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“Employers and Businesses Under Fire--Liability for Active Shooter Events”

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INTRODUCTION

Active shooter incidents are on the rise. Many of those incidents are reported nationwide. Whether it be a school, a place of worship, a yoga studio, a concert or a bar---all these establishments have a common thread. All of these establishments have employees and more and more lawsuits are being brought by employees and third parties after the shooting.

Many employers may not be surprised to learn that after an active shooter incident, there may be a large number of worker’s compensation claims filed against it. However, there are other claims which are on the rise. Employers may now face lawsuits for negligent hiring and retention; hostile work environment and other types of negligence.

There are also a lot of other losses for which an employer/business may not be prepared. There is of course, the tragic loss of life; post traumatic stress disorder and bodily injury. But, the business will also face an interruption; damage to its reputation; loss of employees and damages to the physical premises itself.

This panel shall explore the many causes of action that may asserted after an active shooter incident and the potential exposure for which a business may not be prepared to handle financially. The panel will also discuss how many of the claims may not be covered under current insurance and a new and emerging market.

Tragically, active shooter incidents are occurring more frequently and the insurance

industry is responding.

I. Definitions & Statistics

“Active shooter” “mass assailant” and “mass shooter are terms that have been used interchangeably. But, the Department of Homeland Security has defined an active shooter as an individual actively engaged in killing or attempting to kill people in a confined other populated area. There are shooting incidents that take place everyday. An active shooter thus differs form incidents that may involve a weapon.

The FBI reports that between the years 2000 to 2017 that have been 250 active shooter incidents in the United States. From 2016 to 2017 the active shooter events increased from 20 to 30.

During that same time period of 2000 to 2017, the FBI reports that commerce/businesses are where 42% of the active shooter incidents occurred. 20.8% of the active shooter incidents took place in educational facilities. Not far behind were open spaces and government agencies. But, when one discusses any of these locations, one is talking about a place where there are employees. Consequently, after an active shooter event, lawsuits follow against employers. Recent events should also alert everyone that they may be considered a soft target and no longer safe from an active shooter incident. Places of worship, open air concerts, even a yoga studio have had active shooter incidents. These are locations where individuals did not expect that there would be an active shooter incident. But, now since the recent church shootings and the largest mass shooting in United States history in Las Vegas, entities must reconsider their security system; active shooter training and response and whether the insurance in place would cover the multitude of lawsuits and damages that can result from an active shooter incident.

II. Potential Losses

After an active shooter incident, there is the tragic loss of life. The Washington Post reported that after the Virginia Tech shooting the following costs were incurred:

- \$11.4 million: Safety and security upgrades
- \$6.4 million: Cleanup, renovations, and other facility changes
- \$4.8 million: Settlement payments and other legal costs
- \$2.7 million: Support for survivors and families of victims
- \$3.2 million: Other operational expenses
- \$9.5 million: State expenses, including settlements
- \$590,000: Healthcare cost

This list demonstrates that there are many potential losses in addition to the tragic loss of life and injury. The following losses may be experienced:

- Life & bodily injury
- Funeral & Medical costs
- Property damage/clean up/rebuilding
- Counseling
- Business interruption
- Crisis Management
- New security plans
- Loss of employees
- Workers Compensation Claims
- Lawsuits

Many of those losses, much to the surprise of the business, those losses may not be covered by a General Liability insurance policy or other policies (premises/management/employment liability policies). Most businesses will discover that GL policies will address claims for bodily injury and property damage suffered by third parties such as customers. But, a GL policy may specifically exclude active shooter incident. A duty to defend clause in commercial general liability policies may also mean victims have to sue an organization and win a lawsuit.

General Liability policies may also not cover income losses that result from a shutdown of the business.

The list of potential defendants is also long. After there is an active shooter incident, Claims may be asserted against owners; event promoters, first responders; school district' board of directors; security agencies; active shooter trainers; and employers. For those that are in the property management business, they may find themselves as part of a lawsuit in the aftermath of an active shooter event. Companies that manage buildings/office parks/malls and the like often are the ones that provide the security for the premises. The management company may also be the one with the most knowledge as to the possible exits available in case of an incident and also who is being granted access to the building. The management company may also be the one with the most knowledge as to problematic or controversial tenants.

In addition to potential liability, business owners face the task of repairing or demolishing the facility and regaining its reputation. The costs to rebuild or tear down may be enormous. The interruption to the business after an active shooter event could be for months. The business may even have to relocate. Many businesses are not financially prepared to handle such losses.

Most likely, the GL policies possessed by many of the potential defendants do not cover an active shooter incident—particularly since many policies have not been updated and no one checked to see if policy actually covered these incidents and/or losses.

Claims under a GL policy can include the costs of defense; property damage and depending on if liability is found on the part of the Insured, then it may also trigger coverage.

III. The Workplace

As stated above, all of the locations where there have been active shooter incidents have in common the fact that the incidents occurred at someone's place of employment. This will trigger several types of claims that could be asserted against the employer.

The most common claim will be for workers compensation. Most states make worker's compensation the exclusive remedy for an employee injured at work. But, there are some exceptions.

There may be circumstances where the employer is simply accused as having been negligent. The allegations that are now most frequently asserted are that the employer was negligent. It is often alleged that the employer knew or should have known of the potential harm and did nothing to ensure the safety of its employees and third parties. Indeed, employers have been alleged to have ignored a hostile work environment.

Given that many obligations are imposed on employers, there are many potential claims that could be asserted against them after one of these tragic events.

A. Worker's Compensation

Perhaps the most common and reported type of claim that is filed after an active shooter event is a claim for workers compensation. Claims are filed for physical injuries sustained. But, claims are also being filed by employees who were not physically injured but witnessed the shooting, injuries and deaths. Such claimants allege that they suffer post-traumatic stress disorder (PTSD) and other psychological effects. *See, Evans v. Alliance Healthcare Services*, W2016-00653-SC-WCM-WC (Tenn. Sept. 2017) (Court affirms award for PTSD claims for witnessing of shooting). Laws vary by state and since most workers compensation laws do not provide for coverage if there is no physical injury, several states have tried to pass legislation that first responders be permitted to recover for PTSD for witnessing the shooting, injuries or deaths. Florida, .SB 376, for example, passed the two Senate committees without a single no vote and which would permit first responders to seek workers compensation for PTSD. (*See also*, Colorado, HB 1229; and Connecticut SB 763, the later of which died in committee due to concerns of costs to tax payers.)

In most states, workers' compensation statutes include "exclusive remedy" provisions that prevent injured employees from making tort liability claims against their employers, meaning that workers' compensation benefits are the sole remedy available to these employees. However, there are exceptions to this rule that may apply in active shooter events in some jurisdictions. For example, a targeted, personal attack on an employee with a clear motive that is unrelated to the workplace — for example, an attack by a spouse — could negate workers' compensation for that employee because it falls outside of the "scope of employment." Other employees that were not the target of the attack and yet were injured would typically be able to file claims.

Negligence, reckless behavior, and intentional acts by employers, however, could expose them to additional civil litigation under employers' liability laws. Examples of such behavior include lax security procedures and failure to respond to specific threat warnings before an incident. In New York, paralysis of other serious bodily injury could also provide the ability to bring an action for other than workers compensation benefits.

But, before an employer has to address other potential claims, it cannot ignore the impact that an active shooter incident can have on workers compensation. Such claims can prove costly. For example, the City of Kirkwood, Missouri incurred over \$9.9 million in workers compensation costs from a shooting where gunman opened fire at a city council meeting, killing five and wounding two. The gunman was dissatisfied with treatment by city officials and thus decided to kill them. When so doing, the gunmen also killed and injured others.

Connecticut raised loss costs paid by policyholders by 7.1% for 2013 based on an experiences which included 2010, a shooting at a beer distributor shooting. The shooting had a “measurable impact” on 2013 rates. Business Insurance, *Mass Workplace Shootings Can Directly Affect Workers Comp Rates*, Roberto Cenicerros (2/24/2013).

Benefits may also be sought by the surviving spouses or even life partner. The active shooter incident referred to above resulted in the death of 8 employees. A worker who was accused of theft and terminated returned and shot several of the employees. The fiancée of one those employees sought death benefits which were awarded. During the appeal, the parties settled. *Id.*

As a business owner or employer, these costs as well as other damages cannot be ignored. The injured employees will most likely not return to work. There will be an interruption in business and damage to the reputation of the business. The premises will have to be repaired if not torn down. And of course, there is the tragedy of resulting injury and death.

B. Osha

Every year nearly 2 million Americans are victims of workplace violence according to the Occupational Health & Safety Administration (“OSHA”). Workplace violence is the second leading cause of death on worksites.

Section 5 A1, the general duty of OSHA requires employers to provide their employees with the place of employment that is free from *recognized hazards* that are causing or likely to cause death or serious physical harm. (Emphasize added). Courts have interpreted the general duty clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that the **employer or the industry recognizes as hazardous** and that is likely to cause death or serious physical harm to the employees where there is a feasible method by which to abate the hazards. Failure to do so could result in a finding of OSHA violations under the OSHA act.

Active shooter events are now considered a recognized hazard and indeed OSHA has active shooter guidelines on its web site for employers.

The penalty for a violation is a fine. But, the general duty clause is being used in connection with a negligence claim. Did the employer do what it needed to do to maintain a safe workplace?

Recently, courts have recognized that active shooter scenarios and now considered a recognizable hazard to employees. For example in 2013 a court in Minneapolis Minnesota found fault with the employer for negligence. In this case, an individual walked into his place of employment and shot and killed numerous individuals before taking his own life. Following the OSHA guidelines as set forth in the general duty clause, the court found that the employer needed to make training available and also contain reasonable safeguards in the place of employment. *Beneky V. Accent Signage Systems*, Appeals Court. September 2014 finding that “*Liability is on the employer to train their employees to recognize the indicators of the potential active shooter and how to respond when they are faced with an actual active*

shooter incident". But, see, rejecting Violations of OSHA guidelines as basis for claim where OSHA has not set forth a standard for workplace violence as a result of shooting.

C. Negligent Retention & Supervision

An example of the potential claims against an employer can perhaps be found in the lawsuits and invitations to join in a lawsuit in the aftermath of the shootings in the 2013 active shooter event that occurred in the Naval Yards in Washington, DC. An employee went into a building where he worked at the Naval Yards and killed 14 people. It has been alleged and reported that the shooter had a prior conviction for a shooting; arrests and reprimands and often complained about voices that he heard and transmissions that he thought were being made to him.

After the shooting, some of the claims that are being made are:

Negligent hiring by the IT consulting company;
Negligent retention and monitoring by the IT consulting company for failing to notify security officials of the shooter's deteriorating mental state and allowing him to return to work despite his poor mental health and complaints of hearing voices;
Negligent supervision by the Department of Defense for permitting the shooter to retain his security clearance despite his violent behavior and deteriorating mental health;
Negligence or failures of the third-party company that conducted a background check on shooter;
Negligent and inadequate security at the Navy Yard on the day of the shooting.

These are some of the potential claims that several firms have sought to assert on behalf of potential plaintiffs in the aftermath of the shooting.

Recently, a Court handling the various naval yard shooting case issued a lengthy opinion analyzing the potential liability of the defendants. *Jacobs v. The Experts*, 15-2242 (September 15, 2016, D.C.) [s://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_15-cv-02242/pdf/USCOURTS-dcd-1_15-cv-02242-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_15-cv-02242/pdf/USCOURTS-dcd-1_15-cv-02242-0.pdf)

As with any negligence case, the analysis will consist of a review of whether a duty exists; whether that duty was breached and whether the breach of that duty proximately caused the injuries sustained. In the District of Columbia, where the shooting took place, the Court stated that the duty of care required for negligence was a function of foreseeability. In that regard, the better argument in that instance for foreseeability was whether there was a special relationship. Did one party possess control in order to take reasonable precautions to prevent the intentional harm. In other words, *did the employer know or should it have known its employee's behavior in a dangerous or otherwise incompetent manner and armed with that actual or constructive knowledge, did the employer adequately supervise that employee.*

With respect to negligent hiring, this Court dismissed the claims. There is only so much that was (or can be discovered) in a background search. In that case, there was simply not enough to support a claim that the employer knew of acts that would result in a mass shooting.

It is important to note that there was an argument in the Naval Yard case that employer should have known of the shooter's dangerous propensities prior to hiring him. There were things in the naval yard employee's background that could have led to the conclusion that he had "dangerous propensities". He had been involved in incidents while in the navy; he shot through his ceiling at neighbor; he had been

removed from a nightclub screaming profanities and threats and his own commanding officer asked to have him removed from the navy.

The court first focused on whether a reasonable background investigation was conducted. The Court found that a reasonable investigation was conducted and NO convictions were revealed.

There were arrest records. But, statutorily in the District of Columbia arrest records could not be considered for the purposes of employment. Furthermore, the dissemination of arrests records would violate an individual's right to privacy and due process rights. Therefore, the aforementioned acts may not have been discovered by the employer and also could not be used to deny someone employment.

The Court also discussed the fact that there had been information that the employee suffered from a mental illness. But, the Court noted that an attempt to equate mental illness with violence must fail and contribute to the false notion that mentally ill individuals are predisposed to commit violent acts— "a stereotype that would create undesirable incentives in the employment context" and in violation of the American's with Disabilities Act.

In defending a claim of negligent hiring, the employer conducted a reasonable background search. Focus should also be placed on the fact that employers are restricted in many states as to when they can inquire into the criminal background of an employee and what an employer can do with the information it learns. Arrests without a conviction or suspicions of mental health issues could prove problematic to any employer who refuses to hire an individual based upon learning of same. Convictions that bear no relationship to the position sought may also not be grounds for withdrawing an employment offer.

A defendant should thus focus on the reasonableness of the investigation it conducted and what information it actually had and that it can use in its employment decisions. Care must be taken not to run afoul of the many new background checks laws....and other laws such as the American with Disabilities Act and discrimination laws.

However, once the employee is hired, there may be incidents that will impose liability on the employer. The Court did allow the claims of negligent retention to proceed. There had been incidents during the course of employment that could have placed the employer on notice that this employee could shoot other employees. The employer had a special relationship in that it could control the employees it retained. As such, the Court allowed the claims to remain and for the matter to proceed to discovery.

In the end, for an employer the issue will be what the employer knew or should have known about whether the employee was behaving in a dangerous manner and whether the employer armed with this knowledge acted in an incompetent manner. *Giles v. Shell Oil*, 482 A.2d. 610, 613 (D.C. 1985). This will require a fact sensitive analysis and as such may result in extensive discovery before the issue is resolved.

D. Other Causes of Action

In the lawsuits that followed the San Bernardino shooting, a claim was made of a hostile work environment. The San Bernardino shooter was reported to be married a woman who had been

radicalized. There was a long debate as to whether the shooting incident was an act of terrorism or workplace violence. But, while the issue was debated, a claim was asserted that the employer knew or should have known that its employee was predisposed to commit acts of violence and thus maintained a hostile work environment.

Businesses must also be careful in how the training is conducted or possibly face a claim. *See, e.g. Mclean v. Pine Eagle Charter School*, (teacher filed action against school; school board; security agency and security officer alleging PTSD from unannounced active shooter training), *See also, Meeker v. Life Care Ctrs. of Am., Inc.*, 2015 U.S. Dist. LEXIS 58761 (D. Co., May 5, 2015)(summary judgment denied as to whether workers compensation exclusivity barred claim where issues of fact existed regarding active shooter training). The active shooter plan and who is hired to implement and do the training will be critical in a determination of liability. In the cases cited above, the allegations were that active shooter training was unannounced and therefore allegedly traumatized teachers and students. These cases illustrate the importance of hiring a company with expertise in this area to guide the business.

A cost cutting measure like hiring a retired or office duty law enforcement officer may prove problematic. A business would thus do well to check the credentials of the training agency and proposed plan.

Another often filed claim is for negligence in the failure to provide proper security. A jury in Georgia awarded 46 million dollars against a security company for failure to adequately provide security. Rather than sue the employer or business, the families of the deceased employees filed the claims directly against the company that provided security. The jury was shown videos of the security guards running in the opposite direction rather than responding to the active shooter. *Jury award in plant shooting emphasizes the need for proper security controls*, Caroline Ramsey-Hamilton, April 22, 2015, Security Infowatch. It is not a reach to imagine how the claim could be stretched and made against an employer who knew that the security retained was not adequate and inferior in an effort to cut costs.

After many of the shootings, claims are made regarding exits and access to the building. Sadly, there is a slow learning curve to these incidents. After each incident, lessons are learned. But, still everyone is evolving. After the Sandy Hook shootings, claims were filed alleging improper exits and access to the building.

In California, UPS is facing over a dozen lawsuits which contain many of the aforementioned causes of action. UPS is being accused of having lax security; not conducting sufficient background checks and not doing enough to protect workers when there had been complaints of lax security. *See, e.g. Lefiti v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561236, complaint filed 9/12/17 ; *Lim v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561241, complaint filed 9/12/17 ; *Arquiza v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561240, complaint filed 9/12/17 ; *Bailey v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561237, complaint filed 9/12/17 ; *Bo v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561243, complaint filed 9/12/17 ; *Calderon v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561242, complaint filed 9/12/17 ; *Chen v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561245, complaint filed 9/12/17 ; *Perez v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561239, complaint filed 9/12/17 ; *Tran v. United Parcel Serv., Inc.*, Cal. Super. Ct., No. 17-561247, complaint filed 9/12/17).

MGM and Live Nation have been accused of not having adequate security policies, not properly training staff, not properly surveilling the premises, and failing to respond quickly when security

guard Jesus Campos was shot. The suit alleges that the shooter's VIP status as a high-stakes gambler gave him access to a service elevator at the Mandalay Bay, which he used to stockpile weapons and ammunition in the days before the shooting.

In Live Nation's case, the plaintiffs say the company failed to provide enough exits or properly train employees "in case of a foreseeable event, such as a terrorist attack or other emergency.

It also bears pointing out that MGM has been taking an aggressive approach to its defense. Recently, MGM filed a declaratory action which did not get favorable press coverage despite efforts to explain the move. MGM did so to take advantage of the SAFETY ACT. The act would limit liability for acts of terrorism where security services had been retained. In the Las Vegas for this concert, a vendor was provided that was approved by the Department of Homeland Security. MGM thus sought a declaratory judgement that it was not liable to the victims under the Act.

IV. **The Insurance Industry Responds.**

General liability and EPL policies would not necessarily include language covering an active shooter incident. At the time they were written or bought, there was probably never even a discussion regarding an active shooter incident. There may also many exclusions that would not permit coverage for example for bodily injury or intentional acts.

The industry is responding and there is additional coverage that can be purchased.

Active Shooter Endorsements may be purchased. These endorsements Can be added Private Company or Non-Profit Organization D&O forms, or EPLI forms. Businesses may purchase coverage for medical, hospital and psychological/PTSD Expenses of victims and survivors. In essence, this could include coverage for some emotional distress/anguish.

An employer is also a business owner and may have to incur expenses for consultants and business interruption. Coverage amy also be purchased for loss of attraction. That business will now be associated with this tragic event and result in a loss of business.

Coverage may also be purchased for legal liability in case of lawsuits. judgments, settlements and defense costs.

Coverage may also be purchased for assault both on and off premises. For example, an incident may occur while an employee is traveling on business.

Coverage for employees, customers, guests, students, volunteers and other classes may also be purchased.

Given the increase in mass shootings and the millions of exposures to businesses, it is a growing insurance markets which businesses may want to consider.

V. **Best Practices**

Businesses should review their response and preparedness plan and training for an active shooter scenario. Experienced trainers should be hired. The plans should be reviewed with a trained professional.

Businesses should also train their managers about reports of threats made by employees. They need to proceed with caution, but be vigilant of threats made and respond accordingly.

The background check process should also be reviewed. Again, a professional agency may be necessary depending on the type of business and position being filled. This should be reviewed with counsel as well to ensure that none of the background check procedures run afoul of the employment and discrimination laws.

Employer should also review the policies in place for social media; bullying and harassment. An effective policy may assist the employer in being able to spot a problem and perhaps act before a tragedy occurs.

If security is hired, a business again must look into the professionals being hired. More and more security personnel are being trained to respond to active shooter incidents. Claims have been raised that the security agency retained was not properly trained or did not properly respond.

All of these things may assist a business in reducing its exposure or preventing the incident.

Insurers may want to reassess the business it is insuring and how aware is the insured of the potential situation and how prepared is the business for this scenario. No longer can it be said that "I never thought this would happen in my neighborhood." Active shooter incidents are occurring more and more often and in places no one ever imagined would experience such a tragedy.