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Contacts

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Florida Moves to Protect Guns at Work

On April 15, 2008, Florida Governor Charlie Crist signed into law the **Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008** ("the Act"). This law will impact most employers in the state. It takes effect July 1, 2008. In general, the Florida Attorney General supported the law and has been quoted as saying he will take enforcement action as outlined in the Act. The Florida Legislature found that "a citizen's lawful possession, transportation, and secure keeping of firearms and ammunition within his or her motor vehicle is essential to the exercise of the fundamental constitutional right to keep and bear arms and the constitutional right of self-defense." That right now extends to every employer's parking lot. It trumps the employer's right to maintain security on private property in any other manner that the employer might believe more effective. As long as a customer, employee, or invitee is lawfully in the employer's parking lot and legally owns the firearm, the Act makes it unlawful for any employer, public or private, to prohibit him from keeping a firearm locked inside or locked to a private vehicle on the employer's property.

In addition, the Act prevents employers from inquiring about the presence of a firearm in a vehicle, conducting searches of vehicles, or taking any action against a customer, employee, or invitee in response to statements made about firearms in a vehicle. An employer also may not require, as a condition of employment, that a prospective employee agree to refrain from keeping a legal firearm locked inside or locked to a vehicle if that firearm is kept for lawful purposes. And, employers may not terminate or discriminate against

employees who choose to keep firearms in their vehicles so long as the firearm is never exhibited on company property for any reason other than lawful defensive purposes. The statute will be codified as Fla. Stat. § 790.251.

The Act applies to all businesses, including sole proprietorships, that have employees. The Act defines "employee" to include independent contractors and even volunteers. A few businesses are exempt from the Act, including schools, correctional institutions, certain businesses with combustible materials, or those places where possession of a firearm is prohibited by federal or state law. Other business that are not explicitly exempt from the Act are likely to invite challenge. For example, it is not clear that domestic violence shelters, daycare centers, courthouses, or hospitals fall within the Act's ambit. Similarly, "parking lot" is defined as "any property that is used for parking motor vehicles and is available to customers, employees, or invitees for temporary or long-term parking or storage of motor vehicles." As a result, the Act appears to prevent even a business run from the employer's home from prohibiting guns in the cars parked in the employer's own driveway.

The Act purports to change the law of negligence by shielding employers from liability in lawsuits that are based on actions taken to comply with the prohibitions in this statute, or on inaction induced by those provisions. Employers have no duty of care "related to" the actions prohibited by the Act. On the other hand, aggrieved "lawful" gun owners may bring civil actions against an employer who prohibits guns among other weapons that can still lawfully be prohibited. If the

owner-plaintiff is successful, he or she is entitled to recover all reasonable personal costs and losses suffered as a result of not being allowed to keep a weapon at the workplace parking lot. The Attorney General is charged with enforcing the Act by commencing civil or administrative actions for damages, injunctive relief, civil penalties, and other relief, including court costs and attorney's fees.

Florida has joined other states in passing laws designed to protect the possession of guns in parked vehicles. Mississippi, Oklahoma, Alaska, Minnesota, and Kentucky have passed similar laws. And, according to the Brady Campaign to Prevent Gun Violence, Alabama, Arizona, Indiana, Missouri, Tennessee, Georgia, and Pennsylvania are considering similar bills.

Oklahoma Enforcement Blocked

In an opinion currently being appealed to the Tenth U.S. Circuit Court of Appeals, the federal court for the Northern District of Oklahoma permanently enjoined enforcement of Oklahoma's law, which was very similar to Florida's. In *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282 (N.D.Okla. 2007), several employers challenged the Oklahoma law as an "unconstitutional taking," a violation of their substantive due process rights, and as preempted by federal law. The Oklahoma federal judge granted an injunction in finding that the federal safety and health law preempts state legislation in setting safety and health standards in the workplace.

The court found that Oklahoma's law conflicted with the Occupational Safety & Health Act, 29 U.S.C. §§ 651-678 ("OSHA"). The general purpose of OSHA is to ensure safe and healthful working conditions. OSHA includes a general duty clause that creates an obligation for all employers to identify workplace hazards and to abate them. OSHA requires employers to provide workplaces free from recognized

hazards, even if the employer is not responsible for the hazard. The district court found that OSHA's general duty clause, combined with its general purpose, operate to preempt state law where state law either makes compliance with federal law impossible or poses a significant obstacle to compliance.

The court found that OSHA's general duty clause encompassed the hazard of gun-related workplace violence and that Oklahoma's law posed a material impediment to employer compliance with OSHA. The court reasoned that the presence of unauthorized guns constituted a hazard in the workplace, which employers are required to abate. The Oklahoma law presented a material impediment to the employer's ability to abate the hazard of workplace violence by not allowing employers to ban guns altogether from their properties. The court cited a study published in the *American Journal of Public Health* which found that "workplaces where guns were specifically permitted were 5 to 7 times more likely to be the site of a worker homicide relative to those where all weapons were prohibited."

Another way in which the district court found that the Oklahoma law frustrated the overall goal of OSHA was by shielding employers from civil liability for occurrences resulting from firearms allowed onto the employer's property under the statute. It concluded that, in enacting OSHA, Congress clearly intended to hold employers accountable for workers' injuries or death caused by recognized hazards at the workplace. The court concluded that the tension between state and federal law was untenable and permanently enjoined enforcement of the law.

Plaintiffs also claimed that Oklahoma's law was an impermissible taking in violation of the 5th and 14th Amendments to the U.S. Constitution. That claim failed because the court found that the law did not deprive property owners of all economically beneficial uses of

the property or cause them to suffer a reduction in property value. Although the law adversely affected property owners' right to exclude others from their property, the law's effect did not rise to the level of a taking because it did not result in a complete evisceration of the right to exclude unwelcome individuals from the property.

The court also rejected Plaintiffs' argument that the ability to exclude others from private property is a fundamental right, and that the gun law should be subjected to "strict scrutiny," a standard that sharply confines state action when imposed by the court on a challenged state law. The court found that the Oklahoma law did not affect a fundamental right for purposes of substantive due process analysis, so it was subject only to "rational basis" review. The law passed this lower threshold of the rational basis test, which requires only that a law be rationally related to a legitimate government purpose. The court found the law to be aimed at promoting health, safety and welfare; deterring crime; and protecting the community as a whole. Citing the likelihood that the law could lead to increased, not decreased, workplace violence, the court noted that the law would likely not survive any degree of stricter scrutiny because it was not sufficiently tailored to achieve the objective of promoting safety.

Florida Challenges

Several employer groups opposed the law, and similar litigation to that in Oklahoma is already underway in Florida. According to the *Miami Herald*, April 21, 2008, the Florida Retail Federation and the Florida Chamber of Commerce filed a lawsuit in federal court in the U.S. District Court for the Northern District of Florida challenging the Act. Until this litigation is resolved, employers will be faced with potential exposure under federal law if they comply with the Act. They would be well advised to review their security policies and prepare for possible challenges.

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