

## How Can Employers Protect the Workplace in the Era of Concealed Carry?

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In 2013, Illinois became the final state in the U.S. to permit individuals to lawfully carry concealed handguns in public. At present, over 61,000 Illinois residents have applied to do so. Due to the risks associated with gun violence, prudent Illinois employers are advised to take steps to avoid liability from the possible presence of weapons on company property. Law abiding bearers of concealed weapons can quickly become non-law abiding wielders of weaponry under the wrong circumstances. This is illustrated by the U.S. firearm homicide rate, which is 20 times higher than the combined rates of 22 countries that are our peers in wealth and population,<sup>1</sup> and a U.S. firearm death rate 5.4 times higher than other industrialized nations.<sup>2</sup>

While the Illinois Concealed Carry Act (the “Act”) allows individuals to carry concealed handguns in public and into private businesses, there are limits on these rights. 430 ILCS 66/65. The owner of private, real property may prohibit the carrying of concealed firearms on the property under its control. So long as signs are clearly and conspicuously posted at the entrance of the building, the building and premises shall be deemed a prohibited area under the Act. *Id.*

Where parking facilities are provided, individuals are allowed to bring concealed weapons onto the property so long as it remains either in a vehicle in accordance with the Act, or on the person for the limited purpose of storing the weapon in a trunk. 430 ILCS 66/65. This

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<sup>1</sup> Erin G. Richardson, & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries, 2003*, J. TRAUMA, INJ., INFECTION, & CRITICAL CARE (2010).

<sup>2</sup> Sripal Bangalore, MD, MHA, & Franz H. Messerli, MD, *Gun Ownership and Firearm-related Deaths*, 126(10) AM. J. MED. (Oct. 2013).

represents a legislative stamp of approval for the carrying and storage of deadly weapons mere inches away from businesses, schools, and homes.

What the Act does not address, however, is an employer's right to regulate an employee's ability to carry concealed weapons onto the employer's property. *Id.* An employer's weapons policy should be crafted to fit within the applicable law, to limit the liability posed by employees, and to exercise a degree of control over the potentially harmful consequences of the possession of dangerous weapons on site. The policy should ban the carrying of any firearm or weapon onto any employer property, including owned or leased buildings, and surrounding areas such as sidewalks, walkways, driveways, and—except as otherwise guaranteed by law—parking lots under the employer's ownership or control. The policy can include vehicles owned by the employer whether on the property or not. This is applicable to all individuals on the premises (except police officers and licensed security guards) and any individual in the performance of their job. A weapons policy should also authorize the employer, to the extent permissible by law, to search any person, vehicle, or object that enters its property. Failure to abide by this policy as described should result in discipline up to and including termination.

### **Liability Limited for Claims Based on Invasion of Privacy**

Although the Constitution includes a right to privacy and prohibits unreasonable searches and seizures, this protection does not apply to private, nongovernmental workplaces. *People v. Phillips*, 831 N.E.2d 574, 581 (Ill. 2005). Instead, Illinois employees seeking protection from searches must make a claim under the tort of invasion of privacy. *Acosta v. Scott Labor LLC*, 377 F.Supp.2d 647, 649 (N.D.Ill. 2005). Under this cause of action, courts will hold employers liable if an employee can show that: 1) the employer made an unauthorized intrusion into the plaintiff's

seclusion; 2) the intrusion would be considered highly offensive to a reasonable person; 3) the matter intruded upon was private; and 4) the intrusion caused anguish and suffering. *Id.* However, if a plaintiff cannot show intrusion upon a private matter, then the other three elements need not be analyzed. *Id.*

Consequently, courts typically start their examination and give weight to whether the matter allegedly intruded on is private. In doing so, they give great deference to employers. If an employee has no reasonable expectation that an area is private, then it can not be considered private for the purposes of this tort. *People v. Neal*, 486 N.E.2d 898, 901 (Ill. 1985). The general rule is that something is not considered private when an employee was warned that it might be subject to a search. *Id.* These warnings can be communicated by policy, verbally, reasonable presumption, etc. and, when communicated, are very effective at preventing employer liability. *Id.*

In *People v. Tidwell*, for example, the court upheld a search of a locker assigned to a Cook County jail guard. In that case, the locker facilities were controlled by the administration, which retained a basic right of access. The guard understood this policy and was aware the lockers could be subject to random searches at anytime. *Id.* Because of this understanding, the court reasoned that the guard could not have a reasonable assumption that items in the locker would remain private. *People v. Tidwell*, 266 N.E.2d 787, 792 (Ill. App. Ct. 1971).

Similarly, in *People v. Neal*, a state police officer hid illicit items in an employer-provided raincoat under the seat of his employer-provided vehicle. His employer searched the vehicle and found the illegal items. *Id.* The officer argued that although he knew the vehicle was subject to searches, he felt the items were private because they were concealed in the raincoat.

*Id.* The court found his expectation unreasonable since his vehicle was owned by his employer and he knew that it was subject to periodic inspection. *People v. Neal*, 266 N.E.2d at 901.

The language of an employer's weapons policy should make clear that employees are subject to its right to search. By informing the employees that the employer retains the right to search lockers, desks, briefcases, baggage, etc., employees should not have a reasonable expectation of privacy in those areas. As such, in the event of a claim, the employer will have clearly documented policies to use in its defense.

### **Limiting Liability for Violation of a Right to Bear Arms**

By nature of the employer-employee relationship, an employer has an ability to control his employee's actions. *West Cab Co., Inc. v. Industrial Com'n*, 876 N.E.2d 53, 60 (Ill. App. Ct. 2007). This includes the general ability to control what items an employee brings to the workplace. *People v. Pruitt*, 662 N.E.2d 540, 543 (Ill. App. Ct. 1996). For example, employers can prevent the use or possession of illegal substances on their property such as drugs. *American Federation of State, County and Mun. Employees, AFL-CIO v. State Labor Relations Bd.*, 546 N.E.2d 687, 691 (Ill. App. Ct. 1989). Outside of handguns possessed by licensed conceal carry permit holders, weapons clearly fall in the category of items the employer may control in the workplace.

It is yet unclear how the Act will be interpreted with respect to an employer's right to control an employee's possession of a weapon allowed by the Act on the employer's property. Courts have not yet determined whether the right to carry a concealed weapon in the parking lot (or semipublic area such as a sidewalk) is an absolute right, or whether it can be limited by an employer-employee relationship.

The 6<sup>th</sup> Circuit of the U.S. Court of Appeals has held that employers in Ohio have a clear right to limit an employee's right to bear arms. *Plona v. United Parcel Service, Inc.*, 558 F.3d 478 (6th Cir. 2009). However, unlike the Illinois statute, the Ohio's statute states, "Nothing in this section shall negate or restrict a rule, policy, or practice of a private employer... concerning or prohibiting the presence of firearms on the private employer's premises or property." *Id.* at 481.

Likewise, the 10th Circuit of the U.S. Court of Appeals reached a similar conclusion where the applicable Oklahoma statute provided: "Nothing contained in any provision of the Oklahoma Self-Defense Act... shall be construed to limit, restrict or prohibit in any manner the existing rights of any person, property owner, tenant, employer or business entity to control the possession of weapons on any property owned or controlled by the person or business entity." *Bastible v. Weyerhaeuser Co.*, 437 F.3d 999, 1004 (10th Cir. 2006).

Due to the Illinois Act's lack of language delineating an employer's rights, one cannot state with certainty which direction Illinois courts will take. Consequently, it is essential to draft legal flexibility into the wording of a weapons policy. The language, "To the extent permissible by law" would remain operative language no matter what outcome courts reach. As such, a weapons policy with this language can empower the employer regardless of future rulings.

Contractors, delivery people, and other invitees onto employer property present different issues. An employee who has agreed to abide by the employer's policies is subject to more control than that of a delivery person. An employer should include a statement in its standard purchases orders that it does not permit weapons of any kind within its facilities to place vendors and delivery people on notice of these restrictions.

We do not address arguments made by the National Rifle Association and its supporters that banning the presence of guns makes facilities less secure. We find entirely speculative the argument that armed workers could act as a deterrent in any threatening situation. Confronting agitated persons or criminals armed with weapons attempting to gain access to a facility is a function best left to the police and trained security personnel.

## **Conclusion**

Although there is no substitute for providing secure building access, having a clear workplace policy addressing searches and seizure is a means to improve security, and to shield employers from liability if an incident actually occurs. A disgruntled employee will have a very difficult time showing they thought something was private when the policy states it is subject to search. A weapons policy will also give administrators more authority in dealing with potentially threatening situations. For these reasons we recommend all employers implement a weapons policy as soon as possible.