Healthcare industry at risk

*The threat of workplace violence*

Thursday, October 5, 2017
Speakers

Mario A. Barrera, **Partner**

- More than 30 years of experience.
- Regularly handles complex litigation, provides extensive counseling, and conducts investigations and trainings.
- Broad knowledge regarding:
  - All federal and state discrimination laws (e.g., Title VII, ADEA, PDA, ADA, FMLA)
  - Federal wage and hour laws under the FLSA
  - Other key federal laws, such as NLRA, OSHA and ERISA
  - Torts, contract, and non-compete agreements
- Certified in labor and employment law by the Texas Board of Legal Specialization.
- Fluent in Spanish.
James Hughes, Associate

James advises clients on both day-to-day legal questions, and litigation. He has been involved in the full life cycle of numerous disputes, from pre-suit negotiations and EEOC complaints, initial pleadings, discovery, motion practice, judgment, appeal, and settlement.

James has litigated commercial and employment contracts, wrongful-termination claims, theft of trade secrets, patents and trademarks, and other areas of law. James has extensive experience with federal motions practice and federal procedure.

While acting as a prosecutor in the Attorney-Loan program with the City of Austin, James first-chaired five criminal-misdemeanor trials, successfully obtaining guilty verdicts in every trial.

James believes the hallmarks of good representation are responsiveness, attention to detail, and creativity. Every case is unique, and this means that attorneys must be proactive in developing and prosecuting a strategy that is tailored to each case.

Prior to joining Norton Rose Fulbright, James served two judicial clerkships, at the Western District of Texas (Judge Sparks) and the Texas Supreme Court (Justice Guzman).
Speakers

Emily Wolf, Associate

- Member of the Commercial Litigation team
- Worked for Norton Rose Fulbright as a briefing clerk in her final year of law school
- She holds a B.A. in Biology from the University of Chicago
- J.D. from The University of Texas School of Law
Continuing education information

• We have applied for 1.0 hour of California and Texas CLE credit and 1.0 hour of New York transitional CLE credit. For attendees outside of these states, we will supply a certificate of attendance which may be used to apply for CLE credit in the applicable bar or other accrediting agencies.

• Norton Rose Fulbright will supply a certificate of attendance to all participants who:
  • Participate in the web seminar by phone and via the web
  • Complete our online evaluation that we will send to you by email within a day after the event has taken place
Administrative information

• Today’s program will be conducted in a listen-only mode. To ask an online question at any time throughout the program, click on the question mark icon located on the toolbar in the bottom right side of your screen. Time permitting, we will answer your question during the session.

• Everything we say today is opinion. We are not dispensing legal advice, and listening does not establish an attorney-client relationship. This discussion is off the record. You may not quote the speakers without our express written permission. If the press is listening, you may contact us, and we may be able to speak on the record.
Workplace violence: All too frequent
Workplace Violence in the Healthcare Industry

- Healthcare and social service workers face a significant risk of job-related violence.
- For healthcare workers, assaults comprise 10-11% of workplace injuries involving days away from work, as compared to 3% of injuries of all private sector employees (source: https://www.osha.gov/Publications/osha3148.pdf).
- The National Crime Victimization Survey (NCVS) estimates that between 1993 and 2009, healthcare workers had a 20% overall higher rate of workplace violence than all other workers (source: https://www.osha.gov/Publications/osha3148.pdf).
Nurse stabbed by patient in the face with a pen at UMass Memorial Hospital (September 2017)
2 dead, 6 injured in a shooting at a Bronx hospital (June 2017)
1 critically injured in a stabbing at Massachusetts hospital (June 2017)
1 critically injured in a shooting at a San Diego biotech company (June 2017)
Nurse sexually assaulted by prison inmate-patient at Illinois hospital (May 2017)
4 dead, 2 injured in a shooting at a UPS facility in San Francisco (June 2017)
4 dead in a shooting at a Pennsylvania supermarket (June 2017)
'Good Samaritan' killed, 3 hurt - including shooter -- in shooting at Rolling Oaks Mall (January 2017)
6 dead in a shooting at a cabinet business in Orlando (June 2017)
Other recent examples of workplace violence

**November 2014:**
Nordstrom’s store in Chicago, Illinois
1 death (shooter)

**October 2014:**
Marysville Pilchuck High School in Seattle, Washington
5 dead (including shooter)

**September 2014:**
Resort in Hoover, Alabama
1 dead

**April 2014:**
FedEx Warehouse in Atlanta, Georgia
1 dead, 6 injured

**December 2015:**
Inland Regional Center in San Bernardino, California
16 dead (including shooters), 22 wounded

**November 2015:**
Planned Parenthood Clinic in Colorado Springs, Colorado
3 dead, 9 injured

**May 12, 2017:**
Pine Kirk Care Center in Kirkersville, Ohio
4 dead (including shooter)

**May 5, 2017:**
Yangfeng Automotive Interiors in Fountain Inn, South Carolina
2 injured

**April 24, 2017:**
Dignity Team Health in Dallas, Texas
2 dead (including shooter)

**April 10, 2017:**
North Park Elementary School in San Bernardino, California
3 dead (including shooter), 1 injured

**March 1, 2017:**
Walmart in Orlando, Florida
1 dead
Workplace violence is a foreseeable risk
Workplace violence – general definition

• Any act or threat of physical violence, harassment, intimidation or other threatening disruptive behavior that generates a reasonable concern for safety from violence

• It ranges from threats and verbal abuse to physical assaults and even homicide

• It covers actions/conduct both onsite or offsite, so long as it is related to the business.

• The FBI defines an “active shooter” as “an individual actively engaged in killing or attempting to kill people in a populated area”
  • Source: https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-resources
Workplace violence - statistics

• In 2015, there were 417 workplace homicides in the U.S., an increase of 2% from 2014 (409) and 3% from 2013 (404). 2012 saw a spike in homicides (475) and previous years had seen somewhat of a decline: 2011 (468), 2010 (518) and 2009 (542) (Bureau of Labor Statistics). [Note: 2016 numbers will not be available under the end of 2017]

• In 2015, assaults and attacks including homicides made up 22% of all fatal occupational work injuries, which was the third straight year of decline. (Bureau of Labor Statistics)

• In 2012, 23% of the workplace homicides with female victims were committed by robbers, 21% were by relatives or domestic partners and only 8% by coworkers. The figures for male victims was very different: 36% by robbers, 14% by coworkers and only 3% by relatives or domestic partners
Workplace violence - statistics

• Between 2005 and 2009, 70% of workplace homicides committed by assailants/21% were committed by work associates (National Center for the Victims of Crime)

• In 2014, approximately 27% of adult workers reported being threatened, bullied or harassed and 72% of employers deny, discount, encourage, rationalize or defend it (Workplace Bullying Institute Study)

• Average hospitalization cost for each firearm related injury is $75,884 (The Crime Report December 2, 2014)

• Total hospitalization costs to treat victims of firearm related injuries is approximately $2 billion per year (The Crime Report December 2, 2014/American Public Health Association)
An expanded “duty of care”
Under the General Duty clause of the Act (Section 5(a)(1)), employers are responsible for providing a safe and healthful workplace for their employees that is “free from recognizable hazards that are causing or likely to cause death or serious harm”

According to OSHA, nearly 2 million American workers have reported being victims of workplace violence. The number of unreported cases is likely much higher.

In 2011, OSHA issued a directive on Enforcement Procedures for Investigating or Inspecting Incidents of Workplace Violence. It established uniform procedures used by OSHA field staff to investigate complaints of workplace violence and conduct investigations into violence prone industries such as health care, social service and retail establishments.
Occupational Safety & Health Administration Act

- OSHA also has a webpage that specifically addresses the prevention of workplace violence [https://www.osha.gov/SLTC/workplaceviolence/](https://www.osha.gov/SLTC/workplaceviolence/)

- OSHA has also published several guidance documents for late-night retail establishments and health care/social service workers
  - [https://www.osha.gov/Publications/osha3153.pdf](https://www.osha.gov/Publications/osha3153.pdf)
  - [https://www.osha.gov/Publications/osha3148.pdf](https://www.osha.gov/Publications/osha3148.pdf)

- On December 7, 2016, OSHA issued a Request for Information concerning the prevention of workplace violence in the healthcare and social assistance fields. Comments will be collected thru April 6, 2017
American National Standard

- Approved September 2, 2011
- Designed to help identify and prevent threatening behavior and violence affecting the workplace and to better address and resolve threats and violence that have actually occurred
- Does not create new legal obligations
- Meant to serve as a tool and resource that organizations of any size can use to evaluate, develop and implement policies, structures and practices related to workplace violence
Anticipating workplace violence issues
Zero-Tolerance Policies

- Is there a workplace violence policy in place?
- Does it have “zero tolerance” language?
  - Without such a policy, employees who behave in an unacceptable manner are governed by the misconduct language in the termination policy – a subjective situation at best
- Train supervisors and employees to be vigilant of and recognize hostile/violent situations and to report them immediately
- Documentation of such incidents is key
- Ensure visitor and vendor knowledge of and compliance with workplace violence policy
  - Signage
  - Visitor log
  - Security guard
  - Visitor badges
Employee searches

• Policies should provide that employer reserves the right at all times to search employees’ surroundings and possessions
  • Includes clothes, desks, lockers, bags, briefcases, lunch boxes, company vehicles, and any vehicles parked on company’s property
• Policy should also state that employees are to have no expectation of privacy while on property, except restrooms and other similar areas
• Refusal to allow search must be disciplined
• If policy has not been followed and/or applied consistently, re-issue policy and have employees acknowledge it – and then start applying it
Monitoring Computer Usage

• Policy should state that all contents of the company’s IT resources and communications systems are the property of the company

• Employees should have no expectation of privacy whatsoever in any information or communication transmitted on the company's electronic information and communications systems

• Employer should reserve the right to monitor every employee's activities using the company's IT resources and communications systems

• Employees consent to such monitoring by acknowledging receipt of this policy and use of such resources and systems
Monitoring Computer Usage

• Policy should state that company computers, networks, communications systems and other IT resources are intended for business purposes only – be prepared to apply this language strictly

• Employer should apply policies prohibiting discrimination and harassment to the use of the company's IT resources and communications systems

• Question remains as to whether employers can monitor social media postings – public vs. private setting

• What if employee brings objectionable social media post to employer’s attention?
ADA Concerns

• A disability is never an excuse to violate a workplace rule

• Employees with disabilities can be held to same workplace conduct standard as every other employee

• EEOC:
  • “An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity.”

• If punishment is less than termination, the employer must provide accommodation in the future, absent undue hardship

• But since accommodation is prospective, the employer is not required to excuse past objectionable conduct
ADA concerns

• The ADA does not protect employee who are deemed a direct threat
• The ADA also does not require an accommodation if doing so would result in an undue hardship to the employer
• In certain circumstances, a fitness for duty exam may be helpful
• Consider impact of other anti-discrimination laws (e.g. has there been a consistent application of workplace rules to all employees)
Investigating the Incident

- Deciding when to investigate and take action – always at the first instance; regardless of the employee’s position, seniority and lack of prior disciplinary record
- Investigate reports and threats of workplace violence immediately
  - Consider suspending employee during investigation
- Call law enforcement, if appropriate
- Depending on the seriousness of the incident, consider obtaining temporary restraining orders on behalf of employees who were subjected to violence or credible threats of violence
- Notify workplace violence victims of availability of worker’s compensation benefits
- Record and report incidences of workplace violence on OSHA record keeping logs or to OSHA, if required
Termination Protocols
Planning the termination

• Establish protocol
• Determine location
• Develop exit/escort strategy
• Timing—when is best to deliver the news? Consider waiting until the end of the workday and end of week to terminate
• Make arrangements for a courier service to return the employee’s personal belongings
• Consult with IT to anticipate technology and password issues
• Have a security plan in place—plan in advance what needs to be done if the employee becomes violent
• If there appears to be a high risk of hostility, consult with local police and advise them of the time that termination will occur and inform them of any concerns
Post-termination

• Prevention team de-briefing
• Develop due diligence on hostile cases
• Follow-up with any out-placement services regarding transition
• Continue to support those who were impacted by hostile cases
• When appropriate, make sure employees know of the termination, and so will be on the alert if the individual attempts to re-enter the workplace
“Best practice” workplace violence program
Core program components

- Pre-employment screening
- Policy and procedures
- Prevention team
- Risk vulnerability audit
- Training
- Incident response protocol
- Post critical-incident response team
- Buy in by senior management (very important)
Practical steps for protection of people and business

• Education and training
  • Vast majority of law enforcement agencies endorse “run, hide, fight” protocol
  • If shooter’s location is known, and there is a clear path of escape, best option is to “run”
  • Where clear path of escape is not available (high rise buildings), next best option is to “hide”
  • Where no path of escape is available and shooter has breached area of shelter for workers, final option is to “fight”
  • Because first few minutes of active shooter event are critical, immediate and effective response is key so employer should drill at least annually
Practical steps for protection of people and business

• Emergency notifications
  • Employer should implement an emergency notification system that can deliver accurate information to all employees
  • An e-mail blast prepared in advance with predetermined text for an active shooter situation may be an effective option
  • A blast voice message to all workplace telephones, including cell phones, would be another option
  • An automated activation of intercom function or speaker phones throughout the offices would be yet another option
  • If a broadcast message cannot be completed within a couple of minutes of crisis, it serves of little use
Practical steps for protection of people and business

- Employee initiative
  - Employees should be trained to take the initiative and immediately take action on their own without waiting for an announcement
  - Employees should be trained to listen for loud pops, booms, impact sounds, and especially screams
  - Employees should also be trained to look for other obvious signs such as multiple employees running from a situation
  - Training is key
Practical steps for protection of people and business

- Physical security
  - A security review of the physical facility should be conducted by an expert on an annual basis
  - Accessibility to the workplace by general public should be restricted to areas of a business necessity
  - Consideration should be given to adding locks to interior doors to prevent or block movement by shooter
  - When new office space is being planned, careful consideration should be given to the security aspect (incorporating glass walls or large open areas)
Practical steps for protection of people and business

- Enhanced training for receptionists
  - Specialized training should be provided for office receptionists, triage nurses, and anyone else at entrances
  - They should be prepared to quickly communicate the presence of suspicious or potentially hostile visitors
  - A panic button should be easily accessible to the them
  - They should also be given a clear and readily accessible retreat route to a safe area
Practical steps for protection of people and business

• Coordination with third parties
  • It is critical for employer to open lines of communication with all relevant third parties (adjacent tenants in high rise; landlord’s key personnel, etc.)
  • If a property management company does not take a security initiative, the employer and other key tenants should arrange for a training presentation themselves
  • Employers should have at least annual discussions with building security and management to review response to a crisis
  • If there is a building intercom system, all tenants and building management should understand what will be broadcast regarding a crisis
Practical steps for protection of people and business

• Workplace violence programs
  • Adopt and implement a comprehensive workplace violence prevention program
  • This begins with a published policy statement prohibiting any and all forms of workplace violence
  • It includes training for all employees on detecting and reporting problematic employee behavior
  • It includes training concerning “run, hide, fight” [https://www.youtube.com/watch?v=5VcSwejU2D0](https://www.youtube.com/watch?v=5VcSwejU2D0)
  • It must also address domestic violence in how to both detect and protect victims and other employees
Conclusion

• Workplace violence can happen anywhere and at any time
• It is not unique to large employers because of the size of workforce
• All employers are vulnerable
• Be vigilant and prepared
• Do not wait until a crisis before implementing the appropriate policies, protocols and training