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Professional Liability Issues Relating to Mass Shootings inside Companies, Churches, Schools and Public Areas

**I. Introduction**

US Homeland Security has defined an active shooter as “an individual actively engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is no pattern or method to their selection of victims.”

Mass shootings take place on almost a daily basis with multiple individuals killed or injured, according to Mass Shooting Tracker. Many of the victims may be related to the shooter or at least have some knowledge of the individual. Others are more random. There have been 166 mass shootings in the United States between 1966 and May 2018. 46% of these incidents took place in businesses, 24% in educational environments and the remaining 30% in churches and on government properties. These shootings occurred in 40 of the 50 states and the District of Columbia. Over 1,000 people have been killed. From a financial perspective, the associated property damage, lost revenue and medical expenses for those injured is astronomical. (Statistics are from Washington Post 2/16/2019 Article, “The terrible numbers that grow with each mass shooting”).

From an expense perspective, the single assailant in the 2007 Virginia Tech shooting produced an estimated \$48.2 million in litigation and recovery costs. And it cost \$50 million to build a new Sandy Hook Elementary School in response to the 2012 attack. (Risk Management Magazine, September 8, 2018).

From an insurance perspective, the conventional GL policy may provide some indirect coverage for BI, PD & limited Personal Injury “arising from your liability”. Even if coverage is provided, this exhausts policy limits that were intended to be available for conventional CGL exposures. However, alternative named-peril mass shooting professional liability policies exist that cover exposures such as crisis management, victim counseling, medical expenses, disability expenses, funeral expenses and death benefits. There are also employee benefits coverages pertaining to workers traveling worldwide who are victims of mass shooting events.

From a first party perspective, coverage is now also available for mass shooting related property repair expenses, loss of revenue, extra expenses and loss of attraction.

The insurance underwriters and insurance brokers who offer these coverages often also have experienced specialists on staff who can assist in customizing risk management and loss prevention programs for individual clients. It is recommended businesses considering the purchasing of mass shooter insurance coverage, also perform due diligence in locating and interviewing experienced defense counsel before binding coverage. This allows the business’ executives to possibly negotiate their preferred defense firm and its rates into the insurance coverage via policy endorsement. It should also be noted that mass shooter insurance policies may also limit or exclude coverage for the types of

devices used in mass terror attacks, and/or have policy triggers based on a specific number of victims injured or killed.

Risk managers who are evaluating this coverage should look out for the following exposures: terrorism exclusions; casualties threshold limits; employee exclusions; vehicle exclusions; and mental anguish exclusions. As this niche insurance coverage market evolves, the terms, conditions and exclusions will continue to change.

## **II. Mass Shooter Insurance Coverage Issues**

How a mass shooting or killing is identified depends on the criteria used. While there is no single, broadly recognized definition of a mass shooting, following the shooting at Sandy Hook Elementary School in Newtown, Conn., Congress defined “mass killings” as “three or more killings in a single incident.”

The FBI uses the term “mass murder” and defines it as an event where four or more individuals are killed in a single event, usually in one location or within multiple sites that are in close proximity of each other (e.g., different offices or floors in particular setting like a school, office or mall). However, the FBI does not have formal definition for a mass shooting.

Mass Shooting Tracker, which uses multiple sources to track shooting incidents, defines a mass shooting as “an incident where four or more people are shot in a single shooting spree.” The organization believes the differentiation is critical because even though victims may not die, they were shot and could have lasting repercussions from the shooting event.

Gun Violence Archive, a non-profit that collects statistics from the media, law enforcement, the government and other sources, identifies a mass murder as an incident involving at least four people who are killed, not including the shooter.

This delineation matters to insurers because terminology could impact the type of coverage that applies, as well as any exclusions insurers have determined for mass shooting events.

It should be noted that there is no difference in the types of coverage that apply for terror events, the shooting at the Mandalay Bay or the church in Sutherland Springs, Texas. The attacker(s) do not have to use a gun or guns to trigger coverage. Any weapon can be used, including a car, truck, plane, knife, bomb, etc.

If first responders such as police officers and paramedics suffer injuries or PTSD after a mass shooting incident, workers’ compensation coverage would likely cover treatment. However, individuals who experience shooting events first-hand may only have coverage for PTSD treatment under their health insurance.

## **III. Mass Shooting Exposures:**

### *A. Schools/Universities*

According to the Wall Street Journal, the insurance industry for schools and universities is growing:

*“There’s burgeoning demand for this product,” said Robert Hartwig, director at the Risk and Uncertainty Management Center at the University of South Carolina, which focuses on risks facing organizations. “If you’re a risk manager for a school district, you have to look at it with the same eye that you might look at coverage for a tornado. We live in a very litigious United States.”*

The Wall Street Journal reported in an article out on August 2 that local schools, private schools and some universities are starting to purchase what is called “active-assailant” insurance for protection: *It at least gives us some peace of mind that, in the event of horrible tragedy, we can begin to put things in place,” said Lance Erlwein, treasurer of Belpre City Schools, a district of 1,000 students*

*in southeastern Ohio, which purchased a plan last year that includes a \$25,000 death benefit per victim and trauma counseling. "Fifteen years ago who would have ever thought you would need something like this. It's awful that schools have become the target."*

Schools and universities are realizing the need to assess the liability of an active shooter situation, should it occur, on their grounds.

McGowan, Beazley, AXA XL, Hiscox Ltd., Munich Re, and others have launched such policies since 2016, as mass shootings showed no sign of abating. Premiums can range anywhere from \$1,400 per year for \$1 million in coverage for a small private school to \$50,000-\$100,000 for a \$5 million to \$10 million policy for a large public school district.

As the Wall Street Journal noted, the cost for such incidents – which include not only things like funerals and counseling, but also liability from lawsuits - is enough to make these institutions want to consider this type of insurance.

More than 150 children and adults have been killed in school shootings since 1990, according to a Wall Street Journal review. Scores more were either injured or traumatized by the incidents.

After the February mass shooting at Marjory Stoneman Douglas High School in Parkland, Fla., 15 survivors filed a lawsuit in U.S. District Court of the Southern District of Florida in July against several parties, including the school district's superintendent, law-enforcement officials and Broward County. They seek monetary damages to be determined by a jury and attorney fees for alleged failures to protect students at the school.

Last year, the insurance company for Marysville School District No. 25 in Washington state settled a lawsuit for \$18 million filed by the families of victims in a school shooting that left four students dead and a fifth critically injured. The lawsuit was settled using the school district's liability coverage.

The insurance is assigned a premium based on local crime statistics and the likelihood of an event happening at a particular institution, as well as student enrollment and staffing levels.

According to the Wall Street Journal, to set premiums, insurers consider factors including local crime data, student enrollment and district staff levels. They also consider what safety measures the schools have in place and consider whether schools are monitoring social media to spot potential threats and if schools offer active-shooter awareness training to students and staff. One example is the School District of Indian River County in Vero Beach, Fla., which pays an annual premium of \$20,909 for a \$3 million policy, which includes a \$250,000 per person death or injury benefit after a shooting or other violent act. The insurance covers the district's schools with 15,000 students and employees. Charter schools aren't covered.

#### ***B. Hotels and Concert Venues***

Concert venues and hotels are also vulnerable to significant losses as a result of mass shootings.

The Vegas shooter killed 58 people and wounded more than 800 when he opened fire on Oct. 1, armed with dozens of weapons in his hotel room. Early estimates following the massacre at the Mandalay Bay Hotel in Las Vegas indicate that event could cost insurers more than \$1 billion due to the resulting claims. Companies with potential exposure include the concert organizer; MGM, who owns the hotel; the gun manufacturers, bump stock manufacturers; and the shooter's estate. Others who could have liability include the ticket promoters, unless there was a warning on the tickets indicating that concert goers attended at their own risk (more venues are using this type of disclaimer now); and possibly performers. The potential risks could be covered by active shooter insurance. Workers compensation would likely apply for employees of MGM and the concert promoter.

The companies in the Las Vegas shootings made various attempts to obtain federal court jurisdiction. For example, MGM Resorts, the parent company of Mandalay Bay, preemptively sued victims of the Las Vegas mass shooting before they filed suit against the MGM Grand. The company - which owns Mandalay Bay and the venue across the street from the hotel where most of the victims

were gathered for a country music festival - sued more than 1,000 victims of the shooting in federal courts in Nevada and California. The victims alleged that the MGM defendants were forum shopping to get their case litigated in federal court. MGM told the *New York Post* that the Federal Court "is an appropriate venue for these cases and provides those affected with the opportunity for a timely resolution. Years of drawn out litigation and hearings are not in the best interest of victims, the community and those still healing."

Hotels and concert venues can take the following precautions to prevent the risk of active shooters:

- Metal detectors
- Search Attendees
- Limit Items Attendees can Bring into Venue
- Additional Security Guards
- Surveillance
- Hotels revise their "Do Not Disturb" policies

Some specific examples of efforts to prevent the risk of active shooters include:

- Disney swapped out their "Do Not Disturb" signs for "Room Occupied" signs to indicate that someone may be in the room. However, cast members have been instructed to enter each room at least once a day as part of a guest safety and security check. They will knock and notify guests that they are entering the room just to check on their well-being.
- Hilton is in the process of updating its policies and encouraging employees to be aware of unusual occurrences such as guests who pay in cash, change rooms multiple times, choose not to have their rooms serviced for several days in a row, or those who might be taking numerous pictures of the interior or exterior of the hotel.
- Business are adopting adaptations of the "If You See Something, Say Something" Campaign first seen at airports, trains, subways and other public areas. This same sentiment will extend over into other venues where large numbers of people congregate.

### *C. Corporate Office Exposure for Private Businesses*

#### (1) What is workplace violence?

Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors. Homicide is currently the fourth-leading cause of fatal occupational injuries in the United States. According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI), of the 4,679 fatal workplace injuries that occurred in the United States in 2014, 403 were workplace homicides. However it manifests itself, workplace violence is a major concern for employers and employees nationwide.

#### (2) Who is at risk of workplace violence?

Nearly 2 million American workers report having been victims of workplace violence each year. Unfortunately, many more cases go unreported. Research has identified factors that may increase the risk of violence for some workers at certain worksites. Such factors include exchanging money with the public and working with volatile, unstable people. Working alone or in isolated areas may also contribute to the potential for violence. Providing services and care, and working where alcohol is served may also impact the likelihood of violence. Additionally, time of day and location of work, such as working late at night or in areas with high crime rates, are also risk factors that should be considered when addressing issues of workplace violence. Among those with higher-risk are workers who exchange money with the public, delivery drivers, healthcare professionals, public service workers, customer service agents, law enforcement personnel, and those who work alone or in small groups.

(3) How can workplace violence hazards be reduced?

In most workplaces where risk factors can be identified, the risk of assault can be prevented or minimized if employers take appropriate precautions. One of the best protections employers can offer their workers is to establish a zero-tolerance policy toward workplace violence. This policy should cover all workers, patients, clients, visitors, contractors, and anyone else who may come in contact with company personnel.

By assessing their worksites, employers can identify methods for reducing the likelihood of incidents occurring. OSHA believes that a well-written and implemented workplace violence prevention program, combined with engineering controls, administrative controls and training can reduce the incidence of workplace violence in both the private sector and federal workplaces.

This can be a separate workplace violence prevention program or can be incorporated into a safety and health program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all workers know the policy and understand that all claims of workplace violence will be investigated and remedied promptly. In addition, OSHA encourages employers to develop additional methods as necessary to protect employees in high risk industries.

OSHA also provides links to the following additional information regarding prevention of workplace violence, including:

- [Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence](#). OSHA Directive CPL 02-01-058, (January 10, 2017).
- [Updated Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers](#) (EPUB | MOBI). OSHA Publication 3148, (2015).
- [Worker Safety in Hospitals: Caring for our Caregivers, Preventing Workplace Violence in Healthcare](#). OSHA, (2015).
- [Preventing Violence Against Taxi and For-Hire Drivers](#). OSHA Fact Sheet, (April 2010).
- [Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments](#). OSHA Publication 3153, (2009).

Workplace violence insurance provides coverage for the expenses that a company incurs resulting from workplace violence incidents. The policies cover items such as the cost of hiring independent security consultants, public relations experts, death benefits to survivors, and business interruption (BI) expenses.

For businesses, commercial liability policies may cover some of the property damage from a mass shooting, and business interruption will cover disruptions if an area is shut down for an extended period of time, an airport is closed or other events are cancelled or scaled back. Another issue involves who pays for the clean up after a mass shooting incident and whether or not it is covered under a general liability or property policy.

#### **IV. Questions for the Audience in Roundtable Format**

- What are the primary exposures/risks that need to be covered in your or your clients' businesses, institutions and organizations?
- What are the duty of care and legal defense exposures that need to be covered in your or your clients' businesses, institutions and organizations?
- What are the triggers for obtaining these services?
- How much flexibility does the insurer provide its policyholders in selecting preferred legal defense, crisis response and public relations firms?