

Active Assailant Insurance: A Primer

AN INSURANCE CONTINUING EDUCATION SEMINAR

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Agenda

1. Introduction to Active Assailant Coverage
2. The Myths – Why coverage is thought not to be needed
3. Civil Liability Issues
4. Existing Coverage Issues
5. The Active Assailant Insurance Policy Coverages

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Introduction

STATISTICS ON NUMBER OF ACTIVE SHOOTER
EVENTS

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What is a “Mass Shooting?”

The Gun Violence Archive, which tracks every mass shooting incident in the country, defines a mass shooting as any incident in which at least **4 people are shot**, excluding the shooter.

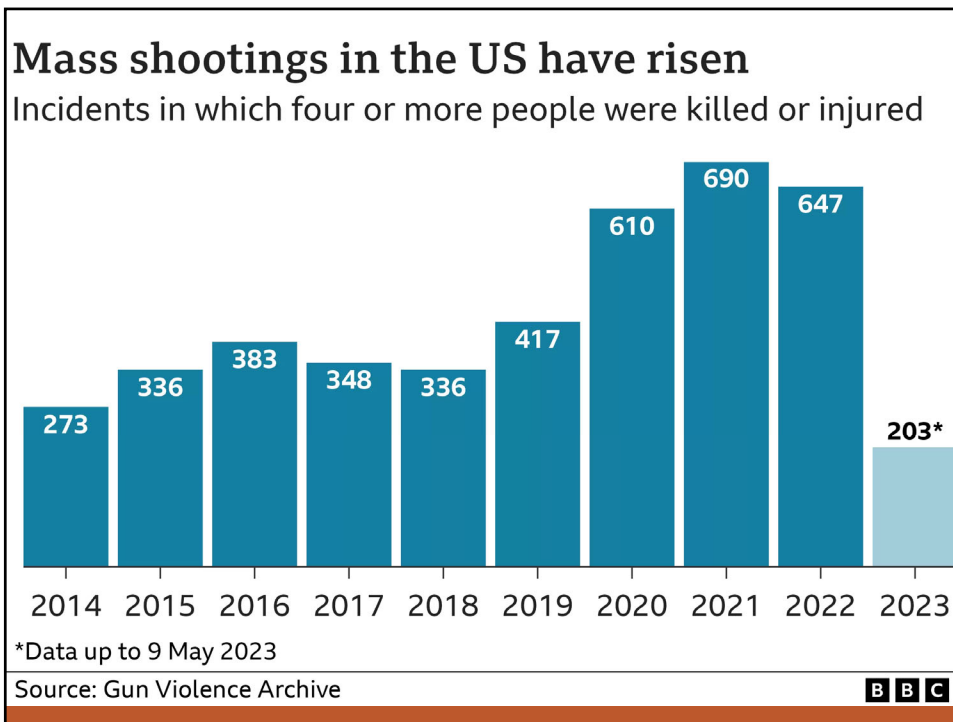
“The United States has faced at least 202 mass shootings so far this year, according to the Gun Violence Archive. There have been more mass shootings than days in 2023.”

Source: ABC News

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2023 Examples: ABC News 5/8/23

- Dallas, Texas – 8 killed, 7 injured at outdoor mall
- Atlanta, Georgia – 1 killed, 4 injured at medical center
- Cleveland, Texas – 5 dead in home shooting
- Dadeville, Alabama – 4 killed, 28 injured at outdoor party
- Louisville, Kentucky – 4 killed, 8 injured at bank

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2023 Examples: ABC News 5/8/23

- Nashville, Tennessee – 6 killed at private school
- East Lansing, Michigan – 3 killed, 5 injured at MSU
- Oakland, California – 1 killed, 7 injured
- Monterey Park, California – 11 killed, 10 injured at dance studio

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Significant Examples

June 12, 2016 – Orlando, Florida – ***Pulse*** Nightclub
49 Killed; 53 Injured

October 1, 2017 – ***Las Vegas*** Route 91 Harvest Music Festival
**58 Killed; 851 Injured of which 422 were wounded by
gunshots**

April 15, 2021 – ***Indianapolis*** FedEx facility
8 Killed; multiple injuries

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The Myths

WHY COVERAGE IS THOUGHT NOT TO BE NEEDED

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The Myths:

1. "I'm already covered."
2. My business interruption coverage or worker's compensation coverage will handle it.
3. Active shooter training covers the risk – there's no need for insurance.

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The Myths:

4. Active shooter insurance is too specific to be worthwhile.
5. This stuff is only for large companies.
6. My business is safe. An attack wouldn't happen here.

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The Myths:

7. If we have an attack, it's too late and the business is ruined.
8. The policy / product doesn't do anything to prevent an attack.
9. The policy would require exhaustion of other policies.
10. It's too expensive.

McGowan Program Administrators

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Purchasing Considerations

There are several reasons why some businesses may choose not to purchase active shooter insurance coverage. Here are some possible factors:

1. **Perception of low likelihood:** Some business owners or managers may believe that the likelihood of a mass shooting occurring at their premises is low, and therefore may not see the need to invest in coverage for this type of event. This perception may be based on the belief that their industry or location is not at high risk for this type of violence.
2. **Cost:** Active shooter insurance coverage can be expensive, especially for smaller businesses with limited budgets. Some businesses may opt to invest in other types of insurance coverage, such as property or liability insurance, which they may view as more essential or cost-effective.

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Purchasing Considerations

3. **Confidence in existing security measures:** Some businesses may believe that their existing security measures, such as access control systems, security cameras, or active shooter drills, are sufficient to prevent or mitigate the impact of a mass shooting. As a result, they may not feel that additional insurance coverage is necessary.
4. **Misunderstanding of coverage:** Some businesses may be unaware of what active shooter insurance coverage actually entails and may not understand the benefits and protections it provides. This can lead to a lack of interest or motivation to invest in this type of coverage.

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Civil Liability Issues

THE CASES ARE OUT THERE, BEING LITIGATED
NOW

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Liability for Mass Shootings: Are We at a Turning Point?

*Michael Steinlage, American Bar Association, The Brief,
February 7, 2020*

Historically, business owners had extremely limited exposure for attacks or shootings occurring on premises.

The generally recognized principle is that a third party's criminal act does not trigger a duty until the business knows it is occurring or about to occur.

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Liability for Mass Shootings: Are We at a Turning Point?

“As mass shooting incidents become more frequent and widely reported, the perception of whether such events are foreseeable **has begun to shift.**”

“[In a recent case the plaintiffs] presented specific evidence that **the risk of an active shooter was known to the owner** of the facility, as well as expert testimony regarding security measures that the clinic could have taken that might have prevented the attack or mitigated its consequences.”

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Liability for
Mass
Shootings:
Are We at a
Turning
Point?

“The court of appeals reversed the lower court’s finding that the shooting was not foreseeable as a matter of law.

“The court of appeals [also held] on the issue of causation...that **a jury could conclude that the defendant’s conduct was a substantial factor in the loss.**”

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ARACENA v. GRULER, Fla. 2018

- Case arose from the Pulse nightclub shooting
- Gruler, an Orlando law enforcement officer, was on duty providing security for Pulse
- At 2 am, he was not at his post, which allowed the shooter to enter the club to “look around”
- The shooter then went back to his vehicle and retrieved his weapons, re-entered the club, and began an hours-long attack and hostage situation

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ARACENA v. GRULER, Fla. 2018

- Gruler immediately became aware of the situation, but stayed outside
- City of Orlando police arrived quickly and engaged the shooter
- Shooter barricaded himself and several hostages in a restroom
- About 3 hours later, police entered the club and neutralized the shooter

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ARACENA v. GRULER, Fla. 2018

- A victim's estate filed a lawsuit against the individual officer, alleging a civil rights violation for:
 - Abandoning his post and
 - Failing to enter immediately to engage and neutralize
- The estate also sued Orlando for failing to train officers.

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ARACENA v. GRULER, Fla. 2018

Generally speaking,

- Failing to protect an individual from third party criminal violence is not a constitutional violation and
- A generalized claim of a "failure to train" police personnel won't overcome this to create municipal liability

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

- Las Vegas Route 91 Harvest Festival
- October 1, 2017
- Incident resulted in 58 deaths and 500 injuries
- In 2018, MGM Resorts, owner of the Mandalay Bay Casino & Hotel, filed a federal lawsuit in California against the victims
- A “declaratory judgment” was sought

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

- MGM wanted to consolidate claims in one federal court.
- Federal court was sought due to the provisions of the 2002 Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act
- MGM argues that the concert’s security company had been certified by the Department of Homeland Security “for protecting against and responding to acts of mass injury and destruction.”
- MGM argues that the SAFETY Act means all lawsuits go to federal court

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

- More importantly, says MGM, the SAFETY Act protects it against liability.
- There is a limitation on liability for technologies and services that involve “preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.”
- At worst, it caps liability at the amount of insurance that was required at the time of certification as qualified anti-terrorism technology (QATT). At best, it eliminates liability completely.

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

According to PBS:

- The SAFETY Act “was a way to encourage private companies to deploy anti-terrorism technologies without an overriding fear of being held responsible.”
- **No motive was determined for the attack, nor was it ruled an act of terrorism, which raised questions about MGM’s legal action.**

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

Insurance Journal reports:

- In May 2019, MGM reported that a settlement will be reached between \$735 to \$800 million by May 2020.
- MGM said that it has \$751 million in insurance to pay toward a settlement

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

Insurance Journal reports:

- “A lawyer handling mediation talks for about **4,200 claimants in multiple states** said it was premature for MGM to report a possible settlement range, as they aren’t even close to resolving all the terms and issues at hand.”
- “The lawyer said ‘It’s true that a settlement is possible. But I will tell you it’s not probable. Nothing is signed. We have a long way to go before we have an agreement.’”

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MGM RESORTS V. VICTIMS OF RT. 91 SHOOTING, Cal. 2018

“A court on Wednesday approved a settlement totaling \$800 million from casino company MGM Resorts International and its insurers to more than 4,400 relatives and victims of the Las Vegas Strip shooting that was the deadliest in recent U.S. history.”

Ritter, AP News, Sept. 30, 2020

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Existing Coverage Issues

COVERAGE ISSUES EXIST WHEN CURRENT FORMS
ARE PUT TO THE TEST

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Existing Coverage Questions

A reminder on the CGL:

- | | |
|---|------------------------------|
| Sec. 1 – Coverages | Sec. 3 – Limits of Insurance |
| <ul style="list-style-type: none"> ◦ Coverage A – bodily injury and property damage ◦ Coverage B – personal and advertising injury ◦ Coverage C – Medical Payments | Sec. 4 – Conditions |
| Sec. 2 – Who is an insured? | Sec. 5 – Definitions |

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Existing Coverage Questions

Structure of the CGL:

The CGL insuring clause (Coverage A) reads:

We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages....

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Existing Coverage Questions

The Insuring Clause Continues:

“This insurance applies to ‘bodily injury’ and ‘property damage’ only if the ‘bodily injury’ or ‘property damage’ is **caused by an ‘occurrence’** that takes place in the ‘coverage territory...”

An “occurrence” is:

“**[A]n accident**, including continuous or repeated exposure to substantially the same general harmful conditions.”

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(Side Notes on “Occurrence”)

1. Two police officers seek to obtain a peaceful surrender
2. The shooter hits one officer; one minute later, hits both officers with a second shot; and then 45 seconds later, hits the second officer a second time
3. Is there one occurrence? Two? Three?
4. Carrier said “one;” claimants say “three”

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(Side Notes on “Occurrence”)

5. Carrier said “insanity” was the one cause
6. Claimants say the shotgun blasts were the cause
7. Court says that it is true the acts would have been intentional and not covered except for the insanity, but
8. There were multiple causes – and NOT a single, uninterrupted continuous cause.
9. **Three occurrences.**

American Indemn. Co. v. McQuaig,
435 So. 2d 414 (Fla. App. 1983)

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Existing Coverage Questions

Defense and Limits Relationship

The amount we will pay for damages is limited as described in Section III - Limits Of Insurance and **our right and duty to defend ends when we have used up the applicable limit of insurance** in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C...

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Existing Coverage Questions

Exclusions Which Might Be at Issue

2(a) – Expected or Intended Injury

2(b) – Contractual Liability

2(d) – Workers’ Comp

2(e) – Employer’s Liability

2(i) – War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of [war, including]

Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents...

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Existing Coverage Questions

CG 21 90 01 06 EXCLUSION OF TERRORISM

“Terrorism” is violence with an intent to intimidate, coerce, disrupt, or, a furtherance of ideology

Among others conditions, the exclusion is applicable if an insured suffers:

1. \$25,000,000 in property loss or
2. **“Fifty or more** persons sustain death or serious physical injury”

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Workers' Compensation Issues

THE GRAND BARGAIN

The basic concept of workers compensation is:

- a pledge to take care of employee for workplace injuries
- in return for waiving rights under Employers Liability

“As part of the social contract embedded in each state’s law, **the employee gives up the right to sue** the employer for injuries caused by the employer’s negligence and **in return receives workers compensation benefits regardless of who or what caused the accident**, as long as it happened in the workplace as a result of and in the course of workplace activities.” (Insurance Information Institute)

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Workers' Compensation Systems

“Employers can purchase workers compensation coverage from private insurance companies or state-run workers agencies, known as state funds. In 20 states, according to a Conning study, ‘Workers Compensation State funds, Evolution of a Competitive Force,’ state funds compete with private insurers and in four states, the state is the **sole provider** of workers compensation insurance.”

“Some coverage is provided by federal programs. For example, the Longshoremen's and Harbor Workers Compensation Act, passed in 1927 and substantially amended in 1984, provides coverage for certain maritime employees and the Federal Employees' Compensation Act protects workers hired by the U.S. government.”

Insurance Information Institute

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Workers Comp and Mass Attacks

“Why Many Employees Have Limited Legal Recourse After A Workplace Shooting”

Tom Spiggle, Forbes, June 19, 2022

“In the majority of workplace shooting scenarios, an employee’s suit against an employer will rely on one or more negligence-based claims. For instance, the employee might allege that the employer was *negligent in the hiring, supervision and retention of the employee* who committed the shootings.”

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Workers Comp and Mass Attacks

“Why Many Employees Have Limited Legal Recourse After A Workplace Shooting”

Tom Spiggle, Forbes, June 19, 2022

“But if the employee’s injuries are compensable through workers’ compensation, then *the employer will generally be immune* from these types of tort suits from the employee. There are exceptions to this rule, such as the employer not carrying workers’ compensation insurance or it was the employer’s intentional conduct that directly caused the plaintiff’s injuries.”

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Workers Comp and Mass Attacks

“Why Many Employees Have Limited Legal Recourse After A Workplace Shooting”

Tom Spiggle, Forbes, June 19, 2022

“*The work-related requirement is important* in workplace shootings because some of them aren’t related to work. If the shooter’s motivation was that he had a personal disagreement with a few coworkers, then it’s possible that any injuries stemming from that shooting might not be considered work-related.”

“The decision as to whether workers’ compensation applies will be fact-specific and focus on whether the victim got hurt while at work, was on the clock and engaged in a work-related task when they got hurt. Workers’ compensation laws vary from state to state, and federal employees often have special laws that apply to them for injuries sustained on the job.”

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Active ~~Shooter~~ Assailant Insurance

POLICY COVERAGES

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Why Active “Assailant”?

Disagreement in a casino

A disagreement over a card game at a casino results in one of the players drawing a gun and firing at their opponent with bystanders being hit by stray shots.

Syringe rage in a shopping mall

A homeless drug addict who takes exception to being moved on by security personnel in a shopping mall reacts by using a used syringe to attack families passing by.

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Why Active “Assailant”?

Acid attack in a bar

A jealous woman throws acid at her ex-boyfriend and new partner on the crowded dance floor of a nightclub soaking those around in the process.

Disgruntled ex-employee

Having been sacked the previous day, a humiliated administrative worker returns to the office brandishing a hunting knife and, in front of his former colleagues, screams a stream of threats at the supervisor.

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Why Active “Assailant”?

Automobile rampage at a school

A former pupil who had been bullied while at high school seeks revenge by driving a car at a group of students one morning as they arrive for the start of classes.

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Some Carriers Call it “Deadly Weapons Protection” or “DWP”

- 1) The Deadly Weapon Protection (DWP) policy is intended to function as “primary insurance” via the policy’s “Other Insurance” clause. If there is an event and both the DWP policy and the GL policy respond, the DWP policy/limits will be primary. This will preserve the GL limits for other more typical GL claims that it is better designed to cover.
- 2) Many GL policies contain terrorism exclusions. A deadly weapon incident could be labeled as “domestic terrorism” and therefore excluded by the GL. The DWP policy contains no terrorism exclusion.
- 3) Some GL policies exclude certain BI or PD if it is committed by an Insured (say if a teacher was the shooter). The DWP policy contains no such “named insured” exclusion/restrictions.

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Some Carriers Call it “Deadly Weapons Protection” or “DWP”

- 4) The GL policy/carrier would not provide any of the pre and post risk management features that the DWP policy provides like the Deadly Weapon and Site Security Risk Assessment Endorsement, Deadly Weapon Safety Action Plan Seminar, and the additional CrisisRisk services outlined in the policy.
- 5) Provides dedicated sub-limits for crisis management services, counselling services and funeral expenses via endorsement.

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What Are We Seeking to Cover?

“The associated costs will go well beyond General Liability and will often include Business Interruption, Workers Compensation, Brand Impairment and potential lawsuits...”

“All of these issues are coming at the Insured at a time of significant physical and emotional trauma.”

Jim Eades of Arlington/Roe in *IIA of IL e-Insight*

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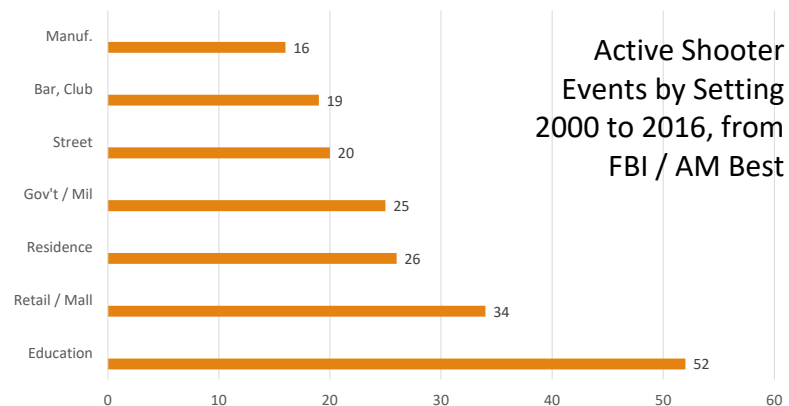
AM BEST SAYS

“Targeted, new insurance solutions are helping these entities develop programs to help protect against and recover from unpredictable and shocking occurrences. Specialized, named-perils active assailant policies are helping...

“In the past, named-perils policies have similarly been developed to help provide protection against storm risk, employment practices liability, and cyber events.”

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Who Should Consider It?



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Who Should Consider It?

According to data from the Gun Violence Archive, which tracks incidents of gun violence in the United States, there have been numerous active shooter incidents at various types of businesses since 2019. Here are some statistics on the types of businesses affected by active shooter incidents:

- Retail businesses: Retail businesses, such as stores and shopping malls, have been the most common location for active shooter incidents, accounting for approximately 26% of all incidents since 2019.
- Industrial or manufacturing businesses: Industrial or manufacturing businesses, such as factories or warehouses, have accounted for approximately 14% of all active shooter incidents since 2019.
- Restaurants and bars: Restaurants and bars have also been a common location for active shooter incidents, accounting for approximately 10% of all incidents since 2019.

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Who Should Consider It?

- Educational institutions: Educational institutions, such as schools and universities, have accounted for approximately 8% of all active shooter incidents since 2019.
- Health care facilities: Health care facilities, such as hospitals and clinics, have accounted for approximately 6% of all active shooter incidents since 2019.

It's important to note that these statistics may not include all active shooter incidents and may vary depending on the source of data and the definition of an active shooter incident. However, these numbers provide a general sense of the types of businesses that have been affected by this type of violence in recent years.

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Name change: Active Assailant Insurance

- Limits are available up to \$20M/\$20M. MP starts around \$3,500 depending on the venue and limits. All markets are E&S.
- These policies are designated premises policies. They can be amended to include specific off-site events.
- The Legal Liability coverage would extend to 1st and 3rd party liability and would be triggered by any suit brought against the client as a result of an Insured Event.
- We have been able to cover clients in jurisdictions where concealed carry permits are allowed. For those risks, we need to be sure to specify this to the underwriters so they can rate accordingly.

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Available Coverages:

Physical damage coverage

“Insureds can get indemnity for physical loss or damage to insured property caused by an active shooter / workplace violence incident. This might include expenses incurred during structural security upgrades along with **building closure, relocation or teardown.**”

Insurance Business America, “*What is active shooter insurance coverage?*” by Bethan Moorcraft (12/14/18)

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Why Teardown Coverage?

Uvalde, Texas

“Robb Elementary is the site of the second-deadliest elementary school shooting in American history, where 19 children and two teachers were killed on May 24, 2022.”

“Ten days after the massacre, the local school district announced plans to demolish the school.”

“There is currently no scheduled date or budget for the demolition of the school, but the district and Uvalde Mayor Don McLaughlin have assured residents that plans are forthcoming.”

ABC News, February 4, 2023 “Robb Elementary School to be demolished, Uvalde contends with conflicting emotions”

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Available Coverages:

Legal liability / litigation

“Insureds are legally obligated to pay for certain damages and claim expenses that arise from an active shooter / workplace violence incident. Organizations today are being held to a higher standard of accountability...”

Moorcraft

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Available Coverages:

Crisis management

“Insurance carriers will indemnify the insured for specialist crisis response and consultant fees resulting solely and directly from an active shooter or threat event. This might include helping insureds deal with public relations, reassuring families and employees and reinforcing the company branding.”

Moorcraft

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Available Coverages:

- Business interruption coverage

- Medical expenses, funeral expenses, and death benefit

- Loss of attraction

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Sample Language of the Coverage:

- “[We will] pay for expense costs associated with the provision of Crisis Management Services which are reasonably and necessarily incurred by the Named Insured in connection with a Deadly Weapon Event.”
- Crisis Management Services can include such things as investigation, crisis management support and temporary security measures

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A Second Sample of Coverage:

“[We will] reimburse the Insured Organization Workplace Violence Expenses incurred by the Insured Organization as a result of any Workplace Violence Event...”

(“Workplace Violence Event” means “any intentional use of deadly force or threat of deadly force with the display of a lethal weapon which occurs on the Premises and which did or could result in bodily injury or death to an Insured Person.”)

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A Second Sample of Coverage:

“Workplace Violence Expenses” means:

1. An independent security consultant for 90 days
2. An independent public relations consultant for 90 days
3. Counseling services to employees on Premises for up to 120 days
4. An independent security guard or security forces for up to 15 days
5. An independent forensics analyst for 120 days

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Available Coverages:

- Business interruption coverage
- Medical expenses, funeral expenses, and death benefit
- Loss of attraction

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Common Exclusions:

- Terrorism exclusions
- Casualties threshold limit
- Employee exclusions
- Vehicle exclusions
- Mental anguish exclusion

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A Specimen Insuring Clause

“[We] will pay on behalf of the Named Insured...up to the limit of liability...for any Damages and Claims Expenses which the Named Insured shall become legally liable to pay because of any Claim or Claims for Bodily Injury, first made against the Named Insured during the Period of Insurance and reported to Underwriters in writing no later than ninety (90) days after the expiry of this policy...”

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A Specimen Insuring Clause

“...caused by a **Deadly Weapon Event** occurring at the **Locations** of the Named Insured after the **Retroactive Date** and before the expiry of this policy.”

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A Detour into Definitions:

Term	Definition
Deadly Weapon Event	any event involving an Assailant(s) and the Named Insured where a Weapon has been used or brandished on any Location(s) of the Named Insured.
Assailant	an individual or group of individuals actively engaged in, or assisting in, killing or attempting to kill a person or persons using a Weapon

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A Detour into Definitions:

Term	Definition
Weapon	any portable or handheld device, instrument or substance which is used by the Assailant(s) in a manner to deliberately cause death or Bodily Injury, and/or any Road Vehicle that is occupied and used by the Assailant(s) in a manner to deliberately cause death or Bodily Injury.

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The “Gathering” Clause

A Deadly Weapon Event (or series of Deadly Weapon Events) which occurs at one Location or multiple Locations of the Named Insured within a period of twenty-four (24) consecutive hours and which do have or appear to have a Related Purpose or are coordinated by one or more Assailant(s) will be deemed to be **one** Deadly Weapon Event.

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