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WORKPLACE VIOLENCE

A new law in Texas allowing concealed handgun licensees and other lawful gun owners to carry handguns, firearms, and live ammunition to work when kept locked inside a vehicle in the company's parking lot sets the stage for this BNA Insights article by Fisher & Phillips attorney Michael Abcarian.

Although Texas may be famous for gun-toting cowboys, it isn't the only state with gun possession laws that pit the interests of gun owners against the interests of employers looking to ensure a safe workplace. Abcarian explores the legal implications of these laws for employers, and advises that employers can drastically reduce the risk of a violent incident by having the proper policies and training in place.

Packing Heat in the Parking Lot: Texas Employers Deal With Changes to the Concealed Handgun Law

By MICHAEL ABCARIAN

Recent legislation in many states has left employers wondering whether their workplace parking lots could be the stage for a gunfight at the O.K. Corral.

While employers generally are required to provide a safe working environment for their employees under various federal and state laws, new gun laws that allow those with the proper licenses to carry their firearms for personal protection during their commute to and from work, and allow sportsmen and recreational shooters the convenience of having their guns available to use at the range before or after work, may be putting employers into precarious public safety situations.

This past September, a new law took effect in Texas (S.B. 321) allowing concealed handgun licensees and

other lawful gun owners to carry handguns, firearms and live ammunition to work when kept locked inside a vehicle in the company's parking lot.

The bill was filed by state Sen. Glenn Hegar (R) in response to several instances where employees had been denied the right to protect themselves while traveling to and from work because their employers prohibited the possession of firearms on company premises, including parking lots.

Although Texas may be famous for gun-toting cowboys, it isn't the only state to pass similar new gun possession legislation. This year alone, 37 bills affecting the right to possess firearms on company property were introduced in 16 state legislatures.

Texas joins Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, and Utah as states that have enacted laws affecting the right to possess firearms on employer premises.

Right to Bear Arms vs. Property Laws

While the Texas bill was backed by firearm rights activists including the Texas Rifle Association and the National Rifle Association, it was opposed by the Texas Association of Business.

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And even though activists are not only excited to have convenience on their side, they are also quick to recite the Second Amendment to the U.S. Constitution, which protects the right to keep and bear arms. They also argue that their constitutional right to self defense must not end when they drive onto their employer's property.

On the other side, businesses feel that Texas's new gun legislation diminishes their property rights and may endanger public safety. Shouldn't it be up to the employer or property owner to decide whether firearms are allowed on its premises? Sometimes these gun laws are referred to as "forced entry" laws because they require property owners to allow the presence of guns on their property whether they wish it or not, leading some employers to believe that the government is unreasonably intruding into employers' rights to control their workplaces.

In addition to such intrusion, employers are worried the new laws may carry the threat of escalated workplace violence and thus, the possibility of significant cost to protect employees and others who are physically present.

The National Institute for Prevention of Workplace Violence Inc. recently released the 2011 Workplace Violence Fact Sheet that includes statistics on workplace violence in this country:

- More than 5,900 people have been victims of homicide in the workplace between 2000 and 2010.
- Homicides from assaults and other violent acts are the third leading cause of death for people at their workplace.
- The nationwide annual economic cost of workplace violence is estimated to be about \$121 billion.
- The average negligence verdict against an employer in a workplace violence lawsuit is \$3 million.

While firearm rights activists and employers' opinions reach across both sides of the spectrum, voters seem split in their opinions about whether employees should be allowed to bring guns to work.

According to a statewide survey released this year by the Texas Association of Manufacturers, nearly half (49 percent) favored the proposal while 45 percent were opposed. The remaining 6 percent were unsure. However, 76 percent of voters who supported S.B. 321 did not think businesses should be held liable if bad things happen when employees bring guns to work.

States Battling It Out in the Courtroom

States that enact workplace gun laws are all but guaranteed a date in the courtroom, fighting against employers that oppose such measures. Florida has seen several attempts to overturn some of its gun laws, and other states have had such issues in their legal systems for years.

Last year, Indiana enacted a "parking lot" law that made it unlawful for employers to adopt or enforce policies that prohibit employees from lawfully possessing firearms or ammunition in their locked vehicles while on employer property (52 DLR A-11, 3/19/10). According to supporters of the law, some employers began requiring employees to disclose whether they own, pos-

sess or transport a gun, and then took action against these employees by requiring them to park off site.

As a result of discrimination lawsuits brought under the Indiana parking lot law, a new law went into effect in July 2011 that prohibits all Indiana employers from inquiring into whether employees own, use, possess or transport guns or ammunition, and prohibits employment discrimination based on an individual's "gun status," including any bans on them from parking on work property. An employee may sue an employer for violating the law, leaving employers liable for actual damages, legal costs, and attorneys' fees, and perhaps even punitive damages in cases involving willful violations.

When Oklahoma enacted workplace gun laws in 2004, ConocoPhillips brought a suit in federal court declaring the state's forced entry laws were unenforceable because they directly conflicted with the general duty clause of the Occupational Health and Safety Act (OSH Act), which requires each employer to "furnish to each of his employees 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 employees."

This federal safety law potentially opened the employer up to criminal liability for noncompliance. ConocoPhillips argued that because federal law trumps state law, the forced entry laws were therefore preempted.

The federal district court agreed that the OSH Act's general duty clause conflicted with the state forced entry law, and said it would be impossible to comply with both, therefore rendering the state law unenforceable (196 DLR A-2, 10/11/07).

However in 2009, the U.S. Court of Appeals for the Tenth Circuit disagreed and overruled that decision (32 DLR AA-1, 2/20/09). In so doing, the appeals court upheld state laws by finding that the OSH Act does not require that employers ensure that the workplace is free of violence, and therefore the laws do not conflict.

Who's Responsible for an Incident?

Through Texas' new gun law amendments, employers are protected from any liability "for damages resulting from or arising out of an occurrence involving a firearm or ammunition transported."

However, employers must be left wondering whether they can still be held liable for a gun-related incident nonetheless in civil litigation under negligence theories. In the aftermath of an incident, could a Texas employer be held liable for negligent hiring if they knew someone had a violent past, brought a gun to work, and used it?

In many circumstances, employers may be held liable under the legal doctrine of *respondeat superior*, which may make an employer responsible for the actions of employees if performed within the course and scope of employment. Therefore, an employer doesn't necessarily need to endorse an employee's actions in order to be found liable for them.

Regardless, even if an employer is not held liable for workplace incidents involving guns, the time and money spent in litigation could still put a crimp in the company's budget.

The Cost of Violence

Either way, employers may stand to lose time and money if providing a safe working environment comes

down to a fight with those who wish to bear arms in the workplace. And workplace violence not only can cause low employee morale or psychological trauma, but also it can severely impact a company's bottom line. There can be production losses, increased employee turnover, as well as skyrocketing insurance and security costs.

Reducing the Risk of Workplace Violence

Every employer should have detailed, written policies prohibiting workplace violence, and specifically regarding guns on company grounds. Although several of these new gun laws may give employees the right to store a gun in a locked car on company grounds, they do not permit an employee to carry a gun into a company facility.

Here are some areas for which preventive measures by employers may be important in the aftermath of new gun laws like Texas's S.B. 321:

1. Establish a Workplace Violence Policy. Have a written policy that absolutely prohibits violence or threats of violence in the workplace. Be sure it is clear that any violation of these rules can result in immediate termination. Also include a procedure that provides a confidential reporting mechanism for threats of violence, and an affirmative duty that every employee has a responsibility for reporting threats of workplace violence.

If your policy contains a blanket policy prohibiting all firearms on company property, you may be in violation of the new Texas law. Consider revising your existing policy to state that firearms are prohibited on company premises *except* where authorized by law.

2. Use the Correct Documents When Hiring and Conducting Background Checks. Meet with human resource department representatives to ensure that appropriate employment applications are being used in the hiring process. The correct forms will provide important information on the applicant and include a valid legal release and disclaimer that allows the employer to conduct lawful background investigations. Employers should conduct background investigations on all applicants to uncover prior convictions, litigation history, employment references, and other relevant background information.

3. Test for Substance Abuse. Private employers should consider testing applicants and incumbent employees for substance abuse. Negative test results should be a condition of employment or continued employment.

4. Investigate All Threats. Establish a written procedure for prompt investigation of all threats of violence. Include specific outlines for the investigation and interview of the person who made the threat, as well as any witnesses to the threat. It may be necessary to seek the aid of an attorney on how to handle violence threats quickly and effectively without increasing the risk of a lawsuit.

5. Provide Training. Develop a training program for management and supervisors. Train supervisors to report all threats to upper management immediately. Supervisors also should be trained in conflict resolution skills, stress management, and how to spot the early warning signs of violent employees.

6. Audit Security Measures. Develop working relationships with local law enforcement to establish a point of contact in the event of workplace violence or similar issues. Consider installing basic systems for protecting property, such as lighting, intercoms, employee identification, surveillance or alarm equipment, or hire a security guard or team.

7. Establish a Crisis Plan. A crisis reaction or contingency plan should be implemented and publicized so that everyone knows what to do in the event of workplace violence.

While violence cannot always be predicted, this does not relieve employers of the obligation to provide a safe workplace. By creating and enforcing comprehensive policies that ensure workplace safety, employers reduce the risk of injury and legal action. The presence of firearms on an employer's premises is clearly a significant factor in this calculus.

Texas's S.B. 321 most likely will not be the last time we hear about workplace gun laws. There are many cases in the legal system that will impact the rights of employers and employees who wish to keep firearms nearby. Although it's impossible to prevent every instance of workplace violence, an employer can drastically reduce the risk of incident by having the proper policies and training in place—including those that deal with firearms at the workplace.