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Addressing Open Carry Challenges For Texas Employers

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Last June, Texas Gov. Greg Abbott signed into law a measure allowing Texans to carry handguns openly in public, praising the measure as ensuring that "Texans can be assured that their Second Amendment rights will be stronger and more secure than ever before." On Jan. 1 the new law took effect, permitting holders of handgun licenses in Texas to carry their weapons openly in most places. The law precludes weapons in certain limited settings and allows commercial establishments to ban weapons in some locations by posting notices to that effect. But, significantly, the new law leaves unanswered many important liability questions for private employers in Texas. Although the law provides limited protections in certain circumstances for employers, many issues — potentially involving significant legal exposure — have yet to play out and be resolved in the courts.

Debate Over Weapons in the Workplace

Since 2011, Texas law has permitted the carrying of concealed handguns with a state license. The latest measure expands that right to the carrying of a handgun in open view, provided it is secured in a shoulder or hip holster. Proponents argue that open carry of weapons promotes a safer environment by deterring — or, if necessary, permitting a direct response to — the types of public attacks that have been all too prevalent in recent news cycles. Detractors, however, worry that the presence and open display of weapons may cause discomfort for some workers and allow common workplace disputes to escalate to violence. By Dec. 31, 2015, nearly a million Texans were licensed to carry a handgun,[1] and in this politically charged debate employers find themselves risking alienation of a portion of their workforce with whatever position they may take.

Where Texas Employers Can (and Cannot) Prohibit Weapons

The Texas open and concealed carry laws bring into sharp relief tension between the right to possess a firearm and the right of private property owners to control access to and conduct on their property. The Texas Legislature balanced these competing interests by permitting private property owners — including businesses — to restrict the possession of firearms in some, but not all, areas.

As is the case with the earlier Texas concealed carry statute, the recent open carry law allows licensed

individuals to carry firearms on private property, unless the property owner gives verbal or written notice prohibiting such conduct.[2] Written notice can consist of a document or sign, provided it contains statutorily prescribed language prohibiting possession of firearms.[3] Among other requirements, any signs must use language specifically prescribed by statute and display the warning in block letters at least one-inch tall, in both English and Spanish, and in contrasting colors.[4] The statute further requires separate postings addressing concealed and open carrying of weapons.[5] Despite these somewhat burdensome posting requirements, many commercial establishments across Texas have opted to restrict carrying of weapons in their retail locations, citing not only concern over potential violence but also the desire to avoid customer and employee discomfort over the presence of weapons.

Notwithstanding the right to exclude weapons from certain private establishments, the ability of Texas employers to exclude firearms from their workplaces has important limits. Texas law permits a private employer to prohibit licensed handgun owners from carrying their weapons — whether openly or in a concealed fashion — on the premises of the employer's business.[6] The statute defines "premises" as a building or portion of a building, but the term expressly excludes public or private driveways, streets, sidewalks, walkways and parking areas.[7] As a result, in a typical workplace setting, an employer may be able to prohibit weapons within the office or factory, but may not to do so in associated areas such as the private driveways, sidewalks and common areas around those buildings. Moreover, the employer may not prohibit an employee licensed to carry a handgun from keeping his or her firearm or ammunition in a locked, privately owned vehicle at work, even if the employer owns or controls the parking area.[8] In contrast to private vehicles, an employer may exclude handguns and ammunition from vehicles owned by the employer and used in the scope of employment.[9]

Liability Protections for Texas Employers

Employers may face a variety of potential claims in the event of firearm use by an employee in the workplace. Generally, an employer can anticipate tort claims from customers or other visitors who are injured by an alleged failure to take reasonable steps to create a safe business environment. Even absent a showing of negligence, an employer may be held vicariously liable for the actions of an employee if those actions are found to have been in furtherance of the employer's business interests.[10] With regard to co-workers injured by an employee, workers' compensation typically provides the exclusive remedy for those injured in the course of their work.[11] Applicability of workers' compensation as the injured employee's exclusive remedy may thus turn on whether a firearm-related incident is found to have occurred while the employee was acting within the scope of his or her employment.[12]

Apart from state law sources of liability, a failure to take reasonable steps to prevent a recognized risk of workplace violence may expose an employer to investigation and citation by the U.S. Department of Labor's Occupational Safety and Health Administration. OSHA's "general duty clause" mandates that employers mitigate "recognized hazards that are causing or are likely to cause death or serious physical harm."[13] Workplace violence is one of the "recognized hazards" that routinely catches OSHA's attention and can lead to a federal citation.[14]

Although to date OSHA has declined to regulate guns in the workplace, in a 2006 interpretation letter the agency indicated that it would treat gun-related violence in the workplace in the same way it treats other workplace violence.[15] That 2006 letter cited a 1992 letter discussing workplace violence more generally. While OSHA indicated in 1992 that "random antisocial acts which may occur anywhere would not subject the employer to a citation for a violation of the OSH Act,"[16] OSHA will take a hard look at whether a workplace violence incident is truly "random."

In particular, if an employee has complained about a particular threat, OSHA may not treat the consummation of that threat as a mere "random antisocial act." "Actual knowledge of a hazard by an employer may be gained by means of prior episodes, employee complaints and warnings communicated to the employer by an employee."[17] This creates substantial tension between the Texas statute and OSHA's mandate to mitigate "recognized hazards." For example, as noted above, the Texas law bars employers from excluding firearms in parking lots or outdoor areas immediately abutting the workplace. Yet OSHA considers acts occurring "outside the workplace" when contemplating what constitutes workplace violence.[18] In short, such areas may be beyond an employers' control for the purpose of banning firearms, yet within OSHA's grasp for the purpose of workplace violence liability.

In the face of these potential sources of liability, Texas law offers employers limited protection. By statute, the legal presence of a firearm on the employer's property alone does not constitute a failure to provide a safe workplace when the weapon is present "under the authority" of the statutory provision prohibiting employers from excluding weapons from certain areas such as walkways and parking areas.[19] Moreover, the statute provides limited immunity from liability to employers for claims arising from possession of handguns in areas in which the employer may not preclude them:

> Except in cases of gross negligence, a public or private employer, or the employer's principal, officer, director, employee or agent, is not liable in a civil action for personal injury, death, property damage or any other damages resulting from or arising out of an occurrence involving a firearm or ammunition that the employer is required to allow on the employer's property under this subchapter.[20]

Thus, an employer may assert the statute as a defense in civil actions for damages arising out of an occurrence involving a firearm or ammunition that the employer is required to allow on its property, except where the employer is shown to have acted with gross negligence.

Additionally, the statutes make clear that an employer does not have a duty to inspect or secure any "parking area the employer provides for employees" or any privately owned vehicle in the parking area.[21] Finally, an employer has no duty to "investigate, confirm or determine" whether an employee is in compliance with firearm and ammunition possession or storage laws.[22]

Unanswered Questions

Unfortunately for employers, the Texas open and concealed carry laws leave a number of questions unanswered. Among these is how the statutes apply in atypical work places. The statutory provisions allowing an employer to post notices prohibiting firearms on a business premises were drafted with the traditional structure of a static office building or manufacturing facility in mind. But how do these provisions apply, if at all, in other work settings such as construction sites, rail yards or port facilities? To what extent might the statutory definition of a business "premises" allow an employer to limit firearms in these and other alternative work places?

Questions also remain regarding the extent to which an employer might be held liable for preventing a licensed employee from carrying a weapon at work. The open and concealed carry provisions create no private cause of action for employees who contend that their employer has wrongly infringed upon their right to carry a firearm. Yet one might imagine circumstances in which an employee injured in an incident of workplace violence asserts that the employer's policy wrongfully prevented the employee from being able to adequately defend him or herself.

And only time and litigation will tell what facts are sufficient to establish tort liability in light of the law's limited protections and immunity. The statute provides that possession of a licensed weapon "under authority" of the provision limiting a business's ability to exclude such weapons "does not by itself constitute a failure by the employer to provide a safe workplace." Because this protection applies only to claims arising from possession of weapons in those locations where an employer may not exclude them, it may not protect an employer from claims that it negligently permitted firearms in locations where it had the right to exclude them (i.e., business premises and company provided vehicles). And in those locations in which an employer is required to allow licensed handguns, it remains to be seen what facts may be sufficient to support a claim of gross negligence thereby taking a claim outside the statute's limited immunity provision.

Conclusion

Although the Texas open and concealed carry statutes define the boundaries of where and how an employer may — and may not — preclude handguns in the workplace, they leave open a number of gray areas that will likely only be answered through litigation. And, given the potential for serious injury or death associated with these issues, the answers may eventually come at a high cost.

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[1] Handgun Licensing Program, Tex. Department of Public Safety, Active License/Certified Instructor Counts as of Dec. 31, 2015 1 (2016), available at https://www.txdps.state.tx.us/rsd/chl/reports/ActLicAndInstr/ActiveLicandInstr2015.pdf.

[2] Texas Penal Code §§ 30.06 (trespass by a licensed holder with concealed handgun); 30.07 (trespass by licensed holder openly carrying a weapon).

[3] Texas Penal Code §§ 30.06(c)(3); 30.07(c)(3).

[4] Id.

[5] Id.

[6] Texas Gov't. Code § 411.203.

[7] Texas Lab. Code § 52.062(b); Tex. Penal Code § 46.035(f)(3).

[8] Texas Lab. Code § 52.061.

[9] Texas Lab. Code § 52.062(a)(2)(A).

[10] See Beech v. Hercules Drilling Co. LLC., 691 F.3d 566, 574 (5th. Cir. 2012) (employer was not vicariously liable for an employee who accidentally shot another employee because such action did not further the employer's business interests.) In Beech, the court found that while the employee's violation of the employer's firearms safety policy "is not dispositive of the course and scope of employment issue," the violation "is relevant because it gives guidance regarding what employee conduct furthers Hercules' business interests." Id. at 576. Cf. Painter v. Amerimex Drilling I Ltd., 2015 WL 6705308, *10–11. (Texas Ct. App.—El Paso Nov. 3, 2015) (before vicarious liability can attach, the employer "would need to retain the right to, or exercise some control over how" the employee conducted the activities giving rise to harm).

[11] Texas Lab. Code § 406.034(a).

[12] Injuries from workplace-related batteries may be exclusively covered by the Workers' Compensation Act if they do not fall within the personal animosity exception. See Walls Regional Hospital v. Bomar, 9 S.W.3d 805, 807 (Texas 1999) (sexual harassment by a physician was covered by the Workers' Compensation Act where the physician "harassed plaintiffs because they happened to be at work at the same time he was," and the plaintiffs did not contend that the physician "ever accosted them privately outside the hospital, nor d[id] they contend that he came to the hospital because they were there."); Nasser v. Security Insurance Co., 724 S.W.2d 17, 19 (Texas 1987) (evidence supported finding that the plaintiff was injured in the course of his employment because "[i]t was part of Nasser's job to talk to customers [and] as a result of his performance of this aspect of his job, he was stabbed by Daryoush," and accordingly "[the] dispute, if any, arose in the workplace or was exacerbated by, or in the very least, was incidental to, a duty of Nasser's employment"); Urdiales v. Concord Technologies Delaware Inc., 120 S.W.3d 400, 405 (Texas Ct. App. — Houston [14th Dist.] 2003) (workers' compensation was employee's exclusive remedy for injuries resulting from a fight between a supervisor and employee involving a weapon where "no personal dispute or animosity [] motivated Cantu to assault [employee], and where "the fight with Cantu occurred after Cantu confronted him about being late from his lunch break").

[13] 29 U.S.C. § 654(a)(1).

[14] See Integra Health Management, No. 13-1124 (OSHRC June 22, 2015). While the Tenth Circuit has held that an Oklahoma statute permitting licensed possession of handguns on private property was not preempted by the general duty clause, it simultaneously reaffirmed OSHA's statutory authority "to set and enforce occupational safety and health standards for businesses," including issuing guidance or promulgating rules indicating "that employers should prohibit firearms from company parking lots." Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1205, 1206 (10th Cir. 2009).

[15] OSHA, Standard Interpretations Letter to Morgan Melekos (Sept. 13, 2006), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504.

[16] OSHA, Standard Interpretations Letter to John R. Schuller (Dec. 10, 1992), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951.

[17] Integra Health, supra note 14.

[18] OSHA, OSHA Fact Sheet: Workplace Violence (2002), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.

[19] Texas Lab. Code § 52.063(b).

[20] Texas Lab. Code § 52.063(a).

[21] Texas Lab. Code § 52.063(c)(1).

[22] Texas Lab. Code § 52.063(c)(2).