

# LEGAL NOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

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## Violence in the Workplace

Virtually every week we read or hear news accounts about violence in the workplace. Statistical evidence supports the contention that violence is playing an increasingly prominent role in the workplace. For example, in the United States, homicide is the second leading cause of death in the workplace. For women, it is the leading cause of workplace fatality. Everyday in the workplace, three people die from violent assaults and six more are injured. One out of every six violent crimes in the United States occurs at work.

Not surprisingly, violence in the workplace has led to a host of claims against employers. The victims attempt to establish liability against an employer for the violent acts of the employer's employee.

Traditionally, an employer could not be held responsible for the criminal or intentional acts of its employee. One exception to this doctrine has been created where victims have shown that an employer's act or failure to act deprived the victim of his or her federal civil rights. Another exception is when the employer was negligent in his or her hiring practices. Since federal civil rights litigation primarily involves state or local governmental employers, our focus will be on the alleged negligent hiring practices of private employers.

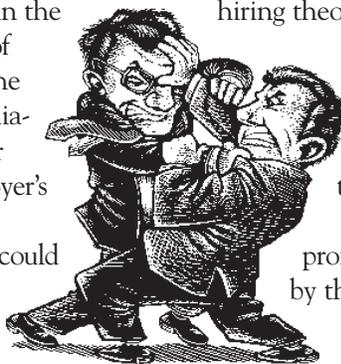
Typically, victims of violence seek to impose liability against employers for negligent hiring, retention and supervision of employees. Under each of these theories, the victims must establish that but for some negligent act, the employee's violence could have been prevented.

### Negligent Hiring Claims

A negligent hiring claim arises when an employer fails to exercise ordinary care in its hiring practices. To prevail on a negligent

hiring theory, an injured victim must show:

- 1) there was an employment relationship between the entity sued and the attacker;
- 2) the attacker committed a tortious act;
- 3) the negligent hiring was the proximate cause of the harm done by the employee-wrongdoer; and
- 4) the employer knew or should have known that the employee was



potentially dangerous.

To rebut a negligent hiring claim, an employer must show that it conducted a reasonable and adequate pre-hiring background investigation. The scope of the pre-hiring investigation is usually related to the degree of risk a potential employee poses to a third-party. For example, a security guard poses a greater risk to third-parties than a secretarial assistant. Therefore, an adequate investigation of a security guard might include a criminal background check. In contrast, an employer's decision not to incur the additional expense of a criminal background check for a secretarial assistant might be considered reasonable.

However, an employer must be aware that federal civil rights statutes safeguard the rights of citizens who are members of a minority group, disabled or veterans of the armed services. These statutes might become important if the employer excludes someone from

## BUYER AND SELLERS: Use Simple Contract Language

**B**uying and selling goods, ranging from complex computer management software programs to quarter-cent widgets, happens every day. The total value of the goods bought and sold on any one day undoubtedly reaches into tens of millions, if not hundreds of millions, of dollars. Buyers and sellers typically use their own standard forms, with long lines of fine print on the reverse side, to set out terms and conditions protecting their own interests should anything go wrong.

It is not unusual, however, for a single transaction to include both a purchase order signed by the buyer and a sales order signed by the seller; with neither party signing the other's document. This leaves the parties in the seemingly odd position that they have paid money and received goods, i.e., they have gone ahead with the heart of the deal, without having a single written contract saying exactly what the deal is. Rather, there are two versions of one transaction. If the deal sours, then it could be "the battle of the forms" that determines the winner and loser.

This business practice is so common that there is an elaborate body of law, centered on the Uniform Commercial Code, that governs what to do when a dispute arises. The code guides

parties, and directs courts, in determining what contract language actually controls the dispute at hand. Unfortunately, even with the code, the law cannot predict every twist and turn that can arise in a business transaction; and year after year, the courts are faced with new cases and how to resolve them under the code. This inability to anticipate each unique problem calls for strong, but uncomplicated, pre-emptive measures.

Your business partners are inevitably going to include terms and conditions in their purchase or sales forms that you would never agree to. Risks, both anticipated and unforeseen, lay in these terms if they can ever be used against you. If you want to limit the potential application of those adverse terms and conditions against you, there is a simple, yet powerful, weapon available. Include language in every one of your forms making clear that you object to each and every term and condition that is not contained in your purchase or sales order. This is one way to make yourself a winner in the battle of the forms.

There are other basic steps that you can take, in advance of problems arising, to protect your business when dealing with purchase and sales forms. Have an attorney review your existing forms to make sure that your business is as secure as it deserves to be.

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## Real Estate Taxes are Coming Again

**F**ineman & Bach, P.C. has been extremely successful in obtaining dramatic reductions in real estate taxes for its clients. We have represented some of the largest owners of real estate in the Delaware Valley and have achieved sizeable reductions in the market valuation for their real estate taxes. In some cases, it has been necessary for us to litigate these matters after representing clients before various boards of commissions throughout the metropolitan area.

However, in many cases, we have been able to strategically negotiate a reduction in these taxes with the administrative personnel of the boards of commissions. We have been able to achieve these results by actively working with professional appraisers, with whom we have long-standing relationships.

Your property is usually evaluated on

three bases:

1. Cost approach
2. Comparative Sales approach
3. Income approach

The cost approach determines how much it would take to rebuild the entire property. This approach is rarely utilized because it is usually too costly to rebuild an income-producing property.

The income approach is used more frequently. Under this approach, we total the revenue from the property less its expenses. From those figures, we determine a fair rate of return for the property. Ultimately, that figure helps us determine the property's fair market value.

The boards of commissions most frequently use the comparative sales approach. Under this approach, the boards compare the sales prices for properties located in the same geographic areas. The boards also consider the manner in which comparable properties are used. From this analysis the boards will determine the fair market value of your property.

None of these methods can be utilized

without help from an attorney. Our firm is flexible in its approach to handling these matters. We can handle these cases on a

contingent fee or an hourly basis.

You should contact us quickly if you believe that there is any chance that your property might be overvalued for real estate tax purposes. You should also be aware that the taxing authorities are now in the process of reevaluating properties and will be sending notices to you shortly. If you receive a notice increasing the market valuation of your property, increasing its taxes, or if you believe your real estate taxes are too high, contact us immediately.

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## **Violence in the Workplace**

employment solely on the basis of information discovered during a background check, if that information is not relevant to the job responsibilities.

### **Negligent Retention Claims**

Employers may also be held liable for tortious acts of their employees under a negligent retention theory. Under a negligent retention claim an employer does not become aware of the employee's history until after the individual is hired. Once the employer becomes aware of the employee's history, an employer can be found liable where information about the employee's past would have been relevant in preventing the violent act upon a third party. To avoid liability, an employer, upon learning of information that could lead to a potentially dangerous situation, must act quickly to take reasonable measures to prevent future harm from occurring.

### **Negligent Supervision**

Negligent supervision, like negligent hiring or negligent retention, requires the victim to establish that the employer had knowledge of the employee's violent tendencies and failed to adequately supervise that employee. To successfully avoid liability under this theory, an employer should take reasonable care to supervise its employees while they are acting on its behalf.

### **Insurance**

Often, employers purchase employment liability insurance to protect themselves from claims arising out of violence in the workplace. If you do have an employment practices policy, please be sure to read it carefully. These policies contain exclusions which might deprive you of insurance coverage under certain circumstances. For example, many policies exclude any coverage for intentional acts. Whether an incident will be covered depends upon the policy language.

It is prudent to review these issues and all your hiring practices with your attorney.

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## **Ten Ways to Know When it is Time to Have Your Estate Planning Reviewed**

1. **You never finished your estate planning in the first place.**  
Since you can't win the lottery without buying a lottery ticket, similarly until you sign your will and other estate documents you will not achieve your estate planning objections.
2. **You have had a sudden increase or decrease in your family asset value.**  
Since asset value has significant impact on your choice of estate planning techniques and documents, any substantial increase or decrease should be followed by a call to your attorney.
3. **You have decided to buy more life insurance or to make changes to your existing life insurance policies.**  
Before you complete the changes, call your attorney. Insurance is an important part of the estate plan.
4. **Fortune has smiled upon you, and you now have more children or grandchildren.**  
Call your attorney and discuss the need for changes to your estate documents.
5. **Your divorce has finally been granted.**  
Although your domestic relations attorney may have some good ideas for you regarding your estate documents after your divorce, don't forget to call your estate attorney.
6. **You are moving to another state.**  
The laws of each state are different with respect to estate planning. Call your attorney and see if he can recommend an estate attorney in your new home town.
7. **You are selling your business.**  
Although asset value has an important impact on estate planning choices, asset composition is also important. Converting an illiquid ownership interest in your business into cash or marketable securities is a good time to call your estate attorney.
8. **Someone has died who is named in your will as a beneficiary or a fiduciary.**  
Once this happens there is no reason to wait to make the appropriate changes to your estate planning documents.
9. **You are preparing to go into a new business venture.**  
In this era of innovative Dot Com companies starting from an idea and exploding into public companies worth millions or billions of dollars, estate planning at the company's birth can be incredibly advantageous to the principals of the business. Competent estate planning, even before any seed money is raised, will result in huge family tax savings.
10. **You can't remember when you last had your estate reviewed.**  
Generally, it is a good idea every five years or so to have your estate reviewed. Laws change and ideas change, and you and your attorney may come up with some wonderful new ways to save your family from paying extra taxes. Your estate attorney is an integral part of your financial planning. Keep his or her telephone number handy.

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# Why You Need an Attorney When Settling an Employment Claim

**Y**ou discharge a 45-year-old employee because of unsatisfactory performance on the job, and she threatens to sue you for “wrongful discharge.” After some discussions, you are able to work out an agreement with the employee. You agree to pay her a month’s severance pay and to give a good reference to potential future employers. You are pleased that you have been able to work out this deal without having to call your attorney, and you write a check to the former employee and wish her well. Maybe you even write up a release based upon one you have around from a prior matter. Have you just made a costly mistake?

In this seemingly ordinary scenario there lie some traps for the unwary. Will you soon be notified that the employee has taken her severance pay and then filed an age discrimination charge against you with the EEOC and the Pennsylvania Human Relations Commission? You can save yourself time and expense by having your legal counsel prepare a proper release so that the former employee cannot come back and sue you later. Why isn’t it a good idea to handle

these matters on your own?

The answer is that there are a number of federal and state laws that apply to releases in employment law matters. Additionally, courts’ interpretation of the laws are always subject to change. This means that an old release may no longer be valid, or it may just not apply to the situation you are currently facing.

For example, the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA) may come in to play when the discharged employee is over 40 years of age. These Acts contain specific provisions which must be included in any release if you want to prevent the employee from filing an age discrimination claim against you. The Supreme Court has held that a release can have no effect on an employee’s ADEA claim unless the release complies with the requirements of the OWBPA.

The OWBPA requirements are numerous and technical. For example, if you intend to have the employee waive any claim based on age discrimination (a good idea if you are discharging an older worker), the

waiver must be in writing and language designed to be understood by the employee or the average individual. The waiver agreement must be drafted “in plain language” and cannot mislead, misinform or fail to inform the employee of what the employee is giving up. The waiver must specifically refer to rights or claims under the ADEA.

In order to be effective, the release must advise the individual in writing to consult with an attorney prior to signing, and the individual must be given at least 21 days to consider the agreement. In certain cases, at least 45 days must be given. There are other requirements as well.

Employment law can be a minefield for the uninformed. In order to avoid the situation where you thought the matter was resolved, only to have it return to your doorstep, consult your experienced employment law counsel before you settle an employment dispute.

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