Active Shooters & Workplace Violence: Are You Prepared?

Barry Brandman
President/CEO
Danbee Investigations
Fair Lawn, NJ
Feb 2016: 3 killed and 14 injured in shooting at Excel Industries

At least 5 dead, 8 hospitalized after shooting at Ft. Lauderdale airport
FBI Study of Active Shooter Incidents 2000-2013

- 160 incidents occurred between 2000 and 2013
- An average of 11.4 incidents occurred annually, with an increasing trend from 2000 to 2013.
- 1,043 casualties, including killed and wounded (shooters were not included in this total)
- 486 were killed in 160 incidents
- 557 were wounded in 160 incidents.
70% of Active Shooter Incidents Occurred In a Commerce/Business or Educational Environment

August 3, 2010
Hartford Beer Distribution Center
8 killed 2 wounded by an employee asked to resign for stealing beer

August 30, 2007
Co-op City Apartments Building’s Leasing Office
1 killed 1 wounded by an employee who was sent to get his job back

August 27, 2003
Windy City Core Supply
6 killed 1 wounded by an employee fired from company 6 months earlier

July 12, 2010
Emcore Corporation
2 killed 4 wounded in a domestic situation that spilled into the workplace

May 27, 2010
AT&T Cellular
1 person wounded by a 79 year-old customer who had been threatening and harassing employees

October 4, 2007
Giordano & Giordano Law Offices
2 killed 3 wounded

January 7, 2010
ABB Plant
2 killed 5 wounded by an employee involved in litigation against the company

June 25, 2009
Defense Systems Factory
2 killed 1 wounded by an employee who had been demoted for an argument with a co-worker & who had to be escorted off of company property

September 9, 2010
Kraft Foods
2 killed 1 wounded by a female employee who had just been suspended & escorted off of company property

July 12, 2010
Emcore Corporation
2 killed 4 wounded in a domestic situation that spilled into the workplace

May 27, 2010
AT&T Cellular
1 person wounded by a 79 year-old customer who had been threatening and harassing employees

October 4, 2007
Giordano & Giordano Law Offices
2 killed 3 wounded

January 7, 2010
ABB Plant
2 killed 5 wounded by an employee involved in litigation against the company

June 25, 2009
Defense Systems Factory
2 killed 1 wounded by an employee who had been demoted for an argument with a co-worker & who had to be escorted off of company property

September 9, 2010
Kraft Foods
2 killed 1 wounded by a female employee who had just been suspended & escorted off of company property
Proactive Safeguards

The Best Way to Protect Against an Active Shooter/Workplace Violence Incident is to *Prevent It* from Occurring.

Many of these Incidents Could Have Been Avoided if Strategic Proactive Controls and Awareness Training Had Been Implemented.
Background Screening Processes

The shooter at Excel Industries had convictions in at least two other States for carrying a concealed weapon, felony battery, disorderly conduct, grand theft and burglary.

- Are your background investigations comprehensive enough?

- Who evaluates screening results and what is the criteria for disqualification?

- What should constitute a follow-up (post hire) background investigation?

- Do contract labor providers replicate your screening processes?
Effectively Utilizing Security Technology to Provide a Maximum Level of Protection to Personnel and Property

Access Control Systems

- Properly controlling the primary entrances used by employees, visitors, vendors and contractors.

- Access card/key fob safeguards: detailed processes regarding how they should be security layered, replaced, returned and voided.
Intrusion Detection Systems

• Programming macros in all keypads

• Wireless and hard wire duress buttons – where they should be located, electronically point identified and tested

• Installing uniquely colored strobe lights in strategic locations that would be activated by the duress buttons; then training personnel on recognition and proper response when strobe lights are activated
Closed Circuit Video Systems

- Critical locations that should have video coverage
- Programming remote monitoring capability
- Installing and using strategically placed public view monitors for employee use
Encouraging Your Workforce to Communicate their Concerns

- Establishing an effective, 100% risk-free hotline program to supplement the company open door policy

- Understanding the difference between suspecting, knowing, and proving and effectively explaining communication options to employees
Conducting Investigations on Potential Threats

• Have legal counsel develop the needed verbiage to allow for follow up and/or reasonable suspicion investigations

• When to initiate a follow up investigation

• Follow up investigations are different from pre-employment background checks.

• Why these investigations should include social media searches
Recognizing Indications of Escalating Hostility

- Being aware of the transition that occurs

- Possible “red flag” statements made by a disgruntled employee:
  
  1. Occurring with greater frequency
  2. Expressed with more emotion (anger, frustration and/or vindictiveness)
  3. Using more aggressive or inflammatory language
  4. Implied or expressed threats directed towards a specific target(s)
  5. A perceived sense of disrespect or insult by the employee, whether it be towards their ethnicity, religious beliefs, etc.
In 63 incidents studied, 70% ended in 5 minutes or less.

37% ended in 2 minutes or less.

60% were over when police arrived.

**The Bottom Line:**
You may have to make decisions
Reacting to an Active Shooter Situation in your Workplace
Run

• Have an escape route and plan in mind before a crisis strikes

• Leave your belongings behind
Hide

- Hide in an area out of the shooter’s view
- Block the entryway to your hiding place and lock the doors
- Silence your cell phone – even a phone on vibrate may give your hiding place away
Fight

• As a last resort if no other options are possible
• Attempt to incapacitate the shooter
The Fight Option

Everyday items that can be used as weapons

Know where an attacker most vulnerable?
Be Prepared for Sensory Overload:

**Adopting the Right Mindset**

- Exposure to gunshots in an enclosed area without hearing protection can be painful and result in temporary hearing loss

- Not like TV – you may well see very traumatizing images

- Police officers will NOT stop to care for wounded until there is no longer a threat
Properly Interacting With Responding Police

• Avoid quick movements toward officers
• Do not grab onto officers for safety
• Keep your hands up with fingers spread apart and visible when police arrive
Active Shooter Resources Page

https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-resources
Handoff to David
What’s on Tap?

- Causes of Action Against Employers
  - What’s the exposure?

- Best Practices / Preventative Measures
  - Pre-Employment
    - Background Checks
    - Fair Credit Reporting Act
  - During Employment
    - Americans with Disabilities Act of 1990
Common Legal Claims Against Employers
Legal Theories

• **Workers’ Compensation**
  – *Exclusive Remedy*: accidents arising out of and in the course of employment
  – Typically bars a negligence lawsuit by an employee against the company
    • Immunity might be lost for intentional acts
    • Does not typically extend to Independent Contractors
Legal Theories

• **Negligence**
  – Applies to claims by third parties against employer for employee’s violent acts
  • Claim revolves around action or inaction of the employer.
  • Requires a causal link between employer’s negligence and subsequent violence in the workplace
Negligent Hiring/Retention

• “[W]here the employee commits an intentional tort,…outside the scope of employment, against [a] member of the public, where the employer either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons.”

• Background checks?
Negligent Training / OSHA

• No mandatory requirement for workplace training on the specific issue of violence, but OSHA’s “general duty” language strongly suggests that such training must occur.
  – The “general duty” clause requires that employers provide a safe and healthful workplace.
  – The “general duty” also creates a duty to protect employees from “feasibly preventable” hazards, including criminal violence in the workplace.
Training - OSHA

• Will vary with circumstances and industry, but examples of training modules include:
  – Conflict resolution
  – Nonviolent reactions
  – Recognition of warning signs
  – Response procedures
Preventative Measures:
Pre-Employment
Is a Background Check Enough?

Looks like a nice guy. Would you hire this man?
Disgruntled Employee Murdered Two Co-workers on Live TV

The general managers said of Vester Flanagan...they saw no red flags during an “extensive screening process” before he was hired in March 2012.
Background Check

• Employers can ask the Employee for:
  – Financial history – maybe / maybe not
  – Employment history
  – Education
  – Criminal history – with strings attached?

• Employers cannot ask the Employee for:
  – Personal/family medical history
  – Genetic history
New Jersey Opportunity to Compete Act

• “Ban the Box” Law became effective in March 2015
  – Regulations were passed in December 2015.

• Applies to any company with ≥ 15 employees over 20 calendar weeks that does business in NJ.
  – Does not matter whether 15 employees work in or out of NJ.

• Requires employers to delay criminal history inquiries until after the “first interview.”
  – Exceptions for certain job (e.g., law enforcement or jobs where background checks are required by law).
New Jersey Opportunity to Compete Act

• What is the “first interview”?
  – Any “live, direct contact” with applicant to discuss employment being sought or qualifications.

• May inquire further if applicant voluntarily discloses information on criminal record before “first interview.”

• Application can state that applicant will be subject to later background check as condition of employment.
Fair Credit Reporting Act (FCRA)

Employer must:

– Provide Notice and Disclosure to Employee to Request Consumer Report

– If Adverse Action is contemplated, Employer must send letter to Employee, along with:
  • copy of credit report
  • copy of FCRA Summary of Rights
Required Authorization and Disclosure

• Section 604(b) of FCRA applies to Employers who procure consumer reports for employment purposes
  – Must clear & conspicuous disclosure in writing
  – Must be “in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes”
  – Must procure consumer’s written authorization
Pre-Adverse Action Notice

• Before employer takes adverse action based on the consumer report
  – A notice that includes a copy of the consumer report you relied on to make your decision and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”
  – Giving the applicant the notice in advance gives him/her the opportunity to review the report and tell you and/or the reporting agency if it is correct.
Notice of Adverse Action

• If you decide not to hire, the notice must include:
  – The name, address, and phone number of the consumer reporting company that supplied the report;
  – A statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; and
  – A notice of his right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if he asks for it within 60 days.
Preventative Measures: During Employment
Workplace Violence Policy

• Policy should:
  – Define workplace violence broadly / zero tolerance
  – Include a policy statement indicating that all employees are responsible for maintaining a safe work environment, that employer will respond to all reported incidents in an appropriate manner, and that the employer will act in an appropriate manner to stop the behavior

• Most have it, but then what?
Employee Assistance Programs

- Employees with mental health or substance abuse issues use *eight times* more medical care, are absent over twice as much, and have four times as many workplace accidents.
- Organized EAPs provide employees with free (or nearly free), confidential and easily accessible resources.
- Questions to be considered in assessing EAP services include:
  - scope of services provided
  - schedule of availability
  - access for out-of-town employees
  - breadth of services
  - willingness to accept involuntary referrals as well as voluntary referrals.
An employee complains about a co-worker being “scary” and “a little off.” The employee also says there are rumors that the employee talks to himself, and has pictures of guns all around his workspace.

She asks you to do something. What do you do?
Can an Employer Order an Employee to Seek Medical Help?

- Vester Flanagan Case Study:
  - July 2012, Flanagan was ordered to contact Health Advocate after complaints by coworkers of “feeling threatened or uncomfortable”

- It is unclear if Flanagan did so prior to termination of employment
ADA - Medical Exams

• ADA generally allows employers to make a disability related inquiry or require a medical exam if a question arises as to the ability of an employee to do the essential functions of his/her job, or to question whether the employee can do the job without posing a “direct threat” due to a medical condition.

• EEOC says such an inquiry or exam must be “job-related and consistent with business necessity”. 
When is a medical exam or disability inquiry "job-related and consistent with business necessity"?

- When an employer has a reasonable belief, based on objective evidence, that:
  - an employee's ability to perform essential job functions will be impaired by a medical condition;
  - an employee will pose a direct threat due to a medical condition.

Follow up on a request for reasonable accommodation also may be job-related and consistent with business necessity.
ADA – Return to Work

• To assist in the determination required by the ADA, an employer may request that a returning employee undergo a “fitness for duty” medical examination, provided that this is consistent with business necessity and is job related.
A disabled employee, even if the disability is a mental one, may be held to the same standard of conduct as non-disabled employees. Thus, where an employee engages in threatening conduct, even where it is caused by mental illness, discipline or termination does not present an issue under the ADA.

- Palmer v. Circuit Court: Disabled employee made threats: “I’m ready to kill her. I don’t know what I’ll do. Her ass is mine. She needs her ass kicked and I’m going to do it.... I want Clara bad and I want her dead.”
Questions?