



From the Office  
to Cyberspace

By Diane Krebs  
and Jamie Haar

**W**hile employers cannot predict what the next trend in social media will be, they can and should certainly take steps to minimize the occurrence of violence and bullying in their workplaces.

# Workplace Violence in the Twenty-First Century

On August 20, 1986, Patrick Henry Sherrill, a mail carrier from Edmond, Oklahoma, arrived to work and went on a murderous rampage, gunning down any employee who crossed his path. After sealing off the exits, Sherrill

murdered fourteen coworkers and wounded six others. When police arrived at the post office, Sherrill turned the gun on himself. This event brought the issue of workplace violence to the forefront of national consciousness (and became so well known that it gave us the surviving expression “going postal”).

The Occupational Safety and Health Administration (OSHA) defines workplace violence as violence or the threat of violence against workers that can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths. But with the advent of new technologies—for example, at present, Facebook has approximately 1.71 billion active users, Instagram 500 million active users, Twitter 313 mil-

lion active users, and Snapchat 60 million action users (see <http://chrisniderdesign.com> (last visited October 28, 2016)—workplace violence often comes in less extreme forms than the case described above. For example, what if Patrick Sherrill had been harassing his colleagues and threatening them online? What if he explicitly warned others on Facebook that he planned to shoot his co-workers ahead of time? What if his employer was aware of these online comments and did nothing to prevent it? Many bullying efforts now occur in the form of online harassment or cyberbullying. Due to their anonymity, not to mention their ease of use, social media and blog posts are becoming increasingly popular outlets for workplace abuse.

Regardless of how it manifests itself, workplace violence, and particularly work-

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place bullying, is a growing concern for employers and employees nationwide. In fact, workplace bullying is becoming a national epidemic. According to the Workplace Bullying Institute's 2014 U.S. Workplace Bullying Survey, more than 65 million U.S. workers are affected by bullying, with approximately 27 percent reporting current or past experience with abusive con-

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duct at work. See <http://www.workplacebullying.org> (last visited October 28, 2016). Furthermore, the survey found that approximately 72 percent of employers deny, discredit, encourage, rationalize, or defend these events. *Id.* In 2008, the American Psychological Association estimated that U.S. businesses lose a staggering \$300 billion per year due to incidences of workplace bullying. See <https://www.shrm.org> (last visited October 28, 2016). More recently, the Harvard School of Public Health reported that one third of American workers suffer from chronic stress and estimated that the number of workdays lost to mental health-related absences adds up to \$27 billion each year. *Id.* In light of these staggering statis-

tics, several states have introduced bills to fight and address workplace bullying, which seek to define and prohibit employers from subjecting their employees to an "abusive work environment."

This article discusses the legal implications of workplace violence, with a particular focus on workplace cyberbullying, and an employer's potential liability. First, the article will address the various types of workplace violence that exist and define each so that an employer/employee can recognize the signs. Second, the article will examine the legal landscape regarding workplace violence and how it implicates several areas of law, including the Occupational Safety and Health Act (OSH Act), Title VII of the Civil Rights Act of 1964 (Title VII), workers' compensation exclusivity, and negligence claims from third-party victims. Third, the article will explore how courts assess employer liability when harassing conduct does not take place within the physical confines of the workplace, but through social media or other electronic forms. Fourth, the article will explain the potential problems an employer might run into while creating its workplace social media policy and investigatory procedures under the National Labor Relations Act (NLRA) and the Stored Communications Act (SCA). Finally, the article will offer suggestions for employers to help combat instances of workplace violence and cyberbullying, with the ultimate goal of creating a safer environment for all in a volatile workplace.

### Types of Workplace Violence

The Centers for Disease Control and Prevention, OSHA, and the National Institute for Occupational Safety and Health have collectively categorized workplace violence into four main categories to help define threat types and prevention strategies. The first category involves violence by strangers. These cases are responsible for the majority of fatal injuries related to workplace violence nationally and involve an assailant who has no legitimate business relationship to the workplace. A typical example would include a stranger that enters the affected workplace to commit a robbery or other type of criminal act. The high-risk industries for this type of violence are taxis and late-night retail.

The second category involves violence by customers or clients. These cases concern assailants who either receive services from or are under the custodial supervision of the affected workplace or the victim. Workers most affected by this category of violence include bus or railway drivers, healthcare personnel, social service providers, teachers, sales employees, and law enforcement officers.

The third category concerns violence by co-workers and involves an assailant who has some employment-related relationship with the workplace. These co-workers are usually trying to seek revenge for what they perceive has been unfair treatment in the workplace.

The final category is violence involving personal relations. In these cases, the assailant violently confronts someone in the workplace with whom they have had some personal relationship. Typically, this would involve a case of domestic violence that spills into the workplace. These actions are usually generated by perceived difficulties in the relationship or by psycho-social factors that are specific to the assailant. This and the third category affect all industries equally, and employers must remain vigilant in order to prevent or minimize these confrontations.

### Workplace Violence and the Law

There a number of laws and causes of actions that may be implicated when workplace violence is involved. The one people typically think of first is the OSH Act (discussed in more detail below), because its general mandate requires covered employers to provide a safe and healthful workplace. But there are other laws that can often play a part in any scenario involving workplace violence or bullying. For example, Title VII requires employers to protect employees against all forms of workplace harassment based on membership in a protected class, such as race, sex, or religion. Sexual, racial, and other forms of harassment can often lead to confrontations, and, at a minimum, may be perceived by individuals as a form of bullying. Moreover, if an employee is injured (whether physically, psychologically, or emotionally) by workplace violence, workers' compensation and even the disability discrimination laws could come into play. It may even be possible for third-party vic-

tims of workplace violence to be able to bring negligence claims against an employer. Furthermore, certain states have statutes more directly applicable to workplace violence. Some of these legal remedies are discussed in more detail below.

### OSH Act and State Law Counterparts

There is no federal law establishing a duty to prevent workplace violence against employees. However, an employer has a duty to provide a safe working environment under the federal OSH Act, which regulates workplace health and safety. The “general duty clause” of the OSH Act requires an employer to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees. *See* 29 U.S.C. §654(a)(1). While employers are not strictly liable for violations of the general duty clause, OSHA can issue citations. In order to cite an employer for violating the general duty clause, the Secretary of the Department of Labor must prove all of the following:

- the employer failed to keep the workplace free from a hazard to which employees were exposed;
- the hazard is recognized;
- the hazard was likely to cause death or serious physical harm; and
- there was a feasible and economically viable way to correct the hazard.

*Workplace Violence*, Practical Law Practice Note 7-505-7511 (2014).

While OSHA does recommend that an employer institute an effective workplace violence prevention program and has made suggestions on how employers can do that (*see* <https://www.osha.gov>), employers are not required to comply strictly with OSHA’s recommendations. However, employers that do choose to implement workplace violence prevention programming can showcase their compliance with OSHA’s suggestions to defend against a claim that they breached the general duty clause.

Unfortunately, OSHA is not in a position to provide comprehensive enforcement of the OSH Act. OSHA has about 2,200 employees charged with overseeing approximately 130 million workers at more than 8 million worksites nationwide. This equates to about one compliance officer for every 59,000 workers. Furthermore, OSHA only

manages to inspect about a quarter of work-sites with a reported workplace fatality—so one can imagine the response percentage when the offense is less severe. Moreover, the penalties are hardly at the level to incentivize companies to address workplace violence issues (though there are other, more basic and humane incentives for reducing workplace violence). The maximum civil penalty for a serious violation of the general duty clause is \$7,000 per violation, and willful or repeated violations carry a maximum penalty of \$70,000 per violation. Criminal penalties are only available if the violation is willful and results in a death, with the maximum criminal penalty being a misdemeanor that can result in up to six months of jail.

Although OSHA may not demand specific workplace violence prevention programs, state law may impose certain policy requirements. For example, New York’s Workplace Violence Prevention Act, applicable to public employers, aims to

ensure that the risk of workplace assaults and homicides is evaluated by affected public employers and their employees and that such employers design and implement workplace violence protection programs to prevent and minimize the hazard of workplace violence to public employees.

N.Y. Lab. Law §27-b (2012). The law mandates that public employers with two or more permanent employees evaluate the current violence risks in the workplace, and public employers with twenty or more employees must also develop a written workplace violence prevention program. Florida’s Convenience Business Security Act requires convenience stores to take certain safety steps, including installing safety and security devices such as cameras and drop safes. *See* Fla. Stat. §812.173. California’s Workplace Violence Safety Act allows an employer to obtain a temporary restraining order and an injunction against anyone that has engaged in unlawful violence or has made a sound threat of violence at the workplace. *See* Cal. Civ. Proc. Code §527.8 (2012). Other states, including Arizona, Arkansas, Colorado, Georgia, Indiana, Nevada, North Carolina, Rhode Island, and Tennessee, have enacted similar legislation. *See* Ariz. Rev. Stat. §12-1810 (2012); Ark. Code Ann. §11-5-115 (2012); Colo. Rev. Stat. §13-14-102(4)(B) (2012);

O.C.G.A. §34-1-7 (2012); Ind. Code §34-26-6 (2012); Nev. Rev. Stat. §§33.200-.360 (2011); N.C. Gen. Stat. Ann. §95-261 (2012); R.I. Gen. Laws §28-52-2 (2012); Tenn. Code Ann. §20-14-101-109 (2012).

A number of states have adopted workplace violence prevention policies specific to the healthcare industry. For example, Connecticut law requires covered health

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care providers to establish a workplace safety committee, conduct a risk assessment, maintain records of incidents of workplace violence, and develop a workplace violence prevention and response plan. *See* 2011 CT S.B. 970 (NS). Washington state law requires health care providers to develop a workplace violence prevention plan and provide workplace violence prevention training. *See* Wash. Rev. Code. §§49.19.005-49.19.070. And Illinois’ Health Care Workplace Violence Prevention Act maintains that “every health care workplace must adopt and implement a plan to reasonably prevent and protect employees from violence at that setting.” *See* IL ST CH 405 §90/15 (2012). These state laws add another critical layer of legal protection for those affected each year by workplace violence.

### Workers’ Compensation and Workplace Violence

Despite the fact that an employee has no private right of action based on a vio-





lation of the general duty clause of the OSH Act, an injured employee can recover monies under the state's workers' compensation law if the injury takes place while the employee was acting within the scope of employment. Of course, once an employee receives workers' compensation benefits, that employee cannot also bring a claim for negligence against the employer,

## Employers must also

be aware of negligent supervision or retention claims after a workplace violence incident. If an individual third party and/or an employee commits an act against another after the employer was aware of the risk of danger, the injured employee may claim that the employer did not exercise reasonable care in supervising or in continuing to retain the employee.

because of the exclusivity provision built into most (if not all) state workers' compensation programs.

The only possible means for an employee injured by workplace violence to avoid the exclusivity provision is if state law recognizes either the intentional tort theory or the dual capacity doctrine. Under the intentional tort theory, if there was a known or suspected danger, an injured employee can argue that an employer's failure to prevent workplace violence was intentional and the employee should not

be limited to workers' compensation benefits. *See Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 106, 639 A.2d 507 (1994). On the other hand, the dual capacity doctrine states that if an employer was also the lessor of property, an employee's recovery may not be limited to workers' compensation if the employer's status as lessor is unrelated to its status as employer. *See Sharp v. Gallagher*, 95 Ill.2d 322, 328, 447 N.E.2d 786 (1983). Employers need to be aware of how their state's workers' compensation law may affect their ability to assert legal defenses if an employee brings a claim for instances of workplace violence.

### Negligence Claims from Third-Party Victims of Workplace Violence

As explained above, an injured employee may not be able to bring a negligence action against the employer unless an exception to the exclusivity provision of workers' compensation law applies. However, workers' compensation laws do not cover or limit a *third party's* negligence claim. In general, for an employer to be liable under a negligence theory, the third party must demonstrate all four elements of common law negligence: the existence of a duty of care, breach of that duty, causation, and harm.

Case law has recognized an employer's duty to protect employees from people with a known dangerous propensity (*see, e.g., Roberts v. Circuit-Wise, Inc.*, 142 F. Supp. 2d 211, 214 (D. Conn. 2001)) and an employer's duty to third parties who interact with their employees within the scope of their employment (*see, e.g., Tyus v. Booth*, 64 Mich. App. 88, 92, 235 N.W.2d. 69 (1975)). States vary as to whether a violation of the OSH Act is admissible as evidence of negligence. However, most courts have held that violation of the OSH Act is evidence of negligence, not negligence *per se*. *See, e.g., Elliott v. S.D. Warren Co.*, 134 F. 3d 1, 4 (1st Cir. 1998)). An employer can rely on traditional negligence defenses in these types of cases, including the defenses of an unforeseeable event or superseding cause in an attempt to undermine the third party's efforts to establish proximate cause for the alleged injury. For example, an employer may argue that an individual third party's violent or criminal act was a superseding cause that negates the employ-

er's negligence as the proximate cause of the injured party's injuries. *See McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 292 (Ky. Ct. of Appeals 2009).

Third-party negligence claims also may allege that the employer was negligent with regard to employee selection, employee supervision, or employee retention. A claim of negligent hiring is based on an employer's breach of a duty to protect employees and customers from injuries caused by an employee who the employer knows or should know poses a risk of harm to others. *See Restatement (Third) of Agency §7.05* (2006). Generally, for an employer to be liable for negligent hiring, a plaintiff must show: (1) the existence of an employment relationship; (2) the employer knew *or should have known* the employee was not suited for the particular employment; (3) the employer's act or failure to act caused the plaintiff's injury; (4) the negligent hiring was the proximate cause of the plaintiff's injury; and (5) actual damage or harm resulted from the employer's act or failure to act. *See, e.g., Linder v. Am. Natl. Ins. Co.*, 155 Ohio App.3d 30, 39, 798 N.E.2d 1190 (2003); *see also Underberg v. S. Alarm, Inc.*, 284 Ga. App. 108, 110, 643 S.E.2d 374, 377 (2007).

An employer that fails to look into an applicant's references or contact the applicant's former employers may be liable for negligent hiring if the reference would have revealed that the applicant had a violent history. Employers interviewing job applicants should be mindful of gaps in employment history, frequent job changes, and criminal records. However, employers should take care to ensure that they are not in violation of federal and state anti-discrimination laws when screening for applicants who may pose a risk of violence. To date, over 100 cities and counties have adopted what is widely known as "ban the box" legislation, so that employers consider a job candidate's qualifications first, without the stigma of a criminal record. Additionally, some jurisdictions are also incorporating the best practices of the 2012 U.S. Equal Employment Opportunity Commission (EEOC) guidance on the use of arrest and conviction records in employment decisions. These practices suggest that employers consider job-relatedness of a conviction,

the time passed since the conviction, and mitigating circumstances or evidence of rehabilitation. Employers concerned with negligent hiring claims should make sure that they are in compliance with these fair chance employment laws.

Employers must also be aware of negligent supervision or retention claims after a workplace violence incident. If an individual third party and/or an employee commits an act against another after the employer was aware of the risk of danger, the injured employee may claim that the employer did not exercise reasonable care in supervising or in continuing to retain the employee. *See, e.g., Ogborn*, 309 S.W.3d at 291.

### **Employee Misconduct and the Americans with Disabilities Act**

Employers are permitted to implement workplace violence policies that include prohibitions on workplace violence or threats of violence. However, employers should exercise caution before disciplining an employee who engages in misconduct if he is suspected of having a mental disorder. The ADA protects qualified employees who have a serious mental or physical disorder. *See* 29 C.F.R. §1630.2(m). According to the EEOC, an employer can discipline an employee for violating workplace behavior that is job-related and consistent with business necessity. However, some courts have held that absent undue hardship, an employer may be required to provide reasonable accommodations to an employee whose misconduct is caused by a disability. *See, e.g., Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001). If an employee's disability poses a direct threat to his or her own health or safety, or that of other people in the workplace or third parties, an employer may be able to take advantage of the direct threat defense under the ADA, provided there is no reasonable accommodation available that would mitigate the potential harm.

### **Workplace Violence in the Twenty-first Century**

As it appears that social media is here to stay, its omnipresence allows for workplace violence in the form of online harassment or cyberbullying. Cyberbullying can include: sending threatening and abusive

emails, text messages, and tweets; sharing embarrassing or offensive pictures or videos of the victim; and spreading gossip on social networking sites. Because these bullying efforts are becoming increasingly more common in the workplace, it is advisable for employers to implement social media guidelines that try to limit this type of online behavior, both in and out of the workplace (though, as explained further below, employers must walk a fine line between providing protection and avoiding other legal pitfalls).

Workplace social media policies are crucial, since employers can potentially be liable for the online activities of their employees. In *Espinoza v. County of Orange*, No. G043067, 2012 Unpub. LEXIS 1022, 2012 WL 420149 (Cal. Ct. App., 4th Dist. Feb. 9, 2012), a California state court held an employer liable for employees' online harassment of a disabled co-worker. Similarly in *Gavrilovic v. Worldwide Language Resources Inc.*, 441 F. Supp. 2d 163 (D. Me. 2006), a linguist sued her military contractor employer for defamation and Title VII violations based on a supervisor's email that referred to the plaintiff as a "sexual plaything" at her military base. Furthermore, in addition to civil liability, cyberbullies can face criminal penalties under federal anti-stalking laws. *See* 18 U.S.C.A. §875, which makes it illegal to transmit a communication containing a threat to injure another person, and 47 U.S.C.A. §223, which prohibits the use of telecommunications to harass, threaten, or abuse another person.

Employers should also be aware of the potentially broad definition of "workplace" cyberbullying. Courts have held that employers can be liable for cyberbullying that takes place after hours or even outside the workplace. In *Isenhour v. Outsourcing of Millersburg Inc.*, No. 14 Civ. 1170, 2015 U.S. Dist. LEXIS 144578, 2015 WL 6447512 (M.D. Pa. Oct. 26, 2015), a man sued his employer for sexual harassment and hostile work environment based on sexually explicit text messages that were sent from his supervisor outside of work hours. The court refused to dismiss the plaintiff's case, holding that a reasonable jury could conclude that the supervisors conduct, including the after-hours texts, was sufficiently threatening and humiliat-

ing to support the plaintiff's claims. So too, in *Blakey v. Continental Airlines Inc.*, 164 N.J. 38 (N.J. 2000), a female pilot brought a hostile work environment suit against the airline after derogatory remarks about her were posted on the airline's online bulletin board. The court held that the fact that the online bulletin board was located outside the workplace did not relieve the employer

## **Workplace social media**

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of the duty of correcting offsite harassment. They explained that while employers do not have a duty to monitor their employees, they do have a duty to stop harassment when it takes place in "settings that are related to the workplace."

Employers can limit their exposure through prompt remedial action after being notified of online harassment or discrimination of an employee. For example, in *Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010), the court granted the defendant employer's motion for summary judgment against the plaintiff's harassment claim because they took prompt remedial action. The employer told its IT department to block employees' access to Facebook after claims of Facebook-based harassment arose.

### **The NLRA and Employment Social Media Policies**

In order for an employer to limit its liability for online workplace violence or cyberbullying, it is crucial that it draft strict online and social media policies for its Employee Handbook that leave no room for error. However, these policies can create other issues. The National Labor Relations Board (NLRB or "Board") Acting General Counsel's Memorandum on Social Media Policies warns employers about the potential risk of drafting social media policies that



violate the National Labor Relations Act (NLRA), because the language could be interpreted by employees as chilling the exercise of rights protected by the NLRA, commonly known as “protected concerted activity” or “Section 7 rights.” NLRB Memorandum OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012).

Although the most common form of protected, concerted activity is membership in a union, it is important for employers to understand that Section 7 rights attach and can be exercised even in non-union environments.

Section 7 of the NLRA provides employees with “the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection...” 29 U.S.C. §157. Although the most common form of protected, concerted activity is membership in a union, it is important for employers to understand that Section 7 rights attach and can be exercised even in non-union environments. An individual’s activities are concerted (1) if they grow out of prior group activity, (2) when the employee acts, formally or informally, on behalf of the group, or (3) when an employee solicits other employees to engage in group activities, even where such solicitations are rejected. See <http://www.americanbar.org> (last visited Oct. 28, 2016).

Moreover, Section 8(a)(1) of the NLRA makes it unlawful for an employer to “interfere with, restrain, or coerce employ-

ees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. §158(a)(1). In other words, an employer violates Section 8(a)(1) if it maintains workplace procedures (including social media policies) that would reasonably tend to “chill” employees in the exercise of their Section 7 rights.

Courts and the Board have dealt with the relationship between an employer’s decision to implement strict social media policies and its employees’ rights to engage in protected, concerted activity, with the Board taking a particularly strict stance on what could be considered chilling to those rights. Professor Robert Sprague, in his article, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, opines as to what elements should be considered in deciding whether social media activity is “protected concerted activity.” Elements to be considered are: “(1) online postings must relate to terms and conditions of employment; (2) there must be evidence of concert...; (3) there must be evidence the employee was seeking to induce or prepare for group action; and (4) the posts reflect an outgrowth of employees’ collective concerns.” However, the NLRB in particular has extended itself very far to find what many would consider an act that would subject the employee to termination to be protected by the NLRA.

For example, in *Pier Sixty, LLC*, 362 NLRB 59 (March 31, 2015), the Board affirmed an administrative law judge’s finding that the employer violated Sections 8(a)(1) and (3) of the NLRA when it terminated an employee for protected, concerted comments that were posted on his personal social media account. This decision involved employees who were concerned with disrespectful treatment of upper level management and even signed a petition that included their ongoing complaints and presented it to an assistant director. The employee at issue was fired after he wrote, “Bob is such a nasty mother f\*\*\*er don’t know how to talk to people!!!!!! F\*ck his mother and his entire f\*cking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!!!” on his Facebook page. In applying a “totality of circumstances” test, the NLRB held that the employee did not lose the protection of the NLRA for these comments, stat-

ing that they were not so egregious as to take him outside the protection of the NLRA. While the NLRB will not extend any protection to comments and behavior it categorizes as “opprobrious conduct,” using expletives is not an automatic bar. See also *Murray Am. Energy, Inc.*, 2016 NLRB LEXIS 260, at \*62-63 (N.L.R.B. Apr. 5, 2016) (finding employee’s posted language “kiss my ass” was protected); *Hispanics United of Buffalo, Inc. v. Ortiz*, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011) (ordering reinstatement of employees discharged for Facebook posts discussing a co-worker; posts including, “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?” and “Tell her to come do [my] f\*cking job n c if I don’t do enough, this is just dum[b]”).

By contrast, in a case submitted to the NLRB for advice, a Frito-Lay former employee’s comment on his Facebook page, “I think they trying to give me a reason to be fired because I’m about a hair away from setting it off in that BITCH. hahahaha,” was not protected as it did not seek to initiate or induce coworkers to engage in group action, and none of his coworkers responded to the posting with similar conditions. *Frito Lay, Inc.*, No. 36-CA-10882, 2011 WL 4526828 (OR OGC Sept. 19, 2011). While the posting did address the terms and conditions of employment, the HR manager decision to terminate was lawful in that the comment was viewed as inappropriate, threatening, and violent. *Id.*

Additionally, the Second Circuit has held that an employee’s “like” on Facebook can be protected by Section 7 of the NLRA when it relates to workplace concerns. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33, 37 (2d Cir. 2015)). In this case, the Board concluded, and the Second Circuit affirmed, that in the context of the ongoing dialogue among employees about tax withholding, the employee’s “like” endorsed his co-workers Facebook comment regarding Triple Play’s errors in their tax withholding. *Id.* at 36. While the Board will deem Facebook activity unprotected if it is disloyal or defamatory, the mere fact that Facebook comments are accessible to customers is not enough to lose the protection of the NLRA, as this would result



in chilling all employee speech online. *Id.* at 36–37.

As conduct and/or speech in a given fact pattern is analyzed under a case-by-case basis, employers should take extra precautions to ensure that their social media policies do not infringe on their employees' right to share and discuss their terms and conditions of employment. If a policy rule is ambiguous, then it will likely be considered overbroad and unlawful. To avoid this issue, an employer should include limiting language, clarifying that the rule does not restrict rights protected by the NLRA. However, a general savings clause would not suffice. Rather, there must be specific limiting or clarifying language related to the particular policy in question. It would be wise for employers to clarify their policy statements through the use of specific examples detailing what would and what would not be permissible, to help demonstrate that the intent of the policy is not to infringe on an employee's rights to engage in protected concerted activity. With respect to workplace violence and bullying, there are (unfortunately) a plethora of examples from which to choose that can help illustrate the appropriate intent behind the policy.

### The Stored Communications Act and Investigatory Procedures

Employers must use caution when taking steps to eradicate workplace cyberbullying zealously, as there are employee privacy protections in place. The Stored Communications Act of 1986 (SCA) makes it unlawful to “(1) intentionally access without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed an authorization to access that facility; and thereby obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage.” In *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002), an airline pilot sued his employer for accessing without authorization his private personal website, which criticized his employer, coworkers, and airline union. The Ninth Circuit held that the SCA applies to employees' private websites that have appropriate privacy protections. *Id.* Similarly, in *Pietrylo v. Hillstone Restaurant Group*, No. 06-5754 (FSH),

2009 U.S. Dist. LEXIS 88702, 2009 WL 3128420, at \*1 (D.N.J. Sep. 25, 2009), the court held that an employer's unauthorized access to an employee's private social media website was a violation of the SCA.

While case law on this topic remains largely unsettled, these cases illustrate the potential SCA protections in place for those employees that set privacy controls on their social media sites. However, not all information that employees post on social networking sites will necessarily be protected. Courts have held that online posts on a co-worker's Facebook page may be unprotected when the employer is the co-worker's Facebook friend and can independently access that information. *Sumien v. CareFlite*, 2012 Tex. App. LEXIS 5331, 2012 WL 2579525 (Tex. App. July 5, 2012).

Moreover, there are many jurisdictions that have laws governing employer access to social media accounts of employees and applicants, about which employers must be wary. States with social media privacy laws include Arkansas, California, Colorado, Illinois, Maryland, Michigan, New Jersey, New Mexico, Nevada, Oregon, Utah, and Washington. In general, these laws prohibit companies from forcing employees and applicants to disclose password and/or other private/protected information, but do not prohibit accessing and viewing publicly available information. In addition, while there is no federal law specifically relating to this issue, Congress is wading into these waters. The Social Networking Online Protection Act was recently introduced in the House of Representatives. The bill prohibits employers from: (1) requiring or requesting that employees or applicants for employment provide their passwords or any other means for accessing their private email accounts or personal online accounts, including social networking websites; or (2) discharging, disciplining, discriminating against, denying employment or promotion, or threatening to take any such action against employees or applicants who refuse to provide such information, file a complaint or institute a proceeding under this bill, or testify in any such proceeding. See <https://www.congress.gov>. This is an issue that employers will need to monitor over time.

### Suggestions for Employers and Employees to Reduce Workplace Violence

There are a number of things employers can do to reduce workplace violence before an event occurs, as well as minimize the fallout after an event with prompt and proper responses. Employers should consider implementing one or more of these measures.

As conduct and/or speech in a given fact pattern is analyzed under a case-by-case basis, employers should take extra precautions to ensure that their social media policies do not infringe on their employees' right to share and discuss their terms and conditions of employment.

- Conduct background checks that effectively and *lawfully* identify candidates with histories of violence, being mindful of ban-the-box laws that may regulate the timing of those inquiries and also may require a fact-specific balancing test to determine if the candidate's criminal background renders them unsuitable for the particular job at issue.
- Draft and implement anti-violence programs and policies. These procedures should include an anti-violence statement that covers anyone that might come in contact with company personnel and provide specific information regarding the consequences of non-compliance. Employees should be encouraged to report concerns even **Violence**, continued on page 67

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- when behavior is observed off of company property, on social media, and/or after the employee has been terminated.
- Keep detailed records of incidents to assess risk regularly and measure progress.
  - Conduct annual assessments of their workplace to determine whether their anti-violence policies are sufficient. In so doing, employers should be mindful of incidents involving threatening remarks or gestures, physical harm or injury to another person, demonstrated aggressive or hostile behavior, intentional destruction of property, self-destructive behavior, and talk of violence. Additionally, employers should be sensitive to drastic changes in employee performance; signs of depression; and changes in personal habits or hygiene.
  - Provide training to supervisors and employees on anti-violence policies to make certain that such policies are being properly and consistently enforced, and to make it clear to employees that this is a priority to the company. Mandatory and annual training may be given on how to recognize the earliest stages of a possible assault or workplace violence incident, as well as how to report these observations. These trainings may also address how to avoid potentially violent encounters, including self-defense drills or exercises. Some employers have even implemented bi-annual emergency action plan drills, like fire drills, where employees gather for a few minutes and review what should be done in the event of various emergency situations, including if an active shooter appears on premises.
  - Immediately investigate any complaints or concerns regarding a potential workplace violence issue. There should be detailed procedures and guidelines in place that designate who should conduct the investigation and how to investigate allegations of workplace violence or bullying properly. Employers may need to implement certain remedial measures during the pendency of an investigation, such as separating co-workers, sending employees home, assigning individuals to different departments, refusing access to the premises, and contacting local law enforcement.
- Implement physical and administrative controls when proper and practicable. Physical controls can include door locks, badges or key codes to limit room access, drop safes in businesses that handle cash, and lighting in parking lots or secluded workplace areas. Administrative controls can include requiring visitors to sign in, present identification, or wear security badges before entering the premises. While these tactics cannot guarantee safety, these measures may severely limit the possibility of at least some forms of workplace violence occurring, while maintaining both employer and employee protection.
  - Consider in advance particular situations that could give rise to violent reactions and prepare for them. For example, when terminating an employee, consider having more than one person in the room and security personnel present or nearby, if necessary.
  - If an incident of violence or bullying unfortunately occurs, an employer's response is critical. Depending upon the nature of the incident, employers should consider involving local law enforcement and/or providing medical evaluation or treatment at the time of the event. Counseling services in the workplace may also be appropriate. At a minimum, employers should evaluate why and how the incident occurred and whether additional measures should be implemented to prevent or minimize recurrence of such incidents.

## Conclusion

The law in this area is still developing as courts and agencies slowly continue to interpret and catch up to the day-to-day changes in social media and technology. In reality they may never catch up completely, but that does not change an employer's burden. While employers cannot predict what the next trend in social media will be, they can and should certainly take steps to minimize the occurrence of violence and bullying in their workplaces, whether it takes place in the "workplace" or on the World Wide Web.

