



Headlines reporting incidents of workplace violence are all too common and often the employee's recourse is workers' compensation. When are these claims compensable?

["A Fargo grocery store employee shot during robbery at closing time"](#)

["Employee assaulted during Raytown bank robbery"](#)

["Workplace Shooter Kills Five"](#)

The above headlines reporting incidents of workplace violence are all too common. However, the facts of workplace violence are different than the public's perception. Although dramatic violent incidents such as workplace homicides and shootings are the most publicized, this is not the only prevalent type of workplace violence. Non-fatal assaults are much more prevalent.

Workplace Violence

Violence at work presents a serious occupational hazard. The Centers for Disease Control and Prevention (CDC) defines workplace violence as "violent acts, including physical assaults and threats of assault, directed toward persons at work or on duty." Workplace violence can vary from threats, intimidation, and harassment to violence, physical assault, and possibly homicide.

According to the Bureau of Labor Statistics (BLS) [National Census of Fatal Occupational Injuries](#), the second-highest cause of worker fatalities in 2011 was assaults and violent acts, which accounted for 18% of the deaths. Of the 780 employee deaths due to assaults and violent acts, 458 were homicides and 242 were suicides. Homicide is the leading cause of death for women in the workplace. Shootings were the most frequent manner of death in both.

Risk factors for workplace violence include:

- Routine face-to-face contact with the public
- The exchange of money
- The delivery of services or good

Research on [Violence in the Workplace](#) published in January of 2012 by the National Council on Compensation Insurance (NCCI) found that injuries resulting from the cause "in act of crime" had the second highest indemnity and medical costs behind motor vehicle injuries. Using data from claims involving lost work-time for injury years 2006 through 2008, the study also found that crime-related injuries are also 10 times more likely to involve a fatality than injuries due to other causes.

According to the National Institute for Occupational Safety and Health (NIOSH), workplace violence typically falls into one of four categories.

Type I: Criminal intent

In this kind of violent incident, the perpetrator has no legitimate relationship to the business or its employee(s). Rather, the violence is incidental to another crime, such as robbery, shoplifting, or trespassing. Acts of terrorism also fall into this category. The vast majority of workplace homicides are Type I violence. A workplace may be at higher risk of Type I violence if the business:

- Handles cash or prescription medications; or
- Operates during late night hours

Type II: Customer/client

Customer/client violence falls occurs when the violent person has a legitimate relationship with the business such as a being a customer, client, patient, student, or inmate and becomes violent while being served. A large number of these incidents occur in the healthcare industry, in settings such as nursing homes or psychiatric facilities. Police officers, prison staff, flight attendants, and teachers can also become victims of this kind of violence. This category accounts for a majority of non-fatal workplace violence incidents. A workplace may be at risk for Type II violence if the business involves:

- Violent individuals such as criminals or those who are mentally ill; *or*
- Individuals who are confined and under stress, such as airplane passengers who have been sitting on the plane for a long period of time or customers waiting in long lines for a store to open.

Type III: Worker-on-worker

The perpetrator of Type III violence is an employee or past employee of the business who attacks or threatens other employee(s) or past employee(s) in the workplace. The motivating factor is often one or a series of interpersonal or work-related disputes. All workplaces are at risk for this type of violence, but workplaces at higher risk include those that:

- Do not conduct a criminal background check as part of the hiring process, although states differ in whether they allow employers to consider criminal records in hiring decisions; *or*
- Are in the middle of downsizing or otherwise reducing their workforce.

Type IV: Personal relationship

Generally the perpetrator is not an employee or former employee of the affected workplace, but does have a personal relationship with the intended victim. This category includes victims of domestic violence who are assaulted or threatened while at work. According to the BLS 2011 Census of Fatal Occupational Injuries, in nearly 2 out of every 5 homicides of female workers, the assailants were relatives. Almost all of the relatives were spouses or domestic partners (current and former). This type of violence can occur in all workplaces, but is most difficult to prevent in workplaces that:

- Are accessible to the public during business hours, such as retail businesses; *and/or*
- Have only one location, making it impossible to transfer employees who are being threatened.

Employer Response to Workplace Violence

The risk of workplace violence raises several concerns for employers. To maintain a safe workplace and minimize liability, employers must take steps to prevent workplace violence and respond appropriately when it occurs. Actions that employers should consider include:

- Training supervisors to spot a potentially violent employee;
- Improving physical security of the workplace (i.e. adequate lighting, silent alarms, cameras, controlled entry points); and
- Developing, communicating and enforcing a workplace violence policy as part of the crisis management program.

Although violence can happen at any workplace, there is a greater risk for it in retail and healthcare industries. OSHA launched a new [Workplace Violence Web page](#) and has published several workplace violence guidance documents including [Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments](#) and [Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers](#).

Beyond monetary costs due to workers' compensation and the potential for liability from lawsuits, employers must contend with employee turnover and lower employee morale after workplace violence occurs.

To mitigate the impact of workplace violence and other crisis, some employers utilize a post trauma crisis intervention protocol. This protocol requires that after traumatic events, including but not limited to robberies, assaults, witnessing violent or traumatic events, etc., employees be immediately referred for acute psychological intervention for a period of time following the event via telephone, onsite or through group counseling.

Investigating Claims involving Workplace Violence

Workers' compensation is typically the recourse available to employees who are injured on the job. To determine whether or not an injury resulting from an act of violence is compensable, a prompt, diligent and thorough investigation is required of these sensitive claims.

Details such as what led to the attack and the identity of the attacker can be more easily discovered when the events have just occurred. Therefore prompt contact with all appropriate parties is imperative. Individuals facing possible criminal charges or indictment for an attack may not be willing to provide a statement to the claims examiner investigating the incident. If the claim is being investigated by law enforcement, a copy of any available reports should be obtained and reviewed. The claims examiner should also attempt to obtain copies of the following:

- Photographs and surveillance tapes
- Employer's workplace violence policy
- Pertinent Lease Agreements

While workers' compensation laws vary from state to state, generally any investigation pertaining to workplace violence must begin by addressing whether the incident both "arose out of" and "occurred in the course of" his or her employment. "Arising out of" pertains to what the employee was doing. The "occurring in the course of" requirement refers to the time and place of the employee's injury. In other words, not only must the employee be at a place where s/he might reasonably be expected to be in the performance of his duties; s/he must also be performing those duties or otherwise furthering the interest of his employer. If both requirements are not met, the claim may not be compensable.

If possible, when considering and investigating any incident of workplace violence, the identity and motive of the attacker must be ascertained. Who did it? When did they do it? Why did they do it? Motives can be separated into the following categories:

- Employment related motives;
- Motives personal to the employee; or
- Motives neutral to the employee and to his employment.

The claim may not be compensable if the attack or assault on the employee was personally motivated.

Another consideration when investigating claims involving workplace violence is whether the job the employee was performing increased the risk of the injury and if the risk was greater than that to which the general public is exposed.

Unless accompanied by a work-related physical injury, claims only seeking treatment of mental illness such as post traumatic stress, anxiety, or depression due to the workplace violence incident may not be compensable in some states.

Decisions regarding claim compensability must be fully supported by the facts determined during the claim investigation and based upon the state laws and case law in the jurisdiction.

Below is a link to a case decided in the past year regarding the compensability of a claim involving workplace violence. Although this decision does not set precedent outside of the jurisdiction where it was decided, it offers some guidance in how courts may address these claims.

[*PA Liquor Control Board vs. Workers' Compensation Appeal Board \(Gregory Kochanowicz\)*](#), No. 760 C.D. 2010

This case involves Greg Kochanowicz who worked for the employer over 30 years and at the time of the incident was a manager for the Pennsylvania Liquor Control Board. On April 28, 2008, a masked man entered the store and stole money from the office safe and cash register. During the robbery, the robber pointed two guns at Mr. Kochanowicz and prodded the back of his head with one of the guns. After getting the cash, the robber duct taped Greg and his co-worker to chairs and then fled the store. Neither Mr. Kochanowicz nor his co-worker was physically injured during the robbery. However, after the incident the claimant alleged that he suffered from anxiety, depression, and flashbacks, and could not return to work.

He filed a Claim Petition seeking total disability benefits alleging that he sustained post-traumatic stress disorder (PTSD) as a result of being robbed at gun point while in the course and scope of his employment. The employer filed an Answer and a Notice of Compensation Denial indicating that the he had not sustained a compensable work-related injury.

In Pennsylvania, in order to recover workers' compensation benefits for a psychic injury, the worker must prove that he or she was exposed to "abnormal working conditions and that his psychological problems are not a subjective reaction to normal working conditions" [see *Babich v. Workers' Comp. Appeal Bd. (CPA Dept. of Corrections)*, 922 A.2d 57, 63 (Pa. Cmwlth. 2007)].

The workers' compensation judge granted Mr. Kochanowicz's claim petition finding that he met his burden of proof, that he was subjected to abnormal working conditions and that the workplace violence he experienced caused his psychic injury. The employer appealed to the Workers' Compensation Appeals Board (WCAB), which affirmed the appeal. The employer then appealed to the Commonwealth Court of Pennsylvania.

On September 20, 2011, the appellate court in a 4-3 decision reversed the ruling of the board. In its reversal, the appeals court explained that when determining whether a working condition is abnormal, the frequency of its occurrence in the specific industry is considered. The court pointed to the evidence presented by the employer that there had been 99 robberies of its southeastern Pennsylvania retail stores since 2002, which equates to 15 robberies per year or more than one per month. Additionally, there had been four retail liquor store robberies in close proximity to Mr. Kochanowicz's store within just weeks of the robbery in this case. In its decision the court held that given the frequency that the employer's stores had been robbed and the proximity of the recent incidents, robberies of liquor stores are a normal condition of retail liquor store employment in today's society, and the Board erred in holding otherwise.

The court's holding that enduring a robbery is a normal working condition was surprising given the OSHA requirement for employers to furnish employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." If an employer has reason to know of possible workplace violence (e.g., threats, intimidation) but does nothing to protect its employees, OSHA may impose civil fines and penalties of \$5,000-20,000 per violation, depending upon the seriousness.

Third Party Recovery

An essential element of every claim investigation is the determination of the liability of any third party. When a workers' compensation injury occurs as a result of third-party negligence, the injured employee has the right to sue for damages in civil court. The employer or insurance carrier may also have a subrogation interest – a right of recovery against the negligent party.

When the claim involves workplace violence, examples of third parties that may be found negligent are:

- **Perpetrator** - The perpetrator or their estate may be sued for general negligence.
- **Contract security companies** - Employers often hire security companies to protect their employees. An employee may have a claim against the company, if there was negligence on the security company's behalf that resulted in harm to an employee which could have been prevented.
- **Commercial landlords or management companies** - Victims of workplace violence may assert claims of negligence and inadequate security against commercial landlords and management companies.

It is important to recognize third party negligence and aggressively pursue recovery throughout the claim. Failure to identify potential third party liability is a missed opportunity to recover claim costs.

Conclusion

If you are assigned a claim involving workplace violence, below are final recommendations for handling:

- When conducting the investigation, avoid making assumptions.
- Be aware of the state laws and any case law in the jurisdiction of the claim. For instance, The Official Code of Georgia Annotated Section 34-9-1 (4) provides "' injury' and ' personal injury' shall not include injury caused by the willful attack of a third person directed against an employee for reasons personal to such employee..."
- Remember that prior to denying any workers' compensation claim, Sedgwick Best Practice [WC04.05](#) requires that the claims team lead review the details of the investigation and evaluation notes to ensure they reflect that a complete investigation and denial evaluation was conducted and document agreement with the decision.
- Sedgwick Best Practice [WC10.05](#) requires that client approval to subrogate against any vendor or third party must be obtained and documented in the claim system.
- Given the sensitivity of these claims, it is important to maintain communication with the client and consider their viewpoint throughout the decision-making process.