

Tornado Warning  
***IDENTIFYING AND  
ADDRESSING WORKPLACE  
BULLYING, VIOLENCE &  
SAFETY***

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***Disclaimer: This presentation is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.***

# Storm Chasers



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# Workplace Bullying

# Workplace Bullying



- What is “bullying”?
  - Intimidating someone to alter their behavior or actions in a manner detrimental to them
  - Yelling at someone or throwing objects to impose will over another person
  - Lying or spreading rumors to negatively impact another person’s or improve one’s own employment or position
  - Sabotaging another’s work
- Why is definition important?

# Workplace Bullying



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- What are employer obligations with respect to bullying when not covered by existing discrimination/harassment policies?
  - Discrimination/harassment policies focus on a person's protected class status (e.g. gender, race)
  - Bullying is not limited to protected class status and can occur between anyone
  - Overlap between these two can occur

# Workplace Bullying



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- What kind of policies should employers have, if any?
  - **MUST** have anti-harassment policy
  - **SHOULD** have some type of anti-bullying policy



# Workplace Bullying



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- What about “professionalism in the workplace” policies instead?
  - **YES!** Professionalism in the workplace policy that defines and prohibits bullying is acceptable, and may be preferred





# Workplace Bullying



- If a complaint of “bullying” is received, how should employers respond?
  - 1 Option to treat the investigation the same as a harassment/discrimination complaint
  - 2 Policy or practice could also include provisions for workplace dispute mediation, coaching, etc.



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# Workplace Violence Prevention Plans

# Workplace Violence Prevention Plans



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- California and New York “workplace violence prevention” plans and policies mandated now
- It’s only a matter of time before similar policies are mandated in other states, including Oregon and Washington

# Workplace Violence Prevention Plans



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- Regardless of whether it's required or not, workplace violence prevention planning is a best practice for employers
- Certain employers may be required by law or liability insurance carriers to have violence prevention plans in place
  - Schools, public employers, businesses open late or early, law enforcement, emergency services, social service agencies, etc.

# Workplace Violence Prevention Plans



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## What kind of policies or procedures should employers have, if any?

1. Written policy/procedure(s) on what to do
  - Policy should address potential violence from (a) workers at the workplace, (b) romantic/family relations of workers, and (c) members of public at large
  - Different procedures depending on whether person has access to inside building or parking lot or not
  - Consider voluntary safety consult with OSHA, insurance carrier, or private safety consultant to identify “weak” areas
2. Training on the policy/procedure(s) for all staff
3. Require everyone to report concerns promptly
4. Investigate reported concerns, praise/reward the good faith reporter

# Workplace Violence Prevention Plans



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## How can workplace violence be prevented entirely?

- Cannot guarantee prevention of all violence
- Consult OSHA, liability insurance carrier, or private safety consultant to identify most likely risks and weaknesses for employers
- Consider hiring private security for vulnerable physical locations, such as dark parking lots at night, secluded/back building entrances
- Consider security alarm systems, including “panic” alarms, lighting dark areas, motion detector lights, camera systems
- Ensure all employee or third-party safety concerns are addressed
- Encourage everyone to report suspicious behavior

# Workplace Violence Prevention Plans



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## If an employee is engaged in threatened violence, what can an employer do?

- Make sure in advance that employer policies and any CBA terms allow for immediate administrative leave and discipline for any threatened or actual violence
- If a threat is made, immediately put the employee on paid/unpaid leave to keep the employee away from the workplace
- Investigate threatened or actual violence
- Discipline or terminate if warranted
- If provably false report, consider disciplining reporting party

# Workplace Violence Prevention Plans



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## If an employee is threatened with violence off-site by third party, what can an employer do?

- Policies should require reporting of threatened violence even if off-site by a third party, to ensure workplace safety
- If a threat is made, allow the employee to use available paid or else unpaid leave to keep the employee away from workplace
- Investigate threatened or actual violence
- In Oregon, be aware of “Safe Leave” requirements (Paid Leave Oregon leave for certain domestic violence situations)
- If provably false report, consider disciplining reporting party





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# OSHA Workplace Safety Requirements

# OSHA Workplace Safety Requirements



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- There is no federal law establishing a duty to prevent workplace violence. However, an employer has a duty to provide a safe working environment under the federal Occupational Safety and Health Act, which regulates workplace health and safety.
- The OSH Act applies to employers either directly through the federal Occupational Safety and Health Administration (OSHA) or through an OSHA-approved state program.
- The OSH Act's general duty clause requires an employer to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.

# OSHA Workplace Safety Requirements



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Whether an employer is liable under the general duty clause for an incident of workplace violence depends on the facts and circumstances. OSHA may issue citations to employers it finds failed to provide employees with adequate safeguards against workplace violence.



## For Example:

1

Following the death of a licensed practical nurse during a home visit, OSHA cited a home-based care provider for:

- exposing home healthcare employees to workplace violence from patients who exhibited aggressive behavior and were known to pose a risk to others; and
- not developing and implementing adequate measures to protect employees from the ongoing serious hazard of workplace violence.

# OSHA Workplace Safety Requirements



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Whether an employer is liable under the general duty clause for an incident of workplace violence depends on the facts and circumstances. OSHA may issue citations to employers it finds failed to provide employees with adequate safeguards against workplace violence.



## For Example:

2

After a worker's death, OSHA cited a health care provider, which assigned "service coordinators" to clients to help them obtain care, because the company failed to address the risk of employees being attacked by mentally ill clients.

3

After a worker's death, OSHA cited a substance abuse treatment facility for not providing training to staff on how to respond to a threat or physical assault and for not having adequate measures to protect the staff from physical assault.

# OSHA Workplace Safety Requirements



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Whether an employer is liable under the general duty clause for an incident of workplace violence depends on the facts and circumstances. OSHA may issue citations to employers it finds failed to provide employees with adequate safeguards against workplace violence.



## For Example:

4

After worker complaints, OSHA cited a psychiatric hospital after an inspection identified numerous instances of violent patients assaulting staff.

5

After worker complaints, OSHA cited a hospital after an inspection showed the hospital's workplace violence program was incomplete and ineffective in preventing numerous assaults by violent patients.

# OSHA Workplace Safety Requirements



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OSHA guidance explains that:

- Courts have interpreted the general duty clause to mean that an employer has a legal obligation to provide a safe workplace.
- An employer is on notice of the risk of violence and should implement a workplace violence prevention program if the employer:
  - Experienced acts of workplace violence; or
  - Becomes aware of threats, intimidation, or other potential indicators that show the potential for violence in the workplace exists or has the potential to exist.

# OSHA Guidance for Workplace Violence Prevention



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OSHA recommends that employers prevent or minimize the risk of workplace violence by:

- Allocating sufficient resources to prevent violence.
- Identifying risk factors, assessing their worksites, and identifying methods for reducing the likelihood of incidents occurring.
- Establishing a zero-tolerance policy toward workplace violence covering all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with employees.

# OSHA Guidance for Workplace Violence Prevention



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OSHA recommends that employers prevent or minimize the risk of workplace violence by:

- Having a well-written and implemented workplace violence prevention program that can be:
  - A separate workplace violence prevention program; or
  - Incorporated into a safety and health program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all workers know the policy and understand that all claims of workplace violence will be investigated and remedied promptly.



# OSHA Guidance for Workplace Violence Prevention



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OSHA recommends that employers prevent or minimize the risk of workplace violence by:



Ensuring that all workers know the policy and understand that the employer investigates and remedies all claims of workplace violence promptly.



Developing a system of accountability for implementing a violence prevention program (such as creating a workplace safety team).



Implementing engineering controls, administrative controls, and training.

# OSHA Guidance for High-Risk Industries



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- OSHA also recommends that employers develop additional methods as necessary to protect employees in high-risk industries. OSHA has created guidelines and recommendations for preventing workplace violence in the following high-risk industries:
  - Healthcare and social services
  - Late-night retail establishments
  - Taxi and car hire
- An employer is not required to comply with this guidance; instead, OSHA's guidelines are meant to be a resource for employers. Employers that follow them can use their compliance to defend against a claim that the employer breached the general duty clause.



# What If Bullying or Threatened Violence Is by a Union Member?

# What If Bullying or Threatened Violence Is by a Union Member?



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- Union membership does not give employee a free pass to bully or threaten or engage in violence.
- Strong policy language on bullying and workplace violence can assist in managing union employees who engage in problematic actions.
- Educating employees regularly on policy language and expectations supports just cause in disciplinary decisions.

# But Can Bullying Other Bad Behavior Be “Protected”? YES



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- **HOWEVER...** This is an area where labor law and employment law do not overlap in a predictable manner.
- Whether or not an employee is engaging in “protected activity” under the NLRA may result in unfavorable outcomes to the employer when seeking to hold employees accountable in this space.
- This has been a place of transition from the Obama–Trump–Biden administrations—so expect a new forecast soon.

# What If Bullying or Threatened Violence Is by a Union Member?



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- Always **follow your CBA** for progressive discipline (and consider past practice).
- **Be thoughtful** in your education and expectation setting on your policies—make sure people know what is expected of them.
- **Be aware** that discipline and discharge for employee actions that are “mixed” in terms of protected labor activity and employment law protections may result in ULPs or grievances—that could result in the employer having to reset the clock.
- But also **know that risk exists** for not responding appropriately for the employee impacted by the negative words or conduct.

# THANK YOU

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