A. Dempsey

New Form I-9 and Regulations

Yesterday, new regulations governing Form I-9s were issued by the Department of Homeland Security and published in the Federal Register. The new rules and the resulting new Form I-9 will go into effect on February 2, 2009. As of such date, all employers will be required to use the new Form. The new regulations make a number of changes to the list of approved documents that can be accepted for the Form I-9, including the ability to accept expired documents. The new Form adds an additional category of status to the employee attestation for “noncitizen nationals” and also includes other format changes. Now that the new regulations and Form have been issued, more information on the new rules and their impact on processing Form I-9s, as well as the changes to note with the new Form, will be forthcoming.

Amy Erlbacher-Anderson

Employers who will be participating in E-Verify should get ready to meet the applicable deadlines and should make sure that their Form I-9s are in good shape given the potential for audit.

As mentioned above, the E-Verify requirements apply to solicitations issued and contracts awarded after January 15, 2009. Employers who will be participating in E-Verify should get ready to meet the applicable deadlines and should make sure

Is Your Company One of the Best Places to Work in Omaha?

Find out if your company or organization is one of the 'Best Places to Work' by registering now to participate in the Best Places to Work Omaha 2009.

This event is an annual opportunity for Omaha area employers to learn more about the engagement and satisfaction of their employees through a confidential, online employee survey. Research has clearly shown that more engaged employees tend to stay longer, serve customers more effectively, and help drive a more profitable company. For companies who have more than fifty employees there is an opportunity to be recognized as one of the 'Best Places to Work in Omaha 2009' at a special luncheon held in conjunction with the Annual Baird Holm Labor Law Forum on May 7, 2009. This competition will recognize the top five employers in both a 50-250 employee category and a more than 250 employee category.

The Best Places To Work is an annual initiative of Baird Holm LLP, in joint sponsorship with the Greater Omaha Chamber of Commerce, created in 2005 with several goals in mind: recognizing and honoring those companies that have created positive work environments, identifying and sharing best practices, promoting Omaha and Omaha-area employers, and providing to participating companies valuable feedback and data that will assist them in measuring levels of employee satisfaction and engagement.

Key dates to remember

- Survey Registration: November, 2008 to February 4, 2009
- Online Survey Conducted: February 9 - 21, 2009
- Survey Results Available: First week of March, 2009
- Best Places to Work Luncheon at the Baird Holm Labor Law Forum: May 7, 2009

Register your company

To register your company for the Best Places to Work Omaha 2009, visit <http://www.qmrinc.com/bestplaces09/omaha>

For more information on the Best Places to Work 2009, please visit:

<http://www.bairdholm.com/news-events-11.html>



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- (1) Also admitted to practice in Iowa
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BAIRD HOLM
1500 Woodmen Tower
1700 Farnam St
Omaha, NE 68102
402.344.0500
402.344.0588
www.bairdholm.com

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