Keeping employees, customers, and other visitors safe at the workplace must be a top priority for every company. Threats of violence and harassment can come from co-workers, former employees, customers, or other third parties. Companies are specifically facing increasing reports and claims of workplace bullying, testing the employer’s policies and ability to ensure that employees feel safe and respected. This Panel will examine various sources of threats to employee safety and discuss proactive strategies for addressing and preventing them from affecting the work environment. It will examine various causes of action and cases where workplace bullying has formed the basis for a cause of action under various laws, and will review relevant proposed state and federal legislation on bullying. It will also address threats to workplace safety from other outside sources, including various states’ "bring your gun to work" laws, and how employers can train employees to respond. Finally, it will examine recent high profile instances of workplace bullying and violence.

Program Chair & Moderator:
John Park, Partner, Waller Lansden Dortch & Davis, LLP

Speakers:
Carolyn N. Lam, Senior Counsel, Labor and Employment, PLH Group, Inc.
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Session 307

**Maintaining a Safe and Positive Workplace:**
**Preventing Workplace Violence and Bullying**

Estimate of Written Materials: 20 pages
November 7, 2014
1:45 - 3 (75 minutes)

Panel Chairs: John Park (Partner, Waller Lansden Dortch & Davis, LLP)

I. Introduction – John Park, Moderator (10 minutes)
   A. Introduction of panelists – opening remarks by panelists on their involvement in preventing and defending against claims of workplace violence
   B. Overview of format of presentation - background, review of legislation and case law, hypotheticals

II. Background and recent events (15 minutes)
   A. Statistics on increase on workplace bullying
   B. Legislation in other countries
   C. Proposed US litigation
   D. Impact on business operations
   E. OSHA regulations

III. Legal claims (15 minutes)
   A. Hostile work environment
   B. Negligent hiring and retention
   C. Intentional infliction of emotional distress
   D. Recent case law

IV. Anti-Bullying strategies (15 minutes)
   A. Best practices
   B. Policies
   C. Pitfalls

V. Special issues (10 minutes)
   A. Social media
   B. Confidentiality
   C. Guns at work

VI. Q&A (10 minutes)
Bullying statistics, in schools:

- 28% of teenagers (grades 6-12) experience bullying.
  - Name calling, teasing, rumor-spreading, physical incidents, purposeful isolation, threats, theft, sexual harassment.
  - Classrooms (29.3%), school hallways (29%), cafeteria (23.4%), gym class (19.5%), restroom (12.2%).
- Cyberbullying on social media is the new frontier.
Bullying statistics, in the workplace:

- Difficult to pinpoint how much “bullying” occurs.
- CareerBuilder survey\(^1\) found 35% of employees experienced workplace bullying.
  - Sabotaging others’ work or reputation (62%)
  - Browbeating, threats, intimidation (52%)
  - Being gossiped about (26%)
  - Physical intimidation or assault (4%)
- Perpetrators can be bosses (48%), coworkers (45%), customers (31%), and company executives (26%).
- Illegal harassment occurs in only 20% of bullying cases.

\(^1\) [http://thehiringsite.careerbuilder.com/2012/09/18/is-workplace-bullying-becoming-a-bigger-problem/](http://thehiringsite.careerbuilder.com/2012/09/18/is-workplace-bullying-becoming-a-bigger-problem/)
Locker Room Bullies

What if management supports the bully because he is more valuable to the bottom line?

What if co-workers support the “bully” and not the “victim”?

Richie Incognito & Jonathan Martin

Bullying or horseplay?
Other Countries’ Approach

- **Sweden**
  - In 1993, the National Board of Occupational Safety and Health passed a law outlawing “Victimization at Work.”

- **European Union**
  - EU has issued several resolutions against “mobbing” in the workplace.

- **Canada**
  - Quebec passed the Psychological Harassment at Work Act in 2004.

- **Australia**
The Healthy Workplace Bill

- Proposed US legislation to address bullying in the workplace.
  - Drafted by Professor David Yamada, author of the first comprehensive analysis of workplace bullying and the law.
  - Considered in over 25 states, but none have passed.
  - Bill does not use the term “bullying”:
    - Abusive workplace; abusive conduct
    - Psychological harm
    - Malice
  - States are wary of passing this bill because it will likely create a new wave of employment-related litigation.
Consequences of Workplace Bullying

- Increase in employee turnover
  - 17% of bullying victims quit their job

- Decrease in employee productivity
  - U.S. Bureau of National Affairs study: workplace bullying costs $5 to $6 billion in loss to productivity.

- Legal liability for the employer
  - Hostile work environment
  - Negligent hiring and retention
  - Vicarious liability
Legal Liability – Hostile Work Environment

- Only addresses bullying based on protected status
  - Race, color, religion, sex, national origin, age and disability
  - Illegal harassment occurs in only 20% of bullying cases.

- "Severe and pervasive conduct"
  - Not intended to operate as a "general civility code"
    

  - "Courts and juries [should] not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’"
    

- Supervisor or co-worker?
Laws only address bullying based upon protected status
Carolyn N. Lam, 8/4/2014
Prima facie elements:

- Employee (bully) committed a tort;
- Employer did or should have known that the bully posed an unreasonable risk of harm; and
- Employer failed to exercise reasonable care in hiring, supervising or training the bully.

Limitations of this cause of action:

- Based on common law; may be preempted by anti-discrimination and anti-harassment statutes.
- Typically, there must be a physical injury because the bully must have committed a tort. Proving the bully committed I.I.E.D can be very difficult.
Legal Liability – I.I.E.D.

- Intentional Infliction of Emotional Distress
- “Extreme and outrageous” conduct is very high bar:
  - “Beyond all possible bounds of decency”
  - “Conduct intolerable in a civilized society”
- Proof of “severe emotional distress” is also a very high bar:
  - “No reasonable man in a civilized society should be expected to endure it.”

  *Harris v. Jones, 281 Md. 560 (1977)*

  - Often requires some physical manifestation of injury
Most states have hard limits. Ex: Alabama - tort of outrage only available for matters relating to sexual misconduct and family burials.

Carolyn N. Lam, 8/4/2014
Legal Liability – Tortious Interference w/ Contract

- Prima facie elements:
  - Employee (victim) had a business relationship;
  - Employee (bully) intentionally and maliciously interfered with the business relationship; and
  - Employee (victim) was harmed by the interference.

- Zimmerman v. Direct Fed. Credit Union
  262 F.3d 70 (1st Cir. 2001)
  - Employer cannot be sued under this theory, but supervisors can.
  - Supervisor has qualified immunity, but loses the immunity if plaintiff can show “actual malice.”
  - Supervisor’s retaliation against plaintiff is sufficient to demonstrate “actual malice.”
Legal Liability – OSHA Workplace Violence

- OSHA imposes a general duty to provide a workplace safe from known or recognized dangers to the employee’s safety and well-being.
  - Workplace violence is in the top four causes of death in the workplace.

- OSHA enforces the law through inspections, citations and fines.
  - Inspections focus on industries considered vulnerable to workplace violence:
    - Healthcare, social service, late-night retail establishments
Legal Liability – Evidentiary Prejudice

  - First major workplace bullying case in the United States.
    - Based on a tort claim for assault.
    - $325,000 jury verdict against the hospital’s chief heart surgeon.
  - Testimony from “expert” on workplace bullying.
    - Dr. Gary Namie – founder of the Workplace Bullying and Trauma Institute.
  - Court of Appeals reversed verdict, ruling that the expert labeling the surgeon a “workplace bully” was prejudicial.
  - Supreme Court reinstated the jury verdict on a technicality because the objection was not properly preserved at the trial level.
Hostile-work-environment protection for everyone.
  - Regardless of protected status.
  - Reinforces existing anti-violence and anti-harassment policies.

Credible investigation and enforcement
  - Use third-party/neutral investigator
    • Fosters employee trust
    • Removes influence of personal relationships
  - Progressive disciplinary action
    • “Zero tolerance” policies can be ineffective
    • Using discretion is important because bullying cases are usually not clear-cut or simple to resolve.
Anti-Bullying Strategies for Employers

- De-escalation policies
  - Identify parties most harmed by alleged bullying
  - Non-punitive separation of alleged bully and victim
  - Prohibition on retaliation

- Comprehensive education and training
  - Executive and managerial commitment
  - Coaching for identified perpetrators
  - HR team must be first-rate

- Add provision in collective bargaining agreement
  - Union remedies can prevent litigation in court.
Cyberbullying – one of the most common forms of modern-day bullying.

Section 7 of the National Labor Relations Act
- Employees cannot be fired for engaging in “protected concerted activity”

*Hispanics United of Buffalo, Inc.*
359 NLRB No. 37 (2012)
- Coworkers teamed up on Facebook to express displeasure with a colleague who was critical of their work.
- Colleague complained to the Employer that she was being harassed. Employer terminated the coworkers.
- NLRB found the terminations unlawful because the coworkers were engaged in “protected concerted activity.”
Bullying Prevention Pitfalls – Confidentiality

- Do not have a policy of requiring confidentiality in every bullying investigation.
  - Discussions among employees regarding workplace investigations are “protected concerted activity.”
  - Employers can lawfully determine, on a case-by-case basis, that confidentiality is required for a particular investigation.

- Consider these factors:
  - Do witnesses need protection and/or a court-ordered injunction against harassment in the workplace?" Is evidence in danger of being destroyed?
  - Is testimony in danger of being fabricated?
  - Is there a need to prevent a cover up?
Several states have laws prohibiting employers from terminating employees for storing guns in their car. Examples:

- Arizona
- Kentucky
- Louisiana
- Florida
- Georgia
- Kentucky
- Minnesota
- Mississippi
These laws are pretty common. States that I know of:
Alabama
Arizona
Florida
Indiana
Kentucky
Louisiana
Maine
Minnesota
Mississippi
North Dakota
Oklahoma
Texas
Utah
Wisconsin

Plus, several more states require employers to prominently post signs if they want to limit this right. Adding the two types of states together, I'd say that the majority of states place limits upon an employer's right to ban weapons in the workplace parkinglot.

Carolyn N. Lam, 8/4/2014
Some states’ laws are less explicit with regards to the employment context. Tennessee’s “Guns in Trunks” law simply states:

_The holder of a valid handgun carry permit recognized in Tennessee may, unless expressly prohibited by federal law, transport and store a firearm or firearm ammunition in the permit holder's motor vehicle . . . while on or utilizing any public or private parking area._

**Issue**: Can TN employers enforce a no-guns policy by terminating employees who keep guns in their trunks while parked on company property?

- At-will employment vs. public policy
- Business freedom vs. 2nd amendment