



# A FRIGHTENING REALITY

## *Prevention, Preparation, and Defense of Active Shooter Lawsuits*

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Active shooter events have become more common<sup>1</sup> in the U.S., leading to liability lawsuits against business owners where these tragic events occur. There is no obvious pattern as to when or where shootings happen. Targets have included schools, places of worship, military bases, concert venues, movie theaters, conventions, bars, airports, shopping centers, and a yoga studio. Victims have included men, women, and children from all walks of life. Given the random nature of these events, any business owner or employer may one day find itself named in an active shooter lawsuit.<sup>2</sup>

This article examines current theories of liability, how lawsuits are being litigated, measures business owners and employers can take to mitigate risk and defend litigation, and protective insurance coverage options.

### **TYPES OF ACTIVE SHOOTER LAWSUITS**

#### **Negligent Marketing, Security, and Employee Training**

The U.S. Department of Homeland Security defines an Active Shooter as "an individual actively engaged in killing or attempting

to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is no pattern or method to their selection of victims."<sup>3</sup>

Plaintiffs have advanced multiple theories of liability in suits arising from active shootings. Families of victims of the shooting at Sandy Hook Elementary School in 2012 sued a gun manufacturer directly, alleging it marketed the military-style rifle used in that shooting "for use in assaults against human beings." The plaintiffs argued this was an exception to a 2005 law<sup>4</sup> protecting firearms manufacturers from liability for crimes committed by gun purchasers. The Connecticut Supreme Court ruled the suit could proceed, and on appeal the U.S. Supreme Court agreed, rejecting an appeal by the gunmaker.<sup>5</sup>

However, most active shooter lawsuits allege negligent security and planning by the premise's owner. In conventional negligent security lawsuits, liability is premised on the foreseeability of the threat.<sup>6</sup> To determine whether a crime is foreseeable, one looks to the existence of other similar violent incidents in the immediate vicinity.

In some active shooter suits, Courts

and juries have applied this reasoning and have ruled in favor of defendants where the shooting deemed unforeseeable. For example, following the Aurora, Colorado, theater shooting in 2012, during which the shooter opened fire in a dark movie theater, the plaintiffs in a state court suit alleged armed guards and a silent alarm could have thwarted the shooting. The defendant argued no security measures would have predicted or stopped the random, carefully premeditated shooting. The case proceeded to trial, where a jury found no liability.

Since then, theories of liability have evolved. These suits now allege that the proliferation of active shooting events put every public accommodation or business owner on notice that a shooting is reasonably foreseeable. Courts are overwhelmingly allowing them to proceed on this basis.

So, what should business owners be doing? Some cases are instructive. In a shooting at a Northern California festival in July 2019, the shooter cut through a fence and opened fire. The Gilroy Garlic Festival Association had security in the form

of metal detectors, bag searches, and police patrols.

In a subsequent lawsuit, plaintiffs alleged the security was inadequate, and that the Association negligently relied on outdated security methods which did not account for modern-day risks. Specifically, festival organizers did not hire adequate numbers of trained security personnel and did not comb the grounds in advance to identify security issues (in this case, a “flimsy” fence).

This case is pending in California, and in fact most lawsuits are pending or quickly settled, providing little case law to guide business owners. However, business owners should be able to show proactive efforts to update security efforts. One way to accomplish this is to consult security experts and implement modernized methods.

Suits also cite negligent employee training, alleging business owners must plan for active shooters by training staff to identify “red flags,” such as unusual behavior, clothing, or bags, and react quickly and appropriately. Private security companies provide such training through modules, videos, and interactive in-person sessions, and many large-scale employers have incorporated this training into their standard employee-training efforts. Implementing such training strengthens the defense of a suit based on this theory.

#### Negligent Hiring and Retention

Negligent hiring and retention theories are raised where an employee is the shooter. In a 2013 navy yard shooting in Washington, D.C. which resulted in 12 deaths, the shooter had told his co-workers he had been hearing voices in his head. The co-workers reported this to the employer. Additionally, the employee had been involved in a previous shooting at his residence where he shot a gun through the ceiling.

The suit focused on the employer’s knowledge of this information and failure to notify authorities or act affirmatively to protect co-workers, and the federal judge allowed it to proceed on this basis. The lesson is simple: employers must pay attention to reports suggesting mental instabilities<sup>7</sup> and violent behavior and treat them as legitimate potential threats.

#### Employee Suits Citing OSHA Violations

An emerging trend is for employees to file complaints with the Occupational Safety & Health Administration (OSHA) after a shooting event. OSHA’s general duty clause states employers must have a place free of recognized hazards, and active shooting incidents are considered such a hazard.<sup>8</sup>

There are no specific OSHA standards for prevention of workplace violence. However, OSHA recommends employers develop workplace violence prevention programs and implement administrative controls, such as physical barriers, alarm systems, lighting, staffing, and other implementations to reduce overall risk.<sup>9</sup> To comply, employers must show they undertook efforts to prepare for what is now considered a legitimate threat to all private enterprises.

#### HOW CASES ARE BEING RESOLVED

Defendants are taking varied approaches when choosing to settle or to defend. As noted, the defendant in the 2012 Aurora, Colorado, movie theater shooting defended the state case through a jury trial and obtained a favorable defense verdict.

However, as shootings have become more common, defendants frequently choose to negotiate settlements. Following the 2017 shooting at a country music festival outside the Mandalay Bay Hotel and Casino, the defendant initially defended the case under a federal law<sup>10</sup> passed after the September 11, 2001, attacks which shielded private entities from liability for “acts of terrorism.” However, the Courts never ruled on applicability of the law, and the parties reached a nearly \$800 million settlement through mediation.

Factors which appear to influence the strategy are the individual case facts, the threat of bad publicity, and the sense of a changing public attitude with respect to the preventability of such shootings. This phenomenon is demonstrated by high-profile grass-roots campaigns for stricter gun control laws throughout the country.

#### MOVING FORWARD: WHAT CAN WE LEARN?

Business owners should examine their existing security plans and look for ways to

improve prevention efforts. Even where an attack cannot be prevented altogether, premises owners can reduce risk and create a more defensible position in a lawsuit by taking proactive steps to secure the location. This could include facility upgrades, lighting, additional exits, bulletproof materials, panic buttons, and security vendor contracts. Employee training is also essential, as employees can be trained to recognize and react to potential shooter situations. Training is offered through private vendors and through the U.S. Department of Homeland Security.

Also, business owners and employers should secure appropriate liability insurance coverage. While the probability of an event occurring is low, damage exposure is potentially astronomical. Therefore, business owners should examine their liability policies to ensure coverage is in place. Existing policies may have terrorism exclusions which leave a gap in coverage. Tailored insurance products, such as “active shooter or assailant” policies are now widely available to address such gaps, and provide coverage for counseling for employees, and “loss of attraction” coverage when a shooting causes a loss of revenue because people are no longer coming to the location of the incident. Coverage may also be secured for the cost of upgrading a building and its security, damages to the building, relocation costs, and sometimes the cost of a teardown following an incident.

Courts are receptive to the new theory that all premises owners are on notice of an active shooting, even where a premises owner has no specific basis to believe its business will be targeted. The best defense to this new reality is to diligently assess and improve security features and secure appropriate coverage. While a random shooting may not be preventable, business owners may be able to mitigate risk and reduce liability by being proactive and recognizing the changing risk.



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<sup>1</sup> According to The Violence Project Mass Shooter Database

<sup>2</sup> A “mass shooting” was defined by a 2015 Congressional Research Service Report as having four or more victims.

<sup>3</sup> [https://www.dhs.gov/xlibrary/assets/active\\_shooter\\_booklet.pdf](https://www.dhs.gov/xlibrary/assets/active_shooter_booklet.pdf)

<sup>4</sup> The Protection of Lawful Commerce in Arms Act (PLCAA)

<sup>5</sup> Remington Arms Co., LLC v. Soto, 2019 U.S. LEXIS 6789

<sup>6</sup> Restatement (Second) of Torts.

<sup>7</sup> While complying with ADA regulations and state disability laws, which can put employers in a difficult position.

<sup>8</sup> [https://www.osha.gov/SLTC/emergencypreparedness/gettingstarted\\_evacuation.html](https://www.osha.gov/SLTC/emergencypreparedness/gettingstarted_evacuation.html)

<sup>9</sup> <https://www.osha.gov/archive/oshinfo/priorities/violence.html>

<sup>10</sup> The Support Antiterrorism by Fostering Effective Technologies Act, or Safety Act.