

Winter 2009

Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers

Sheryl L. Erdmann

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Sheryl L. Erdmann, *Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers*, 43 Val. U. L. Rev. 725 (2009).

Available at: <https://scholar.valpo.edu/vulr/vol43/iss2/7>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



EAT THE CARROT AND USE THE STICK: THE PREVALENCE OF WORKPLACE VIOLENCE DEMANDS PROACTIVE FEDERAL REGULATION OF EMPLOYERS

I. INTRODUCTION

October 4, 2007, a fired restaurant employee guns down two of his former managers in Dilworth, North Carolina.¹ October 5, 2007, a former city worker shoots five people, killing two, in an Alexandria, Louisiana law firm.² October 9, 2007, in a Simi Valley, California tire store, a man shoots a customer to death and critically wounds two store employees before turning the gun on himself.³ October 10, 2007, a Cleveland high school student, after having threatened to stab his fellow classmates, shoots two instructors and two students.⁴ October 11, 2007, a Phoenix bakery employee, with a history of discipline problems, decides to settle a work dispute by shooting and critically injuring a fellow employee.⁵

¹ WCNC, Ex-Employee Charged with Dilworth Murders, <http://www.wcnc.com/news/topstories/stories/wcnc-100407-jmn-shooting.13a51ea3f.html> (last visited Sept. 22, 2008). See also WSOTV, Many Affected By Deadly Shooting At Dilworth Restaurant; Questions Remain About Suspect, <http://www.wsotv.com/news/14277520/detail.html> (last visited Sept. 22, 2008) (discussing shooter's mother and godmother's reactions to the violence). "The two said the suspect, an only child, was not violent, but he'd been in and out of group homes as a teenager. Gregory said her son told her that people at work were picking on him, and he'd bought a gun to protect himself." *Id.* "I said, 'Please don't get no gun,' but they just pushed him into a corner, and if you're in a corner, you're going to come out one way or another," the suspect's mother said." *Id.*

² CBS News, 3 Dead After Louisiana Law Firm Rampage, http://www.cbsnews.com/stories/2007/10/05/national/main3333343.shtml?source=RSSattr=U.S._3333343 (last visited Sept. 22, 2008). "Anger over a divorce settlement may have driven a 63-year-old man to shoot five people in a law office, killing two, then exchange gunfire with police during a standoff . . ." *Id.*

³ Officer.com, Two Dead After California Tire Shop Shooting, <http://www.officer.com/online/article.jsp?siteSection=1&id=38285> (last visited Sept. 22, 2008).

⁴ CNN, Police Chief: Teen Shoots Four, Kills Self at Cleveland High School, <http://www.cnn.com/2007/US/10/10/cleveland.shooting/index.html> (last visited Sept. 22, 2008). See also Cleveland.com, School Shooter Wasn't Supposed to be in Class, http://blog.cleveland.com/metro/2007/10/school_shooter_wasnt_supposed.html (last visited Sept. 22, 2008) (reporting that the shooter entered the high school despite being suspended).

⁵ Nikki Renner & Teana Wagner, Workplace Shooting at Phoenix Bread Company, <http://www.azcentral.com/business/consumer/articles/workplaceshooting10112007.htm> (last visited Nov. 6, 2007) (discussing that the gunman had a history of work problems). "The feud apparently began around 2 a.m. between the two employees at the bakery near Lincoln Street and 23rd Avenue. One of the employees left the bakery and came back with a gun. The armed man shot the other employee and ran off." *Id.*

726 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

The possibility of workplace violence is an ever-present reality.⁶ While violence in the workplace can take on many forms, in the United States, homicide is the fourth-leading cause of fatalities on the job.⁷ The Occupational Safety & Health Administration (“OSHA”) holds employers to a general duty to shield employees from hazards and

⁶ See Jeremiah Marquez, Calif. Worker Wounds 3, Kills Himself, <http://www.foxnews.com/wires/2007Mar05/0,4670,WorkplaceShooting,00.html> (last visited Nov. 6, 2007) (discussing a March 5, 2007 incident of workplace violence). The shooter indicated that he was aggravated about a recent reduction in work for all employees. *Id.* ““The employees recently had their hours cut back,” Risinger said. ‘So he was upset about that, about not having enough work.’” *Id.* See also Cara Buckley, *Ex-Worker Shoots 3 at Co-op City, Killing Old Boss, Police Say*, N.Y. Times, Aug. 31, 2007, at B1. On August 30, 2007, “[a] former janitor enraged at losing his job opened fire with a pistol early yesterday at the Bronx housing complex where he lived and had once worked, killing his former supervisor and injuring two others, one critically” *Id.* See also CNN, <http://www.cnn.com/SPECIALS/2007/virginiatech.shootings/> (last visited Sept. 22, 2008) (summarizing the events of April 16, 2007, when thirty-two people were killed and many more wounded, including students and faculty, at Virginia Tech). See also USA TODAY, *Gunman Kills One Co-Worker, Then Himself at Jeep Plant*, http://www.usatoday.com/news/nation/2005-01-26-jeep-plant_x.htm (last visited Nov. 6, 2007) (covering a January 26, 2005 shooting at a Jeep plant in Toledo, Ohio). “An auto worker wired a shotgun to his body and burst into a Jeep assembly plant, killing a supervisor and wounding two other employees before killing himself.” *Id.* The day before the fatal shooting spree, the alleged gunman met with plant officials to talk about problems with his work. *Id.* See also S. ANTHONY BARON, *VIOLENCE IN THE WORKPLACE: A PREVENTION AND MANAGEMENT GUIDE FOR BUSINESSES* 18-22 (Pathfinder Publishing of California 1993) (discussing examples of workplace violence taking place across the nation). See also MARK A. FRIEND & JAMES P. KOHN, *FUNDAMENTALS OF OCCUPATIONAL SAFETY AND HEALTH* 285 (4th ed., Government Institutes 2007). ““Workplace violence is the new poison of corporate America. It is not just a reflection of a violent society, but of that violent society interacting with workplace dynamics that have significantly changed from 10 or 15 years ago[.]”” *Id.*

⁷ According to the Bureau of Labor Statistics, in 2006, there were 788 fatal occupational injuries in the United States that were caused by assaults or violent acts. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries by Industry and Event or Exposure, All United States, (2006)*, <http://www.bls.gov/iif/oshwc/cfoi/cftb0214.pdf>. Of the 754 fatal injuries, 656 of the victims were male. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries By Worker Characteristics And Event Or Exposure, All United States (2006)*, <http://www.bls.gov/iif/oshwc/cfoi/cftb0220.pdf>. Furthermore, 540 of the fatalities were homicides. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries Resulting from Transportation Incidents And Homicides, All United States (2006)*, <http://www.bls.gov/iif/oshwc/cfoi/cftb0215.pdf>. In 2005, 564 employees were victims of workplace homicide. U.S. Dept. of Labor, Occupational Safety & Health Administration, *Safety and Health Topics, Workplace Violence*, <http://www.osha.gov/SLTC/workplaceviolence/> (last visited Sept. 22, 2008). Workplace violence can, “occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide” U.S. Dept. of Labor, Occupational Safety & Health Administration, *OSHA Fact Sheet, Workplace Violence (2002)* http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf [hereinafter OSHA Workplace Violence Facts].

injury.⁸ However, there has been virtually no enforcement of this duty with regard to workplace violence.⁹ Furthermore, OSHA does not require employers to implement workplace violence prevention policies or initiatives.¹⁰ Instead, OSHA provides employers, operating in a narrow category of industries considered to be high-risk, with only advisory guidelines and recommendations.¹¹ Although a few states have imposed additional obligations, virtually all employers have complete discretion in determining an appropriate level of commitment to hazard prevention and employee training.¹²

⁸ Employers subject to OSHA have a general duty to protect employees. 29 U.S.C. § 654 (2006).

(a) Each employer –

(1) 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;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

Id.

⁹ 3 HR Policies and Practices § 254: 2 (Employer's duty to ensure safe workplace) (September 2007). "Employers have been cited by OSHA for an unsafe work environment resulting in workplace violence under the general duty clause of the Occupational Safety and Health Act. However, this approach has stalled, following a 1995 decision by an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission that the commission let stand." *Id.* See also 15 EMP. COORD. WORKPLACE SAFETY § 3:17 (Workplace violence by third parties as a recognizable hazard) (2007). "In holding that the general duty clause did not require the employer to control the unpredictable actions of third parties in the absence of a risk recognized by the employer's industry, the ALJ noted that the '[Review] Commission has consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent.'" *Id.* See Secretary of Labor v. Megawest Fin., Inc., 17 O.S.H. Cas. (BNA) 1337, 1995 WL 383233 (O.S.H.R.C.A.L.J.)

¹⁰ See OSHA, Safety and Health Topics, Workplace Violence, <http://www.osha.gov/SLTC/workplaceviolence/> (last visited Nov. 6, 2007).

¹¹ See U.S. Dept. of Labor, Occupational Health and Safety Administration, Guidelines For Preventing Workplace Violence For Health Care & Social Service Workers (2004) <http://www.osha.gov/Publications/osha3148.pdf> [hereinafter *OSHA Health Care Guidelines*]. See also U.S. Dept. of Labor, Occupational Health and Safety Administration, Recommendations For Workplace Violence Prevention Programs In Late-Night Retail Establishments, (1998) <http://www.osha.gov/Publications/osha3153.pdf> [hereinafter *OSHA Late-Night Retail Guidelines*]. See also FRIEND & KOHN, *supra* note 6, at 287 (listing the following occupations as high risk: police officers, private security guards, taxi drivers, prison guards, bartenders, mental health professionals, gas station attendants, convenience/liquor store clerks, junior high/middle school teachers, and bus drivers).

¹² See WASH. REV. CODE § 49.19.005-070 (1999). Washington has imposed additional requirements on health care employers to create and implement prevention plans and employee training. *Id.* See also CAL. CIV. PROC. CODE § 527.8 (2007) (California has enacted

728 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

Considering the prevalence of workplace violence and the frequency of missed warning signs, the current regulation of employers is not sufficient.¹³ The purpose of this Note is to prove that current methods of holding employers liable for workplace violence, which are reactionary in nature, will not reduce the prevalence of violent behavior.¹⁴ Instead, employers should be held accountable for not taking proactive steps to safeguard employees.¹⁵ Part II of this Note discusses workplace violence and current regulations of employers; Part III analyzes the current federal and state regulations and discusses the need for employer accountability prior to the occurrence of workplace violence.¹⁶ Finally, Part IV proposes a new federal regulation that is applicable to employers subject to OSHA and requires employers to do the following: complete a worksite analysis, implement hazard prevention and control, educate employees by conducting safety and health training, and develop a system of recordkeeping and program evaluation.¹⁷

the Workplace Violence Safety Act which allows employers to seek temporary restraining orders against individuals who pose a credible threat of violence).

¹³ See Eilene Zimmerman, *Danger Signals At Work, And How to Handle Them*, N.Y. TIMES, Apr. 15, 2007, <http://www.ncdsv.org/images/Danger%20Signals%20at%20Work,%20and%20How%20to%20Handle%20Them.pdf>. See also Cleveland.com, Who Was Asa Coon?, http://blog.cleveland.com/metro/2007/10/who_was_asa_coon.html (providing background as to who Asa Coon is—the high-school student who shot students and teachers in Cleveland). “‘I’m going to get you,’ he warned his tormentor. ‘I will get you.’” *Id.* Some youngsters say Asa was picked on and that he confided to friends that he would shoot up the school. *Id.* “‘I thought he was just kidding,’ said Demar Tabb, 15, a classmate. ‘I probably should have said something, but I didn’t think anything would actually happen.’” *Id.* “Asa entered his school on a steel-gray October day looking for revenge. He shot two teachers and two classmates before he put the gun in his mouth and pulled the trigger. He was 14.” *Id.* See also BARON, *supra* note 6, at 8.

Hansel’s craving for revenge may have become irrepressible in the cab of his truck as he made that familiar drive, but his explosive behavior had been building up in him for some time—for much longer than the three months since he’d lost his job. There had been signs, many of them, some as bright as flares, that Hansel was, at the very least, disturbed. His problems were not completely ignored by [the] Elgar [Corporation]. Hansel was encouraged to see a counselor. But many critical signs had been either unnoticed, dismissed or excused with, “Ah, that’s just Larry. Sure he’s a little strange, but basically he’s all right.”

Id. See also USA TODAY, Some Start with Family before Taking Violence to the Office, http://www.usatoday.com/money/workplace/2004-07-14-killing-side_x.htm (last visited Sept. 22, 2008) (discussing three murderers who moved on to the workplace after taking the lives of family members).

¹⁴ See *infra* Parts II–IV.

¹⁵ See *infra* Parts II–IV.

¹⁶ See *infra* Parts II–III.

¹⁷ See *infra* Part IV.

II. WORKPLACE VIOLENCE AND CURRENT REGULATION OF EMPLOYERS

Although employers should take a proactive role in safeguarding employees from threats of workplace violence, the majority of employers who experience incidents of violence fail to change their prevention procedures.¹⁸ Because there is virtually no requirement for employers to conduct worksite safety analyses, create violence prevention plans, or train employees, it is unlikely that workplace violence will be effectively reduced in the future.¹⁹ To address the need for further regulation of employers, Part II.A defines workplace violence and discusses recent statistics that highlight the widespread national problem.²⁰ Part II.B examines current federal and state regulations of employers that focus on workplace violence.²¹ Last, Part II.C discusses the proactive steps that OSHA encourages employers to take in an effort to shield employees from workplace violence.²²

A. *The Problem of Workplace Violence: Background and Current Statistics*

OSHA defines workplace violence as violence or the threat of violence that occurs at or outside the workplace.²³ Every year in the United States approximately two million workers are victims of workplace violence.²⁴ While the most extreme incidents involve homicide, workplace violence is more prevalent in other forms, such as threats, intimidation, and stalking.²⁵ Workplace violence can be

¹⁸ See Dept. of Labor, Bureau of Labor Statistics, Survey of Workplace Violence Prevention, 2005 (2006), <http://www.bls.gov/iif/oshwc/osnr0026.pdf> (last visited Jan. 7, 2009) [hereinafter *BLS Workplace Violence Prevention Statistics*].

Nearly five percent of the 7.1 million private industry business establishments in the United States had an incident of workplace violence within the 12 months prior to completing a new survey on workplace violence prevention. . . . Although about a third of these establishments reported that the incident had a negative impact on their workforce, the great majority of these establishments did not change their workplace violence prevention procedures after the incident; almost 9 percent of these establishments had no program or policy addressing workplace violence

Id.

¹⁹ See 29 U.S.C. § 654 (2006). Health Care employers in the state of Washington are subject to these requirements. *Id.* See WASH. REV. CODE § 49.19.005 *et seq.*

²⁰ See *infra* Part II.A.

²¹ See *infra* Part II.B.

²² See *infra* Part II.C.

²³ OSHA *Workplace Violence Facts*, *supra* note 7.

²⁴ *Id.*

²⁵ Mark Cohen, *Elements of an Effective Workplace Violence Program*, 33 JUL COLO. LAW 57, 57 (July 2004) [hereinafter *Cohen*]. “[W]orkplace violence also can include less sensational incidents that are often not reported: threats, intimidation, cyberstalking, physical stalking,

committed by individuals who are not employees; customers, suppliers, former employees, strangers, and spouses are all potential perpetrators.²⁶

According to the Bureau of Labor Statistics' Survey of Workplace Violence Prevention, in 2005, five percent of establishments, including

and other forms of harassment." *Id.* See also OSHA Workplace Violence Facts, *supra* note 7. Workplace violence includes anything from threats of violence, verbal abuse, and physical assault, to homicide. *Id.* See also Bruce R. Alper, *Managing the Electronic Workplace*, 763 PLI/LIT 1157 (2007) (discussing cyber-stalking as a new form of workplace violence). See generally BERNADETTE H. SCHELL & NELLIE M. LANTEIGNE, *STALKING, HARASSMENT, AND MURDER IN THE WORKPLACE* (Quorum Books 2000) (discussing guidelines and prevention plans for dealing with the problem of stalking as a form of workplace violence). See also BARON, *supra* note 6, at 31 (detailing the three levels of violence). Violence can take on many forms, which fall into one of the following three levels:

LEVEL ONE:

- Refuses to cooperate with immediate supervisor
- Spreads rumors and gossip to harm others
- Consistently argues with co-workers
- Belligerent toward customers/clients
- Constantly swears at others
- Makes unwanted sexual comments

LEVEL TWO:

- Argues increasingly with customers, vendors, co-workers and management
- Refuses to obey company policies and procedures
- Sabotages equipment and steals property for revenge
- Verbalizes wishes to hurt co-workers and/or management
- Sends sexual or violent notes to co-workers and/or management
- Sees self as victimized by management (me against them)

LEVEL THREE:

- Frequent displays of intense anger resulting in:
- Recurrent suicidal threats
- Recurrent physical fights
- Destruction of property
- Utilization of weapons to harm others
- Commission of murder, rape and/or arson

Id.

²⁶ See Kyle Riley, *Employer TROs Are All The Rage: A New Approach To Workplace Violence*, 4 NEV. L.J. 1, 4 (Fall 2003). "To better understand the problem of workplace violence, experts classify incidents based on the type of offender, identifying four different types: the stranger, the customer/client, the co-worker/former employee, and the personal relationship." *Id.* "Overwhelming statistics indicate that the stranger is the most dangerous and most common offender in the workplace, accounting for nearly sixty percent of violent incidents in the workplace and eighty-four percent of workplace homicides." *Id.* Cohen, *supra* note 25, at 57. "[A]cts 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." *Id.* See American Institute on Domestic Violence, *Domestic Violence in the Workplace Statistics* (2001), <http://www.aidv-usa.com/statistics.htm> (last visited Sept. 22, 2008).

private businesses and state and local governments in the United States, had at least one incident of workplace violence.²⁷ However, fifty percent of establishments that employed a thousand or more workers reported at least one incident.²⁸ While violence is not industry specific, some establishments face a greater threat of workplace violence, particularly if employees work directly with the public or handle valuable goods or property.²⁹

Incidents of workplace violence can have devastating effects on employees.³⁰ Not only does violence instill fear in employees and reduce

²⁷ *BLS Workplace Violence Prevention Statistics*, *supra* note 18. On October 27, 2006, the Bureau of Labor Statistics released its Survey of Workplace Violence Prevention, 2005. *Id.* The Bureau of Labor Statistics “looks at the prevalence of security features, the risks facing employees, employer policies and training, and related topics associated with maintaining a safe work environment.” *Id.* The survey provides data from private industry as well as state and local government. *Id.* Furthermore, survey data is broken down by industry and the size of the establishment (number of workers employed). *Id.* Over 7.4 million establishments that employ over 128 million workers in the United States are represented in the survey. *Id.* The Bureau of Labor statistics asked employers whether an incident of workplace violence had occurred during the past year, and if so, what affect did the incident have on staff. *Id.* The survey further asked whether changes were implemented after the incidence of violence to prevent further risks. *Id.*

²⁸ *Id.* In private industry establishments with a thousand or more employees, goods-producing industries reported a higher percentage of co-worker violence than service-providing industries. *Id.* Service-providing industries reported much higher percentages of criminal, customer, and domestic violence than goods-producing industries. *Id.*

²⁹ *Id.* The Bureau of Labor Statistics identifies the following potentially hazardous work environment characteristics: (1) working directly with the public, (2) exchanging money with customers, (3) having a mobile workplace, (4) working with unstable persons, in health social service, or criminal settings, (5) working in high crime areas, (6) guarding valuable goods or property, (7) working in small numbers, fewer than 5, (8) working in community based settings or house-to-house. *Id.* at Table 4. *See also* FRIEND & KOHN, *supra* note 6, at 287 (listing the following occupations as high risk: police officers, private security guards, taxi drivers, prison guards, bartenders, mental health professionals, gas station attendants, convenience/liquor store clerks, junior high/middle school teachers, and bus drivers).

³⁰ *Id.* *See also* 2 Guide to Employment Law and Regulation § 18:76 Protecting Community Workers Against Violence (2007). “Workers who have been assaulted or seen coworkers attacked have reported experiencing short and long term psychological trauma, fear of returning to work, and changes in relationships with coworkers and family.” *See also* OSHA Health Care Guidelines, *supra* note 11. “Victims of workplace violence suffer a variety of consequences in addition to their actual physical injuries. These may include: . . . [f]eelings of incompetence, guilt, powerlessness[] and [f]ear of criticism by supervisors or managers.” *Id.* *See also* Stephanie Armour, *Life After Workplace Violence*, USA TODAY http://www.usatoday.com/money/workplace/2004-07-14-after-violence_x.htm (last visited Feb. 1, 2008) (detailing the variety of devastating effects of workplace violence on the victim, the victim’s family, fellow co-workers, and the organization as a whole).

I’ve been totally affected through productivity,” says company President Paul Bonin. “The impact [workplace violence] puts on the organization has been phenomenal. With the downturn in the

732 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

morale, but it also decreases productivity and fuels absenteeism and turnover.³¹ Furthermore, employers can incur serious financial costs that go beyond addressing employee injuries and illnesses stemming from workplace violence.³²

Despite these effects and the frequency of workplace violence, more than seventy percent of workplaces in the United States do not have a program or policy addressing workplace violence.³³ Even more

economy, if this company hadn't been as strong as it was, we'd probably be out of business today. I wouldn't wish this on my worst enemy.

Id.

³¹ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. "Of those establishments reporting an incident of workplace violence in the previous 12 months, 21 percent reported that the incident affected the fear level of their employees and twenty-one percent indicated that the incident affected their employees' morale. In State government workplaces reporting an incident of workplace violence in the previous 12 months, 48 percent reported some type of negative effect due to the incident . . ." *Id.* The greater effect on state government workplaces may be due to the nature of the work environment. *Id.* State government workers interact more directly with the public, including unstable or violent individuals, than other types of establishments. *Id.* The survey further indicates that of the establishments reporting an incident of workplace violence in the previous twelve months, nine percent saw a reduction in productivity, eight percent saw an increase in absenteeism, five percent saw an increase in turnover, and three percent noted an increase in health insurance premiums. *Id.*

³² See Joanne Sammer, *Combating Workplace Violence* BUSINESS FINANCE (June 1, 1998) <http://www.businessfinancemag.com/channels/riskManagement/article.html?articleID=4365> (last visited Nov. 6, 2007). Some of the costs of workplace violence include: workers' compensation claims, increased medical claims for stress-related illnesses and psychological counseling, management time spent dealing with incident, absenteeism and reduced productivity costs, litigation expenses, and negative publicity. *Id.* See also BARON, *supra* note 6, at 68-69 (listing the following as costs of workplace violence:

[s]ecurity, [b]uilding repair and cleanup, [b]usiness interruptions with customers, [l]oss of productivity, [l]ost work time, [t]urnover of employees, [s]alary continuation for those who are injured or traumatized, [v]alued employees quitting or retiring early, [i]ncrease in worker's compensation claims, [i]ncreased medical claims, [i]ncreased insurance premium rates, [c]osts of attorney fees, medical care, and psychological care of current employees.)

See also FRIEND & KOHN, *supra* note 6, at 288 (stating that workplace violence costs businesses billions every year).

³³ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. Of the approximately thirty percent of establishments that did have some sort of workplace violence policy, eleven percent only had an oral program. *Id.* at Table 10. "Programs or policies related to workplace violence were more prevalent among larger private establishments and governments. State government establishments were by far more likely to have written or verbal policies or programs than local governments and private industry establishments . . ." *Id.* Eighty-two percent of private industries with workplace violence programs or policies addressed co-worker violence. *Id.* at Table 11. Seventy-one percent discussed customer or client violence. *Id.* Fifty-three percent of policies or programs addressed

devastating, in 2005, only ten percent of establishments that had suffered the effects of an incident of workplace violence reported to have changed their programs or policies in an effort to safeguard employees from further acts of violence.³⁴ To add to the problem, only twenty-one percent of all employers in the United States provide employee training on how to prevent or respond to incidents of workplace violence.³⁵ Additionally, few establishments track the costs of events of violent behavior.³⁶

However, statistics reveal that employers have taken proactive steps when it comes to security, including hiring security staff or installing electronic or physical security devices.³⁷ Although employers have made greater strides in protecting employees with security devices than with training or the use of prevention programs, twenty-six percent of establishments provide no security measures for employees and thirty-three percent employ only one form of protection.³⁸ Furthermore, less than half of all employers have a process for identifying potential or current employees with a history of violence, and only eleven percent of

criminal violence, while only forty-four percent covered domestic violence that spills into the workplace. *Id.*

³⁴ *Id.*

³⁵ *Id.* Only four percent of all establishments trained employees on the effects of domestic violence in the workplace. *Id.* at Table 12. Furthermore, only nine percent of all establishments provided training on violence prevention strategies. *Id.*

³⁶ *Id.* at Table 13. Only forty-three percent of private industry business track the costs associated with employee injuries or illnesses. *Id.* at Table 13. Even worse, only twenty-percent of employers report tracking the costs of workplace violence. *Id.* For all establishments, the costs of workers' compensation were the most frequently tracked, followed by absenteeism and property damage. *Id.* See also FRIEND & KOHN, *supra* note 6, at 289 stating that "over half of all workplace victimizations are not reported to police[.]" (citation omitted).

³⁷ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. "Seventy-two percent of establishments, employing 91 percent of workers, had a least one form of security . . ." *Id.* Over fifty-two percent of employers had installed some type of electronic surveillance, such as alarms, cameras, or motion detectors. *Id.* However, over fifty-seven percent of United States workers are not protected by security staff. *Id.* More than half of the largest establishments, employing a thousand or more workers, required security staff to check in visitors, verify employee identification, stop entry due to restraining or protective order, or screen entry using photos of persons. *Id.*

³⁸ *Id.* Fifteen percent of establishments only employ electronic surveillance, while seventeen percent have only instituted physical security measures. *Id.* at Table A. Furthermore, one percent of establishments rely solely on security staff. *Id.* See also USA TODAY, Convicts Say Companies Share Fault, http://www.usatoday.com/money/workplace/2004-07-15-convicts-side_x.htm (last visited Sept. 22, 2008) (discussing two perpetrators of workplace violence who state that greater security precautions, such as "[a] camera system like [in] a prison[.]" could have prevented their crimes).

employers have a method for tracking clients, customers, visitors, or patients.³⁹

The statistics demonstrate the frequency of workplace violence and also raise concerns regarding how serious employers are about addressing the problem.⁴⁰ Although primarily not an issue until after an incident of workplace violence, current federal and state regulations impose liability on employers for failure to protect workers.⁴¹

B. Current Restrictions on Employers: Federal and State Laws

The lack of a comprehensive law of workplace violence forces employers to refer to various authorities to determine what duty of protection from violence or the threat of violence they owe their employees.⁴² Part II.B.1 examines federal statutes and regulations, whereas Part II.B.2 discusses state laws relating to workplace violence.⁴³

1. Federal Statutes

The Occupational Safety and Health Administration (“OSHA”) has taken the most active role in addressing workplace violence.⁴⁴ OSHA’s

³⁹ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. “42 percent of the establishments surveyed reported they had a process or method for identifying potential or current employees with a history of violence . . .” *Id.* State and local governments were more likely to have instituted a process or method for identifying clients, customers, visitors, or patients with histories of violence. *Id.* See also James R. Todd, “It’s Not My Problem”: *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725 (2004) (discussing employment discrimination suffered by ex-convicts when employers attempt to protect themselves from future liability for workplace violence). See also Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 536–39 (2007) (discussing negligent hiring laws in relation to hiring ex-convicts).

⁴⁰ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. See *supra* notes 27–39.

⁴¹ See *infra* Part II.B.

⁴² 3 HR POLICIES AND PRACTICES § 254:2 (discussing employer’s duty to ensure safe workplace) (Sept. 2007).

⁴³ See *infra* Parts II.B.1– 2.

⁴⁴ See 29 U.S.C. § 651 *et seq.* (1970). Congress’s enactment of the OSH Act of 1970 recognized the need for dedication to workplace safety at the federal level and grants OSHA the power to enforce safety and health standards. *Id.* The OSH Act is not intended to eliminate all occupational accidents but to require employers to make a good faith effort to protect employees and prevent injuries. *Id.* See Occupational Safety and Health Administration Home Page, <http://www.osha.gov/> (last visited Nov. 6, 2007). See also OSHA, Safety and Health Topics, Workplace Violence <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited Nov. 6, 2007).

The Occupational Safety and Health Administration aims to ensure employee safety and health in the United States by working with employers and employees to create better working environments.

General Duty Clause places the greatest federal regulation on private employers, by providing that “[e]ach 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[.]”⁴⁵ Employers who breach this general duty are subject to OSHA sanctions.⁴⁶ However, since an

Since its inception in 1971, OSHA has helped to cut workplace fatalities by more than 60 percent and occupational injury and illness rates by 40 percent. At the same time, U.S. employment has increased from 56 million employees at 3.5 million worksites to more than 135 million employees at 8.9 million sites.

In Fiscal Year 2007, OSHA has 2,150 employees, including 1,100 inspectors. The agency's appropriation is \$486.9 million.

Under the current administration, OSHA is focusing on three strategies: 1) strong, fair and effective enforcement; 2) outreach, education and compliance assistance; and 3) partnerships and cooperative programs.

Occupational Health and Safety Administration, OSHA Facts—August 2007, <http://www.osha.gov/as/opa/oshafacts.html> (last visited Nov. 6, 2007). OSHA defines the term “employer” as “a person engaged in a business affecting commerce who has employees, but does not include the United States [not including the United States Postal Service] or any State or political subdivision of a State.” 29 U.S.C. § 652 (1970). Furthermore, OSHA defines “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce.” *Id.*

⁴⁵ 29 U.S.C. § 654(a)(1) (2006). *See OSHA Late-Night Retail Guidelines, supra* note 11. Congress intended to impose two duties on employers when it enacted the OSHA Act of 1970. *Id.* First, employers have a legal obligation to use feasible means to protect employees from recognized hazards in the workplace. *Id.* This is also known as the “General Duty Clause.” *Id.* Second, employers have the legal obligation to comply with health and safety standards promulgated by OSHA. *Id.*

⁴⁶ *Id.*

Citations for violation of the General Duty Clause are issued when the four components of this provision are present, and when no specific OSHA standard has been promulgated to address the recognized hazard. These four elements are: 1) the employer failed to keep his workplace free of a “hazard”; 2) the hazard was “recognized” either by the cited employer individually or by the employer's industry generally; 3) the recognized hazard was causing or was likely to cause death or serious physical harm; and 4) there was a feasible means available that would eliminate or materially reduce the hazard. It should be noted that whether or not guidelines exist, an employer is still subject to the same legal requirements of Section 5(a)(1); an employer's duty will arise only when the four elements are present. Conversely, even in the presence of guidelines which offer a specific means of abatement for a recognized hazard found in an employer's workplace, the employer need not abate the hazard by the means suggested in the guidelines. Rather, an employer is always free to choose its own method of abatement.

Id. *See also* 29 U.S.C. § 666(a) (2006).

(a) Willful or repeated violation

administrative law judge in 1995 held that employers would not be held strictly liable for hazards that were not recognized by the employer's industry, OSHA has rarely exercised its sanctioning authority in response to incidents of workplace violence.⁴⁷

In addition to the General Duty Clause, OSHA has responded to the need for workplace violence prevention programs in two industries that it considers to be at a high risk for violence.⁴⁸ OSHA has established

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation.

Id.

⁴⁷ 3 HR POLICIES AND PRACTICES § 254:2 (Employer's duty to ensure safe workplace) (September 2007). "Employers have been cited by OSHA for an unsafe work environment resulting in workplace violence under the general duty clause of the Occupational Safety and Health Act. However, this approach has stalled, following a 1995 decision by an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission that the commission let stand." *Id.* See also 15 EMP. COORD. WORKPLACE SAFETY § 3:17 (Workplace violence by third parties as a recognizable hazard) (2007).

In holding that the general duty clause did not require the employer to control the unpredictable actions of third parties in the absence of a risk recognized by the employer's industry, the ALJ noted that the "[Review] Commission has consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent."

Id. See Secretary of Labor v. Megawest Fin., Inc., 17 O.S.H. Cas. (BNA) 1337, 1995 WL 383233 (O.S.H.R.C.A.L.J.)

⁴⁸ OSHA Health Care Guidelines, *supra* note 11.

The Bureau of Labor Statistics (BLS) reports that there were 69 homicides in the health services from 1996 to 2000. Although workplace homicides may attract more attention, the vast majority of workplace violence consists of non-fatal assaults. BLS data shows that in 2000, 48 percent of all non-fatal injuries from occupational assaults and violent acts occurred in health care and social services. Most of these occurred in hospitals, nursing and personal care facilities, and residential care services. Nurses, aides, orderlies and attendants suffered the most non-fatal assaults resulting in injury.

Id. See also OSHA Late-Night Retail Guidelines, *supra* note 11.

From 1980 to 1992, the overall rate of homicide was 1.6 per 100,000 workers per year in the retail industry, compared with a national average of 0.70 per 100,000 workers (NIOSH, 1996). Job-related homicides in retail trade accounted for 48 percent of all workplace homicides in 1996 (BLS, 1997). The wide diversity within the retail industry results in substantial variation in levels of risk of violence. Homicides in convenience and other grocery stores, eating and drinking places, and gasoline service stations constituted the largest share of homicides in retail establishments (BLS, 1997).

Id.

guidelines and recommendations for workplace violence prevention for health care and social service workers as well as late-night retail establishments.⁴⁹ OSHA's suggestions are not binding on employers operating in these industries, they are merely advisory.⁵⁰ However, compliance with OSHA's recommendations is a strong defense against a claim of a breach of general duty.⁵¹ OSHA outlines five key elements of effective workplace violence prevention in its recommendations, including: (1) management commitment and employee involvement; (2) worksite analysis; (3) hazard prevention and control; (4) safety and health training; and (5) recordkeeping and program evaluation.⁵² Despite its authority to ensure the safety of United States workers, OSHA has taken an advisory role in preventing workplace violence by offering employers information on best practices rather than actively imposing sanctions.⁵³

The Office on Violence Against Women, a division of the Department of Justice, also offers employers recommendations and tools

⁴⁹ See *OSHA Health Care Guidelines*, *supra* note 11 (which provides guidelines for preventing workplace violence health care and social service workers). See also *OSHA Late-Night Retail Guidelines*, *supra* note 11 (establishing recommendations for workplace violence prevention programs at late-night retailers).

⁵⁰ See *OSHA Health Care Guidelines*, *supra* note 11. "These guidelines are not a new standard or regulation. They are advisory in nature, informational in content and intended to help employers establish effective workplace violence prevention programs adapted to their specific worksites." *Id.* "They are performance-oriented, and how employers implement them will vary based on the site's hazard analysis." *Id.*

⁵¹ See Robert J. Nobile, SECURITY MEASURES, HUMAN RESOURCES GUIDE § 6:109 (October 2007). OSHA also provides employers with checklists in an effort to assist them in identifying potential hazards. *Id.*

⁵² See *OSHA Late-Night Retail Guidelines*, *supra* note 11; *OSHA Health Care Guidelines*, *supra* note 11. "To ensure an effective program, management and frontline employees must work together, perhaps through a team or committee approach." *Id.* "Employee involvement and feedback enable workers to develop and express their own commitment to safety and health and provide useful information to design, implement and evaluate the program." *Id.* "A worksite analysis involves a step-by-step, commonsense look at the workplace to find existing or potential hazards for workplace violence. This entails reviewing specific procedures or operations that contribute to hazards and specific areas where hazards may develop." *Id.* "After hazards are identified through the systematic worksite analysis, the next step is to design measures through engineering or administrative and work practices to prevent or control these hazards. If violence does occur, post-incident response can be an important tool in preventing future incidents." *Id.* "Training and education ensure that all staff are aware of potential security hazards and how to protect themselves and their coworkers through established policies and procedures." *Id.* "Recordkeeping and evaluation of the violence prevention program are necessary to determine its overall effectiveness and identify any deficiencies or changes that should be made." *Id.*

⁵³ See *supra* notes 47-52.

738 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

for preventing workplace violence at the federal level.⁵⁴ The Violence Against Women Act (“VAWA”) is a potential source of federal regulation applicable to employers, because domestic violence against women often becomes a form of workplace violence.⁵⁵ However, some federal statutes, such as the Americans with Disabilities Act (“ADA”) and the Employee Polygraph Protection Act (“EPPA”), restrict an employer’s ability to safeguard its employees by prohibiting the investigation of an employee’s propensity for violence.⁵⁶ States, through

⁵⁴ See National Advisory Council on Violence Against Women, Toolkit To End Workplace Violence Against Women, <http://toolkit.ncjrs.org/files/fullchapter8.pdf> [hereinafter *Toolkit to End Workplace Violence Against Women*]. To help safeguard women in the workplace, employers can do the following: establish sound workplace policies, form partnerships, communicate workplace policies, train employees, develop safety plans, provide comprehensive health care coverage, mentor small businesses, provide adequate security, distribute resources proactively, and develop intervention strategies. *Id.*

⁵⁵ See 18 U.S.C. § 2261–66 (2006). The Violence Against Women Act, was enacted in a response to the social and economic impact domestic violence and stalking have on society. *Id.* 18 U.S.C. § 2261(a) (2006) provides:

(a) Offenses.—

(1) Travel or conduct of offender.—A person who travels in interstate or foreign commerce or enters or leaves Indian country or within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) Causing travel of victim.—A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

Id. See also American Institute on Domestic Violence, *Domestic Violence in the Workplace Statistics* (2001), <http://www.aidv-usa.com/statistics.htm> (stating that “[i]ntimate partner violence victims lose nearly 8.0 million days of paid work each year—the equivalent of more than 32,000 full-time jobs and nearly 5.6 million days of household productivity[]”).

⁵⁶ The American’s with Disabilities Act (“ADA”) can prevent an employer from questioning an employee or prospective employee about a mental illness that may pose a threat to workplace safety. 42 U.S.C. § 12101 *et seq.* (2006). See also *Collins v. Blue Cross Blue Shield of Michigan*, 579 N.W.2d 436 (Mich. Ct. App. 1998) (where an employer sought judicial review of an arbitration award in favor of former employee on claims that her termination, after telling psychiatrist of plans to kill her supervisor, violated the ADA, the court held that the employer did not violate ADA in discharging employee, whom it considered a direct threat to workplace safety). See also *Poff v. Prudential Ins. Co. of Am.*, 911 F. Supp. 856 (E.D. Penn. 1996) (holding that Mr. Poff’s propensity for violence was a legitimate and non-discriminatory explanation for his termination). The Employee Polygraph Protection Act (“EPPA”) limits the use of private sector polygraph tests during pre-employment screening. 29 U.S.C. § 2001 *et. seq.* (2006).

statutes and common-law, have created additional bases of employer liability for workplace violence.⁵⁷

2. State Laws

A few states have enacted laws that either allow employers additional avenues for shielding employees from threats of violence or impose obligations on employers to create workplace violence prevention plans.⁵⁸ Furthermore, states have developed common law theories of recovery for individuals injured as a result of workplace violence.⁵⁹

California, for instance, has enacted the Workplace Violence Safety Act, which allows employers to seek temporary restraining orders and injunctions on behalf of employees.⁶⁰ The Act provides that,

[a]ny employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.⁶¹

Arkansas, Colorado, Georgia, Indiana, Nevada, Rhode Island, and Tennessee have all enacted similar statutes allowing employers to obtain restraining orders on behalf of employees.⁶²

⁵⁷ See *infra* Part II.B.2.

⁵⁸ See WASH. REV. CODE § 49.19.005 *et seq.* Washington has imposed additional requirements on health care employers to create an implement prevention plans and employee training. *Id.* See also CAL. CIV. PROC. CODE § 527.8 (2007). California has enacted the Workplace Violence Safety Act which allows employers to seek temporary restraining orders against individuals who pose a credible threat of violence. *Id.*

⁵⁹ See *infra* notes 73–74.

⁶⁰ See CAL. CIV. PROC. CODE § 527.8 (2007).

⁶¹ See CAL. CIV. PROC. CODE § 527.8(a) (2007). The statute defines a “[c]redible threat of violence [to be] a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” CAL. CIV. PROC. CODE § 527.8(b)(2) (2007).

⁶² See ARK. CODE ANN. § 11-5-115 (2006). An employer can obtain a restraining order to protect employees who have been battered, threatened or stalked at work. *Id.* See also COLO REV. STAT. § 13-14-102(4) (2006). An employer may see a restraining order to protect employees from imminent danger. *Id.* See also GA. CODE ANN. § 34-1-7 (2006).

Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably

In addition, Florida has enacted the Convenience Business Security Act, which requires convenience store operators to install certain security devices and comply with security standards outlined in the statute.⁶³ Also, Florida requires that a convenience store operator develop and administer a training curriculum for employees, which must be approved by the state's Attorney General.⁶⁴ A convenience store business that fails to comply with the statute is subject to fines.⁶⁵

be construed to have been carried out at the employee's workplace may seek a temporary restraining order and an injunction on behalf of the employer prohibiting further unlawful violence or threats of violence by that individual at the employee's workplace or while the employee is acting within the course and scope of employment with the employer.

Id. See also IND. CODE § 34-26-6 (2007). See also NEV. REV. STAT. § 33.200-33.360 (2006). An employer may seek a temporary restraining order for protection, and if successful, an extended order for protection against "harassment in the workplace." *Id.* See also R.I. GEN. L. § 28-52-2 (2007). See also 2002 Tenn. Pub Acts 541.

⁶³ See FLA. STAT. § 812.1701-812.175 (2006).

- (1) Every convenience business shall be equipped with the following security devices and standards:
- (a) A security camera system capable of recording and retrieving an image to assist in offender identification and apprehension.
 - (b) A drop safe or cash management device for restricted access to cash receipts.
 - (c) A lighted parking lot illuminated at an intensity of at least 2 foot-candles per square foot at 18 inches above the surface.
 - (d) A conspicuous notice at the entrance which states that the cash register contains \$50 or less.
 - (e) Window signage that allows a clear and unobstructed view from outside the building and in a normal line of sight of the cash register and sales transaction area.
 - (f) Height markers at the entrance of the convenience business which display height measures.
 - (g) A cash management policy to limit the cash on hand at all times after 11 p.m.

FLA. STAT. § 812.173. More detailed requirements are set out for convenience stores that have experienced incidents of murder, robbery, sexual battery, aggravated assault, aggravated battery, or kidnapping or false imprisonment in the past. *Id.* See also Office of the Attorney General of Florida, The Convenience Business Security Act, <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/74c0e99789f0e78b85256cc60074d323?OpenDocument> (last visited Feb. 1, 2008).

⁶⁴ See FLA. STAT. § 812.174 (2006).

The owner or principal operator of a convenience business or convenience businesses shall provide proper robbery deterrence and safety training by an approved curriculum to its retail employees within 60 days of employment. Existing retail employees shall receive training within 6 months of April 8, 1992. A proposed curriculum shall be submitted in writing to the Attorney General with an administrative fee not to exceed \$100. The Attorney General shall review and approve or disapprove the curriculum in writing within 60

Furthermore, Washington has enacted a statute requiring health care employers to create and institute workplace violence prevention plans and to conduct employee training on the issue.⁶⁶ Each health care setting

days after receipt. The state shall have no liability for approving or disapproving a training curriculum under this section. Approval shall be given to a curriculum which trains and familiarizes retail employees with the security principles, devices, and measures required by s. 812.173. Disapproval of a curriculum shall be subject to the provisions of chapter 120. No person shall be liable for ordinary negligence due to implementing an approved curriculum if the training was actually provided. A curriculum shall be submitted for reapproval biennially with an administrative fee not to exceed \$100. Any curriculum approved by the Attorney General since September 1990 shall be subject to reapproval 2 years from the anniversary of initial approval and biennially thereafter.

Id.

⁶⁵ See FLA. STAT. § 812.175 (2007).

(1) The violation of any provision of this act by any owner or principal operator of a convenience business shall result in a notice of violation from the Attorney General. Violators shall have 30 days after receipt of the notice to provide proof of compliance to the Attorney General's office. If the violation continues after the 30-day period, the Attorney General may impose a civil fine not to exceed \$5,000. The Attorney General has the authority to investigate any alleged violation and may compromise any alleged violation by accepting from the owner or principal operator an amount not to exceed \$5,000. The Attorney General may suspend the imposition of any fine conditioned upon terms the Attorney General's office in its discretion deems appropriate. Notices of violation and civil fines shall be subject to the provisions of chapter 120.

Id.

⁶⁶ See WASH. REV. CODE § 49.19.005 *et seq.* (2006).

The legislature finds that: (1) Violence is an escalating problem in many health care settings in this state and across the nation; (2) Based on an analysis of workers' compensation claims, the department of labor and industries reports that health care employees face the highest rate of workplace violence in Washington state; (3) The actual incidence of workplace violence in health care settings is likely to be greater than documented because of failure to report or failure to maintain records of incidents that are reported; (4) Patients, visitors, and health care employees should be assured a reasonably safe and secure environment in health care settings; and (5) Many health care settings have undertaken efforts to assure that patients, visitors, and employees are safe from violence, but additional personnel training and appropriate safeguards may be needed to prevent workplace violence and minimize the risk and dangers affecting people in health care settings.

WASH. REV. CODE §49.19.005 (2007). See also 405 ILL. COMP. STAT. 90/1 *et seq.* (2005). Illinois has adopted an extremely similar statute, the Health Care Workplace Violence Prevention Act, requiring health care employers to institute workplace violence prevention

742 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43

is required to complete a security and safety assessment prior to developing a workplace violence plan.⁶⁷ Washington requires health care centers to conduct an assessment that:

include[s], but is not limited to, a measure of the frequency of, and an identification of the causes for and consequences of, violent acts at the setting during at least the preceding five years or for the years [for which] records are available for assessments involving home health, hospice, and home care agencies.⁶⁸

Once the assessment is complete, the statute provides that the following security considerations should be addressed in the prevention plan: “(a) [t]he physical attributes of the health care setting; (b) [s]taffing, including security staffing; (c) [p]ersonnel policies; (d) [f]irst aid and emergency procedures; (e) [t]he reporting of violent acts; and (f) [e]mployee education and training.”⁶⁹

procedures. *Id.* After finding that “[t]he actual incidence of workplace violence in health care workplaces, in particular, is likely to be greater than documented because of failure to report such incidents[,] . . .” the Act requires health care workplaces to develop a violence prevention plan. 405 ILL. COMP. STAT. 90/5-15 (2005). Furthermore, each health care center must train employees on violence prevention policies and reporting procedures. 405 ILL. COMP. STAT. 90/20 (2005). While the statute provides for flexibility and additional resources for employers who need assistance to comply, Illinois has not specifically set out penalties for non-compliance. 405 ILL. COMP. STAT. 90/1 *et seq.* (2005). Therefore, Washington’s statute is a more complete example of holding health care providers responsible for enacting all of OSHA’s best practices. WASH. REV. CODE § 49.19.005 *et seq.* (2006).

⁶⁷ WASH. REV. CODE § 49.19.020(2) (2007).

Before the development of the plan required under subsection (1) of this section, each health care setting shall conduct a security and safety assessment to identify existing or potential hazards for violence and determine the appropriate preventive action to be taken. The assessment shall include, but is not limited to, a measure of the frequency of, and an identification of the causes for and consequences of, violent acts at the setting during at least the preceding five years or for the years records are available for assessments involving home health, hospice, and home care agencies.

Id.

⁶⁸ *Id.*

⁶⁹ *See id.* § 49.19.020(1).

In developing the plan required by subsection (1) of this section, the health care setting may consider any guidelines on violence in the workplace or in health care settings issued by the department of health, the department of social and health services, the department of labor and industries, the federal occupational safety and health administration, medicare, and health care setting accrediting organizations.

The Washington statute further requires that employees working in health care settings receive violence prevention training within ninety days of employment.⁷⁰ In addition, health care providers must keep a record of violence against an employee, patient, or visitor.⁷¹ A health

Id. § 49.19.020(3).

⁷⁰ See WASH. REV. CODE § 49.19.030 (2007), which provides:

By July 1, 2001, and on a regular basis thereafter, as set forth in the plan developed under RCW 49.19.020, each health care setting shall provide violence prevention training to all its affected employees as determined by the plan. The training shall occur within ninety days of the employee's initial hiring date unless he or she is a temporary employee. For temporary employees, training would take into account unique circumstances. The training may vary by the plan and may include, but is not limited to, classes, videotapes, brochures, verbal training, or other verbal or written training that is determined to be appropriate under the plan. The training shall address the following topics, as appropriate to the particular setting and to the duties and responsibilities of the particular employee being trained, based upon the hazards identified in the assessment required under RCW 49.19.020: (1) General safety procedures; (2) Personal safety procedures; (3) The violence escalation cycle; (4) Violence-predicting factors; (5) Obtaining patient history from a patient with violent behavior; (6) Verbal and physical techniques to de-escalate and minimize violent behavior; (7) Strategies to avoid physical harm; (8) Restraining techniques; (9) Appropriate use of medications as chemical restraints; (10) Documenting and reporting incidents; (11) The process whereby employees affected by a violent act may debrief; (12) Any resources available to employees for coping with violence; and (13) The health care setting's workplace violence prevention plan.

Id.

⁷¹ See *id.* § 49.19.040.

Beginning no later than July 1, 2000, each health care setting shall keep a record of any violent act against an employee, a patient, or a visitor occurring at the setting. At a minimum, the record shall include: (1) The health care setting's name and address; (2) The date, time, and specific location at the health care setting where the act occurred; (3) The name, job title, department or ward assignment, and staff identification or social security number of the victim if an employee; (4) A description of the person against whom the act was committed as: (a) A patient; (b) A visitor; (c) An employee; or (d) Other; (5) A description of the person committing the act as: (a) A patient; (b) A visitor; (c) An employee; or (d) Other; (6) A description of the type of violent act as a: (a) Threat of assault with no physical contact; (b) Physical assault with contact but no physical injury; (c) Physical assault with mild soreness, surface abrasions, scratches, or small bruises; (d) Physical assault with major soreness, cuts, or large bruises; (e) Physical assault with severe lacerations, a bone fracture, or a head injury; or (f) Physical assault with loss of limb or death; (7) An identification of any body part injured; (8) A description of any weapon used; (9) The number of employees in the vicinity of the act when it occurred; and (10) A description of actions taken by employees

care center that fails to comply with the statute is subject to citation.⁷² However, the regulation also provides for government assistance to help health care centers comply with the statutory requirements.⁷³ Furthermore, the statute allows health care centers operating in less traditional formats, such as home care or hospice, some flexibility in how workplace violence is addressed.⁷⁴

While a few states have required employers, operating in specific industries, such as health care, to take proactive steps in safeguarding employees from workplace violence, the most prevalent form of employer liability occurs after an employee has already been victimized.⁷⁵ Common-law theories of recovery, including negligent hiring or retention, negligent or inadequate training, negligent supervision, and failure to provide adequate security or to maintain safe premises, allow courts to award judgments in favor of individuals who

and the health care setting in response to the act. Each record shall be kept for at least five years following the act reported, during which time it shall be available for inspection by the department upon request.

Id.

⁷² See *id.* § 49.19.050. "Failure of a health care setting to comply with this chapter shall subject the setting to citation under chapter 49.17 RCW." *Id.*

⁷³ See *id.* § 49.19.060.

A health care setting needing assistance to comply with this chapter may contact the federal department of labor or the state department of labor and industries for assistance. The state departments of labor and industries, social and health services, and health shall collaborate with representatives of health care settings to develop technical assistance and training seminars on plan development and implementation, and shall coordinate their assistance to health care settings.

Id.

⁷⁴ See *id.* § 49.19.070.

It is the intent of the legislature that any violence protection and prevention plan developed under this chapter be appropriate to the setting in which it is to be implemented. To that end, the legislature recognizes that not all professional health care is provided in a facility or other formal setting, such as a hospital. Many services are provided by home health, hospice, and home care agencies. The legislature finds that it is inappropriate and impractical for these agencies to address workplace violence in the same manner as other, facility-based, health care settings. When enforcing this chapter as to home health, hospice, and home care agencies, the department shall allow agencies sufficient flexibility in recognition of the unique circumstances in which these agencies deliver services.

Id.

⁷⁵ See *Van Horne v. Muller*, 705 N.E.2d 898, 904 (Ill. 1998). "Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons." *Id.*

have been injured by workplace violence.⁷⁶ Although authorities have taken different approaches when addressing workplace violence, the majority of “best practices” recommended to employers have been consistent across the board.⁷⁷

C. *Dangling the Carrot: What OSHA Says Employers “Should” Do*

OSHA and other regulating authorities, such as the Office on Violence Against Women, propose guidelines and recommendations in the hopes that, with a solid commitment to safety and employee training, employers will be more successful at preventing workplace violence or at least at minimizing its effects.⁷⁸ These best practices offered by different authorities, but most clearly defined by OSHA, contain a number of similar recommendations for shielding the workplace from violence.⁷⁹ The following elements are widely accepted as essential to an effective violence prevention plan: (1) management commitment and employee involvement; (2) worksite analysis; (3) hazard prevention and control; (4) safety and health training; and (5) recordkeeping and program evaluation.⁸⁰

⁷⁶ See Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171 (1995) (discussing a number of sources of employer liability for workplace violence, including the duty to warn and provide adequate security, as well as negligent hiring, retention, and supervision). See also Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 536–69 (2007) (discussing negligent hiring laws in relation to hiring ex-convicts). See *Keller v. Koca*, 111 P.3d 445 (Colo. 2005). The Colorado Supreme Court held that the owner of a dry cleaning business was not liable for negligent supervision because the sexual assault of a twelve year-old girl was not a known risk of harm, even though three women had quit their jobs after having been sexually harassed and fondled by the same employee. *Id.* See *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086 (Ill. App. 1986). The Illinois Appellate Court found that, where truck a driver with record of violent sexual assaults raped teenage hitchhiker, it was a question of fact for the jury whether the employer negligently hired the driver by not checking his non-vehicular criminal background. *Id.*

⁷⁷ See *supra* Parts II.B–C.

⁷⁸ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11; *Toolkit to End Workplace Violence Against Women*, *supra* note 54.

⁷⁹ See *Friend*, *supra* note 6, at 295. “While there is no cure for workplace violence, there are proactive preventative steps that can be implemented to provide a realistic approach to defusing workplace violence before it occurs[.]” *Id.*

⁸⁰ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11; *Toolkit to End Workplace Violence Against Women*, *supra* note 54.

1. Management Commitment and Employee Involvement

OSHA suggests that management and employees must work together to prevent workplace violence.⁸¹ Management must demonstrate its commitment to dealing with workplace violence by endorsing the establishment's safety policies and providing necessary resources.⁸² Furthermore, employers are urged to allow employees to develop their own commitment to violence prevention by getting involved and providing feedback to management.⁸³

⁸¹ See *OSHA Health Care Guidelines*, *supra* note 11.

Management commitment and employee involvement are complementary and essential elements of an effective safety and health program. To ensure an effective program, management and frontline employees must work together, perhaps through a team or committee approach. If employers opt for this strategy, they must be careful to comply with the applicable provisions of the *National Labor Relations Act*.

Id.

⁸² *Id.* Management commitment should include:

Demonstrating organizational concern for employee emotional and physical safety and health; [e]xhibiting equal commitment to the safety and health of workers and patients/clients; [a]ssigning responsibility for the various aspects of the workplace violence prevention program to ensure that all managers, supervisors and employees understand their obligations; [a]llocating appropriate authority and resources to all responsible parties; [m]aintaining a system of accountability for involved managers, supervisors and employees; [e]stablishing a comprehensive program of medical and psychological counseling and debriefing for employees experiencing or witnessing assaults and other violent incidents; and [s]upporting and implementing appropriate recommendations from safety and health committees.

Id.

⁸³ *Id.*

Employee involvement should include: [u]nderstanding and complying with the workplace violence prevention program and other safety and security measures; [p]articipating in employee complaint or suggestion procedures covering safety and security concerns; [r]eporting violent incidents promptly and accurately; [p]articipating in safety and health committees or teams that receive reports of violent incidents or security problems, make facility inspections and respond with recommendations for corrective strategies; and [t]aking part in a continuing education program that covers techniques to recognize escalating agitation, assaultive behavior or criminal intent and discusses appropriate responses.

Id.

2. Worksite Analysis

Conducting a worksite analysis is another OSHA suggestion for an effective workplace violence prevention plan.⁸⁴ A worksite analysis requires an employer to systematically examine its workplace in an effort to uncover existing or potential hazards.⁸⁵ Once potential threats of violence are pinpointed, an employer is better able to take preventative action.⁸⁶ A workplace analysis often includes examining employee injury or illness records, surveying employees to get feedback on what they see as threats of workplace violence, and evaluating workplace security measures.⁸⁷ To truly uncover potential threats of violence and

⁸⁴ *Id.* See also OSHA Late-Night Retail Guidelines, *supra* note 11; Toolkit to End Workplace Violence Against Women, *supra* note 54.

⁸⁵ See OSHA Health Care Guidelines, *supra* note 11; OSHA Late-Night Retail Guidelines, *supra* note 11.

A worksite analysis involves a step-by-step, commonsense look at the workplace to find existing or potential hazards for workplace violence. This entails reviewing specific procedures or operations that contribute to hazards and specific areas where hazards may develop. A threat assessment team, patient assault team, similar task force or coordinator may assess the vulnerability to workplace violence and determine the appropriate preventive actions to be taken. This group may also be responsible for implementing the workplace violence prevention program. The team should include representatives from senior management, operations, employee assistance, security, occupational safety and health, legal and human resources staff.

Id. “The team or coordinator can review injury and illness records and workers’ compensation claims to identify patterns of assaults that could be prevented by workplace adaptation, procedural changes or employee training. As the team or coordinator identifies appropriate controls, they should be instituted.” *Id.*

⁸⁶ *Id.*

⁸⁷ OSHA Health Care Guidelines, *supra* note 11. “To find areas requiring further evaluation, the team or coordinator should:

- Analyze incidents, including the characteristics of assailants and victims, an account of what happened before and during the incident, and the relevant details of the situation and its outcome. When possible, obtain police reports and recommendations.
- Identify jobs or locations with the greatest risk of violence as well as processes and procedures that put employees at risk of assault, including how often and when.
- Note high-risk factors such as types of clients or patients (for example, those with psychiatric conditions or who are disoriented by drugs, alcohol or stress); physical risk factors related to building layout or design; isolated locations and job activities; lighting problems; lack of phones and other communication devices; areas of easy, unsecured access; and areas with previous security problems.
- Evaluate the effectiveness of existing security measures, including engineering controls. Determine if risk factors have been reduced or eliminated and take appropriate action.”

the overall effectiveness of current security precautions, an independent examiner may be necessary.⁸⁸

3. Hazard Prevention and Control

Once a worksite analysis has been completed and potential threats of violence have been uncovered, specific measures must be implemented to prevent or control the identified hazards.⁸⁹ Engineering controls may help to adapt the workplace in a way that minimizes risk of workplace violence.⁹⁰ Furthermore, administrative controls can help change workplace practices that increase the likelihood of violence.⁹¹ OSHA

Id.

⁸⁸ *Id.* "Independent reviewers, such as safety and health professionals, law enforcement or security specialists and insurance safety auditors, may offer advice to strengthen programs. These experts can also provide fresh perspectives to improve a violence prevention program." *Id.*

⁸⁹ *Id.* "After hazards are identified through the systematic worksite analysis, the next step is to design measures through engineering or administrative and work practices to prevent or control these hazards. If violence does occur, post-incident response can be an important tool in preventing future incidents." *Id.*

⁹⁰ *Id.* To institute engineering controls, an employer may decide to take any of the following actions:

- Assess any plans for new construction or physical changes to the facility or workplace to eliminate or reduce security hazards.
- Install and regularly maintain alarm systems and other security devices, panic buttons, hand-held alarms or noise devices, cellular phones and private channel radios where risk is apparent or may be anticipated. Arrange for a reliable response system when an alarm is triggered.
- Provide metal detectors—installed or hand-held, where appropriate—to detect guns, knives or other weapons, according to the recommendations of security consultants.
- Use a closed-circuit video recording for high-risk areas on a 24-hour basis. Public safety is a greater concern than privacy in these situations.
- Place curved mirrors at hallway intersections or concealed areas . . .
- Provide employee "safe rooms" for use during emergencies.

Id.

⁹¹ *Id.* Some administration control "options for employers are to:"

- State clearly to patients, clients and employees that violence is not permitted or tolerated.
- Establish liaison with local police and state prosecutors. Report all incidents of violence. Give police physical layouts of facilities to expedite investigations.
- Require employees to report all assaults or threats to a supervisor or manager (for example, through a confidential interview). Keep log books and reports of such incidents to help determine any necessary actions to prevent recurrences.

believes that post-incident response is essential to effectively handling an event of violence as well as preventing repeat forms of workplace violence.⁹² Employers with an effective post-incident program will not only help employees deal with the current situation of workplace violence, but will prepare them to handle possible future incidents.⁹³

4. Safety and Health Training

Training and education are also essential to ensure that employees understand an employer's policies and procedures and are able to recognize potential threats of workplace violence.⁹⁴ OSHA suggests that,

-
- Advise employees of company procedures for requesting police assistance or filing charges when assaulted and help them do so, if necessary.
 - Provide management support during emergencies. Respond promptly to all complaints.
 - Set up a trained response team to respond to emergencies.
 - Use properly trained security officers to deal with aggressive behavior. Follow written security procedures.
 - Ensure that adequate and properly trained staff are available to restrain patients or clients, if necessary.

Id.

⁹² See *Cohen*, *supra* note 25, at 59–60.

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.

Id. at 59. See *OSHA Health Care Guidelines*, *supra* note 11.

Post-incident response and evaluation are essential to an effective violence prevention program. All workplace violence programs should provide comprehensive treatment for employees who are victimized personally or may be traumatized by witnessing a workplace violence incident. Injured staff should receive prompt treatment and psychological evaluation whenever an assault takes place, regardless of its severity. Provide the injured transportation to medical care if it is not available onsite.

Id.

⁹³ *Id.* (listing a number of forms of assistance that employers can incorporate into post-incident response, including counseling by professionals, employee support groups, and critical-incident stress debriefing).

⁹⁴ *OSHA Late-Night Retail Guidelines*, *supra* note 11. "Employees need instruction on the specific hazards associated with their job and worksite to help them minimize their risk of assault and injury. Such training would include information on potential hazards identified in the establishments, and the methods to control those hazards." *Id.* See also *BARON*, *supra* note 6, at 49–52 (listing examples of warning signs that employees should recognize as "indicators of potential trouble[]"). All of the following are examples of warning signs of workplace violence: attendance problems, impact on supervisor/manager's time, decreased productivity, inconsistent work patterns, poor on-the-job relationships, concentration problems, safety issues, poor health and hygiene, unusual/changed

at a minimum, all employees should receive general training on workplace safety.⁹⁵ Supervisors, management, and security personnel should receive additional training that details how to identify, evaluate, and develop hazard prevention controls.⁹⁶ Employers should also determine when retraining is necessary, such as when an employee violates a safety procedure or changes job duties.⁹⁷ Furthermore,

behavior, fascination with guns or other weapons, evidence of possible drug use or alcohol abuse, evidence of serious stress in the employee's personal life, continual excuses/blame, and unshakable depression. *Id.* See also USA TODAY, Inside the Minds of Workplace Killers, http://www.usatoday.com/money/workplace/2004-07-14-workplace-killings_x.htm (last visited Feb. 1, 2008) (discussing common motivations for workplace violence and behaviors of perpetrators).

⁹⁵ See OSHA *Late-Night Retail Guidelines*, *supra* note 11. Employee training may include the following topics: an overview of the potential risk of assault; operational procedures that are designed to reduce risk; proper use of security measures and engineering controls that have been adopted in the workplace; behavioral strategies to defuse tense situations and reduce the likelihood of a violent outcome, such as techniques of conflict resolution and aggression management; and specific instructions on how to respond to workplace violence, including emergency action procedures to be followed. *Id.*

Training should be conducted by persons who have a demonstrated knowledge of the subject and should be presented in language appropriate for the individuals being trained. Oral quizzes or written tests can ensure that the employees have actually understood the training that they received. An employee's understanding also can be verified by observing the employee at work.

The need to repeat training varies with the circumstances.

Id. See also WASH. REV. CODE § 49.19.030 (2008) (requiring that there be employee training within ninety days of employment). See also BLS *Workplace Violence Prevention Statistics*, *supra* note 18. The survey reports that of the twenty-one (twenty-two) percent of all establishments that provide some sort of employee training, thirteen percent address the employer's policy or prevention program, four percent discuss domestic violence, eight percent cover risk factors of workplace violence, nine percent address prevention strategies, and sixteen (seventeen) percent of trainings addressed reporting concerns and incidents. *Id.* at Table 12.

⁹⁶ See OSHA *Late-Night Retail Guidelines*, *supra* note 11.

Knowing how to ensure sensitive handling of traumatized employees also is an important skill for management. Training for managers also could address any specific duties and responsibilities they have that could increase their risk of assault. Security personnel need specific training about their roles, including the psychological components of handling aggressive and abusive customers and ways to handle aggression and defuse hostile situations.

Id. See also BERNADETTE H. SCHELL & NELLIE M. LANTEIGNE, *STALKING, HARASSMENT, AND MURDER IN THE WORKPLACE* 225-26 (Quorum Books 2000) (explaining that training should be conducted to help employees identify red-flags and that supervisors should receive more specialized training). OSHA has granted a partial exemption for recording keeping of work-related injuries and illnesses for employers with ten or fewer employees. 29 C.F.R. § 1904.1 (2007).

⁹⁷ See OSHA *Late-Night Retail Guidelines*, *supra* note 11.

employers are encouraged to frequently review the content of employee training material to ensure accuracy.⁹⁸

5. Recordkeeping and Program Evaluation

OSHA suggests that recordkeeping is also an effective way for employers to analyze the severity of hazard risks, evaluate current controls, and pinpoint employees in need of training.⁹⁹ Considering that records often help to uncover problem areas and identify solutions, OSHA recommends that employers maintain documentation of employee injuries and illnesses, incidents of violence, hazards, and corrective actions as part of an effective violence prevention program.¹⁰⁰

Program evaluation is also considered indispensable to violence prevention.¹⁰¹ To ensure that a workplace violence prevention program is on the right track, an employer should solicit feedback by interviewing

Retraining should be considered for employees who violate or forget safety measures. Similarly, employees who are transferred to new job assignments or locations may need training even though they may already have received some training in their former position. Establishments with high rates of employee turnover may need to provide training frequently.

Id.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Employers can tailor their recordkeeping practices to the needs of their violence prevention program. The purpose of maintaining records is to enable the employer to monitor its on-going efforts, to determine if the violence prevention program is working, and to identify ways to improve it. Employers may find the following types of records useful for this purpose:

- Records of employee and other injuries and illnesses at the establishment.
- Records describing incidents involving violent acts and threats of such acts, even if the incident did not involve an injury or a criminal act. Records of events involving abuse, verbal attacks, or aggressive behavior can help identify patterns and risks that are not evident from the smaller set of cases that actually result in injury or crime.
- Written hazard analyses.
- Recommendations of police advisors, employees, or consultants.
- Up-to-date records of actions taken to deter violence, including work practice controls and other corrective steps.
- Notes of safety meetings and training records.

Id.

¹⁰¹ *Id.*

supervisors and employees.¹⁰² Furthermore, employees can be tested or observed to verify that their responses are in compliance with workplace policies and procedures.¹⁰³ After feedback has been generated, employers are urged to update policies and procedures to reflect the lessons learned from the prevention plan evaluation.¹⁰⁴

While most regulatory bodies have taken an advisory role providing employers with recommendations for preventing workplace violence, statistics show that few employers have taken these best practices to heart.¹⁰⁵ As a result, employers often do not reform their practices until after an employee has been threatened, stalked, assaulted, or killed.¹⁰⁶

¹⁰² *Id.*

¹⁰³ See OSHA *Late-Night Retail Guidelines*, *supra* note 11.

Violence prevention programs benefit greatly from periodic evaluation. The evaluation process could involve the following:

- Review the results of periodic safety audits.
- Review post-incident reports. In analyzing incidents, the employer should pay attention not just to what went wrong, but to actions taken by employees that avoided further harm. . .
- Examine reports and minutes from staff meetings on safety and security issues.
- Analyze trends and rates in illnesses, injuries or fatalities caused by violence relative to initial or "baseline" rates.
- Consult with employees before and after making job or worksite changes to determine the effectiveness of the interventions.
- Keep abreast of new strategies to deal with violence in the . . . industry.

Id.

¹⁰⁴ *Id.* "Management should communicate any lessons learned from evaluating the workplace violence prevention program to all employees. Management could discuss changes in the program during regular meetings of the safety committee, with union representatives, or with other employee groups." *Id.*

¹⁰⁵ See *supra* Part II.

¹⁰⁶ See *supra* Part II. See also BARON, *supra* note 6, at 1.

If you had asked me about violence in the workplace two years ago, I wouldn't have understood what you were talking about. In my 20 plus years of Human Resources experience I can't think of one physical fight I had to break up. I have worked with individuals who were pretty hot under the collar, but things were resolvable without further incident. Oh! A car was reported as having a scratch put on it by a suspected fellow employee.

June 4, 1991, I learned that I could be stalked, hunted, and killed in my office. By pure fate, luck, or whatever you call it, I was spared – but two of my friends and colleagues were murdered in cold blood in front of fellow employees.

Id.

III. EFFECTIVELY REDUCING WORKPLACE VIOLENCE: EMPLOYERS NEED MORE THAN JUST A FRIENDLY REMINDER

By providing employers with advisory guidelines and recommendations for addressing workplace violence, rather than mandatory rules with consequences, OSHA puts a great deal of confidence in employers' willingness to follow through and carry out best practices.¹⁰⁷ Unfortunately, this confidence is unfounded, considering that seventy percent of employers do not have a workplace violence program and only ten percent of employers who experience violence proceed to change their policies.¹⁰⁸ While a few states, like Florida and Washington, have recognized the need for greater accountability in specific high-risk industries, the rest of our nation's workers must hope that their employer is one of the few that has taken proactive steps to safeguard them from becoming one of the two-million victims of workplace violence each year.¹⁰⁹

Part III.A of this Note examines OSHA's power to hold employers liable for workplace violence and its failure to exercise this authority.¹¹⁰ Part III.B discusses why OSHA's recommendations are effective and should be binding on employers.¹¹¹ Part III.C analyzes current state regulations of employers and discusses the need to follow in the footsteps of Florida and Washington legislatures.¹¹²

A. OSHA's Role: We Have the Power, But We Are Not Going To Use It

Despite OSHA's mission to ensure employee safety and health and its authority to sanction employers who fail to shield employees from danger, OSHA does not actively exercise its power to protect the nation's workers from workplace violence.¹¹³ Rather than living up to its mission by truly safeguarding workers and demonstrating a national commitment to preventing workplace violence, OSHA has decided to

¹⁰⁷ See *supra* Part II.

¹⁰⁸ See *BLS Workplace Violence Prevention Statistics*, *supra* note 18.

¹⁰⁹ See FLA. STAT. § 812.1701-812.175 (2006); WASH. REV. CODE § 49.19.005 (2008). See also *OSHA Workplace Violence Facts*, *supra* note 7.

¹¹⁰ See *infra* Part III.A.

¹¹¹ See *infra* Part III.C.

¹¹² See *infra* Part III.B.

¹¹³ See Occupational Safety and Health Administration Home Page, <http://www.osha.gov/> (last visited Nov. 6, 2007). See also OSHA, Safety and Health Topics, Workplace Violence <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited Nov. 6, 2007). OSHA's mission is to work with employers and employees in an effort to ensure employee safety and health across the United States. Occupational Health and Safety Administration, OSHA Facts—August 2007, <http://www.osha.gov/as/opa/oshafacts.html> (last visited Nov. 6, 2007).

754 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

stand on the sidelines by issuing recommendations specifically applicable to only two narrow industries.¹¹⁴ Considering that workplace violence is not industry specific and that statistics reveal that employers have not been successful at preventing incidents of violence on their own, OSHA's function as an advisor to employers has proven ineffective.¹¹⁵

OSHA should not sit on its powers to regulate employers.¹¹⁶ While common law theories of recovery, such as negligent hiring or retention, may work to alleviate some of the suffering placed on victims of workplace violence, in these cases, the victimization has already occurred and the damage has already been done.¹¹⁷ Instead of waiting for employees to become victims of violence or hoping that employers will independently adopt prevention plans, OSHA should address the problem of workplace violence head-on by making its best practices binding on employers.¹¹⁸

¹¹⁴ See 3 HR POLICIES AND PRACTICES § 254:2 (2007).

Employers have been cited by OSHA for an unsafe work environment resulting in workplace violence under the general duty clause of the Occupational Safety and Health act. However, this approach has been stalled, following a 1995 decision by an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission that the commission let stand.

Id. See also 15 EMPLOYMENT COORDINATOR WORKPLACE SAFETY § 3:17 (2007).

In holding that the general duty clause did not require the employer to control the unpredictable actions of third parties in the absence of a risk recognized by the employer's industry, the ALJ noted that the "[Review] Commission has consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent."

Id. See Sec'y of Labor v. Megawest Fin., Inc., 17 O.S.H. Cas. (BNA) 1337, 1995 WL 383233 (O.S.H.R.C.A.L.J.); OSHA Health Care Guidelines, *supra* note 11 (best practices for health care & social service workers); OSHA Late-Night Retail Guidelines, *supra* note 11 (best practices for late-night retail establishments).

¹¹⁵ See *supra* Part I.A.

¹¹⁶ See *supra* Part II.A.

¹¹⁷ See Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171 (1995) (discussing a number of sources of employer liability for workplace violence, including the duty to warn and provide adequate security, as well as negligent hiring, retention, and supervision). See also Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 536-69 (2007) (discussing negligent hiring laws in relation to hiring ex-convicts); Van Horne v. Muller, 705 N.E.2d 898, 904 (Ill. 1998). "Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons." *Id.*

¹¹⁸ See *infra* Part IV.

B. *Best Practices Are the "Best" for a Reason*

OSHA's guidelines need to be compulsory because they target specific prevention practices that a majority of our nation's employers have failed to implement on their own.¹¹⁹ In order to ensure the creation of a national dedication to violence prevention, all employers should be required to: (1) demonstrate a management commitment to preventing workplace violence as well as employee involvement aimed at achieving this goal; (2) execute a worksite analysis; (3) create and implement a hazard prevention and control plan; (4) develop and conduct employee safety and health training; and (5) institute a system of recordkeeping and program evaluation.¹²⁰

Although OSHA has stressed the importance of commitment to effective workplace violence prevention, it is clear that few employers have heeded OSHA's advice.¹²¹ Over seventy percent of employers need a wake-up call to motivate them to enact a workplace violence policy.¹²² The risk of OSHA imposing penalties for failure to take proactive steps to protect employees will help open employers' eyes and encourage employers to implement a workplace violence policy rather than to wait until they experience first-hand the effects of workplace violence and employee victimization.¹²³ OSHA's authority to sanction employers,

¹¹⁹ *BLS Workplace Violence Prevention Statistics*, *supra* note 18.

Nearly five percent of the 7.1 million private industry business establishments in the United States had an incident of workplace violence within the 12 months prior to completing a new survey on workplace violence. Although about a third of these establishments reported that the incident had a negative impact on their workforce, the great majority of these establishments did not change their workplace violence prevention procedures after the incident; almost 9 percent of these establishments had no program or policy addressing workplace violence.

Id.

¹²⁰ *See OSHA Late-Night Retail Guidelines*, *supra* note 11; *OSHA Health Care Guidelines*, *supra* note 11.

¹²¹ *Id.* "To ensure an effective program, management, front-line employees, and employee representatives need to work together in the structure and operation of their violence prevention program." *Id.*

¹²² *BLS Workplace Violence Prevention Statistics*, *supra* note 18. Of the approximately thirty percent of establishments that did have some sort of workplace violence policy, eleven percent only had a verbal program. *Id.* at Table 10.

¹²³ *See Zimmerman*, *supra* note 13. *See also* Cleveland.com, Who Was Asa Coon?, http://blog.cleveland.com/metro/2007/10/who_was_asa_coon.html (providing background information on Asa Coon, the high-school student who shot students and teachers at a Cleveland school). *See also* BARON, *supra* note 6, at 8. "But many critical signs had been either unnoticed, dismissed or excused with, 'Ah, that's just Larry. Sure he's a little strange, but basically he's all right.'" *Id.*

756 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

rather than hindsight, will be a new basis for management commitment and employee involvement aimed at preventing workplace violence.¹²⁴

Not only do statistics show a lack of focus on violence prevention, statements made by perpetrators of workplace violence reveal that greater security would have served as an effective deterrent.¹²⁵ Without systematically evaluating current safety measures, requesting employee feedback, or evaluating employee injury records, it is unlikely that employers will uncover potential threats of workplace violence that could easily be avoided with additional precautions in place.¹²⁶ By requiring a worksite analysis, OSHA will force employers to evaluate their current level of security before a perpetrator has the opportunity to pinpoint and take advantage of locations that lack proper protection.¹²⁷

Furthermore, employers must create and execute a hazard prevention and control plan in order to safeguard employees from the security risks discovered in the worksite analysis.¹²⁸ If employers do not implement administrative or engineering controls, perpetrators will not be deterred from committing acts of violence.¹²⁹ As part of this stage of prevention planning, employers must also develop post-incident response procedures.¹³⁰ Often overlooked by employers who do have a

¹²⁴ See Cleveland.com, Who Was Asa Coon?, http://blog.cleveland.com/metro/2007/10/who_was_asa_coon.html (providing background information on Asa Coon, the high-school student who shot students and teachers at a Cleveland school). See also BARON, *supra* note 6, at 8. "But many critical signs had been either unnoticed, dismissed or excused with, 'Ah, that's just Larry. Sure he's a little strange, but basically he's all right.'" *Id.*

¹²⁵ BLS *Workplace Violence Prevention Statistics*, *supra* note 18. Fifteen percent of establishments only employ electronic surveillance, while seventeen percent have only instituted physical security measures. *Id.* Furthermore, one percent of establishments rely solely on security staff. *Id.* See also USA TODAY, Convicts Say Companies Share Fault, http://www.usatoday.com/money/workplace/2004-07-15-convicts-side_x.htm (last visited Feb. 1, 2008) (discussing two perpetrators of workplace violence who state that greater security precautions, such as "[a] camera system like a prison[,]" could have prevented their crimes).

¹²⁶ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11.

¹²⁷ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11.

¹²⁸ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11.

¹²⁹ See OSHA *Health Care Guidelines*, *supra* note 11; OSHA *Late-Night Retail Guidelines*, *supra* note 11.

¹³⁰ See Cohen, *supra* note 25, at 59-60.

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.

violence prevention plan, post-incident response is necessary for treating employees who have become victims of workplace violence as well as identifying causes of violence so that they can be successfully prevented in the future.¹³¹ Once hazard prevention and control procedures have been developed, they should be included in employee safety and health training so that employees are capable of handling threats and incidents of violence.¹³²

Not only does OSHA recommend that employers educate employees on safety and health issues in the workplace, both Florida's and Washington's workplace violence prevention statutes include specific requirements for employers concerning employee training.¹³³ Other than the very limited number of employers subject to these state statutes, employers have discretion as to whether or not to train employees.¹³⁴ Because statistics reveal that less than ten percent of employers educate workers on violence prevention strategies, OSHA should mandate that employers conduct employee training.¹³⁵

Educating employees on violence warning signs, policies and procedures, and best practices for getting involved, is an indispensable part of effective workplace violence prevention.¹³⁶ All too often

Id. at 59. See also OSHA Health Care Guidelines, *supra* note 11; OSHA Late-Night Retail Guidelines, *supra* note 11.

¹³¹ See OSHA Health Care Guidelines, *supra* note 11; OSHA Late-Night Retail Guidelines, *supra* note 11.

¹³² See OSHA Health Care Guidelines, *supra* note 11; OSHA Late-Night Retail Guidelines, *supra* note 11.

¹³³ See FLA. STAT. § 812.174 (2006). "The owner or principal operator of a convenience business or convenience businesses shall provide proper robbery deterrence and safety training by an approved curriculum to its retail employees within 60 days of employment." *Id.*

¹³⁴ See *id.* at § 812.1701-175; OSHA Health Care Guidelines, *supra* note 11; OSHA Late-Night Retail Guidelines, *supra* note 11.

¹³⁵ BLS Workplace Violence Prevention Statistics, *supra* note 18. Only four percent of all establishments trained employees on the effects of domestic violence in the workplace. *Id.* at Table 12. Furthermore, only nine percent of all establishments provided training on violence prevention strategies. *Id.*

¹³⁶ OSHA Late-Night Retail Guidelines, *supra* note 11. "Employees need instruction on the specific hazards associated with their job and worksite to help them minimize their risk of assault and injury. Such training would include information on potential hazards identified in the establishments, and the methods to control those hazards." *Id.* See also BARON, *supra* note 6, at 49-52 (listing examples of warning signs that employees should recognize as "indicators of potential trouble"). All of the following are examples of warning signs of workplace violence: attendance problems, impact on supervisor/manager's time, decreased productivity, inconsistent work patterns, poor on-the-job relationships, concentration problems, safety issues, poor health and hygiene, unusual/changed behavior, fascination with guns or other weapons, evidence of possible drug use or alcohol abuse, evidence of serious stress in the employee's personal life, continual excuses/blame, and unshakable depression. *Id.*

758 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 43]

employees look back and discover that the signs were there, if only someone would have done or said something before it was too late.¹³⁷ Education on health and safety gives employees invaluable tools to protect themselves and others against violence and should be mandatory in every workplace.¹³⁸ Included in employee training should be a discussion of recordkeeping and prevention program evaluation procedures.¹³⁹

Recordkeeping of incidents of workplace violence, prevention plan procedures, and employee training should also be mandatory for employers.¹⁴⁰ Because less than a quarter of employers track the costs of workplace violence and, as a result, more than half of all incidents go unreported to police, requiring employers to maintain records and report incidents and costs of workplace violence is essential to truly understanding the extent of this national problem.¹⁴¹ Employers should also be required to periodically evaluate their workplace prevention plan

¹³⁷ See Zimmerman, *supra* note 13. See also Cleveland.com, Who Was Asa Coon?, http://blog.cleveland.com/metro/2007/10/who_was_asa_coon.html (providing background information on Asa Coon, the high-school student who shot students and teachers at a Cleveland school). "I'm going to get you," he warned his tormentor. "I will get you." *Id.* "Some youngsters say Asa was . . . picked on . . . [and that] he confided to friends that he would shoot up the school." *Id.* A classmate said "I thought he was just kidding, I probably should have said something, but I didn't think anything would actually happen." . . . [Asa] shot two teachers and two classmates before he put the gun in his mouth and pulled the trigger." *Id.* See also Baron, *supra* note 6, at 8.

Hansel's craving for revenge may have become irrepressible in the cab of his truck as he made that familiar drive, but his explosive behavior had been building up in him for some time—for much longer than the three months since he'd lost his job. There had been signs, many of them, some as bright as flares, that Hansel was, at the very least, disturbed. His problems were not completely ignored by Elgar [Corporation]. Hansel was encouraged to see a counselor. But many critical signs had been either unnoticed, dismissed or excused with, "Ah, that's just Larry. Sure he's a little strange, but basically he's all right."

Id.

¹³⁸ See OSHA Late-Night Retail Guidelines, *supra* note 11.

¹³⁹ *Id.*

¹⁴⁰ *Id.* "Employers can tailor their recordkeeping practices to the needs of their violence prevention program. The purpose of maintaining records is to enable the employer to monitor its on-going efforts, to determine if the violence prevention program is working, and to identify ways to improve it." *Id.*

¹⁴¹ BLS Workplace Violence Prevention Statistics, *supra* note 18. Only forty-three percent of private industry business track the costs associated with employee injuries or illnesses. *Id.* Even worse, only twenty-percent of employers report tracking the costs of workplace violence. *Id.* For all establishments, the costs of workers' compensation were the most frequently tracked, followed by absenteeism and property damage. *Id.* See also Friend, *supra* note 6, at 289 (stating that over half of all instances of worker victimization are not reported to police).

to ensure that it reflects current strategies of violence prevention in the industry, employee feedback, and lessons learned after incidents of violence or threats of violence have occurred.¹⁴² Due to OSHA's failure to make its best practices compulsory, a few states have taken it upon themselves to hold employers liable for failing to address the problem of workplace violence.¹⁴³

C. *Florida and Washington: Consequences for Failing To Protect Employees Even Before Violence Occurs*

Florida and Washington have decided to make progress in the prevention of workplace violence by imposing liability on employers who fail to take proper safety precautions or educate employees.¹⁴⁴ Despite the fact that these state statutes are unfortunately not applicable to all employers, they are excellent examples of efforts to ensure that employers are being proactive.¹⁴⁵

While the statute regrettably does not require convenience store employers to complete all of the recommendations established by OSHA, such as conducting a worksite analysis or creating a prevention plan, Florida's Convenience Business Security Act clearly defines the security standards and training requirements necessary for employer compliance.¹⁴⁶ One of the major strengths of Florida's statute is that it requires employers who have experienced certain types of violence in the past to be held to a higher standard of safety.¹⁴⁷ Considering that statistics show that very few employers change their policies after incidents of violence, the Florida statute ensures that greater safety precautions are taken.¹⁴⁸ Another strength of the statute is that it requires convenience store operators to develop their own curriculum for employee training.¹⁴⁹ This gives employers the opportunity to reflect

¹⁴² See *OSHA Late-Night Retail Guidelines*, *supra* note 11.

¹⁴³ See *infra* Part III.C.

¹⁴⁴ See FLA. STAT. § 812.175 (2006). See also WASH. REV. CODE § 49.19.050 (2008). "Failure of a health care setting to comply with this chapter shall subject the setting to citation under chapter 49.17 RCW." *Id.*

¹⁴⁵ See FLA. STAT. § 812.1701-812.175 (2006); WASH. REV. CODE § 49.19.005. (2008).

¹⁴⁶ See FLA. STAT. § 812.1701-812.175.

¹⁴⁷ See FLA. STAT. § 812.173 (2006). More detailed requirements are set out for convenience stores that have experienced incidents of murder, robbery, sexual battery, aggravated assault, aggravated battery, or kidnapping or false imprisonment in the past. *Id.*

¹⁴⁸ See *BLS Workplace Violence Prevention Statistics*, *supra* note 18.

¹⁴⁹ See FLA. STAT. § 812.174 (2006). "The owner or principal operator of a convenience business or convenience businesses shall provide proper robbery deterrence and safety training by an approved curriculum to its retail employees within 60 days of employment." *Id.*

on the potential risks of workplace violence that exist in their own operation and design a training program that caters to the specific needs of the business's employees.¹⁵⁰

While Florida has been more successful at holding employers responsible for protecting employees before an incident of violence than OSHA, Washington has gone a few steps further in the right direction.¹⁵¹ Washington's statute, applicable to health care providers, binds employers to all the best practices recommended by OSHA.¹⁵²

Just like OSHA's best practice guidelines, which outline what employers should do to institute a workplace violence prevention plan, the Washington statute effectively breaks down each requirement, allowing health care providers to clearly comprehend what is necessary for compliance.¹⁵³ Not only does the statute guide employers step-by-step through the creation of a valuable workplace violence prevention plan, it provides for assistance and flexibility.¹⁵⁴

Washington demonstrates its commitment to preventing workplace violence by providing valuable resources, such as training conducted by the federal or state department of labor, for employers who are struggling to comply with the statute.¹⁵⁵ Furthermore, the extra assistance takes the risk of citation off of employers who are truly willing to be proactive, but are experiencing obstacles along the way.¹⁵⁶ Washington is also wise to allow flexibility for non-traditional health care providers because to be effective, violence prevention plans must

¹⁵⁰ OSHA *Late-Night Retail Guidelines*, *supra* note 11. "Employees need instruction on the specific hazards associated with their job and worksite to help them minimize their risk of assault and injury. Such training would include information on potential hazards identified in the establishments, and the methods to control those hazards." *Id.*

¹⁵¹ See FLA. STAT. § 812.1701-812.175 (2006); WASH. REV. CODE § 49.19.005. (2008).

¹⁵² See OSHA *Late-Night Retail Guidelines*, *supra* note 11; OSHA *Health Care Guidelines*, *supra* note 11; *Toolkit To End Workplace Violence Against Women*, *supra* note 54.

¹⁵³ See OSHA *Late-Night Retail Guidelines*, *supra* note 11; OSHA *Health Care Guidelines*, *supra* note 11.

¹⁵⁴ See WASH. REV. CODE § 49.19.060 (2008).

A health care setting needing assistance to comply with this chapter may contact the federal department of labor or the state department of labor and industries for assistance. The state departments of labor and industries, social and health services, and health shall collaborate with representatives of health care settings to develop technical assistance and training seminars on plan development and implementation, and shall coordinate their assistance to health care settings.

Id. See *id.* § 49.19.070. "It is the intent of the legislature that any violence protection and prevention plan developed under this chapter be appropriate to the setting in which it is to be implemented." *Id.*

¹⁵⁵ See *id.* § 49.19.060.

¹⁵⁶ See *id.* § 49.19.050. "Failure of a health care setting to comply with this chapter shall subject the setting to citation under chapter 49.17 RCW." *Id.*

cater to the specific needs of an employer rather than be uniformly applied.¹⁵⁷

While Washington has effectively held health care providers to OSHA's best practices, this proactive approach should also be applied to other industries.¹⁵⁸ Workplace violence is a national problem, and all employers should institute OSHA's guidelines, which are designed to safeguard workers.¹⁵⁹

Considering that over two million employees are victimized by workplace violence every year in this country and that few employers have taken it upon themselves to do anything about it, OSHA should take advantage of its authority to ensure the safety and health of our nation's workers.¹⁶⁰ Rather than waiting for individual states to follow in the footsteps of Florida and Washington, OSHA should demonstrate the need for a national commitment against workplace violence by holding employers accountable for carrying out all of its widely-accepted best practices.¹⁶¹ Again, employer accountability should not be limited to health care providers and late-night retailers.¹⁶² Workplace violence is widespread; every worker is a potential victim.¹⁶³ Part IV of this Note

¹⁵⁷ See *id.* § 49.19.070.

¹⁵⁸ See *BLS Workplace Violence Prevention Statistics*, *supra* note 18.

Nearly five percent of the 7.1 million private industry business establishments in the United States had an incident of workplace violence within the 12 months prior to completing a new survey on workplace violence. Although about a third of these establishments reported that the incident had a negative impact on their workforce, the great majority of these establishments did not change their workplace violence prevention procedures after the incident; almost 9 percent of these establishments had no program or policy addressing workplace violence

Id.

¹⁵⁹ See *supra* Part III.C.

¹⁶⁰ See *supra* Part III.A.

¹⁶¹ See *supra* Part III.

¹⁶² See *supra* Part III.

¹⁶³ According to the Bureau of Labor Statistics, in 2006, there were 788 fatal occupational injuries in the United States that were caused by assaults or violent acts. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries By Industry And Event Or Exposure, All United States (2006)*, <http://www.bls.gov/iif/oshwc/foi/cftb0214.pdf>. Of the 754 fatal injuries, 656 of the victims were male. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries By Worker Characteristics And Event Or Exposure, All United States (2006)*, <http://www.bls.gov/iif/oshwc/foi/cftb0220.pdf>. Furthermore, 516 of the fatalities were homicides. U.S. Dept. of Labor, Bureau of Labor Statistics, *Fatal Occupational Injuries Resulting from Transportation Incidents And Homicides, All United States (2006)*, <http://www.bls.gov/iif/oshwc/foi/cftb0215.pdf>. In 2005, 564 employees were victims of workplace homicide. OSHA, Safety and Health Topics, *Workplace Violence*, <http://www.osha.gov/SLTC/workplaceviolence/> (last visited Sept. 22, 2008). Workplace violence can "occur at or outside the workplace and can range from threats and

proposes an OSHA regulation, mandating that employers comply with violence prevention best practices or else be subject to OSHA's sanctioning authority.¹⁶⁴

IV. THE STICK: A PROPOSED OSHA REGULATION BINDING EMPLOYERS TO WORKPLACE VIOLENCE PREVENTION "BEST PRACTICES"

As discussed in Part III, OSHA should take advantage of its authority to protect the safety and health of the nation's workers by enacting a regulation that gives guidelines for preventing workplace violence and has binding effect on employers.¹⁶⁵ The following proposed regulation incorporates many of the strengths of the abovementioned Florida and Washington statutes.¹⁶⁶ The proposed OSHA regulation appears as follows, with explanatory commentary intertwined:

(a) Findings

The Occupational Safety and Health Administration (OSHA) finds that: (1) Violence is an escalating problem in workplaces across the nation, effecting approximately two million workers every year; (2) Based on the finding of the Bureau of Labor Statistics (BLS), few employers have actively addressed the issue of workplace violence; (3) The actual incidence of workplace violence is likely to be greater than documented because of failure to report or failure to maintain records of incidents that are reported; (4) Employees should be assured a reasonably safe and secure work environment; (5) Many employers have taken some measures to address workplace violence but additional employee training and appropriate safeguards may be needed to prevent workplace violence and minimize the risks and dangers affecting our nation's workers.¹⁶⁷

verbal abuse to physical assaults and homicide[.]” *OSHA Workplace Violence Facts*, *supra* note 7.

¹⁶⁴ See *infra* Part IV.

¹⁶⁵ See *supra* Part III.

¹⁶⁶ See *supra* Part III. The proposed regulation includes provisions used by the Florida and Washington legislatures, OSHA standards and definitions, as well as new language created based on the findings of this Note.

¹⁶⁷ See *supra* Part II. See WASH. REV. CODE § 49.19.005 (2008).

(b) Purpose

The purpose of this regulation is to require employers to implement workplace violence prevention procedures in accordance with these rules, in an effort to reduce the pervasiveness of workplace violence and to protect the nation's workers.¹⁶⁸

*Commentary: Sections (a) and (b) are included in the proposed regulation in an effort to increase employers' awareness of workplace violence and encourage commitment to the national problem. The two sections also provide justification for the new federal initiative and the additional burden the regulation will place on employers.*¹⁶⁹

(c) Definitions

"Employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State;

"Employee" means an employee of an employer who is employed in a business of his employer which affects commerce;

"Violence" or "violent act" means any physical assault or verbal threat of physical assault against an employee.¹⁷⁰

(d) Partial Exemption for Employers with 10 or Fewer Employees

If an employer has ten (10) or fewer employees at all times during the last calendar year, the employer does not need to keep OSHA records required in these rules unless OSHA or the BLS informs the employer indicating otherwise. However, all

¹⁶⁸ See *supra* Parts II-III (establishing workplace violence as a national problem and the need for greater regulation of employers).

¹⁶⁹ See *supra* Parts II-III.

¹⁷⁰ 29 U.S.C. § 652 (1970) (defining the terms "employer" and "employee" for OSHA purposes).

employers covered by the Occupational Safety and Health Act must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees.¹⁷¹

*Commentary: Section (d) is included in the proposed regulation in order to prevent undue burden on employers with fewer than ten employees. While all employers should be responsible for addressing workplace violence, OSHA should be mindful of the size and resources of employers and allow flexibility when necessary.*¹⁷²

(e) Additional Requirements: Employers with History of Serious Workplace Violence

If a murder, robbery, sexual battery, aggravated assault, aggravated battery, kidnapping, or false imprisonment, occurs or has occurred at a place of employment within the past 5 years, and arises out of the operation of the business, the employer shall be required to implement additional security measures.¹⁷³

*Commentary: Section (e) of the proposed regulation is included to address the statistic that reveals that only a small percentage of employers change their policies after an incident of workplace violence.*¹⁷⁴ *Section (e) operates to ensure that employers take workplace violence prevention seriously, even if first-hand experience is not enough to compel them to be pro-active in the future.*¹⁷⁵

(f) Workplace Violence Plan: Worksite Analysis & Hazard Prevention and Control

(1) Each employer shall develop and implement a hazard prevention and control plan to reasonably prevent and protect employees from violence. The plan shall address security considerations related to the following items, as appropriate to the particular employer, based

¹⁷¹ 29 C.F.R. § 1904.1 (2007).

¹⁷² See *supra* Part II.A.

¹⁷³ See FLA. STAT. § 812.173 (2006).

¹⁷⁴ See BLS *Workplace Violence Prevention Statistics*, *supra* note 18.

¹⁷⁵ See FLA. STAT. § 812.173 (2006).

upon the hazards identified in the assessment required under subsection (2) of this section:

- (i) The physical attributes of the employment setting;
 - (ii) Staffing, including security staffing;
 - (iii) Personnel policies;
 - (iv) First aid and emergency procedures;
 - (v) The reporting of violent acts; and
 - (vi) Employee education and training.¹⁷⁶
- (2) Before the development of the plan required under subsection (1) of this section, each employer shall conduct a worksite analysis to systematically examine and identify existing or potential hazards for violence and determine the appropriate preventive action to be taken. The assessment shall include, but is not limited to, a measure of the frequency of, and an identification of the causes for and consequences of, violent acts during at least the preceding five years or for the years records are available for assessments.¹⁷⁷
- (3) In developing the plan required by subsection (1) of this section, employers may consider any guidelines on violence in the workplace issued by the Department of Health, the Department of Social and Health Services, the Department of Labor and Industries, or OSHA.¹⁷⁸

Commentary: Section (f) creates a binding effect for two of OSHA's best practices and requires employers to evaluate their current level of security before a perpetrator has the opportunity to take advantage of weaknesses. Seeing that section (f)(2) allows employers flexibility in plan development, employers are able create the foundation for an effective prevention plan targeted at their specific safety needs.

¹⁷⁶ See WASH. REV. CODE § 49.19.020(1) (2008).

¹⁷⁷ See *id.* at § 49.19.020(2).

¹⁷⁸ See *id.* at § 49.19.020(3). See also OSHA *Late-Night Retail Guidelines*, *supra* note 11; OSHA *Health Care Guidelines*, *supra* note 11.

(g) Violence Prevention Training

- (1) As set forth in the plan developed under section (f), each employer shall provide violence prevention training to all its affected employees as determined by the plan. The training shall occur within ninety days of the employee's initial hiring date unless he or she is a temporary employee. Existing employees shall receive training within six months from the date this regulation becomes effective. Each employer shall create its own training curriculum. The training may vary by the plan and may include, but is not limited to, classes, videotapes, brochures, or other verbal or written training that is determined to be appropriate under the plan. The training shall address the following topics, as appropriate to the particular setting and to the duties and responsibilities of the particular employee being trained, based upon the hazards identified in the worksite analysis under section (f):
 - (i) General safety procedures;
 - (ii) Personal safety procedures;
 - (iii) The violence escalation cycle;
 - (iv) Violence-predicting factors;
 - (v) Domestic violence;
 - (vi) Verbal and physical techniques to de-escalate and minimize violent behavior;
 - (vii) Strategies to avoid physical harm;
 - (viii) Procedures for documenting and reporting incidents;
 - (ix) The process whereby employees affected by a violent act may debrief;
 - (x) Resources available to employees with violence; and
 - (xi) The employer's violence prevention plan.¹⁷⁹

Commentary: Section (g) works to heighten awareness of workplace violence and prevention policies and procedures. Through education, employees will be

¹⁷⁹ See *id.* at § 49.19.030.

*better equipped to identify warning signs or react appropriately if violence does unfortunately enter the workplace. Domestic violence should also be covered during training, especially considering how often it enters the workplace as a form of violence against women.*¹⁸⁰

(h) Violent Act: Recordkeeping Requirements

- (1) Each employer, except where otherwise provided by these rules, shall keep a record of any violent act against an employee or a visitor occurring at the place of employment. At a minimum, the record shall include:
 - (i) The employer's name and address;
 - (ii) The date, time, and specific location at the place of employment where the act occurred;
 - (iii) The name, job title, department assignment, and social security number of the victim if an employee;
 - (iv) A description of the person against whom the act was committed;
 - (v) A description of the person committing the act;
 - (vi) A description of the type of violent act as a:
 1. Threat of assault with no physical contact;
 2. Physical assault with contact but no physical injury;
 3. Physical assault with mild soreness, surface abrasions, scratches, or small bruises;
 4. Physical assault with major soreness, cuts, or large bruises;
 5. Physical assault with severe lacerations, a bone fracture, or a head injury; or
 6. Physical assault with loss of limb or death;
 - (vii) An identification of any body part injured;
 - (viii) A description of any weapon used;

¹⁸⁰ See *supra* notes 54–55.

- (ix) The number of employees in the vicinity of the act when it occurred;
 - (x) A description of actions taken by employees and the employer in response to the act.¹⁸¹
- (2) Each record shall be kept for at least five years following the act reported, during which time it shall be available for inspection by OSHA upon request.¹⁸²

Commentary: Considering that more than half of the incidents of workplace violence likely go unreported, section (h) is essential to truly understand the frequency of workplace violence in the United States.¹⁸³ Furthermore, recordkeeping will help employers better understand the costs associated with workplace violence. Employers with ten or fewer employees will be partially exempt from the recordkeeping requirements under section (h) in order to alleviate undue burden on employers with limited resources.¹⁸⁴

(i) Employers Needing Assistance to Comply

Employers needing assistance to comply with this regulation may contact OSHA. OSHA shall collaborate with employers to develop technical assistance and training seminars on plan development and implementation, and shall coordinate their assistance to cater to individual employer's needs.¹⁸⁵

(j) Non-Compliance: Penalties

The violation of any provision of this regulation by any employer shall result in a citation. Failure to correct a violation for which a citation has been issued within 30 days will result in the imposition of penalties.¹⁸⁶

¹⁸¹ WASH. REV. CODE § 49.19.040 (2008).

¹⁸² See *id.* at § 49.19.040. See also OSHA *Late-Night Retail Guidelines*, *supra* note 11; OSHA *Health Care Guidelines*, *supra* note 11.

¹⁸³ See FRIEND & KOHN, *supra* note 6, at 289.

¹⁸⁴ See *supra* Section (d) of the proposed OSHA regulation.

¹⁸⁵ See WASH. REV. CODE § 49.19.060 (2008).

¹⁸⁶ See FLA. STAT. § 812.175 (2006). See also WASH. REV. CODE § 49.19.050 (2008).

Commentary: Section (i) is included to ensure that employers who wish to comply with the regulation will be given additional assistance if necessary. The goal of the regulation is not to sanction employers struggling to comply on their own but to protect the safety and welfare of the nation's workers. However, if employers fail to seek out available resources or disregard the regulation, section (j) provides for the imposition of sanctions. Section (j) does not specifically define the type or amount of penalties to be assessed to employers who fail to comply with the regulation. OSHA should consider a number of factors when determining appropriate sanctions, such as the size and resources of the employer and the extent of non-compliance.

(k) Enforcement

It is the intent of OSHA that any violence protection and prevention plan developed under these rules be appropriate to the setting in which it is to be implemented. To that end, OSHA recognizes that not all employers and workplaces are the same. While many employers may function in traditional or formal settings, others may not. OSHA finds that it is inappropriate and impractical for all employers to address workplace violence in the same manner. When enforcing this regulation as to employers operating in informal or non-traditional settings, OSHA shall allow sufficient flexibility in recognition of the unique circumstances in which these employers operate.¹⁸⁷

Commentary: Section (k) is included in the proposed regulation to allow flexibility in how workplace violence is addressed by employers operating in unique settings. The intent of the regulation is for employers to be mindful of the prevalence of workplace violence and to discover appropriate ways to protect employees.¹⁸⁸

In sum, by taking advantage of OSHA's authority to regulate employers on a federal level, the above proposed OSHA regulation will better ensure the safety of workers and begin to create greater awareness and a national commitment to workplace violence prevention.

¹⁸⁷ See *id.* at § 49.19.070. See also OSHA *Late-Night Retail Guidelines*, *supra* note 11; OSHA *Health Care Guidelines*, *supra* note 11.

¹⁸⁸ See *id.*

V. CONCLUSION

While OSHA may believe that issuing its suggested guidelines for violence prevention will result in employers actively addressing the problem, statistics do not reveal that workplace violence prevention is on the forefront of employers' minds. Current regulations of employers have failed to effectively reduce workplace violence and tend to only hold employers liable in an effort to provide some relief for victims.

OSHA is sitting on its power to protect the health and safety of the nation's workers from violence, despite its authority to require employers to be proactive and enact its best practices. The aforementioned proposed regulation is the best means to begin to address workplace violence in a comprehensive manner because it tackles the national problem at a federal level. While there will continue to be victims of workplace violence in the United States, the proposed regulation is designed to reduce the frequency of violence by heightening awareness and education, requiring greater security, and imposing strong consequences on employers for failures to proactively protect employees.

Sheryl L. Erdmann*

* J.D. Candidate, Valparaiso University School of Law (2009); B.B.A., Operations & Technology Management and Human Resources Management, University of Wisconsin-Madison (2006).