



EMPLOYEE GUN RIGHTS V. GOOD RISK MANAGEMENT: CAN ANYONE WIN?

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The politics of guns in America are volatile, divisive and passionate. Yet the daily risk guns present to private businesses does not depend upon the politics of the moment. Instead employers must deal with the tragic fact of gun violence in America, and some of their options are limited.

FIREARMS: THE RISK MANAGEMENT PROBLEMS

It is not hard to envision the risks that employees with guns create. OSHA obligates an employer to provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a) (1) (2015). Firearms could meet that

definition, creating a compliance problem. The same firearm could also cause injury, leading to workers’ compensation claims. Employees with guns also create third-party risk. Those injured might sue, alleging negligent security because the employer or property owner negligently failed to prevent the injury or adequately protect against it.

THE MYTH OF THE SECOND AMENDMENT

The federal constitution’s Second Amendment usually is referenced whenever guns are mentioned. However, the amendment’s scope is often misunderstood. Constitutions restrain government, not private businesses. The amendment limits what laws a government may enact to restrict guns.

Still, governments may enact some gun laws without constitutional concerns, even some applicable to private businesses. As a result, some states have enacted gun laws they believe promote the purpose of the federal Second Amendment. These laws often do impact the employer/employee relationship.

BRING YOUR GUN TO WORK LAWS

Several states have enacted statutes generally known as “bring your gun to work” laws. Each state uses different language but they generally have the same objective. Kentucky’s is typical. “No person, including but not limited to an employer, who is the owner, lessee, or occupant of real property shall prohibit any person who is legally entitled to possess a firearm from

possessing a firearm, part of a firearm, ammunition, or ammunition component in a vehicle on the property.” Ky. Rev. Stat. § 237.106(1) (2015). “A firearm may be removed from the vehicle or handled in the case of self-defense, defense of another, defense of property, or as authorized by the owner, lessee, or occupant of the property.” Ky. Rev. Stat. § 237.106(3) (2015). “An employer that fires, disciplines, demotes, or otherwise punishes an employee who is lawfully exercising a right guaranteed by this section and who is engaging in conduct in compliance with this statute shall be liable in civil damages.” Ky. Rev. Stat. § 237.106(4) (2015). The employee may also seek injunctive relief.

In *Mitchell v. University of Kentucky*, 366 S.W.3d 895 (Ky. 2012) the university discharged an employee for violating university policy prohibiting possession of a deadly weapon on university property. The employee’s semiautomatic pistol was stored in his personal vehicle’s glove compartment while parked in a university parking lot. *Mitchell* concluded the statute “forbids a public organization, such as a university, from prohibiting the possession of a firearm in the glove compartment of a vehicle. There can be no other reasonable interpretation of the statutory language.” *Id.* at 899.

Florida’s version is broader than Kentucky’s. Employers may not prohibit “any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.” Fla. Stat. § 790.251(4)(a) (2015). An employer also may not ask whether a person has a firearm in a locked private motor vehicle or search the vehicle. Fla. Stat. § 790.251(4)(b) (2015). Even if the person volunteers that a firearm is in the vehicle, the employer may not take any action against that person. *Id.* Florida even barred employers from conditioning employment upon concealed weapon permits or the presence of firearms in a locked, private motor vehicle. *Id.*

If an employer breaches these rights, the Attorney General “shall commence a civil or administrative action for damages, injunctive relief and civil penalties, and such other relief as may be appropriate ..., or may negotiate a settlement with any employer on behalf of any person aggrieved under the act.” Fla. Stat. § 790.251(6) (2015). The employee was also given a private cause of action and the ability to recover attorney’s fees. *Id.* However, employers are “not liable in a civil action

based on actions or inactions taken in compliance with this section. The immunity provided in this subsection does not apply to civil actions based on actions or inactions of public or private employers that are unrelated to compliance with this section.” Fla. Stat. § 790.251(5) (2015).

Florida courts have considered the statute three times. *Fla. Retail Fed’n, Inc. v. AG*, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008) concluded Florida could “compel a business to allow a gun to be secured in a vehicle in the parking lot.” Florida could also compel a “business to allow a worker – if he or she has a permit to carry a concealed weapon – to secure a gun in a vehicle in a parking lot.” *Id.* However, “the statute is unconstitutional to the extent it compels some businesses but not others – with no rational basis for the distinction – to allow a customer to secure a gun in a vehicle.” *Id.*

In *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381 (M.D. Fla. 2008) an employee kept a shotgun in his apartment and took it with him to respond to cries from a tenant that she had been shot. The next day he was terminated for, among other things, violating the employer’s rule that no employee carry a firearm on the property. The employee sued and relied upon Florida’s statute but it did not apply. “[T]he statute only creates 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 carried his firearm across company property; it was not stored in his car.” *Id.* at 1386.

Finally, *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 968 (Fla. App. 2013) determined “whether a state university may prohibit the carrying of a securely encased firearm within a motor vehicle that is parked in a university campus parking lot.” A student wanted to keep a firearm in her vehicle on campus, in violation of the University’s student conduct code. The court concluded the conduct code conflicted with the statute and was unenforceable.

Louisiana enacted a similar parking lot rule. However employers and businesses may still adopt “policies specifying that firearms stored in locked, privately-owned motor vehicles on property ... be hidden from plain view or within a locked case or container within the vehicle.” La. Rev. Stat. § 32:292.1(C) (2015). “No property owner, tenant, public or private employer, or business entity or their agent or employee shall be liable in any civil action for damages resulting from or arising out of an occurrence involving a firearm transported or stored pursuant to this Section.” La. Rev. Stat. § 32:292.1(B) (2015). The statute also allows

employers to forbid firearms in company vehicles the employee uses while in the course of employment. La. Rev. Stat. § 32:292.1(D)(2) (2015).

THE AMBIGUITIES

Most bring your gun to work statutes are so new that courts have not yet interpreted them. Unfortunately the statutes are sometimes ambiguous. For instance, Kentucky permits an employee to retrieve a gun in the employee’s vehicle “in the case of self-defense, defense of another, defense of property, or as authorized by the owner, lessee, or occupant of the property.” Ky. Rev. Stat. § 237.106(3) (2015). If an active shooter situation develops, may an employee flee the building, retrieve a firearm from his vehicle and then return to confront the shooter? Is that “self-defense?” If so, this seems to only increase the employer’s risk in that armed employees are returning to the scene to return fire. Worse, when police arrive they may mistake the employee for the active shooter.

In Louisiana, liability does not attach “for damages resulting from or arising out of an occurrence involving a firearm transported or stored pursuant to this Section.” La. Rev. Stat. § 32:292.1(B) (2015). As applied to the Lafayette movie theater shooting in June, 2015, assume the shooter legally possessed the firearm involved, transported it to the movie theater in his car, and then used it in the shooting. When the theater is inevitably sued, does the statute arguably provide immunity because the damages arose from a firearm transported or stored in a private vehicle?

WHAT TO DO?

Unfortunately the language in bring your gun to work laws is not uniform where they have been adopted. For the moment, employers may need to add these laws to state specific lists of obligations and hope for the best while implementing those safety policies merited and legal in that state.



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