

Terrorism and the General Duty Clause

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The “General Duty Clause”, §5(a)(1) of the Occupational Health and Safety Act of 1970 (“OSHA”) requires that employers provide employees with a workplace that is free from serious recognized hazards that are causing or likely to cause death or serious physical harm to employees. A “recognized hazard” must satisfy three criteria. First, it must be “reasonably foreseeable” that a particular hazard is likely to affect employees in the course of their employment. (An employer is not liable for hazards that are not foreseeable.) Second, the hazard must be: (1) recognized in the industry, (2) recognized by the employer, and (3) obvious. Third, the hazard must cause or be likely to cause, death or serious physical harm to employees.

In the post-9/11 era, many employers have questioned whether the General Duty Clause requires them to protect the workplace from acts of terrorism. Currently, there is no federal or national legislation that regulates the possibilities of terrorist activities in the workplace. In an interpretation letter written by Enforcement Director Richard Fairfax on November 24, 2003, Fairfax stated, “Terrorist acts are not considered foreseeable emergencies that OSHA expects an employer to reasonably anticipate in the workplace. However, if an employer chooses to develop an emergency plan to safeguard their employees from the possibility of a terrorist event, OSHA recommends that they contact the local emergency planning committee (LEPC) and possibly plan exercises with those involved so they understand their capabilities and limitations.”

An interpretation letter written by John L. Henshaw on May 24, 2004, agrees with the Fairfax letter and further advises employers that OSHA has published emergency preparedness guidance available on its web page to assist employers and employees in the planning for all types of emergencies, including terrorist events. The guidance published includes the Emergency Planning Matrix, Emergency Response e-Tool, Anthrax Matrix, Anthrax Health and Safety Plan, and a fact sheet for high-rise building occupants. Thus, under current OSHA interpretation, employers are not required to include the risk of a terrorist attack in their emergency planning obligations; however, due to the increasing number of thwarted terrorist plots directed at targets in the United States, legislation requiring employers to plan for terrorist events is likely to be soon addressed by Congress.



LINKS

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