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Run, Hide, Fight— the Before, During, & After

Presented by: Anne Knox Averitt

Agenda

- } Importance of Workplace Safety from a Legal Standpoint
 - Case Examples
 - State-Specific Workplace Safety and Employee Rights

- } Preparing for an Active Shooter
 - Recognizing Pre-Incident Indicators
 - Implementing a Response Plan Before an Incident Occurs

- } Individualized Plan Workshop
 - Run, Hide, Fight Plan
 - Individual Questions, Concerns
 - Discussion of Tabletop Exercises

Workplace Violence: Civil Liability Concerns

- § Lawsuit against the Company following the incident
 - Orlando employer sued by shooting victims after Pulse Night Club incident
 - Lawsuits against companies after domestic violence enters the workplace



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Workplace Violence: Civil Liability Concerns

- } Occupational Safety and Health Administration fines
 - Liability imposed after death of Florida healthworker



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State-Specific Laws

} Workplace Safety Statutes

- California
- Indiana
- Iowa
- Minnesota
- North Carolina



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State-Specific Employee Rights

} Guns in Trunks:

- Alabama
- Kentucky
- Tennessee
- Texas
- West Virginia



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Preparing for an Active Shooter

- } Recognizing Pre-Incident Indicators
- } Implementing a Response Plan Before an Incident Occurs



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Responding to Red Flags – Non-Emergency

- } Pay attention to at-risk indicators
- } Document
- } Discipline
- } Report



Responding to an Incident – Emergency

- } Incident alerts and reporting procedures
- } The run, hide, fight plan
- } Aftermath support and evaluation



Formulating a Response Plan

- } “Run, Hide, Fight”
- } Individualized risk-assessment
- } Location-specific concerns, routes, & safe zones
- } Preparing for emergency and non-emergency situations

RUN: Part I of the Response Plan

- } Formulate your emergency evacuation route
- } Plan A evacuation: piggyback the fire drill route
- } Plan B evacuation: second story windows, etc.



RUN: Part I of the Response Plan

} Training Pointers:

- First priority—evacuate unless the threat is in sight or blocking the route.
- Run directly to the exit, and immediately. Don't freeze or debate options.
- Abandon belongings (and high heels).
- Remember 99% of shooters act alone.
- Bring people with you as you see them.
- Grab a makeshift weapon only if you happen to see one (sharp or blunt object).



HIDE: Part II of the Response Plan

- } Hide only if running is not possible
 - If shooter is approaching OR
 - You know shooter is blocking the escape route

- } Designate a Hiding Spot (or two)
 - Locked offices
 - Other secure areas



HIDE: Part II of the Response Plan

- } Training Pointers:
 - Turn off the lights
 - Lock or barricade the door
 - If no lock, place heavy furniture in front of door
- } Call 911
 - If not available, pull alarm or set off ceiling sprinkler
- } Look for makeshift weapons
- } Teamwork
 - Divide and conquer above to do's
- } Find cover: walls, support beams, furniture
- } Turn off your cell phone
- } Stay calm

FIGHT: Part III of the Response Plan

- } Final option
- } Do not try to reason or plead with shooter
- } Create chaos
 - Noise
 - Movement
 - Throw objects

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FIGHT: Part III of the Response Plan

- } No turning back—commit to attack
 - Be as aggressive as possible
- } Makeshift weapons:
 - Scissors
 - Glass
 - Heavy blunt object
 - Ballpoint pen
- } Aim high
 - Target shooter in face, eyes, neck
 - Crotch kick

Communicating the Response Plan

- } Communicate specifics of the plan without disclosing confidential employee-specific information
- } Conduct training, drills, and refreshers



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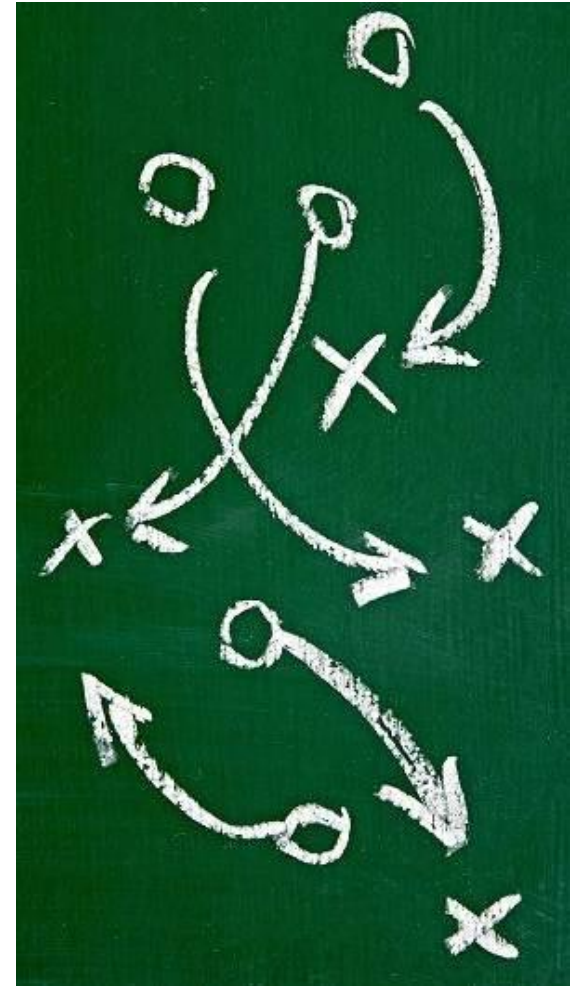
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Filling Out Plan Template

- } Pre-Incident
- } Evacuation
- } Hideout
- } Shooter Confrontation
- } Aftermath Logistics: Immediate
- } Aftermath Logistics: Longer-Term



Questions?

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Out of Sight, but Not Out of Mind:

Telecommuting as a Reasonable Accommodation and Other Considerations

Overview

- } Development of Telecommuting as a Workplace Alternative
- } ADA
- } Workers' Compensation
- } FLSA
- } Additional Considerations

Can I Work From Home?

Everyone is Doing It



- } 3.9 million U.S. employees, or 2.9 percent of the total U.S. workforce, work from home at least half of the time, up from 1.8 million in 2005 (115 percent increase since 2005).
- } The average telecommuter is 46 years of age or older, has at least a bachelor's degree and earns a higher median salary than an in-office worker.
- } Roughly the same population of women and men telecommute.
- } Telecommuting is more common among employees over 35 years of age and most common among baby boomers.
- } In more than half of the top U.S. metro areas, telecommuting exceeds public transportation as the commute option of choice.
- } The biggest employer of telecommuters is _____?

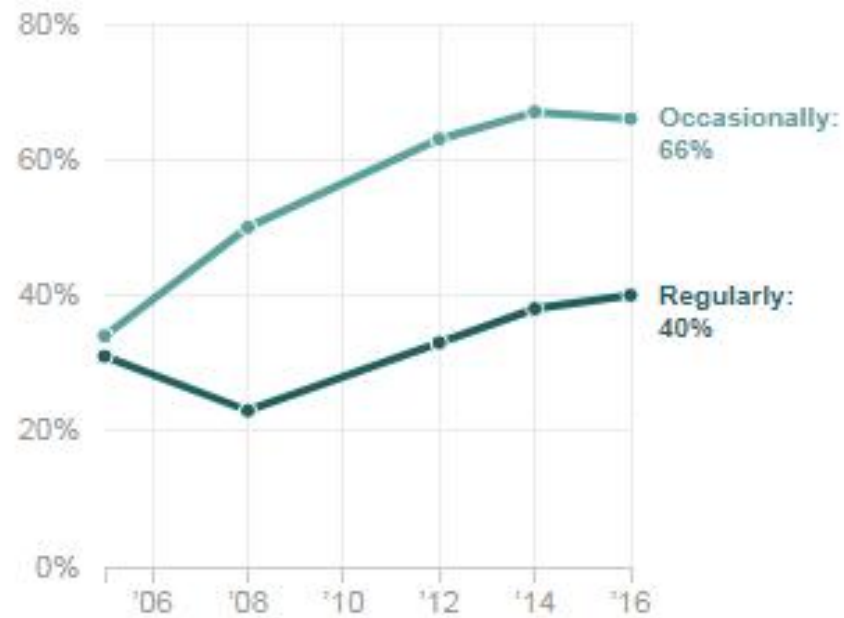
To Telecommute or Not to Telecommute – that is the question!

- } Recruiting/Retention
- } More efficient, no commute, less wasted time
- } Talent Retention
- } Environmental Benefits
- } Morale Builder
- } BUT, when the cat is away ...
- } Disrupts team cohesiveness, less collaboration
- } Technological and other limitations
- } Confidentiality/Security concerns



More Employers Allow Remote Work

Share of employers who allow at least some employees to work regular paid hours from home



Source: Society of Human Resource Managers: 2016 National Study of Employers survey of for-profit and nonprofit employers with 50 or more employees. Margin of sampling error: +/-3.23 percent

Americans with Disabilities Act (ADA)

- } Does the ADA require you to allow telecommuting?
- } ADA: requires covered employees to provide reasonable accommodations to qualified disabled employees if needed to perform essential job functions, unless the accommodation places an undue burden on the employer.
 - (1) Disabled;
 - (2) Otherwise qualified for the position (could perform essential functions) with or without reasonable accommodation;
 - (3) Requested an accommodation; and
 - (4) Employer discriminated by failing to provide necessary accommodation

ADA – “The Process”

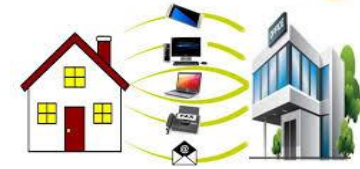
- } Flexible, Interactive Process
- } Begins when a disabled employee requests an accommodation
- } Discuss Limitations and Job Duties, possibly with input from a doctor, to evaluate accommodations that could allow the employee to perform her/his essential functions
- } Understand why disability might require work-from-home accommodation
- } Case-by-case (no bright line test).
- } Must be prepared with an established procedure to evaluate the request closely to be in line with the ADA.

First Question: Is the Employee Disabled?

- } Physical or mental impairment that substantially limits one or more major life activities
- } In favor of broad coverage
- } Courts are to focus on reasonable accommodations as opposed to whether the employee meets the disability standard
- } Discuss employee's abilities, limitations, and duties
- } Long-term or temporary?
- } Examples
 - Asthma, smell aggravations, IBS, depression, anxiety attacks, Delayed Sleep Phase Syndrome

Next: Essential Job Functions

Telecommuting



- } Core Duties of the Position, Not Marginal Duties
 - Multiple factors – employer’s judgment and job descriptions
- } Is the employee’s presence an essential function?
- } Would non-attendance fundamentally alter the nature of the position?
 - What about Skype and Videoconferencing?
 - Personal Communication Necessary? Teamwork?
 - Access to documents or equipment?
 - Confidentiality?
- } → Update Job Descriptions

What is a Reasonable Accommodation?

- } If more than one accommodation is equally effective, employer can choose
- } Look at all options:
 - Another location?
 - Restructure work schedule?
 - Vacant position to move him/her to?
 - Modify equipment or conditions
- } You do not have to agree to the employee's preference
- } You do not have to remove any essential job duty to allow telecommuting
- } The employer, not the employee, determines what job functions are essential
- } If working from home is the only possible accommodation, you need to determine whether physical presence is an essential function of the job

Undue Burden on Employer?

- } Causes significant difficulty or expense given the employer's financial resources and operations
- } High Standard to Deny Accommodation
- } Not all employers will be treated the same, depending on resources and information technology
- } But if you have a telecommuting program otherwise, can't argue that it is an undue burden
- } Again, update job descriptions

ADA Interactive Process

- } EEOC Position: Telecommuting can be required accommodation if the disabled employee can perform the job from home. But employer has the right to evaluate alternative accommodations.
 - If you have a telework program, employees with disabilities must be allowed equal opportunity
 - Even if you do not have a telework program generally, telecommuting may still be a reasonable accommodation
- } Courts generally hold that attendance is an essential job function
 - Exceptions to regulator attendance as an essential function will be “relatively rare”
 - Others (including the 11th Circuit) require more stringent, fact-specific inquiry for employer to deny
 - No Bright Line Test

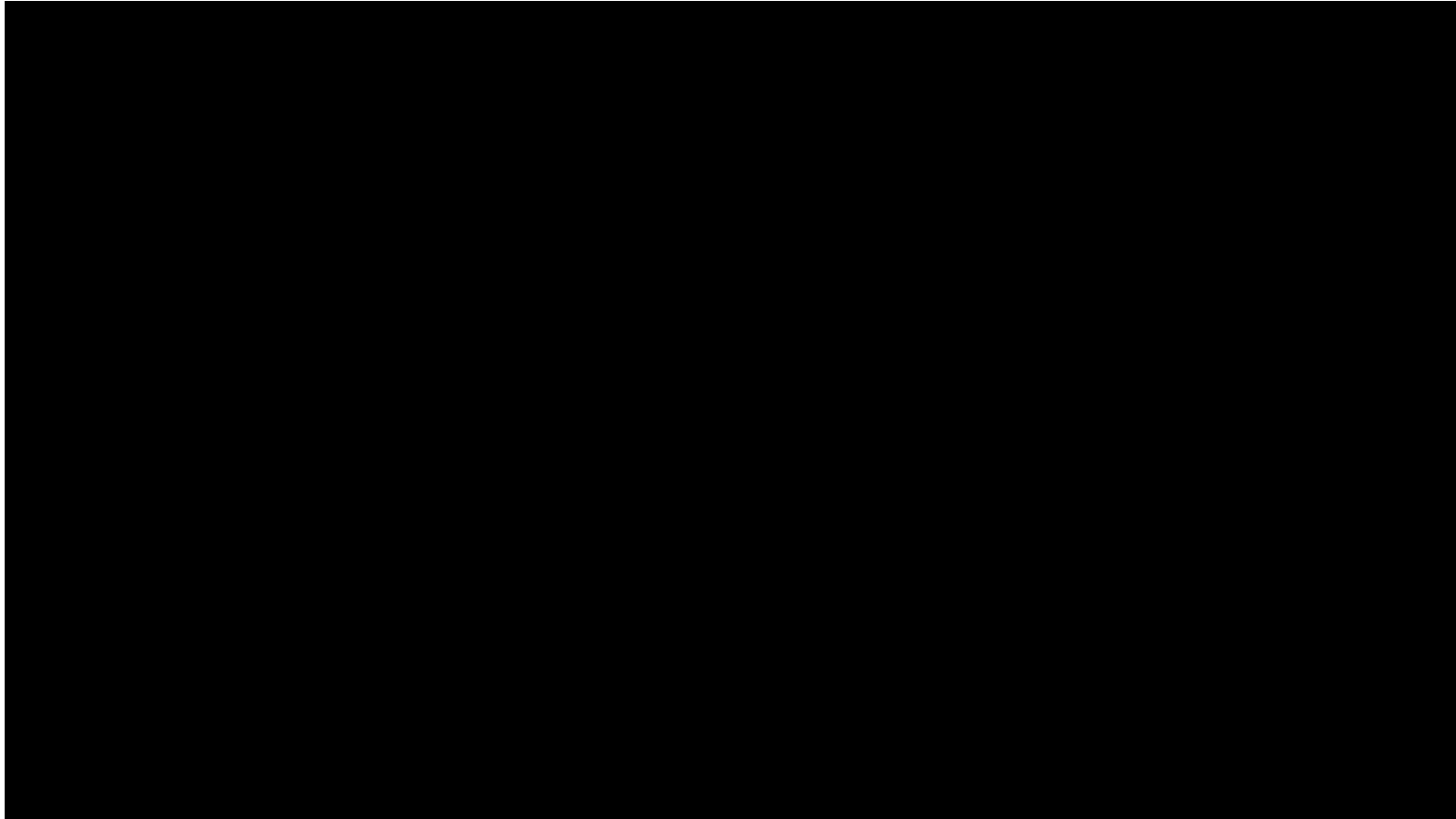
ADA Telecommuting Cases

- } Mosby-Meachem v. Memphis Light, Gas & Water Division (6th Cir. 2018)
 - Employee was able to perform essential functions and request was for limited time
 - MLG&W failed to engage in the interactive process
 - Job description out of date (20 years!)
- } EEOC v. Ford Motor Co. (6th Cir. 2015)
 - Job Required Face-to-Face interaction
 - Comparators did not work from home full time
 - Enforces employer attendance requirements – “common sense”
- } Morris-Huse v. GEICO, (M.D. Florida 2018)
 - Ride share accommodation and flexible work schedule
 - Employee’s preference is not the standard
 - Being able to perform at home on occasion “does not support the conclusion that performing a majority of work via telecommuting, or even on an undefined as-needed basis, would allow plaintiff to perform the essential functions of her job.”

Main Points to Remember

- } Is physical attendance an essential job function?
- } Keep your job descriptions current and accurate
- } If you get an ADA request, consider all the options in the interactive process





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Workers' Compensation

- } Are telecommuters covered under workers compensation?
 - Yes, if during employment, regardless of location
 - Employer is responsible for same safe work environment
- } Arising out of: work-related?
- } In the course of employment – time, place, and circumstances?
- } Was injury tied to work or personal?
- } Employers can implement the following practices that may limit workers' compensation liability for home-based employees:
 - Telecommuting policy
 - Establish guidelines for home office and designated work area
 - Provide Training for safety measures
 - Conduct periodic site checks
 - Set fixed work hours

Fair Labor Standards Act (FLSA)

- } Applies in Telecommuting context
- } If non-exempt under FLSA, put procedures in place to limit and approve overtime
- } Develop guidelines as part of telecommuting policy; turn off phones, log off computers, clock in/out
- } Specifically define how time should be recorded
- } Consider an electronic time keeping system
- } Remote work sick policy
- } Travel time to office if home is main worksite? Maybe.

Other Considerations

- } Be Consistent, Be Fair, Be Unbiased
- } Develop a Formal Policy with clear guidelines to address all aspects and sets out who is responsible for managing – get signoff
- } How will use of company property be managed

6 steps to telecommuting:



Closing Thoughts

- } Telecommuting Requests under ADA are likely to increase
- } Get “Out Front” to develop a good policy and updated job descriptions
- } For an ADA request, engage in a thorough, well-documented interactive process
- } Be Sensitive to WC and FLSA requirements
- } Evaluate Risks vs. Rewards

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Thank You.

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