

2024 Labor and Employment Webinar Series

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Preventing and Responding to Workplace Violence

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Kara M. Maciel is a Founding Partner and Chairs the Firm's national Labor and Employment Practice.

- Defends employers in federal and state litigation, including matters related to ADA, FLSA, FMLA, Title VII, and affirmative action/OFCCP regulations
- Counsel employers on compliance with federal and state law, including issues related to hiring, discipline, internal investigations, and termination
- Provides training to employers on employment issues, including harassment and retaliation, ADA/FMLA compliance, and labor relations



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Rachel L. Conn is a Partner and Chair of Conn Maciel Carey's California Practice. She is based out of the firm's San Francisco office.

- Rachel's practice focuses on OSH compliance and litigation, including inspections, audits, investigations, and enforcement actions involving Cal/OSHA, fed OSHA, and other State OSH Plans.
- She also represents employers and trade associations in Cal/OSHA and fed OSHA rulemakings.
- Previously, Rachel was a partner and led the national OSHA Practice at an AmLaw 100 law firm.



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DANIEL DEACON is a Partner at **Conn Maciel Carey LLP** in the Labor and Employment and OSHA Practice Groups:

- Represents and advises employers in all aspects of the employer-employee relationship including wage/hour disputes and claims of discrimination
- Reviews and revises employee handbooks and workplace policies and procedures
- Helps employers develop and implement effective workplace policies and safety and health programs.

Agenda



OSHA and Cal/OSHA – Workplace Violence

Employment Law Considerations

Recommendations and Strategies

A woman in a light blue shirt is sitting at a desk, covering her face with her hands in a distressed state. She is looking down, and her hands are pressed against her eyes. The desk in front of her is cluttered with papers and a white coffee cup on a saucer. The background is blurred, showing what appears to be an office or a public space. The overall mood is one of stress and emotional exhaustion.

OSHA and Workplace Violence

Workplace Violence Statistics

- In 2022, about 123,940 nonfatal occupational injuries occurred due to intentional injury by another person
 - Of these injuries, the vast majority occur in service providing industries
 - Specifically, about 80% of them occurred in the education and health services industries
- Per the BLS Census of Fatal Occupational Injuries, of 5,486 workplace fatalities in 2022, 849 ($\approx 15\%$) were from intentional injury by another person and 542 ($\approx 9.8\%$) were workplace homicides
- About 8.1% of workplace fatalities among women workers

Significant Workplace Violence Incidents and Enforcement

- Store in **Chesapeake, VA – Nov. 2022**, manager shot and killed 6 employees
- Grocery store **Grovetown, GA – Oct. 2022**, employee physically assaulted by three people
- University in **Stanford, CA – Oct. 2022**, female employee attacked in office and assaulted in campus building
- Supermarket in **Buffalo, NY – May. 2022**, 18-year-old gunman killed 10 people and injured three others
- Hospital in **Burnsville, MN – Jan. 2022**, patient physically assaults several nurses
- Psychiatric Treatment Center in **MA** – issued almost \$200K fine
- **Smithsburg, Maryland - Jun 2022**, gunman shot three people and injured two more at a manufacturing plant.
- **Half Moon Bay, California - Jan 2023**, a spree shooting occurred at two nearby farms killing seven people.
- **Louisville, Kentucky - Apr 2023**, bank employee opened fire at his workplace, killing five people.
- **Jacksonville, Florida - Aug 2023**, three people were fatally shot by a gunman in a mass shooting that took place at a Dollar General store.

OSHA Defines Workplace Violence

Any act or threat of physical violence, harassment, intimidation or other threatening disruptive behavior that occurs at the workplace (i.e., any location where employees perform work-related activities)

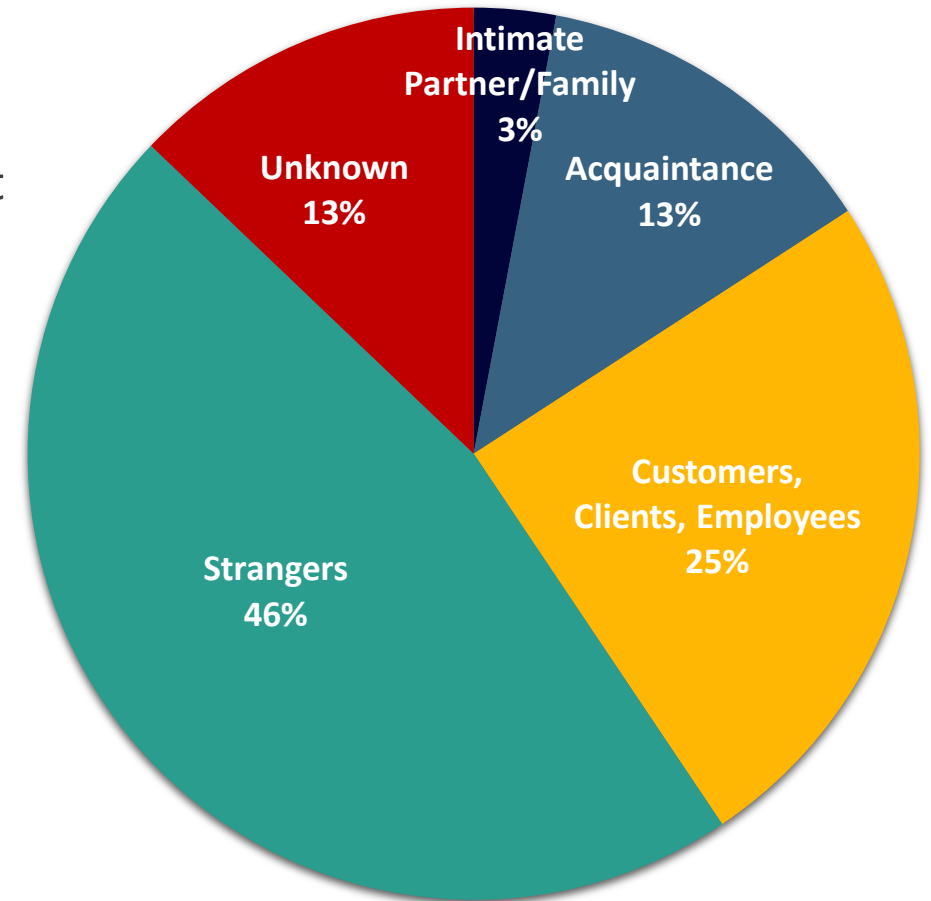
Includes:

- Assault
- Harassment
- Battery
- Intimidation
- Bullying
- Threats
- Active Shooter

Violence and Threats by...

- Employees
 - Disgruntled current/former employee or rejected job applicants
 - Employee/former employee without a specific complaint
- Known Third Parties
 - Spouses, partners, stalkers, etc.
 - Client, patron, vendor or other known 3rd party with or without prior threat
- Strangers
 - Criminal intent (e.g., robbery, gang incident)
 - Irrational connection w/ your company or random target

Workplace Violence – Victim/Offender Relationship (2015-2019)



Workplace Violence Enforcement

- OSHA has no Workplace Violence regulation
- Not having a standard has not stopped OSHA from enforcing
- When OSHA has no specific reg for a hazard, it cites under Sec. 5(a)(1) of the OSH Act (General Duty Clause)

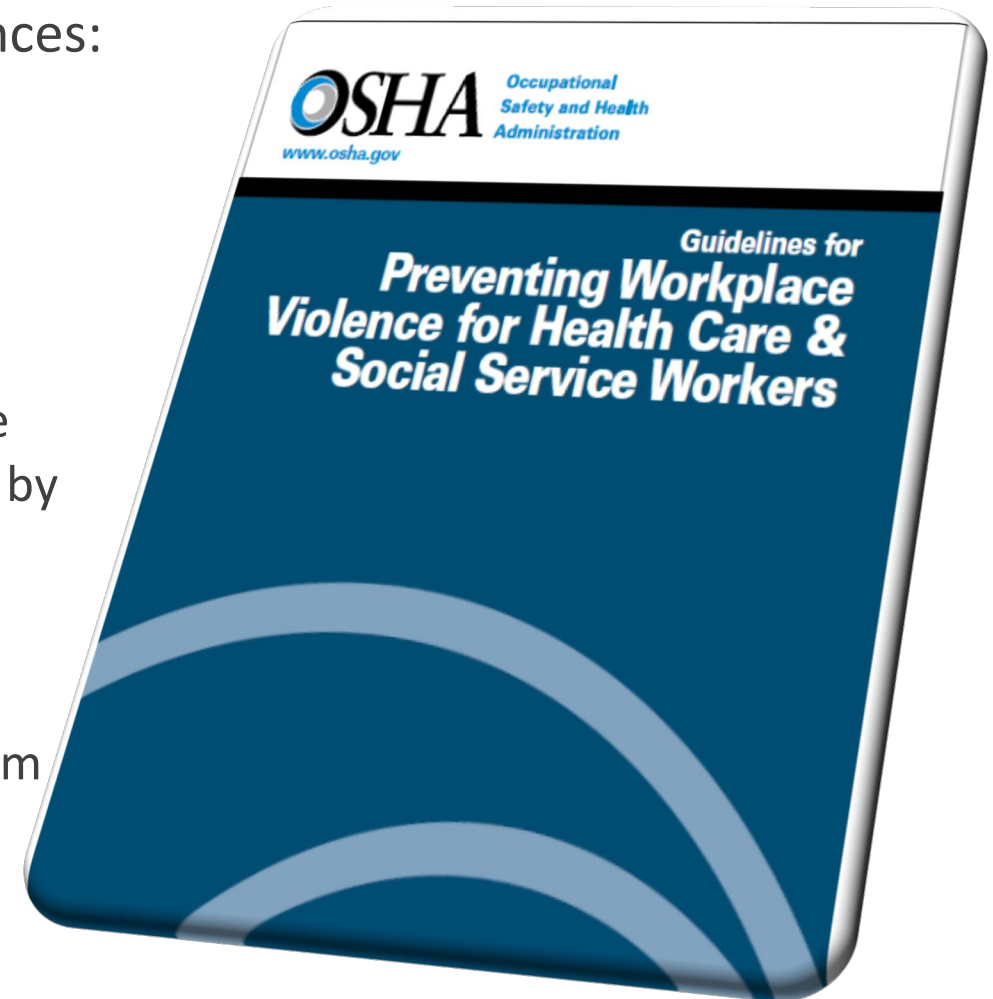
“provide employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm”

- For a 5(a)(1) violation, OSHA must prove hazard is “recognized” by employer or industry



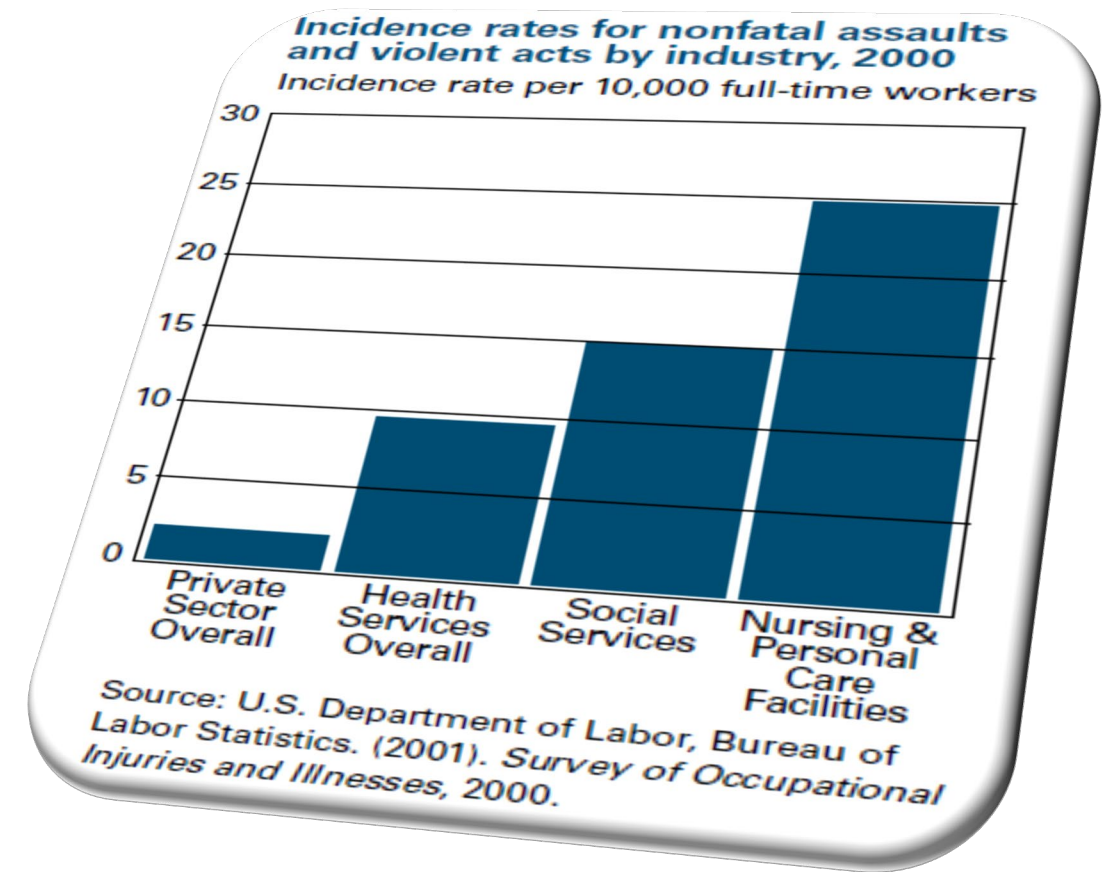
Workplace Violence Enforcement

- To demonstrate hazard recognition, OSHA often references:
 - Industry consensus guidance;
 - Employer’s own policies;
 - Employer’s injury and illness data or incident reports; and
 - OSHA’s own guidance (i.e., employer knew or should have known about a hazard in its guidance, and failed to abate by recognized, feasible methods also in the guidance)
- Increased use of OSHA’s guidance because:
 - Producing guidance requires no notice to or comment from stakeholders; and
 - No economic feasibility analysis required



Recognized Hazard

- Hazard of workplace violence is well-recognized in some industries (e.g., healthcare, late-night retail)
- OSHA's WPV Guidance
 - Workplace Violence Fact Sheet
 - Industry-specific Violence Prevention Guidelines:
 - Taxi drivers
 - Healthcare/Social services
 - Late night retail establishments

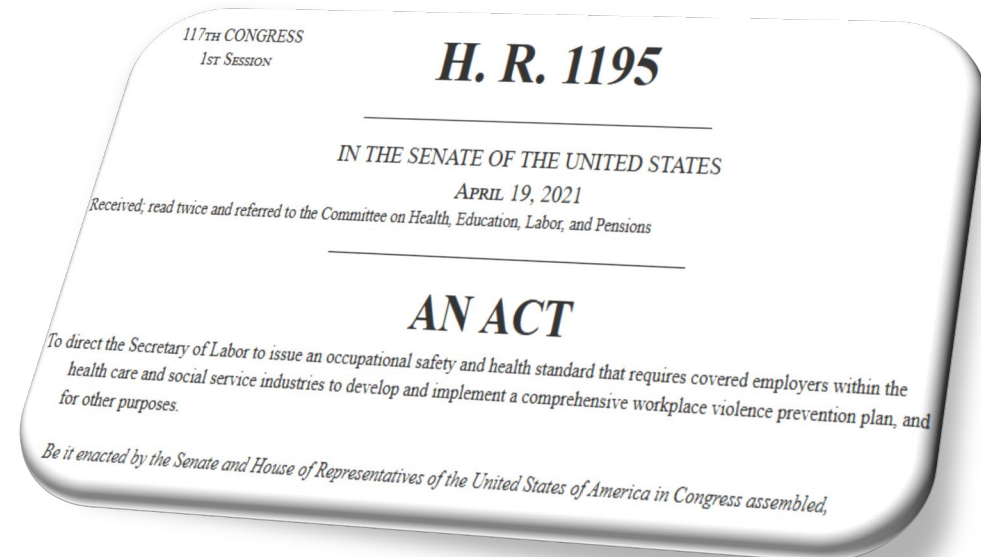


Fed OSHA WPV Rulemaking

- July 2016 – AFL-CIO, Calif. Nurses Ass’n, and other labor groups petitioned fed OSHA for Standard requiring WPV prevention program
- Dec. 2016 - OSHA issued RFI with responses due April 2017
- RFI says OSHA is assessing need for *“a standard aimed at preventing workplace violence in healthcare and social assistance workplaces perpetrated by patients or clients.”*
- Jan. 10, 2017 – On the last day in office of Obama’s Assistant Sec’y of Labor for OSHA, OSHA granted the unions’ petition to begin work on fed WPV rule
- Currently, its on the Fall 2023 Regulatory Agenda at the Pre-Rule Stage.
 - Completed SBREFA review in May 2023
 - Re-opened for comment until July 2023
 - No timeline for on next steps

Workplace Violence Rule in Congress

- Congress continues to put some pressure on fed OSHA for WPV Prevention Program standard
- H.R. 1195 was passed by the House on Apr. 16, 2021 by a 254-166 vote
- Known as the *Workplace Violence Prevention for Health Care and Social Service Workers Act* would require OSHA to:
 - Issue an interim final rule requiring employers in health care and social service sectors to develop and implement a workplace violence plan
 - Issue a final standard within 42 months
 - Never came up for vote in Senate



A photograph of the Golden Gate Bridge in San Francisco, California, taken during sunset. The bridge's iconic orange-red towers and suspension cables are silhouetted against a sky transitioning from blue to orange and pink. The bridge spans across a body of blue water. A white horizontal band is overlaid across the middle of the image, containing the main title.

Cal/OSHA Workplace Violence

SB 553 – Workplace Violence

- Signed by Gov. Newsom on September 20, 2023
- All employers are required to establish, implement, and maintain an effective **Workplace Violence Prevention Plan** by July 1, 2024
- **Exempted Workplaces under Labor Code Sec. 6401.9:**
 1. Facilities covered by and that comply w/ Cal/OSHA's Violence Prevention in Health Care std.;
 2. Facilities operated by the Calif. Dept. of Corrections and Rehabilitation;
 3. Law enforcement agencies;
 4. Teleworking employees; and
 5. Workplaces not publicly accessible, w/ < 10 employees present at once, that comply w/ IIPP

SB 553 – Workplace Violence Definitions

- **“Workplace violence”** means any act of violence or threat of violence that occurs in a place of employment
- That includes, but is not limited to:
 1. The **threat or use of physical force** against an employee that **results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress** (regardless whether the employee sustains an injury)
 2. Incident involving a **threat or use of a firearm or other dangerous weapon**, including use of common objects as weapons (regardless whether the employee sustains an injury)

SB 553 – Workplace Violence Definitions (cont.)

- **“Threat of violence”** = any verbal or written statement, including texts, electronic messages, social media messages, or other online posts, or any behavioral or physical conduct that conveys or reasonably could be perceived to convey intent to cause or place someone in fear of physical harm, and that serves no legitimate purpose
 - **“Workplace violence”** ≠ lawful acts of self-defense or defense of others.

Types of Workplace Violence

“Type 1 violence”

Committed by a person who has no legitimate business at the worksite, including violent acts by anyone who enters w/ intent to commit a crime

“Type 2 violence”

Directed at employees by customers, clients, patients, students, inmates, or visitors

“Type 3 violence”

Against employees by current or former employees, supervisors, or managers

“Type 4 violence”

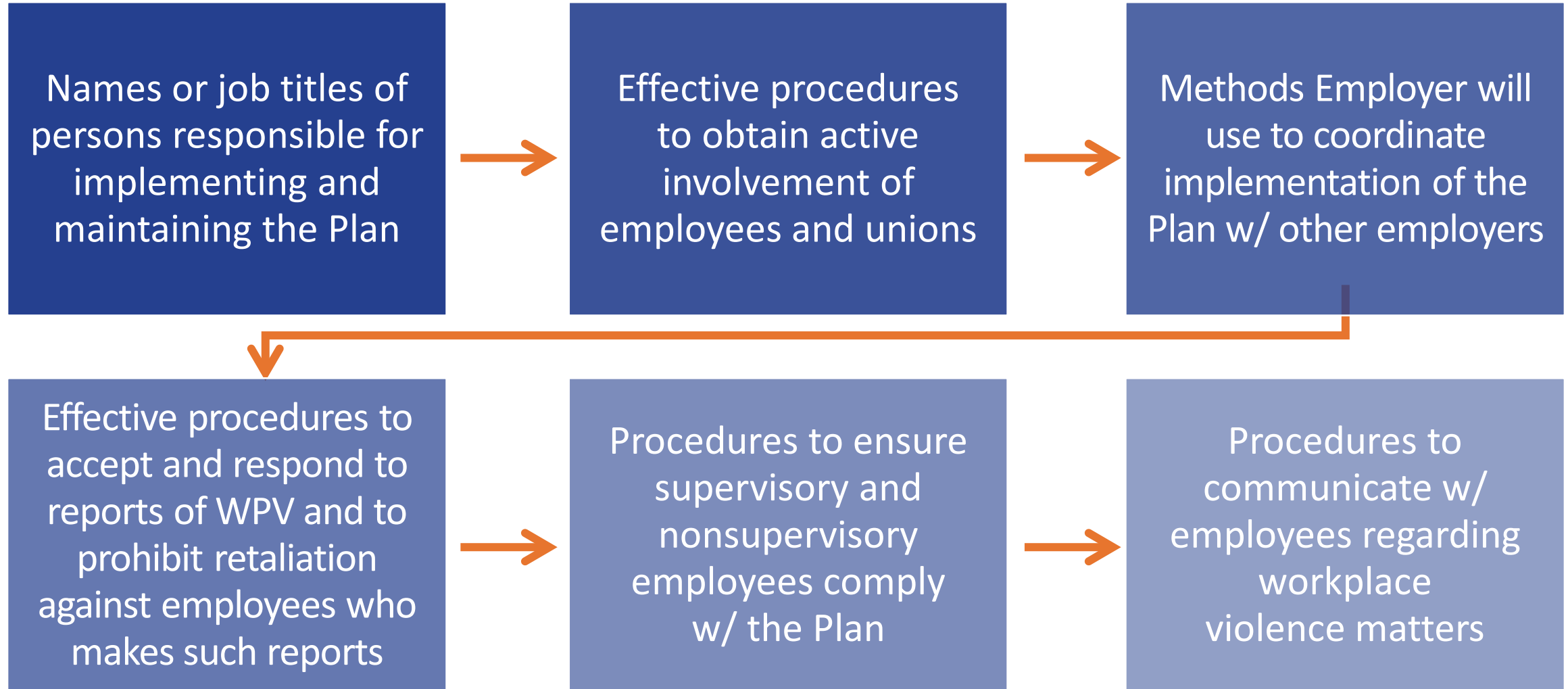
Committed in a workplace by someone who does not work there but who has or had a personal relationship w/ an employee

SB 553 – Workplace Violence WPV Program Overview

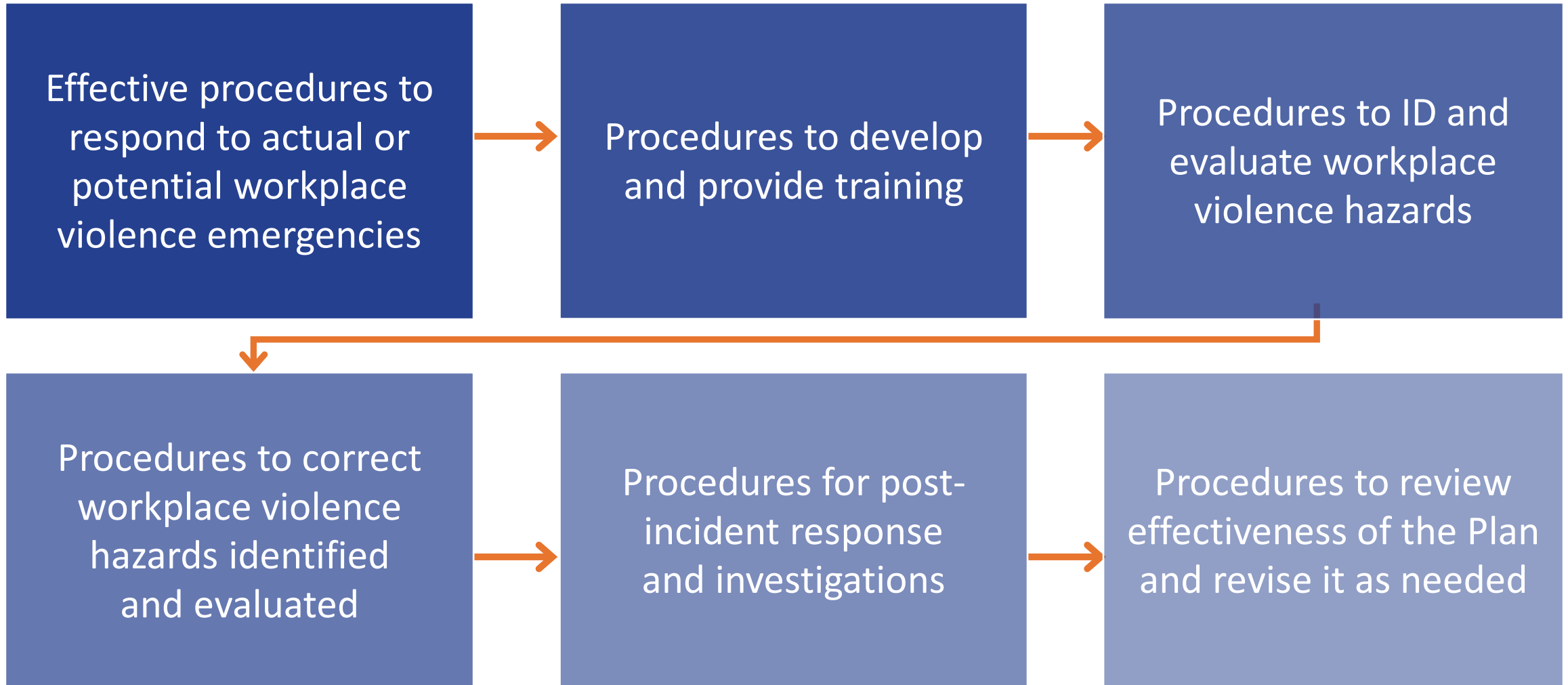
1. Establish, implement, and maintain an effective workplace violence prevention plan
 - May be a part of the IIPP or separate document
2. Workplace violence hazard identification (inspections), evaluation, & correction
3. Violent incident log & investigation
4. Training
5. Recordkeeping



SB 553 – Workplace Violence Elements of Written Plan



SB 553 – Workplace Violence Elements of Written Plan



Violent Incident Log

- Employer shall record information in a Violent Incident Log for every workplace violence incident
- The log shall include the following information:

The date, time, & location of incident

Classification of who committed the violence

Classification of circumstances at the time of the incident

Classification of where the incident occurred

Type of incident

Consequences of the incident

Information about the person completing the Log

WPV Training

- Employers to provide initial training when the Plan is first established and then annually thereafter
- Additional training must be provided when a new or previously unrecognized WPV hazard has been identified and when changes are made to the Plan (may limit to just the new hazard or changes)
- Training events must include an opportunity for interactive questions and answers w/ a person knowledgeable about the Plan

WPV Training (cont.)

WPV Training must cover:

- ❑ The Plan, how to obtain a copy and participate in developing / implementing it
- ❑ Definitions and requirements of the law
- ❑ How to report incidents / concerns to Employer or law enforcement without fear of reprisal
- ❑ WPV hazards specific to employees' jobs
- ❑ Corrective measures Employer has implemented
- ❑ How to seek assistance to prevent / respond to violence
- ❑ Strategies to avoid physical harm
- ❑ The violent incident log and how to obtain copies of records

WPV Recordkeeping

1. Maintain Records of Hazard Identification, Evaluation, and Correction for 5 years
2. Maintain Violent Incident Logs for 5 years
3. Maintain Training Records for 1 year
2. Maintain Incident Investigations for 5 years

Records maintained for items 1-3 must be made available to employees and their representatives upon request w/in 15 calendar days

Employment Law Considerations

A photograph of a desk with various items. In the foreground, there is a stack of two binders. The bottom binder is light blue and has a white label with the words "EMPLOYMENT LAW" in bold, black, sans-serif capital letters. The top binder is grey. To the left of the binders, there is a wooden gavel resting on a dark wooden base. Next to the gavel is a small potted plant with green leaves in a grey pot. In front of the plant is a notebook with a white cover and a blue pen. A pair of glasses is visible in the background, resting on a surface. The background is a blurred image of a desk with a blue and green patterned surface.

**EMPLOYMENT
LAW**

Potential Liability

To employees and third parties

OSH Act General Duty Clause

Negligent hiring
(background checks)

Negligent supervision/retention

To individual employee-victim

Harassment-free workplace

FMLA (fail to provide leave
or retaliate for taking leave)

Retaliation/Whistleblowing

To individual employee-accused

ADA discrimination or
accommodation / Wrongful
termination

Privacy (medical information or
employee monitoring)

Defamation

Impact on Employers

- FY 2021: **21,270 charges alleging harassment** filed with EEOC
- FY 2021: **5,581 charges alleging sexual harassment**
 - About **9.1%** of all charges filed
- FY 2021: the EEOC filed **71 lawsuits under Title VII** – this would include sexual harassment and most other harassment claims.
- FY 2021: EEOC **recovered about \$61.6 million for complainants related to claims of sexual harassment** through litigation and administrative enforcement.

EEOC Select Task Force Findings

Workplace harassment remains a persistent problem that too often goes unreported.

- The least common response to harassment is to take some formal action – either to report it internally or file a formal legal complaint.

There is a compelling business case for stopping and preventing harassment.

- Workplace harassment causes severe pain and suffering to the victims as they experience mental, physical, and economic harm.
- Causes decreased productivity, increased turnover, and reputational harm, all of which affect performance and the bottom line.

EEOC Select Task Force Findings

Leadership and accountability are critical.

- Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment.
- Accountability systems must ensure those who engage in harassment are held responsible and that those who report harassment are rewarded.

Training must change - new approaches should be explored.

- Training is too focused on avoiding legal liability.
- Training should be part of a holistic culture of non-harassment (e.g., workplace “civility training” should be geared towards promoting respect and civility in the workplace).

Duties to Employees and 3rd Parties: Vicarious Liability/*Respondent Superior*

- Generally, no duty to control conduct of another person absent a special relationship (e.g., agency relationship)
- Such relationships exist in employment context (i.e., employee acts as agent for employer for limited purposes)
- Employer has duty to control actions of employees when actions are w/in scope of employment
- Thus, employer may incur vicarious liability for acts committed by employee within scope of employment

3rd Party Claim – Negligent Hiring

- Allegation: employer breached duty to protect employees and 3rd parties from injuries cause by employee whom employer should have known posed a risk of harm and was unfit for job
- **Allegations pertaining to background checks:**
 - ✘ Failure to contact prior employers
 - ✘ Failure to check references
 - ✘ Failure to check for criminal record where such inquires would have revealed history or propensity for violence

3rd Party Claim – Negligent Supervision/Retention

- **Potential negligent supervision claim:** Failing to exercise reasonable care in supervising an employee who threatens or exhibits violent conduct
 - Did employer exercise ordinary care in supervising employee?
 - Was employer’s negligence proximate cause of resulting harm?
- **Potential negligent retention claim:** Employer knew, or should have known, employee is violent or potentially violent, but failed to take appropriate action (e.g., investigation, discharging employee)
 - Constructive knowledge is sufficient to impute liability

Employee Background Checks



- Limitations per federal and state law/guidance
- Arrests versus convictions
- Disparate Impact
- FCRA Compliance
- Beware trending “ban the box” state laws
- Verify employment applications
- Ask for details about job changes on applications and negative info obtained in background checks
- Document everything (including prior employers’ refusal to provide information)
- Consider supplemental background checks during employment

A photograph of two men in business suits shaking hands in a modern, brightly lit atrium with a white, geometric ceiling structure. The man on the left is wearing a dark blue suit and a light blue patterned shirt. The man on the right is wearing a bright blue suit. The background shows a modern building with glass and steel elements.

Recommendations and Strategies for Your Workplace

Realities of workplace violence



Risk factors are almost always present



Leakage, warnings made through comments (intentional or unintentional) can reveal clues to feelings, thoughts or fantasies that may result in violence



Erratic and abnormal behavior is a principal warning sign of future violence



Workplace bullying is often a steppingstone to workplace violence



The path toward violence is an evolutionary one with signposts along the way

Industry Best Practices for Workplace Violence Prevention and Response



- Designate core, multi-disciplinary threat assessment team
- Develop assessment, incident management/reporting, and record-keeping protocols
- Conduct training on recognizing warning signs, domestic violence, hostile terminations, bullying, and pre-attack active assailant behaviors
- Conduct training on reporting obligations and protocols
- Company-wide dissemination of policy and essential information to all employees



... **2024 Employment webinar series** ...

DOL Update: Changes that Will Affect Your Business in 2024
Wednesday, January 24th

Mitigating Cybersecurity Risks from Exiting Employees
Thursday, February 15th

Avoiding, Minimizing, and Fighting Withdrawal Liability
Wednesday, August 14th

Preventing and Responding to Workplace Violence
Wednesday, April 24th

The Changing Legal Landscape of Non-Compete Laws
Wednesday, May 15th

Workplace Safety and Employment Law in ESG Programs
Tuesday, May 28th

New Employee Handbook Laws: Tips for Compliance
Wednesday, June 26th

Mid-Year California Labor and Employment Law Update
Thursday, July 25th

Addressing Whistleblower and Retaliation Complaints
Wednesday, September 25, 2024

2nd Annual Cal/OSHA and Employment Law Summit
Tuesday, October 8th and Thursday, October 10th

ADA Website Compliance Obligations for Businesses
Thursday, October 23rd

Intersection of Artificial Intelligence and OSHA Law
Wednesday, November 13th

The Latest in Employment Discrimination Laws
Thursday, December 12th

the Cal/OSHA Defense Report



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California's Workplace Violence Prevention Law
Thursday, November 9th (2023)

2024 Cal/OSHA Enforcement and Regulatory Update
Tuesday, December 12th (2023)

Preparing for California's Indoor Heat Regulation
Tuesday, January 30th

Top Cal/OSHA Violations
Wednesday, February 21st

Safety and Employment Law Compliance in ESG Programs
Thursday, March 21st

Tips for Responding to Workplace Violence
Wednesday, April 24th

Mid-Year Review of Cal/OSHA Developments
Wednesday, May 22nd

Process Safety Management and CalARP
Monday, August 5th

Preparing for and Managing Cal/OSHA Inspections
Wednesday, August 21st

CMC's 2nd Annual Cal/OSHA and Employment Law Summit
Tuesday, October 8th and Thursday, October 10th

The Intersection of AI and Employment and OSHA Law
Wednesday, November 13th

2025 Cal/OSHA Enforcement and Regulatory Update
Thursday, December 5th

the **OSHA Defense** report



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2023 in Review and 2024 Forecast
Wednesday, January 17th

OSHA Recordkeeping, E-Recordkeeping, and Reporting
Thursday, February 8th

Strategies for Preventing and Responding to Workplace Violence
Wednesday, April 24th

Workplace Safety and Employment Law Compliance in ESG Programs
Tuesday, May 28th

The Impact of New TSCA Regs on OSHA Chemical Safety
Wednesday, June 12th

National and Local Emphasis Programs
Thursday, July 18th

Process Safety Management and CalARP
Monday, August 5th

Unique Aspects of State OSH Plans
Thursday, September 19th

Addressing Whistleblower and Retaliation Complaints
Wednesday, September 25th

2nd Annual Cal/OSHA and Employment Law Summit
Tuesday, October 8th and Thursday, October 10th

OSHA's Hazard Communication Standard Update
Tuesday, October 15th

The Intersection of AI and Employment and OSHA Law
Wednesday, November 13th

12 Ways to Improve Your OSHA Readiness
Wednesday, December 18th

California Workplace Violence Prevention Compliance Solutions

Workplace Violence Prevention Plan

We will develop a customized, compliant written Workplace Violence Prevention Plan along w/ all ancillary documents and sub-policies.

Workplace Violence Prevention Training

We will develop customized training materials and conduct initial interactive training for all affected employees and "train the trainer."

Turnkey and Ad Hoc Services

Scan the QR code below for more info!

Gap Assessment of Related Policies

To ensure alignment, we will perform a Gap Assessment of existing, related policies that intersect with your new Workplace Violence Prevention Plan.

Attorney Consultation Hours

A block of Attorney Consultation Hours to use within a year to help you roll out your new program.



Check Out Our Blogs



Contact Us



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