



Understanding and Mitigating Safety Risk and Legal Liability from Disgruntled Employees

Ryan W. Porte, Esq.
Raimondo & Associates
7110 N. Marks Ave, Suite 104
Fresno, CA 93711
(559) 432-3000 (office)
(559) 575-2020 (cell)
rwp@raimondoassociates.com

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THE INFORMATION CONTAINED IN THIS PRESENTATION IS ONLY INTENDED TO PROVIDE YOU WITH A GENERAL UNDERSTANDING OF LABOR AND EMPLOYMENT LAW AND SOME OF THE CURRENT LEGAL CHALLENGES FACING EMPLOYERS. THE INFORMATION CONTAINED IN THIS PRESENTATION IS NOT TO BE CONSTRUED AS LEGAL ADVICE AND IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL ADVICE. YOU SHOULD CONSULT WITH QUALIFIED LEGAL COUNSEL FOR ADVICE FOR ANY PARTICULAR SITUATION.

Summary of Topics

- Risk of Disgruntled Employees
- Causes of Disgruntled Employees
- Preventing Workplace Issues with Disgruntled Employees
- Reacting to a Workplace Issue when it Occurs
- Overlapping Roles of Human Resources, Safety Professionals, and Security

The Risk

- Disgruntled employees greatly increase the risk of workplace violence, workplace negligence, and employee lawsuits. Serious and costly examples include:
 - An active shooter situation
 - Suicide and preventable accidents
 - Workplace battery/assault
 - Sabotage
 - Employee negligence
 - Lost productivity
 - Loss or destruction of property
 - Lawsuits for wage/hour issues, retaliation, harassment, wrongful termination, Serious & Willful OSHA violations, retaliation, and Private Attorney Generals Act (“PAGA”)
- If a company does not take appropriate steps to mitigate the risks that disgruntled employees present, then the company could be forced to defend themselves against costly legal claims.

Workplace Violence

- Workplace violence is any **act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior** that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors. Acts of workplace violence, including violence from a third-party toward an employee, are currently the **third-leading cause of fatal occupational injuries** in the United States.

- Workplace violence can include:
 - Active Shooter situations
 - Workplace Suicide
 - Employee battery of other employee (Fights.)
 - Employee battery by third-party (Robberies.)

Workplace Negligence

- Workplace negligence is more amorphous than workplace violence but it can be defined as the failure to adhere to standards of behavior that are put into place to ensure the safety of others.

- Employee Negligence can take many forms including:
 - Failure to adhere to safety protocols
 - Failure to properly maintain equipment or property
 - In certain settings, negligence can also include the failure to properly secure company trade secrets/ data/ or maintain cyber security
 - Malingering

Lawsuits

- Employee lawsuits are one of the most difficult and costly challenges facing California companies today.
- California law is not employer friendly. The Labor Code alone has 9104 sections, there are 17 wage orders, and numerous Department of Industrial Relations/DFEH/OSHA guidelines that must be followed. California provides very little training to employers, and THE LAWS CONTINUE TO RAPIDLY CHANGE.
- Lawsuits can take many forms, but the most common lawsuits tend to be for retaliation, harassment (age/sex/race), non-payment or underpayment of wages.
- As a general rule, happy employees do not sue their employers!

The Cost

- U.S. Department of Labor estimates that 2 million American workers are victims of workplace violence each year, costing businesses billions of dollars per year in impaired productivity, employee turnover, security measures, and legal costs.
- Data on the costs of workplace negligence are scarce due to the complex nature of accounting for negligent losses, but it is estimated that billions are lost every year in lost productivity, replacement of equipment, spillage of trade secrets, and injury liability due to employee negligence.
- In 2021 alone, the U.S. Equal Employment Opportunity Commission (“EEOC”) secured \$439.2 million for victims of discrimination. In 2019, the latest year data is available, the Department of Fair Employment and Housing (“DFEH”) counted 22,584 complaints filed. It is believed that this number has increased substantially since then.
- ****Only one disgruntled employee is needed to represent and instigate a class-action civil lawsuit against your company.
- California is extremely employer friendly and provides for attorneys’ fees for employees who win even \$1 in judgment against a company.

MITIGATING LOSSES FROM DISGRUNTLED EMPLOYEES

Causes of Employees Becoming Disgruntled

- There are different environments, triggers, and situations that lead to employees being disgruntled. Here are a few:
 - Being treated disrespectfully
 - Not being recognized for a job well done
 - Working an environment that engages in favoritism
 - Receives a poor performance review
 - Office bullying by peers and seniors
 - Sexual Harassment
 - Lack of career growth opportunity
 - Experiencing domestic and health issues
- Any one of these factors, or a combination of factors can cause an employee to become disgruntled.

Who Is Responsible For Safety?

- In the U.S. Army, we had a saying: “Everyone is responsible for safety from the lowest private to the *&^%! Brigade Commander himself.” Although this is a bit crude, OSHA takes a similar approach.
- OSHA imposes the **duty on employers** to “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” and imposes the **duty on employees** to “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.” (29 U.S. Code sec. 654.)
- In reality, there are myriad ways for employers to be held liable for the acts or omissions of their employees, even if the employees who caused the action are not.
 - Doctrine of “respondeat superior.”
 - **Negligent hiring/retention, training, or supervision of an employee**
 - Harassment (race/ sex/ age/ bullying/ assault/ battery/ etc.)
 - Joint and Several Liability v. Comparative Fault
- Workers’ Compensation – Remember, in California if a worker is injured while on the job, and the employer has obtained adequate workers’ compensation coverage, then Workers’ Comp becomes a complete bar to recovery for that injury.

Management, HR, Safety, Security

- Mitigating the risk that disgruntled employees will perpetrate workplace violence or negligently cause a company to be damaged in some way requires a multi-disciplined approach.
- Many large companies have separate Management, Human Resources, Safety, and Security departments. In smaller companies, it is not uncommon for one person to be wearing “many hats” including the ones above-mentioned.
- It is important to understand that Management, HR, Safety, and Security all play an integral role in mitigating the risk posed by disgruntled employees.

Case Studies

- In *Yawan Yang v. ActionNet, Inc.* (2:14-cv-792 (C.D. Cal. 2014)). The Plaintiff was awarded nearly \$7.4 million (\$2,393,540 in compensatory + \$5 million in punitive) in damages following a workplace violence incident where a coworker grabbed the plaintiff's neck and choked him. The key here was that the employee demonstrated signs of violence, and the employer failed to act in any meaningful way.
- Agricultural Processing Company – Two employees working as “trimmers” in a cannabis company felt harassed by their supervisor and assistant supervisor due to their gender, specifically for presenting as non-gender-normative.

Identifying Disgruntled Employees

- The Department of Homeland Security published a list of indicators of Potential Violence by an Employee. Many of the same indicators in the list below can also be a signal that an employee is disgruntled, even if the potential for violence is low. These include:
 - Poor Performance
 - Increased use of alcohol and/or illegal drugs
 - Absenteeism/ excessive breaks/ tardiness
 - Decreased motivation or involvement with other employees/ negative attitude
 - Decrease in attention to appearance and hygiene
 - Depression /withdrawal
 - Resistance and overreaction to changes in policy and procedures
 - Repeated violations of company policies
 - Increased severe mood swings/ verbal abuse
 - Unstable or emotional responses/ paranoia/ suicidal ideations
 - Outburst of anger or rage without provocation
 - Personal life or financial issues
 - Pursuit of other work
 - Unsolicited comments about firearms, weapons, and/or violent acts

Mitigation – Prevention

- The best way to resolve issues with disgruntled employees is to deal with the problem before it becomes a problem.

- A Company should have the following:
 - Comprehensive Violence and Accident Prevention Policies
 - Conduct Proper Hiring and Vetting Techniques
 - A Responsive Management team
 - Give the disgruntled employee a voice to be heard.

First Contact - Hiring

- The first step in ensuring a safe workplace is in your company hiring practices.
 - First opportunity to spot employees who may become problems
 - Create a policy for an applicant to submit information – whether a general job application or a resume/cover letter
 - When applicable, implement an interview process

- Always remember that hiring is subject to the California law against discrimination, whether that be based on sex/ race/ color/ religion/ disability/ etc. (Cal. Lab. Code sec. 12900 et seq.)

Background Checks

- Background checks of prospective employees can be an important screening tool used by employers to vet employees prior to hire. However, California law restricts when and how an employer can obtain certain types of information.

- Type of information
 - Reference Checks
 - Credit Checks
 - Criminal History Check
 - Reviewing public access social media

- Reference checks

Responsive Management

- As noted above, a number of factors can contribute to an employee becoming disgruntled. However, a responsive management team has many tools to defuse these often delicate situations once a disgruntled employee is identified:
 - ☐ Provide counseling
 - ☐ Provide skill training
 - ☐ Follow up with development
 - ☐ Provide opportunities for advancement
 - ☐ Recognize high achievement
 - ☐ Keep an open door
 - ☐ Remove employee from toxic situation

- Document. Document. DOCUMENT!

Mitigation - Reaction

- So you had a fight at work, one employee complained about threats/harassment from another employee, an employee broke a piece of equipment or caused an injury. What now?
 - Conduct an investigation immediately.
 - If conduct is serious, place suspected employee on paid suspension, while investigation is conducted.
 - If employees negative action is grounds for termination, consult with your attorney.
 - If termination is warranted, ensure that you provide a termination notice indicating the grounds for termination.
 - Instruct employee that the behavior violated company guidelines. Do not be accusatory or hostile.
 - Consider offering a severance in exchange for a “General Release of All Claims.”

Mitigation - Reaction

- So you had an issue at work and now you have been served with a lawsuit?
 - Similar steps above
 - Understand that it is very unlikely that you will walk away from the lawsuit for less than nuisance value regardless of the circumstances
 - Compile employee file and payroll documents
 - Attempt to resolve the case between the parties
 - Call legal counsel

Case Study

- Returning to the world of the trimmer.
- The Company had a zero-tolerance workplace violence policy and suspended both employees involved in the altercation for three days. The company began an investigation but did not complete it in three days. The two employees returned to work for approximately two weeks. The work environment remained hostile. Company called their attorney.
- We advised them that both employees violated company policy and likely needed to be terminated but recommended a follow-on investigation. A follow-on investigation was completed and the employees were terminated. Counsel identified the extremely high risk of a harassment lawsuit from employee and recommended offering a severance.
- Employee did not accept severance immediately, but did ultimately accept 1 week of pay in exchange for a general release.

Conclusion

- Prevention is always the best way to prevent risk and legal liability.
- Call your attorney if you get into hot water.
- Document everything!