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Employer Firearm Policies: Parking Lots, State Laws, OSHA, and the Second Amendment

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Employment Law Commentary, July 2008

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On June 25, 2008, night-shift worker Wesley Higdon was escorted out of a Kentucky plastics factory by his supervisor following an altercation over his cell phone usage and failure to wear eye goggles. Higdon then allegedly went out to the factory parking lot, retrieved a firearm from his vehicle, and killed his supervisor and four coworkers before turning the gun on himself. Under Kentucky law, Higdon's employer was required to allow its employees to keep weapons in their vehicles while parked in the factory parking lot.

According to the U.S. Department of Labor, homicide was the second-leading cause of death for women in the workplace in 2006. Eighty-one percent of all workplace homicides that year involved firearms. Although the overall number of workplace homicides has decreased in recent years, the potential for deadly incidents like the recent event in Kentucky remains a major concern for employers.

In response, many employers have banned firearms from their property in order to decrease gun-related violence. Gun advocates have criticized these policies and have repeatedly challenged them in courts. In recent years, these advocates, including the National Rifle Association ("NRA"), have begun lobbying state legislatures to establish laws that prohibit employers from maintaining gun-free workplace policies. In what appears to be the first step of this strategy, the NRA is lobbying state legislatures to pass laws that prohibit employer policies restricting firearms in vehicles parked in employee parking lots. These parking area firearm laws have become a key front in the gun policy debate: pitting the employers' obligation to protect the safety of their employees against an individual's right to carry and transport firearms.

Over the past five years, a number of states, including Kentucky, have passed laws making it illegal for an employer to prohibit a person from keeping a firearm in a locked vehicle in an employee parking area. Proponents of these laws argue that employees must be allowed to keep a firearm in their vehicles in order to protect themselves from harm during their commute. Opponents of the laws argue that workplace violence will increase with these laws because disgruntled employees would have almost no "cooling-off" period if guns are allowed in parking lots. These opponents argue the laws are an intolerable imposition on property rights, and refer to the statutes as "forced entry" laws because they force an employer to allow weapons on its property.

This commentary will examine current state laws and employers' challenges to them as well as the Supreme Court's recent Second Amendment decision in *District of Columbia v. Heller* and its potential for increased litigation.

Background

The Oklahoma Self-Defense Act, passed in 2004, was the first parking area firearm law of its kind. The legislation was in response to an incident in 2002 in which the Weyerhaeuser Company fired seven workers for violation of a policy prohibiting firearms in vehicles parked on company property. The workers challenged their

terminations in federal court, claiming the employer's policy violated their right to bear arms under the Oklahoma Constitution. The Tenth Circuit upheld the firings and found the state law that authorized Weyerhaeuser's policy to be a reasonable regulation under the state's police power.

In response to the ruling, the Oklahoma legislature, at the prodding of the NRA, drafted legislation to outlaw employer policies prohibiting firearms in vehicles. The law states, in part:

"No person, property owner, tenant, employer, or business entity shall maintain, establish, or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting or storing firearms locked in or locked to a motor vehicle on any property set aside for any motor vehicle."^[1]

Whirlpool Corporation, which later dropped out of the suit and was replaced by ConocoPhillips, filed a pre-enforcement challenge in federal court seeking an injunction against enforcement of the law. Whirlpool argued the law must be set aside because it: (1) deprived the company of its fundamental right to exclude individuals who possess firearms from its property; (2) was unconstitutionally vague; and (3) was in conflict with and preempted by the general duty clause of the Occupational Health and Safety Act of 1970 ("OSH Act").^[2] Whirlpool's third argument, the OSHA General Duty clause, turned out to be the critical component of its legal challenge.

The OSHA General Duty Clause

Section 654(a)(1) of the Federal OSH Act, also referred to as the "general duty" clause, mandates that each employer "shall 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 his employees." This clause has been considered a catch all for any workplace hazards not covered by a specific OSHA regulation.

There has been much speculation about whether workplace violence prevention is required under this clause. The only OSHA enforcement policy that addresses prevention requirements under the general duty clause is a 1992 Letter of Interpretation. It states: "in a workplace where the risk of violence and serious personal injury are significant enough to be 'recognized hazards,' the general duty clause . . . would require the employer to take feasible steps to minimize those risks."

In 1996, OSHA issued workplace violence prevention "guidelines" for night retail establishments. But upon issuance of these guidelines, OSHA emphasized they were only recommendations and would not be used for general duty enforcement. In 2006, the Director of the OSHA Directorate of Enforcement Programs specifically declined to issue a nationwide policy that would ban firearms in the workplace. Given the lack of a general directive from OSHA, it is unclear whether allowing firearms in employer parking lots violates the general duty clause. In order to establish a violation of the general duty clause, the Secretary of Labor must prove:

(1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard.^[3]

When applying the four criteria to parking lot firearm laws, an argument can be made that compliance with state laws like Oklahoma's Self-Defense Act could cause employers to violate their general duty requirements. Allowing guns on an employer's parking lot could be construed as a condition that presents a hazard to employees, thus meeting the first criterion. An oft-cited study by Dr. Dana Loomis, published in the May 2005 issue of the *American Journal of Public Health*, has found that workplace violence significantly increases when guns are allowed on the premises. The second criterion focuses on industry recognition of the hazard. Many employers already have policies banning firearms on their property, so it is likely this criterion would be satisfied. Firearm incidents often cause death or serious bodily harm, so the third "general duty" criterion would also be met.

The fourth criterion requires employers to eliminate or materially reduce a hazard if feasible means exist. Whether state law should be considered when determining if a policy is "feasible" is open to interpretation and must be clarified by the courts. For example, it could be argued that total bans are not feasible because an employer would face civil and possibly criminal penalties under state law. Alternatively, employers could argue that as total bans are a feasible method to prevent or minimize harm, state law should be preempted by the OSHA general duty clause.

The Federal District Court in *ConocoPhillips* found that "gun-related workplace violence and the presence of

unauthorized firearms on company property" qualify as recognized hazards under the OSHA general duty clause.^[4] The court further noted that "it is likely a breach of OSHA's general duty clause if a company does not ban guns from its premises . . . because guns can be easily retrieved from such areas by disgruntled employees."^[5] The court then ruled that the Oklahoma Self-Defense Act was preempted because it conflicts with the Federal OSH Act. The court was careful to note that its opinion should not "be read to require all Oklahoma employers to enact policies similar to Plaintiffs in order to be in compliance with the OSH Act."^[6] However, it is unclear how the Oklahoma state law could be in conflict with the OSH Act without also concluding that the general duty clause requires all employers to ban firearms in their parking lots. The *ConocoPhillips* case is currently on appeal in the Tenth Circuit Court of Appeals.

An Overview of Current State Law

Ten states have passed legislation barring employers from prohibiting firearms in vehicles. Most of the states, including Oklahoma, have provisions similar to the Oklahoma Self-Defense Act quoted earlier in this Commentary. However, some states have included employer liability waivers and/or exceptions to address concerns raised by employers.

Employers who are required to allow firearms to be stored in vehicles on their property have been concerned about being held liable for injuries and damage caused by those firearms. To address these concerns, states such as Alaska, Florida, Georgia, Louisiana, Oklahoma, and Mississippi have included civil liability waivers in their parking-lot firearm laws. Typically, these provisions immunize employers from liability arising from compliance with the law. However, these waivers at most allow employers to avoid liability arising under state law. They do not protect employers from liability under federal law such as general duty clause obligations under the OSH Act.

Some states have also included exceptions to the parking-lot firearm laws for certain types of parking areas, vehicles, and industries. These exceptions allow employers to establish or maintain prohibitions on firearms in parking areas when certain criteria are met. These criteria generally fall into one of three categories:

1. Secured Parking Areas. Employers may prohibit firearms in vehicles that are parked in a parking area that is secured in a manner that restricts or limits public access (i.e., with a gate or a security station).
2. Company Vehicles. Employers may prohibit employees from keeping firearms in vehicles owned or leased by the employer. Some states also allow employers to prohibit firearms in private vehicles when used in the course of business.
3. Employer Type. Some states grant exceptions to certain types of employers, including: national defense, aerospace, nuclear power generation, and others.

The following is a summary of existing parking lot firearm laws prohibiting employers from precluding guns in employees' locked vehicles on company property:

State	Exceptions			Liability Waiver?	Status of Statute
	Secure Parking Area	Company Vehicle	Employer Type		
Alaska	X	X		X	In Effect
Florida		X	X	X	In Effect ^[7]
Georgia	X	X	X	X	In Effect
Kansas		X			In Effect
Kentucky		X			In Effect
Louisiana	X ^[8]	X		X	Effective Aug 15, 2008
Minnesota					In Effect
Mississippi	X	X		X	In Effect
Nebraska		X			In Effect
Oklahoma				X	Not In Effect Injunction on Appeal

Other states that are considering or have considered employer parking lot firearm laws: Alabama, Arizona, California, Indiana, Montana, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin.

The Impact of the Second Amendment and the *Heller* Decision

The Second Amendment to the U.S. Constitution states: “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The meaning of these words has been the cause of much controversy over the last century. Some believe the amendment grants individuals an unfettered right to own firearms, while others believe the amendment merely ensures states are able to maintain militias in order to protect against a tyrannical federal government.

Up until its 2007-08 term, the Supreme Court had not definitively weighed in on this controversy. However, the Court’s opinion in *District of Columbia v. Heller* on June 26, 2008, ended this silence.^[9] At issue in *Heller* was a set of gun control laws that had been in effect in the District of Columbia since 1976. These laws banned the possession of handguns and required that all other firearms kept in the home be trigger-locked or disassembled. The Court initially held that the Second Amendment protects an individual’s right to bear arms. It then struck down the D.C. laws because the District’s ban on handgun possession in the home and its prohibition against operable firearms in the home for self-defense violated this right. However, the right secured by the Second Amendment is not unlimited. The Court explained that *Heller* should not “cast doubt” on “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

Perhaps the most interesting aspect of *Heller* is the number of questions it leaves unanswered. The Court declined to establish a standard against which gun control laws will be measured. In addition, given the District of Columbia’s unique status as a federally controlled territory, the Court’s opinion did not address whether the Second Amendment applies to laws in the individual states. In regard to parking lot firearm laws, the Court did not address whether the right of self-defense extends to a person’s car, as is advocated by the NRA.

The *Heller* ruling will not have an immediate impact on existing parking lot firearm laws, but it will affect the litigation challenging such laws. The Court has not clearly established when safety concerns outweigh an individual right to bear arms. It also did not address the right to bear arms outside the home. Therefore, it is unclear how employer safety requirements under the general duty clause will be balanced against an individual’s rights under the Second Amendment. What is clear is that the *Heller* decision will result in a wave of litigation seeking to answer these important questions: within a day of the Court’s ruling, lawsuits were filed challenging San Francisco’s ban on firearms in public housing and Chicago’s gun control laws.

Feds Raise Minimum Wage and Mileage Reimbursement Rate

While of little effect in California and many other states that have their own minimum wage laws, effective July 24, 2008, the federal minimum wage will rise to \$6.55/hour. And, citing the skyrocketing increase in gas prices, the IRS raised the standard mileage reimbursement rate from its current 50.5¢/mile, which was effective January 1, 2008, to 58.5¢/mile, effective July 1, 2008, through December 31, 2008.

Footnotes

[1] 21 Okl. St. § 1289.7a (2008).

[2] *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1293 (N.D. Okla. Oct. 4, 2007).

[3] *Megawest Financial, Inc.*, No. 93-2879, 1995 OSAHRC LEXIS 80, at *18 (May 8, 1995) citing *Waldon Health Care Center*, (16 OSHC (BNA) 1052 (1993)).

[4] *ConocoPhillips Co.*, 520 F. Supp. 2d at 1328.

[5] *Id.* at 1329 n.56.

[6] *Id.*

[7] A pre-enforcement challenge has been filed by the Florida Chamber of Commerce. A ruling as to whether the law will remain in effect is expected in the near future.

[8] Under Louisiana Act 684, employers may prohibit firearms in secured parking lots as long as they offer a facility for the temporary storage of unloaded firearms or an alternative parking area reasonably close to the main parking area in which employees can keep firearms locked in their vehicles.

[9] 554 U.S. __ (2008).

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