

# Daily Journal

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PERSPECTIVE

## Will Obama tackle guns in the workplace?

By Daniel H. Handman

In the most heated part of his State of the Union address, President Barack Obama implored Congress that the victims of gun violence “deserve a vote” on gun control measures. Of course, no one expects Congress to take that dare, but few realize that there is something the president can do right now, bypassing Congress, to address one gun-related issue: guns in the workplace.

Seventeen states have “parking lot” laws that prohibit an employer from banning employees from bringing guns to work, so long as the guns are left in a locked car in a parking lot. In those states, an employee can bring any *type* of gun and any *number* of guns to work, so long as he leaves the guns in a locked car.

The ordinary political fault lines have been blurred on these laws. The business community, generally a big contributor to *gun rights* legislators, has lined up solidly behind *gun control* advocates, not only taking public stances against these laws, but fighting them in court. Oil companies, Fortune 500 manufacturers, various Chambers of Commerce, even Haliburton have lined up solidly against parking lot laws, motivated by three factors: (1) a fear of increased workplace violence; (2) their belief in their right, as property owners, to prohibit entry onto their property by people they deem unsafe; and (3) their view that the doctrine of “at will” employment has eroded too far already.

**It all started in Valliant, Oklahoma (population: 771)**

Since the founding of our country, no one ever questioned the right of employers to prohibit guns from entering their property. That all changed on Oct. 1, 2002, in Valliant, Okla.

Valliant is a rural town halfway between Oklahoma City and Dallas and it was commonplace for the town’s 771 residents — avid hunters and ranchers — to carry guns with them wherever they went. The biggest employer in town was Weyerhaeuser, a multinational paper producer, which had a large plant in the town. Apparently unbeknownst to many of its employees, Weyerhaeuser also had a company-wide policy prohibiting employees from bringing guns onsite. On Oct. 1, 2002, Weyerhaeuser brought trained dogs onsite to sniff for the presence of guns and, after finding 12 vehicles with guns, fired the employees

who owned the vehicles.

The public was outraged by the terminations. A little over a year later, the Oklahoma Legislature took up what would become the first “parking lot” statute in the country. The bill made no distinction about the type or the number of firearms that were being brought onto the employer’s property nor about the person bringing such weapons. It passed the Oklahoma Senate unanimously and the Oklahoma House of Representatives 92-4.

Soon thereafter, other states followed suit. By 2010, 11 states had adopted some form of a “parking lot” law, and by the end of 2012, the number was up to 17.

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**Sociological studies: merely “junk science”**

As expected, the battle lines have been drawn as to the dangers posed by guns in the workplace. Even after the shooting of Rep. Gabrielle Giffords and the tragic mass shootings at Virginia Tech, Aurora, Colo., and Newtown, Conn., the National Rifle Association unapologetically stands behind the notion that more guns — whether in the hands of trained professionals or otherwise — are at least part of the solution to the epidemic of gun violence. NRA supporters cite a study 2012 by Thomas Baker, an assistant professor at Virginia Commonwealth University, which found that between 2006 and 2011 in Virginia, handgun sales rose by 73 percent, yet violent gun crimes fell by 24 percent. But the NRA has previously derided studies like Professor Baker’s as “junk science,” and it has suggested that no study could accurately measure the relationship between access to guns and an increase in violence.

And with good reason. Most of those studies show a direct correlation between increased availability of guns and violence. For example, a 2009 study by the National Institutes of Health and the University of Pennsylvania showed that people in possession of a gun were approxi-

mately 4.5 times more likely to be shot in an assault than those not in possession of a gun, and that the ratio increased to 5.45 among gun assaults where the victim had a chance to resist.

As far as workplace violence is concerned, a 2005 study published in the *American Journal of Public Health* concluded that worker homicides were approximately three times as likely in workplaces that permitted at least one type of weapon as in those which prohibited all weapons. This study is frequently cited by gun control advocates in opposition to “parking lot” laws.

**An end-around on workplace safety laws**

To date, there have been only two legal challenges to state parking lot laws. The results have been mixed. Although a U.S. District Court judge in Oklahoma found that the state’s parking lot law was pre-empted by federal law, the 10th U.S. Circuit Court of Appeals reversed it. A federal court in Florida reached the same conclusion.

The courts gave the most attention to arguments that “parking lot” laws were pre-empted by the “general duty” clause of the Occupational Safety and Health Act of 1970. That clause requires employers to furnish employees a workplace that is “free from recognized hazards that ... are likely to cause death or serious physical harm to ... employees.”

The U.S. District Court in Oklahoma found that the state’s parking lot law was pre-empted by the act because allowing the presence of guns on an employer’s property would “thwart the federal objective of promoting workplace safety.” In particular, it found that the presence of guns on company property increased the “risk that an event causing death or serious bodily harm will occur,” citing a law review article and snippets from the Occupational Safety and Health Administration’s website.

But, in the absence of any firmer authority, both the 10th Circuit and the U.S. District Court for the Northern District of Florida rejected the pre-emption argument. Both courts placed great significance on the absence of any regulation by OSHA to indicate a link between the presence of guns in the workplace and the risk of serious bodily harm. Implicitly, it seems, those courts would be more welcoming to a pre-emption challenge if such

a regulation existed.

**Will the Obama administration do anything about parking lot laws?**

That, of course, begs the question why the Obama administration has not directed OSHA to adopt such a regulation. Indeed, even in the aftermath of Newtown, President Obama’s Jan. 16 plan to decrease gun violence glaringly omitted any such direction to OSHA.

There are, however, several changes that could impede the expansion of parking lot laws or lead to their demise. First, Newtown seems to have re-energized the gun control lobby and has brought the issue of gun control to the forefront of the national public policy debate. Second, in recent years, parking lot laws have been adopted by states whose laws are reviewed by the 1st and 9th Circuits — appellate courts which tend to have a more pro-gun control bent.

But without question, the single most important development would be action by OSHA to amend its regulations to establish a direct link between the presence of guns in the workplace and the increased risk of bodily harm, such that the federal regulations would directly conflict with parking lot laws. The Obama administration has the power to take that action without interference by Congress and, if it did so, even the courts that have already upheld parking lot laws would have to reconsider their reasoning.

Ultimately, what is most notable about parking lot laws is the apparent lack of public knowledge about parking lot laws and the absence of any serious public debate about them. To be sure, an assault weapons ban, universal background checks, and limits on the size magazine cartridges have dominated the gun control debate. But, despite the increased focus on workplace violence, parking lot laws have taken a backseat in the public debate over gun safety. Whether that will change remains to be seen.



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