***Second Amendment Versus the Employer’s Rights***

***The Business Liability Protection Act***

In the interest of full disclosure, I am an unapologetic advocate of Second Amendment rights (the right of individuals to “keep and bear arms). The current “gun violence” debate has polarized Americans, largely based upon misconceptions, questionable statistics and the justifiable emotions and anger resulting from highly publicized violence. In the face of these events we hear calls for “gun control” on the one hand and increasing demands that Second Amendment rights be protected on the other.

To an extent, employers are caught in the middle. On the one hand we must take steps to assure the safety of our workplaces and employees. On the other, we must recognize that our employees and third parties enjoy this right to “keep and bear arms.” The question then becomes “how do we strike a balance between these competing interests in the workplace?”

Part of the problem has been (and continues to be) a lack of consistency in the patchwork of “gun laws” already on the books. In order to improve the uniformity of laws seeking to balance the respective interests many states – including West Virginia – have begun to enact legislation. Two such statutes are W.Va. Code §8-12-5a (2016) and §61-7-4(d) (2018). The first of these is a “preemption” statute. As enacted, it prohibits local political bodies (counties, cities, etc.) from enacting ordinances restricting the exercise of Second Amendment rights. For example, as a resident of South Charleston I can openly carry a dangerous weapon. If I set foot in the city of Charleston, however, the exercise of my South Charleston right has historically violated a local Charleston ordinance and I could be arrested and charged with a crime.[[1]](#footnote-1) These “preemption” statutes seek to make the law uniform throughout the state.

More problematic for employers has been the question of how reduce the prospect of “gun violence” at their worksite. Many employers simply adopted “no weapons on company property” policies. In my experience, these policies created more problems than they prevented. West Virginians love to hunt and shoot. “Deer Week” has effectively become a state holiday, with many schools closing, families reuniting and hunters harvesting deer in record numbers. Those same shooters and hunters regularly enjoy their sport before coming to work or after leaving. That means they need to bring their firearms to the worksite, or spend an inordinate amount of time dropping them off or retrieving them.

To address that issue, the West Virginia Legislature enacted an amendment to W.Va. Code §61-7-4 in 2018. Titled the “Business Liability Protection Act,” the amendment prohibits owners or lessees of property from a) prohibiting any customer, employee or invitee “lawfully allowed to be present in the area” from possessing any legally owned firearm while on the property, and b) asking whether a firearm is present or searching a vehicle. In short, the statute permits persons “legally in possession” of a firearm to keep it locked in their car on the employer’s parking lot without the employer knowing it is present. It is the West Virginia equivalent of “don’t ask, don’t tell” applicable to guns.

Simple? Not so much………….. First, the employer must only permit the firearm on its property when the employee is “in lawful possession.” There are any number of situations in which the employee would *not be in “lawful possession.”* For instance, some persons between the age of 18 and 21 may be prohibited from possessing a firearm. Persons who are subject to a valid Protective Order may not lawfully possess a firearm. Persons who have been convicted of a felony may not lawfully possess a firearm. Even more esoteric is the fact that a firearm which has had the serial number removed, has been altered in violation of federal law, or has been reported stolen cannot be legally possessed *by anyone.* And no “automatic rifle” can be possessed without a special federal permit.[[2]](#footnote-2) So, even if the employer knows the firearm is present, we cannot be sure the employee is in “lawful possession” of it. And, of course, the employer *cannot inquire and cannot inspect the gun.* All of this leaves the employer in a position where it simply has to *assume* that the employee (or customer or invitee) who brings the firearm onto the property is in lawful possession of it.

The statute now allows employees to possess guns locked in their cars on the company parking lot; so what? Remember, the statute is called the “Business Liability Protection Act.” “The law” protects the employer from liability if an employee “in lawful possession” commits a violent act using the gun while on the employer’s property. But we lawyers earn our living punching “loopholes” in the law. The statute provides the employer is not liable “…in a civil action for money damages based on any actions or inactions taken in compliance with (the statute)…” So, the employer theoretically cannot be held liable in a situation where an employee “lawfully in possession” of a firearm brings the gun to work, gets it out of the trunk of his or her car, and shoots a co-worker in the parking lot.

But what if the employee is prohibited from “lawfully possessing” the gun because of a valid Protective Order, or has a felony conviction? The employer has permitted a person who is *not in lawful possession of the gun to have it on company property* and it has been used to harm a co-worker. Is the employer protected from liability by the provision which prohibits it from inquiring about the gun or searching the vehicle? That may be a strong defense, but what if the perpetrator is the ex-husband of another employee who has obtained a Protective Order against him, and the fact she has done so has been the “talk of the mill?” Should the employer then have known the ex-husband could not “lawfully be in possession” of a firearm? And what if the gun was a hunting rifle which, though locked in the vehicle, was clearly visible on a gun rack? Does the fact the existence of the Protective Order is common knowledge, coupled with the ex-husband’s open and obvious presence of the hunting rifle, shift the burden to the employer to take action?

As with any new law, these questions and the scope of the legislation will evolve over time. For the moment employers should be aware of the Second Amendment protections provided by the changes, but continue to exercise “vigilant common sense.” When in doubt, call your local police.

1. The same problem can occur at the state level. You may recall a case several years ago in which a woman who had been granted a “concealed carry permit” by her state of residence and entered the state of New Jersey where she was arrested and jailed for exercising the right to carry a gun which had been granted by her state of residence. [↑](#footnote-ref-1)
2. An “automatic weapon” is one which requires only a single trigger pull to continue firing. A “semi-automatic” weapon requires the user to pull the trigger each time he or she wants to fire. The ownership or possession of a fully automatic weapon is prohibited by federal law without a special permit issued by ATFE. [↑](#footnote-ref-2)