GUNS AND VIOLENCE IN THE WORKPLACE

STATISTICS ABOUT WORKPLACE VIOLENCE

The U.S. Department of Justice and U.S. Department of Labor both compile useful data on workplace violence.

- Nearly one million employees are victims of workplace violence each year.
- Homicide is the leading cause of workplace fatalities for women and the second leading cause for men.
- In 2010 there were 16,910 non-fatal assaults and violent acts at private workplaces that caused employees to miss work.

In light of these disturbing statistics, employers in states that permit lawfully concealed weapons must balance the substantial potential for workplace violence against an individual employee’s right to lawfully carry a concealed weapon.

When balancing those considerations, the employer must weigh at least two primary (and seemingly contradictory) questions:

- By establishing a “gun free” workplace, will the employer be liable for acts of violence that could have been prevented if weapons were allowed in the workplace?
- If weapons are permitted in the workplace, will the employer be liable if someone is injured as a result of a gun-related incident, whether accidental or intentional?

Given the increasing levels of workplace violence, it is not unreasonable to expect that many employers want to adopt workplace policies that significantly reduce the potential for violence. Such policies are entirely consistent with established legal and common law duties.

Workplace violence frequently results in:

- Physical and psychological harm.
- Losses to property and productivity.
- Workers’ compensation claims.
- Increased litigation.

LEGAL RISKS FOR EMPLOYERS

Employers should be aware that gun-related incidents can result in liability under several different legal theories, including: The Occupational Safety and Health Act (OSH Act) general duty clause, workers’ compensation law, and tort law.

The General Duty Clause

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While there is no federal law establishing an employer’s duty to prevent workplace violence, an employer has a duty to provide a safe working environment under the OSH Act, which regulates workplace health and safety. The Occupational Safety and Health Administration can issue citations to employers that violate the OSH Act general duty clause:

**The Clause Reads:** “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.” 29 U.S.C. § 654(a)(1).

- **Georgia Elec. Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979)** – There is a four-part test for OSHA to establish a violation of the general duty clause.
  1. The employer failed to render its workplace free of a hazard
  2. The hazard was recognized
  3. The hazard caused or was likely to cause death or serious physical harm
  4. The hazard was preventable.

- **Secretary of Labor v. Megawest Financial, Inc., 17 O.S.H. Cas. (BNA) (O.S.H.R.C.A.L.J. June 19, 1995)** – The second part of the test, that the hazard be recognized, carries a high standard of proof, because although the threat of workplace violence is real, an employer may fail to recognize the potential for a violent incident, or may reasonably believe that the police would be the appropriate institution to handle the conduct.

**Workers’ Compensation**

Employers’ obligations to pay and employees’ rights to receive workers’ compensation benefits are largely governed by state law. Typically, employees can receive workers’ compensation benefits for injuries arising out of and in the course of their employment. An employee injured as a result of a gun-related incident at work may be eligible for workers’ compensation benefits.

**Common Law Duties**

In addition to the legal requirements under OSHA and workers’ compensation, employers have a common law duty to exercise ordinary care to maintain a safe workplace.

- **Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942 (Tex. App. 1994)** – An employer may be liable if there is a breach of that common law duty that results in injury to an employee or third party, because the employer/employee relationship is a special one and creates a duty that the employer must control the employee’s conduct to prevent injury.
Massie v. Godfather’s Pizza, Inc., 844 F.2d 1414 (10th Cir. 1988) – Exercising ordinary care includes taking measures to prevent the commission of foreseeable crime.

The importance of the foreseeability standard is that employers are not required to protect employees against all danger. Yet, the limitation of foreseeability provides little guidance as to when liability will attach.

Negligence Claims
Because workers’ compensation laws do not limit a nonemployee’s negligence claims, an employer may face negligence claims from a third-party victim of gun-related violence.

- For example – If an employee with a known propensity for violence injures a customer, depending on the facts of the particular case, an employer may be sued for:
  1) Negligent hiring
  2) Negligent supervision
  3) Negligent retention

Negligence claims are governed by state law. Primary considerations generally include whether the employer should have known that the employee could cause harm to others and, if so, whether the employer acted reasonably under the circumstances.

Vicarious Liability
Under common law, an employer can be vicariously liable for wrongful acts by an employee in the course and scope of their employment. In general, an employee who acts violently is acting outside the scope of his employment. However, depending on the facts of a particular situation, an employer could be liable if the employee was acting in the course and scope of their employment when they injured another person.

42 U.S.C. § 1983 Liability
Section 1983 of the U.S. Code imposes liability on anyone who “under color of state law” deprives another of any constitutional right, privilege, or immunity. But governmental employers will not face liability under § 1983 because there is no constitutional right to be protected from criminals.

Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982) – In a case where a released mental patient murdered a woman, the court said that all plaintiff alleged is failure to protect the woman from a madman, and the state had no constitutional duty to do so.
OVERVIEW OF GUNS-AT-WORK LAWS
* The New Kansas concealed carry law in public buildings is explained in detail in a following section.

To minimize their legal risk and promote a safe work environment, employers often implement workplace violence policies that include a ban on weapons at the workplace.

Currently, there is no federal law that regulates weapons at private workplaces. However, beginning with Oklahoma, several states have enacted so-called guns-at-work laws. These laws, which are typically designed to protect employees’ rights to possess concealed firearms, vary in terms of their restrictions. The rapid influx of guns-at-work laws is concerning for many employers. On the one hand, without immunity, complying with a law that allows employees to bring concealed firearms to the employer’s property can increase legal risk. In contrast, noncompliance with a guns-at-work law can lead to civil or criminal penalties in some states.

More than 15 states have enacted laws addressing guns at work. Many of these laws share the common goal of protecting an individual’s right to bear arms. They differ in the level of restriction placed on an employer’s ability to prohibit weapons at work.

- What these laws typically do for employees:
  - Protect employees’ rights to store firearms in private vehicles even when parked in the employer’s parking lot.
  - Limit an employer’s ability to search vehicles parked on employer property
  - Prohibit discrimination against gun owners
  - Subject an employer to fine for failure to comply with restrictions or requirements

- What these laws typically do for employers:
  - Allow employers to prohibit weapons at work if posting a required notice
  - Provide immunity from injuries arising out of compliance
  - Specify that employers can allow weapons at the workplace without violating the OSH Act general duty clause

Parking Lot Restrictions and Exceptions

More than 15 states have passed varying laws recognizing an employee’s right to store an otherwise lawfully possessed firearm in his locked personal vehicle when it is parked on the employer’s property. Both Missouri and Kansas recognize this right. However, Missouri has a strict limitation prohibiting the removal or brandishing of the weapon while the vehicle is on the premises.

- Vehicles of the Employer

While most guns-at-work laws establish an employee’s right to store a firearm in a locked personal vehicle, many state laws do not extend the right to vehicles owned or

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leased by the employer unless the employee is required to transport or store a firearm as part of his employment duties. Both Kansas and Missouri allow the employer to apply restrictions to vehicles owned or leased by the employer.

- **Vehicle Searches**

Some state laws, including Missouri and Kansas, provide additional protection to employees by prohibiting employers from searching private vehicles on their property for the presence of firearms.

**Anti-Discrimination Provisions**

In states with anti-discrimination laws, employers can be liable for discrimination if a potential or current employee applies for a job and is not hired after disclosing his firearm status or is later terminated after disclosing his status. In fact, Missouri and Kansas, both have specific provisions prohibiting the disclosure of conceal and carry records unless by court order.

**Posting Requirements**

Several states require employers to post notices if they ban weapons at the workplace both for employee prohibition and patron prohibition. In Both Kansas and Missouri employers must post conspicuous notice of the ban.

- **Missouri** – the posted sign must be at a minimum 11 inches by 14 inches with the writing in letters of not less than 1 inch in size.
- **Kansas (more specific)** – the sign must be...
  - Conspicuously posted on the public entrances where prohibition will occur
  - Must include this graphic:

    ![Graphic]

  - The sign shall be eight inches by eight inches or larger. If the sign is eight inches by eight inches, the size of the graphic shall be six inches in diameter. If the sign is larger than eight inches by eight inches, the size of the graphic shall be proportional to the size of the sign.
  - Further requirements:
    - The background shall be white.
    - The portion of the graphic depicting the handgun shall be black.
    - The portion of the graphic depicting the circle and diagonal slash across the handgun shall be red.
    - No text shall be placed within the one-inch area surrounding the graphic.
The sign shall be posted at the eye level of an adult. “At the eye level of an adult” shall mean that the entire sign is between four feet and six feet from the ground.

- The sign shall be posted not more than 12 inches to the right or left of all exterior public and nonpublic entrances to the building.
- The sign shall be visible from the exterior of the building.
- The sign shall not be obstructed by sliding doorways, displays, or other postings.
- Each sign that becomes illegible shall be replaced immediately.

**Employer Immunity**

Several states provide immunity to employers that comply with the guns-at-work law. Missouri does not have explicit immunity provisions. In Kansas, for immunity to apply the building must

1. Have adequate security measures and be properly posted; or
2. Allow licensees to carry in the buildings. If the building is closed to concealed carry without adequate security measures the immunity does not apply.

**BEST PRACTICES FOR EMPLOYERS**

Employers in states with guns-at-work laws can take certain steps to minimize their potential liability.

- Implement and maintain a workplace violence policy that informs employees that threats or violent acts at the workplace are prohibited. The policy should...
  - Be easy to read and understand;
  - Cover acts of violence (regardless of whether the act results in physical injury), harassment, bullying and other intimidation;
  - Prohibit employees from bringing weapons in the workplace as permissible by state law;
  - Set procedures for employees to report threats or violent acts;
  - Set a disciplinary procedure for employees who violate the policy;
  - Explain the resources available to employees, including counseling services and an employee assistance program, if applicable;
  - Prohibit discrimination and retaliation against workplace violence victims.
- Involve security personnel and consider informing local law enforcement if there is concern about a possible violent outburst or if terminating the employment of an employee with known violent tendencies.

Additionally, in states with **parking lot laws**, employers should remember that, at most, a parking lot law allows an employee to store a firearm in a locked personal vehicle in the employer’s parking lot.
• Avoid expanding employees’ rights, for example, by allowing them to bring concealed firearms in the employer’s building.
• Consider security measures that control access to employer parking lots where firearms can be stored. Having trained security personnel monitoring such areas can limit the likelihood an enraged employee can access his firearm and return to the workplace to cause harm without notice.
• If permissible by state law, consider an employee concealed firearms registration process in order to confirm that employees who store firearms in their personal vehicles in an employer parking lot have valid concealed weapons permits. Be aware that certain states (for example, Indiana) prohibit employers from asking employees about firearm ownership.

THE NEW KANSAS LAW ADDENDUM ALLOWING CONCEALED CARRY IN STATE OR MUNICIPAL BUILDINGS

Last spring, the Kansas State Legislature passed The Kansas Personal and Family Protection Act amending existing law to allow those licensed to concealed carry a weapon in state or municipal buildings unless they provide adequate security measures at every public entrance. There are a series of special types of buildings not necessarily covered by the law, opt-out provisions, and exceptions.

• Law enforcement buildings, jails, and correctional facilities
  o Special provisions allow the secure area of such buildings to be under the control of the agency
  o Adequate security measures are not required
  o The public area of the buildings are subject to the same rules as other public buildings in that adequate security measures are required or the agency must allow licensees to carry concealed in the public areas

• Courtrooms are under the control of the chief judge of the judicial district. Municipal courts are subject to the same adequate security measures and posting provisions as any other state or municipal building,

• All state and municipal buildings were eligible for a temporary opt-out until Jan. 1, 2014. This temporary opt-out period has expired.

• Some buildings may have a one-time 4-year opt-out, depending on eligibility
  o Buildings specifically listed in the bill do not need to have a security plan in place, but must notify the Attorney General stating a reason for electing to opt-out
    ▪ medical care facilities
    ▪ adult care homes
    ▪ community mental health center
    ▪ Indigent health care clinics
    ▪ Postsecondary educational facilities including buildings on the grounds or leased by the educational facility

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o Buildings not specifically listed in the bill may enact the opt-out by the governing body adopting a resolution or sending a letter notifying the Attorney General or local law enforcement agency. A security plan is required and must be kept on file and provided to the Attorney General or local law enforcement upon request but is not subject to an open records request.

o Who can be prohibited from concealed carrying in state or municipal buildings under the opt-out provisions?
  ▪ Licensees when building is properly posted
  ▪ Employees
  ▪ BUT NOT – out of state and retired law enforcement officers qualifying under the Law Enforcement Officers Safety Act (LEOSA)

- Exemptions
  o Unified School District buildings
  o The Kansas School of the Blind
  o The Kansas School for the Deaf

➢ Restricted Access Entrances

In buildings not under the opt-out, the ability to deny people the right to concealed carry depends on adequate security measures, proper posting, and whether or not there is a restricted access entrance. The main difference between a building with a restricted access entrance and one without is that when employees are authorized to enter through the restricted access entrance, such an employee may not be prohibited from concealed carrying.

➢ Immunity From Liability

The state and municipalities are immune from liability for the actions of a licensee so long as they have adequate security measures or allow licensees to concealed carry inside the building.