



# Criminal Activity At Work Can Land Retailers In Hot Water

## Insights

3.01.16

Recent workplace violence incidents have driven some employers to take steps to minimize the risk of criminal behavior at their locations. Whether it is beefing up physical security measures on premises, installing surveillance cameras, or providing basic security training to workers, there are many varied approaches to solving the problem.

These efforts are laudable and serve the primary purpose of keeping employees safe from crime. But when these measures fail, retailers can find themselves on the receiving end of a lawsuit. Injured employees, customers, and other third parties could bring suit and claim you are partly responsible for the damages caused by the criminal behavior.

The outcome of these kinds of legal claims is heavily fact-dependent and often illogical. A recent decision out of Missouri highlights the problems retailers can face.

### **Employee Blames Employer For Ex-Boyfriend's Attack**

On November 20, 2012, an employee clocked out of work and walked to her minivan in her Missouri employer's parking lot, only to find her estranged boyfriend hiding in her minivan with a gun. After they exchanged words, the ex-boyfriend chased her down and shot her in the back of the head. Luckily, the employee survived. Unfortunately for her employer, she later filed a negligence lawsuit against the company.

According to the plaintiff, the employer had implemented several security measures on its premises because of previous criminal activity. Approximately 10 years before this incident, an employee had been kidnapped from the parking lot. Following that event, the employer installed nine security cameras around the property. The company later received advice to reposition those cameras to provide better coverage, but took no action on those recommendations.

At some later point, the employer created an ad hoc security team comprised of members of the workforce. The duties of the security team included walking employees to their cars in the parking lot if an employee reported a concern. As an extra precaution, the company had previously allowed another employee who had expressed fear of an ex-spouse to park in a visitor's spot near the front door in the line of sight of the receptionist.

Also, if an employee reported a fear of domestic harm, the HR Director would obtain a photograph of the potential perpetrator to distribute among employees.

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The employee claimed that she had reported concerns about her ex-boyfriend to the employer's HR team on several prior occasions. On the day she was shot, the employee and the ex-boyfriend had attended a court hearing regarding a protection-from-abuse order against him. When the employee arrived for work, she said she reported the dismissal of the protection order to the HR Director, who allegedly assured her the security team would be notified and would keep an eye out for the ex-boyfriend.

However, the employee claimed in court that the HR Director failed to do as promised. At the time of the incident, no employee was assigned to monitor the surveillance camera feed, which, again, was claimed to be poorly positioned so as to not capture all activity. The HR director also had not provided the picture of the plaintiff's ex-boyfriend to the security team. The plaintiff was not offered the opportunity to park in a visitor's spot, and said she was not told of the security team's willingness to walk her to her car.

### **Jury Finds For Employee, Tags Employer With Massive Verdict**

The jury found the employer negligent and awarded \$3.25 million dollars in damages to the injured worker. While there is typically no duty to protect an individual from the criminal conduct of a third party, the plaintiff successfully argued that the employer had undertaken the duty to protect its employees from domestic violence and then failed to properly perform that duty.

### **Retailers Can Feel Stuck Between A Rock And A Hard Place**

The Catch-22 created by situations like this is that, in some circumstances, businesses may be better served from a legal standpoint taking only very limited security measures or no measures at all. The more steps an employer takes, the more opportunities exist to fail to comply with them. Had the employer not created the security team, for example, it might not have been found negligent.

However, not taking any steps to protect customers and employees, or only taking minimal security action, is not a palatable choice to most businesses. Because most retailers will want to take some action to prevent incidents of workplace violence or other criminal activity, there are several concrete steps you can take that will reduce the chances of harm and also minimize the likelihood of legal liability.

### **Eight Point Plan Of Action**

Here are eight action steps to take in order to best serve your employees, customers, and your legal needs:

#### ***1. Understand The Law***

First, in all areas where you operate, you should determine the specific state laws regarding your duty to provide security for your employees and customers. State laws generally base your duty upon factors such as the foreseeability that a crime may occur and whether the nature of your business presents special risks.

Federal law also controls in this area. Because retailers are often susceptible to armed robberies and other violent crimes, the Occupational Safety and Health Administration has adopted standards for retailers' security procedures. The agency has also issued guidance for employers who handle significant business during the holidays, especially Black Friday, because of the crowd control concerns associated with such major sales events. Become familiar with these standards, which will help inform your process.

## ***2. Implement Your Plan***

Once you understand the legal standards you must follow, apply them to your specific business and develop a security plan to prevent criminal behavior. Consider retaining security consultants and legal counsel to assist with development and implementation.

## ***3. Consider Outside Help***

If you operate in a location known for crime, or you become aware of a credible threat towards an employee, you should retain a third-party security guard to assist as necessary. This additional protection can be brought in permanently or on an as-needed basis.

## ***4. Train To Observe And Enforce***

Once you decide what steps to take, you must monitor and enforce the implementation of your procedures. Doing so will require you to make a significant investment by training store level employees to actually conduct themselves in a safe manner and to carry out safety protocols. In the case discussed above, the company's non-compliance with its stated security measures was used as evidence of negligence. Therefore, the importance of this step is paramount.

## ***5. Distribute Your Safety And Security Plan***

Safety measures should be in writing and distributed to all workers, written in clear and basic language to avoid risk of misinterpretation. One of the difficulties for the employer in the Missouri case was that its safety protocols were not written. The plaintiff was able to claim that the scope of the security measures was greatly expanded beyond what the employer believed it had agreed to do.

## ***6. Consider Arbitration Agreements***

Arbitration agreements could work to reduce the risk of massive damage awards, especially in areas notorious for high jury awards. You should consider entering into them with all of your workforce, adapting them for each state depending on the particular law of that location.

## ***7. Perform An Insurance Audit***

You'll find that performing an insurance audit could be an important step. Some liability policies may exclude coverage for criminal conduct. It is important to have an understanding now about the extent of your coverage so that you aren't surprised in the wake of a tragedy.

## ***8. Don't Overpromise***

Finally, your safety measures should not state or suggest that you have assumed responsibility for areas that are not within your control (such as common parking lots in strip malls). Doing so could cause problems when you are unable to effectively monitor and police those locations.

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