



Minimizing The Exposure Created By Cutting-Edge Employment Issues

I. POST-TRAUMATIC STRESS DISORDER IN THE WORKPLACE

Post-Traumatic Stress Disorder is a Disability Facing Employers

Post-Traumatic Stress Disorder (“PTSD”) is commonly described as a mental disorder that can develop following a person witnessing or experiencing a traumatic event or events. The condition can lead to feelings of isolation and withdrawal from everyday activities and can affect a person’s memory and relationships with others.

The National Center for PTSD lists four types of symptoms that a sufferer may feel, as follows:

- Reliving an event through nightmares, flashbacks or triggers which can be sights, sounds or smells that bring the event back;
- Avoidance – the individual may avoid people or places that trigger the memories (including, but not limited to, avoiding crowds, avoiding news or entertainment programs, etc.);
- Negative changes in beliefs and feelings such as avoiding relationships with others or simply feeling that no one can be trusted; and
- Feeling tense, having excessive anxiety, cannot concentrate or easily startled.

Historically, those in military positions and first responders have been known to be dealing with PTSD issues, due to routinely witnessing violent scenes, severe medical issues and devastation. Now, more and more, such issues are being dealt with in a wide variety of workplaces. For instance, individuals may have been the victim of an assault, rape or any crime; suffered prolonged exposure to sexual harassment or other violent workplace issues; experienced exposure to opioid overdoses; or even armed shooter or workplace fatalities (i.e., construction workers).

Employer Programs to Assist Employees with PTSD

Employers are being asked to assist such employees in a variety of ways, whether the PTSD occurs from occupational or non-occupational sources. Many employers make mental health resources available as part of their benefits package and employee assistance program. Management training on how to deal with employees with PTSD is also an important part of the process. Employers are being asked to provide accommodations to such employees, including:

- Concentration issues – reduce distractions with white noise or environmental sound devices, noise cancelling headsets, modifications in lighting, flexible work environment or schedule;
- Memory issues – need to provide written as well as verbal instructions, checklists, wall calendars, electronic organizers or apps, additional training or refreshers;
- Organization issues – provide daily, weekly and monthly tasks lists, assign a mentor or coach, use of electronic organizers or apps;
- Management issues – provide daily to do lists, electronic assists previously noted, regular meetings with supervisors or mentors to determine if goals being met;
- Emotional issues – allow emotional support animal, use of a mentor to alert employee to behavioral issues, EAP assistance and/or flexible work environment;
- Coworker interaction issues - allow part time work from home, allow greater privacy at work and provide disability awareness training to supervisors and coworkers.

Accommodating PTSD in the Workplace

An employee with PTSD will be eligible for leave under the Family Medical Leave Act (“FMLA”), 29 USC Ch. 28, as well as under state and local laws. An employee with PTSD is also entitled, if necessary, to reasonable accommodations under the Americans With Disabilities Act (“ADA”), 42 U.S.C. Sec. 12101, *et. seq.*, if they do not create an undue hardship for the employer. An employer’s failure to meet its legal obligations under these laws will trigger claims that implicate Employment Practices Liability Insurance policies. Other insurance policies potentially affected by employees with PTSD, include Workers’ Compensation, disability insurance, and health insurance.

According to the Equal Employment Opportunity Commission (“EEOC”), the individualized assessment of virtually all people with PTSD will result in a determination of disability under the ADA given its inherent nature. PTSD is specifically included in the definitions of the implementing regulations of the ADA as substantially limiting brain function.

The EEOC continues to seek to enforce the ADA against employers who have maximum or fixed-leave limits for workers and “100 percent healed” policies. According to the EEOC, such employer leave policies violate the ADA by failing to provide leave as a potential reasonable accommodation. Since July of 2018, the EEOC has filed numerous lawsuits alleging such violations of the ADA and collected millions of dollars in settlements. *See, e.g., EEOC v. Mueller Industries, Inc.*, Case No. 18-cv-05729 (S.D. Cal.) (\$1 million settlement). EEOC, Mueller Industries Settles EEOC Class Disability Discrimination Lawsuit For \$1 Million (July 18, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-17-18a.cfm>.

II. EMPLOYEES AS FIRST RESPONDERS TO OPIOID OVERDOSES

Surgeon General's Position

In light of the opioid overdose epidemic, the Surgeon General has recently urged employers to stock the opioid antidote naloxone, similar to a first-aid kit or defibrillator.

Society for Human Resources Management. April 27, 2018. *Employers urged to stock opioid overdose antidote*, Smith, Allen. Retrieved on February 19, 2019 from:

<https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/employers-Naloxone.aspx>

Employers at Risk

Employers at risk include traditional first responders--police, fire, and paramedics. However, coffee shop and fast food workers, as well as library workers, are central players, in that many overdoses take place in those business locations.

Health Day, September 24, 2018. *Coffee shop workers on front lines of opioid crisis*. Retrieved on February 19, 2019, from:

<https://consumer.healthday.com/bone-and-joint-information-4/opioids-990/coffee-shop-workers-on-front-lines-of-opioid-crisis-737843.html>

CBC Radio, April 3, 2018. *How the opioid crisis could turn library workers into emergency responders*. Retrieved on February 19, 2019 from:

https://www.ted.com/talks/chera_kowalski_the_critical_role_librarians_play_in_the_opioid_crisis/transcript

Liability Risks

Liability risks of administering naloxone, include:

- The person administering the naloxone may be injured by the person to whom it is being administered, or can be contaminated by opioid exposure, such as fentanyl. Therefore, proper training is necessary, and the failure to properly train can also create exposure to liability.
- Injury to the person to whom naloxone is being administered.
- Virtually every state has enacted laws to broaden access to naloxone. Most of those laws provide immunity to individuals who possess and administer naloxone.

National Conference of State Legislatures, June 5, 2017. *Drug Overdose Immunity and Good Samaritan Laws*. Retrieved on February 19, 2019 from:

<http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx>

III. BIOMETRICS

Biometric Information Privacy Laws

Biometric data measures and/or analyzes an individual's unique, biological characteristics, such as an individual's face, iris or fingerprint, to identify that individual. Because biometric authentication is less costly and more secure than traditional username and password authentication, it is increasingly used by companies to identify and authenticate customers as well as employees. To protect individuals' rights to privacy, several states have enacted biometric privacy laws, which regulate how businesses collect, use, maintain, share and destroy biometric information from individuals. Similar legislation is pending in several states. Other states, such as New York and California, may not have legislation enacted specifically to regulate biometric data, but may have laws which impact the ability to use biometric information, such as laws which restrict, without prior consent, sharing employees' fingerprints or likenesses.

While Texas, Washington, and Illinois all have biometric privacy statutes, the Illinois Biometric Information Privacy Act (BIPA) is the toughest as it is the only biometric privacy law that provides for a private right of action. Interestingly, although the BIPA was enacted in 2008, it is only recently that there has been a substantial increase in BIPA lawsuits, particularly against employers. In fact, since the fall of 2007 through January, 2019, there have been approximately 200 class actions filed in Illinois under the BIPA. Many of these lawsuits are attributable, at least in part, to the increase in use of biometrics in the workplace for timeclocks, security and in connection with health plans and wellness programs.

The Illinois Biometric Information Privacy Act and State Data Breach Notification Laws

The BIPA requires private entities, in possession of biometric identifiers or biometric information, to develop a written, publicly available policy, and to establish a retention schedule and guidelines for permanently destroying biometric identifiers and/or biometric information. It also requires private entities to issue written notice informing the subject of the specific purpose and length of time for which a biometric identifier or information is being collected, stored and used, and to obtain written consent from the individual or his/her representative prior to collecting biometric identifiers and/or information. 740 ILCS 14/15(a). If biometric information is shared with a third party, additional disclosures are required. 740 ILCS § 14/15(d). Biometric identifiers include retina or iris scans, fingerprints, voiceprints, and scans of the hand or of facial geometry. Biometric information is defined as any information, regardless of how it is captured, converted, or stored based on an individual's biometric identifier and used to identify an individual. 740 ILCS 14/10 § 10.

In addition, biometric identifiers and/or information may not be disclosed to a third party unless the individual or his/her representative gives consent, the disclosure completes a financial transaction requested or authorized by the individual or his/her representative, the disclosure is required by local, state, or federal law, or the disclosure is required pursuant to a valid warrant or subpoena. 740 ILCS § 14/15(d). Under the BIPA, an entity in possession of biometric identifiers and/or information must store, transmit, and protect from disclosure using "the reasonable standard of care" within the entity's industry and must act "in a manner that is the same as or more protective than the manner in which the entity stores, transmits and protects other confidential and sensitive information." 740 ILCS § 14/15 (e).

The remedies under the BIPA provide an incentive to pursue class actions. A prevailing party may recover \$1,000 for each negligent violation and \$5,000 for each intentional or reckless violation, as well as attorneys' fees and other relief deemed appropriate by the court. As damages are awarded for each individual in the class, and potentially for each time that data is collected, such as when a biometric timeclock is used, there is potential for significant loss under the BIPA.

In a recent case, *Rosenbach v. Six Flags Entm't Corp.*, No. 123186 (Ill. Jan. 25, 2019), the Illinois Supreme Court held that "[A]n individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person." This ruling will likely serve to increase the number of BIPA class actions. In fact, additional BIPA class actions were filed shortly after this ruling. However, unlike many of the previous class actions which challenged whether notice was provided or consent given, the new ones challenge the adequacy of the notice or consent. It is anticipated that future case law will address the sufficiency of notice and consent under the BIPA and what constitutes a negligent or intentional/reckless violation, among other items.

Many state data breach notification laws define protected personal information to include biometric information. Thus, an employer must provide notice to its employee if there is a breach and his/her biometric information is disclosed. Violations of these laws may subject an employer to civil penalties, which can be quite large.

Insurance

Certain insurance policies may provide coverage for biometric information privacy lawsuits. Cyber policies that provide coverage for errors and omissions in connection with breach of privacy and/or for violations of privacy-related statutes may provide coverage for a biometric information privacy lawsuit, if the definition of "confidential information" is broad enough to include biometric data. Similarly, a Media Liability policy may also provide coverage for invasion of privacy and may provide coverage for a such a lawsuit. Employment Practices Liability policies may also provide coverage if the policy provides coverage for invasion of privacy and the plaintiff meets the policy's definition of "employee." Of course, an exclusion may preclude coverage for biometric information privacy actions under any of these policies.

Commercial General Liability (CGL) policies often provide coverage for breach of privacy and/or violation of privacy. In recent years, however, CGL policies have included exclusions which preclude coverage for data breaches and other cyber-related exposures. Such an exclusion may preclude coverage for biometric information privacy lawsuits.

IV. EQUAL PAY/COMPENSATION DISCRIMINATION

Sources of the Obligation

The Equal Pay Act ("EPA"), 29 USC Section 206, *et. seq.*, requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal. All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is

an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.

An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand. The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EEOC charge under the EPA does not extend the time frame for going to court.

Retrieved on February 19, 2019, from www.eeoc.gov/laws/types/equalcompensation.cfm.

There have been a number of state and local laws passed which parallel the Equal Pay Act.

In addition, Title VII of the Civil Rights Act of 1964, 42 USC Sec. 2000D, *et. seq.*, the Age Discrimination in Employment Act (“ADEA”), 29 USC Section 621, *et seq.*, and the Americans With Disabilities Act (“ADA”), 42 USC Section 12101, *et. seq.*, prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Therefore, someone who has an Equal Pay Act claim may also have a claim under Title VII, the ADEA, and ADA.

Litigation

As part of its Strategic Enforcement Plan, the EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the EEOC will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

Private litigation has been fueled by laws which give rights beyond the EPA, including the right to openly discuss compensation with co-employees. Additionally, there are laws that prohibit employers from asking about past salary history. These cases have been filed in various sectors of the economy, including against technology and financial companies, and law firms.

Use of Prior Salary History

One of the most significant issues, is the ability of an employer to use prior salary history in establishing compensation levels.

There is a split in the Circuit Courts regarding whether past salary history can be used to justify a wage differential between a man and a woman. *See, e.g., Rizo v. Yovino*, 869 F.3d 1004 (9th Cir. 2017); *Wernsing v. Dep’t of Human Services*, 427 F.3d 466, 468-70 (7th Cir. 2005).

V. LIABILITY—THIRD PERSONS

Strict Liability under Washington’s Law Against Discrimination for Discriminatory Conduct in a Place of Public Accommodation

Floeting v. Group Health Cooperative, No. 95205-1, 2019 Wash. LEXIS 68, at *1 (Jan. 31, 2019)

On January 31, 2019, the Washington Supreme Court affirmed a lower court's decision and held under the Washington Law Against Discrimination, RCW 49.60.215, that employers are strictly liable for the discriminatory conduct of their employees in places of public accommodation. The Court further held that members of the public could file a direct claim against an employer whose employee sexually harasses a member of the public, that such harassment need not be "severe" and "pervasive," and that the employer is "liable if its employee caused the harm prohibited by the statute, even if it did not participate in the discrimination and was not negligent in training or supervising its employees."

Employer Liability for Harassment by a Customer

EEOC v. Costco Wholesale Corp., Case Nos. 17-2432 & 17-2454, 903 F. 3d 618 (7th Cir. Sept. 10, 2018)

In September of 2018, the Seventh Circuit issued an opinion demonstrating the breadth of employers' liability under Title VII when it held Costco liable for a customer's harassment of one of its store clerks. The store clerk was continually followed through the store and confronted by the customer over the course of a year, and Costco responded to the store clerk's complaints by speaking to the customer and directing the customer to refrain from further contact with the store clerk. The Seventh Circuit nonetheless held Costco liable, reasoning that although the employer once attempted to address the harassment, its response was inadequate because the employer knew that the customer subsequently resumed the harassing conduct, that the clerk was afraid of the customer, and that she had contacted the police about the customer's behavior.

Liability for On-Site Contractors

EEOC v. Global Horizons, Inc., 9th Cir. No., 16-35528, 2019 U.S. App. LEXIS 3670 (2/6/19)

Joint liability for alleged discrimination requires employers to take steps beyond the terms of the contract with the third party to avoid joint liability for discrimination claims. Courts are becoming more inclined to look at the actual working relationship and management of employees of third-party contractors, *e.g.*, staffing companies.

VI. ACTIVE SHOOTER COVERAGE

Mass Shootings and the Workplace

The rise of mass shootings and ensuing litigation has created public awareness that workplace violence/active shooter scenarios are a serious workplace related risk.

Violence can occur when employees face the prospect of discharge, layoff or corporate reorganization. Unfortunately, there is no test for predicting when an employee may become violent or predict a random act of violence. Employees, customers, clients, and strangers have committed these acts of violence.

Demand for Active Shooter Insurance

Insurance coverage was initially designed for educational institutions; however, buyers now include banks, hotels, sporting venues, churches and amusement parks. The reality is all standard

insurance policies have left gaps and plenty of “grey” that employers need to be aware of: Workers’ Compensation, Commercial General Liability, Property, Terrorism, Errors & Omissions are not designed for these risks.

As a result, there is a need and demand for a new line of insurance coverage for the risk of an active shooter. It is entitled Active Shooter Protection, Deadly Weapon Protection, Workplace Violence, Active Assailant. While underwriters can factor in the location of the institution, the nature of business that is conducted, the number of employees and visitors, the structure of the facility and other considerations, the unpredictability of these incidents presents many challenges.

There is a need for crisis management in the event of an active shooter incident, and this is an important part of some of these policies. Crisis management involves expert teams trained to help insureds deal with employees, families, law enforcement and media. An employer must show the public it is handling the crisis with competence and compassion. The branding and public perception of an institution after an active shooter event can be difficult to recover from, if not impossible. The way the matter is handled could define the institution for decades.

Active Shooter Insurance Coverage

Coverage can Include:

- Personal expenses. Victim counseling, medical and disability benefits, funeral expenses and death benefits.
- Loss of attraction. When a mass attack stigmatizes a neighborhood/business district, it can fill the revenue gaps (even if the incident did not occur at the insured’s own business).
- Property cost. Cost of structural security upgrades along with building closure, relocation or teardown.
- Loss of revenue/extra expenses. Help businesses recover income lost when police investigations bring commerce to a halt.
- 3rd Party Litigation. Cover expansive range of legal costs related to “duty of care” that might not be available under existing policies.
- Pre-Loss Mitigation Assessments. Train staff to recognize certain signs of troubled individuals.
- Awareness Training. An actual crisis shouldn’t be the first time an institution has thought about how to respond. There must be complete awareness training on what to do when faced with these types of incidents. Just like a fire drill, entities should run active shooter scenarios/real life exercises.
- Other policy considerations include:

- Coverage for all types of individuals: Employees, customers, patients, students, guests and patrons.
- Casualty thresholds: Some policies only provide coverage after a certain number of people have been injured or killed.
- Limitations on weapon used: Don't confine to firearms, or bladed weapons. Include explosives, vehicles, acids, or other weapons.