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Protecting your employees, the public, and
your company: How to prepare for workplace
violence situations in your corporate
environment

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Introduction:

According to the Occupational Safety and Health Administration (OSHA), more than two million cases of workplace violence are reported every year. In 2014, there were 403 instances of workplace homicides.

Shooting incidents from 2014 - July 2017 (see chart 1) have steadily increased totaling 183 events causing approximately 425 casualties and 1,308 deaths. Confirmed terror attack incidents in the United States (see chart 2) have also increased during that same period totaling 36 attacks causing approximately 238 casualties and 144 deaths.

Additionally, per a recent FBI study, there have been 160 active shooter situations in America between the years of 2000-2013. These active shooter situations have resulted in 557 injured victims and 486 deaths. (See charts 3 and 4) These numbers are set to drastically rise following incidents subsequent to the study such as the San Bernardino Inland Regional Center attack and the Pulse Nightclub shooting in Orlando.

Following these events, grieving families and victims often seek restitution by turning to the legal system. In workplace violence situations where the victims are employees, legal claims are filed most frequently against their employers. In cases of an active shooter situation where most or all victims are members of the public, claims are usually filed against the business where the incident occurred, such as a nightclub or movie theater.

Adopting a program that aims to reduce the occurrence of workplace violence, or minimize the effect of active shooters, will not only go a long way towards preventing or reducing the cost of defending against litigation, but may help in avoiding these tragedies altogether.

Chart 1:¹

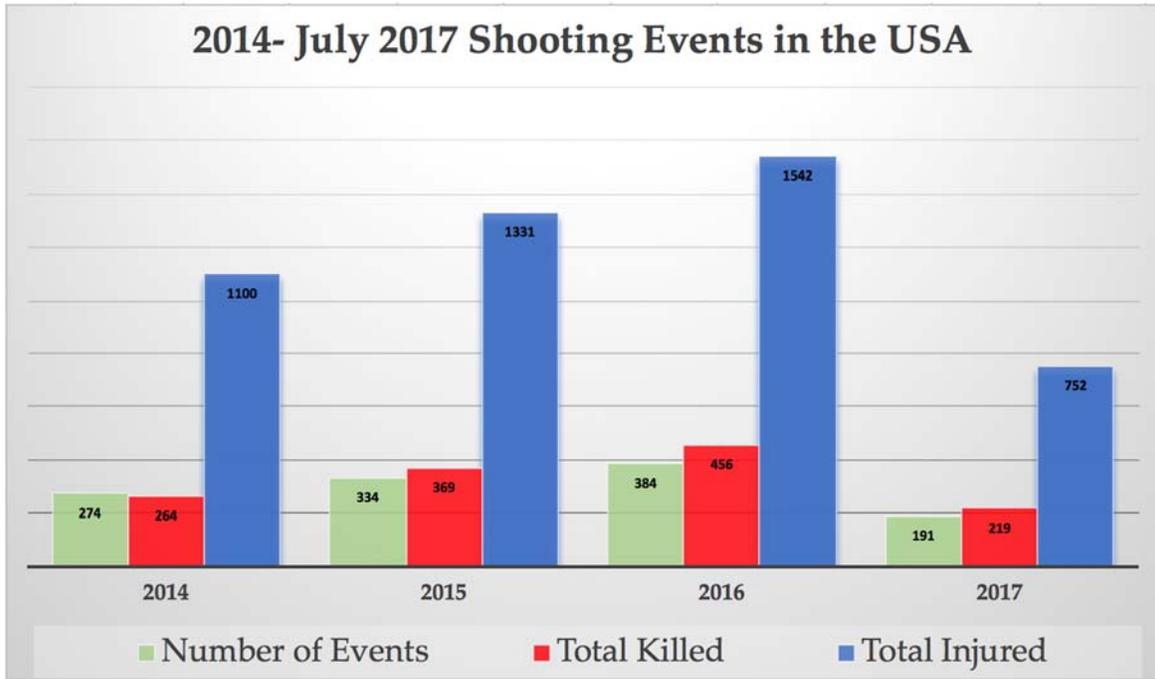
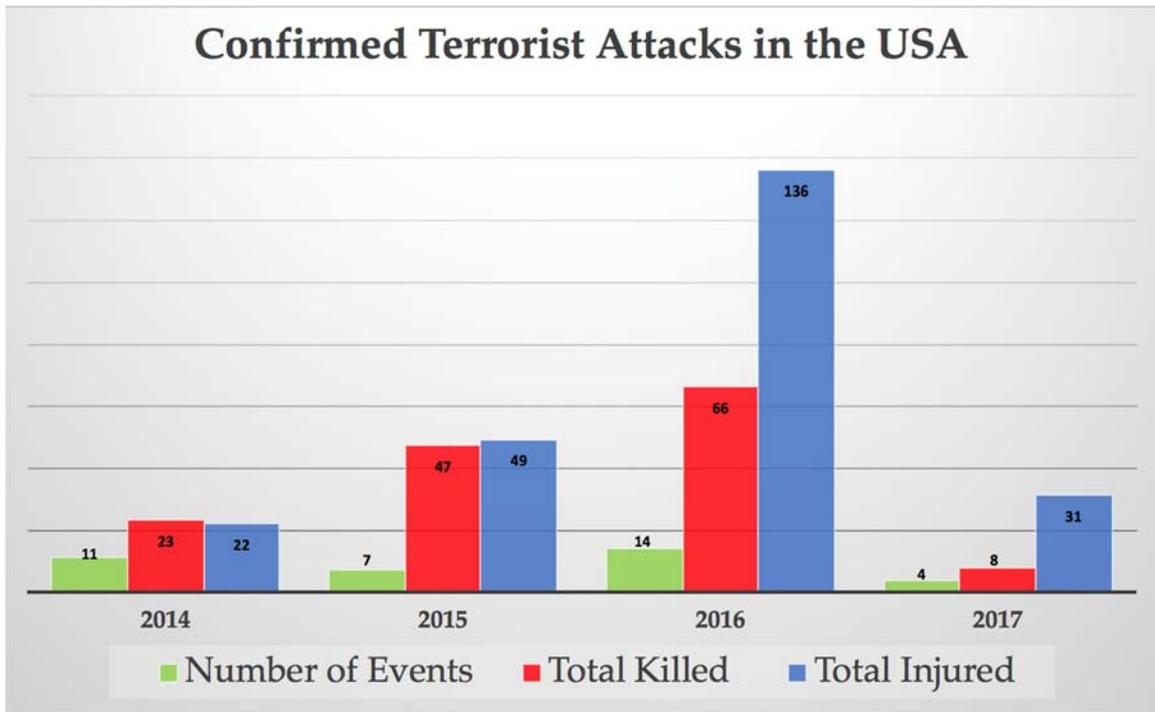


Chart 2:²



¹ <http://www.shootingtracker.com>

² <http://www.johnstonsarchive.net/terrorism/wrjp255a.html>

Chart 3:

A Study of 160 Active Shooter Incidents in the United States Between 2000 - 2013:
Incidents Annually

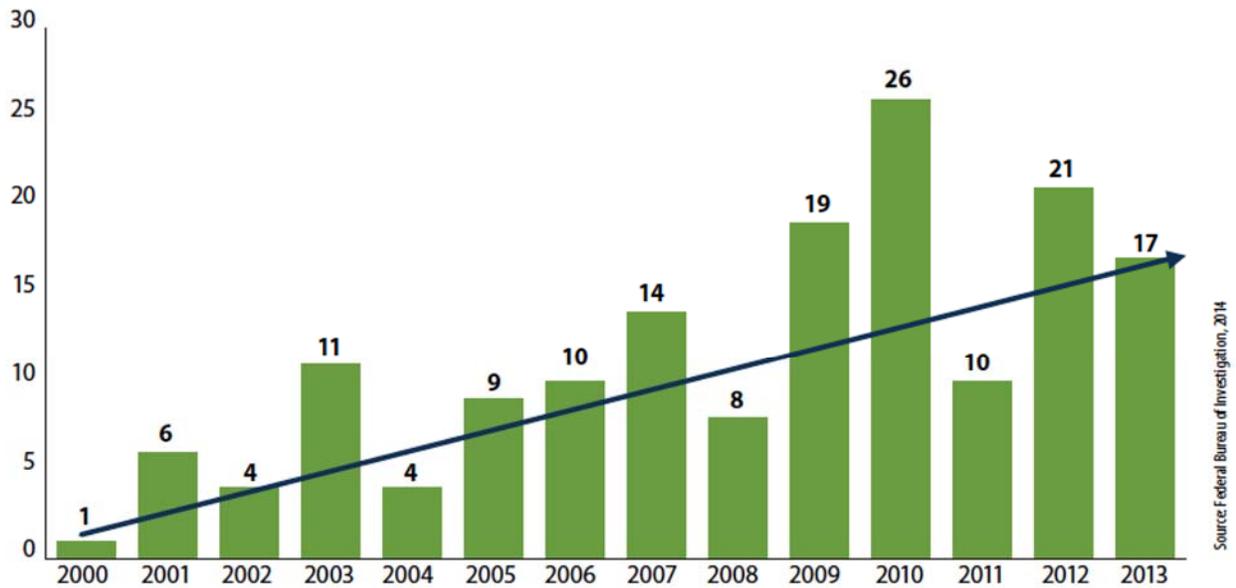
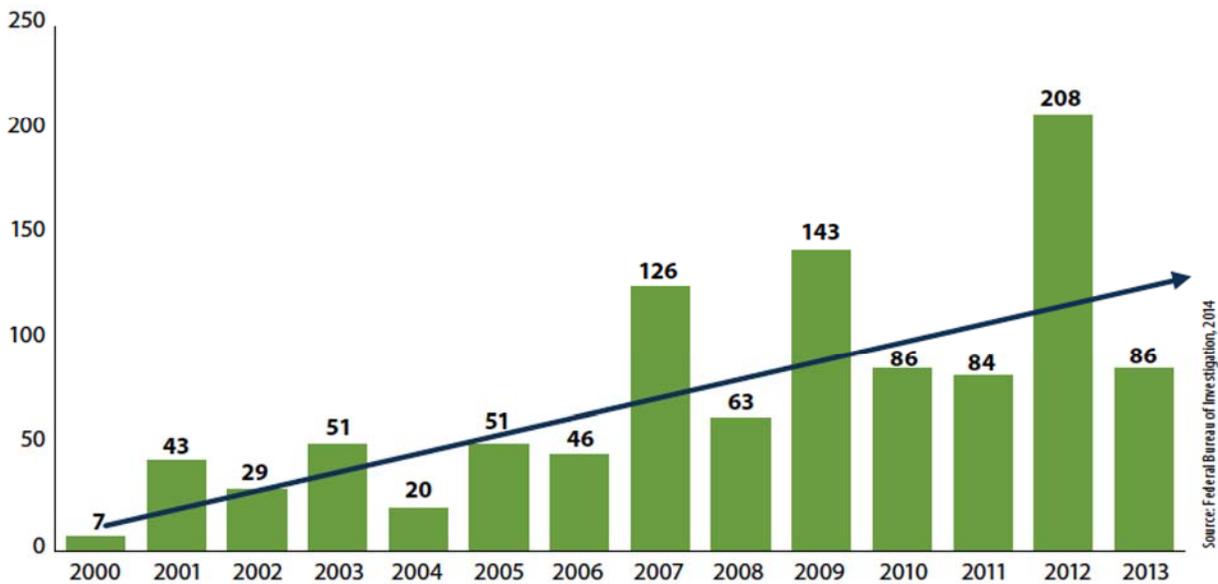


Chart 4:

A Study of 160 Active Shooter Incidents in the United States Between 2000 - 2013:
Annual Totals of 1,043 Casualties



Legal Claims:

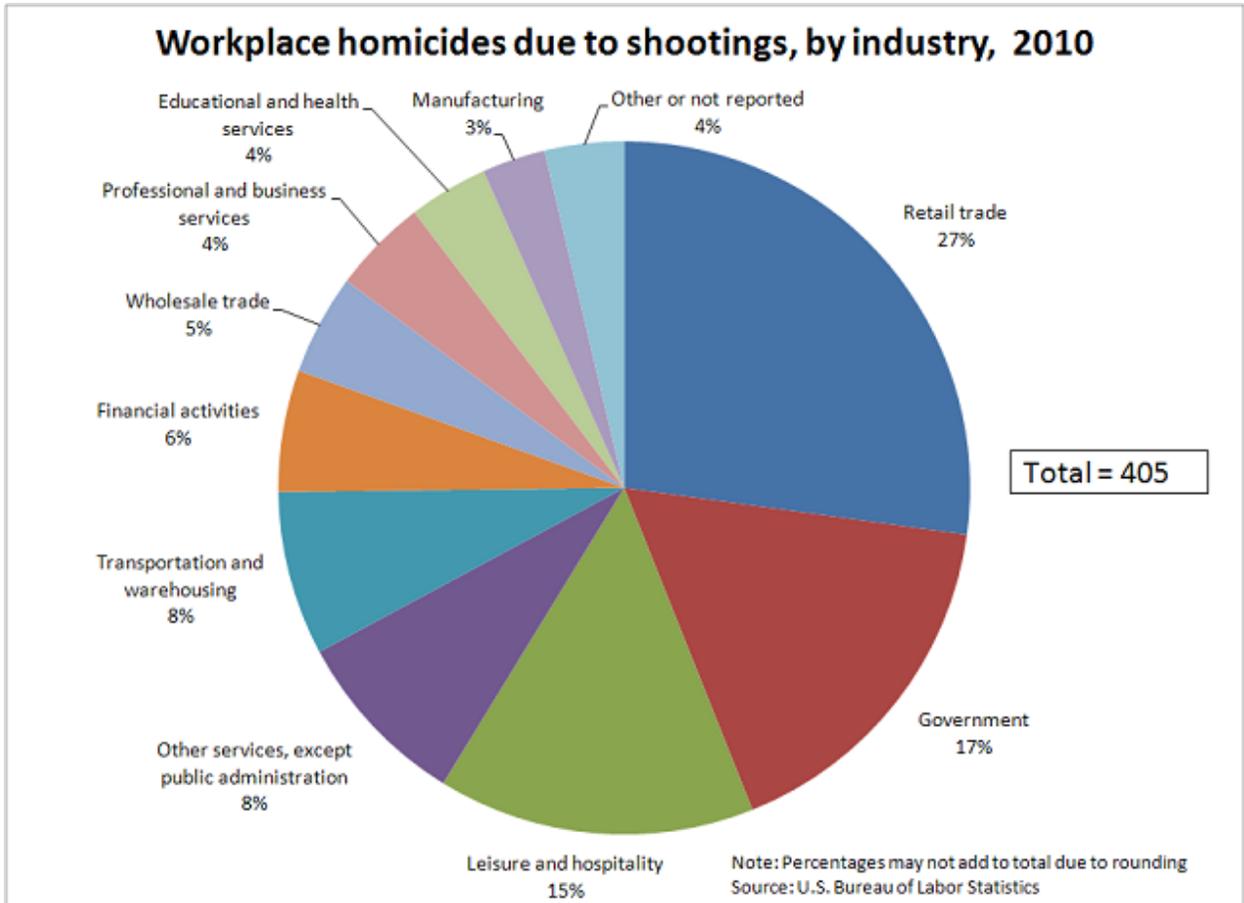
In addition to workers' compensation benefits, victims of workplace violence can often seek compensation through the legal system. Claims may be filed against the employer under the OSHA General Duty Clause as well as common law torts including negligence. Under the doctrine of respondeat superior an employer may, in some circumstances, be responsible for the actions of the employer's employees or agents. According to one study by liability expert Norman D. Bates, these claims often lead to settlements up to or over \$500,000. The claims that proceed to trial often return damages for the victim upwards of \$3,000,000.³

Families who have lost loved ones because of an active shooter situation also turn to the legal system. While claims against business establishments are often unsuccessful, they are frequently filed. Fighting these claims can cost millions in legal fees. Victims or family members acting on their behalf will often assert claims against business establishments for negligence or wrongful death, as well as causes of action under most states' premises liability statutes.

³ Norman D. Bates & Susan J. Dunnell, Liability Consultants, Major Developments in Premises Security Liability 6-7 (1993).

I. Workplace Violence Situations:

Chart 5:



A. *The American National Standard on Workplace Violence Prevention and Intervention:*

The collaboration of the American Society for Industrial Security (ASIS)⁴ and Society for Human Resources Management (SHRM)⁵, developed the Workplace Violence Prevention and Intervention, ASIS/SHRM WVPI.1-2011. This is an approved standard by the American National Standards Institute (ANSI)⁶ and in part states:

⁴ American Society for Industrial Security ASIS International is the preeminent organization for security professionals, with more than 37,000 members worldwide.

⁵ The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management, representing more than 250,000 members in over 140 countries

⁶ The American National Standards Institute (ANSI) has served in its capacity as administrator and coordinator of the United States private sector voluntary standardization system for more than 90 years.

“No organization, large or small, public or private, for-profit or in the nonprofit sector, can assume that it will be immune to the wide range of disturbing, threatening, and violent conduct that falls within the broad definitions of “workplace violence.”

“All organizations ultimately carry a responsibility, both for humanitarian and legal reasons, to protect employees and others who interact with the workplace to the fullest practical extent by taking measures to detect threats at the earliest possible moment, engage in effective intervention through careful Incident Management, and mitigate consequences should violence erupt.”

B. OSHA General Duty Clause:

Under federal law, an employer has a duty to furnish to employees a place of employment that is free from recognized hazards that are causing or are likely to cause an employee's death or serious physical harm.⁷ OSHA interprets the general duty clause to mean that an employer has a legal obligation to provide a safe workplace. If an employer learns of a threat or there may be a reason to know about a potential threat, the employer must take measures to ensure the safety of the employees. Failure to do so may result in legal liability.

In more recent court rulings, some of which are discussed below, there has been an increasing trend towards finding companies without “active shooter” safety protocols increasingly liable for damages. Currently, OSHA’s definition of a recognized hazard is a hazard that is considered reasonably foreseeable.⁸ These reasonably foreseeable hazards are those recognized as hazards commonly observed in that industry, those recognized by the employer, or those that are deemed common sense hazards.⁹ While it cannot be said with certainty that OSHA has recognized an active shooter situation as a reasonably foreseeable hazard, courts certainly have.

C. Negligence:

Claims may also be brought under common law negligence. For a claim of workplace negligence, the person bringing the legal action will need to prove that (1) an employer owed a duty to the employee; (2) the employer breached that duty; (3) the breach was the “but for” cause of the harm; (4) the breach was the proximate cause of the harm as in it arose from a reasonably foreseeable series of events caused by the negligence; and (5) there was harm or damages. In most of these cases, victims of workplace violence are often harmed or killed by a coworker. The claim is that the employer engaged in negligent hiring and retention practices which exposed the employee to harm.

⁷ <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title29/html/USCODE-2010-title29-chap15-sec654.htm>.

⁸ See. 29. U.S.C. § 654

⁹ *Id.*

In 2008, a federal court found a restaurant liable for negligence because the manager did not know how to properly diffuse a potentially hostile situation. The jury awarded over \$19 million to a 15-year old restaurant patron who got into a fight with an off-duty restaurant employee.¹⁰ The court found that the manager's response to the growing hostile situation was instructing the two individuals to take the matter outside. This showed a lack of preparedness and training, something the restaurant is responsible for even in the case of off-duty employees.¹¹

In 2013, a contract IT employee opened fire at the Navy Yard in Washington, D.C. killing twelve people.¹² The representatives of seven of the victims' estates (or surviving family members or heirs), as well as two injured survivors brought lawsuits against the company that hired the shooter. In total, nine lawsuits for money damages were filed against the company, with two being from victims who alleged emotional suffering.¹³ Seven out of the nine claims were for negligent hiring and retention. The claim for negligent hiring was dismissed, but the court ruled that the negligent retention claim could proceed forward. The court found that there was enough information where the company who employed the shooter should have known that this was a potentially dangerous individual who needed supervision and did not take steps towards addressing that.¹⁴

In another 2013 incident, an employee at Accent Signage brought a gun into his workplace and killed six coworkers. The family of one victim, James Beneke, sued Accent Signage on six different counts. The court dismissed four of the counts, but allowed the claims of gross negligence and grossly negligent retention of the employee to continue. Gross negligence requires a showing that the actor owed a higher legal duty to the victim than that of ordinary care.¹⁵ It also requires a showing that the actor completely disregarded this duty. The court found, in allowing the claims to proceed, that Accent Signage had failed to protect its employees, who it owed a legal duty to.¹⁶ The company knew that the shooter posed a threat as they were warned ample times by his coworkers and other supervisors that he was unstable. And yet, the company had no security cameras, no security guards, and clearly no program in place to address this type of situation. Even on the day when the shooter was to be terminated, the company took absolutely no precautions. The shooter was informed that he was to be terminated, and yet he remained unsupervised which allowed him to retrieve the weapon from his vehicle. Accent Signage ultimately settled with the Beneke family for an undisclosed amount.

Often, an employer will never know who will become a perpetrator. These characteristics are not always obvious and could develop over the course of employment, as well. A program that

¹⁰ Foradori v. Harris., No. 523 F.3d 477 (5th Cir. 2008).

¹¹ Id.

¹² Halmon-Daniels v. Experts, Inc., No. 15-1501 (D.D.C. 2016).

¹³ Id.

¹⁴ Id.

¹⁵ Beneke v. Accent Signage Sys., No. 27 MCV-13-2275 (Min. 4 D.C. 2013).

¹⁶ Id.

is designed to address these situations even if the threat is not obvious may be a necessary preventative measure against workplace violence.

D. Respondeat Superior:

Respondeat superior is another common law tort claim where an employer may be held liable for the actions of an agent¹⁷ or employee. In the common circumstance, a disgruntled employee may bring a weapon to the workplace and cause harm to fellow coworkers or management. Under respondeat superior, for the employer to be held liable, it must be proven that the disgruntled employee was acting under the scope of employment. While not a common claim, if asserted it may cost a lot of money to defend against.

E. Things to Know:

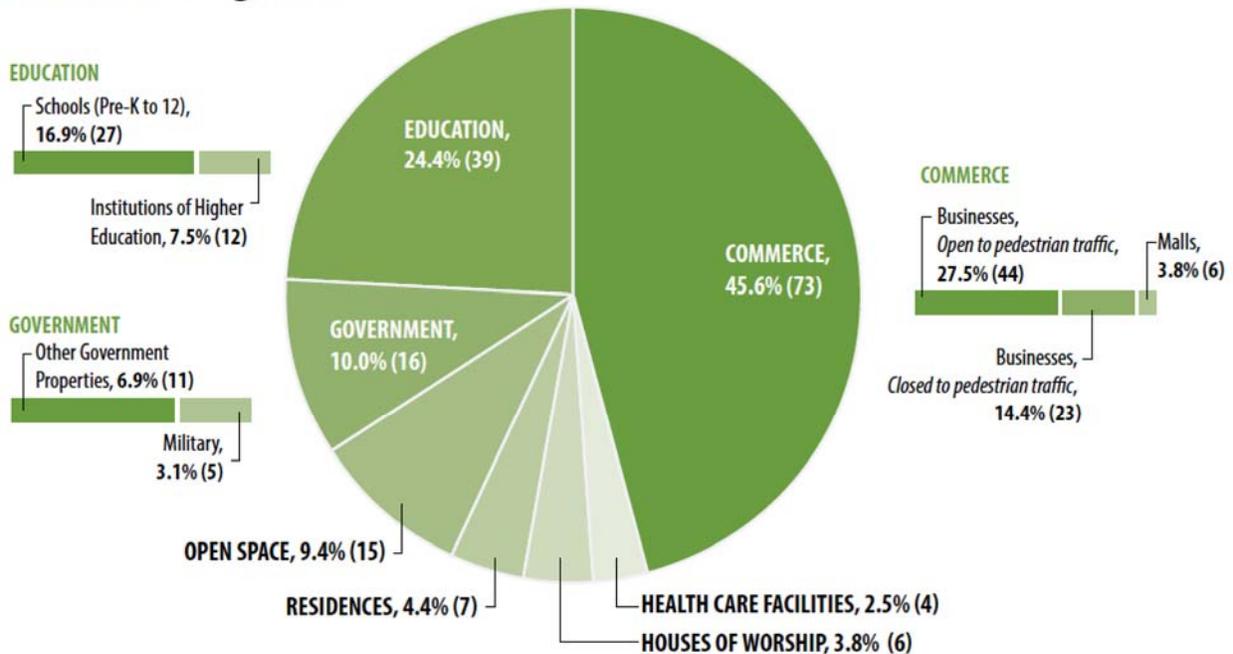
Whether claims are asserted under OSHA, negligent hiring/retention, or respondeat superior, lawsuits filed after workplace violence are common. Money spent on these types of claims can reach upwards of \$1,000,000. As discussed, settlement in these types of lawsuits are \$500,000. Cases that proceed to trial return a jury award of upwards of \$3,000,000.

¹⁷ An agent is someone authorized to act under the authority of the employer. E.g. a contract worker, temporary employee etc.

II. Active Shooter Situations:

Chart 6:

A Study of 160 Active Shooter Incidents in the United States Between 2000 - 2013:
Location Categories



A. *Negligence:*

In 2016, two gunmen opened fire at Club Blu night club in Florida. The night club was hosting a teenager’s night and advertised that there would be “Tight Security All Night.” The parents of one 14-year-old filed seven lawsuits against Club Blu for having negligent security.

In the 2012 Aurora, Colorado movie theatre shooting where 12 people were killed and 70 others were injured, many of the victims’ families brought negligence suits against the movie theatre. These suits were eventually dismissed but the movie theater still incurred over \$700,000 worth of legal fees in defending the matter.

In 2015, in a workplace shooting that killed two women and critically wounded another, a jury awarded over \$40 million in total to the families of the deceased. Kraft Foods, Inc. had contracted its plant security to a third-party company (U.S. Security Associates, Inc.) One of the Kraft employees had just been suspended for causing a “fracas” with her coworkers. A security company employee was asked to escort her off the premises. The employee escorted her to the gate and left her alone to walk to the car. The Kraft employee went to her car to retrieve a gun and drove to the gate, demanding entrance. Upon entering the premises, she proceeded to the break room and shot three of her coworkers, killing two. Meanwhile, the security supervisor

ran away when he witnessed the incident and the guards in the guard shack, panicked and confused, failed to warn anyone inside the facilities despite a duty to do so. The Court concluded that the security company through its employees was liable for negligently failing to perform its duties that it was contracted for and for not following proper protocol despite it being in place.¹⁸

The jury awarded nearly \$38 million in punitive damages.¹⁹ The defendant security company appealed stating that the award was too high. The appellate court affirmed the award of the damages claiming that it was appropriate under the circumstance. Plaintiffs' counsel Shanin Specter noted: "This case sends an important message to this security company that their guards can't simply run away from their posts, they have to actually act like security guards."

B. Wrongful Death:

Wrongful death claims are often brought against an entity that, because of negligent or intentional harm, causes the death of another person. Family members can bring these claims against corporations, businesses, and other entities even when the death was caused by a third party. In the same 2012 Aurora movie theatre shooting, families of the victims brought wrongful death suits against the movie theatre. While the suits were unsuccessful, fighting these types of claims is costly.

C. Premises Liability

A possessor of land who holds it open to the public for entry for a business purpose is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.²⁰ Because of the special relationship that exists between a business and business invitee, a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm to satisfy the duty.²¹

Most states have a premises liability statute under which a property owner is liable for injuries caused by some type of unsafe condition of the premises. Under these statutes, a business will

¹⁸ Masciantonio v. United States Sec. Assocs., (Pa. 1 D. 2016). See Also Wilson v. United States Sec. Assocs., (Pa. 1 D. 2016).

¹⁹ Punitive damages are assessed against an actor as a way to punish them. It is to deter the act from committing the tort in the future, and to deter others from committing the same.

²⁰ McKown v. Simon Prop. Grp., Inc. 344 P.3d 661 (2015).

²¹ *Id.*

be liable for the criminal actions of a third party only if the actions were deemed to be reasonably foreseeable.

In the 2012 Aurora movie theatre shooting, the claims that were not dismissed were those brought under the Colorado Premises Liability Act.²² The court concluded that under the applicable statute, the case against the movie theatre can proceed forward because two questions would have to be answered. (1) Did Cinemark know or should it have known that this danger existed, and, if so, (2) Did it exercise reasonable care to protect patrons against this danger.²³

Conclusion:

These tragedies can potentially impact a business financially and emotionally. Financially, work stops as time is spent battling legal disputes, consoling employees or the families of victims, and ultimately the business' reputation will be damaged. Emotionally, the business owners and employees alike will struggle trying to recover from an incident like this. Efforts will be focused on recovering rather than building the business and this is not the position any employer wants to be in.

Adopting a program that aims to reduce the occurrence of workplace violence or minimize the effect of active shooters is a way of taking proactive measures to protect and grow a business. Having an active, up to date, and informative training program can help to reduce legal losses. While there is no absolute way to prevent lawsuits from being filed in the wake of a tragedy, a company that can show preventative measures will be in a much stronger position to defend against these claims. This can help lead to claims and causes of action being dismissed prior to expensive discovery and trial phases and in the worst-case scenarios, reduced settlement costs or awards of monetary damages at trial. The company will become safer, stronger, and more protected in a time where these types of threats are unfortunately all too real and commonplace.

More importantly than any kind of financial loss, the goal of such a program is to prevent these types of events from creating victims. Too often we see "X" number of fatalities or "X" number of injured victims – human beings and their loved ones who are suffering. Any steps a business can take to prevent or reduce these harms will be both sound and smart business decisions and more importantly, the right thing to do to protect one's employees and patrons.

²² Traynom v. Cinemark, No. 1:12-cv-02517-RBJ-MEH (D. Co. 2013).

²³ Id.