

ELEMENTS OF AN EFFECTIVE WORKPLACE VIOLENCE POLICY

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The possibility of workplace violence is a reality every employer must address. Approximately two million Americans are victims of workplace violence each year.¹ Estimates of the annual cost of workplace violence nationwide have been as high as \$35 billion.² This includes lost productivity, employee turnover, increased training and security expenses, and healthcare costs. In 1998, nearly 16 percent of all workplace fatalities resulted from violent acts.³

An effective workplace violence program can reduce the incidence of workplace violence and, thereby, increase productivity.⁴ Implementation of a workplace violence program and enforcement of any written policy resulting from that program can be persuasive evidence for an employer in litigation arising out of violence in the workplace, but only if the employer complies with all aspects of its policy. From a liability standpoint, a policy that exists on paper, but is not enforced, is worse than no policy at all.

This article begins with a brief discussion of workplace violence in general, the forms it may take, and the possible responses available. It next presents an overview of the legal standards applicable to employers in the context of workplace violence and offers a model setting forth four key elements for an effective workplace violence program. It also discusses the role of the attorney in establishing and enforcing a workplace violence policy, and concludes with a checklist of issues to consider in drafting a written workplace violence policy.

Forms of and Responses to Workplace Violence

Workplace violence may take many forms. Violence that injures people or damages property is but one form. However, workplace violence also can include less sensational incidents that are often not reported: threats, intimidation, cyberstalking, physical stalking, and other forms of harassment. Moreover, acts of workplace violence are not always committed by employees. Organizations also must consider the possibility of violence by the spouse, ex-spouse, or significant other of an employee. Additionally, organizations should not ignore the possibility of violence by customers, suppliers, competitors, or even total strangers.

The dynamics of workplace violence are not always the same, but in many instances workplace violence can be analyzed in terms of an "emotional hill" that likens a person building up to an attack to someone climbing a hill.⁵ To reach a state of mental excitement sufficient to allow him or her to harm others, the person must reach an emotional summit.

The hill consists of five stages. The first stage is the *low anxiety* stage. In this stage, staff members should be alert to a person showing non-directed energy, such as pacing or hand wringing. The second stage is the *high anxiety* stage, which a person may evidence by using a loud voice or asking to speak with someone "in charge." The third stage is *verbal abuse*; the person in this stage is belligerent, angry, challenging authority, and testing the limits. He or she may yell or curse. The fourth stage (the peak of the emotional hill) is *physical abuse*. In this stage, the person has suffered a total loss of control and is a danger to himself and others. The final and fifth stage is *conflict resolution*, representing that person's descent from the peak of physical abuse. This is the time to re-engage communication with the person who has been acting out, to assess the needs of the perpetrator, the victim(s) or target(s), and

staff members present during the event, and to evaluate the organization's response to the incident.

Although the ascent up the hill usually takes longer than the descent, this is not always the case. In fact, someone could jump right into physical abuse and bypass the anxiety and verbal stages altogether. Nevertheless, the emotional hill model is useful. Cool-headed employees who know how to recognize what stage a person is in and how to respond at each stage may be able to prevent an incident from becoming physically violent. For example, an employee who recognizes that a person is in the high anxiety stage may be able to use verbal de-escalation techniques to address the concerns of the person acting out before the conflict escalates into verbal or physical abuse. Similarly, an employee dealing with someone who is verbally abusive may be able to prevent physical violence by using body language and "command and consequence" techniques. An example of such a technique would be to say to the perpetrator, "Sit down and lower your voice or I will call our security personnel."

Standards Applicable to Employers

The law of workplace violence is not contained within any single statute; rather, it is comprised of federal and state statutes and regulations, as well as principles established by case law. A detailed treatment of the law of workplace violence is beyond the scope of this article, but a brief review of the most important principles may help in understanding why employers should implement workplace violence programs and how those programs should be structured.

Statutes

The most all-encompassing federal statute relating to workplace violence is the General Duty Clause of the Occupational Safety and Health Administration ("OSHA") Act of 1970, which provides:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.⁶

Another federal statute with some applicability in this area is the Violence Against Women Act ("VAWA").⁷ This statute, amended in 2000,⁸ established within the Department of Justice an Office on Violence Against Women. The Office has instituted "best practices" for employers to create a safe workplace, including recommendations to establish sound workplace policies, train employees, develop safety plans, provide adequate security, and develop intervention strategies.⁹

Other statutes with some applicability in the area of workplace violence include the Americans with Disabilities Act ("ADA")¹⁰ and Employee Polygraph Protection Act ("EPPA").¹¹ The ADA may come into play when an employer or prospective employer believes an employee or prospective employee has a disability, such as a mental impairment, that poses a threat to the safety of others in the workplace. The ADA also governs the types of questions an employer may ask a job applicant; for example, it prohibits prospective employers from asking applicants questions pertaining to their medical history and questions about mental illnesses.

The EPPA generally prevents employers engaged in interstate commerce from using lie detector tests either for pre-employment screening or during the course of employment, with certain exemptions. The EPPA does not apply to federal, state, and local governments. In addition, lie detector tests administered by the federal government to employees of federal contractors engaged in national security intelligence or counterintelligence functions are exempt.

The EPPA also includes limited exemptions where polygraph tests may be administered in the private sector, subject to certain restrictions, to (1) employees who are reasonably suspected of involvement in a workplace incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation; (2) to prospective employees of armored car, security alarm, and security guard firms who protect facilities, materials, or operations affecting health or safety, national security, or currency and other like instruments; and (3) to prospective employees of pharmaceutical and other firms authorized to manufacture, distribute, or dispense controlled substances who will have direct access to such controlled substances, as well as current employees who had access to persons or property that are the subject of an ongoing investigation.

Colorado statutes also may provide a basis on which to hold employers liable for incidents of workplace violence. For example, CRS § 13-21-115(3) provides that, in some instances, a landowner or occupant may be held liable for injuries to others if he or she knew or should have known of a danger on the premises and failed to exercise reasonable care to protect visitors from that danger.

Case Law

In addition to statutes governing aspects of workplace violence, common law theories of recovery may provide a basis for holding an employer liable for damages suffered as a result of workplace violence. These theories include negligent hiring or retention, negligent training, negligent supervision, improper or inadequate training, failure to maintain safe premises, and failure to provide adequate security.¹²

Although suits filed by victims of workplace violence are a legitimate concern of any organization, employers also must be alert to causes of action that can be asserted against them by current or former employees accused of workplace violence. A false statement that harms a person's reputation may open the door to a defamation claim. Moreover, employers should be sensitive to the privacy rights of applicants and employees, lest they find themselves on the wrong end of a privacy lawsuit.

Key Elements of an Effective Workplace Violence Program

The four key elements of an effective workplace violence program are: (1) management support; (2) a workplace safety analysis; (3) training; and (4) post-incident response. Each of these elements can and should be addressed in a written workplace violence policy. Also, it is important not to confuse the program with the written policy that reflects it; the written policy may help in implementing the program, but the written policy means little without ongoing management support, periodic workplace safety analysis, training, and incident evaluation.

Management Support

The implementation of an effective workplace violence program requires the support of management. Management must publicly commit to a policy that places employee safety on the same level as customer safety. It must make clear that it will not tolerate violence in the workplace. Finally, management must give those charged with developing and implementing the program adequate authority, as well as provide adequate funding for such a program.

Workplace Safety Analysis

A workplace safety analysis is essential in developing a sound workplace violence program. The analysis should include a step-by-step, common-sense look at all aspects of the workplace to identify existing or potential hazards for workplace violence. It should include reviewing procedures or operations that contribute to those hazards and identify the locations where the hazards are greatest. It also should address how to minimize the threat from each hazard that is identified. For example: Can the physical structure of the workplace be altered

to minimize a particular hazard? Can procedures be changed? Would additional equipment lessen the danger or improve the organization's ability to respond to an incident?

There are many resources available to assist employers in conducting this type of analysis. These include law enforcement agencies and consultants with expertise in workplace violence. Some trade associations have developed checklists and recommendations tailored to the needs of their particular industries. Also, government agencies such as OSHA and the Office on Violence Against Women offer numerous publications that employers may find useful in this endeavor.¹³

Training

Training is a critical element of any workplace violence program. When research showed a slight decline in workplace violence in the 1990s, the Workplace Violence Research Institute attributed the drop to increased awareness and employee training.¹⁴ Proper training ensures that employees are aware of and alert to potential security hazards and that they know how to respond in a given situation. Training can include improving awareness, education concerning the warning signs of violent behavior, and teaching verbal de-escalation skills. It also may include teaching defensive techniques that enable staff members to protect themselves and subdue an attacker without seriously injuring themselves or the attacker.

Employers also may consider developing a crisis response team to respond in specified situations. For example, DART, Inc. has helped a number of Colorado hospitals develop crisis response teams that know how to respond when a patient or visitor appears agitated and on the verge of becoming physically violent.¹⁵

Post-Incident Response

The post-incident response is an often-neglected aspect of an effective workplace violence policy. It must include not only a review of how and why the incident happened, but also should take care of the needs of both those victimized in the incident and the person who committed the violent act. Not every employee who commits a violent act will be terminated or suspended. Legal considerations or a genuine desire to retain a valuable employee who has acted out of character may lead management to conclude that termination is not appropriate.

Even if management terminates the employee, the manner in which the termination is carried out may impact the degree of anger the employee feels and the likelihood he or she will instigate further violence. Similarly, if a customer temporarily becomes irate, that customer may not be forever banned from the premises. Post-incident response should include consideration of whether and how wounded relationships can be healed. Depending on the nature of the incident, there may be times when post-incident response should include consideration of public relations issues arising out of the incident.

Role of the Attorney

The attorney's role in establishing a workplace violence program depends on the nature and size of the organization the attorney represents and the culture of the organization. In larger organizations, the human resources or risk management department may take the lead in establishing a workplace violence program. In these organizations, it is important for the attorney to take an active role in making certain the program and written policy is consistent with all applicable laws and regulations. As suggested above, an attorney advising an employer on workplace violence issues must be familiar with a variety of statutes and regulations, as well as a significant body of case law.

Smaller organizations that do not employ in-house counsel may be reluctant to create a workplace violence program. Moreover, they may not wish to pay an attorney to draft a workplace violence policy. Sometimes, the call to the attorney does not come until after a violent incident has taken place. Attorneys representing small businesses should work to educate their clients on workplace violence issues and the various laws that address what an employer or prospective employer can and cannot do when handling workplace violence issues.

Checklist for Drafting a Written Policy

There are many resources available to assist in drafting a written workplace violence policy, and sample policies abound.¹⁶ Following is a checklist of issues employers may wish to consider in drafting a written workplace violence policy. This list is by no means exhaustive, but should provide a good foundation for those who wish to draft or review such a policy:

- Definition of workplace violence to include threats, stalking, harassment, and destruction of property
- Statement of organizational prohibition of workplace violence by employees, vendors, customers, or anyone else on the premises
- Statement of "zero tolerance" policy
- Statement that violation of the policy may result in discipline up to and including termination of employment
- Designation of person(s) in charge of workplace violence issues with name(s) and contact information
- Hiring procedures
 - Pre-employment screening
 - Criminal history checks
 - Credit checks (comply with Fair Credit Reporting Act¹⁷)
 - Drug/alcohol screening
 - Psychological testing
 - References
 - Interview questions aimed at workplace violence (compliance with ADA)
 - Role-play scenarios aimed at ability to respond to irate people and stress
 - New employee orientation to explain company policies
- Safety of off-site employees and drivers
 - Know where they are
 - Know their itinerary
 - Know when they are supposed to return
 - Require periodic check-in
 - Provide communications tools for use in emergency
- Employee Assistance Programs
- Stress reduction opportunities
- Health club memberships
- On-site exercise facilities
 - On-site massage
 - Break room
 - Classes on dealing with stress
- Insurance
 - Liability insurance for employer
 - Coverage for employee's mental health treatment
 - Coverage for employee's substance abuse treatment
- Privacy issues

- Make clear employees have no expectation of privacy in such things as e-mails, phone conversations, and contents of desks
- Communications
 - Identify whom to call in event of particular types of incidents
 - Post emergency phone numbers near phones
 - Provide necessary equipment (phones, panic buttons, and two-way radios)
- Reporting requirements
 - Require employees to report incidents to a designated official
 - Provide that failure to report may result in discipline
 - Include a statement prohibiting retaliation against the reporting party
 - Establish a hotline
 - Allow anonymous reporting
- Monitoring
 - Track number and nature of incidents
 - Analyze trends
- Internal investigation procedures
 - Provide a statement that employer will investigate all reports of workplace violence
 - Appoint a person to investigate the incident
 - Establish procedures to be used during investigation
- Documentation requirements
 - Statement from victim
 - Statement from witnesses
 - Statement from perpetrator
 - Video evidence, if available
 - Photographs of injuries
 - Preservation of physical evidence
 - Copies of relevant police reports
- Medical
 - Encourage medical attention when appropriate
 - Maintain adequate first-aid supplies
 - First-aid training
- Interim disciplinary measures
 - Suspension of accused employee
 - Reassignment of accused employee
 - Written statement that directs accused employee not to return to premises
 - Increased security personnel
- Disciplinary options and procedures
 - Counseling
 - Verbal or written warnings
 - Probation
 - Demotion
 - Reassignment
 - Termination
- Termination procedures
 - Terminate immediately and do not give employee reason to return
 - Give employee written order not to return
 - Advise employee of available outplacement services
 - Have security personnel present or alerted to event
 - Have paperwork done in advance to minimize length of meeting
 - Terminate at end of day when other employees have gone home
 - Avoid humiliating employee, if possible
 - Have a second employee serve as witness during termination discussion
 - Obtain keys, key cards, and other access devices
 - Consider termination pay to alleviate financial insecurity
 - Consider promise not to contest claim for unemployment
 - Consider offer to provide letter of reference

- Referral to Employee Assistance Program if the employer has one
- Change door codes if necessary
- Substance abuse policies
- Weapons policies
- Sexual harassment policies
- Domestic violence policies
- Protecting cash and valuables on the premises
- Computer security issues, such as change of passwords
- Policies on discrimination based on race, gender, religion, and so on
- Training requirements
 - Personal safety awareness
 - Verbal de-escalation
 - Warning signs of potential workplace violence
 - Defensive techniques
 - Situational training
 - First-aid training
 - Evacuation plan
 - Frequency of training
- Relations with law enforcement
 - Alert law enforcement to possible issues
- Security personnel
 - Number of security personnel
 - Placement of security personnel
 - Qualifications
 - Weapons or no weapons
 - Understanding of duties
 - Relations with law enforcement
- Crisis response plan
 - Develop plan and designate team members who will deal with particular type of incident, such as an irate individual, bomb threats, shootings, fire, and terrorists
- Require periodic workplace safety audits
- Physical structure
 - Barriers to vehicles
 - Mirrors to see around corners and blind spots
 - Landscaping for unobstructed views of workplace
 - Limits on posting signs in windows
 - Adequate lighting in and around workplace
 - Adequate lighting in parking lots and paths
 - Glass versus Plexiglas®
 - Fencing
 - Multiple exits
 - Number of entrances
 - Safe rooms
 - Phones in each room
- Security equipment
 - Entrance gates
 - Door controls
 - ID cards
 - Alarms
 - Panic buttons
 - Closed-circuit TV
 - Metal detectors
- Visitor procedures
 - Sign in and out
 - Required ID

- Visitor badges
- Check visitor against list of possible threats
- Limit visitors to certain areas
- Mail procedures
 - Written mail handling procedures
 - Suspicious packages
 - Bomb threat procedures
- Evacuation plan
 - Posted floor plans showing exits and entrances
- Post-incident response
 - Review how and why incident occurred and lessons learned
 - Discuss needs of the victim(s)
 - Discuss needs of the perpetrator
 - Public relations

This checklist is just that—a checklist. There is no requirement or suggestion that every employer create a written workplace violence policy that addresses each of the items contained in the checklist. Obviously, the level of detail contained in a written workplace violence policy will depend on the employer's size and financial resources. Finally, employers should be careful to ensure that their written workplace violence policy does not conflict with other established company policies and procedures.

Resources

The study of workplace violence and its prevention is still in its infancy. Many government agencies, universities, and business groups are working hard to learn more about workplace violence. Two of the leading organizations are the National Institute for Occupational Safety and Health (<http://www.cdc.gov/niosh>) and the Workplace Violence Research Institute (<http://www.noworkviolence.com>).

Conclusion

Workplace violence is a serious problem that costs Americans billions of dollars each year. Implementation of a workplace violence program by an employer can reduce the incidence of workplace violence and minimize its impact. A solid workplace violence program also can be persuasive evidence in favor of an employer if a victim of workplace violence elects to file suit against the employer. However, an effective workplace violence program requires more than just a written document. At a minimum, it should be comprised of the four elements discussed above: (1) management support; (2) a workplace safety analysis; (3) training; and (4) post-incident response.

Attorneys representing employers, whether large or small, should be alert to workplace violence issues and assist in developing a workplace violence program and a written workplace violence policy appropriate to the needs of their clients. Similarly, attorneys with administrative responsibilities within their own firms should consider the possible workplace violence issues within the firm and determine whether the firm has developed and implemented an appropriate workplace violence program.

NOTES

¹ *Workplace Violence: A Report to the Nation*, The University of Iowa Research Prevention Center (2001).

² Workplace Violence Research Institute (1996), available at www.noworkviolence.com.

³ Statistical Abstract of the United States, Table 710 (2000), available at <http://www.census.gov>.

⁴ *Supra*, note 2.

⁵ This "emotional hill" model was first described by David Landers, an internationally known police self-defense instructor who presently serves as Illinois State Field Coordinator for the Midstates Organized

Crime Information Center. This model and similar models form the theoretical basis for much of the verbal de-escalation training that is now mandatory for most law enforcement officers.

629 U.S.C. § 654(a)(1).

742 U.S.C. § 13701. The Act was amended in 2000.

8P.L. 106-386.

9See http://toolkit.ncjrs.org/vawo_8.html.

10 42 U.S.C. §§ 12101 *et seq.*

11 29 U.S.C. §§ 2001 *et seq.*

12 In *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996), the Colorado Supreme Court upheld a verdict finding the church liable for negligent hiring and retention of a clergyman who was known to have a proclivity toward abusing young children. Similar theories of recovery have succeeded in other states. See, e.g., *Ponticas v. KMS Investments*, 331 N.W.2d 907 (Minn. 1983) (owner of apartment complex held liable for rape of tenant by manager on theory of negligent hiring); *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So.2d 744 (Fla.App. 1 Dist., 1991) (plaintiff awarded \$1.9 million in compensatory damages and \$600,000 in punitive damages against employer after employee attacked customer); *Smith v. Orkin Exterminating Co., Inc.*, 540 So.2d 571 (La.App. 4th Cir., 1989) (employer held liable when employee returned to customer's home and sexually assaulted her).

13 See <http://www.cdc.gov/niosh> and notes 7-9, *supra*.

14 *Supra*, note 2.

15 DART, Inc. is a non-profit organization based in Boulder that offers training in workplace violence prevention and preparedness. DART stands for Defense Awareness Response Training. For more information, visit <http://www.dartdefense.org>.

16 See, e.g., <http://www.toolkit.cch.com/tools/downloads/violpol.rtf>; <http://www.cobar.org/group/display.cfm?GenID=2970>; and <http://www.uschamber.com/sb/business/tools/downloads/violpol.rtf>.

17 15 U.S.C. §§ 1681 *et seq.*

About the Author

Mark Cohen has 38 years of experience as a lawyer. He earned a B.A. in Economics at [Whitman College](#) and earned his law degree at the [University of Colorado in Boulder](#). He earned an [LL.M. Agricultural and Food Law](#) from the [University of Arkansas](#), where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of [The Colorado Lawyer](#) (including one as chairperson), and service on the Executive Board of the [Colorado Municipal League](#).

Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil.¹ He has written numerous articles and book reviews for [The Colorado Lawyer](#). In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, *The Fractal Murders*, became a Book Sense® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the Institute of General Semantics and the [Mystery Writers of America](#). He writes a regular column for the [Nederland Mountain-Ear](#).

Mark's practice focuses on drafting and reviewing legal documents including contracts, corporate documents, real estate documents, employment documents, intellectual property documents, motions, pleadings, and briefs. He also litigates cases arising out of poorly drafted documents. He enjoys helping businesses and other lawyers improve their legal and non-legal documents by translating them from Legalese into plain English. Learn more at [Plain English Consulting](#).

Mark holds a black belt in karate and serves on the board of directors of [Dart, Inc.](#), a Boulder non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.

¹ 45 POF3d 1

You may view Mark's complete bio at <http://www.cohenslaw.com/markcohen.html>.