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THE PUBLIC-PRIVATE SECURITY PARTNERSHIP: COUNTERTERRORISM CONSIDERATIONS FOR EMPLOYERS IN A POST-9/11 WORLD

*Andrew P. Morriss**

In the *National Strategy for Homeland Security*, issued by the Office of Homeland Security in July 2002, the federal government set out a preliminary strategy for protecting the United States against future terrorist attacks.¹ This strategy includes a major, if not-yet-completely-defined, role for the private sector:

A close partnership between the government and private sector is essential to ensuring that existing vulnerabilities to terrorism in our critical infrastructure are identified and eliminated as quickly as possible. The private sector should conduct risk assessments on their holdings and invest in systems to protect key assets. The internalization of these costs is not only a matter of sound corporate governance and good corporate citizenship but an essential safeguard of economic assets for shareholders, employees, and the Nation.²

As this preliminary strategy develops into concrete measures, employers who employ both Americans and non-citizens in America, as well as those who employ either Americans and non-citizens overseas, will face a wide range of demands for cooperation with counter-terror agencies, choices about employment policies that affect counter-terror efforts, and concerns by employees about the impact of counter-terror measures on

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1. OFFICE OF HOMELAND SECURITY, OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR HOMELAND SECURITY 12 (2002) [hereinafter NATIONAL STRATEGY FOR HOMELAND SECURITY], available at <http://www.whitehouse.gov/homeland/book/index.html>.

2. *Id.*

their employment. This Article surveys some of the less immediately obvious issues that employers need to consider in adjusting to the post-9/11 environment—an environment in which counter-terror operations have become the nation’s highest government priority.

I. EVERYTHING HAS CHANGED

It is routine to begin discussions of terrorism with the statement that everything has changed since September 11, 2001.³ At the risk of restating the obvious, the 9/11 attacks on American soil—the killing of American civilians through the use of American resources—led to a major shift in the federal strategy for combating terrorist organizations. The resulting counterterrorism efforts are marked by several characteristics. First, the war on terror is defined as a war against all terrorist organizations everywhere, a broadly defined set of enemies.⁴ Second, the federal government is committed to harnessing all available resources in its counterterror operations.⁵ Third, the federal government has cast the war on terror as providing a stark choice (in President Bush’s words): “[e]ither you are with us, or you are with the terrorists.”⁶

These characteristics have the potential to put employers in a difficult spot. The federal anti-terror strategy clearly envisions a significant role for the private sector in a broad campaign against a wide range of organizations and individuals. For example, the federal government’s 2004 workplace charitable giving “campaign” required participating charities to check their employees’ names against the federal terror watch list.⁷

3. See Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1344-48 (2004) (providing clear analysis of the “everything has changed” claim).

4. A wide range of public pronouncements support this summary. For brevity’s sake, I will cite to President Bush’s Sept. 20, 2001 speech responding to the 9/11 attacks. President’s Address Before a Joint Session of the Congress on the United States, Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 2 PUB. PAPERS 1140 (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).

5. *Id.* (“We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.”).

6. *Id.*

7. The campaign adopted a less restrictive approach in 2005. See Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations, 70 Fed. Reg. 15783-01, (proposed Mar. 29, 2005); OMB Watch, CFC Shifts

Similarly, some federal agencies required contractors to compare their employee lists to the terror watch list.⁸ Such obvious steps are only the beginning of efforts to harness private sector resources for counter-terror efforts. Other nations with greater experience combating terrorism have also relied heavily on civilian involvement in their anti-terror efforts.⁹

Obviously much has changed since 9/11, something corporate executives have recognized.¹⁰ Many of the changes are less obvious than those described above. It is worth considering some of these less obvious ways in which things have changed, since these changes directly or indirectly affect employers in a wide range of areas.

II. CHANGED LAW ENFORCEMENT PRIORITIES

Counter-terrorism is now a top priority for law enforcement agencies, particularly federal agencies. This has important implications for employers. For example, before September 11, 2001, the top law enforcement priority for the Cleveland FBI office was health care fraud; it is now counter-terrorism.¹¹ This shift of law enforcement resources has obvious consequences for employers in the health care industry, who must now bear a greater burden of preventing fraud with reduced access to federal law enforcement assistance. As a result of the public nature of this resource shift, employees inclined to commit health care fraud may be more likely to do so, since they have less fear of prosecution than they did in the past.

Position on Terrorist List Checking [hereinafter CFC Shifts Position], at <http://www.ombwatch.org/article/articleview/2778/1/3?TopicID=1>.

8. See Public Notice, 70 Fed. Reg. 3430-01 (Jan. 25, 2005) (describing a system of security records to be maintained by Department of State); CFC Shifts Position, *supra* note 7.

9. See, e.g., Gerard E. Faber, Jr., *Casenote: Silveira v. Lockyer: The Ninth Circuit Ignores the Relevance and Importance of the Second Amendment in Post-September 11th America*, 21 T.M. COOLEY L. REV. 75, 116-17 (2004) (noting that "Israeli citizens are often the first to respond to terrorist attacks" and arguing that such efforts are effective).

10. See Booz Allen Hamilton, *How Corporate Security is Reshaping the Post-9/11 CEO Agenda* (2002) (noting that corporate executives rank security as a significantly higher priority since 9/11), available at <http://extfile.bah.com/livelink/livelink/100690?func=doc.Fetch&nodeid=100690> (last visited Apr. 28, 2006).

11. This is based on my personal knowledge from hearing the director of the local office speak.

- Increased Likelihood of Employees' Serving on Active Duty in the Military

Reservists and National Guard members are more likely today to spend significant periods on active duty than they were before 9/11.¹² Although federal law and the law of some states prohibit discrimination against employees returning from active duty, complaints of such discrimination are increasing.¹³

- Changed Immigration Rules and Practices

Multinational employers must contend with a number of new challenges as entry into the United States becomes significantly harder. As new biometric passport rules go into effect,¹⁴ few countries will be able to comply with new rules, forcing travelers—including business travelers—to procure visas before entering the United States.¹⁵ The *Financial Times*' business travel correspondent has recommended shifting meetings from the United States to Iceland to accommodate "Europeans who can't be bothered with the queues at Kennedy and Americans who don't want to fly all the way to Charles de Gaulle to see their clients."¹⁶

C. TERRORISM LAWSUITS

Although a great deal of attention is given to *official* responses to terror attacks, the victims of terror and their relatives have also launched *legal* attacks on businesses, governments, and individuals alleged to be involved in terrorism.¹⁷ The pre-9/11 problems of multinational companies who did business in Cuba, Libya, and other states under American sanctions indicates the potential problems for employers operating in a world where

12. The Military Coalition, *TMC GUARD & RESERVE COMMITTEE Legislative Goals for 2006*, at http://www.themilitarycoalition.org/Testimony/committeegoals/guard_reserve.htm (last visited Apr. 25, 2006).

13. See, e.g., James W. Crawley, *Some Guard Vets Facing Fight for Jobs*, HERALD-COURIER (Tenn.), Apr. 10, 2005 (noting that 4,400 complaints were filed in the last three years under the federal Uniformed Services Employment and Reemployment Rights Act).

14. See Electronic Passport, 70 Fed. Reg. 8305-01 (proposed Feb. 18, 2005).

15. See Tyler Brule, *Not So Cutting Edge*, FIN. TIMES, Apr. 9-10, 2005, at W22 ("[T]he reality is that only five European countries will come remotely close to hitting the October date and most people will have to resort to lining up outside embassies to apply for an entry visa.").

16. *Id.*

17. See, e.g., Elliott Blair Smith, *Lawsuit: Arab Bank Financed Terror Group*, USA TODAY, July 6, 2004, at 7B (describing an \$875 million lawsuit against a Jordanian bank by families of four U.S. victims of suicide bombers in Israel), available at http://www.usatoday.com/money/industries/banking/2004-07-06-arabbank_x.htm.

nations disagree on which states sponsor terrorism or the appropriate strategies for dealing with those that do.¹⁸

D. HEIGHTENED SENSITIVITY TO FOREIGN ATTEMPTS AT INDUSTRIAL ESPIONAGE IN THE UNITED STATES

The French government, for example, admitted assisting French companies by conducting espionage against U.S. companies.¹⁹ Meanwhile, Chinese efforts at espionage aimed at trade secrets are well documented.²⁰

E. INCREASED FEDERAL SPENDING ON ANTI-TERROR EFFORTS

Federal spending on anti-terror efforts since 9/11 has more than tripled.²¹ Given the public-private partnership envisioned by the federal government, it is likely that the federal government expects a significant increase in private spending to occur as well. Estimates of private sector direct spending on increased security range from \$10 billion to \$127 billion.²²

F. MORE PRIVATE EFFORTS AT LAW ENFORCEMENT

Individual efforts at enforcing laws, such as the recent effort by private citizens to stop illegal border crossings in Arizona, pose problems for employers whose employees are involved.²³

18. For an overview of practical problems in sanctions legislation, see Anne Q. Connaughton & Glenn H. Kaminsky, *Exporting to Special Destinations and Persons: Terrorist-Supporting and Embargoed Countries, Designated Terrorists, and Sanctioned Persons*, 857 Prac. L. Inst./Comm. L. & Prac. Course Handbook Series 255 (2003), WL 857 PLI/Comm 255.

19. One author has quoted a head of French intelligence as supporting espionage against American corporations, claiming that “[i]n economics, we are competitors, not allies.” The author also describes other nations’ espionage efforts against American firms. Christopher G. Blood, *Holding Foreign Nations Civilly Accountable for Their Economic Espionage Practices*, 42 IDEA 227, 229-33 (2002).

20. See Office of the National Counterintelligence Executive, Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, at 1 (2003) (“Foreign businessmen, scientists, academics, and governments continue to aggressively target a variety of US technologies in 2002 and 2003.”), available at http://www.nacic.gov/publications/reports_speeches/reports/fecie_all/fecie_2003/fecie_2003.pdf. “Foreigners from almost 90 countries attempted to acquire sensitive technologies from the United States in 2003 . . .” *Id.*

21. Bart Hobijs, *What Will Homeland Security Cost?*, FED. RES. BANK N.Y. ECON. POL’Y REV., Nov. 2002, at 23 (noting increase from 0.1% of GDP to 0.35% of GDP), available at <http://www.ny.frb.org/research/epr/02v08n2/0211hobi.html>.

22. *Id.* at 28.

23. See, e.g., Timothy Egan, *Wanted: Border Hoppers, and Some Excitement Too*, N.Y. TIMES, Apr. 1, 2005, at A14 (describing private efforts to prevent illegal entry over Arizona border).

As these examples suggest, the world employers operate in has changed as a result of the increased importance of counter-terror operations. Such changes create a number of obvious problems for employers. In hiring new employees, for example, employers may wonder if they have adequately verified a potential employee's identity, if the potential employee is a terrorist, or if the employers have inappropriately profiled a potential employee as a potential terrorist, opening themselves to charges of discrimination based on religion, national origin, or race. Addressing one of these dangers may aggravate one of the others. Indeed, each step taken to ensure that a potential employee is not a terrorist raises possible problems concerning illegitimate profiling and claims of discrimination.

Employers might also be concerned about difficulties in transporting employees to facilities in other countries because of counter-terrorism measures at borders, whether an organization involved in a workplace charitable giving campaign has financial ties to terrorist organizations, or whether an employer's facilities are being used by terrorists.

In addition to these questions, there is a large variety of additional issues that employers may need to consider in adjusting to the post-9/11 security environment. In the following section, this Article considers some areas in which employers are likely to have to make choices that relate to counter-terror issues in two areas: the private activities of employees and the employer's use of private security forces.

III. PRIVATE ACTIVITIES BY EMPLOYEES

Individual employees can take part in the war on terror outside of their roles as employees. Such activities may be either through public agencies (e.g., volunteering for the armed forces reserve or National Guard) or through private means (e.g., participating in voluntary border patrols such as those recently instituted in Arizona or carrying a concealed weapon for personal protection).²⁴ The decisions employees make concerning their private responses have impacts on their work—an employee called to active duty in the military is not, obviously, available to perform her

24. Such activities have a long history in the United States. See generally Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998); Andrew P. Morriss, *Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115 (1997) (describing private efforts to control crime and protect property rights in the nineteenth century west).

regular job duties. Employees carrying concealed weapons off-duty (including driving to and from work) raise questions for employers concerning weapons possession on company property. Some of these private choices by employees are protected by statute (e.g., the Uniformed Service Employment and Reemployment Rights Act).²⁵ Others, such as the Arizona private border patrols, may be actively discouraged by government agencies. In each case, however, the issues raised by an employee's private actions require careful thought by employers for they potentially affect multiple workplace policies.

A. MILITARY SERVICE BY EMPLOYEES

Since the draft ended in 1973, U.S. military strategy has been built around the "Abrams Doctrine" and the concept of "Total Force."²⁶ This approach to military personnel needs makes the armed forces reserves and National Guard critical parts of the military structure.²⁷ As a result, increased military activity (something that seems likely to continue for the foreseeable future) virtually requires participation by reserve and National Guard units.²⁸ Even if the level of military activity declines with the eventual withdrawal of at least some U.S. forces from Iraq, it is likely that military operations (including training) will continue at a level greater than

25. 38 U.S.C §§ 4301-4333 (2002).

26. William F. Kuehn, *The Role of The National Guard in Homeland Security*, available at <http://www.strategicstudiesinstitute.army.mil/ksil/files/000149.doc>.

27. See, e.g., Introduction to the Office of the Assistant Secretary of Defense for Reserve Affairs, <http://www.defenselink.mil/ra/documents/rc101/rc101.pdf> (listing critical roles of reserve forces); Michael P. Noonan, *The Future of the Reserves and the National Guard: A Conference Report*, Foreign Policy Research Institute, <http://www.fpri.org/enotes/20050119.military.noonan.citizensoldier.html> (describing conference discussion of history and future of reserves policy); Donald Rumsfeld, Annual Report to the President and Congress, 2002, at 63, available at http://www.defenselink.mil/execsec/adr2002/pdf_files/chap5.pdf ("Today's Reserve Components, comprised of the National Guard and Reserve forces, are an integral part of the defense strategy and day-to-day operations of the U.S. military.").

28. See Thom Shanker, *Reserve System Needs Change, Military Experts Believe*, N.Y. TIMES, July 4, 2004, at 9 (describing importance of reserves to military strategy). At least one journalist has noted that forty percent of troops in Iraq in June 2004 were reserves and national guard troops. Sumana Chatterjee, *Iraq Deployments Hurting Employers, They Tell Lawmakers*, KNIGHT RIDDER/TRIB. NEWS SERVICE, June 26, 2004, ("Increased reliance in Iraq on the part-time warriors of the national guard and military reserves is straining U.S. businesses and could cause big problems . . ."). See also Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 861 (2002) (discussing Total Force Policy).

existed pre-9/11. Employers should therefore anticipate that that their employees in reserve and National Guard units will be called to active service and plan accordingly.

What employers cannot do is discriminate against employees who participate in military units outside of their regular employment. The Uniformed Service Employment and Reemployment Rights Act (“USERRA”)²⁹ covers all private employers as well as state and federal employers.³⁰ Unlike most other federal employment regulation laws, it has no small-business exception. The USERRA was passed in 1994 and significantly expanded federal protections for employees temporarily serving in the military.³¹

The USERRA imposes a broad antidiscrimination requirement on employers:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.³²

In addition, the statute also has an anti-retaliation provision.³³ Since retaliation claims under antidiscrimination laws can succeed even where the underlying discrimination claim fails, employers need to be particularly careful to avoid any suggestion in the workplace that managers or the employer generally is opposed to military service. Given the particularly heated nature of the political debate over the war in Iraq, retaliation claims may become even more prevalent.

The most important distinction between the USERRA and other anti-discrimination laws is that once a plaintiff has satisfied the statute’s requirement for stating a prima facie case of discrimination, the burden of proof—and not merely the burden of production—shifts to the employer to prove that discrimination did not take place.³⁴

29. 38 U.S.C. §§ 4301-4333 (2006).

30. 38 U.S.C. § 4303(4)(A) (2002).

31. Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists’ Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 808 (2004) (“USERRA significantly strengthens and expands the employment and reemployment rights of all uniformed service members.”).

32. 38 U.S.C. § 4311(a) (2002). For a thorough survey of the USERRA, see Wedlund, *supra* note 31, at 808-30.

33. 38 U.S.C. § 4311(b) (2006).

34. 38 U.S.C. § 4311 (2006); *Sheehan v. Dept. of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

Under the USERRA, employers must allow eligible employees to take military leave (for up to a cumulative total of five years),³⁵ may not require notice beyond that specified in the statute (e.g., may not require copies of military orders),³⁶ and must reemploy the employee upon his or her return from service if the employee follows the statutorily mandated procedure for notifying the employer that the employee is ready to return from military service.³⁷ Reemployment requires more than simply restoring an employee to his or her old position, however. The federal courts have consistently applied “the escalator principle” to the seniority of returning veterans. As the Supreme Court noted in a case under a predecessor statute, the returning veteran “does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.”³⁸ Thus, employers must credit employees on military leave with the seniority and other increases in employment benefits that would have been earned by the employees had the employees not been absent on military service. The USERRA codifies the escalator principle by providing that:

[A] person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.³⁹

35. 38 U.S.C. § 4312(a)(2) (2002). There are classes of service which do not count toward the five-year cumulative limit, including National Guard and Reserve unit annual training and regular drills. *See, e.g.*, 38 U.S.C. § 4312(c)(1)-(4) (2006).

36. 38 U.S.C. § 4312(a)(1) (2006). The statute’s specification of verbal notice as sufficient precludes requiring additional notice. Presumably an employer could contest the timing of the notice, although it seems unlikely that an employer would prevail based on timing so long as the employee was not seeking to harm the employer. *See, e.g.*, *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245, 1247 (6th Cir. 1988) (holding under predecessor statute that fifteen minute notice before three week National Guard service was inadequate).

37. There are different requirements depending on the length of time the employee was serving and whether the employee is returning from hospitalization or not. Employees who do not follow the statutory requirements may only be disciplined in accordance with general policies, however. 38 U.S.C. § 4312(e)(3) (2006).

38. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

39. 38 U.S.C. § 4316(a) (2002).

In addition to federal laws, many states also have veterans' rights laws which grant similar reemployment rights.⁴⁰ Where state laws are more generous, they are not preempted by federal law.⁴¹

Employees serving on active duty raise a number of practical issues which employers must resolve. For example, employers who provide military training leave should adequately describe the details of such leaves. Also, under a federal personnel statute, agencies must provide their employees with leave to attend reserve training.⁴² Although the statute does not apply to private employers, it is illustrative of the difficulties in drafting a military leave policy.

The statute requires agencies to provide up to "15 days" of leave.⁴³ The Department of Justice, like some other federal departments, counted all of the days employees were engaged in training against the fifteen day limit, including days on which the employees were not scheduled to work.⁴⁴ In effect, the agency read "15 days" to mean "15 calendar days." This reading of the statute made sense before 1899, when all forms of leave were calculated in terms of calendar days and federal employees were paid for all days, including weekends and holidays.⁴⁵ Under modern personnel statutes, however, the word "days" generally refers to working days, not calendar days.⁴⁶ Because the federal statute defining military leave had not been changed until 2000, however, the reference to "days" continued to be read as "calendar days" by the Justice Department.⁴⁷

The Court of Appeals for the Federal Circuit rejected this interpretation, however, holding:

As a general matter, employees are not accountable to their employers for time they are not required to work. We see no reason why federal employees need military leave for days on which they are not scheduled to work. . . . The statute purports to measure how many days of paid leave

40. See, e.g., N.H. REV. ST. § 110-B:65 (2004).

41. 38 U.S.C. § 4302(a) (2002).

42. 5 U.S.C. § 6323(a) (2002).

43. *Id.*

44. See 38 U.S.C. § 4312(e) (2002).

45. *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1335 (Fed. Cir. 2003).

46. *Id.* at 1338 (citing 5 U.S.C. § 6302(a) (2002)).

47. Office of Personnel Management, *Memorandum for Heads of Executive Departments and Agencies*, (October 13, 2004) available at <http://www.opm.gov/oca/compmemo/2004/2004-19.asp> (last visited May 2, 2006).

employees are entitled to, not how many days of reserve training they may attend.⁴⁸

Rejecting a number of technical, statutory interpretation arguments in favor of the government's reading, the court concluded that "days" meant "workdays" in this statute.⁴⁹

While some of the details of this decision are relatively arcane, the case illustrates the difficulties caused by piecemeal amendment of policies, which creates confusion and leaves inconsistencies. It also illustrates the need for clear definitions of terms, including commonsense terms like "days." The Federal Circuit's decision illustrates how it is possible to make a federal case out of a word as simple as "days," and to have a sharp difference of opinion over the correct reading of the word, even among highly skilled members of the bench. Even if only the dictionary meaning is intended, a list of definitional terms in employee policies, handbooks, and the like can prevent the expense of litigation over how to read those definitions.

In addition to the rights provided under the USERRA, the Servicemembers Civil Relief Act ("SCRA") provides a variety of protections from creditors and court actions for service men and women on active duty.⁵⁰ Employers engaged in litigation with current or former employees may find that litigation stayed under the SCRA.⁵¹ Also, as with the USERRA, the SCRA's 2003 passage expanded the protections granted by its predecessor statute, the Soldiers and Sailors Civil Relief Act of 1940.

In general, employers should anticipate that employees will be called to active duty more often and for longer durations than was true prior to 2001, and should examine their employment policies to determine how to handle the problems created by the extended absence of employees from the workplace.⁵² The increasing number of complaints under the federal

48. *Butterbaugh*, 336 F.3d at 1337.

49. *Id.* Judge Bryson dissented on statutory interpretation grounds. *Id.* at 1343 (Bryson, J., dissenting).

50. 50 U.S.C. app. §§ 501-596 (2003). See Charles W. Dobra, *Military, Employment and Business Law – New Developments that Employers, Employees Who Are Military Reservists or Guardsmen, and the Lawyers Who Represent Them, Should Be Aware Of*, 17 DUPAGE COUNTY B. ASS'N BRIEF 12 (Nov. 2004) (providing an overview of the statute), available at <http://www.dcba.org/brief/novissue/2004/art21104.htm>.

51. 5 U.S.C. § 6323(a) (2002).

52. Of course, both state and federal laws provide a wide range of excused absences from work for periods from a few hours to months. Jury duty, educational conferences at employees' children's schools, voting, and family and medical leave for illness, birth or

statutes protecting employees on active duty make this an important area in which employers should review their policies.⁵³

B. PRIVATE COLLECTIVE ACTION

Employee involvement in private collective efforts poses two separate categories of problems for employers. First, employees may undertake to join in private collective efforts to enhance national security. For example, two separate private border patrol groups now operate in Arizona along the U.S.-Mexican border, with volunteers patrolling the U.S. side of the border.⁵⁴ Employees' participation in such efforts on their own time is, of course, none of the employers' business. Such participation raises potential public relations problems for employers, however, where the private efforts are unpopular with potential customers. A firm marketing products in Mexico, for example, might be concerned about negative impacts on sales if it became known there that the firm's employees were engaged in private border patrols.

Second, employees may be involved in organizations that draw the attention of law enforcement agencies engaged in counter-terrorism operations. For example, prior to 2001, an employee's involvement in charitable fundraising for the Holy Land Foundation would have been unlikely to draw law enforcement attention. Since that foundation was identified by the federal government as connected to Hamas, which is on the U.S. government's list of terrorist organizations, an employee's private activities on behalf of the U.S. charity would likely draw intense interest from law enforcement. Both types of activities raise important issues for employers that are best addressed in advance of a problem.

IV. INVOLVEMENT IN PRIVATE EFFORTS TO ENHANCE NATIONAL SECURITY

Currently, the most widely known private effort at national security involves the organizations patrolling the U.S.-Mexican border in Arizona. But these are not the only efforts by private citizens to play a role in the war on terror. For example, groups have organized efforts to provide supplies to troops serving overseas, including providing security

adoption of a child are just a few of the protected reasons for absence from the workplace. See JAMES O. CASTAGNERA, PATRICK J. CIHON, & ANDREW P. MORRIS, *TERMINATION OF EMPLOYMENT: EMPLOYER AND EMPLOYEE RIGHTS* (West 2006) (describing state laws providing for mandatory leave for employees for various reasons).

53. See Wedlund, *supra* note 31, at 804-07.

54. Amy Argetsinger, *In Ariz., 'Minutemen' Start Border Patrols*, WASH. POST, Apr. 5, 2005, at A3, available at <http://www.washingtonpost.com/wp-dyn/articles/A26339-2005Apr4.html>.

equipment.⁵⁵ Because of the contentious nature of the political debate over issues related to the war on terror, such efforts may have significant impacts on employers. Private efforts by employees raise issues concerning, among other activities:

- Making charitable appeals in the workplace, by soliciting contributions or selling raffle tickets and the like;
- Posting the private groups' materials in employee workspaces (cubicles, offices, break rooms, etc.);
- Putting identifiable employees in the news, where they may be photographed or filmed wearing employer-logo clothing or other items;
- Soliciting donations from employers to support private national security efforts;
- Using employer resources to organize, promote, and conduct private efforts (e.g., email, telephones, copiers, and the like);
- Placing demands on employees during the workday inconsistent with their employment (e.g., a media outlet may seek to interview an employee during the work day concerning off-duty private national security efforts).

A variety of policies, from accommodation to outright prohibition of work-time involvement, are possible in response to these issues. The correct policy will depend on a wide range of factors specific to each employer.⁵⁶ The important point is not what specific policy the employer adopts; rather, the focus must be on the process through which policies are adopted. Because of the highly charged nature of issues surrounding the war on terror, developing policies on such issues in consultation with employees is likely to require more diplomacy and care than developing a new policy concerning more mundane workplace issues. Moreover, developing policies on these issues *before* a crisis arrives seems virtually certain to save the employer public relations problems. Policy responses developed by line managers confronted with, for example, an employee

55. See, e.g., Adam Wilson, *Star Power Draws Aid for Troops*, READING EAGLE (Reading, Pa.), Apr. 16, 2005 (describing a celebrity auction organized by the parents of a soldier to raise money to buy equipment for troops in Iraq).

56. Employers with collective bargaining agreements may also need to consult with the relevant unions in formulating such policies.

wearing a hat with a private border patrol logo and an angry customer are less likely to be carefully thought through or implemented than policies developed in the absence of an immediate confrontation.

V. INVOLVEMENT IN PRIVATE EFFORTS THAT DRAW LAW ENFORCEMENT INTEREST

Since 9/11, the federal and state governments have taken a variety of steps to increase their abilities to identify potential threats to national security before they result in terrorist activities, and to make conducting terrorist activities more difficult. These include enhanced visa requirements⁵⁷ and attempts to interdict financing for terrorist organizations and their support networks.⁵⁸

Employers need to be prepared to respond to law enforcement interest in their employees generally. Employer cooperation with law enforcement is often critical to the investigation, but it can also put the employer at risk. In 1997, for example, Avery-Dennison discovered that its intellectual property was being stolen.⁵⁹ Through surveillance, the company discovered that one of its key scientists was the culprit. Rather than simply firing the scientist, the company elected to cooperate with the FBI and set up a sting operation to lure the foreign company's president to the United States where he could be arrested. Doing so required the company to put significant intellectual property assets at risk: if the sting had gone wrong, the company might have lost a valued asset.⁶⁰

Formulating a policy for terror-related investigations can be more complex than formulating the equivalent policy for employees accused of non-terror-related crimes because of the politically charged nature of the war on terror. Some private organizations resist cooperation with law enforcement authorities. For example, Prof. Joh quotes a crime prevention manager at a private university as saying, "[w]e're under no obligation to

57. See Enhanced Border Security and Visa Entry Reform Act of 2002, 8 U.S.C. §§ 1701-1775 (2002) (requiring visas from countries that do not meet biometric passport standards).

58. See, e.g., Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267 (2004) (discussing efforts to use financial controls to limit terror financing).

59. See generally STEVEN FINK, *STICKY FINGERS: MANAGING THE GLOBAL RISK OF ECONOMIC ESPIONAGE* (2002); U.S. v. Yang, 281 F.3d 534 (6th Cir. 2002) (describing espionage).

60. The sting was successful and the foreign company's president was arrested and convicted.

turn in our students [to the public police]. We don't want our students to get locked up."⁶¹

To the extent law enforcement authorities believe an employee is making use of the employer's resources (email, telephones, mail, travel, etc.) as part of the employee's criminal efforts, employer cooperation may be critical to the investigation's success. Yet law enforcement authorities will inevitably make mistakes in choosing the targets of their investigations. Even where the correct target is chosen, some investigations will not ultimately yield convictions or even indictments. To take only the least serious consequences, employers risk negative publicity if their cooperation in an unsuccessful investigation becomes known.⁶² The key for employers is to recognize that the combination of the increased law enforcement priority for counter-terror operations and the nebulously-defined nature of the scope of counter-terror operations means that (i) law enforcement authorities may be interested in a broader range of employee conduct than if they were concerned only with non-terror-related crimes; and (ii) the risks to employers from cooperating and from not-cooperating with the law enforcement investigations are greater than in the case of non-terror-related crimes.

A. CONCEALED CARRY

Gun sales increased significantly in the months after September 11, 2001.⁶³ In addition, the number of states (currently thirty-six) with "shall issue" concealed carry permit laws or their equivalent has continued to grow.⁶⁴ "Shall issue" statutes require local law enforcement authorities to issue permits to carry concealed weapons to applicants who meet certain basic conditions.⁶⁵ When a state adopts a "shall issue" statute, it significantly broadens the class of potential permit holders, since law

61. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 599 (2005).

62. Of course, they also risk negative publicity if they fail to cooperate and the target manages to successfully conduct a terrorist operation.

63. Al Baker, *A Nation Challenged: Personal Security; Steep Rise in Gun Sales Reflects Post-Attack Fears*, N.Y. TIMES, Dec. 16, 2001, at 1A.

64. Packing.org, http://www.packing.org/state/report_shall_issue.php (last visited Apr. 29, 2006). Packing.org provides an excellent resource on the current status of concealed carry laws in all fifty states. The total of thirty-six includes the thirty-five states listed on the website plus Vermont, which simply does not regulate concealed carry and so permits it by default.

65. Typically, the conditions are lack of a felony record and completion of a basic training course on firearms safety.

enforcement authorities have generally resisted granting permits under discretionary statutes.⁶⁶ “Shall issue” laws began to be adopted in the late 1980s and spread rapidly, producing “a veritable revolution” in firearms permit laws.⁶⁷

As the right to carry a concealed weapon becomes more broadly accepted, employers face two important questions. First, will they allow their employees to carry weapons in the workplace? Second, will they allow their employees to have weapons in their cars in company parking facilities?

The first question is not as ridiculous as it may first sound to some readers. One response to the 9/11 attacks was to allow airline pilots to carry weapons on board commercial flights.⁶⁸ Beyond pilots, however, a Pizza Hut driver drew national attention via *USA Today* when he was discharged after successfully fending off an attempted robber with his handgun.⁶⁹ Given the broad range of facilities which are potential targets of terror attacks,⁷⁰ it is not unreasonable to expect that some employees will seek to exercise their state rights to carry concealed weapons to protect themselves or their places of employment.

The second question is potentially more important. Employers’ bans on weapons in parked cars on company lots have engendered wrongful discharge litigation⁷¹ and the amendment of at least one state concealed carry

66. Clayton B. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 682-85 (1995).

67. Ian Roberts and Don B. Kates, Regulation of Carrying Handguns: Some History and Some Civil Liability Issues 34 (2005) (manuscript on file with author). Firearms rights appear to continue to be expanding. See, e.g., *Handgun Debate Tilts Toward Easier Access, Fewer Rules*, BELLEVILLE NEWS DEMOCRAT, Apr. 10, 2005, at A8 (discussing the trend toward removing restrictions on concealed carry and the private use of force).

68. The Arming Pilots Against Terrorism Act, Pub. L. No. 107-296, Title XIV, § 1401, 116 Stat. 2300 (2002) (codified at 49 U.S.C. §§ 44921, 44903, and 44918 (2002)). For a critical comment on the policy, see generally Monica G. Renna, *Comment: Fire in the Sky: A Critical Look at Arming Pilots with Handguns*, 68 J. AIR L. & COMM. 859 (2003). For a discussion of the arguments in favor of arming pilots, see David Kopel, *Air Neglect*, National Review Online, <http://www.nationalreview.com/kopel/kopel070203.asp> (last visited May 2, 2005); John R. Lott, Jr., *P.C. Air Security*, National Review Online, <http://www.nationalreview.com/comment/comment-lott090203.asp> (last visited May 2, 2005).

69. Stephanie Armour, *Companies that Ban Guns Put on Defensive*, USA TODAY, Dec. 10, 2004, at 1B.

70. See Justin Rood, *Homeland Security Department Drops Banks from Qaeda Target List*, CONG. Q., Mar. 29, 2005 (describing variety of possible targets), available at <http://page15.com/2005/03/homeland-security-department-drops.html> (last visited May 11, 2005).

71. See, e.g., *Hansen v. America Online, Inc.*, 96 P.3d 950 (Utah 2004).

statute.⁷² Although most concealed carry laws currently give employers the right to ban possession on the employer's property,⁷³ there are indications that other states may follow Oklahoma's lead and attempt to restrict employers from extending their bans on weapons to parking lots.⁷⁴

In March 2004, Oklahoma Governor Brad Henry signed into law amendments to the Oklahoma Firearms Act and Oklahoma Self-Defense Act which provided that:

No person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.⁷⁵

The Oklahoma Court of Criminal Appeals, the state's highest court for criminal law matters, held that this statute makes it a misdemeanor for employers to forbid employees from keeping personal firearms in locked cars in employers' parking lots.⁷⁶ Minnesota's concealed carry law, also under constitutional attack, has a similar provision.⁷⁷ Kentucky's concealed

72. OKLA. STAT. tit. 21, § 1289.7a (2005). The rationale for prohibiting employers from banning weapons in parking lots is that such a ban prevents employees from exercising their right to carry a concealed weapon during their commute, and so during a significant part of their week.

73. See, e.g., TEX. GOV'T CODE § 411.203 (2005) ("This subchapter does not prevent or otherwise limit the right of a public or private employer to prohibit persons who are licensed under this subchapter from carrying a concealed handgun on the premises of the business.").

74. See Wayne LaPierre, *Standing Guard*, AM. RIFLEMAN (Feb. 2005) ("[Workplace bans have] escalated into a larger battle that may well threaten the very concepts of personal self-defense"), available at http://www.webwonks.org/Extra/NRA/nraarchive/2005/feb_05.html (last visited May 11, 2005).

75. OKLA. STAT., tit. 21, §§ 1289.7a, 1290.22(B) (2005). See *Whirlpool Corp. v. Henry*, 2005 WL 701374, at *1 (Okla. Crim. App., Mar. 28, 2005) (describing the legislative history of the statute).

76. *Whirlpool*, 2005 WL 701374 at *2-3. The Oklahoma statute has been stayed pending a federal court challenge to its constitutionality under the federal constitution. The employers are arguing that:

- (1) H.B. 2122 violates the Fifth and Fourteenth Amendments of the United States Constitution because it results in an unconstitutional taking of Plaintiffs' property;
- (2) H.B. 2122 violates the Fourteenth Amendment's guarantee of due process because it is unconstitutionally vague and overbroad; and
- (3) H.B. 2122 violates the Supremacy Clause because it conflicts with federal laws such as the Occupational Safety and Health Act's General Duty Clause, 29 U.S.C. 654(a), which requires employers to provide a workplace free from hazards.

The Williams Companies v. Henry, 2004 WL 3200338, at *3 (N.D. Okla. Dec. 20, 2004).

77. MINN. STAT. § 624.714(17)(4)(c) (2003) ("The owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms in a parking

carry law prohibits employers from barring employees or other permit holders from having weapons and ammunition in vehicles owned by the employee or permit holder.⁷⁸

Even where states do not explicitly amend concealed carry laws to prohibit parking lot bans, employees may use the public policy exception to the at will rule to attempt to avoid discipline for violating such bans. Although the Utah Supreme Court, the only state court of last resort to consider such a claim to date, rejected this policy argument in a 2004 opinion,⁷⁹ other courts may decide otherwise. After all, Utah's public policy exception is relatively narrow.⁸⁰ Utah confers "the elevated status of a public policy" only "on a right that we have deemed essential to our way of life, the architecture of the institutions of government, or the distribution of governmental power."⁸¹

In the concealed carry public policy challenge, the plaintiffs alleged that their discharge fell into the third category.⁸² The Utah Supreme Court's opinion placed great weight on a 2004 debate over an amendment to the Utah concealed carry law in which members of the legislature debated the impact on private property owners of an amendment aimed at requiring the University of Utah to permit concealed carry on its property,⁸³ and the fact that the amendment's sponsors specifically stated that private property owners retained the ability to forbid employees from bringing

facility or parking area.") For a thorough account of the Minnesota statute's legislative history, see Joseph E. Olson, *The Minnesota Citizens' Personal Protection Act of 2003: History and Commentary*, 25 *HAMLIN J. PUB. L. & POL'Y* 21 (2003).

78. KY. REV. STAT. ANN. § 237.110(14) (2005).

79. *Hansen v. America Online, Inc.*, 96 P.3d 950 (Utah 2004).

80. The exception applies in the following circumstances: "(i) refusing to commit an illegal or wrongful act, such as refusing to violate the antitrust laws; (ii) performing a public obligation, such as accepting jury duty; (iii) exercising a legal right or privilege, such as filing a workers' compensation claim; or (iv) reporting to a public authority criminal activity of the employer." *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 408 (Utah 1998).

81. *Hansen*, 96 P.3d at 952.

82. *Hansen*, 96 P.3d at 953.

83. *Hansen*, 96 P.3d at 954 ("Senator Waddoups stated that the bill's sole purpose was to preempt efforts by the University of Utah to restrict the possession of firearms on its campus, in defiance of what Senator Waddoups understood to be a clear legislative mandate to the contrary."). See also Kathy L. Wyer, *Comment: A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 *UTAH L. REV.* 983, 987-95 (2003) (describing controversy between university and legislature).

weapons onto the employers' property.⁸⁴ If such a claim arose in a state with a stronger public policy exception and without the specific type of legislative history upon which the Utah court relied, it is conceivable that a public policy claim could be upheld against an employer whose policy on firearms possession frustrated an employee's rights to carry a concealed weapon. Moreover, only the Society for Human Resource Managers and the Utah Manufacturers' Association submitted amici briefs in the Utah case; no amici briefs were submitted by any firearms rights organizations.⁸⁵ Future cases are likely to draw attention from such organizations, increasing political pressure on the courts to recognize a public policy claim.

Even if employers ultimately prevail in defeating public policy claims based on state constitutional firearms rights and state concealed carry laws in every state—a potentially expensive battle—and Oklahoma-style parking lot statutes do not spread or are struck down, employers face the question of whether it is wise to ban employees carrying weapons in either parking lots or the workplace generally. The limited legal literature on the subject published thus far has largely been critical of such statutes;⁸⁶ a manuscript coauthored by firearms rights scholar and attorney Don Kates argues that employers should permit employees to carry weapons in the workplace.⁸⁷ Advocates of allowing employees to carry weapons or store them in cars argue that “[r]estricting access to guns can protect [victims of violence] from a good person who could intercede on [their] behalf during a crime.”⁸⁸

84. *Hansen*, 96 P.3d at 956 (“[W]e confront here the unique situation in which the very claim to the public policy exception sought by the employees has been taken up and debated by the legislature.”).

85. Alan Gottlieb of the Second Amendment Foundation has been quoted as proclaiming, “[w]e’re fighting back [against limits on employees carrying firearms]. . . . Employers have rights. But if you don’t allow an employee the means to defend themselves [sic] in the parking lot, there can be liability for the company.” Armour, *supra* note 69.

86. See generally, A. Nicole Hartley, *Business Owner Liability and Concealed Weapons Legislation: A Call for Legislative Guidance for Pennsylvania Business Owners*, 108 PENN. ST. L. REV. 637 (2003); Tanja Lueck Thompson, *Weapons in the Workplace: The Effect of Tennessee’s Concealed Weapons Statute on Employer Liability*, 28 U. MEM. L. REV. 281 (1997); Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873 (1996).

87. Ian Roberts & Don B. Kates, *Regulation of Carrying Handguns: Some History and Some Civil Liability Issues* (2005).

88. The quote is from Oklahoma State Representative Greg Piatt, author of a proposed Oklahoma statute to exempt businesses from civil liability if a gun stored in an employee’s car is used to cause an injury in the workplace. Paula Burkes Erickson, *Weapon Restraint Draws Fire; Employers and Employees both Want Rights*, THE DAILY OKLAHOMAN, Mar. 26, 2005, at 11B.

Among the issues employers must consider in drafting a workplace firearms policy are:

- The possibility of boycotts and other protests from gun rights groups.⁸⁹
- Liability for any torts or crimes committed by employees with their firearms on company property, under theories such as premises liability, negligent hiring, negligent supervision, or respondeat superior.
- Liability for violation of employer's duty to provide a safe workplace.

Most importantly, perhaps, firearms issues tend to produce emotional responses from individuals on both sides of the debate.⁹⁰ Employers are likely to face intense criticism from either gun rights or gun control advocates, and sometimes from both, depending on the specific policy they adopt with respect to firearms possession in the workplace and in parking areas. Moreover, the facts concerning the impact of weapons possession are hotly contested and difficult to disentangle without familiarity with sophisticated statistical issues.⁹¹ All sides in the debate are able to marshal both statistics and anecdotal evidence, and tend to discount the other sides' evidence, leaving employers with no clear refuge in "the facts" to support their policy choices.

Employers have five options with respect to weapons policies: (1) total prohibition; (2) prohibition of unlawfully carried weapons; (3) no policy; (4) encouragement of weapons possession by both employees and

89. Ohioans for Concealed Carry is conducting a boycott campaign in Ohio against employers and businesses that prohibit concealed carry on their premises. Roberts and Kates, *supra* note 87, at 2-3.

90. See generally Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perception*, 151 U. PA. L. REV. 1291 (2003) (arguing that cultural factors account for attitudes toward guns). But see David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data Are Also Important*, 151 U. PA. L. REV. 1387 (2003) ("[E]mpirical evidence has a powerful influence on beliefs about gun control.").

91. See generally, e.g., John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (University of Chicago Press 2d. ed. 2000) (arguing that "shall issue" laws reduce crime through deterrence); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003) (criticizing the analysis in Lott & Mustard). Note 3 in the Ayres and Donohue paper lists a number of other studies both supporting and critical of the "more guns, less crime" hypothesis. *Id.* at 1197.

customers; (5) prohibition of either customers or employees carrying weapons but permission for the other group to carry.⁹²

Employers who put in place restrictions on either employees or customers carrying weapons must also consider how they will enforce such policies.⁹³ Simply posting signs, a step usually required by concealed carry laws, may be insufficient to deter individuals from bringing weapons into the workplace. For example, many people who carry concealed weapons do not have permits.⁹⁴ Given that they are carrying illegally, they are unlikely to be deterred by a sign announcing a no weapons policy. Vigorous enforcement can cause a backlash, however. A company's use of trained dogs to locate guns in employee cars in the company's parking lot at an Oklahoma facility prompted the passage of the Oklahoma ban on employer prohibitions on guns in locked cars.⁹⁵

Installing security is expensive, however. An employer at one New York office building which had been a possible, explicit target of a terrorist attack (and which I visited in spring 2005) has security guards, restricted access, metal detectors and bag screening equipment, but no longer screens employee bags because the employer determined that employees were unlikely to pose a sufficient threat to justify the cost and inconvenience of repeated screening of their bags. While rational, such a tradeoff is unlikely to appear justified to a jury evaluating security precautions in a post-attack lawsuit.⁹⁶

Technology will provide new tools to employers' arsenal of detection methods: "Devices currently being developed and tested could permit the police to scan an individual from a distance . . . to determine if a firearm is

92. These policy options are outlined in detail in Roberts and Kates, *supra* note 87, at 81-88.

93. *See, e.g.*, Boone, *supra* note 86, at 892 ("Prohibition of handguns at the workplace . . . must be enforced to be effective.").

94. Jon S. Vernick, et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J. L. MED. & ETHICS 567, 568 (2003); Tom W. Smith, 2001 National Gun Policy Survey of the National Opinion Research Center. Research Findings (University of Chicago, National Opinion Research Center, 2001).

95. Repps Hudson, *Where Does a Company's Right to Prohibit Guns Stop?*, ST. LOUIS POST-DISPATCH, Dec. 6, 2004, at E01.

96. "Because the hindsight bias increases the perceived likelihood of a known outcome, it makes decisionmakers appear as if they used inappropriate probability estimates. The outcome, however, also has a direct influence on the perceived quality of a decision, even apart from the outcome's impact on perceived probabilities—which is evidence of an outcome bias independent of the hindsight bias. When decisions turn out badly, people assume that decisionmakers made poor choices." Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 581 (1998).

being carried under his or her clothing.”⁹⁷ The availability of such devices, however, changes the calculation of which steps to enforce a firearms policy are reasonable.

B. EMPLOYER-RETAINED PRIVATE SECURITY FORCES

Private security forces⁹⁸ have long been a major part of law enforcement in the United States. Even with the increase in counter-terror operations, they are now the majority of law enforcement in terms of both manpower and dollars spent.⁹⁹ “Moreover, private police are increasingly referred to as the first line of defense in the war against terrorism.”¹⁰⁰ Of course, employers were already using private security forces long before 9/11. The question of interest, therefore, is how a law enforcement focus on counter-terrorism operations changes the way private security forces are used.¹⁰¹

Private security differs from publicly-provided security in several respects. Private efforts tend to focus on preventing problems, and not on detecting and apprehending those who commit offenses.¹⁰² A preventative approach stresses a reliance on surveillance over detection or apprehension as a primary means of controlling loss, crime, and disorder. Surveillance here refers not simply to the use of closed-circuit television cameras and electronic monitoring, but also more broadly to embedded systems of control over individual behavior.¹⁰³

Employers simply have more opportunities to embed such systems of control into the workplace than public authorities do with respect to society generally. Private security operations are less constrained by restrictions of the types imposed on public security forces. For example, employers are able to play a major role in defining the terms under which their security forces have access to employees’ lockers, cars, and other property while it is on the employer’s premises. Similarly, employers are able to require

97. Vernick, et. al., *supra* note 94, at 567. *See id.* at 569 (describing technologies).

98. Joh, *supra* note 61, at 577.

99. *Id.* at 575 (“Private police now employ more people and spend more dollars than our public police agencies do.”).

100. *Id.* (citations omitted).

101. There are approximately 1,000,000 private security guards in the United States. Hobijn, *supra* note 21, at 21. *See generally* Bruce L. Benson & Brent D. Mast, *Privately Produced General Deterrence*, 44 J.L. & ECON. 725 (2001) (discussing the role of private deterrence of crime).

102. Public authorities focus more on the latter in part because prevention requires more resources and because of constitutional restraints on public authorities’ information gathering without pre-existing evidence of a crime. Joh, *supra* note 61, at 575.

103. *Id.* at 589 (citations omitted).

employees to submit to drug testing under circumstances in which a public authority could not.¹⁰⁴ Most importantly, due to the difference in laws, employers can simply remove from their workforce employees who do not cooperate with private security efforts, while public authorities have no similar option. These differences are important because they mean that private security forces potentially have access to information unavailable to public security forces, information that may be valuable to public law enforcement authorities.¹⁰⁵

There are ways in which private security efforts do *not* differ from public security efforts, and these are worth considering as well. First, there are not significant differences in the resources available to private security forces.¹⁰⁶ What private security forces may legally do with those resources is, of course, another matter, but private security forces can legally obtain much of the technology available to public law enforcement agencies and can often illegally obtain the remainder. Thus, differences in available technology are not likely to be a major distinction between the two.

There are four areas in which employers need to consider changing their use of private security forces. First, because of the decentralized nature of American society, many potential targets for terror attacks are privately owned and operated (e.g., power plants). Security for these potential targets is partly, if not largely, in private hands.¹⁰⁷ Coordinating this security with public authorities is likely to become more important.¹⁰⁸

104. *Compare* *Burdeau v. McDowell* 256 U.S. 465, 475 (1921) (holding that private searches do not need to comply with with Fourth Amendment standards) *with* *National Treasury Employers Union v. Von Raab* 489 U.S. 656, 1386 (1989) (“Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment.”).

105.

The power to arrest assumes an even less significant role if we consider that many private police can also rely upon the laws of property, contract, and employment that derive from the legal powers of their clients. Thus, for example, private sector employees may possess reduced rights of privacy in their computers, offices, and files that subject them to greater degrees of intrusion by the private police departments of their employers than by public police.

Joh, *supra* note 61, at 606.

106. “With few limitations, private police have the same access to the material resources that public police do.” *Id.* at 599.

107. *Id.* at 589

108. *See, e.g.,* Peter R. Orzag, *Homeland Security and the Private Sector, Testimony Before the National Commission on Terrorist Attacks on the United States*, Brookings

For example, part of the coordination involves persuading the public authorities not to identify targets for terrorists: unfortunately, information collected and made public under regulatory laws can serve to identify less-obvious facilities whose destruction could prove economically devastating or cause large scale death and injury.¹⁰⁹ Moreover, providing the enhanced level of security for potential targets can be expensive.

Second, the new emphasis on security concerns often requires rethinking multiple aspects of facility design and strategically manipulating the physical environment of the workplace can reduce opportunities for criminal behavior.¹¹⁰ For example, at my university, Case Western, a disgruntled ex-student attacked students, faculty, and staff, killing one and wounding two in 2003.¹¹¹ The ex-student smashed through a glass door with a sledge hammer and opened fire on the people in the building with both a handgun and a rifle. Fortunately, the ex-student lacked knowledge about weapons and had selected a poor quality rifle, which jammed repeatedly.¹¹² Area law enforcement authorities were on the scene in minutes, a rapid response made possible in part by the Cleveland SWAT team having just completed a training session, placing them at the ready in their vehicle when the call came in.¹¹³ Unfortunately, the building where the ex-student attacked had an unconventional design, by noted architect Frank Geary. The building features many curved walls, a large atrium, and an unusual floor plan.¹¹⁴ The SWAT team's response was slowed by these features, which hampered planning the defense and enabled the perpetrator to fire at the SWAT team from the upper floors, pinning them down on the ground floor for a time.

Institution 2003, at 5-7 (arguing direct regulation of building design may be needed to mitigate attacks).

109. Jonathan H. Adler, *How the EPA Helps Terrorists*, National Review Online (describing how EPA lists of chemical facilities can provide terrorists with targeting information), available at <http://www.nationalreview.com/comment/comment-adler092701shtml> (last visited May 11, 2005).

110. Joh, *supra* note 61, at 600.

111. Mike Tobin & Scott Hiaasen, *CWRU Suspect a Reclusive, Quirky Figure*, PLAIN DEALER (Cleveland, Ohio), May 18, 2003, at A1. The perpetrator is currently on trial for terrorism as well as murder and other charges—a total of 338 charges. Jim Nichols, *Case Defendant Not Insane, doctor says*, PLAIN DEALER (Cleveland, Ohio), Mar. 22, 2005, at B1.

112. This is based upon presentations by Cleveland SWAT team members to the author's Firearms Regulation classes in spring 2005 and fall 2003.

113. Danny Hakim, *Ex-Employee Held in Campus Attack*, N.Y. TIMES, May 11, 2003, at A19.

114. *One is Dead, One Arrested in Cleveland Campus Siege*, N.Y. TIMES, MAY 9, 2003, at A14; Danny Hakim, *supra* note 114 (describing difficulties caused for police by building design).

Third, a key feature of counter-terror operations is a heavy emphasis on using data analysis to attempt to identify potential terrorists before they strike. Private security efforts tend not to generate information that can be used in such data mining efforts. Employers should therefore anticipate that law enforcement agencies will seek to share such data in the future. Currently, private police often have contacts with public police, sometimes illicit ones, which give them access to public information.¹¹⁵ The reverse is likely to become a more important issue in the future.

VI. CONCLUSION

It seems certain that the war on terror will be a long-term feature of American society. It also seems certain that private employers will be expected by the federal government to play an important role in the war. This is what the National Strategy for Homeland Security refers to as “principles of shared responsibility and partnership.”¹¹⁶ Even beyond pressure from federal and state governments, employers will need to consider how a range of private activities by their employees will affect the workplace—from concealed carry of firearms to charitable contribution campaigns. The breadth of the possible impacts make a regular reassessment of corporate employment (and other) policies a necessity.

The threat of litigation has regularly driven employers to adopt conservative practices, with defensive measures like the adoption of explicit at-will disclaimers in employee handbooks dominating. Unlike these past threats, the impact of counter-terrorism measures cannot be mitigated simply by the adoption of additional policies. Instead, employers must negotiate between the Scylla and Charybdis of the harm of being too stringent and the harm of failing to prevent a terrorist incident. To take but one example, an employer who prohibits employees from carrying concealed weapons in the employer’s parking lots prevents law abiding employees (since they will obey the policy and not bring their weapons into the parking lot) from shooting another employee or a customer on the premises but risks employees not being able to mitigate an attack.¹¹⁷

115. Joh, *supra* note 61, at 612.

116. NATIONAL STRATEGY FOR HOMELAND SECURITY, *supra* note 1, at 2.

117. In the 1991 Luby’s Cafeteria shooting in Killeen, Texas, a gunman drove his truck through the front window and killed twenty-two people. Suzanna Gratia, a patron and an excellent marksman, had left her gun in her car in compliance with then-effective Texas law prohibiting concealed weapons. WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 30

Striking the right balance is going to be a difficult and ongoing task for employers in the post-9/11 world.