

Podcast

Protecting Healthcare Workers Against Violence

By Dorothy Parson McDermott &

January 9, 2024

Meet the Authors



Dorothy Parson McDermott

(She/Her • Dottie)

Principal

317-489-6940

Dorothy.McDermott@jacksonlewis.com

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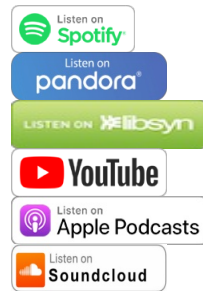
Workplace Safety and Health

Details

January 9, 2024

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Jackson Lewis P.C. · Protecting Healthcare Workers Against Violence



Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast, We get work™, focused solely on workplace issues. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

Staffing challenges have led to increased frustration for patients and their families, and increased risk for healthcare workers safety, security, and health. Physical violence, harassment, and other threatening behavior against healthcare workers is a genuine cause for concern for healthcare organizations and regulators, leading the Occupational Safety and Health Administration to consider implementing a new workplace violence standard for the healthcare industry.

On this episode of We get work™, we discuss the growing momentum that government agencies and healthcare organizations are taking to protect healthcare workers against violence, and what steps employers can take to plan their strategies and responses if an incident occurs.

Our hosts today are Courtney Malveaux and Dottie McDermott, principals,

respectively, in the Richmond and Indianapolis offices of Jackson Lewis, and members of the Healthcare and Workplace Safety and Health Groups at Jackson Lewis.

Courtney, the co-leader of the Workplace Safety and Health Group, is no stranger to regulatory action. He enforced federal and state OSHA laws as Virginia's labor commissioner before joining Jackson Lewis as a principal in the Richmond office.

Clients, human resources, and management team members appreciate Dottie's sage and practical input as she aligns proposed defense and resolution strategies with business goals and objectives. Courtney and Dottie, the question on everyone's mind today is, how can healthcare employers protect their employees against workplace violence? And how does that impact my business?

Dottie McDermott:

Well, thanks, Alitia. Courtney Malveaux and I are pleased to be here to talk about this really important topic. I know Courtney and I confer frequently on, unfortunately, issues of workplace violence and its increasing in the workplace, generally. First of all, how are you doing today?

Courtney Malveaux:

I'm doing great, Dottie. How are you?

Dottie McDermott:

Good, good. I know this is a difficult topic to talk about, one that our clients want to be prepared for. But at the same time, obviously a very serious issue.

I was looking at some statistics recently, and it's just so shocking. I know we all hear of unfortunate news reports of serious violence occurring in the workplace. But I saw one survey that showed recently, 40% of healthcare workers had experienced workplace violence, and in the past several years. And I was just surprised how predominant it is in the healthcare setting.

Courtney Malveaux:

Me too. And it's become an increasing concern. And one thing that really struck me was, followed by law enforcement and security professionals, that mental health professionals have very high incidents of non-fatal incidents of workplace violence. I saw a statistic around 45 per 1000 in a year.

So it's something that it's very real. And OSHA is looking at the safety, and security, and health of workers. And health workers are no exception, and they are definitely experiencing some difficult times.

Dottie McDermott:

Yeah, absolutely. I saw, I think, a similar report by the US Bureau of Labor Statistics. They, as you know, issue an annual report about injuries and illnesses at work. And I saw that days away from work for healthcare and social sectors, 13% of those days were a result of workplace-related violence. So that was a

staggering number.

Courtney Malveaux:

Well, there's a number of things that are being done on this front, but it's a developing picture. And I know you kind of looked at this from a perspective of what's happening in some of the states. Would you like to just kind of tell us what's happening with developing law in this area?

Dottie McDermott:

Yeah, absolutely. And I think that some of the states, there's growing momentum in really addressing this, particularly for the healthcare industry, but also just overall. There are at least nine states already that I can think of off the top of my head that have workplace violence prevention training requirements. Certainly, California is one of those. Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, and Washington State.

I think Texas was also looking into a lot specific to healthcare workers directly, given the predominance of issues in the healthcare field.

And these laws are really forward-thinking. The idea behind it being, let's take a moment when everything is calm and there's no major issues going on, to really plan out what the strategy and response will be like if there's an unfortunate incident at work. And of course, that comes in many different forms. It can be employee-on-employee violence. It could be in the healthcare setting, frustration arising out of staffing challenges.

It could be concerns by patients and families that get upset with respect to the treatment or diagnosis. So, a lot of variables, certainly. And it's good that we have this momentum of states that are really ... I think sometimes compliance is a challenge, but this is one area in particular where you really do want to get ahead of it. And I think that implementing these training requirements and some monitoring is really important.

And something, to the extent we're working with our clients on these issues, I know it's a difficult topic. But at the same time, they're really glad to get this and have a plan in place before anything happens.

Courtney Malveaux:

Dottie, you talk about momentum. Do you think that we will see more of these laws coming online in the states? Do you see more action happening on this?

Dottie McDermott:

I do. Yeah, I really do. It's something that does come up. I do monitor what laws are being proposed across jurisdictions to help with compliance efforts by our clients. And certainly, this one comes up frequently. And it's one that I've seen, it can get alignment among the legislatures of the state. So I do see that it's growing, and it's getting a lot more focus and attention.

I had been looking at how some of the state OSHA departments seem to be also

honing in on the concern that workplace violence has for healthcare employers. Have you noticed that yourself, Courtney?

Courtney Malveaux:

A little bit. Not as much as the state legislatures. So Cal-OSHA, California OSHA, has a standard in place. But really, that's still a developing picture, and OSHA oftentimes is kind of the initiator for a lot of new standards. We saw that in some other contexts like heat in the workplace.

And then where California goes, sometimes other OSHA state plans go as well. Now, only about half the states are what are called OSHA state plans. OSHA, Occupational Safety and Health Administration. And so when we talk about OSHA, usually we're talking about that federal agency. It's housed in DC, it implements law in the various states.

But roughly half the states have their own state plan. In other words, they have their own standards, they can have their own state-specific standards. And so that is one area where I do think we will see more activity in the state plans.

But interestingly, OSHA's looking at a potential standard on this for healthcare workers nationally, but we don't have one now. And so, when OSHA doesn't have a standard in place for a particular hazard, then it does have under the Occupational Safety and Health Act, it's called the General Duty Clause.

And basically, the general duty clause says, okay, I have several volumes of standards sitting right here on my shelf. And if you have insomnia, this is the perfect way to cure it, Dottie. So I have some standards I could send you anyone else if you have problems sleeping.

But for anything that is not in those volumes of specific standards, it has general duty clause, which requires under the OSH Act that employers must provide employment, and a place of employment, that is free of recognized hazards. Now, I know that sounds amorphous, but it's kind of meant to be a catchall for all those things that OSHA has not yet gotten around to creating a standard for in the last 50-plus years. But might get around to doing.

But OSHA standards do often come at a glacial pace. There are standards that have taken years. And even, yes, decades to create. And you know what? There's so much whiplash between administrations. And sometimes a standard is proposed or thought about, but doesn't see the light of day, and then you have a new administration, and there you go.

On this one, the current administration is looking at a potential standard on this. But in the meantime, we have that General Duty Clause. And OSHA did take the step of recognizing violence in healthcare settings as a significant occupational risk. So that's something that OSHA has observed, and has at times used general duty, or at least kind of pulled it out as a potential basis for citation for workplace violence in healthcare settings.

And when OSHA does that, and it doesn't have a standard in place, it does have guidance. If you ever want to know where OSHA's going, take a look at some of

the guidance. And that may give you an idea as to what the rule-makings may propose. So there's some guidance exactly on this.

Dottie McDermott:

Courtney, I've seen a couple of decisions recently too, in the past several years especially, where OSHA's general duty clause has been applied in litigation for cases involving healthcare industry in place, specifically related to workplace violence. So that's certainly spilling over to courts. And to the extent there isn't a state law issue or the local or state OSHA has any type of regulation. Certainly, I've seen the general duty clause addressed in the various cases.

Courtney Malveaux:

But they hate to do it.

Dottie McDermott:

Yep.

Courtney Malveaux:

And especially their attorneys at the solicitor's office hate to do it, because the burden is higher. And so there are other elements of proof they have to establish if they use general duty.

And I'll tell you, in a previous life, about 10 years ago, I headed up a state plan. I was commissioner of labor in Virginia. And so I had been presented with scenarios when I was asked to use general duty. And there are those who may use it more liberally, some who may be a little bit more cautious in the use of general duty. It really depends on the administration.

And as they say, personnel is policy. The people who are in charge have a whole lot to do with how aggressively they may use the law. I will say though, in the meantime, there is helpful guidance. Generally, if employers are following guidance, then they're putting themselves in a good position.

Dottie McDermott:

Yeah. Is there something specific then, to healthcare and other similar type of workers?

Courtney Malveaux:

There's some. And I'll just speak generally, just because our time is short. And we can also look back at what OSHA has viewed as healthcare providers. And so of course, that includes hospitals. And OSHA has been specific in saying that, okay, well, we'd like to see a comprehensive violence prevention program from hospitals.

And by the way, Dottie, when it comes to OSHA, if it isn't in writing, it doesn't exist. So if you don't have a written comprehensive violence prevention program, especially for a hospital, you really should have one. And I will tell you that if you have plans like that in place, and OSHA opens an inspection, the

inspectors will tend to look at you much more favorably if you have those kinds of plans in place. And also if you train employees on them, and you enforce them, and take steps to identify when people are not following that program.

It's a little sticky to come up with a template that applies across the board. OSHA tends to want to see risk factors addressed, which vary from one facility to the next, which can vary widely, even within a hospital from one unit to the next.

And so OSHA wants to see multidisciplinary committees that may include direct care staff, if you have unions on site to include them. You want to include management and non-management employees. And so having employee engagement, that is kind of the catchphrase that OSHA loves to use. They want to see engagement of managerial, non-managerial, union, non-union. Employees from across the board who are identifying those particular risk factors, and specifics, and how you address them.

Dottie McDermott:

Yep. That makes a lot of sense. And in your experience, do you tend to find that a lot of employers are prepared, or is it still something that you're getting requests for counsel on fairly frequently in preparing those plans?

Courtney Malveaux:

Dottie, to prepare for this, I didn't have to look beyond my desk. I have a stack of employers that are looking to put together plans exactly like this, dealing with workplace violence. And some of them are healthcare and some are not.

There's that, and there's also the flip side of this. Which, it gets a lot of attention, especially when an incident breaks out. But there are emergency action plans and active shooter plans for employers. And I will tell you that hospitals, healthcare employers, they're in a particularly vulnerable place.

And so you may have, they're open largely to the public. You have a lot of traffic coming through. Sometimes you may have patients or others coming in as a result of violent situations that may have occurred elsewhere, but sometimes that comes in.

So the employers that I'm dealing with right now are looking exactly at, okay, what kind of guidance are we getting from the Department of Homeland Security? What kind of guidance are we getting from FBI, other agencies, industry partners, to try to put together these emergency action plans and active shooter guides? In addition to what we traditionally have thought of as workplace violence in healthcare.

Dottie McDermott:

And falling off the heels of the pandemic, I was also surprised to see some statistics where, of course, the epidemic itself, given the staffing shortages and the significant increase in need, resulted in a higher amount of workplace violence. So turning to the infectious diseases aspects too, are you seeing that

type of issue addressed in these plans now?

Courtney Malveaux:

There is. In fact, our experience with Covid is enlightening many of us in terms of how OSHA's looking at healthcare. So two points on that, and the first one that I made was that when we think of healthcare, maybe we might think of hospitals.

OSHA, when we were dealing with Covid, had a standard for healthcare. And healthcare was to define not only to include physicians, nurses, but also technicians, clinical lab workers, first responders, maintenance workers, security and administrative personnel, social workers, food service, housekeeping, mortuary personnel. The list of employees and settings that are called healthcare by OSHA was really expanded in ways that, a lot of folks were caught off guard.

And that arose during Covid, when we had that Covid standard. So that was one thing we learned from that. And yes, you're right, a little bit of a separate topic, but yes, from Covid, OSHA is dusting off and looking at a potential infectious diseases standard.

We may see that rolled out, we'll see. It was proposed initially by the Obama administration. There was no activity during the Trump administration. But now the Biden administration, especially after our pandemic experience, is really looking to put forward together infectious diseases standard. And that's something that will be coming down the pike.

Dottie McDermott:

So my understanding then overall is, OSHA is really making workplace violence prevention one of its priorities. If it were to make a rule, what would that look like? How long would that process take, and when would we expect to see some publications of that?

Courtney Malveaux:

It could take years. And pretty good about keeping cards close to the vest in terms of timing and what might be in a standard. But a lot of the things that we saw in recent standards that were put forward, I think you'll see. And of course, there's always a written plan, that's always something that they want to see.

They want to see training on it. They want to see that employers are taking steps to use controls to address a hazard. And so, OSHA has what it calls this hierarchy of controls. And so the first thing it looks to is trying to eliminate a hazard. And so that might be finding ways to prevent violence from occurring to begin with.

And then second, after elimination, it may look to engineering controls. Which is, okay, what kind of structural barriers can we put in place? Or how can we structure our rooms or facility and ways to reduce the possibility or the exposure to violence?

And then after that is what are called administrative controls. So who knows? I mean, it could be things like how you schedule things, or how you prepare people, or training. Or those types of things that we do that are not physical things that we do, but ways that we try to administratively address a hazard.

So I think OSHA will be true to itself, and follow many of the guide post it has in other standards. And I think we'll see something like that in a standard that comes forward if it does.

And again, who knows? I hate to be political, but there's this seesaw at OSHA. And so from one administration to the next, the emphasis and the regulatory aggressiveness of OSHA can change just like that, from one administration to the next. So all I can say is, keep your seatbelt on Dottie. And let's see where it goes.

Dottie McDermott:

Absolutely. Well, I know we'll all stay tuned and posted for that. And if they were to issue some type of new rulemaking, there'd certainly need a notice and comment period, right? So even if they were to get something out, there'd be time for everyone to look at that and weigh in.

Courtney Malveaux:

Absolutely. We'll have a time to comment on it. And the cast of characters that will come in and comment on the pro-regulatory side and the less-regulatory side, I'm sure we'll see that. You never know. And sometimes OSHA puts forward a standard and it's tied up in the courts for a while as well.

But if I could end on this, Dottie, I was wondering if there's anything in your crystal ball?

Dottie McDermott:

Well, we were talking about momentum earlier. The fact that more and more states are implementing training, record keeping requirements and incident log requirements. I think that's a positive development really, even though I know compliance can be such a headache for employers. This is one area where you really do want to push your organizations to be ahead of the game, and be prepared in a situation like this.

Another element that I've seen employers use to their advantage is, when they do get rise of an employee to employee situation, to doing those prompt investigations. And if necessary, utilizing some states have the ability for employers to move for a restraining order themselves, setting parameters with respect to incidents that might be developing, which could really help cool down situations.

So I think I've noticed an increased trend in that. And it's, I think, avoided a lot of issues. So otherwise, other than additional momentum in the states as others consider training requirements, I think that is a direction that will continue. Because that's one area where everyone can agree on.

First of all, no one wants any instance in their workplace. But two, to the extent someone's responsible for helping address those problems, having a plan and an outline to get that done, and getting buy-in within the organization, I think is a positive element. So I know a lot of our clients are definitely even considering it, of course, when they're not required to.

Courtney Malveaux:

Sure, sure. Yeah.

Well, I'll just add one final thought, which is there's a conference for the American Bar Association. All the OSHA lawyers, people, me and everyone else just like me, we all get together once a year and we powwow with the Assistant Secretary of OSHA, Secretary of Labor in charge of OSHA, Doug Parker. Who hails from California. He headed up the California State Plan, and all the other OSHA brass. And so it wouldn't surprise me if we see some elements of the California plan at OSHA.

And also, there are a couple of things that they really emphasized. One was a heavy emphasis on mental health of workers, and OSHA has guidance on that. And so there's a lot of focus on that. And especially, there are workplace suicides, unfortunately. As well as violent incidents directed at others.

So there's the mental health aspect, and a lot of focus on vulnerable workers. And so the vulnerable worker in this context could be someone who might have a disability, maybe undocumented workers, lower-paid workers. Workers who are maybe patient-facing or public-facing that may be exposed to hazards that may arise from those interactions.

So it wouldn't surprise me if we see a push on this. And it wouldn't surprise me to see if we move in that kind of a direction. So we'll see.

Dottie McDermott:

Absolutely. Well, I always am interested in your perspective. You just know so much about OSHA. And yeah, we'll keep tabs on these developments and see what comes out to play. So that's some interesting perspective on Cal-OSHA and what we might see here moving forward. So thanks for taking time out, Courtney, to talk with me. I really appreciate it.

Courtney Malveaux:

Sure. Thank you, Dottie.

Alitia Faccone:

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