

EMPLOYER TROs ARE ALL THE RAGE: A NEW APPROACH TO WORKPLACE VIOLENCE

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This Article examines the emerging phenomenon of the Employer TRO – a remedy that allows employers to obtain TROs in response to the threat of workplace violence. The author argues that the employer TRO arms employers with new substantive rights, increases the protection of employees, and reduces the employer’s liability for incidents of workplace violence. A comprehensive examination of the current responses to workplace violence indicates that employers and employees lack a response to the imminent workplace assault.

I. INTRODUCTION

Danton Camm worked for the City of Palo Alto in California for nearly 15 years,¹ supervising a crew of workers in the utilities department.² Camm, an avid hunter, boasted that he “could kill a man at 600 yards.”³ His pickup carried the vanity license plate “SHOOOT.”⁴ He owned 18 rifles and pistols, and had even once mistakenly brought a pistol to work.⁵ On more than one occasion, Camm had threatened to shoot co-workers, but his co-workers, understanding these comments to be a running joke, did not take them seriously.⁶ Eventually, Camm’s threats and disposition became more serious. The City of Palo Alto suspended Camm twice for threatening behavior.⁷ When an employee notified Camm that he had complained about Camm to a supervisor, Camm threatened to shoot the employee, the employee’s wife, and the employee’s new baby if the City of Palo Alto fired him.⁸

What separates the story of Danton Camm from other threats and violent incidents in the workplace is that the City of Palo Alto was able to obtain a temporary restraining order (TRO), effective for two weeks, enjoining Camm from making contact with the employee (staying 100 yards away from the

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¹ City of Palo Alto v. Serv. Employees Int’l Union, 91 Cal. Rptr. 2d 500, 502 (1999).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 502-03.

⁸ *Id.* at 502.

employee, the employee's residence, place of work, and place of child care).⁹ The City of Palo Alto later extended the TRO into an injunction lasting for three years and promptly terminated Camm's employment.¹⁰

This Article examines the new phenomenon of the employer TRO to address workplace violence. California was the first state to enact such a statutory scheme, passing the Workplace Violence Safety Act in November of 1994.¹¹ Arizona enacted similar legislation in 2000.¹² Nevada most recently followed suit by enacting Nevada Assembly Bill 370 ("A.B. 370") in June of 2001, which became effective in October 2001.¹³ Nevada modeled A.B. 370 after the Arizona and California statutes.¹⁴

This Article argues that the new approach – employer TROs – provides employers with new substantive rights to effectively address workplace violence. Part II analyzes the current threat of workplace violence. Part III identifies the myriad of options available to either the employer or the victims to respond to workplace violence. Generalized options address all potential offenders in the workplace, whereas specific options target a specific type of workplace violence. Some options aim to prevent workplace violence, while other options aim to respond to a specific incident of workplace violence. Part IV examines California, Arizona, and Nevada experiments with the employer TRO. This section compares the employer TRO with current available options and argues that the employer TRO fills identified gaps in the current response to workplace violence. This section acknowledges that the employer TRO may alter employment responsibilities and disrupt some existing employment laws, but argues that the need for employer TROs outweighs any negative side effects of authorizing employer TROs.

II. ASSESSING THE RISK OF WORKPLACE VIOLENCE

A. *Workplace Violence: The Employer's Greatest Concern*

While incidents of workplace violence do not appear to be on the rise, society is paying greater attention to the problem.¹⁵ Increasing awareness of

⁹ *Id.* at 502-03.

¹⁰ *Id.* at 503. An arbitrator later reinstated Camm upon a finding that Camm did not intend to carry out his threat, that the City denied Camm due process, and that the City denied Camm's right to union representation and the right to a fair and full investigation. *Id.* Interestingly, a court reversed the arbitrator's order because reinstatement was inconsistent with the injunction, enjoining Camm from being within 100 yards of the workplace. *Id.* at 508.

¹¹ CAL. CIV. PROC. CODE § 527.8 (West 2001).

¹² ARIZ. REV. STAT. § 12-1810 (2001).

¹³ Assemb. B. No. 370, 2001 Leg., 71st Sess. (Nev. 2001).

¹⁴ *Meetings of the Assembly Committee on Judiciary*, 71st Sess. 7 (Apr. 5, 2001), available at <http://www.leg.state.nv.us/71st/minutes/assembly/JUD/final/871.html> (last visited July 28, 2003). Six other states have also enacted workplace TRO statutes. ARK. CODE ANN. § 11-15-115 (Michie 2003); COLO. REV. STAT. § 13-14-102(4)(b) (2003); GA. CODE ANN. § 34-1-7 (2003); IND. CODE § 34-26-6-6 (2003); R.I. GEN. LAWS § 28-52-2 (2003); TENN. CODE ANN. § 20-14-102 (2003).

¹⁵ INJURY PREVENTION RESEARCH CENTER, *WORKPLACE VIOLENCE: A REPORT TO THE NATION* 4 (Feb. 2001), at <http://www.public-health.uiowa.edu/IPRC/NATION.PDF> (last visited July 28, 2003) [hereinafter *REPORT TO THE NATION*] (noting a sharp decline in homicides at workplaces from 1994 to 1999). From 1993 to 1999, violent crimes in the

workplace violence is due, in part, to the media's sensationalism of acts of violence in the workplace.¹⁶ However, the significant toll exerted by workplace violence cannot be understated, and the statistics are alarming. One out of every four employees will be a victim of workplace violence during their life.¹⁷ One out of every six violent crimes occurs in the workplace.¹⁸ As an occupational hazard, homicide is the second leading cause of death, accounting for one sixth of all occupational fatalities.¹⁹ Every year 1,000 people are murdered in the workplace; another 1.5 to 2 million people are victims of assault, rape, or robbery.²⁰ Offenders use various means to disrupt the workplace. For example, everyday 16,400 threats are made, 723 workers are attacked and 43,800 workers are harassed.²¹

Workplace violence also has a ripple effect, affecting not only the targeted victim, but everyone associated with the workplace. Violence in the workplace may inflict irreparable psychological harm. One report concludes that "negative publicity drives customers away, valued employees leave the company and new hires are harder to attract."²² Workplace violence also imposes substantial financial costs. Experts estimate the total economic loss to be around \$4.2 billion a year.²³ Given the frequency and severity of workplace violence, it is not surprising that for the last three years, workplace violence has been employers' greatest concern.²⁴

B. Types of Workplace Violence

Incidents of workplace violence share certain characteristics. While the victims are more often male, workplace violence is the top occupational hazard resulting in death for women.²⁵ The offenders are overwhelmingly male, and

workplace decreased forty-four percent, whereas violent crime as a whole decreased forty percent. DETIS T. DUHART, U.S. DEP'T OF JUSTICE, VIOLENCE IN THE WORKPLACE, 1993-99 1 (Dec. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf> (last visited July 28, 2003).

¹⁶ Kathy McCabe, *Plan Tries to Prevent Workplace Violence*, BOSTON GLOBE, Apr. 21, 2002, at 8 (describing how a workplace attack killing seven employees in Wakefield, Massachusetts brought worldwide attention to the small town).

¹⁷ Timothy Pajak, *Workplace Violence Tops Corporate Security Concerns*, HR WIRE, Apr. 16, 2001.

¹⁸ Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS L.J. 505, 506 (2000).

¹⁹ GREG WARCHOL, U.S. DEP'T OF JUSTICE, WORKPLACE VIOLENCE, 1992-96 6 (July 1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wv96.pdf> (last visited July 28, 2003).

²⁰ Jerry Goldstein, *Workplace Violence vs. Employee Rights*, 35 MD. B.J. 46 (Jan./Feb. 2002); REPORT TO THE NATION, *supra* note 15, at 4.

²¹ Pajak, *supra* note 17 (citing to *Top Security Threats and Management Issues Facing Corporate America*, available at <http://www.ci-pinkerton.com> (last visited July 28, 2003)).

²² *Id.*

²³ Jules M. Davis, *Potential Violence to the Bottom Line - Expanding Employer Liability for Acts of Workplace Violence in North Carolina*, 78 N.C. L. REV. 2053, 2054 (2000).

²⁴ Pajak, *supra* note 17.

²⁵ DUHART, *supra* note 15, at 2 (noting that men are fifty-six percent more likely to be victims of workplace violence than women); Whitten & Mosley, *supra* note 18, at 506 (commenting that homicide is the "number one cause of [female] workplace death in the United States").

tend to act alone.²⁶ In one out of every five incidents, the offender is carrying a weapon.²⁷ The government is the employer most at risk of workplace violence.²⁸ These characteristics do not adequately explain the phenomenon of workplace violence, and do not provide any useful modes of analysis. To better understand the problem of workplace violence, experts classify incidents based on the type of offender, identifying four different types: the stranger, the customer/client, the co-worker/former employee, and the personal relationship.²⁹

1. *Type I: The Stranger*

Type I incidents include those where the offender does not have any legitimate relationship with the business entity, employer, or employee. Overwhelming statistics indicate that the stranger is the most dangerous and most common offender in the workplace, accounting for nearly sixty percent of violent incidents in the workplace and eighty-four percent of workplace homicides.³⁰ The stranger often resorts to violence during the commission of a crime, and frequently the stranger possesses a dangerous weapon.³¹

Theft is often the motive behind Type I incidents.³² As such, certain sectors of employment are more likely to fall prey to these violent incidents. The stranger tends to target workplaces that are open 24 hours, have little security, and primarily operate cash transactions.³³ Convenience store clerks, taxi drivers, and security guards are typical victims of Type I violence.³⁴ Industries such as the medical, law enforcement, transportation, and the retail sales industries are also particularly at risk.³⁵

2. *Type II: Customer/Client*

Type II offenders include both willing and unwilling clients (such as the prisoner or crime suspect). These incidents are distinguished from Type I attacks, because the customer or client has a legitimate relationship with the workplace, but reacts violently "during the course of a normal transaction."³⁶ These incidents rarely result in death, but are frequent nonetheless and may be a common occurrence for some employees.³⁷ Mental health workers, teachers,

²⁶ DUHART, *supra* note 15, at 7 tbl.13 (noting that offenders are male and over eighty percent of the time the offender is acting alone).

²⁷ *Id.* at 7 tbl.12.

²⁸ *Id.* at 5 tbl.9 (noting a high rate of incidents in government workplaces (28.6 incidents for every 1000 workers in the workforce)).

²⁹ REPORT TO THE NATION, *supra* note 15, at 4 ("Addressing this problem is complicated, because workplace violence has many sources. To better understand its causes and possible solutions, researchers have divided workplace violence into four categories. Most incidents fall into one of these categories[].").

³⁰ *Id.* at 10 tbl.20; WARCHOL, *supra* note 19, at 4 tbl.8.

³¹ REPORT TO THE NATION, *supra* note 15, at 5.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ DUHART, *supra* note 15, at 8 tbl.15.

³⁶ REPORT TO THE NATION, *supra* note 15, at 7.

³⁷ DUHART, *supra* note 15, at 10 tbl.20 (noting that four percent of workplace homicides are committed by a customer or client).

social workers, bus and taxi drivers, and police officers face Type II violence with frequency.³⁸

3. *Type III: Co-worker/Former Employee*

Type III violence (violence committed by a co-worker or former employee) receives the most media attention, but accounts for only seven percent of workplace homicides (or sixty-seven homicides a year).³⁹ Because these incidents of workplace violence often relate to internal work disputes, managers or supervisors may be more likely targeted by the Type III offender than other types of offenders.⁴⁰ Type III violence is not more common in one workplace vis à vis another.⁴¹

4. *Type IV: Personal Relationship*

The final category of workplace violence involves the Type IV offender who has a personal relationship with the intended victim. The offender targets a particular individual in the workplace because of an external dispute. Offenders typically are not current or former employees.⁴² Overwhelmingly, the attackers are male.⁴³ This category exclusively includes domestic violence attacks in the workplace.⁴⁴

Each incident of workplace violence, regardless of type, should be of a particular concern to employees and employers. Currently both employers and victims have multiple options they may undertake to redress injuries or prevent future incidents.

III. EXISTING PREVENTATIVE, CORRECTIVE, AND REMEDIAL APPROACHES TO WORKPLACE VIOLENCE

Several options exist that victims of workplace violence and employers can use to address incidents of workplace violence. Employers can adopt internal procedures to help prevent, identify, or diffuse potential workplace violence. Employers can also obtain limited injunctive relief through tort actions. Victims of workplace violence may be able to obtain a restraining order against the offender, obtain a money judgment against the employer through various claims of employer liability, or obtain limited relief through OSHA procedures. A detailed analysis of each option follows.

³⁸ REPORT TO THE NATION, *supra* note 15, at 7.

³⁹ DUHART, *supra* note 15, at 10 tbl.20.

⁴⁰ REPORT TO THE NATION, *supra* note 15, at 9.

⁴¹ See *id.* (stating that the postal industry is "no more likely than any other industry to be affected by this type of violence").

⁴² *Id.* at 11.

⁴³ DUHART, *supra* note 15, at 10 tbl.19 (noting that from 1993 to 1999 males were more than four times more likely to be the attacker than females).

⁴⁴ REPORT TO THE NATION, *supra* note 15, at 11 (commenting that "[b]ecause of the insidious nature of domestic violence, it is given a category all its own in the typology of workplace violence").

A. Employer Options

1. *Physical Security of the Workplace: A Generalized Preventative Approach*

There are many measures employers can take to increase the security of the workplace, which will also help prevent workplace violence. Employers can (1) perform audits on the security of the workplace to develop a security plan; (2) reduce access to the workplace where possible with use of locks, security cards, or codes;⁴⁵ and (3) improve lighting, maintain surveillance cameras where appropriate, employ security guards to monitor the workplace, and/or install alarms to notify the police or others of a security breach or a potential situation.⁴⁶

These measures can be costly for the employer, but the employer often will derive substantial benefit from a secure workplace and can justify the cost accordingly. By having a secure workplace, the employer can defray the economic burden of workplace violence and also protect trade secrets.⁴⁷ The employer will not incur additional costs from liability by maintaining a physically secure workplace. However, improper monitoring may invite an "intrusion upon seclusion" claim or an "invasion of the right to privacy" claim by employees. To avoid incurring this liability, employers should notify employees about monitoring being conducted.⁴⁸

Physical security measures may be ineffective in preventing co-worker/former employee (Type III) or customer/client (Type II) workplace violence.⁴⁹ Given that these offenders, by definition, have a legitimate business relationship with the company, it follows that they will easily obtain entry into the workplace because they are entitled to be there. However, some measures (such as alarms, security guards, and surveillance cameras) may still reduce violence or enable the employer to respond appropriately. Physical security measures may be the only solution when the offender is a stranger (Type I) or shares a personal relationship with the victim (Type IV). In Type I or Type IV incidents, the offender does not have a legitimate relationship with the employer and could be categorically, physically screened from the workplace

⁴⁵ Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 186 (1995).

⁴⁶ *Id.*; Tom Collins, *Acts of Violence are Usually Followed by Suits Against the Employer*, 24 LEGAL TIMES, May 28, 2001, at 41.

⁴⁷ See *supra* Part II.A (discussing the economic ripple effects of workplace violence); UNIF. TRADE SECRETS ACT §1(4) (amended 1985), 14 U.L.A. 438 (1990) (requiring trade secrets to be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy[]").

⁴⁸ See RESTATEMENT (SECOND) OF TORTS § 652B (1976); *Vera-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 180 (1st Cir. 1997) (holding that open video surveillance did not violate the Fourth Amendment of the United States Constitution because there is no legitimate expectation of privacy under the Fourth Amendment where an object is exposed to plain view and the viewer's presence at the vantage point is lawful); *Sanders v. Am. Broad. Co.*, 85 Cal. Rptr. 2d 909, 919 (Cal. 1999) (holding that "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by co-workers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation.").

⁴⁹ REPORT TO THE NATION, *supra* note 15, at 7, 9.

to avoid potential incidents of workplace violence. Thus, increasing physical security is exclusively a preventative tool and primarily addresses Type I and Type IV offenders. The preventative measure is also generalized, in that it addresses the entire class of Type I and Type IV offenders as opposed to addressing specific offenders within the class.

2. *Applicant Screening: A Hybrid Preventative Approach*

Although physical security may not be an effective approach to address co-worker/former employee violence (Type III), one way to prevent Type III violence is pre-employment application screening. Applicant screening can be classified as a hybrid measure because screening applicants is both generalized and individualized.⁵⁰ In one sense the measure is generalized because the employer is indiscriminately screening all prospective employees in an attempt to exclude the potentially violent employees. However, applicant screening can also become individualized after a prospective employee has been red-flagged. The employer must make an individualized decision about whether to offer the applicant employment or whether to deny employment altogether.

By checking references, conducting background checks, and using effective interviewing skills, an employer can identify and exclude some potential offenders. One executive of a company, albeit a company that performs background checks for employers, warns that "[a] dangerous employee is like having a dangerous piece of machinery on the floor He or she poses a potential risk to other workers and to the entire company."⁵¹ However, when an employer actively screens employees out of the hiring pool, employers should evaluate whether there could be any discrimination claims.⁵²

a. *The Risk of Employer Liability for ADA Violations*

In the workplace violence context, employers should be concerned about potentially violating the Americans with Disabilities Act of 1990 (ADA).⁵³ If screening an applicant triggers the filing of ADA claims, employers will be reluctant to use the preventative measure, causing applicant screening to be an ineffective option for employers. Before addressing the specific methods of screening applicants, an evaluation of the threat of ADA claims is warranted.

First, employers must evaluate whether the ADA even applies. The ADA prohibits discrimination against qualified individuals with disabilities in the review of applications and hiring processes, as well as all other phases of employment.⁵⁴ In order to be covered by the Act, applicants must demonstrate

⁵⁰ In one sense the measure is generalized because the employer might indiscriminately screen all prospective employees in an attempt to exclude the potentially violent employee. For example, employers might generally look for gaps in employment, which may be a result of previous acts of violence. See ALFRED G. FELIU & WEYMAN T. JOHNSON, *NEGLIGENCE IN EMPLOYMENT LAW* 68 (2002). However, applicant screening can also become individualized after a qualified prospective employee has been red-flagged. *Id.* at 144-45. The employer must make an individualized decision about whether to deny employment altogether.

⁵¹ David Kelly, *How Well Do You Know Your Workforce?*, HR WIRE, Oct. 8, 2001.

⁵² FELIU & WEYMAN, *supra* note 50, at 68.

⁵³ 42 U.S.C. §§ 12101-12117 (2000) (as pertaining to private employers).

⁵⁴ *Id.* § 12112(a).

that they are qualified individuals with a disability.⁵⁵ The ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”⁵⁶ In the context of screening out potentially violent employees, employers are attempting to exclude individuals with certain mental characteristics and may be excluding individuals with mental impairments. Mental impairments are specifically included within the definition of disability. However, an applicant must leap over two hurdles to receive ADA protection.

The first hurdle applicants must leap is to demonstrate that either their mental impairment substantially limits a major life activity or that the employer regards them as having such a condition.⁵⁷ The ADA does not cover all mental impairments or those regarded as mental impairments. If the employer is only addressing concerns over workplace violence, the employer will only exclude employees who become easily irritable and are prone to violent outbursts. This basis for exclusion does not regard excluded employees as having a mental impairment that substantially limits a major life activity. “[P]eople who become easily angered . . . are commonplace. [A] low threshold of tolerance is not unique, nor does it merit recognition under the ADA.”⁵⁸ Furthermore, “poor judgment, irresponsible behavior and poor impulse control do not amount to a mental condition that Congress intended to be considered an impairment”⁵⁹ While some employees who are excluded under a screening for potentially violent employees may suffer from a mental impairment that qualifies as a disability under the ADA, a narrowly tailored screening will not be the basis for arguing that the employer regarded the employee as having a disability.

Assuming the employee leaps over the disability hurdle, the employee must still demonstrate qualification for the position. If an applicant is screened out of the hiring pool under a narrowly tailored screening to identify potentially violent employees, the applicant is likely not qualified for the position. The Seventh Circuit announced this explicitly in *Palmer v. Circuit Court of Cook County, Illinois*,⁶⁰ a case involving a social service caseworker who threatened a co-worker.

[I]f an employer fires an employee because of the employee’s unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an

⁵⁵ *Id.*

⁵⁶ *Id.* § 12102(2). The Equal Employment Opportunity Commission (EEOC), the federal agency authorized to enforce the ADA and other anti-discrimination laws, defines mental impairment to include “mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2 (2002).

⁵⁷ 42 U.S.C. § 12102(2).

⁵⁸ *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1440 (D. Kan. 1996). Fenton repeatedly made unwanted contact with a co-worker after the co-worker ended their relationship. *Id.* at 1441. The co-worker repeatedly complained to management, resulting in several warnings to Fenton to discontinue contact with the co-worker or risk termination. *Id.* Fenton assaulted the co-worker outside the workplace, resulting in his termination. *Id.* at 1441-42. The court dismissed Fenton’s ADA claim on summary judgment because Fenton did not suffer from a mental disability as defined under the ADA. *Id.* at 1446.

⁵⁹ *Id.* at 1446 (quoting *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989)).

⁶⁰ 117 F.3d 351 (7th Cir. 1997).

issue under the Americans with Disabilities Act The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge – in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The Act protects only “qualified” employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one.⁶¹

Related to the second hurdle is the “direct threat” defense. The ADA allows employers to impose “qualification standards” including “a requirement that an individual shall not pose a *direct threat* to the health or safety of other individuals in the workplace.”⁶² When an employer screens employees during the application process, the employer may have less information on which to base an employment decision than after hiring the applicant, because the employer does not have the opportunity to observe the applicant in the work environment. A lack of evidence may frustrate the employer's attempt to assert a “direct threat” defense because the employer must make a substantial showing of “direct threat.” “[I]f the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a . . . significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through a reasonable accommodation.”⁶³

These two hurdles demonstrate that an employer using a narrowly tailored scheme for screening applicants should not be concerned about ADA violations. However, an employer may inadvertently exclude a qualified individual with a disability by screening potentially violent employees from the hiring pool. For example, the screening may result in an inaccurate determination that the prospective employee is a danger to others. In the rare case where an employee is able to leap the first two hurdles, the third element of an ADA claim, that the employee suffered an adverse employment action as a result of the disability, is relatively easy to prove. At the very least, it presents an issue of fact entitling the case to go to trial.⁶⁴ In such a case, the employer will bear the burden of proof that the potential employee constituted a direct threat.⁶⁵ Thus, if the employer deviates from limited applicant screening, the employer should be concerned about potential ADA violations.

⁶¹ *Id.* at 352 (citations omitted).

⁶² 42 U.S.C. § 12113(b) (2000) (emphasis added) (§12113(a) states that failing to qualify under (b) may serve as a defense to a charge of discrimination). The court evaluates a direct threat defense based on a “reasonable medical judgment” of four factors: “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” 29 C.F.R. § 1630.2(r).

⁶³ EEOC, ADA ENFORCEMENT GUIDANCE: PRE-EMPLOYMENT DISABILITY RELATED QUESTIONS AND MEDICAL EXAMINATIONS, Oct. 10, 1995, at *2, *available at* 1995 WL 1789073.

⁶⁴ 42 U.S.C. § 12112(b)(1) (defining the term “discriminate” in conjunction with §12112(a)'s prohibition against discriminatory conduct). An employer may even admit to the causation prong – that the employee was not hired because of the condition – in an attempt to validate the application screening and seek dismissal on other grounds.

⁶⁵ *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)).

b. Reference Checking

By checking references, employers may be able to prevent incidents of violence in the workplace by excluding violent employees. However, as a result of lawsuits by former employees for defamation and tortious interference with prospective contractual relations, former employers are hesitant to volunteer information. Checking references often elicits nothing more than the prospective employee's dates of prior employment and the title of his former position.⁶⁶

Employers may be able to obtain more specific information from former employers if they require applicants to sign a written authorization for the release of information from former employers. This practice ensures that former employers are protected under the qualified privilege defense, which will hold former employers harmless for statements made in good faith during reference checking.⁶⁷ However, even a written authorization may not persuade former employers to provide further information, because the qualified privilege defense does not provide absolute immunity to defamation lawsuits.⁶⁸

Despite the ineffectiveness of reference checking to identify and exclude dangerous employees, employers should continue the formality of reference checking for at least two reasons. First, checking references exacts little cost to the employer, and in some situations may identify dangerous prospective employees if the former employer is cooperative. There are not any direct costs associated with reference checking, because this can be done over the telephone with relative convenience. It is not necessary to check the references of all applicants, but only those applicants where employment offers may be tendered. In addition, some former employers may be willing to identify dangerous former employees. Reference checking will often amount to little gain, but requires little investment of resources.

Employers should also continue to check references to avoid claims of negligent hiring by victims of workplace violence. One of the necessary elements of a negligent hiring claim is that the employer negligently employed a dangerous employee.⁶⁹ Constructive knowledge of the danger will be proven if the plaintiff can show a reasonable investigation would have disclosed the employee was potentially dangerous.⁷⁰ For example, a plaintiff might contend

⁶⁶ See, e.g., Eileen Drake, *Limiting Workplace Violence: Effective Management of Volatile Employees*, in EMPLOYMENT LAW ADVICE 3-2 (2001); see also, e.g., *Chambers v. Am. Trans Air, Inc.*, 577 N.E.2d 612 (Ind. Ct. App. 1991) (affirming the trial court's summary judgment in a defamation lawsuit for defendants based on the qualified privilege defense); *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7th Cir. 1993) (affirming the trial court's summary judgment in a tortious interference lawsuit for defendant's based on the qualified privilege defense).

⁶⁷ *Delloma*, 996 F.2d at 168.

⁶⁸ *Id.* at 170 (stating that a finding of actual malice on behalf of the former employer would defeat a qualified privilege defense).

⁶⁹ RESTATEMENT (SECOND) OF AGENCY § 213 (1957) (stating that "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others.").

⁷⁰ *Id.* § 213 cmt.D, explaining that

that if the employer had checked the employee's references, the employer would have learned of prior acts of workplace violence.

c. Criminal Background Checks

The employer may be able to supplement reference information by conducting an independent criminal background check of the prospective employee. Employers are generally not required to conduct a criminal background check to meet their duty of care under negligence law.⁷¹ However, many employers, especially in the wake of the September 11th terrorist attacks, voluntarily perform background checks as a routine matter.⁷² Background checks might disclose violent crimes previously committed by prospective employees. The employer may want to exclude individuals convicted of violent crimes based on the belief that the commission of prior violence is "proof-positive . . . of a violent personality."⁷³ Background checks will not exclude all individuals with a violent personality, but will exclude individuals who have reacted violently in the past.

Employers do not have unfettered discretion in conducting criminal background checks because state and federal laws place substantive and procedural limitations on their use. Because of a state interest in rehabilitating convicted criminals, some states limit the use of background checks.⁷⁴ The use of arrest records may also invite disparate impact race discrimination claims under Title VII of the Civil Rights Act of 1964, because minorities might be unevenly

[a]n agent . . . may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.

⁷¹ Alfred G. Feliu, *Workplace Violence and the Duty of Care: The Scope of an Employer's Obligation to Protect Against the Violent Employee*, 20 EMP. REL. L.J. 381, 384 (1994). As the article notes, however, employers may have to conduct such a check to avoid negligence where the type of employment contemplated involves security or serious risk of injury. *Id.*

⁷² Kelly, *supra* note 51. Fifty-eight percent of employers are more likely to use background checks after September 11th. *Id.* Sixty percent of employers currently perform routine background checks on new employees. *Id.*

⁷³ Feliu, *supra* note 71, at 392-93.

⁷⁴ N.Y. CORRECT. LAW § 752 (McKinney 2001) (prohibiting the denial of employment because of prior criminal offenses or a lack of "good moral character" unless "there is a direct relationship [with] the criminal offense[] and the specific . . . employment sought[] or [if] the issuance of . . . employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public"); WIS. STAT. § 111.335 (2001) (prohibiting the request of arrest records except those relating to pending charges and prohibiting the denial of employment based on conviction record except when the crime "substantially relate[s] to the circumstances of the particular job"); UTAH CODE ANN. §§ 53-10-102, 53-10-108 (2001), *amended by* 2002 Utah Laws Ch. 13 (HB 35) (only authorizing the dissemination of criminal records for employment purposes when the employer employs "persons who deal with: (a) national security interests; (b) care, custody, or control of children; (c) fiduciary trust over money; or (d) health care to children or vulnerable adults"); CONN. GEN. STAT. § 46a-80 (2001) (prohibiting the State of Connecticut from disseminating arrest records or denying employment based on conviction records); CAL. LAB. CODE § 432.7 (West 2001) (prohibiting all employers from using or requesting information relating to arrests that did not lead to conviction, except for pending violations); HAW. REV. STAT. § 378-2 (2001) (prohibiting the denial of employment based on arrest record).

excluded from the hiring pool, raising an inference of racial profiling.⁷⁵ Additionally, background checks may also implicate the Fair Credit Reporting Act (FCRA).⁷⁶ If an employer obtains information from a consumer reporting agency, the employer should (1) obtain prior written consent from the applicant, (2) provide the applicant with a copy of the report if the employer makes an adverse hiring decision, (3) provide the applicant with the name, address, and telephone number of the consumer reporting service, and (4) inform the applicant of the right to dispute the report.⁷⁷

As long as the employer follows the requirements of FCRA and applicable state law, while being cautious to avoid a discriminatory effect or purpose, background checks can be an effective tool to improve workplace safety. Industry experts estimate that as many as fifteen percent of applicants lie about criminal convictions.⁷⁸ Private service companies can conduct background check for employers at a considerable cost.⁷⁹ Many employers must deem this cost justifiable, given that most employers voluntarily conduct background checks. The use of background checks communicates to applicants that the employer only hires desirable candidates, and a failure to conduct background checks may attract undesirable candidates.⁸⁰ In reducing workplace violence, background checks attempt to prevent violent employees from entering the workforce, which will only reduce co-worker/former employee (Type III) violence.

d. Effective Interviewing

The employer must be particularly careful during the interview process. The ADA specifically prohibits questions designed to inquire about an applicant's mental disorder.⁸¹ However, an employer could ask questions with a more limited focus designed to ascertain how the applicant handles stress or how the applicant would perform job tasks.⁸² By asking applicants permissible

⁷⁵ Drake, *supra* note 66, at 3-3; 42 U.S.C. § 2000e-2(k) (2000).

⁷⁶ 15 U.S.C. § 1681 (2000).

⁷⁷ FTC, Altmeyer Home Stores, Inc., Analysis to Aid Public Comment, 63 Fed. Reg. 15,202-01, 15,203 (Mar. 30, 1998); 15 U.S.C. § 1681(m)(a) (2000).

⁷⁸ Kelly, *supra* note 51.

⁷⁹ See, e.g., AAA Personal Background Checks, available at <http://www.aaa-bc.com/background.htm> (last visited July 28, 2003) (advertising contact information check and most state and federal criminal background checks for \$103).

⁸⁰ Kelly, *supra* note 51 (quoting Kit Fremin, president of Background Check International: "People will take the path of least resistance . . . If you're the only company in town who is not doing background checks, then don't be surprised when all the dirt bags end up at your place.").

⁸¹ The ADA states: "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A) (2000).

⁸² One author suggests the following types of questions:

- Tell me about a time you thought you were treated unfairly by your supervisor. How did you handle it? What did you do or say?
- Have you ever been discharged or disciplined on any job?
- Have you ever been in a fight or argument at work?
- Have you ever been asked to resign a position?
- Have you ever considered leaving a job (or left) as a result of a conflict with a supervisor or co-worker?

questions that may uncover an applicant's propensity to react violently, the employer can add an additional layer of protection at little or no cost.

3. *Employee Assistance Programs: A Generalized Preventative Approach*

Employee Assistance Programs (EAPs) can provide valuable benefits to the employer and employee. EAPs are free, or low-cost, confidential counseling services for employees, and are usually available through the employer's health plan.⁸³ EAPs can be proactive programs to address an employee's emotional and mental well-being or substance abuse problems. By implementing an EAP, the employer can improve the productivity and morale of the work force, as well as improve recruiting.⁸⁴

EAPs can also provide a safe outlet for employees (either potential victims or offenders) to discuss frustrations or conflicts. EAPs will help prevent workplace violence by empowering potential victims of personal relationship (Type IV) violence to seek assistance and by extinguishing smoldering tempers that may explode into co-worker/former employee (Type III) violence.⁸⁵ The EAP is a preventative measure that requires voluntary participation from potential offenders or victims. Because EAPs are confidential and available for all employees, EAPs are generalized programs that never require the employer to make individualized determinations about employment. Instead EAPs aim to ease tension in the workplace and enable employees to receive confidential assistance.

Depending on relevant economic factors, "the EAP can take many forms: a hotline; an information and referral service only; a central diagnostic and referral service; or a consortium that fills these roles for many companies."⁸⁶ Although an EAP will exact some cost on the employer, the employer may save more in helping to establish a drug-free workplace, improving work performance of employees, reducing turnover, and improving employee attendance.⁸⁷ For many employers, EAPs pay for themselves while reducing workplace violence in the process.

4. *A Workplace Violence Policy: A Hybrid Preventative and Corrective Approach*

Every company should have a workplace violence policy in place, but the policy must be carefully drafted. An inflexible policy could remove the employer's discretion, requiring the employer to retain a violent employee until

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- How do you "blow off steam" when you're mad about something?
 - What are the three most stressful events you've ever experienced at work and how did you handle them?

Whitten & Mosley, *supra* note 18, at 551.

⁸³ *Id.* at 552; Drake, *supra* note 66, at 3-5.

⁸⁴ Whitten & Mosley, *supra* note 18, at 552.

⁸⁵ Drake, *supra* note 66, at 3-5.

⁸⁶ 1 GUIDE TO EMPLOYMENT LAW AND REGULATION § 1.76 (2d ed. 2002).

⁸⁷ Paula Santonocito, *Getting with the Program*, HR WIRE, Jan. 14, 2002 (noting that Boeing, Inc. "achieved a minimum 4-to-1 savings-to-investment ratio, or an estimated \$5.1 million, as the result of its EAP, a program that, at the time of the study, served 100,000 employees and 250,000 dependents.").

a major incident occurs, or requiring the employer to take drastic action when lesser disciplinary action might be appropriate.⁸⁸ On the other hand, employers may relieve liability for discrimination claims by pointing to a non-discriminatory purpose for termination: adherence to the workplace violence policy.⁸⁹ However, having a workplace violence policy, and poorly applying the policy, could be worse than not having a workplace violence policy at all. Employers can face liability if incidents are not appropriately documented, or the employer does not consistently apply the policy.⁹⁰ As a result, employers may be wise to draft a general policy that communicates expectations to employees, but retains discretion for the employer to decide which disciplinary options are appropriate.⁹¹ Given that the Ninth Circuit recently held a community college workplace violence policy to violate the First Amendment, public employers should describe violent behavior, particularly threats, with more specificity.⁹²

Workplace violence policies address solely co-worker/former employee (Type III) violence. They aim to prevent Type III incidents by deterring co-worker violence and by authorizing progressive disciplinary measures to prevent an incident from escalating into a more serious incident. Similar to application screening, workplace violence policies share characteristics of both generalized and individualized options to respond to workplace violence. The policy will apply to all employees, reflecting a generalized option. However, in applying the policy, employers must make individualized determinations about retaining and disciplining employees when the policy is violated.

A workplace violence policy can be a beneficial tool for employers because it reduces liability, helps prevent workplace violence, and imposes few additional costs. By designing procedures before incidents occur, employers can save time in addressing problems. The cost of implementing and enforcing a policy depends on the employer's human resources department and legal counsel, but the benefits of implementing an appropriate policy are long term.

⁸⁸ Drake, *supra* note 66, at 3-5.

⁸⁹ Muszak v. Sears, Roebuck & Co., 63 F. Supp. 2d 292, 299 (W.D.N.Y. 1999) (holding that adherence to a workplace violence policy was not disability discrimination under the ADA); Adkins v. U.S. W. Communications, Inc., 181 F. Supp. 2d 1189, 1198-99 (D. Colo. 2001) (holding that adherence to a workplace violence policy was not pretext for age discrimination or length-of-service discrimination under the ADEA or ERISA); Wall v. City of Durham, 169 F. Supp. 2d 466, 478 (M.D.N.C. 2001) (holding that violation of a workplace violence policy, not prohibited racial discrimination under Title VII, was reason for termination).

⁹⁰ Herrick v. Quality Hotels, Inns & Resorts, Inc., 24 Cal. Rptr. 2d 203, 208 (Cal. Ct. App. 1993) (affirming judgment for victim-employee because the employer ratified the offender-employee's conduct by not enforcing the weapons policy); Smith v. Nat'l R.R. Passenger Corp., 856 F.2d 467, 469-70 (2d Cir. 1988) (reinstating \$3.5 million jury verdict based on the employer's negligent failure to document incidents as required by the company policy).

⁹¹ Drake, *supra* note 66, at 3-5.

⁹² Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001). The policy defined workplace violence as "including, but not limited to, making written, physical, or visual contact with verbal threats or violent behavior overtones" *Id.* at 781.

5. Injunctive Relief Against the Offender: An Individualized Preventative and Corrective Approach

By suing under trespass theory, the employer could obtain a temporary restraining order (TRO) or a preliminary injunction against violent offenders. TROs provide the employer with a purely individualized measure to prevent the escalation of workplace violence and correct past and present incidents of workplace violence; a TRO will effectively suspend an employee from the workplace. Because the measure is individualized, obtaining a TRO requires the ability to identify potential offenders individually. TROs might only be practical when used against co-workers/former employees (Type III) and customer/clients (Type II), because the employer is aware of these individuals in the workplace and can foresee future incidents of workplace violence. If a stranger (Type I) or offender with a personal relationship (Type IV) were repeatedly engaging in workplace violence in a particular workplace, and the employer could identify the offender, TROs could also be used to address these types of workplace violence.

Employers most commonly seek TROs during violent labor disputes, where a group of individuals may present a threat to the workplace, and not in classic situations of workplace violence.⁹³ This trend reflects hesitancy by employers to obtain injunctive relief against violent offenders. A TRO is generally only available upon a showing of immediate irreparable injury.⁹⁴ Furthermore, a remedy at law must be inadequate, the employer must have a reasonable probability of success on the merits of the trespass claim, and the employer must win a balancing of the equities.⁹⁵ Even assuming an employer could show sufficient evidence, obtaining a TRO or preliminary injunction involves costly procedures which may not be cost-effective for the employer. Obtaining a TRO generally requires filing a complaint, a memorandum of points and authorities supporting the injunction, and a proposed injunction.⁹⁶ After these steps are completed, a TRO will usually expire ten days after its issuance.⁹⁷ With such limited protection at a great cost, the employer must preserve the existing TRO for the most critical of workplace emergencies.

⁹³ See, e.g., *McCabe Hamilton & Renny Co. v. Chung*, 43 P.3d 244 (Haw. 2002) (the petitioner sought a TRO to stop a union member from committing violence and trespassing); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 23 P.3d 1197 (Colo. 2001) (employer sought a TRO to enjoin violent and threatening conduct by union members). This author could not find any reported cases where an employer sought a TRO in response to a typical example of workplace violence.

⁹⁴ FED. R. CIV. P. 65(e).

⁹⁵ DAN B. DOBBS, *LAW OF REMEDIES* § 2.11(2), at 187-88 (2d. ed. 1993).

⁹⁶ Donald M. Peters, *Temporary Restraining Orders and Preliminary Injunctions*, ARIZ. ATT'Y, Apr. 1995, at 25.

⁹⁷ FED. R. CIV. P. 65(e) is the federal practice on this issue, and represents state approaches to the amount of time a TRO remains valid.

B. Victim Options

1. Temporary Protection Orders (TPOs) Against the Offender: An Individualized Preventative and Corrective Approach

States routinely authorize TROs by statute to specifically address domestic violence disputes.⁹⁸ The procedures for obtaining a domestic violence TRO are streamlined, and because the remedy is statutory, plaintiffs do not have to meet the irreparable injury requirement or prove that remedies at law are inadequate.⁹⁹ To avoid confusion with common law TROs, jurisdictions typically refer to the domestic violence TRO as a temporary protection order (TPO). Courts typically will issue the TPO with a showing of "good cause" that can be met by proving an incident of prior abuse.¹⁰⁰ Furthermore, TPOs are procedurally easier to obtain than their common law counterparts. For example, Oregon will issue TPOs ex parte upon an affidavit of the petitioner, over the telephone, within one day after the petition is filed.¹⁰¹ A TPO can prohibit the alleged batterer from engaging in further abuse or harassment and require the alleged batterer to discontinue contact with the petitioner, including prohibiting the offender from entering or approaching the petitioner's workplace or business.¹⁰² A TPO sought by victims against offenders may be an appropriate response to potential violence by an assailant with a personal relationship to the victim (Type IV). Similar to a common law TRO that an employer might obtain, the TPO requires an individualized determination by the victim that the offender represents a threat. This measure is corrective, because if the TPO is enforced, future contact by the individual will result in criminal penalties. However, the TPO is primarily a preventative tool to shield the victim from future attacks by the offender.

Employers are currently incapable of stepping into the shoes of domestic violence victims to obtain a TPO. In most states, only the victim of domestic violence may obtain the TPO; however, frequently victims are reluctant to apply for a TPO. Victims of domestic violence may be wary to apply for a TPO because of threats by the batterer, the humiliation of relaying their story of abuse to others, the inability to afford legal representation, and a belief by victims that the TPO will be ineffective.¹⁰³ A few states allow an adult to file an

⁹⁸ DOBBS, *supra* note 95, at 170.

⁹⁹ *Id.* at 179.

¹⁰⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1035 (1993). The authors state that:

Statutes define "good cause" to include an emergency, immediate danger, immediate and present danger of abuse, imminent and present danger of bodily injury, an occurrence of abuse, a substantial likelihood of imminent danger of abuse, clear and convincing evidence of imminent danger of abuse, and imminent and present danger to a child. A few states issue temporary protection orders based on probable cause of imminent and present danger, or on probable cause of irreparable injury. A temporary protection order may also issue based on the court's reasonable grounds to believe abuse occurred or that an emergency exists.

Id. at 1035-36 (footnotes omitted).

¹⁰¹ *Id.* at 1038-39.

¹⁰² *Id.* at 914-20.

¹⁰³ Mayumi Waddy, *DVRO: Just a Piece of Paper*, 11 J. CONTEMP. LEGAL ISSUES 81, 83-84 (2000).

application for a TPO as a surrogate for any other member in the household.¹⁰⁴ It appears, however, that states have not extended the standing for a TPO beyond the household in question.¹⁰⁵ This jurisdictional issue prevents employers from utilizing the TPO on behalf of employees affected by domestic violence.

Even if the victim obtains a TPO, there are limits to the TPO's effectiveness to prevent violence in the workplace. The TPO can only be enforced if the violations are reported to the police and the police enforce the TPO.¹⁰⁶ Furthermore, TPOs are unlikely to deter those already contemplating criminal conduct, such as domestic violence.¹⁰⁷ In addition, a TPO may infuriate the batterer and lead to more violence.¹⁰⁸ Despite these limitations, TPOs are accepted as a beneficial deterrent to domestic violence.¹⁰⁹

2. *Employer Liability: An Individualized Preventative and Remedial Approach*

Victims have used various theories to assert employer liability for injuries sustained during incidents of workplace violence. There has been substantial scholarly work on the diverse nature of claims that plaintiffs might bring following violence in the workplace.¹¹⁰ Employer liability arguably can be an effective remedy, because it compensates victims and provides financial incentives for employers to prevent workplace violence. Lawsuits against the employer address the employer's response to the specific incident of workplace violence. The employer's response to generalized incidents of workplace violence may also be relevant, but the lawsuit will address the specific incident, the specific employer, the specific victim, and the specific offender.

An initial stumbling block for any employee/plaintiff injured in a violent workplace incident is to avoid the state's workers' compensation exclusive remedy provision. Under the tort system of the early twentieth century, employees faced difficult challenges in receiving compensation.¹¹¹ Labor and management struck a compromise, where the employees received prompt recovery under the workers' compensation law regardless of fault, and the

¹⁰⁴ See, e.g., OHIO REV. CODE ANN. § 3113.31(c) (West 2001).

¹⁰⁵ See Klein & Orloff, *supra* note 100, at 846.

¹⁰⁶ Gary Brown et al., *Starting a TRO Project: Student Representation of Battered Women*, 96 YALE L.J. 1985, 2018 (1987).

¹⁰⁷ Richard A. Lingg, *Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes*, 67 ST. JOHN'S L. REV. 347, 360 (1993).

¹⁰⁸ Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. OF THE AM. MATRIMONIAL LAWS 335, 346 (1994).

¹⁰⁹ *Minutes of the Meeting of the Assembly Committee on Judiciary*, 71st Sess. 8 (Apr. 5, 2001), available at <http://www.leg.state.nv.us/71st/minutes/assembly/jud/final/871.html> (last visited July 28, 2003).

¹¹⁰ See, e.g., Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: An Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 106-07 (1997); Ann. E. Phillips, Comment, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139 (1996); Whitten & Mosley, *supra* note 18, at 505.

¹¹¹ W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 80, at 568, 572, n.43 (1984) (noting that between seventy and ninety-four percent of workplace injuries were not compensated).

employer avoided limitless liability for workplace accidents.¹¹² While workers' compensation provides quicker relief for workers, often workers' compensation will not fully compensate the victim, and the victim will attempt to avoid the exclusive remedy by directly suing the employer.¹¹³

In certain instances, plaintiffs/employees may be able to avoid the workers' compensation system. The workers' compensation scheme applies only when the injury arises out of the scope of employment.¹¹⁴ Given this limitation, employers will be open to liability from non-employee victims, including independent contractors. Employees also may be able to avoid the exclusive remedy by showing that their claim falls within the intentional tort exception, which is based on the idea that the workers' compensation exclusive remedy provision only applies when the worker is injured in the scope of employment by "accident."¹¹⁵

However, state laws vary considerably. In three states, an employee can avoid the workers' compensation scheme if anyone committed an intentional tort against the employee.¹¹⁶ Many states will only allow plaintiffs to avoid the workers' compensation remedy when the employer acted with the "deliberate intent" to cause the employee's injuries.¹¹⁷ In some states, if an employer knows of threats of harm and allows the threats to continue, the conduct can be described as intentional because the employer is substantially certain that injury will result.¹¹⁸ Because of inconsistencies in workers' compensation laws, some employees will recover more than others.

Plaintiffs who have avoided the workers' compensation bar have recovered damages for their injuries with theories such as negligent hiring,¹¹⁹ negli-

¹¹² *Id.* at 574.

¹¹³ *Id.*

¹¹⁴ *Id.* at 575.

¹¹⁵ Beaver, *supra* note 110, at 106.

¹¹⁶ PA. STAT. ANN. tit. 77, § 411(1) (West 2001) (excluding injuries "caused by an act of a third person intended to injure the employee [sic] because of reasons personal to him, and not directed against him as an employee [sic] or because of his employment"), *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 424 (Minn. Ct. App. 1993) (holding that "a violent murder by a known assailant" is an assault occurring for reasons personal to the victim and not subject to workers' compensation's exclusive remedy provision); *Shutters v. Domino's Pizza, Inc.*, 795 S.W.2d 800, 802-03 (Tex. Ct. App. 1990) (stating that assault is not covered by workers' compensation if the assault is not connected to the scope of employment or if the assault occurred for reasons personal to the employee and assailant). California specifically addressed the treatment of workers' compensation for cases involving workplace violence by lowering the causation requirement for recovery under the workers' compensation law. *Lockheed Martin v. Workers' Comp. Appeals Bd.*, 117 Cal. Rptr. 2d 865, 871 & n.7 (Cal. Ct. App. 2002) (interpreting CAL. LAB. CODE § 3208.3 (West 2001)).

¹¹⁷ Michelle Gorton, Comment, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 ENVTL. L. 811, 820 & n.65 (2000) (citing *Davis v. U. S. Employers Council, Inc.*, 934 P.2d 1132, 1148-49 (Or. Ct. App. 1997).

¹¹⁸ *Id.* at 841 (describing workers' compensation law in Ohio, Louisiana, Michigan, North Carolina, and West Virginia).

¹¹⁹ See generally Whitten & Mosley, *supra* note 18, at 520-21 (footnotes omitted) (stating that a negligent hiring claim requires a showing that: "(1) the employee in fact had a propensity for violence; (2) the employer knew or should have known of the propensity for violence; and (3) the employer hired the employee negligently or with callous disregard for the rights of persons who would reasonably be expected to come into contact with the employee.").

gent supervision,¹²⁰ negligent retention,¹²¹ and voluntary assumption of a duty to protect.¹²² However, the only effect employer liability has on the incidents of workplace violence is to encourage employers to use existing options to prevent and control workplace violence. Employer liability does not advance the potential to prevent workplace violence, but only creates incentives for employers to provide as much protection as the law requires. Moreover, because of inconsistent workers' compensation laws, some employers have greater incentives than others to fully utilize the employer options.

C. *The Government Option (OSHA): A Generalized Preventative Approach*

A final interested party in reducing workplace violence is the federal agency authorized to enforce workplace safety, the Occupational Safety and Health Administration (OSHA). All private employers are subject to the Occupational Safety and Health Act of 1970 (OSH Act),¹²³ which OSHA enforces. Failure to comply with the OSH Act can result in stiff penalties.¹²⁴ The OSH Act imposes a "general duty" on employers to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."¹²⁵ OSHA has applied the general duty clause to workplace violence, citing employers for violations in response to incidents of workplace violence.¹²⁶

OSHA also issued specific guidelines encouraging employers to develop a "violence prevention program" based on five central elements: (1) management commitment and employee involvement, (2) worksite analysis, (3) hazard prevention and control, (4) safety and health training, and (5) evaluation.¹²⁷ How-

¹²⁰ *Id.* at 530 (noting that employers may be liable when an employee commits a "wrongful act" and the employer negligently or recklessly supervised the employee).

¹²¹ *Id.* at 527-28 (noting that employers negligently retain employees when they have actual or constructive notice of an employee's violent behavior).

¹²² Employers that undertake to protect the workplace can actually increase their liability if harm results from a "failure to exercise reasonable care to protect [the] undertaking, if (a) [the employer's] failure to exercise reasonable care increases the risk of such harm, or (b) [the employer] has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." RESTATEMENT (SECOND) OF TORTS § 324A (1976).

¹²³ See 29 U.S.C. §§ 651-678 (2000). Section 652(5) excludes the United States government and state governments from the scope of the OSH Act.

¹²⁴ See *id.* § 666 (an employer can be fined anywhere from \$5,000 to \$70,000 for a willful violation and as much as \$7,000 for non-willful and non-serious violations).

¹²⁵ *Id.* § 654(a).

¹²⁶ See, e.g., *Sec'y of Labor v. Megawest Fin., Inc.*, 17 O.S.H. Cas. (BNA) 1337 (ALJ 1995) (reversing violation of general duty clause because the hazard of workplace violence – tenants attacking landlords – was not recognized by Megawest or its industry). While Megawest was ultimately successful, this case demonstrates OSHA's willingness to apply the general duty clause to incidents of workplace violence. States have also cited companies for workplace violence. See, e.g., *Nation in Brief*, WASH. POST, Nov. 8, 2000, at A9 (noting that Hawaii cited Xerox Corp. for "failing to enforce workplace violence policies" in response to an incident where an employee fatally shot seven co-workers).

¹²⁷ OSHA, GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTH-CARE AND SOCIAL-SERVICE WORKERS, 4 (2003) (available on the OSHA government website at: <http://www.osha.gov/Publications/osh3148.pdf>) (last visited Aug. 2, 2003).

ever, OSHA has declared that it will not cite employers for violations of the general duty clause because of a failure to institute a "violence protection program."¹²⁸ These standards are merely advisory "best practices" that employers may use to prevent workplace violence.¹²⁹ Employers should take note that if the advisements are "best practices," it would be difficult to find that an employer utilizing the advisements violated the "general duty" clause.

In the status quo, OSHA only affects workplace violence by advising employers how to reduce violence, and by fining employers for violations of the general duty clause. OSHA appears to concentrate on late-night retailers and health care workers, which might help reduce violence from strangers (Type I) and violence from customer/clients (Type II), since Type I and Type II offenders are most likely to target these respective establishments.¹³⁰ Because OSHA's specific advisements are completely voluntary, OSHA fails to play a sizable role in reducing workplace violence, and will only represent a reminder to employers of their duty to provide a safe workplace under the general duty clause.

IV. THE NEWEST APPROACH TO WORKPLACE VIOLENCE: PANACEA, BAND-AID, OR FAILURE?

This section will address the employer TRO as a response to workplace violence. Initially, this section will examine the substantive law of the employer TRO as it has been applied in California, Arizona, and Nevada. After comparing the three laws, this section argues that the employer TRO will complement existing approaches to workplace violence by filling important gaps in current approaches and further reducing workplace violence. In addition, this section argues that the employer TRO will not materially increase the employer's risk of liability. While the employer TRO may disrupt some existing laws and have a limited effect on workplace violence, this section argues that the strengths of the employer TRO outweigh the weaknesses and that employer TROs should be adopted in other states.

A. *The Substantive Law of the Employer TRO*

1. *California's Workplace Violence Safety Act*

In 1994, California passed the Workplace Violence Safety Act, becoming the first state to authorize an employer TRO for workplace violence.¹³¹ The Act intended to provide employers with an equivalent power to obtain a TRO in response to workplace violence as is provided to victims of harassment and domestic violence.¹³² The Act allows an employer to obtain a TRO to enjoin illegal acts or threats of violence in response to any "credible threat of vio-

¹²⁸ Letter from Joseph A. Dear, Asst. Secretary of OSHA, to Hon. Christopher S. Bond, Chairman of the Comm. on Small Business, US Senate (Aug. 29, 1996), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22248&p_text_version=FALSE (last visited July 28, 2003).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ CAL. CIV. PROC. CODE § 527.8 (West 2000).

¹³² See *Scripps Health v. Marin*, 85 Cal. Rptr. 2d 86, 93, n.8 (Cal. Ct. App. 1999).

lence" directed at an employee.¹³³ A "credible threat of violence" includes any "knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose."¹³⁴

The procedure for an employer to obtain a TRO is relatively inexpensive and undemanding. An employer can obtain a TRO, lasting for fifteen days, upon an affidavit showing that the employer is entitled to the TRO.¹³⁵ There is no filing fee to petition for a TRO, nor is there a requirement to post a bond.¹³⁶ The employer may extend the TRO up to three years, after a hearing, if a judge determines by clear and convincing evidence that the defendant "engaged in unlawful violence or made a credible threat of violence."¹³⁷ A court has further construed this provision to require a finding by clear and convincing evidence that a failure to issue the injunction would subject the employee to further violence or threats.¹³⁸ The court imposed this additional standard because applying the statute literally would effectively require a stronger showing for an ex parte TRO than a permanent injunction.¹³⁹

In addition, the statute professes not to alter the existing duty, "if any," to provide a safe workplace.¹⁴⁰ Thus, the statute should not expand any common law duty to employees or impose additional requirements to abide by the OSH Act's "general duty" clause. In the eight years that the law has existed, no cases have been reported where an employer incurred liability as a result of using, misusing, or failing to use the employer TRO.

2. Arizona's Injunction Against Workplace Harassment

Arizona, building off of California's experience with the employer TRO, drafted similar legislation which became effective in 2001.¹⁴¹ The Arizona injunction against workplace harassment allows employers to obtain injunctions in response to workplace harassment, defined as "a single threat or act of physical harm or damage or a series of acts over any period of time that would

¹³³ CAL. CIV. PROC. CODE § 527.8(a).

¹³⁴ *Id.* § 527.8(b)(2).

¹³⁵ *Id.* § 527.8(e).

¹³⁶ *Id.* § 527.8(o).

¹³⁷ *Id.* § 527.8(f). Note, however, that section (f) provides that a plaintiff may "apply for a renewal of the injunction by filing a new petition for an injunction" at any time within three months of the injunction's expiration.

¹³⁸ See *Scripps Health*, 85 Cal. Rptr. 2d at 94. The *Scripps Health* court observed that a literal reading of the statute would not require a showing that "great or irreparable harm would result to the employee due to the likelihood the unlawful violence would recur." *Id.* While this evidence is required for issuing an ex parte TRO, the statute does not explicitly require this for the issuance of a permanent injunction. *Id.* See also CAL. CIV. PROC. CODE § 527.8(e) & (f).

¹³⁹ *Scripps Health*, 85 Cal. Rptr. 2d at 94.

¹⁴⁰ CAL. CIV. PROC. CODE § 527.8(k). This provision is a prime example of a heavy-handed approach to prevent any additional employer liability because of the employer TRO. "Nothing in this section may be construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a safe workplace for employees and other persons." *Id.*

¹⁴¹ ARIZ. REV. STAT. § 12-1810 (2001) (enacted by 2000 Ariz. Sess. Laws, Ch. 72 § 1).

cause a reasonable person to be seriously alarmed or annoyed.”¹⁴² This harassment could be directed towards the employer or any other person who enters the workplace such as customers, employees, or independent contractors.¹⁴³

The procedure for an employer to obtain an Arizona injunction is streamlined and affordable. Upon a successful petition for a TRO, the employer may enjoin the defendant from approaching the employer's property or contacting the employer or any other person in the workplace.¹⁴⁴ Applications for a TRO are subject to filing fees, but the petitioner does not have to post a bond.¹⁴⁵ To obtain a TRO, an employer must submit an affidavit that avers facts entitling the employer to a workplace harassment TRO.¹⁴⁶ A court will issue the TRO *ex parte* if the court “finds reasonable evidence of workplace harassment by the defendant *or* that good cause exists to believe that great or irreparable harm would result . . . if the injunction is not granted before the defendant . . . can be heard”¹⁴⁷ This language departs from the common law of injunctions, because a TRO could be issued absent a showing of irreparable harm.¹⁴⁸

The TRO will last a full year from service upon the defendant, and the plaintiff may take up to a year to serve the defendant with the TRO.¹⁴⁹ Thus, by delaying service, an employer can effectively preserve the possibility of injunctive relief for up to two years. However, a defendant may attempt to quash the TRO by requesting a hearing at any time while the injunction is effective.¹⁵⁰ Violations of the TRO can result in prosecution for “the crime of interfering with judicial proceedings” in addition to any other crimes that the defendant may commit in disobeying the order.¹⁵¹

The Arizona statute insulates peace officers and employers from civil liability. Employers are held immune from liability for “seeking or failing to seek an injunction” under the Arizona statute.¹⁵² The civil liability immunity provision contains an exemption for liability arising from the seeking of an injunction “primarily to accomplish a purpose for which the injunction was not designed.”¹⁵³ Because of the malleability of legislative purpose, the civil immunity provision may not provide the amount of immunity that employers expect. The statute further prohibits the admission of evidence regarding the employer TRO as an admission of the employer; however, statements or actions made by the employer in filing for the TRO may be used for impeachment purposes.¹⁵⁴ In addition, the statute does not modify the duty to provide a

¹⁴² *Id.* § 12-1810(R)(2).

¹⁴³ *Id.* § 12-1810(C)(3).

¹⁴⁴ *Id.* § 12-1810(F)(1).

¹⁴⁵ *Id.* § 12-1810(D).

¹⁴⁶ *Id.* § 12-1810(A), (C)(3).

¹⁴⁷ *Id.* § 12-1810(E) (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* § 12-1810(I).

¹⁵⁰ *Id.* § 12-1810(G) (“At any time during the period that the injunction is in effect, the defendant may request a hearing After the hearing, the court may modify, quash or continue the injunction.”).

¹⁵¹ *Id.* § 12-1810(H).

¹⁵² *Id.* § 12-1810(P).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

safe workplace.¹⁵⁵ At a minimum, the employer's liability does not appear to expand with the passage of the statute authorizing TROs for workplace harassment.

3. *Nevada's Order for Protection Against Harassment in the Workplace*

Nevada followed in California and Arizona's footsteps on June 13, 2001.¹⁵⁶ Nevada's order for protection allows employers to obtain injunctive relief in response to harassment that may be directed against anyone present in the workplace, such as employees, independent contractors, and customers.¹⁵⁷ The definition of harassment covers threats of injury or actual injury to person, property, or the mental health or safety of a person.¹⁵⁸ This broad definition of harassment is limited by a requirement that the "threat would cause a reasonable person to fear that the threat will be carried out or the act would cause a reasonable person to feel terrorized, frightened, intimidated or harassed."¹⁵⁹

The procedure a Nevada employer must use to obtain an employer TRO is accessible and economical. Initially an employer must apply for a temporary order for protection against harassment in the workplace with an application describing the events comprising the harassment.¹⁶⁰ If the court finds that the events occurred and the petitioner provided the defendant with notice, then the court can issue an injunction.¹⁶¹ This injunction could issue without notice to the defendant if, based on an accompanying affidavit averring the events of harassment, the court finds: (1) immediate and irreparable injury; (2) a loss or damage to an employer or another in the workplace will occur without the injunction; and (3) appropriate attempts have been made to provide notice to the defendant.¹⁶² In either case, with or without notice, the court has the discretion to require a hearing before the temporary order will be issued.¹⁶³ Additionally, the temporary order will not issue without the posting of a bond.¹⁶⁴

If the court issues a TRO, the defendant will be enjoined from contacting a person in the workplace or approaching the workplace for fifteen days following the issuance.¹⁶⁵ A court may extend the TRO for up to a year upon an application for a hearing by a petitioner.¹⁶⁶ A defendant, at any time, may also petition for a hearing to modify or quash the TRO.¹⁶⁷ Once the defendant has been served with the TRO, officers can enforce the TRO without witnessing a

¹⁵⁵ *Id.* § 12-1810(K)(1).

¹⁵⁶ See 2001 NEV. STAT. 566 §§ 1-19 (enacted as NEV. REV. STAT. 33.200-360 (2002)).

¹⁵⁷ NEV. REV. STAT. § 33.240(2) (2001).

¹⁵⁸ *Id.* § 33.240(1)(a)-(c).

¹⁵⁹ *Id.* § 33.270(3).

¹⁶⁰ *Id.* § 33.250.

¹⁶¹ *Id.* § 33.270(1)-(2).

¹⁶² *Id.* § 33.270(4).

¹⁶³ *Id.* § 33.270(3).

¹⁶⁴ *Id.* § 33.270(2).

¹⁶⁵ *Id.* §§ 33.270(5), 33.280(1).

¹⁶⁶ *Id.* § 33.270(6)-(8).

¹⁶⁷ *Id.* § 33.270(9). Section (9) requires a defendant to give the employer two days notice of such a hearing.

violation, so long as they have probable cause to believe the defendant violated the order.¹⁶⁸

Nevada also includes a civil immunity provision, protecting employers and peace officers operating under the statute. Employers are immune from civil liability for failing to seek an order, or for seeking such an order, unless the order was sought in bad faith.¹⁶⁹ Furthermore, any acts or statements made under the statute will not be admissible as an admission of the employer or for impeachment.¹⁷⁰ In addition, the employer TRO disclaims any modification of "the duty of the employer to provide a safe workplace."¹⁷¹

4. *A Comparison of the California, Arizona, and Nevada Employer TRO*

Each state's attempt to authorize employer TROs share similar characteristics. The central similarity linking these three statutes is that each statute gives an employer standing to obtain a TRO in response to workplace violence.¹⁷² Each state limits its statute to incidents that would alarm a "reasonable person" and would include situations where individuals have threatened others, but not engaged in violent conduct.¹⁷³ Each state also provides that the employer TRO does not alter the existing duty to provide a safe workplace.¹⁷⁴ Finally, each TRO can be obtained ex parte with a sufficient affidavit.¹⁷⁵

Despite these similarities, there are noticeable differences among the three state statutes. The coverage of Nevada's statute is slightly broader than the California and Arizona statutes because it includes property damage as well as actual psychological injury.¹⁷⁶ The Nevada and Arizona statutes are broader than California's statute because they allow employers to step into the shoes of anyone in the workplace, not just employees.¹⁷⁷

The procedural requirements of the employer TROs also vary considerably. California and Arizona do not require the issuance of a bond by the petitioner, whereas Nevada requires a bond before a court can issue a TRO.¹⁷⁸ Additionally, California does not require any filing fee when applying for the TRO.¹⁷⁹ The California and Nevada TRO will only last for fifteen days, and

¹⁶⁸ *Id.* § 33.320(1).

¹⁶⁹ *Id.* § 33.340(1).

¹⁷⁰ *Id.* § 33.340(2).

¹⁷¹ *Id.* § 33.360.

¹⁷² Compare CAL. CIV. PROC. CODE § 527.8 (West 2000), with ARIZ. REV. STAT. § 12-1810(A) (2001), and NEV. REV. STAT. § 33.250.

¹⁷³ Compare CAL. CIV. PROC. CODE § 527.8(b)(2), with ARIZ. REV. STAT. § 12-1810(R)(2), and NEV. REV. STAT. § 33.240(1), (3).

¹⁷⁴ Compare CAL. CIV. PROC. CODE § 527.8(k), with ARIZ. REV. STAT. § 12-1810(K)(1), and NEV. REV. STAT. § 33.360(1).

¹⁷⁵ Compare CAL. CIV. PROC. CODE § 527.8(e), with ARIZ. REV. STAT. § 12-1810(A) & (E), and NEV. REV. STAT. § 33.270(4).

¹⁷⁶ Compare NEV. REV. STAT. § 33.240(1)(b), with CAL. CIV. PROC. CODE § 527.8(a), and ARIZ. REV. STAT. § 12-1810(R)(2).

¹⁷⁷ Compare NEV. REV. STAT. § 33.240(2), and ARIZ. REV. STAT. § 12-1810(E), with CAL. CIV. PROC. CODE § 527.8(a).

¹⁷⁸ Compare ARIZ. REV. STAT. § 12-1810, and CAL. CIV. PROC. CODE § 527.8, with NEV. REV. STAT. § 33.270(2).

¹⁷⁹ CAL. CIV. PROC. CODE § 527.8(o).

can be extended for three years and one year respectively, whereas Arizona's TRO can effectively last for up to two years without a special hearing for extension.¹⁸⁰ California's extension process requires a stronger showing of the need to extend the TRO,¹⁸¹ whereas little guidance has been given to Nevada courts as to the burden that employers must meet to extend a TRO.¹⁸²

A final area where the statutes diverge is on the issue of civil immunity. California relies on disclaiming any modification of the duty to provide a safe workplace to protect employers.¹⁸³ Arizona provides complete civil immunity under the statute, unless the employer sought a TRO for a purpose other than to prevent harassment.¹⁸⁴ In a similar vein, Nevada's civil immunity provision is absolute unless the employer sought a TRO in bad faith.¹⁸⁵

B. Strengths of the Employer TRO

1. What's New About the Employer TRO?

The employer TRO is a new approach to an old problem. A review of the existing approaches to workplace violence reveal glaring deficiencies in the types of approaches available. The employer TRO is an individualized preventative and corrective measure which clearly distinguishes the TRO from generalized preventative measures, such as EAPs or enhanced physical security, because generalized preventative measures do little to address an imminent incident of workplace violence. While applicant screening can involve individualized decisions, these decisions are also made before an incident occurs and cannot address an imminent incident. All three options can be fairly classified as options that must be implemented and utilized well before an incident escalates to violence. While these options are important to the overall prevention of workplace violence, they do not provide relief similar to the employer TRO.

Two other options – employer liability and OSHA action – are post-incident remedies which will not aid the prevention of a specific incident of workplace violence because they address specific incidents only after they have occurred. By establishing a financial cost for failure to appropriately respond to workplace violence, these options affect employer resolution of incidents by providing incentives to make full use of the options available. OSHA may also provide information to facilitate further development of security and other internal measures. However, these options do not, in and of themselves, enable employers to undertake further measures to address workplace violence. These measures only encourage employers to use existing approaches to workplace violence. While these incentives are important to insure that employers use appropriate methods to control workplace violence, they address the problem from a different angle than the employer TRO.

¹⁸⁰ Compare CAL. CIV. PROC. CODE § 527.8, and NEV. REV. STAT. § 33.270, with ARIZ. REV. STAT. § 12-1810; see *supra* note 150 and accompanying text.

¹⁸¹ *Scripps Health v. Marin*, 85 Cal. Rptr. 2d 86, 93 (Cal. Ct. App. 1999); CAL. CIV. PROC. CODE § 527.8(e) & (f).

¹⁸² NEV. REV. STAT. § 33.270(6) & (7).

¹⁸³ CAL. CIV. PROC. CODE § 527.8(k).

¹⁸⁴ ARIZ. REV. STAT. § 12-1810(P).

¹⁸⁵ NEV. REV. STAT. § 33.340(1).

There are three approaches to workplace violence that do address the problem from a similar angle as the employer TRO; nonetheless, the employer TRO provides a substantially new option. Workplace violence policies attempt to set a general norm for appropriate behavior in the workplace and prescribe repercussions for failing to meet the norm.¹⁸⁶ An employer TRO is similar in that it subjects individuals to a general norm of conducting themselves appropriately, so as not to cause apprehension in a "reasonable person." Failure to meet this norm will result in an injunction, enjoining the individual from entering the workplace. The employer TRO is an extension of the workplace violence policy, but it still has a role to play. The workplace violence policy will only affect co-worker (Type III) violence. In Arizona and Nevada, the employer TRO has broader coverage in that it could potentially apply to co-worker (Type III), customer (Type II), and personal relationship (Type IV) violence.¹⁸⁷ Additionally, the most severe punishment a workplace violence policy can impose is termination. TROs, on the other hand, extend beyond termination and provide employers with post-employment relief. Finally, employer TROs provide a legal deterrent as opposed to an economic deterrent.

The employer TRO shares many similarities with the common law TRO that an employer might be able to obtain, based on a trespass claim, and the temporary protection order that a potential domestic violence victim might obtain. The need for the employer TRO has arisen because the employer lacks standing to obtain a TPO,¹⁸⁸ and a common law TRO would be too burdensome to be cost-effective. For example, when a depressed employee of the University of Washington posed a threat to the workplace amid news that he was shopping for a gun, the employer attempted to do everything within its legal power to diffuse the situation.¹⁸⁹ The director of the residency program stated, "We didn't have enough to get a restraining order. . . . [b]ut we could have said 'You're Fired.' The fear was that if we fired him right then, he would kill himself."¹⁹⁰ This employer could have used an intermediary approach, like the employer TRO, without having to terminate the employee. Under the existing law, the employer was unable to obtain the TRO, whereas an employer TRO statute might have authorized a TRO in this incident. Furthermore, the employer TRO need not be based on a tort claim, and presents a legally relaxed standard to issue the TRO.¹⁹¹ The employer TRO is intended to specifically address workplace violence. While a domestic violence victim might obtain a TPO that could be effective in the workplace, evidence suggests that many victims are reluctant to do so and may not notify their employer of the TRO.¹⁹²

¹⁸⁶ See discussion *supra* Part III.A.4.

¹⁸⁷ See discussion *supra* Part IV.A.4.

¹⁸⁸ *Minutes of the Senate Committee on Judiciary*, 71st Sess. 15 (May 9, 2001), available at <http://www.leg.state.nv.us/71st/minutes/senate/jud/final/1332.html> (last visited July 28, 2003).

¹⁸⁹ Susan Kelleher & Eli Sanders, *Troubled Resident's Case Left UW With Quandary*, SEATTLE TIMES, July 5, 2000, at A1.

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., CAL. CIV. PROC. CODE § 527.8(a) (West 2001) (authorizing a TRO for a showing of a credible threat of violence).

¹⁹² See discussion *supra* Part III.B.1.

A final attribute of the employer TRO that separates it from all existing options is that it is relatively risk-free. The Nevada and Arizona civil immunity provisions allow employers responding to workplace violence to consider the use of an employer TRO without the fear of a lawsuit from offenders or potential victims.¹⁹³ Each current option available to the employer must be exercised cautiously to avoid liability, but the Nevada and Arizona TROs are risk-free as long as an employer seeking a TRO acts in good faith.

2. *The Effectiveness of the Employer TRO to Reduce Workplace Violence*

The employer TRO, as an intermediary step between pre-incident and post-incident prevention, provides an effective tool for employers to address workplace violence. Initially, it is worth noting that workplace violence is ordinarily preventable. In 99.9% of violent workplace incidents, warning signs are present.¹⁹⁴ "Workplace harassment and violence are probably the most preventable workplace injuries or stressors [E]mployers should act against perpetrators of small incidents to prevent worse ones from occurring."¹⁹⁵ Employer TROs can be used to act against these small incidents before they become severe incidents.

Evidence suggests that employer TROs have helped to diffuse small situations. For example, when an employee was being stalked by an ex-boyfriend, the employer was able to end the stalking by obtaining a temporary restraining order.¹⁹⁶ Where TPOs have failed in the past, employer TROs may succeed. Employers who obtain TROs are more motivated to prosecute violations of the TROs, whereas a recent study indicates that 87.7% of female domestic abuse victims fail to file contempt motions after violations of the TRO.¹⁹⁷ The employer often has greater resources and police may treat the employer's charges more seriously than the domestic violence victim.¹⁹⁸ TRO statutes also allow arrests by police officers regardless of whether the officer observed the violation.¹⁹⁹ One of the most important effects of an employer TRO is that it will enable earlier police involvement and will prompt a visit by a police officer to serve the TRO.²⁰⁰ This visit can diffuse the potential offender's frus-

¹⁹³ ARIZ. REV. STAT. § 12-1810(P) (2001); NEV. REV. STAT. § 33.340(1) (2001).

¹⁹⁴ Whitten & Mosley, *supra* note 18, at 506.

¹⁹⁵ Julie Gannon Shoop, *Workplace Violence Affects Millions, Survey Finds*, TRIAL, Dec. 1993, at 76.

¹⁹⁶ Mary J. Pitzer, *Taking Steps to Protect Employees Amid Rising Workplace Violence*, L.A. TIMES, Mar. 23, 1997, at D5 (declaring that "[h]arassing phone calls stopped, and the crisis subsided").

¹⁹⁷ Kristen Go, *Most Restraining Orders Work, But They Must Be Backed By Action*, DENVER POST, Sept. 12, 1999, at B1.

¹⁹⁸ See Nancy Egan, *The Police Response to Spouse Abuse: A Selective, Annotated Bibliography*, 91 LAW. LIBR. J. 499, 506 (1999) (citing research suggesting that police officers prefer mediation over arrest upon the belief that most domestic violence victims do not desire that their spouse be arrested).

¹⁹⁹ See, e.g., NEV. REV. STAT. § 33.320(1) (2001).

²⁰⁰ *Minutes of the Senate Committee on Judiciary*, 71st Sess. 15 (May 9, 2001), available at <http://www.leg.state.nv.us/71st/minutes/senate/jud/final/1332.html> (last visited July 28, 2003); Ilana DeBare, *Companies Can Defend Themselves Against Workplace Violence*, S.F. CHRON., Mar. 24, 1998, at C1.

tration and cause the offender to reconsider plotted acts of violence in the workplace.²⁰¹ Where contact with an individual in the workplace or presence in the workplace might not ordinarily be a crime, the action will constitute a crime when it directly violates a TRO. Employers will have the full force of law behind them when they report violations of the TRO. As a whole, restraining orders are more beneficial than harmful in the prevention of violence.²⁰² Employers in California tend to agree, as applications for employer TROs have escalated steadily since 1998.²⁰³

C. Weaknesses of the Employer TRO

1. Disruption of Current Laws

Anytime a new body of law enters an existing body of law, conflicts in the laws must be resolved. Because the employer TRO creates a new body of law and does not stem from an existing body of law, one major weakness is that it will disrupt current employment laws. It could affect both the law on sexual harassment and arbitration orders.

a. Sexual Harassment: Faragher/Ellerth Defense

Employers face civil liability under Title VII of the Civil Rights Act of 1964 for sexual harassment if the employer "fail[s] or refuse[s] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."²⁰⁴ The Supreme Court has interpreted this provision to prohibit both quid pro quo sexual harassment and hostile work environment discrimination.²⁰⁵ To prevail on a hostile work environment claim, the plaintiff must show that the "workplace [was] permeated with 'discriminatory intimidation, ridicule, and insult,' that [was] 'sufficiently severe or pervasive to alter the conditions of [her] employment . . .'"²⁰⁶

Hostile work environment claims can overlap with incidents of workplace violence. For example, in *Susko v. Romano's Macaroni Grill*,²⁰⁷ when an employee reported incidents of sexual harassment to a supervisor, the harasser threatened the plaintiff with physical violence and repeated unwanted physical contact such as squeezing the employee's side.²⁰⁸ The plaintiff survived summary judgment on a hostile work environment sexual harassment claim based partially on the violent threat, because "the threat of physical violence is material to a subjective and objective determination of whether a hostile work envi-

²⁰¹ *Minutes of the Senate Committee on Judiciary*, 71st Sess. 15 (May 9, 2001), available at <http://www.leg.state.nv.us/71st/minutes/senate/jud/final/1332.html> (last visited July 28, 2003).

²⁰² Go, *supra* note 197, at B1.

²⁰³ See Tracy Wilson, *Workplace Restraining Orders on the Increase*, L.A. TIMES, Aug. 20, 2000, at B1.

²⁰⁴ 42 U.S.C. § 2000e-2(a)(1) (2000).

²⁰⁵ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

²⁰⁶ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

²⁰⁷ 142 F. Supp. 2d 333 (E.D.N.Y. 2001).

²⁰⁸ *Id.* at 335.

ronment existed.”²⁰⁹ This is an example of co-worker (Type III) violence. Because hostile work environment claims can also be actionable as a result of harassment by customers,²¹⁰ physical violence by customers (Type II) may also affect a hostile work environment claim.

Regardless of the effect of workplace violence on hostile work environment claims, an employer could still use the employer TRO in response to sexual harassment. In Nevada and Arizona, harassment is specifically mentioned as a covered act. Likewise, California issues TROs in response to certain harassment involving assault, battery, or stalking.²¹¹

In 1998, the Supreme Court announced an affirmative defense to hostile work environment claims in the companion decisions of *Faragher v. City of Boca Raton*²¹² and *Burlington Industries, Inc. v. Ellerth*.²¹³ Under these cases, an employer can successfully defend against a hostile work environment sexual harassment claim by showing:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”²¹⁴

This defense may not be available to an employer whose supervisor created the hostile work environment.²¹⁵ However, if the hostile work environment claim is based on a customer (Type II) or co-worker (Type III) incident, the defense is available to employers against sexual harassment claim.

If an employer TRO applied in the jurisdiction, plaintiffs/employees could attempt to defeat a *Faragher* defense by arguing that the employer did not obtain a TRO to end the harassment. A TRO could even be fashioned to allow the employee or customer access to the worksite, but prevent them from making contact with the harassed employee. Even if the employer took some action, the employee could argue that the employer did not take enough action because the TRO could have legally enforced any instructions to discontinue sexual harassment. If TROs are inexpensive or free, provide prompt relief, are easy to obtain, and are effective, then an employer that failed to obtain a TRO in response to harassment may be unable to persuade a jury that they “exercised

²⁰⁹ *Id.* at 338.

²¹⁰ *See, e.g.,* Lockhard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998) (holding that harassment by customers was sufficiently severe and pervasive to justify a hostile work environment claim).

²¹¹ NEV. REV. STAT. § 33.240 (2001) (defining harassment as including bodily injury or “[s]ubstantial harm to the physical or mental health or safety of a person”); ARIZ. REV. STAT. § 12-1810(R)(2) (2001) (defining harassment as “a single threat or act of physical harm or damage or a series of acts . . . that would cause a reasonable person to be seriously alarmed or annoyed”); CAL. CIV. PROC. CODE § 527.8(b)(1)-(2) (West 2001) (defining unlawful violence as “any assault or battery, or stalking,” and defining credible threat of violence as a “knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety [or that of his or her family]”).

²¹² 524 U.S. 775 (1998).

²¹³ 524 U.S. 742 (1998).

²¹⁴ *See, e.g., Faragher*, 524 U.S. at 807.

²¹⁵ *Id.* at 807-08.

reasonable care to prevent and correct promptly any sexually harassing behavior."²¹⁶

Employers in Nevada and Arizona might respond that they are immune from civil liability under the statute; however, this response would likely fail. Plaintiffs could argue that the immunity provision does not apply because the liability is based on the sexual harassment experienced, not the employer's failure to respond properly with a TRO. The *Faragher* defense does not create civil liability; rather, as a defense, it removes pre-existing civil liability under a hostile work environment sexual harassment claim.

Employers in California, unable to claim the civil immunity defense, will have to rely on the disclaimer of modifying the duty to maintain a safe workplace, arguing they did not violate their duty of reasonable care. Attempting to shield the employer with the modification clause may be rejected by a reviewing court; the clause appears to apply to the general duty to provide a safe workplace, not an individualized duty to respond to sexual harassment. The clause reads: "[n]othing in this section may be construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a *safe workplace* for employees and other persons."²¹⁷ Furthermore, the plaintiff may not be arguing that the workplace was unsafe, but that working conditions changed as a result of the hostile work environment. The resolution of whether the employer exercised due care will be fact-based. Typically, the employer meets its duty of care if it has a sexual harassment policy in place and quickly responds with remedial action to a complaint of sexual harassment.²¹⁸ However, these components are not, as a matter of law, the exercise of reasonable care,²¹⁹ and prior decisions would have assumed that the employer could not have obtained an employer TRO. The possibility remains that a failure to obtain an employer TRO might impair a *Faragher* defense.

Conversely, employers who obtained TROs may attempt to use the issuance of the TRO as evidence that they met their duty of reasonable care. While this evidence may be relevant, it will not, in and of itself, meet the first prong of the *Faragher* test because the employer must generally have a complaint procedure in place to ensure that it learns of workplace violence incidents.²²⁰ Furthermore, it would not be advisable for an employer to respond to every incident of sexual harassment with a TRO.

In resolving this issue, courts should refrain from admitting evidence about the failure of an employer to obtain a TRO in evaluating the *Faragher* defense when the harasser is an employee. Allowing such evidence would, in effect, give employees in one state more protection from sexual harassment under a federal statute than another state. Furthermore, sanctions against employees, such as firing or suspension, will have the same effect on sexual harassment as an employer TRO, because both remove the harasser from the workplace. The use of these sanctions are already evaluated in the *Faragher* defense. As such, the failure of an employer to obtain an employer TRO would

²¹⁶ *Id.* at 807.

²¹⁷ CAL. CIV. PROC. CODE § 527.8(k) (West 2001).

²¹⁸ *See, e.g.,* Robles v. Cox & Co., Inc., 154 F. Supp. 2d 795, 804-05 (S.D.N.Y. 2001).

²¹⁹ *Id.*

²²⁰ *Id.*

not aid the factfinder in determining if the employer used reasonable care. Even if the employer retained the employee, but obtained a limited TRO to enjoin contact with the victim, this measure would not deter sexual harassment any more than if the employee believed the employer would terminate him upon another incident of sexual harassment.

If the harasser is not an employee, consideration of an employer's failure to obtain a TRO may be relevant and helpful in an analysis of whether the employer exercised reasonable care. While the employer can refuse to serve the customer, or prohibit the customer from being in the workplace, this may not present a serious deterrent to a customer. If a customer continues to enter the workplace and harass an employee, an employer TRO may not only be proper but also reasonable.

If the employer obtains a TRO against a harasser and wishes to introduce this evidence on the issue of reasonable care, courts should consider the evidence, but not presume reasonable care simply because the employer obtained the TRO. While creating a presumption of reasonable care may provide an added incentive for employers to use TROs to address sexual harassment, the incentive does not disappear by only making the evidence relevant. In fact, it would place the decision in a proper balance – motivating the employer to evaluate when a TRO might be appropriate and when a TRO would not be appropriate – instead of creating an incentive for employers to categorically respond to sexual harassment with TROs. Even if an employer responded to sexual harassment with a TRO, this does not demonstrate that the employer exercised due care. The employer should still be required to have a procedure in place to address complaints and respond with prompt corrective action. Without such a requirement, employers cannot be deemed to have taken appropriate action to become aware of sexual harassment, which is as important as taking appropriate action when learning of complaints.

b. Effects on Arbitration Orders

California's Workplace Violence Safety Act demonstrated an unusual side effect on arbitration orders. In the incident described in the introduction to this article – involving Danton Camm and his threat to shoot a co-worker, the co-worker's wife, and the co-worker's new baby if the City of Palo Alto fired Camm²²¹ – the TRO proved to disable any arbitration ordering reinstatement. The City of Palo Alto, Camm's employer, obtained an employer TRO prior to dismissing Camm.²²² An arbitrator ordered that Camm be reinstated and ordered backpay based on finding that Camm would not act on his threat and that the City violated Camm's right to appropriate notice, right to union representation, and right to a full and fair investigation.²²³ A court subsequently overturned the order, although agreeing with the arbitrator's findings, because reinstatement would violate the public policy of obeying judicial orders.²²⁴

²²¹ *City of Palo Alto v. Serv. Employees Int'l Union*, 91 Cal. Rptr. 2d 500, 502 (Cal. Ct. App. 1999).

²²² *Id.* at 503.

²²³ *Id.*

²²⁴ *Id.* at 507-08.

Whether this side effect will manifest itself in Nevada and Arizona remains to be seen.

While on the one hand *City of Palo Alto* correctly holds that an arbitration decision should not be able to quash a lawfully issued TRO, the decision suggests that the employer TRO produces an inequitable result. Although based on sound legal principles, the decision removes a remedy to address a legal wrong. If the arbitrator correctly found that Camm did not pose a threat to the workplace, and that Camm's employer removed him without cause, the employer would be able to escape its duty under the collective bargaining agreement to properly investigate claims of misconduct by successfully obtaining a TRO prior to dismissal. While reinstatement would also have been an improper result, an order for backpay would have retained some incentive for employers to follow the terms of labor-management agreements and would not have upset the TRO. The court may have properly applied the law, but the legislature should address this situation by allowing employees to obtain backpay if the TRO results from a violation of a collective bargaining agreement.

2. *The Limits on the Effectiveness of the Employer TRO to Reduce Workplace Violence*

There are three substantial limits to the effectiveness of an employer TRO to address workplace violence. One criticism is that a restraining order often will only enrage the offender to commit violence. This argument, also a criticism of the existing TPO, reasons that TROs are unlikely to deter individuals plotting criminal conduct.²²⁵ Because restraining orders are so confrontational, they may increase the risk of violence.²²⁶

A second criticism acknowledges that while TROs may be beneficial, employers can generally still obtain equivalent relief by contacting police officers to arrest individuals engaging in violence in the workplace. A lobbyist for the Public Defender, concerned about the potential criminal liability for offenders who violate an employer TRO, criticized the Nevada statute by arguing that if an individual is trespassing, the employer can currently contact the police to arrest the individual.²²⁷ One could argue that if there is a need for an employer TRO it is only because employers are not effectively using existing remedies.

The third, and most persuasive, argument about the limitations of the employer TRO is that employer TROs will not affect the most serious offender in workplace violence: the stranger (Type I). This offender is responsible for eighty-four percent of workplace homicides²²⁸ and sixty percent of violent

²²⁵ Lingg, *supra* note 107, at 360.

²²⁶ Jeff Gottlieb, *Agency Shooting Shows Access Can Have a Price*, L.A. TIMES, Nov. 27, 1998, at A1 (in this incident, the employer did not obtain a TRO because of the fear that "[r]estraining orders almost always are risk elevators").

²²⁷ *Minutes of the Senate Committee on Judiciary*, 71st Sess. 15 (May 9, 2001), available at <http://www.leg.state.nv.us/71st/minutes/senate/jud/final/1332.html> (last visited July 28, 2003) (statement of Mark S. Sertic).

²²⁸ DUHART, *supra* note 15, at 10 tbl.20.

workplace incidents.²²⁹ Because a TRO is a targeted remedy, it requires that the threat be identified in advance. The procedures for obtaining a TRO require a specific defendant. A stranger may strike without warning and not return again, or the employer may be unable to identify a recurring harasser when the person is a stranger. These limitations suggest that the employer TRO will not be an effective remedy to address workplace violence.

D. The Employer TRO: A Band-Aid Worth Applying

Because the three criticisms of the effectiveness of employer TROs have some legitimacy, it is unfair to classify the employer TRO as a panacea to cure workplace violence. There will be individuals who will not abide by the TRO. An employer must determine if the TRO will help diffuse or escalate the violence, and determine if other options are more appropriate, based on the specific individual. While some violations of a TRO might ordinarily allow a police officer to arrest an individual, the TRO clarifies certain activity which may be non-violent as a crime, but which is based on prior violent activity and a likelihood that the violence will continue.

Generally, TROs are considered more beneficial to the reduction of violence than they are harmful. As a result, the employer TRO operates as a band-aid, and not a failure. The employer TRO, while not a practical remedy to address stranger (Type I) violence, can conceivably be used against all other forms, which account for at least forty percent of all violent incidents.²³⁰ In addition, the employer is in a better position to prevent violence stemming from individuals who are in the employer's control. The employer TRO will complement existing options by giving employers the full realm of effective options to address workplace violence and by supplying the employer with pre-incident, imminent incident, and post-incident responses. While existing laws must be amended or harmonized to facilitate the employer TRO, this can be done by the legislature as conflicts are identified. Potential conflicts with existing employment laws should not hinder the development of new laws to address problems in the workplace.

V. CONCLUSION

An effective approach to prevent workplace violence requires an integrated scheme to address different types of workplace violence. One method alone cannot adequately address each instance of workplace violence. Consequently there may not be any panaceas to cure this ill. Unfortunately, even an employer utilizing all of its legal options may be unable to avoid a particular incident of workplace violence. The TRO can complement the existing preventative, corrective, and remedial options to more effectively control violence in the workplace. The TRO, a band-aid of sorts, offers an important option for employers to act deliberately and quickly to incidents that may be imminent.

The new phenomenon of the employer TRO will also present novel legal issues to the employment relationship, but this is nothing new to the evolving

²²⁹ WARCHOL, *supra* note 19, at 4 tbl.8.

²³⁰ *Id.*

areas of labor and employment law. Given the recent spread of employer TROs, more states may be willing to consider the TRO and can build off of the experiments in California, Arizona, and Nevada.