

Workplace Violence, Firearm Prohibitions, and the New Gun Rights

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Introduction

WORKPLACE VIOLENCE IS SURPRISINGLY COMMON—some estimates suggest approximately two million incidents per year, including several hundred workplace homicides and suicides,¹ as well as an alarmingly high rate of mass shootings and active shooter rampages.² In spite of the prevalence of workplace gun violence, and partly in response to it, legislatures and some courts have begun to restrict employers' ability to prohibit firearms at the workplace facility—especially in employee parking lots, but in some cases, also within the workplace building itself.³ Employees have growing legislative protec-

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1. See Joe Seiner, *Workplace Violence and Texas Tragedy*, WORKPLACE PROF BLOG (Sept. 2, 2019), https://lawprofessors.typepad.com/laborprof_blog/2019/09/workplace-violence-and-texas-tragedy.html [<https://perma.cc/DL7N-PH4A>] (“Every year this country sees almost two million incidents of workplace violence. Federal data reveals that over a 13-year period, almost 10,000 murders occurred in the workplace.”); Autumn Heisler, *Allowing Guns in the Workplace Introduces Liability Risk*, RISK & INS. (May 1, 2018), <https://riskandinsurance.com/workplace-violence-arming-managers> [<https://perma.cc/9H2M-VSMN>] (“According to OSHA, two million workers in America are victims of workplace violence each year.”); Christal Hayes & Paul Brinkmann, *Orlando Shooting Is Latest in Growing Trend of Workplace Violence, Expert Says*, ORLANDO SENTINEL (June 5, 2017, 6:50 PM), <https://www.orlandosentinel.com/news/os-orlando-workplace-shooting-violence-uptick-20170605-story.html> [<https://perma.cc/GB59-TSBJ>] (suggesting that “about 2 million people are victims of workplace violence each year”); Charles Montaldo, *It’s Official: “Going Postal” Is Epidemic*, THOUGHTCO. (April 3, 2019), <https://www.thoughtco.com/going-post-al-epidemic-972216> [<https://perma.cc/88GH-W6TP>] (discussing several recent incidents).

2. See Grant Duwe, *Patterns and Prevalence of Lethal Mass Violence*, 19 CRIMINOLOGY & PUB. POL’Y 17, 30 (2020) (“Historically, workplace shootings have been more prevalent, accounting for 27% of the cases.”).

3. See Joe Cellura, *Guns in the Workplace? Developing a Balanced Risk Management Policy*, RISK & INS. (Jan. 22, 2020), <https://riskandinsurance.com/gun-policies-in-the-workplace/>

tion and are even encouraged to bring guns to work, and customers or patrons may also have enhanced rights to bring guns into businesses or offices that they visit, regardless of the wishes of employers or managers. This trend coincides with a larger trend of liberalized laws about carrying concealed or openly displayed firearms.⁴ Despite those laws, more gun owners are now carrying handguns outside the home.⁵ In almost half the states, obtaining a concealed carry permit exempts the permittee from undergoing any subsequent federal background checks when purchasing a firearm from a dealer,⁶ and in most

[<https://perma.cc/NF9Q-V9MV>] (“Some states prohibit employers from curtailing employees’ rights to bring firearms to work altogether. Some local laws and regulations also mandate appropriate signage regarding gun policies at a facility.”).

4. See Dru Stevenson, *Ethical Issues with Lawyers Openly Carrying Firearms*, 10 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 290, 293 (2020) (“Most states have liberalized their ‘concealed carry’ laws in recent years, and some have loosened restrictions on openly carrying firearms as well - many states already permitted open carry.”). On the liberalization trend for “concealed carry,” see Carl T. Bogus, *The Hard, Simple Truth About Gun Control*, in GUNS IN LAW 88, 92–93 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds. 2019) (describing the trends in concealed carry and open carry laws); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 264 (2018) (discussing the trend in state law); Hannah E. Shearer, *Jeopardizing Their Communities, Their Safety, and Their Lives: Forced Concealed Carry Reciprocity’s Threat to Federalism*, 45 HASTINGS CONST. L.Q. 429, 431–33 (2018) (discussing state variations in concealed carry permit requirements); Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1690 (2018) (“[A]s of 2015, every state and the District of Columbia allow the public concealed carry of firearms.”). On the trend of allowing “open carry,” see Lance Duroni, *Out of the Home and in Plain Sight: Our Evolving Second Amendment and Open Carry in Wisconsin*, 102 MARQ. L. REV. 1305, 1306–07 (2019) (detailing how Wisconsin only denies concealed carry permits in limited circumstances); Mary Beth Chappell Lyles, *The Open Carry Library: Navigating Gun Policies in the Age of Open Carry Laws and Mass Shootings*, 19 AM. ASS’N L. LIBRS. SPECTRUM 31 (2015) (mentioning changes in several state laws that resulted in more patrons openly carrying guns into public libraries); J. Harrison Berry, *Arkansas Open Carry: Understanding Law Enforcement’s Legal Capability Under a Difficult Statute*, 70 ARK. L. REV. 139, 139–40 (2017) (describing how Arkansas’s new open carry law legalizes open carry of a firearm so long as the person possessing the firearm does not intend to unlawfully use the gun as a weapon against another).

5. See Bogus, *supra* note 4, at 93 (showing an increase from 2.7 million to 11.1 million Americans having concealed carry permits from 1999 to 2014).

6. See Dru Stevenson, *Michigan Legalizes Marijuana, Loses Its “Permanent Brady Permit” Status with ATF*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS (Mar. 18, 2020), <https://sites.law.duke.edu/secondthoughts/2020/03/18/michigan-legalizes-marijuana-loses-its-permanent-brady-permit-status-with-atf/> [<https://perma.cc/JW98-GJDZ>]. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) allows twenty-two states to substitute their concealed carry permits for the background checks that would normally be a requirement for gun purchases from dealers, as these states have concealed carry permit requirements at least as stringent as the federal background check requirements. See PERMANENT BRADY PERMIT CHART, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Mar. 3, 2020), <https://www.atf.gov/rules-and-regulations/permanent-brady-permit-chart> [<https://perma.cc/9XPG-S5FR>]. In practical terms, permit/license holders in these states can skip the National Instant Criminal Background Check System background check when purchasing

states, private person-to-person sales do not require background checks.⁷ This means employers cannot rely on regulatory controls to screen unstable or discharged employees, or upset patrons, from purchasing firearms.⁸ At the same time, unarmed coworkers, supervisors, and business customers or clients often feel threatened, intimidated, or even bullied by the presence of firearms in their immediate work environment, especially in the wake of highly-publicized mass shootings at workplaces, stores, schools, and office spaces.⁹ The presence of firearms can have a chilling effect on employee communication and interactions and can alter the dynamics of relationships within a workplace, such as declining romantic overtures or responding to teasing by an armed coworker.¹⁰ This Article explores the re-

firearms from a licensed gun dealer, whether online, in-store, or at a gun show, even though normally required for the dealer to do the background check. *Id.* Note the caveat that an individual's permit or license must be less than five years old. *Id.*

7. See *Universal Background Checks*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/> [https://perma.cc/ZMP3-XMGH]. Twenty-one states and Washington D.C. have extended background check requirements to some or all private gun sales, which goes beyond what federal law requires, though only twelve states require background checks on all gun sales and transfers. *Id.* At the time of this writing, the House has already passed a bipartisan bill for universal background checks, but it has stalled in the Senate. See also *Bipartisan Background Checks Act of 2019*, H.R. 8, 116th Cong. (2019); *H.R.8 - Bipartisan Background Checks Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/8> [https://perma.cc/AY96-AFT2].

8. See *Background Check Procedures*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/background-check-procedures/> [https://perma.cc/5CUF-9ZFY].

9. See Michael Z. Green, *Mediating Psychiatric Disability Accommodations for Workers in Violent Times*, 50 SETON HALL L. REV. 1351 (2020) (discussing the prevalence of workplace violence and its relationship to mental health issues and employer responsibilities, and proposing the use of mediation as a more significant tool in resolving the balance of concerns presented in these situations).

10. See FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE?: DEMOCRACY AND THE ARMED SOCIETY* 186 (2015) ("This is the real selling point of guns: they give an individual an *advantage* over others."); see also *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) ("Your interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence."). Eugene Volokh observed:

To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police. Most people are aware that many neighbors own guns, and even that many people are licensed to carry concealed guns and many others carry them illegally, but this abstract knowledge doesn't cause much worry. But when a gun is visible, it occupies people's attention in a way that statistical realities do not.

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009); see also Jennifer Carlson, *Mourning Mayberry: Guns, Masculinity, and Socioeconomic Decline*, 29 GENDER & SOC'Y 386,

cent legislative and judicial developments in this area (forcing employers to permit guns on workplace grounds or within facilities), the new trend for employers to provide active shooter response training or purchase active shooter insurance policies, the policy arguments and trade-offs regarding gun-free workplaces versus employee gun rights, and the need for employers to reduce the risk of violence—especially lethal violence—in the workplace.

This Article proceeds as follows: Part I sets forth the current situation with alarmingly prevalent workplace shootings; the need for better policy responses is self-evident. Part II devotes its first section to exploring the rise—mostly in the last decade—of statewide “Parking Lot Laws,” which guarantee the rights of employees to keep guns in their cars at work, and that prioritize gun owners’ rights over the property owner’s property rights. Further, Part II briefly observes how employees, and sometimes patrons, may bring guns into certain types of workplaces. Part III presents the emergence of specialized insurance policies (active shooter insurance) for rampage shootings at workplaces, and some of the complex issues that pertain to this new type of risk management. While Parts II and III focus on legal and market responses tailored to increasing workplace shootings, Part IV discusses how more generalized legislative initiatives promoting gun control—or gun rights—affect the prevalence of workplace shootings in that jurisdiction; a distinct question from how such firearm policies affect overall crime rates or gun deaths. Finally, this Article provides a brief conclusion.

I. The Crisis

Workplace shootings are the most common type of active shooter events.¹¹ In 2014, the Federal Bureau of Investigation (“FBI”) completed a study detailing the frequency of active shooters in the United States.¹² A total of 1,043 casualties resulted from the 160 active shooter incidents that were included in the study, with 486 people killed and 557 wounded.¹³ The individuals who were wounded by incidental occurrences (e.g. being hit by shattered glass that resulted

389 (2015) (“As a form of hegemonic masculinity, masculine protectionism shapes contemporary American gun politics.”).

11. See generally PETE J. BLAIR & KATHERINE W. SCHWEIT, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013 (Tex. State Univ. & U.S. Dep’t of Just. Fed. Bureau of Investigation eds., 2014).

12. *Id.*

13. *Id.* at 9.

from gunfire; falling while running from the shooter) were not included in the calculation for the amount of people wounded.¹⁴ Of all civilian-owned guns in the world, Americans own almost 46%, so, unsurprisingly, deadly mass shootings are a regular occurrence.¹⁵ Mass shootings in commercial workplace settings are a significant part of the larger gun violence problem.¹⁶ From a historical vantagepoint, workplace shootings have been much more common than school shootings,¹⁷ though the latter receive more attention in the news media and provoke a more visceral reaction from the public. The final report published by the FBI found that at least 44% of active shooter incidents in the United States target commercial locations.¹⁸ Within the past decade, the incident with the second highest casualty count took place in Orlando, Florida where 102 casualties occurred in a commercial setting.¹⁹ In 2018, occupational injuries caused by homicide shootings totaled 453 fatalities in the workplace.²⁰

A rise in workplace rampages committed by disgruntled employees and estranged partners of employees has increased in the past few years.²¹ After complaining to human resources about several issues, a

14. *Id.* at 9.

15. Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. UNIV. J.L. & POL'Y 1, 2 (2019). To put this in perspective, the number of Americans who have died from gun violence "in the last fifty years" exceeds the number of Americans who have died "in all of the wars in American history." *Id.* at 3.

16. See Grant Duwe, *Patterns and Prevalence of Lethal Mass Violence*, 19 CRIMINOLOGY & PUB. POL'Y 17, 20 (2019).

17. See *id.* at 30.

18. U.S. DEPT. OF JUST. FED. BUREAU OF INVESTIGATION, ACTIVE SHOOTER INCIDENTS: TOPICAL ONE-PAGERS 2000-2018 (2019), <https://www.fbi.gov/file-repository/active-shooter-one-page-summaries-2000-2018.pdf/view> [<https://perma.cc/3TH5-GL2C>]. Incidents that take place in businesses open to pedestrian traffic are significantly more lethal than incidents occurring in businesses closed to pedestrian traffic; the FBI identified 37 incidents that occurred in the latter and 74 incidents in the former setting. *Id.* Out of the 282 shooters between 2000-2018, only 12 were female, 7 of whom were current or former employees of the business in which the incident occurred. *Id.*

19. *Id.*

20. *Fatal Occupational Injuries for Selected Events or Exposures, 2011-18*, U.S. BUREAU LAB. STAT., (Dec. 17, 2019), https://www.bls.gov/news.release/cfoi.t02.htm?mod=article_inline [<https://perma.cc/RSW5-JYNH>]; see also, Jennifer Mascia, *The Bronx Hospital Attack Was the Fifth Workplace Shooting Last Month*, TRACE (Oct. 2, 2018, 11:27 AM), <https://www.the-trace.org/2017/06/bronx-hospital-attack-fifth-workplace-shooting/> [<https://perma.cc/8R4P-BNQW>]. In 2017, a former doctor at the hospital he used to work for shot one person and injured six others while wearing his lab coat. *Id.* In the same month, five other shootings were committed by a UPS employee, grocery store clerk, an employee at an awning company, and an employee at a biotech company. *Id.*

21. See Jennifer Mascia, *Gunman Strikes Orlando Workplace in the Most Common Type of 'Active Shooting'*, TRACE (June 6, 2017, 9:04 AM), <https://www.thetrace.org/2017/06/orlando-mass-shooting-workplace/> [<https://perma.cc/WWW2-9F4C>]. Some of the deadliest

frustrated cook at a downtown hotel in Los Angeles threatened to kill his coworkers and customers.²² In Mississippi, a Walmart store manager shot two fellow coworkers.²³ In a Chicago factory, a fired employee killed five former coworkers.²⁴ In Virginia Beach, a former municipal worker killed twelve people.²⁵ In February 2020, a worker killed five fellow employees in Milwaukee while wearing his Miller Brewing Company uniform.²⁶ In July 2020, an estranged husband in Lakewood, Washington “showed up at his estranged wife’s workplace, then shot and killed her boyfriend before turning the gun on himself”²⁷ In March 2016, in Texas, “a gunman walked into a Walmart and shot an employee who had been dating the killer’s estranged wife.”²⁸

Survivors of the 400 workplace homicides that occur on average each year suffer from the traumatic mental effects caused by witnessing their coworkers die next to them.²⁹ This mortality rate does not take into account the long-term effects of such trauma, which “is exacerbated by witnesses’ need to return to the scene of the homicide

workplace shootings involved employees from San Bernadino County Department of Public Health (14 dead), Fort Hood Military Post (13 dead), Washington Navy Yard (12 dead), Hartford Distributors (8 dead), Salon Meritage (8 dead), Accent Signage Systems (6 dead), Atlantis Plastics (5 dead), and Fiamma Awning (5 dead). *Id.*

22. Phil Hesel, *Disgruntled Employee Had Arsenal of Guns, Threatened Mass Shooting at California Hotel, Police Say*, NBC NEWS (Aug. 22, 2019, 8:04 AM), <https://www.nbcnews.com/news/us-news/disgruntled-employee-had-arsenal-guns-threatened-mass-shooting-california-hotel-n1045076> [<https://perma.cc/QA98-W72A>].

23. David K. Li, *‘Disgruntled Employee’ Kills 2 Co-workers, Wounds Officer Inside Mississippi Walmart*, NBC NEWS (July 30, 2019, 4:35 PM), <https://www.nbcnews.com/news/us-news/two-killed-officer-wounded-gunfire-erupts-inside-walmart-mississippi-n1036081> [<https://perma.cc/GP79-FELH>].

24. Julie Bosman, Mitch Smith & Neil Vigdor, *5 Killed in Shooting at Molson Coors in Milwaukee*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/us/milwaukee-shooting-miller-coors.html> [<https://perma.cc/P84B-2BJH>].

25. *Id.*

26. *Id.*

27. *Police: Estranged Husband Shows Up at Hospital and Kills Wife’s New Boyfriend, Then Himself*, YAKTRINEWS.COM (June 9, 2020, 10:02 AM), <https://www.yaktrine.com/police-estranged-husband-shows-up-at-hospital-and-kills-wifes-new-boyfriend-then-himself> [<https://perma.cc/KLT9-K2B4>]; see also DANIEL L. SCHWERIN, JEFF THURMAN & SCOTT GOLDSTEIN, ACTIVE SHOOTER RESPONSE (StatPearls Publishing, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK519067/> [<https://perma.cc/BW2L-LPAD>] (estranged partners are 25% of active shooters).

28. Dale Hartley, *Preventing Workplace Shootings*, PSYCH. TODAY (Mar. 23, 2016), <https://www.psychologytoday.com/us/blog/machiavellians-gulling-the-rubes/201603/prevent-ing-workplace-shootings> [<https://perma.cc/K7R6-SCJ9>].

29. Erika L. Sabbath, Summer Sherburne Hawkins & Christopher F. Baum, *State-Level Changes in Firearm Laws and Workplace Homicide Rates: United States 2011 to 2017*, 110 AM. J. PUB. HEALTH 230 (2020).

each day to earn a living themselves.”³⁰ Studies reveal that workplace homicide is more prevalent when companies allow their employees to carry weapons at work.³¹ Furthermore, studies indicate that states that advance legislation promoting increased background checks, buyer regulations, dealer regulations, and limits on firearm trafficking reduced workplace homicide between 2.75% and 5%.³² Notably, “strengthening the state-level firearm policy environment . . . would save, on average, the lives of 16 workers each year who would have died from workplace homicides, with further benefits extending to their families, coworkers, and employers.”³³

The gravity of this issue makes surprising the fact that it receives so little academic attention, especially from the legal academy. Though many gun owners—and those who bring their guns to work—argue that their guns enhance their safety, research shows that firearm ownership often “may increase, rather than decrease, the risk of becoming a victim of violence.”³⁴

In a study published in 2005, Dana Loomis and her co-authors offer evidence that “policies allowing guns in the workplace may increase the risk of homicide for workers.” Their research also concluded that employers’ experiences with crime will likely help in forming gun possession policies, which has the adverse effect of work sites at the “highest risk for crime” being “most likely to allow guns.”³⁵ With most adults spending significant amounts of time at work, and since “violence is a leading cause of death for US workers,” the seriousness of workplace shootings must be addressed.³⁶ Furthermore, the Loomis study found that “[w]orkplaces where guns were permitted were about five times as likely to experience a homicide as those where all weapons were prohibited;” this association remained even after controlling for other risk factors.³⁷

Employers are responsible for providing hazard-free work sites, yet the largely unpredictable nature of workplace shootings can make

30. *Id.*

31. *Id.* at 204.

32. *Id.* at 235.

33. *Id.*

34. Dana Loomis, Stephen W. Marshall & Myduc L. Ta, *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH 830, 830 (2005).

35. *Id.* at 830–31.

36. *Id.* at 830.

37. *Id.* at 830.

this burden difficult.³⁸ Disgruntled employees are an everyday phenomenon, but for each ex-employee that poses a serious threat, many others pose no imminent threat, but also want employers to respect their privacy and their legal rights to bear arms.³⁹ The situation for employers, therefore, is delicate. On one hand, they must tread carefully when an employee evinces mental health problems, staying within the boundaries of state and federal disability antidiscrimination laws.⁴⁰ On the other hand, employers normally have legal obligations to keep workplaces safe for their workers and can face liability for failures to prevent foreseeable lethal threats.⁴¹ As one commentator put it, “few things in our lives go more to the core of our identity than our jobs.”⁴²

On June 30, 2017, Dr. Henry Bello, an ex-employee, walked into the Bronx Lebanon Hospital with his white lab coat concealing an AR-15 assault rifle—the firearm he used to open fire, kill a fellow doctor, and injure six other people.⁴³ On June 5, 2017, an Orlando awning company was faced with a similar situation, as a recently fired employee, “fatally shot five former co-workers and then himself.”⁴⁴ On June 8, 2017, a Pennsylvania grocery store clerk shot and killed three coworkers and then himself.⁴⁵ On June 14 of the same year, a San Francisco UPS employee did the same, fatally shooting three coworkers and himself.⁴⁶ Finally, on June 20, 2017, a San Diego biotech company’s employee “shot his coworker in the head, critically wounding him.”⁴⁷ The temporal proximity of these incidents makes it clear that resentful employees shoot up their former or current places of work with “alarming regularity.”⁴⁸ The “most common type of active shoot-

38. Erik Eckholm & Richard A. Oppel Jr., *Virginia Shooting Spotlights Riddle of Workplace Safety*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/28/us/virginia-shooting-spotlights-riddle-of-workplace-safety.html> [https://perma.cc/RAM7-X78J].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*; see also Joseph Seiner, *Workplace Violence and Texas Tragedy*, WORKPLACE PROF BLOG (Sept. 2, 2019), https://lawprofessors.typepad.com/laborprof_blog/2019/09/workplace-violence-and-texas-tragedy.html [https://perma.cc/VX84-U6RZ].

43. Colleen Long, *The Latest: Ex-colleague Says Hospital Gunman Was a Problem*, ASSOCIATED PRESS NEWS (June 30, 2017, 7:45 PM), https://apnews.com/748f9b9350cb4444aeb22bacd6f352a9?utm_campaign=SocialFlow&utm_source=twitter&utm_medium=AP [https://perma.cc/5NLR-GCB2].

44. Mascia, *The Bronx Hospital Attack*, *supra* note 20.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

ing” is a disgruntled current or former employee, such as the one who had been fired from the small business two months prior to the Orlando shooting, where he gunned down five employees.⁴⁹

Embittered current or former employees are not the only ones who perpetrate homicides at workplaces—estranged spouses, domestic partners, and other romantic partners account for an alarming share of such incidents. Between 2003 and 2008, about one-third of women murdered in U.S. workplaces were killed by a current or former intimate partner.⁵⁰ From 1997 to 2009, 321 women and thirty-eight men were victims of on-the-job intimate partner homicide.⁵¹ These workplace homicides frequently lead to “broader morbidity,” where coworkers of the deceased, who are often witnesses and survivors, are forced to deal with long-term trauma.⁵²

This Article focuses on legal or law-related policies intended to reduce the number of workplace shootings, or, in contrast, those that might increase the prevalence of shootings. It is worth mentioning at the outset, however, that researchers have identified a few practical, non-legal measures that employers can take to reduce workplace homicides. Although the mass shootings that garner media attention typically occur during the workday, a significant number of workplace killings happen at night, often in relation to robberies or burglaries.⁵³ Measures to reduce nighttime robberies and burglaries made a difference, such as staffing arrangements that avoided solo work at night (an employee being on the premises alone) reduced the risk of homicide for workers.⁵⁴ Bright exterior lighting, and simply keeping doors closed, also reduced the likelihood of worker homicides.⁵⁵ Such practical, employer-driven measures are not politically or legally controversial, at least not until they are legally mandated. Unfortunately, no single measure, or even a combination of measures, can completely eliminate workplace homicides—but combinations of various measures are more effective than over-investment in a single measure.⁵⁶

49. Mascia, *Gunman Strikes Orlando Workplace*, *supra* note 21.

50. See Kelly Mollica & Carol Danehower, *Domestic Violence and the Workplace: The Employer's Legal Responsibilities*, 17 J. MGMT. & MKTG. RSCH. 1, 6 (2014).

51. See *id.*

52. Sabbath, Hawkins & Baum, *supra* note 29.

53. See Dana Loomis et al., *Effectiveness of Safety Measures Recommended for Prevention of Workplace Homicide*, 287 J. AM. MED. ASSOC. 1011, 1011 (2002) (admittedly, this study was done more than twenty years ago, though no contradictory findings have been published in the meantime).

54. See *id.* at 1014.

55. See *id.* at 1015.

56. See generally *id.*

One current legislative battle in the ongoing cultural war over gun rights is the legal presence of guns in the workplace—the rights of employees to bring guns to work versus the rights of employers to ban them.⁵⁷ Employers and business owners invoke private property rights in these debates, while employees insist that their Second Amendment rights should prevail.⁵⁸ In an interesting reversal of the usual partisan positions on gun rights, at one point, Congressional Republican Caucus Leader Debra Maggart—a Second Amendment enthusiast—opposed a guns-at-work law introduced by Democratic Representative Eddie Bass.⁵⁹ Maggart stalled the proposed law, maintaining that guns-at-work laws would violate employers’ property rights and would threaten their ability to control workplace safety.⁶⁰ As a result, the National Rifle Association (“NRA”) helped ensure her defeat in the next primary by spending heavily on campaign ads against her.⁶¹

II. Guns at Work: The Rise of Parking Lot Laws & Abolition of “Gun Free Zones”

Some legislatures and courts have begun to restrict employers’ ability to prohibit firearms at the workplace, with much of the attention focused on employee parking lots; but sometimes also within the workplace building itself. Examples include teachers bringing guns to schools and staff in government buildings, such as courthouses. Legislatures have provided more legal protections to employees, and customers or patrons may also have enhanced rights to bring guns into businesses or offices that they visit, regardless of the wishes of employers or managers. This Part focuses primarily on Parking Lot Laws, with some mention of legal changes allowing guns to be brought *into* certain workplaces, especially schools, religious institutions, and government offices.

57. Sara Sahni, *Gun Battle in Georgia Over Firearms at Work*, 25 GA. EMP. L. LETTER 1, 1 (2013).

58. *Id.*

59. *Id.* at 2.

60. *Id.*

61. *Id.*

A. Parking Lot Laws

In 2016, David Lee Allison, a temporary worker at Black & Decker, fired more than 120 rounds at his fellow employees.⁶² He threatened them with a knife; additionally, while being escorted from the property due to his behavior, Allison retrieved a semi-automatic rifle from his car and started shooting.⁶³ Though this specific instance of workplace violence did not lead to any casualties, the same is not true for other unhinged and “disgruntled employee[s]” at work.⁶⁴ In 2018, the Census of Fatal Occupational Injuries (“CFOI”) reported a total of 453 workplace homicides that resulted from an intentional shooting by another person.⁶⁵ Much debate has ensued as a result of scenarios such as the aforementioned regarding how the right to gun possession should be regulated at workplaces. Yet in the past several years, more than half of U.S. states have adopted legislation forcing employers to allow employees to keep guns in their cars at work. By 2019, twenty-six states enacted laws that allow employees “to store a firearm in their personal cars in an employer’s parking lot.”⁶⁶

This legislative trend has drawn criticism, as employer-property owners have argued that these Parking Lot Laws violate the Takings Clause of the United States Constitution.⁶⁷ In *Ramsey Winch, Inc. v. Henry*,⁶⁸ Plaintiff business owners argued that state statute amendments prohibiting them from banning the storage of firearms locked in vehicles on their property were *per se* takings, as it required them “to provide an easement for individuals transporting firearms.”⁶⁹ Moreover, they argued that the Occupational Safety and Health (“OSH”) Act preempted the amended legislation, as gun-related workplace violence should be a recognized hazard under its general duty clause.⁷⁰ Though the district court found that “the challenged laws

62. Maranda Faris, *Man Accused of Firing Over 120 Shots at Black & Decker*, JACKSON SUN (Aug. 29, 2016, 7:27 PM), <https://www.jacksonsun.com/story/news/crime/2016/08/29/black-decker-suspect-facing-charges-fired-120-rounds/89517874/> [<https://perma.cc/CQ38-CTHL>].

63. *Id.*

64. *Id.*

65. *Fatal Occupational Injuries Resulting from Transportation Incidents and Homicides by Occupation, All United States, 2018*, U.S. BUREAU OF LAB. STAT. (Dec. 17, 2019), <https://www.bls.gov/iif/oshwc/foi/cftb0327.htm> [<https://perma.cc/866V-NG8S>].

66. ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 11:14, Westlaw (database updated Nov. 2019).

67. *See, e.g., Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1209 (10th Cir. 2009).

68. *Id.*

69. *Id.*

70. *Id.* at 1205–06.

were preempted” by the OSH Act, the Tenth Circuit disagreed and reversed the holding.⁷¹ They reasoned that the Occupational Safety and Health Administration (“OSHA”) had not indicated that “employers should prohibit firearms from company parking lots,” as reflected by the lack of any discussion about such prohibition on their website, guidelines, and citation history.⁷² Additionally, OSHA declined to concretely address a request to promulgate a standard banning firearms from the workplace—consciously refraining from adopting the standard, even in light of the controversy surrounding firearms.⁷³ Hence, the Tenth Circuit held that the amendments’ purpose of increasing safety and securing the Second Amendment right to bear arms had a rational basis, and that the business owners’ due process claim failed.⁷⁴

The Tenth Circuit’s findings are consistent with one commentator’s argument that “the OSH Act does not preempt Parking Lot Laws because OSHA has yet to articulate a standard for workplace violence and states are not foreclosed from regulating such areas.”⁷⁵ Furthermore, Congress stated that the assertion of state standards over any occupational safety or health issue, in the absence of applicable federal standards, will not be prevented.⁷⁶ The lack of federal preemption has helped encourage the passage of more states laws that allow individuals to keep their firearms in their vehicles when at work.⁷⁷ Predictably, supporters argue that these laws allow for employee self-defense if faced with criminals, such as carjackers, robbers, or rapists, while running work-related errands or commuting to and from work.⁷⁸ Opponents argue that Parking Lot Laws can “too easily turn a disagreement deadly” and supervisors will fear disciplining their employees, knowing that they have immediate access to guns.⁷⁹

71. *Id.* at 1202.

72. *Id.* at 1206.

73. See Letter from Richard E. Fairfax, Directorate of Enforcement Programs, to Morgan Melekos (Sept. 13, 2006), <https://www.osha.gov/laws-regs/standardinterpretations/2006-09-13> [<https://perma.cc/FCW6-58RJ>].

74. *Ramsey Winch Inc.*, 555 F.3d at 1211.

75. Malerie Leigh Bulot, “Bring Your Gun to Work” and You’re Fired: Terminated Employees’ Potential Rights for Violations of Parking Lot Laws, 78 LA. L. REV. 990, 1003 n.90 (2018) (citing Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 491–92 (2009)).

76. 29 U.S.C. § 667(a) (2020).

77. Royal, *supra* note 75, at 477.

78. *Id.* at 478.

79. *Id.*

In this author's view, employers should have the right to ban guns from their property—including the parking lot. In recognition that many employers will either permit guns on the premises (if given the choice) or will not be searching employees' locked cars for guns, employers are unlikely to know if someone has a gun locked in their car. However, guns kept locked in employees' cars in the parking lot pose less threat than guns inside the building, both for accidental discharges and for heat-of-the-moment rage shootings (during workplace disputes, etc.). A gun noticed under a coworker's clothing (or worn openly in a holster) or noticed in a desk drawer is more likely to cause misunderstanding or panic among coworkers than a gun hidden away in an employee's car in the lot. At the same time, employee disputes and incidents sometimes occur in the parking lot too—whether between coworkers, or between employees and customers, vendors, or even trespassers. A firearm within reach (just inside the employee's car) can permit a situation to escalate into a shooting. Given that employers are likely to face liability issues for shootings that occur on their premises, and that insurers might charge higher premiums or offer discounts depending on risk reduction policies, employers should have the freedom to make this decision, as they bear the cost of insuring against the risk.

B. Guns on the Premises

A parallel trend is states repealing their traditional bans on guns in government buildings, including courthouses, so that those with concealed carry permits can now bring guns into court buildings; in some states, openly carrying firearms is now permissible in such premises, though generally not inside courtrooms.⁸⁰ Courts and government offices employ many workers, so these legislative initiatives simply expand the number of scenarios and locations where employees may encounter coworkers or visitors who are carrying firearms. Regarding courthouses, note that while the judiciary and the American Bar Association have strongly (and eloquently) opposed the introduction of guns, the number of shootings in these facilities has climbed in recent years as more guns have been present.⁸¹

In response to some of the horrific rampage shootings in public schools, some states in recent years have permitted, or even encouraged, teachers or other school personnel to bring guns to school,

80. See Stevenson, *supra* note 4, at 328–38 (discussing in detail the trend of states allowing guns in court buildings and annexes).

81. See *id.*

with the idea that these workers would be able to thwart a would-be active shooter. Like courts and other government offices, schools employ many teachers, staff, cafeteria personnel, and volunteers from the community, and these workers have more exposure to guns in the workplace as a result. Unfortunately, schoolteachers and School Resource Officers (“SROs”) sometimes mishandle guns in schools, potentially resulting in terrifying accidents and occasional tragedies.⁸² On numerous occasions, school staff members have misplaced their handguns somewhere in the school (often the gun is inadvertently left in the bathroom), only to be found by schoolchildren later in the day.⁸³ In some instances, students have also discovered and accessed guns that were stored on site and which were required and thought to be secure.⁸⁴ Mishaps occur several times a year where students dis-

82. See *Every Incident of Mishandled Guns in Schools*, GIFFORDS L. CTR. (Mar. 2, 2020), <https://giffords.org/blog/2020/02/every-incident-of-mishandled-guns-in-schools-blog/> [<https://perma.cc/8Z9C-NVPD>] (collecting publicly-reported incidents of mishandled guns in schools). The author wishes to acknowledge the invaluable help provided by research assistant Stephanie McKernan in researching and compiling this subsection.

83. See, e.g., *Boy Finds Gun in School Bathroom in Miami*, CBS MIAMI (Oct. 5, 2018, 5:49 PM), <https://miami.cbslocal.com/2018/10/05/boy-finds-gun-in-school-bathroom-in-miami/> [perma.cc/6G6Y-2RMQ] (fifth-grader found a security guard’s gun in the bathroom); *Student Finds Loaded Gun in Holly Hill School Bathroom*, WESH2 (May 3, 2017, 11:04 PM), <https://www.wesh.com/article/student-finds-loaded-gun-in-holly-hill-school-bathroom/9599927> [perma.cc/3P33-U7BZ] (the gun was left in the restroom by a campus security guard); Becky Metrick, *Teacher Charged After Students Find Her Loaded Gun in Bathroom*, PUB. OPINION NEWS (Sept. 13, 2016, 6:39 PM), <https://www.publicopiniononline.com/story/news/2016/09/12/teacher-resigns-after-child-finds-her-loaded-gun-school/90280916/> [perma.cc/T45P-5KB2] (four students between the ages of 6 and 8 found a teacher’s loaded gun on the toilet tank in a single unisex school bathroom); Kaitlin Zurawsky, *Ringgold Student Finds Security Guard’s Loaded Gun in Bathroom*, WTAE: PITTSBURGH’S ACTION NEWS 4 (Oct. 13, 2016, 11:29 PM), <https://www.wtae.com/article/ringgold-student-finds-security-guard-s-loaded-gun-in-bathroom/8059057> [perma.cc/97DA-4Y7H] (high school student found district security guard’s loaded gun).

84. See, e.g., Dean Narciso, *First Graders Had Access to Gun Meant to Prevent School Violence*, COLUMBUS DISPATCH (Aug. 16, 2019, 7:11 AM), <https://www.dispatch.com/news/20190816/first-graders-had-access-to-gun-meant-to-prevent-school-violence> [perma.cc/NM93-APPK] (district transportation director left her gun in an unlocked plastic case behind her desk during a short trip to the restroom and returned to find that the gun was accessed by two first graders); J. Ryne Danielson, *Central Middle Teacher Brought Gun to Class, Students Stole It*, PATCH (Oct. 26, 2018, 9:10 AM), <https://patch.com/missouri/stlouis/central-middle-teacher-brought-gun-class-students-stole-it> [perma.cc/6GUQ-3E2T] (substitute teacher didn’t realize their gun, which was stolen by two students aged 13 and 14, was missing until the end of the school day; the students were later arrested for stealing the gun); Carla Field, *5th-grader Takes Security Guard’s Gun at School, Officials Say*, WYFF 4 (May 13, 2015, 7:47 PM), <https://www.wyff4.com/article/5th-grader-takes-security-guard-s-gun-at-school-officials-say/7014639#> [perma.cc/49UU-6Q9P] (a fifth-grade student took a security guard’s gun from his holster while sitting next to him); Bill Wilson & Heather King, *Teacher Charged After Loaded Gun Found in Classroom*, WITN (Dec. 5, 2014, 8:30 AM), <https://www.witn.com/content/news/Teacher-charged-after-loaded-gun-found-in-classroom-28>

charge guns belonging to school personnel or attending police officers,⁸⁵ or where teachers and staff accidentally discharge their own firearms in or around the school.⁸⁶ While the introduction of guns into schools may have been a well-intentioned response to tragic mass shootings of children, there are obvious downsides: accidents and, sometimes, intentional shootings by the personnel who bring the guns to work, or by students or coworkers who find or take someone else's gun located on the premises. School employees (teachers and staff) are not immune from the same types of mental illness, coworker conflicts, and revenge over termination that affect workers in other workplaces.

III. Employer Insurance Issues

Because of the rise in workplace shootings, the need for workplace violence insurance rose 270% in 2019.⁸⁷ Many companies are

4881001.html [https://perma.cc/4S96-WJGX] (high school student found loaded gun in auto mechanic teacher's laptop bag).

85. See, e.g., Minn. Pub. Radio News, *Third-grader Fires Minnesota Cop's Holstered Gun; No One Hurt*, DULUTH NEWS TRIBUNE (Feb. 5, 2018, 6:00 PM), <https://www.duluthnewstribune.com/news/crime-and-courts/4399076-third-grader-fires-minnesota-cops-holstered-gun-no-one-hurt> [perma.cc/HTK5-TD84] (third-grader pulled the trigger of a school liaison officer's holstered handgun while sitting next to him and fired a round into the floor). The holster was a department-approved holster with a trigger guard that typically cannot be touched or fired in the holster, "but the child's small finger was able to reach inside." *Id.*; Gus Burns, *Gun Discharges During Struggle Between Deputy, High School Student*, MLIVE (Apr. 2, 2019), https://www.mlive.com/news/detroit/2017/10/report_gun_discharges_during_s.html [perma.cc/AK33-TG2R] (18-year-old student grabbed a deputy's gun during an arrest, causing the weapon to discharge; the student faces possible charges of domestic violence—the reason for the initial arrest, attempting to disarm a police officer and resisting or obstructing a police officer).

86. See, e.g., Justin Trombly, *Pasco Deputy's Gun Goes Off in Weightman Middle School Cafeteria, Strikes Wall*, TAMPA BAY TIMES (Apr. 30, 2019), <https://www.tampabay.com/news/publicsafety/pasco-resource-officers-gun-goes-off-hits-cafeteria-wall-at-weightman-middle-school-20190430/> [perma.cc/66JK-BJ8H] (SRO's holstered firearm fired a round into the wall while he was on duty); Kaley Johnson, *DFW School Resource Officer Accidentally Fires Gun at School*, FORT WORTH STAR-TELEGRAM (Apr. 18, 2019, 7:13 PM), <https://www.star-telegram.com/news/local/crime/article229432704.html> [https://perma.cc/U37H-5RFB] (Mesquite police officer assigned to a high school accidentally fired a round from his handgun while inspecting it); Amy Larson, *Seaside High Teacher Accidentally Fires Gun in Class, Students Injured*, KSBW 8 (Mar. 14, 2018, 6:30 PM), <https://www.ksbw.com/article/seaside-high-teacher-accidentally-fires-gun-in-class/19426017#> [perma.cc/T7ZD-NV85] (teacher who also serves as a reserve police officer accidentally fired a gun inside a classroom while teaching a course about gun safety).

87. Katie Young & Contessa Brewer, *Rise in Mass Shootings Leads to 'Rapid Growth' in Active Shooter Insurance*, CNBC (Jan. 10, 2020, 4:22 PM), <https://www.cnbc.com/2020/01/10/rise-in-mass-shootings-boosts-active-shooter-insurance.html> [https://perma.cc/8MZH-FW8U]. In other words, 220 new policies in only one month. *Id.*

vulnerable to workplace shootings; approximately 10–20% of employees have personal spousal, financial, or drug abuse problems that increase the likelihood for workplace violence.⁸⁸ As a result, policy coverage for deadly-weapon attacks assist corporations by providing monetary remuneration to victims and in navigating lawsuits and settlements.⁸⁹ After the Las Vegas shooting in 2017, MGM Resorts International paid \$50 million out of pocket to cover the shortage of its insurance policy.⁹⁰ According to one insurer, “the increased costs associated with providing a rapid response and comprehensive support pay off with fewer claims and less litigation.”⁹¹

A. Why Corporations Purchase Active Shooter Insurance

In response to the rise in mass shooting incidents, private companies are protecting their assets from hefty liability judgments by purchasing active shooter insurance⁹² in addition to their general liability insurance.⁹³ Active shooter insurance includes a broad range of coverages such as for physical damage, the duty to defend against litigation, crisis management, business interruption coverage, and re-branding the business.⁹⁴ The private sector has experienced a surge in active shooter coverage with a 235% growth in 2018 and a 270% growth in 2019,⁹⁵ especially within certain industries such as education and healthcare.⁹⁶ As such, businesses are beginning to realize

88. *See id.*

89. *See id.*

90. *Id.* (after the incident, MGM discovered it was covered for only \$751 million as part of its general liability policy, but the amount needed to settle the case after fifty-eight people were killed and hundreds injured was \$800 million).

91. *Id.*

92. Bethan Moorcraft, *What Is Active Shooter Insurance Coverage?*, INS. BUS. AM. (Dec. 14, 2018), <https://www.insurancebusinessmag.com/us/guides/what-is-active-shooter-insurance-coverage-118961.aspx> [<https://perma.cc/SB8E-PV8E>]. According to U.S. Homeland Security, an active shooter is “an individual actively engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is no pattern or method to their selection of victims.” *Id.*

93. *Id.* (a general liability policy will most likely not be sufficient because of the amount of “gray area” found in the language with respect to workplace-violence).

94. *Id.*

95. *See* Young & Brewer, *supra* note 87. The increase in deadly weapons coverage parallels the increase in cyber security insurance coverage. *Id.*

96. *See* Moorcraft, *supra* note 92. The increase in coverage is not limited to one industry. Although education and healthcare have seen the largest rise in coverage, the need for this type of insurance is widespread. *Id.*; *see also* Adjua Fisher, *Is Active Shooter Insurance Becoming a Risk Management Necessity?*, RISK & INS. (Mar. 1, 2019), <https://riskandinsurance.com/active-shooter-insurance-for-workplaces/> [<https://perma.cc/A3SY-MRHJ>] (“[H]ealthcare and social service workplace settings are particularly at risk for violence, with 75 percent of workplace assaults occurring in those industries.”). The largest under-

that insurance companies have a “comparative advantage over the policyholder in bearing the risks in question.”⁹⁷

Insureds may also be motivated to purchase deadly weapons coverage in order to avoid becoming personally liable for injuries caused to employees or customers. This incentive is likely attractive to “public corporations where stockholders can diversify away from firm-specific risk.”⁹⁸ Nevertheless, one prevailing reason why businesses purchase active shooter insurance is to guard against negligence lawsuits that will inevitably follow a mass shooting.⁹⁹ Negligence lawsuits are commonly pursued even when law enforcement finds that the “event could not have been prevented, there were no signs of danger, and every reasonable precaution was taken.”¹⁰⁰ Moreover, companies are further at risk of losing such a lawsuit, considering there is a real risk that juries will likely sympathize with the victims and their families and grant a large verdict against the defendant.¹⁰¹

B. Types of Coverage and Services Provided by Insurers

Insurers specialize in data collection and analysis that focuses on measuring the risks of loss caused by firearm catastrophes;¹⁰² thus, allowing them to protect their client more effectively through information technology. In addition, insurers consult security firms to further diagnose the risk and adjust the premiums accordingly. In order to limit the risk of accidents, insurers provide preventative services such

writer of Active Shooter Workplace Violence offers policies for the industries such as education, religious, retail, entertainment, hospitality, lodging, healthcare, and public entities (e.g. counties, cities, and townships). *Managers and Owners Can Maintain a Secure Environment for Their Business and Rest Easy at Night when They “Think McGowan”*, MCGOWAN PROGRAM ADM’RS (2020), <https://mcgowanprograms.com/products/active-shooter-insurance/> [<https://perma.cc/PG5K-ZAS7>].

97. George A. Mocsary, *Insuring the Unthinkable*, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW, at II.A. (LexisNexis, 2018); *see also* Darla Mercado, *Mass Shootings Boost Interest in Active Shooter Insurance*, CNBC (Aug. 14, 2019, 4:17 PM), <https://www.cnbc.com/2019/08/13/domestic-terrorism-has-given-rise-to-this-type-of-insurance-coverage.html> [<https://perma.cc/HQS2-AXJR>]. On the other hand, there are several exclusions and limitations where insurance policies may fall short. *Id.* For example, their policy does not include biological weapons, and certain policies will not pay “unless the incident leads to a specified number of casualties, while other contracts limit their payout based on the weapons used.” *Id.*

98. Mocsary, *supra* note 97, at II.B.1.

99. *Id.* at II.B.2. A breach of the employer’s “duty of care” to work in a safe environment includes protection against workplace violence. *Id.* As a result, “employers can be held liable for negligence if employees receive ‘reasonably foreseeable’ injuries.” *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at II.A.1.

as “sending in risk management companies to assess a location’s vulnerabilities and make suggestions in an effort to beef up their security protocols.”¹⁰³ Insurers provide a variety of coverage options ranging from \$20 million to \$35 million¹⁰⁴ and premiums ranging from \$1800 to \$20 million.¹⁰⁵ The policies offer different levels of coverage and terms such as “requir[ing] the involvement of three or more victims, while others have no minimum victim requirement; some cover only firearm-related injuries, sometimes with exclusions, while others include a range of weapons.”¹⁰⁶

Insurance companies value businesses that implement strategies and programs to minimize their risk and will reward such behavior with lower rates. Additional services, such as the provision of training on “how to identify potential active assailants”¹⁰⁷ and methods to increase overall awareness of certain characteristics of a potential shooter, are recommended. Importantly, consultants will provide services that lessen the likelihood that a threat will emerge from within the company. Further recommendations may be advised such as “cover[ing] warning signs to watch for in colleagues, providing mental health services, pre-employment screening, termination procedures (including notifying law enforcement in advance of especially apprehensive firings).”¹⁰⁸ In addition to preventative programs, insurers offer post-incident assistance such as “crisis management and public relations services.”¹⁰⁹ After a tragedy, mending public relations is a crucial and expensive part of the process needed to avoid lawsuits. Services will typically include, “shaping the public message surrounding an event to setting up information hotlines and reaching out to the victims and law enforcement to offer assistance on behalf of the insured.”¹¹⁰

Insurers will also contribute active response methods designed to give employees the ability to manage the assailant until the police arrive, since the police usually arrive after the incident occurs. These techniques are especially important in light of the fact that of 160

103. See Young & Brewer, *supra* note 87.

104. Mocsary, *supra* note 97, at I. On the other hand, the large amount of media attention that given to the shootings may be disproportionate and “greatly exaggerated” to the actual risk of the mass shootings. *Id.* Some materials indicate that insurers may “leverage the media’s inflation of the actual danger” to their benefit. *Id.*

105. Fisher, *supra* note 96.

106. Mocsary, *supra* note 97, at I.

107. *Id.* at III.A.

108. *Id.*

109. *Id.* at III.A.

110. *Id.*

incidents recorded in a recent study, approximately two-thirds ended before the police arrived, “either because a citizen intervened, the shooter fled, or the shooter committed suicide or was killed by someone at the scene.”¹¹¹ While some employers encourage their employees to be armed in order to respond to the exigency more swiftly, most employers “face legitimate liability concerns, relating to the law’s treatment of mistakes made by armed defenders.”¹¹² At least one liability insurer will terminate coverage of schools if their employees are armed.¹¹³

C. Active Shooter Insurance Coverage for Schools

Although this Article focuses on workplace shootings as opposed to school shootings, it is also true that schools and universities are the workplace for teachers and other school staff. For insurers, mass shootings in schools and universities are increasingly common, as are shootings in retail/wholesale establishments and shopping malls.¹¹⁴ One study stressed the importance of creating active shooter management strategies: “Emergency planning and preparedness is not only important for schools that have experienced active shooting events, but also for those that have no experience with those incidents.”¹¹⁵ An essential mitigation method schools have adopted in light of increased school shootings is purchasing insurance coverage for mass shooting incidents. Active shooter insurance for small private schools can range anywhere from \$1,400 per year for \$1 million in coverage to \$50,000–\$100,000 for a \$5 million to \$10 million policy in large public school districts.¹¹⁶ Unfortunately, some schools, such as Stoneman Douglas High School, did not have express insurance coverage for active shooter incidents but only had general liability coverage, which does not specify if mass shootings are covered.¹¹⁷ Some families

111. *Id.* at III.B.

112. *Id.*

113. *See id.*

114. *See* Gloria Gonzales, *Demand for Active Shooter Cover Growing: A.M. Best*, BUS. INS. (July 15, 2019), <https://www.businessinsurance.com/article/20190715/NEWS06/912329612/Demand-for-active-shooter-cover-growing-AM-Best> [<https://perma.cc/SF3L-U8FL>].

115. Teal L. James, *Emergency Plans and Campus Shootings: A Case Study on Mitigation and Recovery Strategies* (2018) (Ph.D. dissertation, Northcentral University) (ProQuest).

116. *See* Noor Zainab Hussain & Suzanne Barlyn, *More School Districts Buying Active Shooter Insurance*, INS. J. (Mar. 21, 2018), <https://www.insurancejournal.com/news/national/2018/03/21/483990.htm> [<https://perma.cc/L3V8-ADAT>].

117. *Id.* *See also* Gonzales, *supra* note 114. After the Parkland shooting, districts across Florida were motivated to purchase active shooter insurance to protect themselves against

needed to be compensated for the surgeries their children required after suffering numerous injuries.¹¹⁸ One family opened a GoFundMe to raise money to pay for the numerous treatments and surgeries required for their son who was shot five times during the incident.¹¹⁹

In the end, though employers and business owners can manage and pool risk through insurance—whether through general liability coverage or special policies or riders for workplace shootings—they bear the cost of insuring against this risk so that when an incident occurs, the victims can receive compensation. This author contends that the party bearing the cost of insuring against a risk is the best cost-avoider or is in the best position (at least from the standpoint of information asymmetries) to reduce the risk of incidents in general. Employers therefore should have latitude in adopting policies about guns on their property.

IV. The Relationship of Workplace Shootings to Other Firearm Policies

So far, this Article has focused on policies (both governmental and employer-based) that specifically address workplace shootings, such as insurance coverage or rules about guns stored securely in the employees' cars in the employer's parking lot. Other firearm policies, however, may have a significant impact on the frequency and lethality of workplace shootings, even though they have a more general scope. A fascinating study appeared in February 2020 within the American Journal of Public Health about the effects of changes in state gun laws—such as concealed carry permits—on workplace homicides, most of which are shootings.¹²⁰ This study provides the most up-to-date data available on how liberalization of gun laws in a state contribute to the problem of shootings in the workplace, and it merits some discussion when considering laws and policies that target workplace violence or that enhance employees' rights to bring guns to work. Also of interest to those in the legal academy who study firearm policy, this study uses much more recent data about the incidence of workplace shootings than most of the other studies that are widely cited at this time. For convenience, I will henceforth refer to the study as the Sabbath-Hawkins-Baum ("SHB") study.

emergency situations. *Id.* Seven districts purchased \$3 million worth of policies from McGowan. *Id.*

118. Hussain & Barlyn, *supra* note 116.

119. *Id.*

120. See Sabbath, Hawkins & Baum, *supra* note 29.

First, an overview of the findings seems appropriate: The authors conclude that “strengthening the state-level firearm policy environment within [the study’s] interquartile range (adding 20.5 firearm laws) would save, on average, the lives of 16 workers each year who would have died from workplace homicides, with further benefits extending to their families, coworkers, and employers.”¹²¹ During the six-year period between 2011 and 2017, 3,131 workplace homicides occurred.¹²² The peak year within this period was 2016, with 500 workplace homicides nationwide—the equivalent of 0.3 homicides per 100,000 workers.¹²³ Keep in mind that homicides are *not* the leading cause of workplace deaths—in fact, homicides accounted for only 9% of the workplace deaths during this period.¹²⁴ On the other hand, guns (usually handguns) are by far the weapon of choice for workplace killings (79%).¹²⁵ This makes sense, not only due to the widespread availability of firearms in the United States, but also because shootings are more likely to result in death than attacks with other deadly weapons; especially when coupled with the fact that it takes less time to kill more people with a gun than other weapons (for multiple murders or mass killings). The largest percentage of assailants were coworkers or former coworkers, but assailants also often included customers, clients, patients, and/or family/intimate partners of the victims.¹²⁶ Workers most likely to be homicide victims at work are retail sales staff, cashiers, and police.¹²⁷

Firearm-related legislative activity was in high gear during the study period, perhaps attributable to a series of high-profile rampage shootings in schools, entertainment venues, houses of worship, and places of business, with some states imposing tighter restrictions on firearm sales, use, and carrying, and others loosening or liberalizing gun regulations.¹²⁸ In fact, the authors of the SHB study found that the tightening/loosening ratio was about evenly matched during this six-year period, with twenty-three states enacting stricter regulations

121. *Id.* at 235.

122. *Id.* at 232.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.* (“The 2011 through 2017 period was an active one for the enactment and implementation of firearm regulations . . .”).

and twenty-three weakening gun regulations (or strengthening gun rights, depending on one's perspective).¹²⁹

This even match created an elegant natural experiment, with the usual caveat that correlation does not equal causation, especially when it comes to gun laws. States with more urban centers and violent crime rates trending upwards might be more likely to adopt more restrictive gun laws but may still see higher rates of gun crimes than states with less population concentration and lower crime rates generally. Moreover, "gun control" or gun-related laws cover a wide range of legal restrictions: from background check requirements to concealed carry permitting regimes; from dealership inspections to gun-free zones; and from gun storage laws (child safety locks, etc.) to disarming those with domestic violence convictions.¹³⁰ Partisan positions can vary on specific types of gun regulation or gun rights (a few garner bipartisan support and others do not). Gun laws pertaining to possession, domestic abusers, and concealed carry permits saw the most legislative activity from 2011-2017.¹³¹

The researchers found that as gun restrictions became stricter in a state, workplace homicide rates went down.¹³² The authors note that the study focused on *workplace* homicides, not homicides in general, as other researchers have done.¹³³ Greater legal restraints on gun possession by domestic violence offenders was one type of legislative change that showed the most correlation—a 5.3% drop in workplace homicides.¹³⁴ The SHB study suggests that disarming domestic abusers could produce this effect in two ways: making it harder for abusers to obtain a gun and deploy it against their victim while at work; and also to reduce collateral shootings (for example, coworkers and supervisors who try to intervene) that result when armed abusers stalk, harass, and threaten their victims in and/or around their workplace.¹³⁵

Stricter laws relating to the concealed carrying of firearms also correlated with a drop in workplace shootings (-5.8%).¹³⁶ Concealed carry laws can pertain to the amount of discretion that local law enforcement has in granting a concealed carry permit to an applicant (i.e., "shall issue" vs. "may issue"), and limits on the locations where

129. *Id.*

130. *See id.* at 232–34.

131. *See id.* at 232.

132. *Id.* at 234.

133. *Id.*

134. *Id.*

135. *See id.* at 234.

136. *Id.*

permit holders can carry their firearms (e.g., court houses, churches, university campuses).¹³⁷ Background checks correlated with a 5% drop in workplace homicides, while buyer restraints (age, purchases per month, etc.) produced a more modest effect (2.7%).¹³⁸ One finding that surprised the authors was that child safety policies seemed to have a significant effect on workplace homicides.¹³⁹ As mentioned above, correlation does not always equal causation, but the authors suggest a possible explanation might be “that an unintended effect of making firearms less accessible to children is that the same firearms are less accessible to theft or misuse by adults other than the original owner.”¹⁴⁰

Other types of gun laws that generate substantial public debate, and even legal challenges, had less effect on workplace shootings, though these may affect gun homicide rates in other contexts. “There were no statistically significant associations between workplace homicide rates and high-risk gun owner prohibitions, possession regulations, assault weapons bans, preemption, or ‘stand your ground’ laws.”¹⁴¹ This makes sense: If workplace homicides usually involve handguns, a ban on assault rifles would have less effect or relevance to this type of gun violence. Preemption laws—by which states prevent municipalities from adopting their own local gun ordinances—might also have less effect on workplace shootings specifically, as some locales might have adopted stricter gun controls, while others may have been more permissive. “Stand your ground” scenarios may happen infrequently in workplace settings compared with areas around one’s home or incidents that occur during roadside traffic-related altercations with strangers. Of course, there is a wealth of evidence and legal commentary demonstrating that “stand your ground” laws have other pernicious effects.¹⁴² This merely highlights part of the problem with our current public discourse about firearm policy that frames the issues in absolute terms (e.g. arguing gun regulations “don’t work” or,

137. *Id.* at 234–35.

138. *Id.* at 235.

139. *Id.*

140. *Id.*

141. *Id.* at 234.

142. See, e.g., Sadat & George, *supra* note 15 (discussing enactment of stand your ground laws and the subsequent results); Jennifer N. Grimes, *Hate, Conflict, and Public Space: Stand Your Ground Laws and Potential Immunity for Hate Crimes*, 15 J. HATE STUD. 83, 88–93 (2019) (discussing effects of stand your ground laws); Julian Santaella-Tenorio, Magdalena Cerdá, Andrés Villaveces & Sandro Galea, *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REV. 140, 146 (2016) (discussing empirical studies that reached differing conclusions).

conversely, that every type of gun violence justifies every type of gun control). Even if assault weapon bans, stand your ground laws, age/mental health requirements for possession, and felon dispossession do not address the specific problem of workplace safety, they could be very effective at reducing rampage shootings in schools, gang violence, domestic violence, accidental shootings, or suicides.

Similarly, there is not a lot of evidence yet about whether Parking Lot Laws actually increase workplace shootings—there may be a few isolated incidents of disgruntled workers retrieving their gun from their car and shooting someone at work, but we do not have rigorous systemic evidence that more workplace shootings occur when employees are permitted to keep guns locked in their cars in the lot outside. Even if we could isolate the effects of these laws from those of other state gun policies, Parking Lot Laws are comparatively new on the scene (most passed in the last decade), so we lack good data for effects over time. It seems unlikely that Parking Lot Laws *reduce* workplace shootings. Though the argument that employees with guns on the property could retrieve them to neutralize an attacker is conceivable (and there may be some anecdotal incidents along these lines), we do not have any empirical studies demonstrating this as a pattern. It is important to remember that researchers have difficulty disentangling the effects of various gun laws in a given state, as they often come bundled together—a state that passed a Parking Lot Law may have simultaneously liberalized its concealed carry laws or reduced restrictions on certain types of guns, ammunition, etc. The point here is that the firearm laws associated most directly with guns at the workplace may have far less effect on workplace shootings than, say, the ability of a terminated employee to drive to a nearby gun store and obtain a gun within a few minutes, before cooling down from the affront.

Conclusion

Workplace shootings are an under-appreciated component of our nationwide gun violence epidemic. It is easy, and even understandable, for the media and policy makers to give special attention to horrific school shootings, but this should not come at the cost of overlooking another prevalent and urgent problem facing our communities. Workplace shootings are more common than school shootings. Employers are now purchasing active shooter insurance policies to manage their liability in case “the unthinkable” happens, but insurance does not prevent these tragedies, it merely helps compensate victims and repair the workplace after they occur.

From a “best cost-avoider” standpoint, employers are normally in a better position to identify and mitigate the risks of shootings than the workers or other potential victims, such as patrons, vendors, or other bystanders who may be present during a shooting, or who may perpetrate the shooting. Handling terminations carefully can reduce risks of an embittered former employee returning to the worksite for revenge, and carefully smoothing out conflicts between coworkers can reduce the risk of altercations that escalate into violence or homicide. Having a hands-on management strategy for employees who are domestic violence victims can help, as violence at home often spills over to workplace violence. Managing access to the workplace—and between sections of the premises—can also mitigate the risk of a mass shooting, either by making it less likely to occur at all, or by lowering the potential death count.

None of these, however, can eliminate the problem in a country awash in easily accessible firearms, combined with destabilizing factors such as a broken mental healthcare system and a lingering opioid epidemic. In the end, workplace shootings are a predictable, inevitable symptom of a larger problem—a society that does not manage gun violence well. Most of the adult population spends most of their waking hours at their workplace. So, when gun violence is prevalent in society, it will manifest in the places where people spend the majority of their time.

This Article discussed a number of current issues pertaining to workplace violence—Parking Lot Laws, Active Shooter Insurance, and other types of gun regulations—and each of these merit much more academic attention. However, we still lack the full picture of the effects of each of these components and we need innovative ideas and strategies for reducing workplace violence. I hope to have opened the discussion on each of these points, and I plan to explore these issues in subsequent articles—and I invite other researchers and commentators to join in this endeavor.