

LEGAL ILLUSTRATIONS OF WORKPLACE GUN LAWS AND THEIR IMPLICATIONS ON EMPLOYERS AND HUMAN RESOURCE MANAGERS

By

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I. INTRODUCTION

Workplace gun laws or “parking lot” laws, as they are commonly called, prohibit property owners from banning firearms from company parking lots where employees park.¹ The push for these laws has been primarily fueled by the National Rifle Association (NRA), an association established in 1871 and declaring its mission as “uphold[ing] Second Amendment rights and [advocating] enforcement of existing laws against violent offenders to reduce crime.”² The NRA’s contemporary movement to expand American citizens’ gun rights into the workplace began after the Weyerhaeuser Corporation in 2002 terminated eight employees for keeping guns in their cars.³

To support its movement, the NRA has argued that employees should have the right to “protect themselves on their drive home.”⁴ However, opponents of workplace gun laws have argued that laws coercing business owners to allow guns on their property violate Fifth Amendment property rights.⁵ Additionally, it has been argued that permitting firearms to be stored in vehicles parked in company parking lots could potentially place companies in a “catch-22” situation where they are forced to decide whether to comply with state workplace gun laws or comply with federal law requiring

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¹ See Stefanie Steines, Note, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171, 1178-79 (2008).

² *Federal Judge Upholds Florida’s NRA-Backed “Guns at Work” Law*, NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION, July 29, 2008, available at <http://www.nra.org/News/Read/NewsReleases.aspx?id=11358> (last visited Nov. 9, 2009) (“The ‘Guns at Work’ law, as it is known, has been part of a three-year effort by the National Rifle Association (NRA) to expand the self-defense rights of law-abiding gun owners.”).

³ The employees terminated were located in Weyerhaeuser’s Valliant, Oklahoma facility. See Scott Gold, *NRA, Oil Company Clash Over Guns*, LOS ANGELES TIMES, Aug. 2, 2005, available at <http://articles.latimes.com/2005/aug/02/nation/na-nra2> (last visited Oct. 6, 2009).

⁴ Amy S. Clark, *Bar Ass’n, NRA Battle of Guns in Cars*, CBS NEWS, Feb. 9, 2007, available at <http://www.cbsnews.com/stories/2007/02/09/business/main2457881.shtml>, (last visited Nov. 9, 2009) (“The National Rifle Association says the question is whether employees can protect themselves on their drive home.”).

⁵ See DeWayne Wickman, *Florida Gun Law Crosses Line of Common Sense*, USA TODAY, June 15, 2008, at 12A (“Opponents of [workplace gun laws] argue that it violates the Fifth Amendment, which protects a person’s property rights. Forcing business owners to allow people to bring guns onto their property, they contend, tramples upon this constitutional protection.”).

employees to maintain a safe work environment.⁶ Thus, this recent trend or movement toward allowing firearms on employers' parking lots is a controversial and hotly debated topic.

As the number of states enacting workplace gun laws has increased, some employers have refused to comply with these laws and have maintained policies banning firearms from their parking lots.⁷ However, employers' refusals to comply with these laws may fuel inquiry of potential liability for this lack of compliance. Furthermore, even if employers choose to comply with workplace gun laws, this does not eliminate the numerous questions surrounding these laws. In particular, with compliance emerge questions regarding how these laws could potentially influence the incidences of violence within the workplace and whether employers will be liable for the resulting violence.

This article will concentrate on some of the legal illustrations of workplace gun laws in various states, along with potential legal disputes that companies may face by failing to follow these laws. It will also discuss probable legal challenges confronting companies that choose to comply with these laws. Finally, the article will suggest plausible steps that companies can take to keep their workplace safe while following their state gun laws.

II. WORKPLACE GUN LAW STATUTES

In 2004, Oklahoma became the first state to enact a workplace gun law.⁸ Since that time, nine other states have followed suit, enacting some type of workplace gun legislation.⁹ Similar legislation has also been proposed in Alabama, Arizona, California, Indiana, Michigan,¹⁰ Montana, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin.¹¹

⁶ See Joanne Deschenaux, *Court Strikes Down State Law Prohibiting Workplace Gun Policies*, Oct. 24, 2007, available at http://moss07.shrm.org/LegalIssues/StateandLocalResources/Pages/CMS_023464.aspx (last visited Nov. 9, 2009) ("An Oklahoma federal court ruled that a state law barring employers from prohibiting weapons on workplace property was invalid because it was pre-empted by federal law This decision 'gives Oklahoma employers relief from the "Catch-22" position of having to choose between violating state or federal law.'").

⁷ See, e.g., Ron Word, *Georgia Pacific: Palatka Plant Exempt from Gun Law*, ASSOCIATED PRESS STATE & LOCAL WIRE, July 14, 2008 ("Georgia Pacific's paper mill in Palatka is joining two Orlando theme parks which claim they are exempt from a new state law allowing employees to keep their guns in their cars at work."); *Disney Worker Gun Rules Eased At Some Sites*, ST. PETERSBURG TIMES, Aug. 16, 2008, at 4B.

⁸ See OKLA. STAT. tit. 21, §1290.22 (2008); *id.* §1289.7a (2008); see also Steines, *supra* note 1, at 1178-79.

⁹ ALASKA STAT. § 18.65.800; FLA. STAT. ANN. § 790.251; GA. CODE ANN. § 16-11-135; KAN. STAT. ANN. § 75-7c11; KY REV. STAT. ANN. § 237.106; LA REV. STAT. ANN. § 32:292.1(D)(1); MINN. STAT. § 624.714; MISS. CODE ANN. § 45-9-55; UTAH CODE ANN. § 53-5a-102(2)(a).

¹⁰ On September 10, 2009, Michigan's "Firearm Ownership Employee Protection Act," H.B. 5330 was introduced by House Representatives Paul Opsommer, Fred Miller and Steven Lindberg and referred to the Labor Committee. This bill prohibits employment decisions based on legal ownership or use of a firearm that is unrelated to employment.

¹¹ See David Saleh Rauf, *Texas Legislature Senate OKs Guns at Work Bill that Would Allow Storage in Locked Vehicles on Employer Property Moves on to the House Guns: Ban Inside a Business Sill OK*, THE HOUSTON CHRONICLE, March 26, 2009, at A1; David B. Ritter & Sonya Rosenberg, *Is "Bring Your Gun to Work Day" Coming?*, WORKPLACE HR & SAFETY, available at

Although the specific wording of these state statutes differs, their effect is principally the same, which is to allow an employee to store a firearm in a locked vehicle parked on an employer's parking lot.¹² A parking lot has been defined as "any property that is used for parking motor vehicles and is available to customers, employees, or invitees for temporary or long-term parking or storage of motor vehicles."¹³ And a motor vehicle has been described as "any automobile, truck, minivan, sports utility vehicle, motor home, recreational vehicle, motorcycle, [or] motor scooter . . ."¹⁴ Further, as a general rule, these workplace gun laws only apply to those individuals who may legally possess a firearm under state and federal law.¹⁵

Workplace gun law statutes typically prohibit both public and private employers from restricting their employees' possession of firearms.¹⁶ For example, Florida's statute, titled "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008," which became effective on July 1, 2008, provides that:

No public or private employer may prohibit any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.¹⁷

The recent case of *Bruley v. Village Green Management* exemplifies a court's unwillingness to expand or extend the protection of workplace gun laws beyond the scope of a locked vehicle on an employer's parking lot.¹⁸ In *Bruley*, an at-will employee claimed that he was wrongfully discharged by his employer for carrying his personal shotgun from his apartment in the employer's apartment complex to a tenant's unit after hearing the tenant scream that she had been shot.¹⁹ The *Bruley* court disagreed with the employee's rationale and held that Florida's workplace gun law did not assist him since the law covered only those situations where an employee keeps a properly licensed gun locked in a car parked on the employer's property.²⁰

<http://www.workplacemagazine.com/EzineStory/HR/2009/Feb/02032009Article1.htm>, (last visited Nov. 9, 2009) ("And over a dozen other states—Alabama, Arizona, California, Indiana, Montana, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin—are considering or have considered parking lot gun laws.").

¹² See, e.g., ALASKA STAT. § 18.65.800 ("[T]he state, a municipality, or a person may not adopt or enforce a law, ordinance, policy, or rule that prohibits or has the effect of prohibiting an individual from possessing a firearm while that individual is within a motor vehicle or prohibiting an individual from storing a firearm that is locked in the individual's motor vehicle while the motor vehicle is otherwise legally parked in or on state or municipal property or another person's property.").

¹³ See, e.g., FLA. STAT. ANN. § 790.251(2)(a).

¹⁴ See, e.g., FLA. STAT. ANN. § 790.251(2)(b).

¹⁵ See, e.g., ALASKA STAT. § 18.65.800 ("This section applies only to possession of a firearm by an individual who may legally possess a firearm under state and federal law.").

¹⁶ See e.g., ALASKA STAT. § 18.65.800; FLA. STAT. ANN. § 790.251; GA. CODE ANN. § 16-11-135; MISS. CODE ANN. § 45-9-55; OKLA. STAT. tit. 21 §1290.22; OKLA. STAT. tit. 21 §1289.7a.

¹⁷ FLA. STAT. ANN. § 790.251(4)(a); see also Dara Kam, *Legislature OKs Workplace Gun Bill*, PALMBEACHPOST.COM, April 10, 2008, available at

http://www.palmbeachpost.com/politics/content/state/epaper/2008/04/10/m1a_xgr_guns_0410.html (last visited Nov. 9, 2009) (discussing Florida's workplace gun law).

¹⁸ *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381 (M.D. Fla. 2008).

¹⁹ *Id.* at 1386-87.

²⁰ *Id.*

Interestingly, Utah has a workplace gun law statute, titled “Uniform Firearm Law,” stating that it only applies to a local authority or state entity.²¹ Under this statute, a “local authority or state entity includes public school districts, public schools and state institutions of higher education.”²² But Utah’s workplace gun law statute does not apply to private employers and does not prohibit a private employer’s right to restrict the possession of firearms in the workplace.²³

Usually, workplace gun law statutes do set out specific exceptions or exemptions wherein employers may prohibit employees from storing firearms in locked vehicles parked in company parking lots.²⁴ Common exemptions include: any penal or correctional facility;²⁵ property where firearms are prohibited by state or federal law;²⁶ and a vehicle owned or leased by the employer and used by the employee in the course of his or her duties.²⁷

Moreover, some workplace gun law statutes—such as the one in Georgia—allow an employer to prohibit employees from storing guns in locked vehicles parked in “a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means.”²⁸ And Louisiana’s workplace gun law makes it very clear that employers can prohibit guns in cars parked in secure restricted parking lots if either of the following conditions exist: (1) the employer or business provides facilities for the temporary storage of unloaded firearms; or (2) the employer or business provides an “alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately-owned motor vehicles.”²⁹

At least three states—Florida,³⁰ Minnesota,³¹ and Oklahoma³²—have statutes that specifically mention the existence of employer liability for violating these laws. Notably, Oklahoma’s statute states that an individual can bring a civil action to enforce the statute: “If a plaintiff prevails in a civil action related to the personnel manual against a[n] ... employer or business for a violation of this section, the court shall award actual damages,

²¹ UTAH CODE ANN. § 53-5a-102(2)(a) (“[A local authority or state entity may not] prohibit an individual from owning, possessing, purchasing, selling, transferring, transporting, or keeping a firearm at the individual’s place of residence, property, business, or in any vehicle lawfully in the individual’s possession or lawfully under the individual’s control.”).

²² UTAH CODE ANN. § 53-5a-102(6)(b).

²³ See *id.* § 53-5a-102(7) (stating that “[n]othing in this section restricts or expands private property rights[.]”).

²⁴ See, e.g., FLA. STAT. ANN. § 790.251(7)(a)-(g).

²⁵ See, e.g., *id.* § 790.251(7)(b); GA. CODE ANN. § 16-11-135(d)(2); KY. REV. STAT. ANN. § 237.106(5)(b).

²⁶ See, e.g., FLA. STAT. ANN. § 790.251(7)(g); LA. REV. STAT. ANN. § 32:292.1(D)(1); KY. REV. STAT. ANN. § 237.106(5).

²⁷ See, e.g., FLA. STAT. ANN. § 790.251(7)(f); LA. REV. STAT. ANN. § 32:292.1(D)(2).

²⁸ GA. CODE ANN. § 16-11-135(d)(1); accord, e.g., ALASKA STAT. § 18.65.800(d); LA. REV. STAT. ANN. § 32:292.1(D)(3)(a)-(b); MISS. CODE ANN. § 45-9-55(2).

²⁹ LA. REV. STAT. ANN. § 32:292.1(D)(3)(a)-(b).

³⁰ See FLA. STAT. ANN. § 790.251(4)(b) (prohibiting an employer from violating the privacy right of an employee by inquiring whether the employee has a firearm in a vehicle parked in the company parking lot and providing that the employer may not take any action against the employee based on verbal or written statements that the employee has a gun in a parked vehicle in the company parking lot).

³¹ MINN. STAT. § 624.714 (2008) (“Employment related civil sanctions may be invoked for a violation.”).

³² See OKLA. STAT. tit. 21 §1289.7a(C) (2008).

enjoin further violations of this section, and award court costs and attorney fees to the prevailing plaintiff.”³³

For the most part, workplace gun law statutes contain provisions stating that an employer will not be liable in a civil action based on compliance with the statutes.³⁴ Georgia’s workplace gun law statute goes even further by stating that an employer is not only immune from a civil action but is also immune from criminal action for complying with the statute “unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit [a] criminal act on the employer’s premises.”³⁵

III. THE IMPACT OF WORKPLACE GUN LAWS ON WORKPLACE VIOLENCE

The enactment of workplace gun laws in different states—like those in Minnesota and Georgia—raises concerns about how these laws will impact the occurrence of acts of violence in the workplace. Specifically, workplace violence has been defined “as any action that may threaten the safety of an employee, impact an employee’s physical or psychological well-being, or cause damage to company property.”³⁶

A report on workplace violence conducted by the National Council on Compensation Insurance, Inc. (NCCI Holdings, Inc.)³⁷ has shown that, in general, instances of violence occurring at work have decreased.³⁸ Indeed, in the United States, homicides in private-sector jobs totaled 461 in 2006 and had decreased 52.8% from 1994, and from 2000 to 2006, homicides fell by 25%.³⁹

Remarkably, some professions are more susceptible than others to experience workplace violence.⁴⁰ For example, NCCI’s report shows that “cab drivers, chauffeurs, security guards and workers with access to cash drawers—such as retail employees, hotel and food service workers—are at the greatest risk of being killed on the job.”⁴¹ And robbery was found to account for 68% of all workplace homicides in 2006.⁴² Approximately 55% of all of these assaults in 2006 were experienced by health care workers—such as social service providers—who are also at a high risk of violence at

³³ *Id.*

³⁴ *See, e.g.*, FLA. STAT. ANN. § 790.251(5)(b) (“A[n] . . . employer is not liable in a civil action based on actions or inactions taken in compliance with this section.”); LA. REV. STAT. ANN. § 32:292.1(B) (“No . . . employer or business entity . . . shall be liable in any civil action for damages resulting from or arising out of an occurrence involving a firearm transported or stored pursuant to this Section.”).

³⁵ GA. CODE ANN. § 16-11-135(e).

³⁶ *Detecting Potentially Violent Behavior*, PR NEWswire, March 23, 2009.

³⁷ NCCI, located in Boca Raton, Florida “manages the nation’s largest database of workers compensation insurance information.” About NCCI Overview, <https://www.ncci.com/NCCIMain/AboutNCCI/Pages/default.aspx> (last visited Oct. 6, 2009); *see also* Roberto Cinceros, *Workplace Violence Rate Continues to Decline; On-the-Job Assaults, However, Show Volatility*, BUS. INS., Sept. 8, 2008, at 4.

³⁸ Cinceros, *supra* note 37.

³⁹ *Id.* Although the rates of homicides for the entire nation did increase 4% since 2000, the rates had fallen 39% since 1992. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

work due to factors related to the nature of their jobs, including the frequency of handguns and other weapons among patients and their families or friends.⁴³

The decline in workplace violence over the last few years has been attributed to human resource personnel, after the emergence of the notion of “going postal” following high-profile workplace shootings in the 1980s and 1990s, beginning to employ policies that coach supervisors to identify warning signs and how to handle discontented employees.⁴⁴ Additionally, an adoption in the 1990s of “zero tolerance policies” of workplace violence has been a factor cited in support of a rationale for the decline in workplace violence.⁴⁵ Another factor is the changing workforce—the fact that young people who are now entering the workplace tend to be “more likely than older employees to confront unacceptable behavior early on.”⁴⁶

Yet, workplace violence has not been completely eliminated.⁴⁷ Particularly, violence like threats, harassment, assaults and rapes continue to be a workplace issue according to the National Institute for Occupational Safety and Health.⁴⁸ In fact, within the last few years there have been numerous media reports of discontented employees or irritated customers who have engaged in acts of violence at work.⁴⁹ For instance, on

⁴³ *Id.*; see also *Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers*, UNITED STATES DEPARTMENT OF LABOR- OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, available at <http://www.osha.gov/Publications/OSHA3148/osha3148.html> (last visited on Nov. 9, 2009) (Other factors attributed to the higher risk of violence experienced by health care and social service workers include: (1) “The increasing use of hospitals by police and the criminal justice system for criminal holds and the care of acutely disturbed, violent individuals”; (2) “The increasing number of acute and chronic mentally ill patients being released from hospitals without follow-up care”; (3) “The availability of drugs or money at hospitals, clinics and pharmacies, making them likely robbery targets”; (4) “Factors such as the unrestricted movement of the public in clinics and hospitals and long waits in emergency or clinic areas that lead to client frustration over an inability to obtain needed services promptly”; (5) “The increasing presence of gang members, drug or alcohol abusers, trauma patients or distraught family members”; (6) “Low staffing levels during times of increased activity such as mealtimes, visiting times and when staff are transporting patients”; (7) “Isolated work with clients during examinations or treatment”; (8) “Solo work, often in remote locations with no backup or way to get assistance, such as communication devices or alarm systems”; (9) “Lack of staff training in recognizing and managing escalating hostile and assaultive behavior”; and (10) “Poorly lit parking areas”).

⁴⁴ See Roberto Cenicerros, *Stricter Company Policies Help Lower Number of Homicides in Workplace; Training Early Intervention Can Keep Violence From Escalating*, BUS. INS., June 16, 2008, at 11.

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*; see also National Institute for Occupational Safety and Health, CENTERS FOR DISEASE CONTROL website, available at <http://www.cdc.gov/niosh/about.html> (last visited Nov. 9, 2009) (“The National Institute for Occupational Safety and Health (NIOSH) is the federal agency responsible for conducting research and making recommendations for the prevention of work-related injury and illness. NIOSH is part of the Centers for Disease Control and Prevention (CDC) in the Department of Health and Human Services.”).

⁴⁹ *See, e.g.,* David Abel, *Cambridge Police Arrest Suspect in Workplace Shooting*, THE BOSTON GLOBE, Jan. 28, 2009, available at http://www.boston.com/news/local/breaking_news/2009/01/police_probe_ca.html, (last visited Nov. 9, 2009) (reporting that Clyde Howard chased his colleague Maurice Ricketts around the office of their employer Baystate Pool Supplies Inc. and fired multiple shots, hitting Ricketts in the head and torso); Lindsey Russell, *Troy, Michigan Office Shooting Follow-Up—1 Dead 2 Injured, and Suspect Caught*, ASSOCIATED CONTENT, Apr. 12, 2007, available at

November 14, 2008, Jing Wu, a computer engineer who had been fired from the software startup SiPort, Inc., returned within a few hours of his firing to the company's Santa Clara, California headquarters and asked for a meeting with three executives.⁵⁰ During that meeting, Mr. Wu allegedly pulled out a gun and shot and killed all three of the executives.⁵¹

Furthermore, Prepara, Inc., a company that specializes in workforce preparedness solutions, predicted in November 2008 that occurrences of workplace violence could possibly rise as a result of the United States economic recession and that "ongoing, significant employment cut-backs have put many workers on-edge, fearing their homes, finances and jobs could be in danger."⁵² Also, crimes may be committed by individuals that do not normally fit the criminal profile—like the 51-year-old woman who robbed a bank in Fitchburg, Massachusetts in December 2008, demanding \$50,000 after she became desperate by her inability to find a job.⁵³

In addition to the economic conditions facing the country in 2008 and 2009, the increasingly growing number of states adopting workplace gun laws will likely amplify the incidences of workplace violence.⁵⁴ In fact, "[a]ccording to a 2005 study in *The American Journal of Public Health*, job sites that allow guns are five to seven times more probable to suffer homicides than locations that ban all guns."⁵⁵

One of the main arguments asserted against workplace gun laws is that these laws will reduce workplace safety and expose employers to greater incidences of workplace violence.⁵⁶ An example of a real life instance of violence occurring after the enactment

http://www.associatedcontent.com/article/209765/troy_michigan_office_shooting_followup.html (last visited Nov. 9, 2009) (reporting that a man suspected of shooting three people, killing one, at an accounting firm where he was fired the week before the shooting, was arrested after a high-speed chase); *see also CNN Shooting Highlights Safety in Public Workplaces*, CNN.COM, Apr. 9, 2007, available at <http://www.cnn.com/2007/US/04/05/cnn.shooting.security/index.html> (last visited Nov. 9, 2009) ("Deadly shootings recently at Atlanta's CNN Center and the University of Washington's Seattle campus underscore how attackers may target victims who work in public places."); Clark, *supra* note 4 ("In July 2003, Lockheed Martin employee Doug Williams abruptly left a training session at the company's Meridian, Mississippi plant and retrieved a shotgun and semiautomatic rifle from his truck in the employee parking lot He opened fire on employees, killing six and wounding eight.").

⁵⁰ Mike Harvey, *Tech Engineer Kills Three Bosses at Silicon Valley Start-Up After Being Sacked*, TIMESONLINE, available at

http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5167198.ece (last visited Nov. 9, 2009).

⁵¹ *Id.*

⁵² *Stress of Weak Economy May Increase Workplace Violence*, WORKPLACE VIOLENCE NEWS, Nov. 13, 2008, available at <http://workplaceviolencenews.com/2008/11/12/stress-of-weak-economy-may-increase-workplace-violence/> (last visited Nov. 9, 2009).

⁵³ Kevin Johnson, *Crime Rising As Economy Sinks; Some Areas See Increase in Offenses As People Try to Cope with Desperation*, USA TODAY, Dec. 22, 2008, at 3A.

⁵⁴ *See* Mark Sherman, *Debate on Guns in Employee Parking Lots*, ASSOCIATED PRESS, Feb. 9, 2007, available at

<http://www.ncdsv.org/images/Debate%20on%20guns%20in%20employee%20parking%20lots.pdf> (last visited Nov. 9, 2009).

⁵⁵ *Guns in the Workplace Update*, BRAUN CONSULTING NEWS, available at

<http://www.braunconsulting.com/bcg/newsletters/spring2009/spring20093.html> (last visited Nov. 9, 2009).

⁵⁶ *See* Bill Kaczor, *Brady Center Takes Aim at Gun Bill*, ASSOCIATED PRESS, Dec. 5, 2005 ("Democratic lawmakers and a business security director joined Brady Campaign officials who argued that similar bills

of a workplace gun law is the June 2008 case of a plastics worker in Henderson, Kentucky who went to his car and obtained his gun following an argument with his supervisor.⁵⁷ After retrieving his gun from the car, the plastics worker killed five coworkers.⁵⁸ Approximately two years prior to this tragic event, Kentucky's workplace gun law became effective.⁵⁹ This event in Kentucky demonstrates the point that allowing employees to keep guns in their locked vehicles parked on company parking lots could potentially intensify the chances of workplace violence occurring in the workplace since guns will be more accessible to employees. And if anything were to happen in the workplace to ignite an employee's temper—such as termination or reprimand of the employee—there will be no real “cooling off” period, as the irate employee with an accessible gun can simply obtain the firearm from his or her vehicle parked in the company parking lot.

Moreover, the physical and psychological harms associated with workplace violence are not the only consequences of workplace violence to employers and companies when incidences of violence occur. As a matter of fact, “[t]he effects of workplace violence on businesses and employers are far-reaching and include ... losses to property and productivity; increased security; workers' compensation and litigation costs; and decreased employee morale.”⁶⁰ The National Safe Workplace Institute published a report indicating that workplace violence cost employers \$4.2 billion in missed days of work and legal fees in 1992.⁶¹ Workplace violence also cost society an estimated \$6.5 billion from 1992 to 2001.⁶² Therefore, as workplace gun laws are enacted, employers and companies required to comply with these laws will be detrimentally affected because the employers will be forced to pay for the financial costs incurred from the incidences of violence that may naturally arise from these laws.

IV. LEGAL IMPLICATIONS OF EMPLOYERS' COMPLIANCE WITH WORKPLACE GUN LAWS

introduced in the House and Senate for the 2006 legislative session would violate employers' property rights and reduce workplace safety.”)

⁵⁷ See Bob Driehaus, *Man in Kentucky Kills 5 Co-Workers*, N.Y. TIMES, June 25, 2008, available at <http://www.nytimes.com/2008/06/25/us/26kentuckycnd.html>, (last visited Nov. 9, 2009).

⁵⁸ See *id.*

⁵⁹ Kentucky's workplace gun law statute became effective on July 12, 2006. See KY. REV. STAT. ANN. § 237.106.

⁶⁰ Steines, *supra* note 1, at 1173 (citing Terry Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 874 n.6 (1996); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES TBL. A-2: FATAL OCCUPATIONAL INJURIES RESULTING FROM TRANSPORTATION INCIDENTS AND HOMICIDES, ALL UNITED STATES, 2006, at 1 (2007), available at <http://www.bls.gov/iif/oshwc/foi/cftb0085.txt> (last visited Nov. 9, 2009)).

⁶¹ *Workplace Violence Survey and White Paper 3*, AM. SOC'Y OF SAFETY ENG'RS (1999), available at <http://www.asse.org/professionalaaffairs/docs/021507GAhouse%20e.doc> (last visited Nov. 9, 2006); see also Steines, *supra* note 1, at 1173-74.

⁶² Steines, *supra* note 1, at 1174 (citing Daniel Harvey et al., *Societal Cost of Workplace Homicides in the United States, 1992-2001*, 47 AM. J. INDUS. MED. 518, 518 (2005)).

When considering the increased acts of violence that may follow the enactment of workplace gun laws, employers forced to comply with these laws must also consider their potential legal liability for these acts of violence. As part of this consideration, it may initially be reasoned that under most workplace gun laws the employers will be immune from liability for complying with these laws, since most workplace gun law statutes contain provisions that appear to absolve an employer of liability for incidences occurring as a result of the employer's compliance with these laws.⁶³ However, this analysis may be flawed because not all states' statutes contain specific provisions limiting an employer's liability for complying with the workplace gun laws.⁶⁴

Another reason the analysis that employers are immune from liability as a result of complying with workplace gun laws may be flawed is because this conclusion is based merely on speculation since, as of yet, no court cases have resolved this issue. Given the uncertainty about how an employer's liability for workplace violence will be affected by workplace gun laws, it is essential to review potential claims of liability against an employer whose compliance with workplace gun laws results in violence. These potential claims of liability include: *respondeat superior*; employers' negligence in breaching a duty to protect their employees; and employers' negligence in hiring and retaining dangerous and unfit employees. Each of these claims are discussed below.

A. *RESPONDEAT SUPERIOR*

One potential claim that may be instituted against an employer following an employee's act of violence resulting from the employer's compliance with a workplace gun law is a claim for *respondeat superior*. The doctrine of *respondeat superior* allows an employer to be held liable for its employees' torts committed within the scope of employment.⁶⁵ While rare, on occasions, employees' acts of violence toward third parties have been considered to be within the scope of employment even though the employer has not authorized these acts.⁶⁶

At present, there are no cases deciding the issue of whether an employer can be held liable on a *respondeat superior* claim for workplace violence committed by an employee following the enactment of a state workplace gun law. But the cases where an employee's act of violence has been held to be within the scope of employment offer an archetype of the *respondeat superior* claim.⁶⁷ For instance, in *Bryant v. Livigni*,⁶⁸ a store manager

⁶³ See *supra* notes 34-35.

⁶⁴ See, e.g., UTAH CODE ANN. § 53-5a-102; KY. REV. STAT. ANN. § 237.106.

⁶⁵ See *Maria D. v. Westec Residential Sec.*, 102 Cal. Rptr. 2d 326, 330 (2000) ("Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment.").

⁶⁶ See *Lisa M. v. Henry Mayo Newall Mem'l Hosp.*, 48 Cal. Rptr. 2d 510, 513 (1995) ("[A]n employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts."); see also, Jules M. Davis, *Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Potential Violence to the Bottom Line—Expanding Employer Liability for Acts of Workplace Violence in North Carolina*, 78 N.C. L. REV. 2053, 2056-2060 (2000).

⁶⁷ See, e.g., *Mary M. v. City of Los Angeles* 285 Cal. Rptr. 99, 124 (1991) (reversing the appellate court's decision because evidence of the transaction, when viewed as a whole, established the jury could reasonably conclude the police officer was acting within the scope of his employment when he committed a

assaulted and injured a small child after he saw the child's brother urinating on a wall of the store.⁶⁹ The jury awarded compensatory and punitive damages against both the store manager and his employer.⁷⁰ On appeal, the court held that *respondeat superior* liability against the employer for the child's assault was proper even though the employee's acts were not the normal actions of a store manager.⁷¹ The court determined that liability against the employer could be established from evidence that the manager's acts were prompted in part by a purpose to protect store property or further his employer's business.⁷² In effect, the purpose of *respondeat superior* is "to protect an injured party by broadening the liability for the act which caused the injury so as to include a financially responsible defendant."⁷³

B. NEGLIGENCE

As with *respondeat superior* claims, there are no cases directly on point where a third party, such as an employee, has instituted a negligence claim against an employer that has complied with workplace gun laws. Nonetheless, courts have held that negligence claims can be brought against employers for violent acts occurring in the workplace.⁷⁴ In particular, employees instituting negligence claims against their employers following acts of violence in the workplace may allege that their employers owed them a duty; this duty was breached by the employer subjecting the employee to injuries resulting from the violent acts; and the breach proximately caused the employees' injuries.⁷⁵

In general, courts have rejected the idea of imposing liability upon an employer for a third party's criminal acts committed against an employee "based solely upon the 'special nature of an employment relationship.'"⁷⁶ However, courts have allowed a negligence claim instituted against an employer following an incidence of workplace violence. For example, in *Dupont v. Aavid Thermal Technologies, Inc.*,⁷⁷ Robert Hillard shot and killed Raymond E. Dupont Jr. on January 21, 1998 in the parking lot of their

rape); *Bryant v. Livigni*, 619 N.E.2d 550, 559-60 (Ill. App. Ct. 1993) (holding that *respondeat superior* liability was proper when a store manager assaulted a child).

⁶⁸ *Bryant*, 619 N.E.2d 550.

⁶⁹ *Id.* at 553.

⁷⁰ *Id.* at 554.

⁷¹ *Id.* at 559.

⁷² *Id.*

⁷³ *Bibergal v. McCormick*, 421 N.Y.S.2d 978, 979 (N.Y. Civ. Ct. 1979).

⁷⁴ *See Dupont v. Aavid Thermal Techs., Inc.*, 798 A.2d 587 (N.H. 2002).

⁷⁵ *See id.*

⁷⁶ *Id.* at 591 ("[W]e are not aware of any decisions imposing liability upon an employer for the criminal acts of a third person based solely upon the 'special' nature of an employment relationship."); *see also Parham v. Taylor*, 402 So.2d 884, 886-67 (Ala. 1981), *overruled on other grounds by Lathan Roof Am., Inc. v. Hairston*, 828 So.2d 262 (Ala. 2002) ("As a general rule, in the absence of special relationships or circumstances, a private person has no duty to protect another from a criminal attack by a third person."); *Thoni Oil Magic Benzol Gas Stations, Inc. v. Johnson*, 488 S.W.2d 355, 357-58 (Ky. 1972) ("[A]bsent unusual circumstances, an employer need not anticipate injury to an employee through the criminal acts of third persons. In the ordinary situation an employer has no duty to provide police protection for employees.");

⁷⁷ *Dupont*, 798 A.2d at 587

employer's Aavid Thermal Products Inc.'s Laconia, New Hampshire facility.⁷⁸ To support the negligence claim, the plaintiff-administrator of Dupont's estate claimed that the defendants owed Dupont a duty because of the conduct of two of Dupont's supervisors which included the following: (1) the supervisors escorted Dupont and Hillard outside of the building even though "they suspected that the situation would turn violent;" (2) they observed Hillard's escalating agitation; (3) they were informed that Hillard had a loaded handgun; (4) they allowed the confrontation between Hillard and Dupont to continue; (5) they failed to warn Dupont that Hillard was armed; and (6) they failed to call the police.⁷⁹ The plaintiff also alleged that the defendants "were aware of a history of workers bringing weapons into the workplace" and there had been "past episodes of potential violence similar to the incident involving [Dupont]."⁸⁰

The court in *Dupont* held the defendants liable for negligence and determined that an employer has a duty to protect an employee who, while acting in the scope of employment "comes into a position of imminent danger of serious harm and this is known to the employer or to a person who has duties of management."⁸¹ In reaching this holding, the court focused on the fact that Dupont's supervisors knew that Hillard was armed and upset and therefore they were aware of the fact that Dupont was in a "position of imminent danger of serious harm."⁸² Despite this knowledge, however, the supervisors failed to take reasonable steps to prevent the attack that they supposed would happen.⁸³ The court also emphasized the fact that this was not the first time the defendants had encountered violence in the workplace.⁸⁴

C. NEGLIGENT HIRING AND RETENTION

Another potential basis for liability for an employer who complies with workplace gun laws is a claim for negligent hiring and retention. As with *respondeat superior* and cases where the employer breaches its duty to protect the employee, there are no negligent hiring and retention cases that have focused on the issue of whether an employer can be held liable for incidences of workplace violence based on its compliance with workplace gun laws. Even so, courts have held that employers can be held liable for injuries resulting from acts of violence if they were negligent in hiring or retaining the employees committing acts of violence.⁸⁵

⁷⁸*Id.* at 589. After the shooting, Hillard shot and killed himself. *Id.*

⁷⁹*Id.* at 593.

⁸⁰*Id.*

⁸¹*Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 314B).

⁸²*Id.* at 594.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵ See, e.g., *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748 (1992) (holding that a child sexually molested by a pastor was entitled to proceed against church and church conference on theory of negligent hiring of the pastor where the pastor had been censured for inappropriate sexual behavior at previous employment); *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391 (Va. 1988) (allowing a mother of a ten-year-old raped by a church employee to pursue claim of negligent hiring against church and its pastor where the defendants knew or should have known of the employee's recent conviction of sexual assault on a young girl and nevertheless "entrusted [him] with duties that encouraged him to come freely into contact with children" and gave him "keys that enabled him to lock and unlock all of the church's doors"); *Copithorne v. Framingham Union Hosp.*, 520 N.E.2d 139 (Mass. 1988) (allowing a rape victim to

Liability for a negligent hiring claim is based on “the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.”⁸⁶ And a claim for negligent retention of an employee occurs when, “during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge or reassignment.”⁸⁷

From the foregoing, it may be deduced that—assuming the workplace gun laws are not found to absolve an employer of liability for the resulting acts of violence—an employer who complies with workplace gun laws could potentially be liable for the resulting violence if: (1) the act of violence occurs while the employee is acting in the scope of his or her employment; (2) the employer breaches its duty to protect the employee by placing the employee in “a position of imminent danger of serious harm and this is known to the employer or to a person who has duties of management[;]”⁸⁸ (3) if the employer hires an employee whom the employer knows or should have known would be “unfit” or a danger to others;⁸⁹ or (4) the employer retains an employee whom the employer knows or should have known would be “unfit” or a danger to others.⁹⁰ At this point, however, any deduction regarding the extent of employers’ liability for complying with workplace gun laws is speculative since this issue has not been decided by the courts. Thus, as the number of states enacting workplace gun laws increases, employers and their counsel must be aware of the potential liability resulting from complying with workplace gun laws, and they must be attentive to any future court decisions addressing this issue.

V. LEGAL IMPLICATIONS OF EMPLOYERS’ REFUSAL TO COMPLY WITH WORKPLACE GUN LAWS

The concerns for workplace violence and the associated financial costs of such violence have caused many employers to implement policies banning guns from the workplace even in the face of workplace gun laws. In effect, these employers refuse to

pursue a claim against a hospital for its negligence in extending staff privileges to doctor where the hospital was aware of other allegations of past sexual misconduct by the doctor).

⁸⁶ *Ponticas v. K.M.S. Inv.*, 331 N.W.2d 907 (Minn. 1983) (allowing a tenant raped by manager of apartment complex to maintain action for negligent hiring because landlord/employer failed to make an adequate investigation of manager’s employment background before entrusting manager with pass key).

⁸⁷ *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744, 753 (Fla. Dist. Ct. App. 1991). In *Tallahassee Furniture Co.*, John Allen Tucker, a deliveryman employed by Tallahassee Furniture Company, attacked Elizabeth Holland Harrison in her home and, as a result, she suffered permanent disfigurement and disability. The court determined that there was sufficient evidence to find for Harrison on both her negligent hiring and retention claims because Tallahassee Furniture Company knew of Tucker’s past criminal record and should have been aware that he was unsuitable for customer contact positions. *Id.* at 759.

⁸⁸ *Dupont*, 798 A.2d at 593 (quoting RESTATEMENT (SECOND) OF TORTS §314B).

⁸⁹ See *Tallahassee Furniture Co.*, 583 So.2d at 744.

⁹⁰ See *id.*

comply with workplace gun laws. What is more, in some instances, the justification given for this refusal to comply is the claim that the employer is exempted from compliance.⁹¹ For example, Walt Disney World claimed an exemption to Florida's workplace gun law based on the fact that it has a permit for its fireworks shows and one exception to Florida's law is "[p]roperty owned or leased by an employer who has obtained a permit ... to engage in the business of importing, manufacturing, or dealing in explosives materials on such property."⁹²

A. EMPLOYER-INSTITUTED LITIGATION CHALLENGING WORKPLACE GUN LAWS

The decision to adopt a policy banning firearms from the workplace when workplace gun laws exist may require employers to bear the ominous burden of instituting lawsuits as plaintiffs challenging the validity of their states' workplace gun laws. A basis for an employer's opposition to these laws is the claim that these laws are preempted by the federal Occupational Safety and Health Act's (OSH Act) general duty clause.⁹³ This clause provides that each employer shall furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.⁹⁴

In order for a violation of this general duty clause to be proven, it must be shown by the Secretary of Labor that: (1) the employer failed to render its workplace free of a hazard; (2) the hazard was recognized; and (3) the hazard caused or was likely to cause death or serious physical harm.⁹⁵ An act of criminal violence in the workplace has been held to be one of those hazards that an employer must protect against.⁹⁶ This means that an employer can be found to have violated the "general duty clause" of the OSH Act for neglecting to guard against acts of violence committed against its employees in the workplace.⁹⁷

Currently, only three courts have decided the issue of whether workplace gun laws are preempted by the OSH Act's general duty clause.⁹⁸ The first lawsuit took place in Oklahoma in the case of *ConocoPhillips Co. v. Henry*, where two Oklahoma laws make it a crime for "any person, property owner, tenant, employer, or business entity to ... establish ... any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked ... vehicle."⁹⁹ In

⁹¹ See, e.g., Word, *supra* note 7; *Disney Worker Gun Rules Eased At Some Sites*, *supra* note 7 ("The state Attorney General's Office ... determined Walt Disney Resort has a right to bar employees from bringing guns to work, but Disney ... backed off a policy prohibiting workers from doing the same at all its locations, including Celebration and a reservation center in Tampa.").

⁹² See *Disney Worker Gun Rules Eased At Some Sites*, *supra* note 7; see also, FLA. STAT. ANN. § 790.251(7)(e).

⁹³ See, e.g., *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1286-87 (N.D. Okla. 2007); *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009); *Florida Retail Fed'n, Inc. v. Attorney Gen. of Florida*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

⁹⁴ 29 U.S.C. § 654(a)(1) (1970).

⁹⁵ *Id.*; *Getty Oil Co. v. Occupational Safety & Health Review Comm'n*, 530 F.2d 1143 (5th Cir. 1976).

⁹⁶ See Boone, *supra* note 60, at 875-76.

⁹⁷ See *id.*

⁹⁸ See *ConocoPhillips Co.*, 520 F. Supp. 2d at 1282; *Ramsey Winch, Inc.*, 555 F.3d at 1199; *Florida Retail Fed'n, Inc.*, 576 F. Supp. 2d at 1281.

⁹⁹ *ConocoPhillips Co.*, 520 F. Supp. 2d at 1286-87; see also, OKLA. STAT. tit. 21 §§ 1289.7a & 1290.22(B).

essence, the laws opposed in *ConocoPhillips* gave Oklahoma citizens the right to transport and store guns in locked vehicles despite the objections of a private property owner such as an employer.¹⁰⁰ The plaintiff, ConocoPhillips Company,¹⁰¹ had a policy prohibiting the possession of firearms on property owned or controlled by the company, including its parking lots. ConocoPhillips challenged, among other things, that Oklahoma's statutes at issue were preempted by the OSH Act's general duty clause.¹⁰²

The *ConocoPhillips* Court held that Oklahoma's gun laws making it a crime to prevent a person from transporting and storing firearms in locked vehicles, as amended, were preempted by the OSH Act's general duty clause.¹⁰³ Specifically, the court determined that the case involved obstacle conflict preemption, which is where federal law "does not completely occupy a field of law ... but state law instead impedes some policy or purpose of a federal statute or regulation."¹⁰⁴ The court's holding was based on its finding that the general duty clause "extends to the hazard of gun-related workplace violence" and that the challenged laws, as amended, created a substantial barrier to compliance with the general duty clause and hindered the "overall purposes and objectives of Congress in passing the OSH Act" or "the federal purpose of stimulating and encouraging employers to enact policies promoting workplace safety[.]"¹⁰⁵

On February 18, 2009, almost a year and a half after the *ConocoPhillips* case was decided, the Tenth Circuit Court of Appeals reversed the *ConocoPhillips* decision in *Ramsey Winch, Inc. v. Henry*.¹⁰⁶ The *Ramsey Winch* court, in reaching its holding, explained that the OSH Act has not suggested that employers should preclude firearms from company parking lots and, despite being cognizant of the debate about firearms in the workplace, the Occupational Safety and Health Administration (OSHA) has not adopted any standard on this issue.¹⁰⁷ In fact, the court noted that on January 16, 2009, OSHA issued a letter to Oklahoma State Senator Jerry Ellis in response to the case before

¹⁰⁰ *ConocoPhillips Co.*, 520 F. Supp. 2d at 1286.

¹⁰¹ Notably, the original plaintiff to the lawsuit was Whirlpool Corporation, which filed the suit on October 27, 2004. *Id.* at 1286. However, on November 22, 2004, Whirlpool and the defendants in the case filed a stipulation of dismissal. *Id.* at 1287 n.7. Thereafter, the parties agreed that the intervenors, The Williams Companies, Inc. and ConocoPhillips, would act as plaintiffs in the case. *Id.* On August 8, 2005, plaintiffs and defendants filed a stipulation of dismissal of The Williams Companies, Inc. *See id.*

¹⁰² *Id.* at 1323-24.

¹⁰³ On June 9, 2005, while this lawsuit was pending, Oklahoma's governor signed the law revising § 1289.7a of Oklahoma's statute titled "Prohibiting persons from transporting, storing firearms in locked vehicle unlawful." The revisions provided in pertinent part that "[n]o ... employer or business entity shall maintain, establish or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in locked vehicle ...". Section 1290.22 was not revised while the case was pending and stated that "[n]o ... employer or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle." *Id.* at 1340; *see also*, OKLA. STAT. tit. 21 §§ 1289.7a & 1290.22(B).

¹⁰⁴ *ConocoPhillips Co.*, 520 F. Supp. 2d at 1329 (quoting Mgmt. Ass'n for Private Photogrammetric Surveyors v. U.S., 467 F. Supp. 2d 596, 603-04 (E.D. Va. 2006)).

¹⁰⁵ *Id.* at 1338. Regarding the court's finding that the laws acted as a barrier to compliance, the court concluded that locking firearms in vehicles does not avert the dangerous workplace situations that the general duty seeks to prevent. *Id.* at 1330, 1336-38.

¹⁰⁶ 555 F.3d 1199 (10th Cir. 2009).

¹⁰⁷ *Id.* at 1207-08.

the court “stating that ‘[g]un related violence is not a recognized occupational hazard in industry as a whole’ and that ‘[OSHA] do[es] not believe that, as a general matter, the general duty clause of the OSH Act preempts [the Oklahoma Amendments].”¹⁰⁸ Accordingly, the court held that Oklahoma’s laws making it a crime to prohibit a person from transporting or storing a firearm in a locked vehicle did not conflict with any OSHA standard.¹⁰⁹

Additionally, the court found that the district court’s holding that these laws were preempted by the OSH Act’s general duty clause interfered with Oklahoma’s police powers “and essentially promulgate[d] a court-made safety standard” which was “beyond the province of federal courts.”¹¹⁰ In effect, the *Ramsey Winch* court held that the challenged Oklahoma laws were applicable to those businesses required to follow the OSH Act.

Like the *Ramsey Winch* court, when confronted with the issue of whether a law allowing employees to secure firearms in their vehicles was preempted by the OSH Act’s general duty clause, the United States District Court for the Northern District of Florida held that no such preemption existed.¹¹¹ In *Florida Retail Federation, Inc.*, the court explained that the OSH Act “requires the Secretary of Labor to promulgate standards using procedures set forth in 29 U.S.C. § 655[.]” but no such standards have been promulgated on guns in parking lots.¹¹² The court also focused on the provision of the OSH Act stating that “[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.”¹¹³ Based on its focus on the OSH Act, the court concluded that since there was no standard regarding guns in parking lots, the OSH Act’s general duty clause does not preempt state regulation of this matter.¹¹⁴ Also, the court concluded that there was no preemption because “[t]he OSH Act is not a general charter for courts to protect worker safety ... [but] [t]he Act instead sets forth explicit standards that courts must enforce.”¹¹⁵

Despite the holdings in *Florida Retail Federation, Inc.* and *Ramsey Winch*, the issue of whether state workplace gun laws are preempted by the OSH Act’s general duty clause may yet to be resolved. Presumably, as the number of states enacting workplace gun laws grows, the preemption issue will again be challenged and the only resolution to this issue may have to be decided by the United States Supreme Court.

B. EMPLOYEE-INSTITUTED LITIGATION CHALLENGING AN EMPLOYER’S POLICY BANNING FIREARMS

The decision to adopt a policy banning firearms from the workplace has also exposed employers to employee-instituted litigation challenging the ban. In general, an

¹⁰⁸ *Id.* at 1208, n.9 (quoting *Letter from Thomas Stohler, Acting Assistant Sec’y of Labor, to Jerry Ellis, Oklahoma State Senate* (Jan. 16, 2009)).

¹⁰⁹ *Id.* at 1207-08.

¹¹⁰ *Id.*

¹¹¹ *Florida Retail Fed’n, Inc. v. Attorney Gen. of Florida*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

¹¹² *Id.* at 1297-98.

¹¹³ *Id.* at 1298 (quoting 29 U.S.C. § 667(a)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1298.

at-will¹¹⁶ employee's opposition to the employer's refusal to comply with workplace gun laws usually surfaces after the employee failed to follow the company policy banning firearms and is subsequently terminated. The plaintiff-employees in these cases typically bring a wrongful discharge claim based on a public policy exception¹¹⁷ to the unfettered right to terminate an at-will employee.¹¹⁸

Although the court in *Bastible v. Weyerhaeuser Co.*¹¹⁹ concluded that Oklahoma's workplace gun laws did not apply, the case provides a model of an employee-instituted wrongful termination claim based on an employer's policy banning firearms in the workplace.¹²⁰ In *Bastible*, the plaintiffs were either former employees of defendant Weyerhaeuser Company or former employees of contractors that supplied personnel for Weyerhaeuser at its paper mill in Valliant, Oklahoma.¹²¹ These employers had a policy prohibiting firearms on the premises, including the parking lots.¹²² On October 1, 2002, after Weyerhaeuser's management became concerned about possible substance abuse at its paper mill, the company's security brought in dogs and ran them past vehicles parked in the mill parking lot.¹²³ After the canine search revealed contraband in their car, the plaintiff-employees were terminated.¹²⁴

The plaintiffs argued, among other things, that they had a public policy cause of action for wrongful termination based upon their right to keep arms as provided for under Oklahoma's Constitution.¹²⁵ The court did acknowledge that Oklahoma law recognized a public policy exception to the unregulated right to terminate an at-will employee from employment "where an employee is discharged for refusing to act in violation of an

¹¹⁶ An at-will employment situation means that without a contract stating otherwise "either the employer or the employee can terminate the relationship at any time for any reason, even for no reason, without legal liability attaching." Deborah Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000).

¹¹⁷ See, e.g., *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 596 (Md. 2003):

For the tort of wrongful discharge to lie, the public policy in question must be "a preexisting, unambiguous, particularized announcement, by constitution, enactment, or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the public policy on the relevant topic not a matter of conjecture or interpretation."

(quoting *Porterfield v. Mascari*, 788 A.2d 242, 245 (Md. Ct. Spec. App. 2002)); *Smith v. Bates Technical Coll.*, 991 P.2d 1135, 1139 (Wash. 2000) ("The policy underlying the exception is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy.") (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984)); *Stevens v. Superior Court of Los Angeles County*, 941 P.2d 1157 (Cal. 1997) ("There are four categories of employee conduct subject to protection under a claim of wrongful discharge in violation of fundamental public policy: refusing to violate a statute, performing a statutory obligation, exercising a statutory right or privilege, and reporting an alleged violation of a statute of public importance.").

¹¹⁸ See e.g., *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1381 (M.D. Fla. 2008); *Hansen v. Am. Online*, 96 P.3d 950 (Utah 2004).

¹¹⁹ 437 F.3d 999 (10th Cir. 2006).

¹²⁰ *Id.* at 1007 (indicating that Oklahoma's workplace gun laws are not retroactive in effect and because these laws were enacted after the case was instituted, they do not apply).

¹²¹ *Id.* at 1000-01.

¹²² *Id.* at 1002.

¹²³ *Id.*

¹²⁴ *Id.* at 1003.

¹²⁵ *Id.* at 1007.

established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.”¹²⁶

The court stated that although the Oklahoma court had not addressed the issue of whether “there is a clear and compelling public policy involving the right to bear arms, such that an at-will employee may not be terminated when he exercises that right, we are confident that the courts would not embrace that view.”¹²⁷ In reaching this conclusion, the court focused on the fact that the right to keep and bear arms in Oklahoma may be controlled and is not an unfettered right.¹²⁸ Consequently, the *Bastible* court held that the district court properly dismissed the plaintiffs’ wrongful discharge claims.¹²⁹

Bastible demonstrates that an employee terminated for exercising his or her right to bear arms will not necessarily prevail over an employer on a wrongful discharge claim. Further, this is not the only court that has reached this conclusion. A federal court in *Bruley v. Vill. Green Mgmt. Co.*,¹³⁰ discussed earlier,¹³¹ and the Utah Supreme Court, in *Hansen v. America Online*,¹³² reached the same conclusion. In *Hansen*, a group of employees brought a wrongful discharge claim after they were terminated from their employment for transferring their guns to another employee’s car in the company parking lot. The *Hansen* court affirmed the trial court’s decision granting summary judgment in favor of the employer and held that the Utah legislature had intentionally rejected giving the right to keep and bear arms total supremacy over “the right to regulate one’s own private property.”¹³³

A review of wrongful discharge claims arising from an employer’s ban of guns in the workplace shows that courts confronted with these claims have been unconvinced about the validity of the argument that an employer’s policy banning firearms or its refusal to comply with the state’s workplace gun laws constitutes a public policy exception to an employment-at-will situation.¹³⁴ Nonetheless, since there are a limited number of cases where this issue has been analyzed, this may not completely ease employers’ concerns regarding their possible liability for banning firearms in the workplace.

As a result, employers confronted with the question of whether there is a justifiable basis to refuse to comply with workplace gun laws should consider this issue very carefully and must thoroughly discuss this option with their corporate counsel. Employers must have their counsel thoroughly review their individual state’s workplace gun law to determine if such an exemption exists. The company’s counsel must provide employers with ample advice regarding possible exemptions under their state’s workplace gun law. Therefore, based on the potential legal implications involved, employers implementing a policy banning firearms in states that have enacted workplace gun laws should not take this decision lightly.

¹²⁶ *Id.* (quoting *Burk v. K-Mart Corp.*, 770 P.2d 24, 29 (Okla. 1989)).

¹²⁷ *Id.* at 1007-08.

¹²⁸ *Id.* at 1008.

¹²⁹ *Id.*

¹³⁰ 592 F. Supp. 2d 1381, 1381 (M.D. Fla. 2008).

¹³¹ *See supra*, notes 18-20 and accompanying text.

¹³² 96 P.3d 950 (Utah 2004).

¹³³ *Id.* at 954-55.

¹³⁴ *See Bastible*, 437 F.3d at 999; *Hansen*, 96 P.3d at 950.

VI. PROCEDURES EMPLOYERS CAN IMPLEMENT TO MAINTAIN A SAFE WORKPLACE WHILE COMPLYING WITH WORKPLACE GUN LAWS

If, after weighing their options, employers choose to comply with workplace gun laws, they should adopt company policies and techniques to ensure that their workplace remains safe. To do this, it will be essential for the company's counsel to be well versed on the state's workplace gun law statute or statutes. Once counsel has become knowledgeable about the specific provisions of the law, counsel must review the company's firearm policies, if any exist, with employers and human resource managers.

With their counsels' assistance, employers may be wise to revise any of their employment policies that prohibit guns at work.¹³⁵ In particular, to avoid potential challenges to company policies, they may want to rewrite and redefine the workplace as the office or inside the company plant or facility, as opposed to the company parking lot.¹³⁶ Employers may also want to devise, if they do not have them, firearm policies that comply with the state law allowing firearms, and these policies should state specifically how firearms should be handled in the workplace.¹³⁷

Furthermore, it will be imperative for the companies' human resource managers to train their supervisors so that these supervisors understand that they cannot discriminate or treat employees storing concealed weapons in locked vehicles parked on company parking lots differently from other employees.¹³⁸ Likewise, employers may need to refrain from inquiring about gun ownership on employment applications if this information is currently included on job applications.¹³⁹

Because employers have a legal obligation to promote a safe work environment for their workers, it was suggested in a Federal Bureau of Investigation report that a workplace violence strategy must be supported from the top of the company and there is no "one-size-fits-all strategy," meaning that a good workplace violence plan should be tailored to the "needs of a particular employer and a particular workforce."¹⁴⁰ The idea of a tailored violence plan holds true even more in a situation where employers are required to follow workplace gun laws.

As part of this workplace violence plan, employers must be cognizant to take seriously "the psychological and behavioral component when terminating employees."¹⁴¹

¹³⁵ Yesenia Salcedo, *Business Groups Challenge Florida "Gun at Work" Law*, INSIDE COUNSEL, July 2008, at 72.

¹³⁶ *Id.*

¹³⁷ *Employers Unnerved by Ruling Upholding the Legality of Guns in Workplace Parking Lots; Amid Rising Layoffs, Federal Decision Highlights Concern About Workplace Violence, Attorney Says*, PR NEWswire, Feb. 27, 2009.

¹³⁸ Salcedo, *supra* note 135, at 72.

¹³⁹ *Id.*

¹⁴⁰ *Workplace Violence: Issues in Response*, CRITICAL INCIDENT RESPONSE GROUP, at 19 (Eugene A. Rugala & Arnold R. Isaacs eds.), available at <http://www.fbi.gov/publications/violence.pdf> (last visited Nov. 9, 2009).

¹⁴¹ Security and human resource consultants advise the following to keep employees safe when terminating employees: (1) do not fire people on Fridays; (2) do not let a fired employee back in the building, especially if there is any reason for concern; (3) advise those who control access to the building that the person has been fired and is not to be readmitted; (4) have a policy in place on the process for terminating employees and follow this process; (5) if an individual has had behavioral problems consider consulting

In general, there are certain warning signs that employers should look for as indicators of potential incidences of workplace violence, such as intense stress and behavioral changes in employees.¹⁴² Additional warning signs may include unpredictable behavior, increased irritability or hostility, reduced quality of work, poor organizational and time management skills, and absenteeism.¹⁴³ To ward off potential incidences of workplace violence, it will be imperative for companies' human resource managers to ensure that their managers and employees are trained on how to recognize these warning signs and how to deal with them and how to avoid them.¹⁴⁴ Moreover, given the fact that the economic conditions in 2008 and 2009 have caused some individuals not normally fitting the profile to commit crimes and acts of violence—like the 51-year-old woman who robbed a bank in Massachusetts in December 2008¹⁴⁵—companies need to be more alert than ever to potential problems of violence that may arise even from an individual who may not be showing these warning signs.

Finally, employers must realize that just because they operate in a state that has adopted workplace gun laws, that does not mean that they do not have the right to restrict firearms at their workplace. As previously explained, these workplace gun laws are usually limited to locked vehicles on employee parking lots.¹⁴⁶ This means that employers can have gun-free work-zones even if they are required to comply with the workplace gun laws, such as in company buildings and secure parking lots with restricted access.¹⁴⁷ These gun-free work zones still allow companies to regulate firearms in the workplace. An employer's ability to regulate firearms, notwithstanding workplace gun laws, will hopefully protect employers and their employees from the likely acts of workplace violence that may occur as a direct result of the enactment of these laws.

VII. CONCLUSION

At present, ten states have enacted workplace gun laws prohibiting employers from adopting any policy restricting their employees' right to store firearms locked in their vehicles parked on company parking lots.¹⁴⁸ As comparable legislation is being considered in other states, this number will surely continue to grow.¹⁴⁹ With enactment of these laws come reasonable concerns about whether they will multiply the violent occurrences that take place in the workplace.

with a psychologist and an expert in violence assessment before the exit interview; and (6) if no security department exist, the company should consider hiring a consultant to handle the termination. Pete Carey, *Experts Say Companies Can Take Precautions to Prevent Workplace Violence*, *CONTRA COSTA TIMES*, Nov. 18, 2008.

¹⁴² *Stress of Weak Economy May Increase Workplace Violence*, *supra* note 52.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Johnson, *supra* note 53 and accompanying text.

¹⁴⁶ See *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1381 (M.D. Fla. 2008).

¹⁴⁷ See, e.g., ALASKA STAT. § 18.65.800(a); GA. CODE ANN. § 16-11-135(d)(1); LA. REV. STAT. ANN. § 32:292.1(D)(3)(a)-(b); MISS. CODE ANN. § 45-9-55(2).

¹⁴⁸ See ALASKA STAT. § 18.65.800; FLA. STAT. ANN. § 790.251; GA. CODE ANN. § 16-11-135; KAN. STAT. ANN. § 75-7c11; KY. REV. STAT. ANN. § 237.106; LA. REV. STAT. ANN. § 32:292.1(D)(1); MINN. STAT. § 624.714; MISS. CODE ANN. § 45-9-55; OKLA. STAT. tit. 21 §1290.22; OKLA. STAT. tit. 21 §1289.7a; UTAH CODE ANN. § 53-5a-102(2)(a).

¹⁴⁹ See Gold, *supra* note 3.

Based on these concerns, some employers continue to preclude employees from bringing guns into company parking lots.¹⁵⁰ The decision to disobey these laws can have legal implications, such as subjecting the employer to employee-instituted lawsuits. Yet, the decision to fulfill the requirements of workplace gun laws does not necessarily insulate employers from liability. Potential liability may exist if employers conform to these laws and, as result of their compliance, acts of violence take place in the workplace. Accordingly, employers required to abide by workplace gun laws must confer with their counsel and human resource managers to employ policies that operate to keep their workplaces safe while ensuring that these employers are simultaneously following these gun laws.

¹⁵⁰ See, e.g., Word, *supra* note 7; Disney Worker Gun Rules Eased At Some Sites, *supra* note 7.