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"Bring Your Gun to Work" and You're Fired: TerminatedEmployees' Potential Rights for Violations of Parking Lot Laws

Malerie Leigh Bulot

"Bring Your Gun to Work" and You're Fired: Terminated Employees' Potential Rights for Violations of Parking Lot Laws

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INTRODUCTION

In August 2016 at a Black & Decker facility in Tennessee, security guards escorted an employee to the company parking lot as he cursed at them and yelled racial slurs.[1] When exiting the building, the raging employee pulled out a knife and fought with security.[2] The employee cut car tires,[3] raced to his vehicle in the company parking lot, retrieved his automatic rifle stored within it, and fired 120 rounds at security, other cars, and the facility.[4] Law enforcement labeled the event an instance of "workplace violence."[5] This violent workplace shooting was made possible in part by a Tennessee law that forbids employers from proactively banning firearms from their premises. In 2013, the Tennessee Legislature passed a "Parking Lot," or "Bring Your Gun to Work," law ("Parking Lot law"), which prohibited employers from instituting policies that ban the storage of firearms in vehicles on company property, including the parking lot.[6] As a result, the shooter could keep his firearm in his vehicle on the company parking lot, ready for such an attack.

Workplace violence like the Black & Decker incident is prevalent in the United States.[7] In 2010, there were 518 workplace homicides,[8] 405 of

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1. Maranda Faris, *Man accused of firing over 120 shots at Black & Decker*, JACKSON SUN (Aug. 29, 2016), http://www.jacksonsun.com/story/news/crime/2016/08/29/black-decker-suspect-facing-charges-fired-120-rounds/89517874/ [https://perma.cc/2ABE-CMVG].

2. *Id.*

3. *Id.*

4. Fortunately, no one was injured. Maranda Faris & Katherine Burgess, *Disgruntled Black & Decker employee arrested in shooting*, JACKSON SUN (Aug. 25, 2016), http://www.jacksonsun.com/story/news/crime/2016/08/25/shots-fired-reported-near-passmore-lane-businesses-locked-down/89338202/ [https://perma.cc/EW9A-7U2A].

5. *Id.*

6. *See* TENN. CODE ANN. §§ 39-17-1313, 50-1-312 (2017).

7. This trend of workplace violence has persisted since at least the 1990s. *Workplace homicides declined in 2004*, U.S. BUREAU OF LABOR STATS. (2005), http://www.bls.gov/opub/ted/2005/aug/wk5/art04.htm (see chart) [https://perma.cc/GY3G-RMBW]. Between 2006 and 2010, just over 3,000 people were victims of workplace homicide. *Id.*

8. *Workplace Homicides from Shootings*, U.S. BUREAU OF LABOR STATS., http://www.bls.gov/iif/oshwc/cfoi/osar0016.htm (last modified Sept. 16, 2015) [https://perma.cc/ZK72-HZY7].

which were shootings[9] and 77 of which resulted in multiple fatalities.[10] Despite potential workplace fatalities and the employer's duty to provide a safe work environment,[11] employers in 21 states cannot prohibit employees from storing firearms in vehicles on company parking lots.[12] Though some workplace violence may be unavoidable,[13] these Parking Lot

9. OCCUPATIONAL SAFETY & HEALTH ADMIN. OFFICE OF COMMC'N, OSHA TRADE RELEASE: OSHA ISSUES COMPLIANCE DIRECTIVE TO ADDRESS WORKPLACE VIOLENCE (Sept. 8, 2011), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20637 [https://perma.cc/9AQA-FR86].

10. *Workplace Homicides from Shootings*, *supra* note 8. The trend continued when in 2012 there were 463 workplace homicides, 81% of which resulted from shootings. *News Release: National Census of Fatal Occupational Injuries in 2012 (Preliminary Results)*, U.S. BUREAU OF LABOR STATS., https://www.bls.gov/news.release/archives/cfoi_08222013.pdf (last modified Aug. 22, 2013) [https://perma.cc/2M6Z-ZQ3Z].

11. *See, e.g.*, Taboas v. Mlynczak, 149 F.3d 576, 582 (7th Cir. 1998); Gallose v. Long Island R.R. Co., 878 F.2d 80, 84−85 (2d Cir. 1989); MacNeil v. Labor and Indus. Review Comm'n, 2012 WL 147861, at *4 (Wis. Ct. App. Jan. 19, 2012); Parsons v. United Tech. Corp., Sikorsky Aircraft Div., 700 A.2d 655, 666 (Conn. 1997); Sprouse v. Miss. Emp't Sec. Comm'n, 639 So. 2d 901, 904 (Miss. 1994) (Prather, J., dissenting); *see also* Occupational Safety and Health Act, 29 U.S.C. § 654 (2012) (aiming to provide for a hazard-free work environment).

12. *See, e.g.*, ALA. CODE § 13A-11-90 (2017); ALASKA STAT. § 18.65.800 (2017); ARIZ. REV. STAT. ANN. § 12-781 (2017); FLA. STAT. § 790.251 (2017); GA. CODE ANN. § 16-11-135 (2017); IDAHO CODE § 5-341 (2017); 430 ILL. COMP. STAT. § 66 / 65 (2017); IND. CODE ANN. § 34-28-7-2 (2017); KAN. STAT. ANN. § 75-7c10 (2017); KY. REV. STAT. ANN. § 237.106 (West 2017); LA. REV. STAT. § 32:292.1 (2017); ME. STAT. tit. 26, § 600 (2017); MINN. STAT. § 624.714(18) (2017); MISS. CODE ANN. § 45-9-55 (2017); NEB. REV. STAT. § 69-2441 (2017); N.D. CENT. CODE § 62.1-02-13 (2017); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22 (2017); TENN. CODE ANN. §§ 39-17-1313, 50-1-312; TEX. LABOR CODE ANN. § 52.061 (West 2017); UTAH CODE ANN. § 34-45-103 (West 2017); WIS. STAT. § 175.60(15m) (2017). Given the general prohibition, this Comment refers to these statutes as "Parking Lot laws."

13. Some workplace violence is simply unavoidable—a company firearm ban, for instance, will not ward off disgruntled employees who retrieve guns from their homes, domestic violence situations that bleed into the workplace, or robberies. *See generally* Jennifer Moyer Gaines, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH. L. REV. 139, 148 (2000). An employer *may* foresee violence resulting from gun storage on company property. *See* Dana Loomis et. al., *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH 830, 831 (2005). There is also some value in an employer being able to maintain a ban of firearms. One 2005 study found that a workplace without a firearm ban was seven times more likely to have a homicide than a company with a firearm ban. Loomis et al., *supra*, at 831.

laws nonetheless encumber an employer's ability to ensure workplace safety[14] and exercise its private property rights.[15]

Although Parking Lot laws largely circumscribe an employer's authority, they are the law in their respective states and govern many companies' policies.[16] Failure to comply with the statutes carries serious implications for employers; depending on the jurisdiction, criminal penalties or civil damages may be instituted against an employer who fails to comply with the statutes.[17] Most Parking Lot laws, however, fail to provide an explicit right of action to an employee terminated for storing a firearm on company property.[18]

When a Parking Lot law is not actionable on its face, an employee must first examine his employment arrangements to determine possible remedies upon termination. The majority of employees in the United States are at-will, meaning that the employer or the employee may terminate the employment relationship at any time for any reason.[19] Because the at-will doctrine lends itself to uncertainty and arbitrariness,[20] many states limit the negative consequences of at-will by recognizing the

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14. *See* Loomis et al, *supra* note 13, at 831.

15. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 745 (1998) ("There is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems."); *see also* Sara Sahni, *Gun Battle in Georgia Over Firearms at Work*, 25 GA. EMP. L. LETTER 1 (2013).

16. 21 states have these laws. *See supra* note 12.

17. *See* ALA. CODE § 13A-11-90; FLA. STAT. § 790.251; GA. CODE ANN. § 16-11-135; IDAHO CODE § 5-341; MINN. STAT. § 624.714(18); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22; TENN. CODE ANN. §§ 39-17-1313, 50-1-312; *see also* FLA. STAT. § 790.251(6) ; UTAH CODE ANN. § 34-45-106.

18. *See* ALASKA STAT. § 18.65.800; ARIZ. REV. STAT. ANN. § 12-781; GA. CODE ANN. § 16-11-135; IDAHO CODE § 5-341; 430 ILL. COMP. STAT. § 66 / 65; IND. CODE ANN. § 34-28-7-2; KAN. STAT. ANN. § 75-7c10; LA. REV. STAT. § 32:292.1; ME. STAT. tit. 26, § 600; MINN. STAT. § 624.714(18); MISS. CODE ANN. § 45-9-55; NEB. REV. STAT. § 69-2441; TEX. LABOR CODE ANN. § 52.061; UTAH CODE ANN. § 34-45-103; WIS. STAT. § 175.60(15m).

19. *See* RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW INST. 2015); Joseph Z. Fleming, *Labor and Employment Law: Recent Developments—At-Will Termination of Employment Has Not Been Terminated*, 20 NOVA L. REV. 437, 437 (1995). At-will employment is the predominant employment doctrine across states, so this Comment examines at-will employment as it relates to the tort of wrongful discharge.

20. At any time and without reason, the employer or employee might decide to end employment. Brad Rogers Carson, *Labor Law:* Tate v. Browning-Ferris Industries*: Oklahoma Creates a Common Law Action for Employment Discrimination*, 46 OKLA. L. REV. 557, 585 (1993).

tort of wrongful discharge in violation of public policy ("WDVPP").[21] The WDVPP tort is a public policy exception to at-will employment that curtails an employer's ability to fire an employee if doing so would infringe on some well-established public policy.[22] Though the breadth of the tort depends on the state, such recognized public policies are encompassed in state Parking Lot laws.[23] These statutes elevate an employee's rights to keep and bear arms and to defend himself above the private property rights of his employer.[24]

Though a state's recognition of WDVPP and Parking Lot legislation affords discharged employees a tort action for WDVPP, this Comment argues that terminated employees must look for an alternate remedy when the state they work in does not recognize WDVPP. In such a case, a terminated, gun-storing employee may look to a "whistleblower" statute for recovery.[25]

Part I of this Comment examines the Second Amendment and various state Parking Lot laws and their exceptions. Part I also presents courts' and scholars' determinations on the constitutionality of Parking Lot laws. Part II explains the tort of wrongful discharge itself as it varies among the states along with the public policy and whistleblower exceptions to at-will employment. Part III focuses on a recent United States Fifth Circuit Court of Appeals case, *Swindol v. Aurora Flight Sciences Corporation*, in which the Fifth Circuit became the first court to recognize a gun-storing employee's right of action against a former employer who violated a state's Parking Lot law.[26] Part IV determines that the *Swindol* court correctly decided the case after generally analyzing the rationale of WDVPP and the public policy considerations behind the enactment of Parking Lot laws. Part IV also argues that in the event a state does not

21. As of 2007, 44 states have recognized such an exception. Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LABOR L. & POL'Y J. 313, 338 (2007).

22. RESTATEMENT OF EMP'T LAW § 5.01 (AM. LAW INST. 2015).

23. *See* discussion *infra* Part IV.A.

24. Ethan T. Stowell, *Top Gun: The Second Amendment, Self-Defense, and Private Property Exclusion*, 26 REGENT U. L. REV. 521, 538 (2013).

25. *See, e.g.*, LA. REV. STAT. § 23:967 (2017); MINN. STAT. § 181.932 (2017); *see also* Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 549 (2004) ("The statutes typically protect three types of 'whistleblowing' conduct: (1) disclosure . . . (2) assistance . . . (3) objection . . . ."). *See generally* Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and The Courts Provide a Shelter to Public and Private Sector Employees to Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316 (1993).

26. Swindol v. Aurora Flight Sci. Corp., 832 F.3d 492 (5th Cir. 2017).

recognize WDVPP, the existence of a whistleblower statute nonetheless will provide a right of action to an employee terminated for storing guns in his vehicle on company property. Part V surveys the employment laws of Utah and Louisiana, which respectively include the WDVPP tort and the whistleblower statute, and examines the circumstances surrounding their Parking Lot laws' enactment.

I. THE INDIVIDUAL RIGHT TO KEEP ARMS IN PARKING LOTS

In 2008, following increased lobbying efforts by interest groups like the National Rifle Association and a heightened public interest in gun rights,[27] the United States Supreme Court's decision in *District of Columbia v. Heller*[28] reexamined the Second Amendment of the United States Constitution,[29] which grants the right to keep and bear arms, and ultimately disregarded a century-old precedent.[30] In *Heller*, the Court shifted its understanding of the Second Amendment from a collective right[31] to an individual right.[32] Accordingly, although the Second Amendment encompasses an individual right to keep and bear arms, that right is only that of the people against the national and state governments,[33] and private actors are fully within their purview to limit firearm exposure on their own land.[34] Scholars nonetheless refer to *Heller* as a "limelight"

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27. The National Rifle Association in the years preceding 2008 began to push for the individualist view of the Second Amendment in its lobbying of Congress and state legislatures and financing of presidential elections. *See* Robert J. Spitzer, *Gun Law, Policy and Politics*, 84 N.Y. ST. B.A. J., July-Aug. 2012, at 35, 35 (defining the individualist view as one that the Second Amendment grants a personal right to keep and bear arms to civilians, not just those individuals in a "militia"); Garry Mathiason & Andrea R. Milano, *"Bring Your Gun to Work" Laws and Workplace Violence Prevention*, 60 FED. LAW. 60, 61 (2013).

28. District of Columbia v. Heller, 554 U.S. 570 (2008).

29. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

30. *Heller*, 554 U.S. 570. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that the right to possess firearms existed only for those citizens in a state militia).

31. *See Cruikshank*, 92 U.S. at 553.

32. *Heller*, 554 U.S. at 591.

33. *Id.* at 619–20. The Second Amendment also is effective as to state actors by virtue of the Fourteenth Amendment. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

34. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1265 (11th Cir. 2012) ("An individual's right to bear arms as enshrined in the Second Amendment, whatever

case because the decision brought the Second Amendment squarely within the public's attention.[35] With the subsequent focus on a citizen's right to bear arms, 12 additional states passed Parking Lot laws.[36] These statutes went "beyond the [traditional] protection of an individual's right to keep arms in the home" to include the right to keep arms on another's private property.[37] The following sections distill the general provisions and various limitations of Parking Lot laws and identify those instances in which courts upheld the constitutionality of some of the statutes.

A. Parking Lot Laws Vary, but Policy Does Not

Parking Lot laws purport to protect gun owners' rights on the private property of others and, in so doing, limit employers' and other property owners' property interests.[38] These statutes either "prohibit property owners from banning the storage of firearms locked in vehicles located on the owner's property"[39] or forbid employers from "establish[ing], maintain[ing], or enforc[ing] any policy or rule that has the effect of allowing such employer or its agents to search the locked privately owned vehicles of employees or invited guests on the employer's parking lot . . . ."[40] The statutes give employees the right to store firearms in their vehicles on a company's private property.[41] Pursuant to these laws, employers may

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its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land.").

35. Stowell, *supra* note 24, at 523.

36. *See, e.g.*, ALA. CODE § 13A-11-90 (2013); ALASKA STAT. § 18.65.800 (2005); ARIZ. REV. STAT. ANN. § 12-781 (2009); IDAHO CODE § 5-341 (2009); 430 ILL. COMP. STAT. § 66 / 65 (2013); IND. CODE ANN. § 34-28-7-2 (2010); ME. STAT. tit. 26, § 600 (2012); N.D. CENT. CODE § 62.1-02-13 (2011); TENN. CODE ANN. § 39-17-1313 (2013); TENN. CODE ANN. § 50-1-312 (2015); TEX. LABOR CODE ANN. § 52.061 (West 2011); UTAH CODE ANN. § 34-45-103 (West 2009); WIS. STAT. § 175.60(15m) (2014).

37. Stowell, *supra* note 24, at 521−22.

38. Some statutes not only govern private and public employers but also affect the rights of other property owners, such as landlords, municipalities, and others. *See, e.g.*, ALASKA STAT. § 18.65.800(a); GA. CODE ANN. § 16-11-135.

39. Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009).

40. GA. CODE ANN. § 16-11-135(a).

41. Employees are just one group that has the right to store firearms in their vehicles, subject to some exceptions; for instance, invitees and/or customers may also store firearms on another's private parking lot in some states. *See, e.g.*, ALASKA STAT. § 18.65.800(a) (stating "an individual"); ARIZ. REV. STAT. ANN. § 12-781 (stating "a person"); FLA. STAT. § 790.251(4) (stating "any customer, employee, or invitee"); GA. CODE ANN. § 16-11-135; N.D. CENT. CODE ANN. § 62.1-02-13.

not implement policies that effectively ban the storage of guns at the workplace, a restriction that infringes on their rights as private property owners to use their land and exclude things or persons from it.[42] To somewhat compensate for this infringement, if an incident were to occur as a result of firearm storage on the premises—like the violence at Black & Decker—more than half of Parking Lot laws dictate the employer cannot be held civilly liable for any resulting injuries or damages.[43]

If an employer bars gun storage on its property in an effort to avoid workplace violence injuries, however, it would violate the Parking Lot law and could result in criminal[44] or civil liability.[45] Conversely, the majority of Parking Lot laws lack a private enforcement mechanism for individuals harmed by a company policy illegally banning firearms.[46] Parking Lot laws in 15 states fail to grant explicitly a right of action to employees who are directly harmed as a result of unlawful company policies.[47] Though

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42. 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (1765) ("The third absolute right, inherent in every [man], is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution . . . ."). The right of property, from the time of Blackstone, has included the right to use and exercise dominion over one's property "in total exclusion of the right of any other individual in the universe." 1 WILLIAM BLACKSTONE, COMMENTARIES *2; *see also* Merrill, *supra* note 15, at 745 ("There is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems . . . .").

43. *See* ALASKA STAT. § 18.65.800(c); FLA. STAT. § 790.251(5)(b); GA. CODE ANN. § 16-11-135(e); LA. REV. STAT. § 32:292.1(B) (2017); ME. STAT. tit. 26, § 600(2) (2017); MISS. CODE ANN. § 45-9-55(5) (2017); N.D. CENT. CODE ANN. § 62.1-02-13(3); OKLA. STAT. tit. 21, §§ 1289.7a(B), 1290.22(E) (2017); TENN. CODE ANN. § 39-17-1313(b) (2017); UTAH CODE ANN. § 34-45-104 (West 2017); WIS. STAT. §175.60(21)(c) (2017).

44. *See* ALA. CODE § 13A-11-90 (2017); FLA. STAT. § 790.251; GA. CODE ANN. § 16-11-135; IDAHO CODE § 5-341 (2017); MINN. STAT. § 624.714(18) (2017); OKLA. STAT. tit. 21, §§ 1289.7a,1290.22; TENN. CODE ANN. §§ 39-17-1313, 50-1-312.

45. Employers may be held civilly liable in a civil or administrative action commenced by the state's Attorney General. *See* FLA. STAT. 790.251(6); *see also* UTAH CODE ANN. § 34-45-106.

46. *See* discussion *infra* Part II.A. Only Alabama, Florida, Kentucky, North Dakota, Oklahoma, and Tennessee speak to possible civil actions for employees to enforce Parking Lot laws. *See infra* Part II.A.

47. *See* ALASKA STAT. § 18.65.800; ARIZ. REV. STAT. ANN. § 12-781 (2017); GA. CODE ANN. § 16-11-135; IDAHO CODE § 5-341; 430 ILL. COMP. STAT. § 66 / 65 (2017); IND. CODE ANN. § 34-28-7-2 (2017); KAN. STAT. ANN. § 75-7c10 (2017); LA. REV. STAT. § 32:292.1; ME. STAT. tit. 26, § 600; MINN. STAT. § 624.714(18); MISS. CODE ANN. § 45-9-55; NEB. REV. STAT. § 69-2441 (2017); TEX. LABOR CODE ANN. § 52.061 (West 2017); UTAH CODE ANN. § 34-45-103; WIS. STAT. § 175.60(15m).

these Parking Lot laws purport to extend the right to keep arms to a company's parking lot, most statutes do not provide employees with the tools to protect their rights.

1. Guns on Company Property: Who, What, When, Where, How Limitations

Parking Lot laws confer the right to store guns on company property, but this right is not absolute, as the statutes contain many limitations. These limitations are categorized in the following way: (1) gun requirements; (2) limits on location; (3) vehicle requirements; (4) employee requirements; and (5) alternative solutions for employers. First, the guns stored in parking lots must be legal and out of sight.[48] Second, if the employer's business is one requiring a certain level of safety, the employer may nonetheless ban firearms.[49] Parking Lot laws also generally require that the employee's vehicle be locked and properly parked on company property.[50] Many Parking Lot laws mandate that employees who

48. Many statutes require that the gun be "lawfully possessed" by the employee, meaning that the gun is properly registered and the employee is licensed in accordance with state gun laws. *See generally* ALA. CODE § 13A-11-90(b); ALASKA STAT. § 18.65.800(a); FLA. STAT. § 790.251(4)(a). Some Parking Lot laws require the gun be kept out of plain view. *See, e.g.*, ALA. CODE § 13A-11-90(b)(3); ARIZ. REV. STAT. ANN. § 12-781(A)(2); 430 ILL. COMP. STAT. 66 / 65(b); IND. CODE ANN. § 34-28-7-2(A); ME. STAT. tit. 26, § 600(1); TENN. CODE ANN. § 39-17-1313(a)(2); UTAH CODE ANN. § 34-45-103(1)(a)(iii).

49. Such locations include the following: nuclear generating stations, *see* ARIZ. REV. STAT. ANN. § 12-781(C)(5); FLA. STAT. § 790.251(7)(c); GA. CODE ANN. § 16-11-135(d)(3); 430 ILL. COMP. STAT. 66 / 65(a)(22); schools, *see* FLA. STAT. § 790.251(7)(a); MINN. STAT. § 624.714(18)(b); NEB. REV. STAT. § 69-2441(1)(a); hospitals, *see* N.D. CENT. CODE ANN. § 62.1-02-13(6)(g) (2017); correctional facilities, *see* FLA. STAT. § 790.251(7)(b); GA. CODE ANN. § 16-11-35(d)(2); IND. CODE ANN. § 34-28-7-2(b)(2); KY. REV. STAT. ANN. § 237.106(5)(b) (West 2017); N.D. CENT. CODE ANN. § 62.1-02-13(6)(b); UTAH CODE ANN. § 34-45-107; on or near a military base, *see* ARIZ. REV. STAT. ANN. § 12-781(C)(7); U.S. government property, *see* KY. REV. STAT. ANN. § 237.106(5)(a); where national defense, aerospace, homeland security occur, *see* FLA. STAT. § 790.251(7)(d); GA. CODE ANN. § 16-11-135(d)(4); 430 ILL. COMP. STAT. 66 / 65(a)(19) (where one cannot carry a firearm into parking area of "airport"); N.D. CENT. CODE ANN. § 62.1-02-13(6)(c); or where activities involving explosives occur, *see* FLA. STAT. § 790.251(7)(e); N.D. CENT. CODE ANN. § 62.1-02-13(6)(d).

50. The vehicle or the compartments of the vehicle containing the firearm must be locked according to the following state Parking Lot laws: ALA. CODE § 13A-11-90(b)(3); ALASKA STAT. § 18.65.800(a); ARIZ. REV. STAT. ANN. § 12-781(A)(1); FLA. STAT. § 790.251(4)(a); 430 ILL. COMP. STAT. 66 / 65(b); IND. CODE ANN. § 34-

wish to store guns must have a valid permit for the gun[51] or meet certain criteria for gun possession.[52] An employee must meet any or all of the first four types of requirements, depending on the state.[53] Failure to do so would give the employer the right to enforce an otherwise unlawful ban or void the employee's right to keep arms on company property.[54]

In addition to gun, location, vehicle, and employee requirements, employers in several states can take certain actions to further limit firearm storage in the company parking area.[55] For instance, an employer can provide extra security for parking lots,[56] post signage stating "no

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28-7-2(a); LA. REV. STAT. § 32:292.1(A); ME. STAT. tit. 26, § 600(1); NEB. REV. STAT. § 69-2441(3); N.D. CENT. CODE ANN. § 62.1-02-13(1)(a); OKLA. STAT. tit. 21, §§ 1289.7a(A), 1290.22(B) (2017); TENN. CODE ANN. § 39-17-1313(a)(2)(B); TEX. LABOR CODE ANN. § 52.061; UTAH CODE ANN. § 34-45-103(1)(a)(ii). This requirement applies only to employees' vehicles because an employer can always ban firearm storage in company vehicles. *See* ALA. CODE § 13A-11-90(b); ARIZ. REV. STAT. ANN. § 12-781(C)(2); FLA. STAT. § 790.251(7)(f); GA. CODE ANN. § 16-11-135(c)(2); IDAHO CODE § 5-341; IND. CODE ANN. § 34-28-7-2(a); KAN. STAT. ANN. § 75-7c10(b); LA. REV. STAT. § 32:292.1(D)(2); ME. STAT. tit. 26 § 600(1); MISS. CODE ANN. § 45-9-55(3); NEB. REV. STAT. § 69-2441(4); N.D. CENT. CODE ANN. § 62.1-02-13(6)(e); TEX. LABOR CODE ANN. § 52.061; WIS. STAT. § 175.60(15m)(b). In some states, the employee must have general permission from his employer to park his vehicle in the company parking area and therefore store his firearm in his vehicle. *See, e.g.*, ALA. CODE § 13A-11-90(b)(2); TENN. CODE ANN. § 39-17-1313(a)(1).

51. ME. STAT. tit. 26, § 600(1); NEB. REV. STAT. § 69-2441(3) (when referencing "permitholder").

52. ALA. CODE § 13A-11-90(b)(1).

53. *See, e.g.*, ALASKA STAT. § 18.65.800; ARIZ. REV. STAT. ANN. § 12-781; GA. CODE ANN. § 16-11-135; IDAHO CODE § 5-341; 430 ILL. COMP. STAT. § 66 / 65; IND. CODE ANN. § 34-28-7-2; KAN. STAT. ANN. § 75-7c10; LA. REV. STAT. § 32:292.1; ME. STAT. tit. 26, § 600; MINN. STAT. § 624.714(18); MISS. CODE ANN. § 45-9-55; NEB. REV. STAT. § 69-2441; TEX. LABOR CODE ANN. § 52.061; UTAH CODE ANN. § 34-45-103; WIS. STAT. § 175.60(15m).

54. *See supra* note 53.

55. *See, e.g.*, ALASKA STAT. § 18.65.800(d); ARIZ. REV. STAT. ANN. § 12-781(C)(3)(a)−(b); GA. CODE ANN. § 16-11-135(d)(1); LA. REV. STAT. § 32:292.1(D)(3); MISS. CODE ANN. § 45-9-55(2); *see also* ARIZ. REV. STAT. ANN. § 12-781(C)(8); LA. REV. STAT. § 32:292.1(D)(3)(b); UTAH CODE ANN. § 34-45-103(2)(a)(i).

56. In a handful of states, an employer who restricts or limits access to its lots like with a gate or a guard may maintain and enforce a policy preventing storage of firearms. ALASKA STAT. § 18.65.800(d); ARIZ. REV. STAT. § 12-781(C)(3)(a)−(b); GA. CODE ANN. § 16-11-135(d)(1); LA. REV. STAT. § 32:292.1(D)(3); MISS. CODE § 45-9-55(2). Similarly, if an employer provides an alternate lot for employees who wish to store guns in their cars that is "reasonably" close to the normal parking areas,

firearms,"[57] or provide alternative storage for firearms.[58] When an employer takes one of those steps, he may continue to ban firearms from areas with extra security, signage, or alternative storage.[59] The intricacies of the Parking Lot laws are numerous and varying, yet the root of this legislation is the elevation of employees' right to keep arms in their vehicles above employers' interests in property and safety of the work environment.

B. Parking Lot Laws Held Constitutional, yet Subject to Criticism

Employers challenged some of the statutes in courts across the nation on constitutional grounds.[60] Employers asserted that the Parking Lot laws were unconstitutional for the following reasons: (1) they effected a "taking without just compensation" under the Fifth Amendment's Takings Clause;[61] (2) the federal Occupational Safety and Health Act ("OSH Act")[62] preempted the state Parking Lot laws; (3) the statutes distinguished between businesses without a rational basis for the distinction; and (4) the statutes were unconstitutionally vague. Despite the employers' best arguments, courts largely upheld Parking Lot laws.[63]

1. Constitutionality Under the Takings Clause

Because Parking Lot laws limit employers' right to use and exclude from their land, challengers argued the statutes amounted to a "taking" under the Fifth Amendment's Takings Clause.[64] In the 2009 case of

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the employer may restrict storage in the normal parking area. ARIZ. REV. STAT. § 12-781(C)(8); LA. REV. STAT. § 32:292.1(D)(3)(b); UTAH CODE § 34-45-103(2)(a)(i).

57. NEB. REV. STAT. § 69-2441(2); OKLA. STAT. tit. 21, § 1290.22(D) (2017).

58. ARIZ. REV. STAT. § 12-781(C)(3)(c).

59. *See, e.g.*, ALASKA STAT. § 18.65.800(d); ARIZ. REV. STAT. § 12-781(C)(3)(a)−(b); GA. CODE ANN. § 16-11-135(d)(1); LA. REV. STAT. § 32:292.1(D)(3); MISS. CODE § 45-9-55(2); *see also* ARIZ. REV. STAT. § 12-781(C)(8); LA. REV. STAT. § 32:292.1(D)(3)(b); UTAH CODE § 34-45-103(2)(a)(i).

60. *See* Ramsey Winch, Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009); Fla. Retail Fed'n, Inc. v. Att'y Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

61. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

62. Occupational Safety and Health Act, 29 U.S.C. § 651 (2012).

63. *See* discussion *infra* Part I.B.1.–3.

64. *See Ramsey Winch*, 555 F.3d at 1208; *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1289−90; *see also* U.S. CONST. amend V.

Ramsey Winch v. Henry,[65] the United States Tenth Circuit Court of Appeals reviewed Oklahoma's Parking Lot law that imposed criminal liability on property owners.[66] The employer, Whirlpool, brought the initial action alleging the statute's unconstitutionality on several grounds and sought a permanent injunction against the statute's enforcement.[67] Whirlpool argued that restricting an employer's property interest and right to use his land constituted a taking.[68] The court reasoned that merely prohibiting all property owners from making certain usages of their land did not constitute a *per se* taking or a taking under the *Penn Central Transportation Company v. City of New York* factors.[69] Instead, the court analogized the case to the United States Supreme Court's opinion in *PruneYard Shopping Center v. Robins*.[70] In *PruneYard*, the Court did not find a taking when California's constitution prohibited a private shopping

65. *Ramsey Winch*, 555 F.3d 1199.

66. OKLA. STAT. tit. 21 § 1289.7a(A) (2009).

67. *Ramsey Winch*, 555 F.3d at 1202−03.

68. *Id.* at 1208−09. Whirlpool also argued that Oklahoma's statute was unconstitutional because (1) it was preempted by the OSH Act; and (2) it was unconstitutionally vague under the Fifth Amendment's Due Process Clause. *Id.* The *Ramsey* court did not afford much weight to the vagueness claim because a state law must be facially vague to be declared unconstitutional. *Id.* at 1211 n.11. Based on the particular facts of the case, the court determined that the statute was not unconstitutionally vague. *Id.*

69. *Id.* at 1209−10. Traditional takings occur when the government physically occupies land. Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991). When regulations are involved, however, a taking may nonetheless still occur. Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). There are two types of regulatory takings in which some governmental regulation is such that it effects a taking within the meaning of the Fifth Amendment. *Penn. Coal Co.*, 260 U.S. at 414−15. First, a *Penn Central* taking occurs when a consideration of the following factors demonstrates that a regulation goes so far as to deprive a landowner of land use: (1) the magnitude of the economic impact sustained by landowner; (2) whether the landowner relied on old law or regulations such that investment-backed expectations were impacted; and (3) the character of government action, that is, whether it is similar to a traditional taking and targeted towards a few landowners. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Second, a *per se* taking is one in which the *Penn Central* factors are considered automatically satisfied; these takings include when a government permanently and physically occupies private land and when a regulation deprives a landowner of all reasonable economic uses. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432−33 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

70. *Ramsey Winch*, 555 F.3d at 1207 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

center from banning free speech in the form of petition circulation.[71] The *Ramsey* court determined that circumventing the shopping center's right to exclude in *PruneYard* is similar to the Parking Lot laws' circumvention of the employer's right to ban guns from its property.[72] Ultimately, the *Ramsey* court found that the plaintiffs had "not suffered an unconstitutional infringement of their property rights, but rather [were] required by the Amendments to recognize a state-protected right of their employees."[73] This Tenth Circuit decision is representative of lower courts' refusals to find an unconstitutional taking.[74]

2. Constitutional Because No Federal Preemption

Multiple courts likewise have found Parking Lot laws constitutional despite employers' claims that the federal scheme set forth in the OSH Act preempted such laws.[75] When a federal law either expressly or implicitly preempts a state law, courts invalidate the state law.[76] One of the main

71. *See PruneYard*, 447 U.S. at 84.

72. *Ramsey Winch*, 555 F.3d at 1207.

73. *Id.* at 1209; *see also* Fla. Retail Fed'n, Inc. v. Att'y Gen. of Fla., 576 F. Supp. 2d 1281, 1289−90 (N.D. Fla. 2008).

74. No other federal courts of appeals have examined the constitutionality of Parking Lot laws on takings grounds. *See, e.g.*, *Fla. Retail Fed'n*, 576 F. Supp. 2d 1281. Contrary to the Tenth Circuit and Florida district court's findings, one law review comment suggests that Parking Lot laws do, in fact, effect an unconstitutional taking. Stefanie L. Steines, Comment, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171 (2008). The commentator examined the *Penn Central* factors and determined that they "appear to weigh in favor of finding of a taking" for three reasons: (1) an increase in workplace violence increases economic costs for the employer; (2) the "investment-backed expectations" prong is inconclusive in determining a taking; and (3) some statutes impose criminal liability. *Id.* at 1189−96. Courts, however, have yet to adopt this reasoning, and the statutes are presumed constitutional on takings grounds.

75. *See Ramsey Winch*, 555 F.3d 1199; *Fla. Retail Fed'n*, 576 F. Supp. 2d 1281.

76. Preemption occurs because the Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Express preemption occurs when a federal statute either contains a preemption clause explicitly identifying which state laws or regulations will be affected or contains some other clear statement of congressional intent to preempt, thus giving states clear areas in which to operate. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111−12 (1992) (Kennedy, J., concurring). Implied preemption can take multiple forms: (1) direct conflict; (2) indirect conflict; and (3) field preemption. Direct conflict exists most

types of implied preemption is field preemption, which occurs when a regulatory scheme is so complex and far-reaching that "no room remains for the operation of state law at all."[77] In such a case, courts infer that Congress meant to occupy that particular field in its entirety.[78] As such, although a gap may exist in that comprehensive scheme, the breadth of federal law implies that Congress meant to govern that gap.[79]

Opponents of Parking Lot laws claimed that the OSH Act is an example of field preemption because the Act aims to ensure safe workplaces.[80] The OSH Act contains a plethora of "occupational safety and health standards for businesses" to ensure safe work environments.[81] Given the overall goal of the OSH Act, employers argued that state Parking Lot laws implicate issues for workplace violence, an aspect of the safe working environment[82] that Congress aimed to protect with the OSH Act.[83] In two notable cases, courts disagreed with employers, holding that the OSH Act does not preempt Parking Lot laws for two main reasons: the Act lacks specific standards for workplace violence[84] and the impetus for the Act's enactment was not to curb workplace violence but only "traditional work-related hazards."[85] Although the Occupational Safety and Health Administration

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clearly when a party cannot possibly comply with both the state and federal law. *See* Wyeth v. Levine, 555 U.S. 555, 589 (2009). Indirect conflict involves a more difficult analysis and exists when the animating policies of the federal law are undermined by the state counterpart. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002).

77. Cook v. Rockwell Intern. Corp., 790 F.3d 1088, 1093 (10th Cir. 2015). *See* Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286, 2295−98 (2013); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227−28 (2000); *see also* Arizona v. United States, 567 U.S. 387, 401 (2012).

78. *See Arizona*, 567 U.S. at 401 ("[F]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

79. *See* Pac. Gas & Elec. Co. v. State Energy Research Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

80. *Ramsey Winch*, 555 F.3d at 1203 (citing 29 U.S.C. § 651(b) (2012)); *Fla. Retail Fed'n*, 576 F. Supp. 2d 1281.

81. *Ramsey Winch*, 555 F.3d at 1205 (citing 29 U.S.C. § 651(b)(3)).

82. 29 U.S.C. § 651(b).

83. *Ramsey Winch*, 555 F.3d at 1202; *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1297.

84. *Ramsey Winch*, 555 F.3d at 1208; *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1298.

85. *Ramsey Winch*, 555 F.3d at 1205. The *Ramsey* court relied on Congress's policy statement to bolster its "traditional work-related hazards." *Id.* The OSH Act's preamble states, "Congress finds that personal injuries and illnesses *arising out of work situations* impose a substantial burden upon . . . interstate commerce

("OSHA")[86] issued voluntary workplace violence guidelines, the Tenth Circuit declined to find that those guidelines constituted federal preemption.[87] Instead, the court determined that the issuance of guidelines, as opposed to a specific standard, signaled that neither OSHA nor Congress intended to preempt state regulation.[88] Despite the OSH Act's general duty clause requiring employers to maintain a hazard free work environment,[89] the court reasoned the clause could not preempt because it was overbroad.[90]

After these opinions in 2011, however, OSHA articulated an interest in overseeing workplace violence.[91] OSHA issued a manual providing

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in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a) (emphasis added). Furthermore, Congress aimed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

86. OSHA is the administrative agency charged with enforcement of the OSH Act. *About OSHA*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (2016), https://www.osha.gov/about.html [https://perma.cc/FJ4D-Y4XM].

87. *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1298.

88. *Ramsey Winch*, 555 F.3d at 1205.

89. *See* 29 U.S.C. § 652(a)(1).

90. *Ramsey Winch*, 555 F.3d at 1205. *See Fla. Retail Fed'n*, 576 F. Supp. 2d at 1298−99. These courts' findings are consistent with that of one commentator who argued 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. 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). The commentator found Congress's statement that "nothing in the OSH Act prevents states from regulating where no federal standard is in place" to be dispositive. *Id* at 509 (citing 29 U.S.C. § 667(a)).

91. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE (2011). This directive issued in 2011, of course, postdates many of the state Parking Lot laws. *See* ALASKA STAT. § 18.65.800 (2005); ARIZ. REV. STAT. ANN. § 12-781 (2009); FLA. STAT. § 790.251 (2008); GA. CODE ANN. § 16-11-135 (2008); IDAHO CODE § 5-341 (2009); IND. CODE ANN. § 34-28-7-2 (2010); KY. REV. STAT. ANN. § 237.106 (West 2006); LA. REV. STAT. § 32:292.1 (2008); MINN. STAT. § 624.714 (2009); MISS. CODE ANN. § 45-9-55 (2006); N.D. CENT. CODE § 62.1-02-13 (2011); NEB. REV. STAT. § 69-2441 (2009); OKLA. STAT. tit. 21 § 1289.7a (2004); TEX. LABOR CODE ANN. § 52.061 (West 2011); UTAH CODE ANN. § 34-45-103 (West 2009). If a court were to find preemption based on congressional intent to preempt, however, even those laws pre-directive would be supplanted. Wis. Pub. Intervenor v. Motier, 501 U.S. 597, 605 (1991). Therefore, the timing of the federal and state laws' enactment does not pose an issue for preemption because even if a federal law, or in this case an agency manual, post-

guidance for industries with a high risk of workplace violence and directed its personnel to investigate all workplace homicides.[92] One commentator reviewed Texas's Parking Lot law in light of the OSHA manual, finding that unlicensed gun owners are not vetted and consequently might be considered a workplace hazard under the OSH Act.[93] The author determined accordingly that the new OSHA workplace violence regulation might indicate enough congressional purpose to support a finding that the general duty clause of the OSH Act does in fact preempt the Texas statute.[94] Although no court has considered the manual and statutes together to date, it is possible that a court could find that the OSHA 2011 manual preempts state Parking Lot laws.[95]

3. Unconstitutional When Statutes Distinguish Between Businesses

Notwithstanding the strong arguments for and against federal preemption of Parking Lot laws, one court declared a state statute unconstitutional on the basis of distinction.[96] In *Florida Retail Federation, Inc. v. Attorney General of Florida*, a federal district court held the Florida statute unconstitutional because the statute treated businesses with concealed-carry permitted employees and businesses without concealed-

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dates the Parking Lot law, the state law still would be preempted and precluded from enforcement. *Wis. Pub. Intervenor*, 501 U.S. at 605.

92. Brian G. Redburn, *The Texas Parking Lot Law: Why Overbroad Legislative Drafting Makes Chapter 52 of the Texas Labor Code Uniquely Susceptible to Constitutional Challenges After the New OSHA Workplace Violence Regulations*, 19 TEX. WESLEYAN L. REV. 761, 777–78 (2013) (citing ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE, *supra* note 91). Industries are classified as high-risk for violence based on several factors: (1) whether work deals with public or "unstable people"; (2) whether work is isolated; (3) whether work involves money and valuables; (4) whether work provides service or care; (5) whether the workplace serves alcohol; and (6) "the time of day and location of work." ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE, *supra* note 91, at Abstract-1.

93. Redburn, *supra* note 92, at 779.

94. *Id.* at 781.

95. As of February 15, 2018.

96. *See* Fla. Retail Fed'n, Inc. v. Att'y. Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008). A state statute's distinction or classification is unconstitutional when the distinction is not "rationally related to a legitimate governmental interest." U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 533 (1973). The Equal Protection Clause of the Fourteenth Amendment states, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

carry permitted employees differently.[97] Although a business owner without concealed-carry permitted workers could ban firearms from its parking lots, businesses with at least one worker with a concealed-carry permit could not.[98] The court held this distinction unconstitutional, stating that "without any rational basis, the statute's provision on guns in customer vehicles subjects some businesses to an obligation and competitive disadvantage that otherwise-identically-situated businesses do not face."[99] Today, no Parking Lot laws contain such a distinction.[100]

The handful of employers' challenges to Parking Lot laws have been unsuccessful.[101] When a court declared a Parking Lot law unconstitutional on grounds of distinction,[102] the court still held that a state can force a business to allow guns on to its parking lots.[103] Despite some commentators' arguments that the statutes were or are currently unconstitutional, courts have yet to be presented with such a challenge.

II. ACTIONABLE VIOLATIONS OF PARKING LOT LAWS

Assuming Parking Lot laws are constitutional, the question remains as to whether the existence of those statutes provides an employee terminated for violating a company's unlawful firearm ban with a right to recover damages. The employment relationship is always contractual,[104] whether the parties form a contract with a duration of employment or rely on the at-will default presumption that exists in 49 states and the District of

97. *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1291 (examining FLA. STAT. § 790.251 (2008)).

98. *Id.* The statute was problematic for employers who wished to ban customers from storing firearms on their lots and was practically difficult to enforce because workers and permit status could change frequently. *Id.* at 1291−92.

99. *Id.* at 1293.

100. *See supra* note 12.

101. *See* Ramsey Winch, Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009); *Fla. Retail Fed'n*, 576 F. Supp. 2d 1281. The legislature did not remove the unconstitutional portion but rather just ignores the unconstitutional distinction. *See* FLA. STAT. § 790.251 (2017).

102. *Fla. Retail Fed'n*, 576 F. Supp. 2d at 1293.

103. *See id.* at 1301.

104. "At its core, employment is a contractual relationship. The law of contracts rests on a series of default rules," like the at-will doctrine. RESTATEMENT OF EMP'T LAW § 2.01 cmt. b (AM. LAW. INST. 2015). Therefore, parties may contract for different terms to rebut the at-will presumption. *Id.*; *see also* Stacy Gray, Note, Futch v. McAllister Towing, Inc.*: Transforming the Punitory Effect of a Breach of the Employee Duty of Loyalty?*, 51 S.C. L. REV. 927, 929−30 (2000).

Columbia.[105] The ability of the parties in an at-will employment relationship to terminate employment at any time allows the employer in particular to act arbitrarily.[106] As a result, the parties, state statutes, and common law can modify the at-will employment default rules to curtail potential arbitrariness.[107] For example, the parties may circumvent the uncertainty of at-will employment by varying these default rules via a separate contract identifying the terms and conditions of employment.[108] When parties fail to vary the at-will default presumption, the parties must rely on statutory or common-law tort actions to recover for wrongful termination.[109]

A. Express Rights of Action Within Parking Lot Laws

A minority of states' Parking Lot laws grant such a statutory remedy.[110] Six statutes explicitly grant an employee a right of action against an employer who violates their provisions.[111] In these states, the legislatures proactively articulated an exception to at-will employment[112]

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105. RESTATEMENT OF EMP'T LAW § 2.02 (AM. LAW INST. 2015); *see also* Barton v. Jefferson Par. Sch. Bd., 171 So. 3d 316, 324 (La. Ct. App. 2016). *See* Kenneth R. Swift, *The Public Policy Exception: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 554 (2010). *See, e.g.*, Schultea v. Wood, 27 F.3d 1112, 1116 (5th Cir. 1994); Ridenhour v. Int'l Bus. Machs. Corp., 512 S.E.2d 774, 778 (N.C. Ct. App. 1999); *Ex parte* Michelin N. Am., Inc., 795 So. 2d 674, 677 (Ala. 2001). Montana is the one state that does not default to at-will employment. *See* MONT. CODE ANN. §§ 39-2-901 to -914 (2017). The state has a comprehensive statutory regime granting the exclusive right of wrongful discharge. MONT. CODE ANN. §§ 39-2-901 to -914. This regime requires good cause to fire an employee. MONT. CODE ANN. § 39-2-904(1)(b). Montana defines good cause as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." MONT. CODE ANN. § 39-2-903(5).

106. Carson, *supra* note 20, at 562. At any time and without reason, the employer or employee might decide to end employment.

107. RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW INST. 2015).

108. *See* Place v. Conn. Coll., 2013 WL 3388744, at *11 (Conn. Super. Ct. 2013).

109. *See* discussion *supra* Part II; *see also* William R. Corbett, *An Outrageous Response to "You're Fired!"*, 92 N.C. L. REV. 17, 22 (2013).

110. *See* ALA. CODE § 13A-11-90(g) (2017); FLA. STAT. § 790.251(4)(e) (2017); KY. REV. STAT. § 237.106(4) (West 2017); N.D. CENT. CODE § 62.1-02-13(1)(e) & (5) (2017); OKLA. STAT. tit. 21 § 1289.7a(C) (2017); TENN. CODE § 50-1-312(A–B) (2017).

111. *See supra* note 110.

112. If there is a public policy and a remedy is provided by statute, inquiry into the wrongful discharge tort ceases. *See* discussion *infra* Part V.A.

by providing employees with a mechanism to enforce the Parking Lot laws' provisions.[113] Employees may file suit for damages, thereby protecting the employee from termination, discrimination, or other adverse actions on the basis of firearm storage.[114] Though all six statutes give employees a right of action, only Florida's law does not do so explicitly. Instead, Florida's Parking Lot law merely prohibits an employer from terminating employees who exercise their constitutional right to keep and bear arms, which has been interpreted to create an implied right of action.[115] Overall, these six statutes grant an action to terminated employees separate from that provided by other statutes and tort law.

B. Blow the Whistle to Get a Remedy

Another statutory exception to the at-will presumption is the whistleblower status of the employee.[116] State and federal statutes[117] enshrine the whistleblower exception, providing a cause of action to terminated employees who report an employer's illegal activities.[118] There are four major types of remedies that federal and state whistleblower statutes afford: (1) those based on retaliation against whistleblowers; (2) those that reward whistleblowers for speaking out; (3) those that reward employers for investigating potential illegal acts and protecting whistleblowers; and (4) those that punish a potential whistleblower's

113. The six states are Alabama, Florida, Kentucky, North Dakota, Oklahoma, and Tennessee. *See supra* note 110.

114. *See* ALA. CODE § 13A-11-90(g); KY. REV. STAT. § 237.106(4); N.D. CENT. CODE § 62.1-02-13(1)(e) & (5); OKLA. STAT. tit. 21 § 1289.7a(C); TENN. CODE § 50-1-312(A)−(B).

115. FLA. STAT. § 790.251(4)(e). One employee who brought an action under this statute, however, was unsuccessful because the facts of the case did not fall squarely within the statute. *See* Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381, 1385 (M.D. Fla. 2008). The court did recognize that the Parking Lot law "create[d] an exception to at-will employment to prevent an employer from firing an employee for possessing a firearm *in the employee's car* while on company property." *Bruley*, 592 F. Supp. 2d at 1386. This statement seemingly implies a right of action, but it has yet to be expounded upon by the courts. In the instant case, because the plaintiff-employee grabbed his gun from his apartment at the complex he also worked for, he could not utilize the Parking Lot law to recover. *Bruley*, 592 F. Supp. 2d at 1383−84.

116. Swift, *supra* note 105, at 557.

117. Most notable is the Federal False Claims Act, 31 U.S.C. §§ 151−169 (2012).

118. Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1137 (2003).

inaction.[119] These statutes constitute an exception to at-will employment because whistleblowers have a "legitimate and respected desire to enforce laws and regulations" and therefore should not be penalized for following that desire.[120] State whistleblower statutes vary greatly, however, resulting in a "patchwork" of laws across the nation.[121] In some states, what is often referred to as a whistleblower statute acts as a codification of the common-law tort action for WDVPP.[122] One such state statute is Louisiana Revised Statutes § 23:967. Although generally called a "whistleblower" statute,[123] this statute goes beyond the traditional protections that similar statutes afford by making a termination actionable if an employee objects or refuses to participate in his employer's illegal acts.[124]

Whistleblower statutes are related to the tort of WDVPP[125] in that the former are predicated on the notion that when society declares conduct illegal, it also is identifying a public policy that could be the basis for a WDVPP claim.[126] Where whistleblower statutes and public policy differ is that whistleblower statutes provide a remedy to encourage employees to report an employer's illegal acts that harm the public in some way.[127] In many ways, states often embrace whistleblower statutes over WDVPP because they are narrower, providing specific instances in which a remedy

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119. Naseem Faqihi, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3356 (2014).

120. Jones, *supra* note 118, at 1138; *see also Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933−34 (1983); Venessa F. Kuhlmann-Macro, *Blowing the Whistle on the Employment-at-will Doctrine*, 41 DRAKE L. REV. 339, 340 (1992).

121. Christopher Wiener, *Blowing the Whistle on* Van Asdale*: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 536 (2010). For further discussion of the murky whistleblower statutes, see Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes−Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1087−1121, Appendix A (2004) (summarizing all 50 states' employment exceptions).

122. *See, e.g.*, LA. REV. STAT. § 23:967 (2017).

123. *See* Accardo v. La. Health Servs. & Indem. Co., 943 So. 2d 381 *passim* (La. Ct. App. 2006).

124. LA. REV. STAT. § 23:967.

125. *See, e.g.*, Porter v. Reardon Mach. Co., 962 S.W.2d 932, 937 (Mo. Ct. App. 1998) (labeling Missouri's whistleblower exception a second category of public policy exception); Moyer v. Allen Freight Lines, Inc., 885 P.2d 391, 393 (Kan. Ct. App. 1994) ("Kansas courts have recognized several public policy exceptions to the employment-at-will doctrine . . . [o]ne . . . is called the whistle-blower's exception.").

126. *See* Jones, *supra* note 118, at 1146.

127. *See id.*

is available.[128] Conversely, the public policy exception often is ambiguous and unpredictable,[129] depending on the state's approach to sources of public policy.[130]

C. The Tort of WDVPP: Common yet Complicated

The tort of WDVPP is not defined uniformly among the states, and some states fail to recognize it at all.[131] Those courts that do recognize WDVPP hold "that certain terminations [are] counterproductive to the broader social welfare, and with that came the rise of the public policy exception . . . ."[132] Consequently, if an employee's termination offends some "well-established public policy," the tort of wrongful discharge is available.[133] Such well-established public policies may be found in state constitutions, statutes, jurisprudence, and administrative regulations, among other sources.[134]

Most states recognize some form of this exception,[135] but some scholars have questioned its utility because it "has been pleaded by employees in cases in which public policy was not clearly implicated."[136] In an effort to solidify what an employee must prove to bring a WDVPP claim, Professor

128. *See id.* at 1147.

129. "'Public policy' is an amorphous concept." Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 145 (Wash. 2008).

130. *See* discussion *infra* Part V.A.

131. "A clear majority of jurisdictions recognizes such a limit when the employer discharges an employee in violation of a well-established public policy." RESTATEMENT OF EMP'T LAW § 5.01 cmt. a (AM. LAW INST. 2015).

132. Swift, *supra* note 105, at 556.

133. RESTATEMENT OF EMP'T LAW § 5.01 (AM. LAW INST. 2015). What constitutes a well-established public policy varies among states, but some general examples of such policies include employees' rights to file workman's compensation claims or to report safety habits. Kashif Haque, *The At-Will Employment Rule and Its Impact on Wrongful Discharge Cases*, 2013 WL 5290494 (Oct. 2013).

134. RESTATEMENT OF EMP'T LAW § 5.03 (AM. LAW INST. 2015).

135. Dau-Schmidt & Haley, *supra* note 21.

136. Swift, *supra* note 105, at 565–66 ("[T]he public policy exception is now 'intended merely to provide a modicum of judicial protection for those who did not already have a means of challenging their dismissals under state law.'" (citing Van Kruinigen v. Plan B, L.L.C., 485 F. Supp. 2d 92, 96 (D. Conn. 2007))).

Henry Perritt enumerated the following elements: clarity;[137] jeopardy;[138] causation;[139] and overriding justification.[140] Although this elemental approach to public policy is relatively simple and efficient, only Iowa, Ohio, and Washington adopted Perritt's elements.[141] Instead, many states are unclear and vary in their approaches to determining public policy for the tort.[142]

Employment-at-will is deeply ingrained in American employment law; it forms the basis for the majority of employment relationships.[143] The at-will presumption benefits employers and employees because either can terminate the employment relationship at any time.[144] This benefit, however, does not outweigh the great potential for unpredictability in employment. Accordingly, several statutory and common-law exceptions exist to curtail the arbitrary aspect of at-will employment.[145] In the context of Parking Lot laws, there are three potential routes for employee recovery: (1) a grant of action in the Parking Lot law; (2) a whistleblower action; and (3) a WDVPP claim. As to the third route, the recent Fifth Circuit opinion in *Swindol v. Aurora Sciences Flight Corp.* examines whether a terminated employee may base a WDVPP claim on a Parking Lot law violation.[146]

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137. *See* Henry. H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398−99 (1989) ("That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law . . . .").

138. *Id.* at 399 ("That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy . . . .").

139. *See id.* ("The plaintiff's dismissal was motivated by conduct related to the public policy . . . .").

140. *Id.* ("The employer lacked overriding legitimate business justification for the dismissal . . . .").

141. *See* Lower v. Elec. Data Sys. Corp., 494 F. Supp. 2d 770, 775 (S.D. Ohio 2007); Raymond v. U.S.A. Healthcare Ctr. Fort Dodge, L.L.C., 468 F. Supp. 2d 1047, 1057 (N.D. Iowa 2006); Leininger v. Pioneer Nat'l Latex, 875 N.E.2d 36, 40 (Ohio 2007); Gardner v. Loomis Armored, Inc., 913 P.2d 377, 382 (Wash. 1996).

142. *See* discussion *infra* Part IV.A.

143. *See* Dau-Schmidt & Haley, *supra* note 21.

144. Fleming, *supra* note 19, at 437; *see also* Tolmie v. United Parcel Serv., Inc., 930 F.2d 579, 580 (7th Cir. 1991); Swindol v. Aurora Flight Sci. Corp., 805 F.3d 516 (5th Cir. 2015).

145. *See* discussion *supra* Part II.

146. Swindol v. Aurora Flight Sci. Corp., 832 F.3d 492 (5th Cir. 2016).

III. *SWINDOL V. AURORA SCIENCES FLIGHT CORP.*: THE RIGHT OUTCOME FOR MISSISSIPPI

In its examination of Mississippi's WDVPP and Parking Lot law, the Fifth Circuit became the first court to hold that a terminated employee could base a WDVPP action on a violation of a Parking Lot law.[147] Aurora's Mississippi management fired employee Robert Swindol for violating a company ban on firearms on company property when he stored his firearm in his truck parked in the company parking lot.[148] Swindol brought suit in the Northern District of Mississippi, alleging WDVPP and defamation.[149] In support of his WDVPP claim, Swindol cited to the Mississippi Parking Lot law and urged the court to interpret the statute so as to "create a separate and additional public policy exception to the at-will doctrine."[150]

The district court dismissed Swindol's wrongful discharge claim, reasoning that the Mississippi Parking Lot law did not provide an exception to at-will employment.[151] The district court instead held that Mississippi law recognized only two such exceptions: (1) a "'narrow public policy exception'" mirroring a whistleblower exception; and (2) the policy manual exception, pursuant to which a terminated employee possesses a right to sue if the termination was in violation of the company policy manual.[152] Swindol appealed to the Fifth Circuit, maintaining his position that Mississippi's Parking Lot law should be interpreted to "create a separate and additional public policy exception to the at-will doctrine because doing so would fortify Mississippi's public policy supporting the right to bear arms."[153] Although the court agreed that the Parking Lot law "clearly expresses a public policy prohibiting employers from barring employees from possessing firearms,"[154] the Fifth Circuit declined to carve

147. *Id.*

148. Swindol v. Aurora Flight Sci. Corp., 2014 WL 4914089, at *1 (N.D. Miss. 2014).

149. *Swindol*, 832 F.3d at 493.

150. Swindol v. Aurora Flight Sci. Corp., 805 F.3d 516, 521 (5th Cir. 2015) (internal quotations omitted). Similar to other Parking Lot laws, Mississippi's statute provides, in pertinent part, "a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." MISS. CODE ANN. § 45-9-55(1) (2017).

151. *Swindol*, 2014 WL 4914089, at *4.

152. *Id.* at *2 (internal citations omitted).

153. *Swindol*, 805 F.3d at 521 (internal citations omitted).

154. *Id.* at 522.

out such an exception and certified a question to the Mississippi Supreme Court.[155]

Much like Swindol's proposed interpretation, the Fifth Circuit's certified question asked whether the Mississippi Parking Lot law created an additional and completely separate exception to at-will employment from the normal public policy exception.[156] The Mississippi Supreme Court rejected the Fifth Circuit's wording of its certified question, maintaining that the statute did not warrant a separate at-will exception because the Mississippi Legislature's mere passage of the Parking Lot law created a public policy to be enforced with the tort of WDVPP.[157] Furthermore, the Mississippi Supreme Court decided that the state's constitution also sets forth a protectable public policy in the right to keep and bear arms.[158]

Upon receipt of the Mississippi Supreme Court's answer, the Fifth Circuit concluded that Swindol had a cognizable WDVPP claim under Mississippi law.[159] The Fifth Circuit reasoned that "the [supreme] court was holding that the relevant cause of action for discharging someone in violation of this statute is the same as that already recognized for wrongful discharges under [the narrow public policy exception case] *McArn*, namely, a tort action with the same categories of relief being available."[160] As such, the Fifth Circuit reversed the lower court's dismissal and remanded the case for further proceedings on the merits because Mississippi common law recognizes WDVPP for a termination violating the Parking Lot law.[161]

This decision marks the first time a court held a Parking Lot law actionable as providing the public policy for recovery under WDVPP. Prior to *Swindol*, courts examined only a wrongful discharge claim based on a Parking Lot law when the statute itself provided the employee with a

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155. Upon a finding that diversity jurisdiction did exist despite Swindol's deficient complaint, the Fifth Circuit certified the following question: "[w]hether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55." *Id.* at 523.

156. *Id.*

157. "[T]he Legislature has declared it 'legally impermissible' for an employer to terminate an employee for having a firearm inside his locked vehicle on company property." Swindol v. Aurora Flight Sci. Corp., 194 So. 3d 847, 852−53 (Miss. 2017).

158. *Id.* at 853.

159. Swindol v. Aurora Flight Sci. Corp., 832 F.3d 492, 494 (5th Cir. 2016).

160. *Id.*

161. *Id.* at 493.

cause of action.[162] Courts continually declined to find a compelling public policy in the constitutional right to bear arms to warrant an exception to at-will employment.[163] Even a federal court in Mississippi previously declined to create an exception based on the Parking Lot law alone.[164] Though the *Swindol* outcome only benefits Mississippi employees, it would be desirable for many non-Mississippi employees.

IV. EMPLOYEE RECOVERY UNDER WDVPP AND WHISTLEBLOWER STATUTES

The other 20 states with Parking Lot laws do not have precedents providing a WDVPP claim to gun-storing employees. Though other state courts have yet to reach a *Swindol* outcome, any state with a Parking Lot law and either a whistleblower statute or recognition of WDVPP possesses the tools to grant a right of action to an employee terminated for storing a gun in their vehicle. This section looks to the rationale behind recognition of WDVPP and whistleblower statutes. That very rationale supports a cognizable claim in the context of all Parking Lot laws. When a state neither recognizes WDVPP nor has a whistleblower statute, an employee terminated in violation of a Parking Lot law is left without recourse.

A. Rationale of WDVPP

The *Swindol* court did not speak directly to the justifications for its public policy exception, yet the very rationale behind even the narrowest exception demands that courts recognize Parking Lot laws as clear articulations of public policy.[165] The basic proposition supporting the public policy exception is that "in a civilized state where reciprocal legal rights and duties abound the words 'at will' can never mean 'without limit or qualification,' . . . for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public."[166] When at-will employment rules value workforce flexibility, whatever occurs within the employment relationship must not

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162. Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381, 1385−86 (M.D. Fla. 2008).

163. *See* Bastible v. Wyerhaeuser Co., 437 F.3d 999, 1007 (10th Cir. 2006); Plona v. United Parcel Serv., Inc., 558 F.3d 478, 482 (6th Cir. 2009); Hansen v. Am. Online, Inc., 96 P.3d 950, 953 (Utah 2004).

164. Parker v. Leaf River Cellulose, L.L.C., 73 F. Supp. 3d 687, 692−93 (S.D. Miss. 2014), *rev'd and remanded,* 2016 WL 4245455, at *1 (5th Cir. 2016).

165. *See* Swindol v. Aurora Flight Sci. Corp., 194 So. 3d 847, 853 (Miss. 2016).

166. Sides v. Duke Univ., 328 S.E.2d 818, 826 (N.C. Ct. App. 1985).

offend the public interest.[167] The public policy exception aims to "prohibit an employer from placing an employee in the position of keeping a job only by performing an illegal act, forsaking a public duty, or foregoing a job-related right or privilege."[168]

In examining a WDVPP claim, courts must conduct two analyses in every case.[169] First, the court must establish that the discharge violates some well-established public policy.[170] Second, the court must inquire as to whether there is an existing remedy protecting the employee's and society's interests.[171] If no such remedy exists, then a claim for WDVPP is available.[172]

First, the well-established public policy incorporated in Parking Lot laws is the individual right to keep and bear arms.[173] Though a constitutional right limits only the power of federal and state governments to interfere with the exercise of that right,[174] the mere enactment of a law giving employees the right to store firearms in their cars on private property indicates that those state legislatures value the right to keep and bear arms over employers' property rights or safety concerns. Parking Lot laws themselves create a right to keep arms in a particular area independent from that of the state and federal constitutions.[175]

Parking Lot laws' public policy qualifies as "well-established" under any of the varying approaches to the public policy exception. The narrowest approach is the "unlawful" approach in which a wrongful discharge action only is available when the employee is fired for refusing to participate in or for reporting an employer's illegal acts.[176] Under the unlawful approach, the employee must demonstrate that his employer directed him to perform the illegal act.[177] The unlawful approach also requires "an explicit statement of public policy in a statute that supports

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167. *Id.*

168. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992).

169. Osborn v. Prof'l Serv. Indus., Inc., 872 F. Supp. 679, 681 (W.D. Mo. 1994) (internal citations omitted).

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* discussion *infra* Part V.A.

174. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

175. *See* Fla. Retail Fed'n, Inc. v. Att'y. Gen. of Fla., 576 F. Supp. 2d 1281, 1295 (N.D. Fla. 2008) ("I conclude that when the statute refers to the 'constitutional' right to bear arms, it means the right to bear arms created by § 790.251 itself.").

176. Thomas L. Cluff, Jr., *In Defense of a Narrow Public Policy Exception of the Employment At Will Rule*, 16 MISS. C. L. REV. 437, 449 (1996).

177. *Id.*

the specific interest the employee is asserting."[178] Parking Lot laws expressly prohibit company bans on firearm storage, thus making the maintenance or enforcement of such a ban illegal.[179] Under the unlawful approach to identifying a well-established public policy, those 21 state legislatures that enacted Parking Lot laws articulated a well-established public policy that can be enforced via WDVPP.

A more expansive approach to identifying actionable public policies is the "public purpose" approach, which "recognizes wrongful discharge actions for employees who can allege that their terminations harm the public good in any general manner."[180] This intermediate view requires "an explicit declaration of policy, but recognizes sources other than specific legislation, such as constitutional provisions . . . ."[181] Under this approach, Parking Lot laws give terminated employees a wrongful discharge claim as well. An employee fired for bringing his gun to work and storing it in his vehicle need only prove by using any source of law that his termination harmed the public good.[182] An employee could argue that by prohibiting him from storing firearms in contradiction with a state's Parking Lot law, his termination harms the public good by infringing on a legislatively bestowed right and the right to self-defense.[183] Therefore, the termination circumvents the people's legislative will articulated in the Parking Lot law.

The broadest approach to the public policy exception is the "just cause" approach, which bars any discharge that is not based on good cause.[184] The "just cause" approach encompasses most wrongful discharge claims because it grants courts discretion in distilling public policy from any source of law.[185] The breadth of this method undercuts the doctrine of at-will employment because no longer is "bad reason or no reason at all" sufficient to end the employment relationship.[186] Reasoning *a fortiori*, if Parking Lot laws provide a strong and rooted public policy under the narrower approaches, the broadest approach must also result in a tort

178. Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-At-Will Rule*, 24 CONN. L. REV. 97, 104 (1991).

179. *See supra* note 12.

180. Cluff, Jr., *supra* note 176, at 450.

181. Rothstein, *supra* note 178, at 104.

182. Cluff, Jr., *supra* note 176, at 450; Rothstein, *supra* note 178, at 104.

183. *See* discussion *infra* Part V.A.

184. Cluff, Jr., *supra* note 176, at 453.

185. The court is not tied to only "legislatively enunciated polic[ies]." Rothstein, *supra* note 178, at 104 (internal quotations omitted).

186. This is an expansive approach, similar to "good cause" as defined in Montana's comprehensive regime displacing at-will in that state entirely. *See* MONT. CODE ANN. § 39-2-903(5) (2017).

action for WDVPP. The "just cause" view is that employers may not terminate employees for anything but good cause.[187] Therefore, an employer who terminates an employee for keeping a gun in the employee parking area would not satisfy the just cause requirement.[188] Good cause does not exist when an employee is fired for exercising a right in accordance with a state statute.[189] After conducting this analysis for Parking Lot laws, there is a well-established public policy under all of the various approaches. Also, in the 15 states whose statutes do not provide an explicit cause of action, a statutory remedy for the employee does not exist.

More state legislatures could have enacted specific remedies to avoid the public policy question;[190] however, the fact that a state even recognizes WDVPP suggests that an express statutory remedy is not required in all instances.[191] Assuming the legislatures know of the possibility of WDVPP, they likely intended for the common-law tort to fill the gap in the statutory regime. After all, the WDVPP action is a "common law cause of action to uphold policies established by legislatures,"[192] and "the legislature has not and cannot cover every type of wrongful termination that violates a clear mandate of public policy."[193] WDVPP, therefore, represents both a remedial gap-filler and a judicially created method to vindicate employees' rights against employers' actions that are disruptive of public policy.[194]

Although WDVPP acts as a gap-filler, some scholars nonetheless argue that the tort should not be so broad as to infringe on parties' right to contract freely for and terminate employment.[195] Even the narrowest public policy exception, however, allows for a wrongful discharge claim because the right encompassed in Parking Lot laws is well-established and

187. Rothstein, *supra* note 178, at 104 (internal quotations omitted).

188. Norris v. Housing Auth. of City of Galveston, 980 F. Supp. 885, 894 (S.D. Tex. 1997).

189. Good cause is generally defined as an employee's failure to perform his employment duties that an ordinary employee could do. *See id.*

190. *See* discussion *supra* Part II.A.

191. *See, e.g.*, Murphy v. Topeka-Shawnee Dept. of Labor Servs., 630 P.2d 186, 192 (Kan. 1981) (finding that the legislature's failure to grant a cause of action in the text of the statute itself does not defeat the public policy).

192. David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 662 (1996).

193. Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841−42 (Wis. 1983).

194. Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 171 (N.C. 1992).

195. Cluff, Jr., *supra* note 176, at 444.

significant.[196] Given the above analysis, when a state recognizes WDVPP, even in the slightest form, the state also must recognize a claim of wrongful discharge for violation of its Parking Lot law, much like the Fifth Circuit and Mississippi Supreme Court held in *Swindol*.[197] Without the tort of WDVPP, the employee must focus on statutory exceptions to at-will employment for recovery.

B. Whistleblower Statutes' Rationale and Rights of Action

The goal of whistleblower statutes is to protect both the public [198] and whistleblowers from employers' illegal acts and retaliation.[199] Legislative intent in promulgating such statutes is similar to a state's purpose in recognizing the WDVPP action.[200] These statutes, therefore, aim to encourage employees to report illegal acts by granting whistleblowing employees a right of action against employers who retaliate or dismiss them.[201] Although whistleblower statutes vary a great deal among the states as far as what an employee must do to claim whistleblower status and protection,[202] the rationale for whistleblower statutes is similar to that of WDVPP. Therefore, a state's whistleblower statute also gives employees terminated in violation of Parking Lot laws a cause of action. Conversely, if a state has neither the WDVPP tort nor a whistleblower statute, then the employee does not have a claim against his employer because the at-will employment doctrine governs.

The rationale of WDVPP and whistleblower statutes indicates that state legislatures intended to enshrine public policies in Parking Lot laws.[203] As such, Parking Lot laws must be actionable. Legislatures

196. It is well established in the sense that it is clearly mandated by a statutory provision. *See* Thomas P. Owens III, *Employment at Will in Alaska: The Question of Pub. Policy Torts*, 6 ALASKA L. REV. 269, 311 (2003). It is significant because it purports to promote the individual right of self-defense. *See* Parween S. Mascari, *What Constitutes a "Substantial Public Policy" in West Virginia for Purposes of Retaliatory Discharge: Making a Mountain out of a Molehill?*, 105 W. VA. L. REV. 827, 843 (2003). Ultimately, however, "policy determinations frequently are made on an ad hoc basis, ultimately by the high court of the jurisdiction." Cavico, *supra* note 25, at 591.

197. *See* discussion *infra* Part V.A. for the example of Utah.

198. Cluff, Jr., *supra* note 176, at 448−49.

199. *See generally* Nathan A. Adams IV, *Distinguishing Chicken Little from Bona Fide Whistleblowers*, 83 FLA. B.J. 100 (2009).

200. *See generally* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000).

201. *See* Faqihi, *supra* note 119, at 3361–63.

202. *See* discussion *supra* Part II.B.

203. *See* discussion *infra* Part V.A.

enacted these laws in light of the state's existing WDVPP or whistleblower statutes, contemplating that employees terminated in violation of the Parking Lot provision would have some type of recourse against their employers. A state's recognition of WDVPP and whistleblower status results in a right of action, much like the *Swindol* outcome.

V. APPLYING WDVPP AND WHISTLEBLOWER STATUTES TO UTAH AND LOUISIANA PARKING LOT LAWS

The following subsections are case studies of the Parking Lot laws of Utah and Louisiana and potential actions for terminated employees. The Parking Lot laws of these two states are representative of the statutes of many other states because they contain many of the same prohibitions, restrictions, and limitations seen in Parking Lot laws throughout the country.[204] Furthermore, Utah has a whistleblower statute only for public employees[205] but recognizes WDVPP, whereas Louisiana has a general whistleblower provision broadly applicable to both private and public employees but does not recognize the tort of WDVPP.[206]

A. Utah: A WDVPP State

Utah's Parking Lot law is similar to many other states' but does not contain as many exceptions.[207] Utah's Parking Lot law provides: "[A] person may not establish, maintain, or enforce any policy or rule that has the effect of: (a) prohibiting any individual from transporting or storing a firearm in a motor vehicle on any property designated for motor vehicle parking . . . ."[208] The statute requires the employee to have a legal permit and to store the gun out of sight in a locked vehicle.[209] Yet the law gives the employer options to limit the storage of firearms.[210] Unlike a handful of statutes, Utah's statute does not impose criminal liability[211] but does

204. *See* discussion *supra* Part I.A.

205. *See* UTAH CODE ANN. § 67-21-3 (West 2017).

206. *See* LA. REV. STAT. § 23:967 (2017); *see also* Puig v. Greater New Orleans Expressway Comm'n, 772 So. 2d 842 (La. Ct. App. 2000). This statute also doubles as a codified version of WDVPP. *See* discussion Part II.B.

207. *Compare* FLA. STAT. § 790.251(7)(a) (2017), *with* UTAH CODE ANN. § 67-21-3.

208. UTAH CODE ANN. § 34-45-103(1)(a).

209. *Id.* § 34-45-103(1)(a)(i)–(iii).

210. *See id.* § 34-45-103(2)(a) (stating that employers may provide an alternate parking lot or protected storage place before entering the normal parking area).

211. *Id.* § 34-45-105. *Cf.* ALA. CODE § 13A-11-90 (2017); FLA. STAT. § 790.251.

grant enforcement power to the state attorney general.[212] The attorney general may file an action seeking restitution for any individual who suffers a loss based on a violation of the statute.[213] Though an injured party's claim may be brought by a state attorney general, the statute is unclear on whether it contemplates a private right of action for the terminated employee.

Utah's Parking Lot law purports to allow a private civil cause of action for any "individual who is injured, *physically or otherwise*, as a result of any policy or rule prohibited by" the Parking Lot law.[214] An employee may argue that this provision encompasses an action for wrongful discharge by stating he has been "injured, physically or otherwise," although this language is ambiguous. By singling out physical injury and following with a catchall term, the right of action may be limited to physical injuries and those injuries that accompany physical injuries.[215] The statute does not explicitly mention termination or discrimination like the Parking Lot laws of other states,[216] posing the question of whether the Utah Legislature actually intended to create a cause of action for termination in the statute.[217] This ambiguity thus warrants a determination as to whether the statute protects a public policy made actionable by the state's recognition of the WDVPP tort.

Assuming the Parking Lot law does not grant a right of action to terminated employees, an employee must look to Utah's employment law for recourse. In general, Utah recognizes the tort of WDVPP.[218] In *Peterson v. Browning*, the Utah Supreme Court held that although every statute cannot be an expression of public policy, "when the statutory language expressing the public conscience is clear and when the affected interests of society are substantial," the statute provides a basis for a WDVPP action.[219] More recently, the court stated that it construes public policy narrowly to guard only "those principles which are so substantial

212. UTAH CODE ANN. § 34-45-106.
213. *Id.*
214. *Id.* § 34-45-105 (emphasis added).
215. One such akin injury is mental anguish, economic damages, or those that might accompany physical injury. *See, e.g.*, Susan A. Berson, *The Taxation of Tort Damage Awards and Settlements: When Recovering More for a Client May Result in Less*, 78 J. KAN. B. ASS'N. 21, 22 (2009).
216. *See* statutes cited *supra* note 114.
217. *See* discussion *supra* Part II.A.
218. *See, e.g.*, Peterson v. Browning, 832 P.2d 1280 (Utah 1992).
219. *Id.* at 1282.

and fundamental that there can be virtually no question as to [the] importance for promotion of the public good."[220]

Moreover, the Utah Supreme Court recognizes four categories of WDVPP: "(1) refusing to commit an illegal or wrongful act, (2) performing a public obligation, (3) exercising a legal right or privilege, and (4) reporting to a public authority criminal activity of the employer."[221] The court is wary of the exception's broad application, but the court's clear articulation of the exception indicates that the Parking Lot law would encompass such a public policy given the legislative history of the statute.[222]

Legislative drafts and comments during hearings are useful in determining what public policy the Utah Legislature aimed to address with this statute's enactment.[223] The sponsoring state senator indicated that he drafted the original version of the Parking Lot law in response to a Utah Supreme Court decision in which an employer terminated several employees after seeing them with guns in the company parking lot.[224] In *Hansen v. America Online, Inc.* ("*AOL*"), the court found that the right to keep and bear arms in Utah was a clear and substantial policy articulated by the legislature in its debate over its Parking Lot law.[225] The court, however, declined to allow public policy to trump the property interests of the employer.[226] Because the sponsoring senator mentioned a case that accepted the right to keep and bear arms as an important state public policy, it follows that the public policy in enacting the Parking Lot law was to go beyond the *AOL* court's holding and allow the right to keep arms to trump the employer's property interest.[227]

Another possible clear and substantial public policy in the Parking Lot law's enactment is that of self-defense. Several times in the pre-enactment discussion, parties spoke about the concern that workers, if unable to store

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220. Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 625 (Utah 2015). The court found that the public policy behind a "Stand Your Ground" law was self-defense and that the public policy of self-defense was substantial enough to warrant an exception to at-will employment. *Id.* at 625–29.

221. *Id.* at 628 (citing Hansen v. Am. Online, Inc., 96 P.3d 950, 952 (Utah 2004)).

222. Erin Bergeson Harris, *Recent Development in Utah Law*, 2005 UTAH L. REV. 215, 225 (2005).

223. Bernard W. Bell, *Legislative History without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 3 (1999).

224. Utah Senate Floor, *Utah State Senate-Day 35 2009 (part 2)*, UTAH LEGISLATURE (2009), http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=8802&meta_id=425206 [https://perma.cc/8H99-EJ9N].

225. *Hansen*, 96 P.3d at 956.

226. *Id.*

227. *See Utah State Senate-Day 35 2009*, *supra* note 224.

their firearms in their vehicles, would be at a loss for self-protection in their daily commute to and from work.[228] According to the Utah Legislature, these two proffered public policies are of such clarity and importance to warrant a recognition of the public policy exception when the Parking Lot law is concerned. As such, a Utah employee fired because of a violation of the statute was entitled to a WDVPP claim.

B. Louisiana: A Whistleblower State

Louisiana Revised Statutes § 32:292.1, or the Parking Lot law, prohibits property owners and employers, among others, from stopping any person from storing firearms in privately owned vehicles in parking areas.[229] This statute allows for the same alternative solutions for employers as Utah.[230] Like Utah and 47 other states,[231] Louisiana recognizes at-will employment.[232] Unlike Utah, however, Louisiana does not recognize the common-law tort of WDVPP.[233]

Because WDVPP is unavailable, Louisiana's whistleblower statute provides an employee with a right of action for his employer's illegal acts.[234] Unlike the tort, an inquiry into legislative history is not as pertinent because the whistleblower statute is not contingent upon some indeterminable public policy.[235] Instead, whether a right of action exists is purely a result of statutory construction and application to the facts at issue.

Louisiana Revised Statutes § 23:967, the whistleblower statute first enacted in 1997,[236] provides for recovery in three situations. The first two are more traditional forms of whistleblower claims—either the employee discloses or threatens to disclose his employer's violation[237] or the

228. *Id.*; *Senate Business and Labor Committee*, UTAH LEGISLATURE, http://Utah legislature.granicus.com/MediaPlayer.php?clip_id=13862&meta_id=507029 (last visited Oct. 16, 2017) (beginning at 1hour 11minutes) [https://perma.cc/SJY3-YL 7Q].

229. LA. REV. STAT. § 32:292.1 (2017).

230. *See* discussion *supra* Part V.A.

231. Swift, *supra* note 105, at 554.

232. LA. CIV. CODE art. 2024 (2017) ("A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party."); *see also id.* art. 2747 ("A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for doing so.").

233. *See* Guillory v. St. Landry Par. Police Jury, 802 F.2d 822 (5th Cir. 1986); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. Ct. App. 1982).

234. LA. REV. STAT. § 23:967.

235. A whistleblower statute is "an embodiment of the state's public policy against wrongful or retaliatory discharge." Cavico, *supra* note 25, at 564.

236. LA. REV. STAT. § 23:967 (1997).

237. LA. REV. STAT. § 23:967(A)(1) (2017).

employee testifies or informs a public body of the violation.[238] The last provision in Revised Statutes § 23:967(A)(3) goes beyond what is generally considered a whistleblower claim, permitting a wrongful termination action when the employee expresses his disapproval of the employer's illegal act.[239] Section 23:967(A)(3) states, "An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law . . . objects to or refuses to participate in an employment act or practice that is a violation of law."[240] As such, the employee must prove six elements to recover: [241] (1) he was in good faith;[242] (2) the act or practice actually violated some state law;[243] (3) he refused or objected to the employer's act or practice;[244] (4) he informed his employer of the violation;[245] (5) an adverse employment action occurred;[246] and (6) the adverse action resulted from the whistleblowing activity.[247]

In the case of an employee like Swindol, who brought his gun to work in accordance with state law and subsequently was terminated, several of the elements of the whistleblower statute are easily met. Assuming the employee is in good faith, a violation of state law may be established by demonstrating the maintenance or enforcement of a company firearm ban, both of which are prohibited by the Parking Lot law.[248] The next element of refusal or objection is satisfied by the employee's actual gun storage on the company's premises. By ignoring company policy, the employee effectively declines to acquiesce to the employer's illegal practice. Turning to the last

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238. LA. REV. STAT. § 23:967(A)(2).

239. Several other states contain this type of refusal-to-participate provision. *See, e.g.*, FLA. STAT. § 448.102(3) (2017); MINN. STAT. § 181.932(1)(3) (2017); NEB. REV. STAT. §§ 48-1102, -1114 (2017); N.H. REV. STAT. § 359:B4 (2017); N.J. STAT. § 34:19-3 (2017); N.D. CENT. CODE § 34-06-20 (2017).

240. LA. REV. STAT. § 23:967(A)(3).

241. LA. REV. STAT. § 23:967(B). The wrongfully terminated employee may recover back pay, reinstatement, compensatory damages, attorneys' fees, and/or court costs. *Id.*

242. LA. REV. STAT. § 23:967(A). This is a threshold question. *See* Accardo v. La. Health Servs. & Indem. Co., 943 So. 2d 381, 385 (La. Ct. App. 2006).

243. LA. REV. STAT. § 23:967(A)(1). If an employee can prove only that the employer violated its own policy, the whistleblower claim will fail. *Accardo*, 943 So. 2d at 385; Odeh v. City of Baton Rouge, 191 F. Supp. 3d 623, 628 (M.D. La. 2017); Thomas v. La. Dep't. of Social Servs., 406 F. App'x. 890 (5th Cir. 2010).

244. LA. REV. STAT. § 23:967(A)(3).

245. LA. REV. STAT. § 23:967(A). *See* Herster v. Bd. of Supervisors of La. State Univ., 72 F. Supp. 3d 627, 647 (M.D. La. 2014).

246. *See* Tatum v. United Parcel Serv., Inc., 79 So. 3d 1094, 1104 (La. Ct. App. 2011), *writ denied*, 82 So.3d 290 (La. 2012).

247. *See Herster*, 72 F. Supp. 3d at 647.

248. *See* LA. REV. STAT. § 32:292.1.

two elements of adverse employment action and causation, termination explicitly falls within the statute's definition of "reprisal,"[249] and the close temporal proximity of the refusal to participate to the reprisal is indicative of a causal link.[250]

Thus far, five of the six identified elements will be met in a case with facts similar to *Swindol*. The only element of the § 23:967(A)(3) action posing an issue for employees terminated in violation of the Parking Lot law is that which requires the employee to inform his employer of the violation.[251] This provision demands that if the employee believes an actual violation has occurred, he first must inform his employer of the possible violation before objecting or refusing to participate.[252] In many cases, an employee will not know to notify the employer first that its ban is unlawful before bringing his gun to work to defy the company policy. The case law signals, however, that this element is unavoidable—the employee first must notify his supervisor before refusing to participate to be protected under the whistleblower statute.[253]

The Parking Lot law clearly makes it illegal for companies to enforce bans on firearms.[254] As such, if an employer's policy conflicted with that law and the employer fired an employee for the gun, then the employee is covered under Louisiana's whistleblower statute, provided the employee is in good faith and first notifies the employer of the ban's illegality.[255] The employee would have a right of action provided that reprisal was made against him for "refus[ing] to participate in an employment act or practice that is in violation of law."[256]

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249. LA. REV. STAT. § 23:967(C)(1).

250. *See* Washburn v. Harvey, 504 F.3d 505, 511 (5th Cir. 2007) (stating that temporal proximity will support a finding of causation "when the protected act and the adverse employment action are 'very close' in time").

251. LA. REV. STAT. § 23:967(A).

252. *See* Gerald J. "Jerry" Huffman, Jr., *The New Louisiana Employment Statutes: What Hath the Legislature Wrought*, 58 LA. L. REV. 1033, 1061 (1998).

253. Mabry v. Andrus, 34 So. 3d 1075, 1081 (La. Ct. App. 2010).

254. *See* LA. REV. STAT. § 32:292.1(C) , which states,

> No property owner, tenant, public or private employer, or business entity shall prohibit any person from transporting or storing a firearm pursuant to Subsection A of this Section. However, nothing in this Section shall prohibit an employer or business entity from adopting policies specifying that firearms stored in locked, privately-owned motor vehicles on property controlled by an employer or business entity be hidden from plain view or within a locked case or container within the vehicle.

Id.

255. LA. REV. STAT. § 23:967(A)(3).

256. *Id.*

CONCLUSION

Parking Lot laws, which are presumably constitutional, encompass the rights to keep and bear arms and to self-defense. In their promulgation of such statutes, legislatures elevated employees' rights above their employers, infringing upon companies' private property rights. As such, companies can no longer impose an outright ban on having firearms on company premises, thus expanding the potential for workplace violence like that at Black & Decker. Regardless of possible workplace violence, however, employers must abide by the provisions of Parking Lot laws. When an employer neglects to do so, an employee may recover for the violation of Parking Lot laws, depending on the employment law of the state. Some generalizations are to be made in determining whether a state's law grants a remedy; for instance, when a Parking Lot law neglects to grant an explicit remedy, employees can recover under the tort of WDVPP or alternatively under a whistleblower statute because Parking Lot laws encompass important public policies. Recognition of either WDVPP or whistleblower status allows for public enforcement of the laws: when an employee is terminated for storing his gun in accordance with a Parking Lot law, the law grants him with the ability to enforce the law by bringing a WDVPP or whistleblower action. In the event that a state does not acknowledge WDVPP or a whistleblower exception, the doctrine of employment-at-will prevails, and the violation is not actionable. This Comment supposes that future courts should find merit in all future actions brought by gun-storing terminated employees, meaning the Fifth Circuit rightly decided *Swindol v. Aurora Flight Sciences Corp.* both as a matter of law and of policy.

Malerie Leigh Bulot[*]

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