

Employee Benefit ■ Plan Review

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Workplace Safety, Security and Employee Gun Rights: Best Practices to Mitigate Workplace Violence Risk

In the wake of the mass shootings that continue around the country, President Obama, some members of Congress, state and local officials and many advocacy groups are pursuing an aggressive agenda to increase safety measures and controls for guns and ammunition. Regardless of what action, if any, our elected officials take, employers have a duty to protect their employees, clients and customers from harm, and they can be held liable for failing to do so. Employers must evaluate a variety of considerations with regard to workplace violence, including employee rights under state gun laws, establishing a workplace violence policy, conducting background checks, whether and how to institute an Employee Assistance Program (EAP), employee training to recognize and report threats, and avoidance of discrimination claims.

EMPLOYEE GUN RIGHTS

As a general rule, state laws do not authorize gun owners to bring their weapons into the physical confines of the workplace. Employers generally remain free to prohibit guns within the office building, plant, store and the like. However, many states have enacted laws that permit employees to bring guns onto the employer's property so long as the employee complies with federal and state laws. The underlying policy suggests that prohibiting a gun owner from bringing their firearm to work deprives that employee of protection during his or her commute.

These gun laws are generically referred to as "parking lot" laws because they authorize employees possessing *valid concealed carry permits* to bring guns onto an employer's property such as a parking lot and secure the weapon in their *personal* (not company) vehicles. Once on the employer's property, the employee's gun must be concealed from plain view and locked in a secure vehicle to prevent theft. Employers that have secure or restricted access parking lots may ban employees from storing firearms in employer parking lots assuming state law requirements are satisfied.

For example, under Mississippi law an employer with a parking area that restricts access to the general public by means of a security gate or fence can prohibit employees from transporting or storing firearms in their vehicles. Other states, such as Arizona and Louisiana, allow an employer to restrict the transport and storage of employee firearms, but require that the employer possess a secured parking area and either offer temporary storage for employee firearms, or an alternative parking location should the employee desire to store the weapon in their personal vehicle during the shift.

Since early 2013 at least two more state legislatures—Alabama and South Carolina—are considering joining Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, Tennessee, Texas, Utah, and Wisconsin in enacting parking lot laws.

WORKPLACE VIOLENCE POLICY

Establishing a written policy on workplace safety to eliminate workplace violence is the first step in a violence prevention program. The implementation of a zero tolerance policy for workplace violence will promote employee safety, security, and equity, and should require that employees report threats and comments that suggest suspicious or concerning behavior.

A bona fide reporting component is critical, as employees are the eyes and ears of the organization. Ideally, employers should have or implement an "Open Door" policy that encourages employees to report any concerns to their supervisors or human resources. This will allow employers to appropriately assess and identify employee concerns and fully investigate any reports. All threats must be taken seriously until investigated and documented. A timely and thorough response to employee concerns will underscore the legitimacy of the reporting options.

BACKGROUND CHECKS

The use of background checks may assist employers in identifying job applicants with

violent histories that indicate risk for dangerous behavior. The Equal Employment Opportunity Commission (EEOC), however, issued new guidance last year regarding an employer's use of criminal background checks in hiring that discourages employers from following a policy of refusing to hire ex-offenders. While the EEOC cautions that employers cannot summarily refuse to hire applicants based on their criminal history, state and federal laws may prevent individuals convicted of certain crimes from being employed in certain fields (*i.e.*, individuals working in a skilled nursing care facility may not be convicted of aggravated assault). In industries that have no such prohibitions, employers can still use background checks to evaluate a candidate's trustworthiness and other indications

of risk to others, and indeed may exclude a candidate, so long as an individualized assessment of that person's background and contemplated job responsibilities is performed.

EMPLOYEE ASSISTANCE PROGRAMS

Employers regularly have employees that encounter difficult times in their lives that could serve as triggers for violent and disruptive behavior. For this reason, employers are encouraged to establish a formal EAP. The EAP is a confidential medical and counseling resource provided to employees to address personal issues related to family, alcohol or drug use, finances, or other stressors. These confidential programs often have 24/7 hotline numbers and can refer employees to local resources for additional care.

AVOID DISABILITY DISCRIMINATION CLAIMS

When addressing workplace violence and prevention, there is no single right approach. Indeed, there are various tools at the disposal of employees that can help screen out dangerous individuals in the hiring process, heighten employee awareness, and promote prompt threat identity. There are also numerous pitfalls and challenges to implementing these policies and programs, and good planning and management, with the help of experts, should maximize safety and minimize risk. ☉

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