

“Bring Your Gun to Work” Laws and



Gun violence and guns in the workplace are front page news. In addition to the obvious concerns raised in the wake of recent tragic events, an underlying legal question emerges: What are the requirements and limitations faced by employers seeking to protect employees from acts of violence that occur in the workplace? In just the last few decades, the law of workplace violence prevention has developed under the umbrella of employment law. Significant progress has been made; however, further progress is necessary—and possible—to fully protect employees at their place of work.

BY **GARRY MATHIASON AND ANDREA R. MILANO**

Workplace Violence Prevention

On Dec. 14, 2012, the world was shaken when an intruder, armed with four firearms and hundreds of rounds of ammunition, shot his way through the locked doors of an elementary school and killed 20 children and six adults, wounded two other individuals, and then shot and killed himself as emergency responders arrived at the scene. The tragedy at Sandy Hook elementary school in Newtown, Conn., shocked, devastated, and baffled the general population. Among the shared sentiments was a collective sense of disbelief that such a large-scale, violent tragedy could occur anywhere, much less at an elementary school—supposedly one of the safest environments for young children and most secure workplaces for teachers, administrators, and staff.

Unfortunately, mass, public acts of violence occur all too frequently in today's society. In 2011, a man opened fire at a constituent meeting held in a supermarket parking lot in Casa Adobes, Ariz., shooting U.S. Representative Gabrielle Giffords point-blank in the head, and killing six people—including a nine-year-old girl and a federal judge.

Less than a week prior to the shooting at Sandy Hook, a shooting at a shopping mall in Clackamas, Ore., left another two individuals dead. Then, just ten days following Sandy Hook, in West Webster, N.Y., a man shot and killed two firefighters and seriously wounded two others after they responded to a fire he had set as a trap for them. Less than a month after Sandy Hook, a 16-year-old high school student brought a shotgun to school

and critically wounded a fellow student.

Since the 1999 Columbine High School massacre, more than 30 other school shootings have occurred in the United States. In 2012 alone, at least 16 mass shootings occurred in the United States, leaving at least 88 individuals dead and numerous more injured. Most recently, the bombs that exploded near the finish line of the Boston Marathon in April 2013 and the fatal shooting of a campus security guard at MIT in the following days demonstrate that the problem of gun violence continues in today's society.

One issue that arises in light of these tragedies is how best to protect individuals from acts of violence in public or semi-public environments. Employers are one of many groups forced to grapple with this issue, as they have a particular concern and duty regarding how best to protect employees and other individuals from such violence at their places of business. For the most part, the mass shootings described above took place in workplaces and involved employees as well as members of the public. In response to the specific concern regarding employees, the law of workplace violence has begun to develop in recent years and will continue to evolve based on the country's responses—both political and social—to such tragic acts of violence in our society.

This article provides a general overview of the body of law that has developed regarding workplace violence and its prevention. Thereafter, it examines the increasing conflict between employer policies banning guns in the workplace and a new trend among states to pass laws allowing employees to carry guns to work and keep them locked in their cars, often in their employers' parking lots. This topic of widespread disagreement has entered the courtroom and is working its way through state and federal appellate courts.

This article offers a few practical tips for lawyers who are seeking to address workplace violence issues in their own offices and in the workplaces of those they serve and then concludes by showing that unprecedented opportunities exist for implementing a national policy on maintaining a safe workplace while respecting the full impact of the Second Amendment right to bear arms.

Brief History of the Laws Regulating Workplace Violence

Workplace violence has been, and continues to be, a considerable challenge in the United States. The scope of this problem is vast.

Violence has consistently ranked among the top four causes of death in workplaces during the past 15 years.¹ More than 3,000 people died from workplace homicide between 2006 and 2010.² Close to 20 percent of all violent crime in the United States occurs in the workplace.³

The scope of workplace violence reaches far beyond the highly publicized instances of extreme physical violence such as those described above. The National Institute for Occupational Safety and Health (NIOSH) broadly defines workplace violence as “any physical assault, threatening behavior, or verbal abuse occurring in the work setting.”⁴ Further, NIOSH broadly defines a workplace as “any location, either permanent or temporary, where an employee performs any work-related duty.”⁵ This definition includes, but is not limited to, the building, surrounding perimeters, parking lots, field locations, clients’ homes, and the roadways to and from work assignments.⁶ From this definition, workplace violence is divided into three categories: homicide, physical assault, and harassment or intimidation. According to NIOSH, a shocking 40 percent of employees have been victims of workplace violence in at least one of these three contexts.⁷

Until the 1990’s, very little attention was devoted to preventing workplace violence. Public opinion began to change on July 1, 1993, when a businessman with a simmering grudge entered the law offices of Petit & Martin at 101 California Street in San Francisco and killed eight people and injured six more within a span of fifteen minutes. Two years later, the 145-attorney firm was dissolved. Out of this tragedy arose a widely publicized gun control movement. Perhaps even more significantly, the 101 California Street episode focused national attention on violence taking place in the workplace and the then fledgling efforts to prevent such violence with a multidisciplinary response.

Along with other pioneers, Dr. Christopher Hatcher, a professor of psychology at the University of California’s San Francisco Medical School, theorized that workplace violence did not happen randomly. Dr. Hatcher contended that employers could do more than expand their security staff and respond to violence when it occurred; employers could adopt policies on workplace violence prevention, identify early warning signs, train frontline managers on what to observe, and encourage employees to report threats.

Essential to this approach is the employer’s formation of a multidisciplinary team to evaluate threats and mobilize appropriate responses. The team includes representatives from management, human resources, security, and legal.⁸ A resource to the team is a psychologist, psychiatrist, or senior security professional specially trained in threat assessment. Hatcher’s approach recognized a developing body of law regarding the employer’s duty to provide a safe workplace and protect employee and visitor rights, as well as protect the rights of the perpetrator. In assessing warning signs and responding, the law of the workplace is an essential consideration.

In the last three decades, this new subspecialty of employment law has developed extensively. Heightened attention and new regulations have accounted for marked improvements in this area of law within a relatively short timeframe. Among these advancements are state statutes that allow employers to obtain restraining orders and personal injunctions on behalf of their employees who are being

harassed or threatened, state legislation prohibiting workplace bullying, and developing protections for employees who are victims of domestic violence. In 1994, California passed the Workplace Violence Safety Act, which allows employers to obtain injunctions or temporary restraining orders on behalf of their employees to protect employees against violence in the workplace.⁹ Many states followed California’s lead and enacted similar legislation allowing employers to obtain restraining orders or injunctions on behalf of their employees. Today, most states allow employers to obtain restraining orders on behalf of their employees in at least some situations.

In an additional effort to protect employees’ interests, in 2011, Connecticut became the first state to require that paid sick leave be provided to employees that they may use to seek help if they are victims of domestic violence.¹⁰ Similar ordinances have been passed in Seattle, Wash., and Milwaukee, Wisc.¹¹ Another form of workplace protection for victims of domestic violence is recognition as a protected category under employment anti-discrimination laws. New York recently added to its list of protected categories a person’s status as a victim of domestic violence.¹²

Finally, on the issue of workplace bullying, since 2003, twenty-one states have introduced bills to prohibit workplace bullying, although none of these bills has yet become law.¹³ These bills are

Dr. Christopher Hatcher, a professor of psychology at the University of California’s San Francisco Medical School, theorized that workplace violence did not happen randomly.

mostly variations of the Healthy Workplace Bill, which was drafted and promoted by the Workplace Bullying Institute, a private organization that was founded in 1997 to raise awareness and combat workplace bullying. These examples illustrate the progress that has been made in recent years to protect employees’ safety at their workplaces.

This multidisciplinary approach has proved extremely successful in reducing and preventing acts of workplace violence. Indeed, workplace homicides have been reduced by more than 50 percent since 1994.¹⁴ Additionally, from 2002 to 2009, the rate of nonfatal workplace violence declined by 35 percent, following a 62 percent decline from 1993 to 2002.¹⁵ Unfortunately, episodes of violence continue to occur all too frequently. Consequently, continued efforts to further develop this area of law remain necessary.

Even in light of the decreasing overall number of workplace homicides and instances of nonfatal workplace violence, certain industries and demographic groups remain uniquely at risk for job-related homicide. For example, of the 105 work-related deaths of first-line supervisors and managers of retail sales workers in 2005, 70 percent were classified as homicides. By comparison, homicides accounted for only 41 percent of the 123 workrelated deaths of police officers in that same year.¹⁶ Recently, schools—primary, secondary, and post-secondary—have gained significant media attention as a new environment particularly susceptible to acts of mass violence.

According to the Department of Labor, in 2009 nearly 81 percent of all workplace homicides were caused by shootings.¹⁷ The Bureau of Labor Statistics' Census of Fatal Occupational Injuries reports that assaults and violent acts accounted for 17 percent of all workplace fatalities in 2011. Approximately two-thirds of these deaths have been classified as homicides. Men suffered a disproportionately larger share of all fatal workplace injuries, accounting for 92 percent. However, women were more than twice as likely as men to be the victim of a workplace homicide.¹⁸

The total cost of all workplace violence is now estimated to exceed \$120 billion annually.

Federal Regulation of Workplace Violence

The federal statute that generally governs workplace violence is the Occupational Safety and Health Act (OSHA). This act, which became effective in 1970, is enforced by the Occupational Safety and Health Administration (OSHA Administration). The act and the OSHA Administration mostly focus on regulating inherently dangerous industries, such as those that expose employees to hazardous or toxic materials, as well as protecting employees from occupational health and safety risks such as catastrophic accidents (i.e., explosions, improper use of equipment).

The federal requirement for employers to protect employees from acts of workplace violence arises from the statute's General Duty Clause, which requires employers to provide their employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm."¹⁹

In recent years, the OSHA Administration has published literature and guidelines that are aimed at defining investigation procedures for incidents of workplace violence, especially for industries particularly susceptible to acts of violence. Under the September 2011 directive regarding enforcement procedures for investigating all incidents of workplace violence (including nonfatal incidents), OSHA field offices may find employers that fail to reduce or eliminate "serious recognized hazards" to be in violation of the General Duty Clause.²⁰ To that end, field officers are directed to "gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees."²¹

The directive encourages a "focus on the availability to employers of feasible means of preventing or minimizing such hazards," but it also provides that it is the employer's responsibility to employ the most effective feasible controls available to protect its employees from acts of workplace violence.²²

The OSHA Administration uses this General Duty Clause to encourage employers to take steps to prevent injury to employees, including those occurring from incidents of workplace violence. The OSHA Administration has developed guidelines that focus on preventing workplace violence in health care and social service operations, as well as in the late-night retail industry. Also OSHA has noted that it will continue to issue citations for workplace violence under the General Duty Clause where criminal activity endangers workers. Many states have supplemented the federal OSHA and corresponding regulations with additional state legislation aimed at protecting employees from various workplace dangers, including workplace violence.

Guns at the Workplace

Generally, trends among state legislatures have moved toward

providing additional protections to employees with regard to workplace violence, such as the new protections for employees who are victims of domestic violence, prohibitions against workplace bullying, and legislation that allows employers to obtain restraining orders and injunctions on behalf of their employees. Specialized safety statutes have also been enacted to provide workplace violence prevention procedures and mandatory staff training in hospitals, which have been identified as a workplace environment with specific safety susceptibilities.²³

More often than not, providing these protections to employees results in additional regulations and obligations placed on employers, and frequently increases the potential liability to which employers are exposed. However, one current legislative trend that seems to run counter to this general pattern of protection by way of additional regulation is the "bring your gun to work" movement. In short, "bring your gun to work" statutes prohibit employers from prohibiting guns on their premises—at least in their parking lots. Indeed, in general, these laws expressly permit individuals to keep firearms locked in their vehicles in employer parking lots and prohibit employers from establishing work rules to the contrary.

This trend began in 2002, after a widely publicized event in Oklahoma, in which an employer terminated several employees for possessing firearms in their vehicles on the employer's property. The Oklahoma legislature responded by amending the Oklahoma Self-Defense Act to ban employers from establishing "any policy or rule that has the effect of prohibiting" its employees from "transporting and storing firearms in a locked vehicle" in company parking lots.²⁴

Since then, 19 states have passed laws that permit employees to store guns in their vehicles at work.²⁵ This trend is likely to continue, as similar bills were introduced in 16 additional states in 2011. Alaska passed a bill in 2005 similar to Oklahoma's stating that legal gun-owners may maintain firearms in their locked vehicles even when on property where the property owner forbids them.²⁶

In April 2008, Florida passed a law permitting Florida residents with a concealed handgun permit to store firearms in their locked vehicles at work.²⁷ The broadly written Florida law also prohibits employers from discriminating against employees, customers, or invitees who assert their rights under it.²⁸

Similarly, in May 2008, Georgia passed a law prohibiting employers from preventing employees and customers from storing guns in their vehicles on the employer's property.²⁹ Louisiana passed its version of this law in July 2008.³⁰ Arizona, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, and Utah have similar laws, and in 2011, four states, Maine, North Dakota, Texas, and Wisconsin, added their own. Numerous other states are likely to follow.³¹ To date, no state has reached so far as to permit employees to bring guns into the actual workplace if prohibited by their employer.

The effect of such prohibitions on employer policies regarding workplace violence is plainly evident. In response to these laws, one Oklahoma federal district court ruled that state laws banning such employer policies were entirely preempted by the federal OSHA.³² The court determined that not allowing employers to pass such prohibitions was a violation of an employer's general duty under OSHA to protect workers from "recognized hazards that are causing or are likely to cause death or serious physical harm."³³ The court opined that the laws were in direct defiance of an employer's attempt to promote safety in the workplace.

A Florida district court analyzing the same argument in 2008, however, rejected the Oklahoma court's decision, and upheld the law prohibiting employers from developing policies to restrict employees from storing guns in workplace parking lots.³⁴

Then, in 2009, the Tenth Circuit Court of Appeals overturned the Oklahoma district court's prior ruling and held that OSHA did not preempt the state gun law.³⁵ In reaching its conclusion that the Oklahoma statute was not preempted by OSHA, the court reasoned that:

Because the absence of *any* specific OSHA standard on workplace violence is undisputed, the district court correctly recognized that the only possible area of OSH Act preemption was under the general duty clause and the OSH Act's overarching purpose. Thus, in finding preemption, the district court held that gun-related workplace violence was a "recognized hazard" under the general duty clause, and, therefore, an employer that allows firearms in the company parking lot may violate the OSH Act. We disagree. OSHA has not indicated in *any* way that employers should prohibit firearms from company parking lots. OSHA's website, guidelines, and citation history do not speak at all to any such prohibition. In fact, OSHA *declined* a request to promulgate a standard banning firearms from the workplace. [...] In declining this request, OSHA stressed reliance on its *voluntary* guidelines and deference "to other federal, state, and local law-enforcement agencies to regulate workplace homicides." OSHA is aware of the controversy surrounding firearms in the workplace and has consciously decided *not* to adopt a standard. Thus, we are not presented with a situation where the general duty clause applies because OSHA has been unable to promulgate a standard for an "unanticipated hazard."³⁶

Implicit in the Tenth Circuit's opinion is the notion that, were the OSHA Administration to issue on-point regulations that allowed employers to prohibit employees from bringing guns onto their premises, such a regulation—which would directly conflict with the state gun laws—would preempt those conflicting state laws.

To date, the OSHA Administration has not taken any steps to enact such regulations. However, if it were to do so, then the legal climate regarding these "bring your gun to work" laws could be significantly altered.

Conversely, state "bring your gun to work" laws are gaining credibility and recognition in state court. After being upheld by both the Florida district court and the Tenth Circuit, these laws have now become factors in wrongful termination cases. For example, in *Mitchell v. University of Kentucky*, the Kentucky Supreme Court applied that state's law against prohibitions on possessing firearms in vehicles to overturn a summary judgment dismissal of the plaintiff's public policy-based wrongful discharge claim.³⁷ The plaintiff, who had been employed at-will as an anesthesia technician at the University of Kentucky Medical Center, was fired after university officials learned that he had a licensed firearm in his vehicle on university property. In reviving his wrongful discharge suit, the Kentucky Supreme Court held that his "discharge was contrary to a fundamental and well-defined public policy, i.e., the right to bear arms, as evidenced by the Kentucky Revised Statutes."³⁸

The *Mitchell* decision is notable for numerous reasons, including the court's willingness not only to further narrow the employment-

at-will doctrine but also to limit the state laws that give public universities the authority to broadly restrict firearms on their property. Additionally noteworthy is the view of the Kentucky Supreme Court that public policy favors an individual's right to carry a firearm onto his or her employer's property—completely inapposite to the position of the Oklahoma district court in 2007.

Similar wrongful discharge litigation has ensued in Indiana,³⁹ and other cases will undoubtedly follow as employers struggle to balance the need to ensure a safe workplace with laws allowing employees to maintain firearms on company property.

Particularly noteworthy is the potentially conflicting situation created by these state gun laws for employers. Generally, and for many reasons, employers are wary of increased governmental workplace regulations. Certain workplace regulations result in high administrative costs, reductions in production, and little proven benefit to employees and consumers. Additionally, such regulations can eliminate jobs and lead to expensive, time-consuming litigation. Here, however, the scenario created by these state gun laws creates an anomalous situation in which additional federal regulation may be the most desirable outcome for employers. Effectively, the state gun laws, as written, constitute a form of workplace regulation, by prohibiting employers from prohibiting firearms, and thus requiring employers to permit firearms on their property.

Employers almost unanimously favor being able to prohibit or limit the presence of firearms on their property, whether it is part of a workplace violence prevention policy or business risk reduction effort.⁴⁰ Being free of the obligation to permit firearms on their premises would allow employers to determine the gun control rules most appropriate to their respective places of business.⁴¹

In the wake of recent tragic events involving shootings in public places, and with the political task force on gun control being put into effect, the time may be coming for the OSHA Administration to reevaluate its position on workplace violence and adopt more stringent regulations that move from voluntary to compulsory compliance.

The U.S. Postal Service: A Brief Case Study in Workplace Violence Prevention

Beginning in 1983 and continuing for over a decade, a number of widely publicized instances of workplace violence occurred involving United States postal workers. The U.S. Postal Service had never experienced more instances of workplace violence than the national average. However, because of its size, and the attention that these events received, it seemed like workplace violence was a regular occurrence. If a post office had a shooting it was national news and frequently became the subject of Congressional hearings, whereas a similar event in a local fast food restaurant often was treated as second page news. In the early 1990's, when workplace violence was claiming an average of four deaths a day, and the U.S. Postal Service's workforce over several years produced 40 deaths (one percent of the reported workplace homicides), the term "going postal" became interchangeable with workplace violence. Congress, the media, and the public demanded action.

In 1995, the U.S. Postal Service forcefully responded with many strong measures in an attempt to address and prevent future acts of violence. The programs implemented by the Postal Service included a zero tolerance policy for workplace violence, prohibition of unauthorized firearms, better selection methods used during hiring,

violence awareness training, threat assessment and crisis management training and implementation, improved dispute resolution mechanisms, and “soft exit” strategies for terminations.

Contrary to the expectations of some of the skeptics, these programs and the sincere commitment of the U.S. Postal Service were extremely successful in markedly reducing workplace violence rates in all categories. Workplace homicides, physical assaults, and especially verbal assaults and threats fell to less than half the national average for comparable sized employers.⁴²

This anecdotal “success story” suggests that positive change is possible and may be within reach for employers that seek to reduce the risk of workplace violence occurring at their place of business. Indeed, it has been demonstrated that employers and entities that commit to eliminating threats of workplace violence are able to make marked improvements within a relatively short timeframe.

The law of workplace violence has greatly facilitated and encouraged these positive developments, notwithstanding the growth of “bring your gun to work” laws. Accordingly, in light of recent tragic events, the time is ripe for employers to take action to eliminate risk factors that exist in their workplaces and reduce the risk of future violence and harm. Below are a few practical tips that concerned lawyers can help implement in their own offices and can recommend to clients who want to reduce the chance that their business will become a statistic.

Generally, and for many reasons, employers are wary of increased governmental workplace regulations; certain regulations result in high administrative costs, reductions in production, and little proven benefit to employees and consumers. Effectively, the state gun laws, as written, constitute a form of workplace regulation, by prohibiting employers from prohibiting firearms, and thus requiring employers to permit firearms on their property.

Practical Steps That Can Be Taken (and/or Recommended) Immediately

Practical ways to reduce the likelihood of future instances of workplace violence include the use of proper prescreening techniques, consistent enforcement of workplace rules, use of employee assistance programs and/or other pertinent healthcare resources, and reliance on the legal protections already available to individuals.

Increasingly, employers face an obligation to investigate an employee’s propensity for violence prior to offering employment. The case law in this area has been generated under the tort of negli-

gent retention.⁴³ Establishing procedures for background investigation and considering the use of screening tests are essential parts of any overall plan to minimize workplace violence.⁴⁴ An employer may even be held liable for failing to perform applicant background checks and employee investigations. Current statutory and common law sources of liability include negligent hiring and retention, negligent failure to warn intended victims, breach of an implied contract or covenant of good faith and fair dealing, occupational safety and health acts (especially with respect to the explicit regulatory duty to provide a safe work environment), intentional or negligent infliction of emotional distress, assault, battery, and equal employment opportunity laws.⁴⁵

Another important step for employers in preventing workplace violence is to inform its employees of what it considers to be unacceptable behavior, and strictly require all employees, managers, and clients to adhere to this standard. A policy prohibiting workplace harassment, threats, and violence should be developed and implemented as part of each employee’s individual onboarding paperwork. Employees should feel free to raise concerns of workplace harassment, threats, and/or violence to their supervisors, human resources, or even an outside “hotline.” Consistent application of the employer’s disciplinary procedures for infractions of the employer’s workplace violence policy, as well as appropriate reliance on alternative resources, such as employee assistance programs, will likely decrease the chances of workplace violence. Additionally, proper and consistent application of effective policies will likely result in earlier detection of inappropriate behavior, which helps to eliminate threats of violence prior to escalation.

Employers should also consider providing resources to employees in the unfortunate event that an instance of workplace violence does occur. Affected employees should be provided with referrals to appropriate resources and/or healthcare providers to ensure that their physical and mental well-being is appropriately being addressed. Such resources include counseling, access to employee assistance programs, and occupational trauma experts being brought in for consultations.

With healthcare costs rising, it is increasingly important for employers to be knowledgeable about the resources available to their employees and, where necessary, to guide their employees to make effective use of available healthcare programs. Of course, to increase effective participation, employees should be assured that such treatment is confidential.

Additional strategies abound for employers who seek to provide healthier, safer, and more secure workplaces for their employees, but these very simple, practical ways to reduce the likelihood of future workplace violence are ones that can be implemented quickly, easily, and painlessly by virtually any employer.

The Future of Workplace Violence Law and the Duty to Maintain a Safe Workplace

Workplace violence is a relatively new area of law with a short, yet robust, history. Since the 1990’s, a number of talented and dedicated professionals from a variety of social sciences have cooperated to form a multidisciplinary approach that has significantly reduced the number of instances of workplace violence to provide a safer and more secure workplace for all U.S. employees.

Of course, significantly more progress needs to be made to reduce and eliminate the threats of violence still present in our

society. The issue of gun control is at the forefront of the nation's attention and, as always, is a topic of heated and passionate debate. However, regardless of political affiliation, the issue of guns in the workplace is a recent developing area of law, impacting employers, employees, and the general public.

One other consideration in this brewing debate, of course, is how the U.S. Supreme Court's decision in *District of Columbia v. Heller*,⁴⁶ will impact the proliferation of these "take your gun to work" laws.⁴⁷ However, in the last analysis, the issue of whether employers have a right to maintain rules and regulations regarding the presence of guns in their workplace is different from the national debate on the Second Amendment, the right to purchase guns, and the imposition of limitations regarding the purchase of guns.

Nothing in the workplace debate limits gun ownership or the right to maintain a weapon outside the workplace. Some employers hire armed security and a few others allow employees to use weapons in self-defense. However, the vast majority of employers, even including many who support an individual's Second Amendment rights, believe that weapons should not be in their workplaces, and that they, as employers, have the right—as well as the obligation—to regulate weapons, including firearms, on their premises.

With the full attention of the nation and our political leaders, it is entirely possible that the OSHA Administration will recognize that, as part of their legal obligation to maintain a safe workplace, employers have a duty to develop reasonable policies concerning guns in the workplace, including the right to prohibit their presence. Thereafter, it will be for the federal courts and potentially the Supreme Court to decide whether conflicting state laws can withstand federal preemption. ☉

Garry Mathiason is chairman of the Board at Littler Mendelson, the largest global law firm exclusively devoted to labor and employment law. He originated the firm's workplace violence prevention practice, has drafted model violence prevention legislation, and advised over 300 clients encountering incidents of actual or potential workplace violence. Mathiason has previously contributed to The Federal Lawyer; see The Emerging Law of Training, May 1998, Vol. 45 No. 4. Andrea R. Milano is a second year associate at Littler Mendelson. She joined the firm's San Francisco office in October 2011 after graduating from Cornell Law School. Her practice includes representing employers in a wide range of labor and employment law matters.

© 2013 Garry Mathiason and Andrea R.

Milano, Littler Mendelson P.C. All rights reserved.

Endnotes

¹U.S. Department of Labor, OSHA Office of Communications, OSHA Trade News Release, Sept. 8, 2011, available at www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20637.

²*Id.*

³Dana Loomis, *Preventing Gun Violence in the Workplace*,

Connecting Research in Security to Practice (CRISP) Report Commissioned by the ASIS International Foundation, Sept. 8, 2008, available at www.asisonline.org/foundation/guns.pdf.

⁴National Inst. for Occupational Safety & Health, *Workplace Violence Prevention Strategies & Research Needs* § 1.2.

⁵*Id.*

⁶*Id.*

⁷Julia Thomson, *47 Million Americans Are Victims of Workplace Aggression*, Jan. 18, 2006, dailynews.mcmaster.ca/story.cfm?id=3767 (citing a survey conducted by Aaron Schat, assistant professor at the DeGroot School Business at McMaster University in Canada).

⁸Garry G. Mathiason, *Foreword* to THREAT ASSESSMENT A RISK MANAGEMENT APPROACH, xiii (Joseph McCann ed., The Haworth Press 2003).

⁹CAL. CIV. PROC. CODE § 527.8.

¹⁰Connecticut Public Act No. 10-144.

¹¹Chapter 14.16, Seattle Municipal Code; see Jason N.W. Plowman, *Milwaukee Paid Sick Leave Ordinance Upheld by Wisconsin Court of Appeals*, Aug. 19, 2011, available at www.littler.com/publication-press/publication/milwaukee-paid-sick-leave-ordinance-upheld-wisconsin-court-appeals-0.

¹²N.Y. EXEC. LAW § 296(a)(1).

¹³The legislative history of all proposed bills is available at www.healthyworkplacebill.org.

¹⁴U.S. Dept't of Labor, Bureau of Labor Stats., *National Census of Fatal Occupational Injuries in 2008*, at 2 (2009), available at www.bls.gov/news.release/pdf/cfoi.pdf.

¹⁵Bureau of Justice Statistics, *Workplace Violence 1993-2009*, Erika Harrell, Ph.D., March 29, 2011, available at bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2377.

¹⁶U.S. Dept't of Labor, Bureau of Labor Stats., *Census of Fatal Occupational Injuries Charts, 1992-2005*, at 14 (2006), available at www.bls.gov/iif/oshwc/cfoi/cfch0004.pdf.

¹⁷U.S. Dept't of Labor, Bureau of Labor Stats., *Occupational Homicides by Selected Characteristics, 1997-2009*, available at www.bls.gov/iif/oshwc/cfoi/work_hom.pdf.

¹⁸U.S. Dept't of Labor, Bureau of Labor Stats., *National Census of Fatal Occupational Injuries 2011*, available at www.bls.gov/news.release/cfoi.nr0.htm.

¹⁹29 U.S.C. § 654(a)(1).

²⁰OSHA Instruction CPL02-01-052. Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents (effect. Sept. 8, 2011). In conjunction with the 2011 directive, Fed-OSHA has launched a web page to assist employers in preventing incidents of workplace violence. See www.osha.gov/SLTC/workplaceviolence/index.html.

²¹See *id.*

²²See *id.*

²³See, e.g., N.J. STAT. ANN. § 26:2H-5.17.; MASS. GEN. LAWS ch. 265, § 13I; Pub. Act No. 11-175 (Conn. July 13, 2011); WASH. REV. CODE § 49.19.005-070.

²⁴OKLA. STAT. tit. 21, § 1290.22

²⁵See, e.g. OKLA. STAT. tit. 21, § 1290.22.; ALASKA STAT. § 18.65.800; FLA. STAT. § 790.251.

²⁶See ALASKA STAT. § 18.65.800.

Workplace Violence continued on page 72

able pretrial rulings, or successful juror selection. Or, perhaps the company wants to go to trial to send a message to plaintiffs' counsel, other plaintiffs' attorneys, or to the public. If the company has a strong case, it may opt to have a bellwether trial, both to "test the waters" and to resolve key issues of liability that will serve as a pattern for the remaining tort cases. While there is some opportunity to course-correct after a failed bellwether trial, the optimum result is to carefully select the first test plaintiffs to enhance the likelihood of a defense verdict. An early win can send a message to the public and the plaintiffs' bar, and incentivize the favorable resolution of any remaining claims. ☉

Dara D. Mann practices product liability litigation with a focus on toxic tort, environmental, and commercial litigation. She manages chemical litigation involving products such as pesticides, benzene, dioxin, and vinyl chloride, as well as general product liability litigation involving automobiles, airplanes, machinery and agricultural products. She is also experienced

in mass tort and consumer fraud actions involving pharmaceuticals, medical devices, and tobacco products, among others. Mann has been named one of Georgia's "Future Stars" of Litigation by Benchmark Litigation in 2012 and 2013. She is an active member of the Defense Research Institute (DRI) and is a member of the Board of Directors for the Product Liability Advisory Council (PLAC). Lauren D. Bellamy focuses her practice on business and commercial litigation. She handles cases involving contracts and business torts, telecommunications litigation, consumer fraud class actions, and mass tort litigation. Bellamy also has experience representing business interests in contract disputes, investigations, and arbitrations.



WORKPLACE VIOLENCE continued from page 66

²⁷FLA. STAT. § 790.251.

²⁸*Id.*

²⁹GA. CODE ANN. § 16-11-135.

³⁰LA. REV. STAT. ANN. § 292.1.

³¹ARIZ. REV. STAT. § 12-781; IND. CODE § 10-14-3-33.5; KAN. STAT. ANN. § 75-7c11; KY. REV. STAT. ANN. § 527.020(4); ME. REV. STAT. ANN. tit. 1.26, § 600; MICH. COMP. LAWS ANN. § 28.425f; MINN. STAT. ANN. § 624.714; N.D. CENT. CODE § 62.1-02; TEX. LAB. CODE ANN. § 52.061; UTAH CODE § 34-45-101 *et seq.*; W. VA. CODE ANN. § 61-7-14. *Cf.* MISS. CODE § 45-9-55 (employer can prohibit firearms in company vehicles); MO. REV. STAT. § 571.107.1(15) (same); NEB. REV. STAT. § 281202 (15)(2) (same).

³²*ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282 (N.D. Okla. 2007).

³³*Id.*

³⁴*Florida Retail Ass'n v. Attorney Gen. of Fla.*, No. 4:08cv179-RH/WCS (N.D. Fla. Jul. 29, 2008).

³⁵*Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1209-11 (10th Cir. 2009).

³⁶*Id.* at 1205-06. (emphasis in original) (citations omitted).

³⁷*See Mitchell v. Univ. of Ky.*, 366 S.W.3d 895 (Ky. 2012).

³⁸*Mitchell*, 366 S.W.3d at 897.

³⁹SOC. FOR HUMAN RESOURCE MGMT., *Indiana's 'Take Your Gun to Work' Law to Be Tested in Lawsuit*, (Oct. 9, 2012), at www.shrm.org/hrdisciplines/safetysecurity/articles/Pages/Indiana-Workplace-Gun-Law-Lawsuit.aspx.

⁴⁰*See, e.g., Simon Romero, An Oklahoma Version of Guns vs. Butter*, N.Y. TIMES, Nov. 24, 2004, available at www.nytimes.com/2004/11/24/business/24guns.html; Stephanie Armour, *Companies that ban guns put on defensive*, U.S.A. TODAY, Dec. 9, 2004, available at usatoday30.usatoday.com/money/companies/management/2004-12-09-guns-cover_x.htm.

⁴¹The Second Amendment was never intended to allow citizens to carry firearms into their workplaces. Free speech is a cherished right protected by the First Amendment, yet it is well established that the Amendment does not cover private workplaces. *Los Angeles Teachers Union v. Los Angeles City Board of Education*, 71 Cal. 2d 551,

564-65 (1969).

⁴²*See* REPORT OF THE UNITED STATES POSTAL SERVICE COMMISSION OF A SAFE AND SECURE WORKPLACE, August 2000, prepared by the National Center on Addiction and Substance Abuse at Columbia University.

⁴³*See, e.g., Haddock v. City of New York*, 553 N.E.2d 987 (N.Y. 1990) (holding New York City liable for an employee's rape of a nine-year-old girl because employee was a violent offender convicted of rape and other violent crimes, and the City employed him as a utility worker for public parks, where the employee worked closely with children in playgrounds.)

⁴⁴However, the EEOC has recently issued guidance documents discouraging employers from refusing to hire employees with criminal backgrounds, and identifying the potentially discriminatory impact that the use of criminal background checks may have on hiring practices.

⁴⁵*See, e.g., Randi W. v. Muroc Jt. Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997) (holding an employer liable for fraud and negligent misrepresentation for giving a former employee a positive reference that did not mention prior charges or complaints of sexual misconduct and impropriety with students, when the former employee sexually assaulted the plaintiff, a student at a school that hired the former employee based on the former employer's positive recommendation); *Herrick v. Quality Hotels, Inns and Resorts, Inc.*, 19 Cal. App. 4th 1608 (1993) (affirming the jury's award of \$40,000 in general damages and \$75,000 in punitive damages for intentional infliction of emotional injury to a former employee when the employee was threatened with a gun by another employee, and the employer knew the threatening employee kept guns on the work premises and was previously arrested for threatening another employee.)

⁴⁶554 U.S. 570 (2008).

⁴⁷The Supreme Court generally held that the Second Amendment confers an individual the right to keep and bear arms and that statutes banning handgun possession in the home violated the Second Amendment.