

On the Road WITH THE SECOND AMENDMENT



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*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.*¹

Many businesses have policies preventing their customers and employees from possessing firearms in the workplace. Motor carriers are no different. However, it has been estimated that up to fifty percent of drivers of commercial motor vehicles carry firearms in their trucks, and in certain parts of the country, the number may be closer to ninety percent.² Charged with the delivery of expensive goods, it is easy to imagine why a truck driver would feel the need to be armed while on the road. According to the National Institute for Occupational Safety and Health, nearly seventy-six percent of all workplace homicides are robbery related, compared with only seven percent in the general population.³ It is equally easy to understand why a commercial motor carrier would pause at the idea of its drivers packing heat while on duty. This article will focus on some of the practical and legal issues for trucking companies interested in implementing and enforcing employment policies that prohibit the possession of firearms by drivers.

Rationale Underlying Employment Policies Banning Firearms in the Workplace

According to The Bureau of Labor Statistics' Census of Fatal

Occupational Injuries, the transportation industry accounted for thirteen percent (13%) of all work-place homicides between 2003 and 2010.⁴ Studies have shown that workplace violence significantly increases when guns are allowed on the premises.⁵ Regardless of federal, state or local regulations, company policy is likely the clearest way to outline a carrier's stance on employees carrying firearms while on the road. By giving employees clear guidelines regarding firearms in the workplace, these policies can reduce liability, increase employee safety and address concerns with public image.

Clearly, accidental shootings, intentional shootings, and arrests for illegal firearm possession can lead to liability and downtime for motor carriers. In *Great West Casualty Co. v. See*,⁶ an independent contractor/commercial truck driver's wife was shot when a handgun the driver had stored in the cab accidentally discharged while her husband was unloading the truck. The driver's wife sued the carrier for which the independent contractor was driving, alleging her husband's "negligent conduct took place in the course and scope of his employment and, as a result, [the carrier] was vicariously liable." Before the wife's suit was resolved, the carrier's insurer sought declaratory judgment as to whether an existing policy that covered independent contractors of the carrier applied to the shooting. The court held that the process of loading and unloading a vehicle was covered by the policy and therefore injuries arising directly out of that process were covered. In *Merchants Fast Motor Lines, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA*,⁷ a truck driver accidentally shot a passenger in a

passing van. When a wrongful death action was brought against the carrier, the carrier's insurer brought a declaratory judgment action to determine whether a commercial general liability policy covered the shooting. The court held that the allegations did not conclusively establish that the trucker was not in the course and scope of his employment when he accidentally fired the gun and that the policy covered the shooting. In *Sebastiano v. Bishop*,⁸ a CGL insurer was sued after a trucker's son removed a handgun from the truck which accidentally discharged, killing the son's friend. The *Sebastiano* court found that the commercial general liability policy of the employer did not cover the accidental shooting because the discharge had nothing to do with a covered use of the vehicle. Whether the trucker involved was an independent contractor or employee, the motor carrier and the insurers involved in these suits were forced to expend attorneys' fees and costs and were faced with potential liability because of firearms being kept in their vehicles.

Legal Issues

The question of whether it is lawful for a truck driver to carry a firearm while operating a commercial motor vehicle requires the analysis of federal, state, statutory and regulatory law. Of course, the starting point is the Second Amendment itself. The language used in the Second Amendment as set forth above, is not a model of clarity.⁹ This

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being said, the United States Supreme Court held in *District of Columbia v. Heller*¹⁰ and *McDonald v. Chicago*¹¹ that the Second Amendment protects an individual's right to possess a firearm unconnected with military service. However, like most rights, "the Second Amendment is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."¹²

Federal Law

One common misconception is that the Federal Motor Carrier Safety Administration ("FMCSA") has issued regulations that prohibit drivers of commercial motor vehicles from carrying firearms in their trucks. No such regulation exists.¹³ The reality is that for motor carriers, federal law gives little guidance on how to handle the driver firearm issue. The federal government has issued regulations on licensing related to commercial drivers with criminal convictions (including convictions for using a vehicle to commit a felony)¹⁴ and regulations regarding the proper shipment of firearms¹⁵ but has shied away from directly regulating drivers who carry personal firearms. Likewise, there is no federal law that prohibits carrying a firearm across state lines. In fact, under the Firearm Owners Protection Act¹⁶ ("FOPA"), an individual traveling from one state to another cannot be incarcerated for a firearm possession offense in a state that has strict gun control laws if the traveler is just passing through (i.e., short stops for gas and food). However, where a vehicle has a compartment separate from the driver's compartment, FOPA requires a firearm be unloaded and stored in that separate compartment.¹⁷ For most truck drivers, the requirements of FOPA do not offer a practical method for carrying firearms while on the road. Convincing drivers to carry their unloaded firearms in a trailer rather than a cab would be a difficult feat for any carrier.

Employment Policies

One valid Second Amendment limitation comes in the form of employer policies prohibiting employees from bringing firearms into the workplace. State statutes authorizing these policies are generally considered reasonable regulations under the state's police power.¹⁸ One example of a statute that expressly authorizes anti-gun policies is Kansas' Personal and Family Protection Act.¹⁹ The act allows properly licensed individuals to carry a concealed handgun, pistol, or revolver but expressly permits public and private employers to restrict or prohibit employees from carrying a concealed weapon while on the employer's business premises or while engaged in the employee's employment duties.²⁰ Because of potential liability exposure, most large employers utilize these statutes to prohibit employees from bringing firearms to the workplace. In the transportation industry, a carrier whose employees are allowed to carry firearms onboard their trucks face an arguably greater exposure, where their employees' "workplace" is mobile and often difficult to supervise. 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,²¹ which regulates workplace health and safety. Without a clear mandate from the government, employers often face tough questions when considering the implementation of employment policies restricting the possession of firearms in a company truck.²²

Parking Lot Laws

As outlined above, state statutes often allow an employer to prohibit guns at the workplace. However, several states have passed legislation that limits an employer's ability to keep guns off company property.²³ Known commonly as "parking lot laws" or "take your gun to work laws," firearm advocates argue that these laws are an important way to ensure a worker's

right to defend him or herself on the job. As of July, 2011, approximately seventeen states had enacted "parking lot laws."²⁴

The first parking lot law was passed in Oklahoma in 2004 and is similar to most of its successors. The Oklahoma Self-Defense Act provides that:

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.²⁵

This act, and others like it, have been challenged in courts around the country. Soon after its passage, employer ConocoPhillips filed a pre-enforcement challenge in federal court seeking an injunction against enforcement of the Oklahoma Self-Defense Act.²⁶ Conoco made three arguments in support of its contention that the law was unenforceable: (1) it deprived the company of its fundamental right to exclude individuals who possess firearms from its property; (2) it was unconstitutionally vague; and (3) it was in conflict with and preempted by the general duty clause of the OSH Act.²⁷ It was the OSH Act argument that convinced the trial court. Under the acts' "general duty" clause, an 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."²⁸ This clause has been considered a catch all for any workplace hazards not covered by specific OSHA regulations. The trial court held 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.”²⁹ However, on appeal, the Tenth Circuit disagreed and held that the OSH Act did not preempt the Oklahoma Self-Defense Act.³⁰ The employers’ alternative arguments, including the position that “parking lot laws” are a physical per se taking of the employers’ property were largely ignored.

While *Ramsey* remains good law, it remains unclear how “parking lot laws” will be handled by any given court. Complex analysis of each state’s firearm statutes is required and even then, clashes between an employee’s Second Amendment rights and the property rights of an employer can lead to mixed results. The same property argument asserted in *Conoco Phillips* was used by an employer who terminated three employees for violating an anti-firearm policy by transferring guns in a company parking lot in *Hansen v. America Online, Inc.*³¹ In *Hansen*, the Utah Supreme Court sided with the employer. For the commercial carrier, policies against firearms apply less to real property parking lots, and more to personal property truck cabs. Unfortunately, courts have not directly addressed whether any states “parking lot law” allows an employer to enact a policy banning firearms in the truck cabs used by their truck drivers off company property. That being said, some states have included exceptions to the parking-lot firearm laws for certain types of parking areas, vehicles, and industries. These exceptions allow employers to maintain prohibitions on firearms in parking lots under certain conditions. One such condition involves keeping firearms in vehicles owned or leased by the employer.³² Under Florida law, a policy against firearms in a company car remains valid despite the general “parking lot law.” Some states also allow employers to prohibit firearms in private vehicles when used in the course of the employer’s business.³³

For an employer, these laws tend to place it in a “Catch Twenty-Two.” On the one hand, they want to protect their employees and comply with the OSH Act. On the other hand, they need to be cognizant that enforcing a gun-ban policy can lead to a violation of their state’s “parking lot laws.” Fortunately, some states have recognized this predicament. The “parking lot laws” in Alaska, Florida, Georgia, Louisiana, Oklahoma, and Mississippi include civil liability waivers for employers that are forced to allow employees to store guns on company property.³⁴ “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.”³⁵

State and Local Conceal – Carry Laws

In addition to potential liability, a carrier must consider whether allowing its drivers to carry puts those drivers at risk of being arrested for illegally carrying a firearm. Reciprocity is not always guaranteed with a state concealed firearm permit. An analysis of whether a driver can carry concealed during a shipment is a dizzying endeavor. Currently, Illinois,³⁶ and the District of Columbia prohibit carrying firearms anywhere but in the home or in an individual’s passenger car. Alaska and Vermont allow anyone to carry concealed without requiring a permit (although both states issue a permit for the sole purpose of allowing their citizens access to reciprocity from other states). Other states have varying positions that fall somewhere between these examples. What makes matters worse is that states with seemingly identical concealed carry laws do not always recognize one another’s permits.³⁷ Some states recognize a majority of outside permits, but many more do not. When one considers that local governments have their own concealed carry policies and their

own reciprocity policies, the analysis becomes even more convoluted.

For example, if a motor carrier intends to allow its employees to carry concealed firearms while working, they would do well to choose truckers from some states, but not others. A trucker with a concealed carry permit from the state of Tennessee can legally carry concealed in thirty-seven states: Alaska, Alabama, Arkansas, Arizona, Colorado, Delaware, Florida, Georgia, Iowa, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, Nebraska, North Dakota, New Hampshire, New Mexico, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, Washington, West Virginia, and Wyoming. At first glimpse, it is easy to think a Tennessee trucker could make a perfectly legal cross country delivery with a firearm concealed under his jacket. However, this does not take into consideration the municipalities the driver may have to avoid due to local ordinances banning concealed carry firearms. If that same company were to hire a trucker with a concealed carry permit from California, the cross country trip becomes even more difficult. The California conceal carry permit is only recognized by nineteen states: Alaska, Arizona, Iowa, Idaho, Indiana, Kentucky, Michigan, Missouri, Mississippi, Montana, North Carolina, Nebraska, South Dakota, Tennessee, Texas, Utah, Vermont and Wisconsin.

Conclusion

Without a clear mandate from the federal government that would limit a truck driver’s right to carry a concealed firearm, motor carriers are left to ponder whether to implement their own limitations on their drivers. Regardless of one’s personal beliefs on firearms and the Second Amendment, it makes good business sense to implement a ban on firearms

in a company truck. While it may be difficult to explain to a company driver why a motor carrier has decided to ban firearms, doing so may limit criminal and civil liability for carriers, insurers and drivers alike. 

Endnotes

1. The Second Amendment to the United States Constitution, as ratified by the States and authenticated by Thomas Jefferson, Secretary of State.
2. TruckNews-Blog; truckers packing heat; Drivers Alike's Blog, *Truckers CAN Carry a Gun*, April 15, 2011 available at <http://driversalike.wordpress.com/2011/04/15/truckers-can-carry-a-gun/>.
3. See Centers for Disease Control and Prevention, *Violence in the Workplace*, NIOSH Publications Bulletin 57, available at <http://www.cdc.gov/niosh/docs/96-100/introduction.html>.
4. Center for Disease Control and Prevention, Occupational Violence, available at <http://www.cdc.gov/niosh/topics/violence/>; Anderson DG, *Workplace violence in long haul trucking*, JOURNAL OF THE AMERICAN ASSOCIATION OF OCCUPATIONAL HEALTH SERVICES, Jan 2004.
5. Dr. Dana Loomis, *Study on Guns in the Workplace*, AMERICAN JOURNAL OF PUBLIC HEALTH, May 2005.
6. 185 F.Supp.2d 1164 (U.S. Dist. Nev. 2002).
7. 919 S.W.2d 903 (Tex. Ct. App. 1996) (overturned on other grounds).
8. 1997 WL 587138 (Ohio App. 6 Dist. Sept 19, 1997).
9. Compare with the Pennsylvania Constitution of 1776, which provided that "the people have the right to bear arms for the defense of themselves and the state."
10. 554 U.S. 570 (2008).
11. 561 U.S. 3025 (2010)
12. *Heller* at 626.
13. See http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/rules_search_results.aspx?keyword=firearms&Cat_type=A.
14. See The Commercial Motor Vehicle Safety Act of 1986, available at <http://www.fmcsa.dot.gov/registration-licensing/cdl/cdl.htm>.
15. 18 U.S.C. § 922(a); 27 C.F.R. §§ 478.31 & 478.30.
16. 18 U.S.C. § 921 et seq.
17. *Id.* at § 926A
18. See, e.g., *Bastible v. Weyerhaeuser*, 437 F.3d 999 (10th Cir. 2006).
19. K.S.A. 75-7c01 et seq.
20. However, as with other "parking lot law" states addressed infra, licensed employees are permitted to store their firearms in their vehicles while at work, even if their vehicles are parked on the employer's property. *Id.*
21. 29 U.S.C. § 654(a)(1) (2011).
22. Numerous truck bloggers raise this same question. See, e.g., AskTheTrucker, *Truck Drivers and the Unlawful Possession of a Firearm*, August 6, 2010, available at <http://askthetrucker.com/truck-drivers-and-the-unlawful-possession-of-a-firearm/>; Mike Howe, *Can Truckers Carry a Gun?*, available at <http://www.layover.com/driverscorner/truck-talk/>.
23. Mark Fleming, Esq. and Angela K. Miles, Ph. D., *Legal Illustrations of Workplace Gun Laws and their Implications on Employers and Human Resource Managers*, ALSB JOURNAL OF EMPLOYMENT AND LABOR LAW, Volume 11, No. 2, 104-123, Fall 2009.
24. Daniel J. Schuch, Nelsy C. Gomez and David L. Barron, *Annie Get your Gun . . . and Bring it to Work*, available at <http://www.chainstoreage.com/article/annie-get-your-gun-%E2%80%A6-and-bring-it-work>.
25. See OKLA.STAT. tit. 21, §1290.22 (2008); *Id.* §1289.7a (2008).
26. *Conoco Phillips Co. v. Henry*, 520 F. Supp.2d 1282 (N.D. Okla. 2007).
27. *Id.*
28. 29 U.S.C. § 654(a)(1).
29. 520 F. Supp.2d at 1329 *n. 56.
30. *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).
31. 96 P.3d 950 (Utah 2004).
32. See, e.g., FLA.STAT. ANN. § 790.251(7)(f); LA. REV.STAT. ANN. § 32:292.1(D)(2).
33. *Id.*
34. Neil Perry, *Employer Firearm Policies: Parking Lots, State Laws, OSHA, and the Second Amendment*, Vol 20, No. 7, EMPLOYMENT LAW COMMENTARY, July 2008.
35. *Id.*
36. This law has recently been struck down in Federal Court. See Ray Long; Annie Sweeney; Monique Garcia. *Concealed carry: Court strikes down Illinois' ban*, Chicago Tribune, (December 11, 2012).
37. For example, Missouri, Michigan and Wisconsin all use similar language mandating that permits "shall issue" to residents only. However, a Missouri conceal carry permit will be recognized in Michigan but not in Wisconsin. Likewise, Arizona, Nevada and Idaho all use similar language mandating that permits "shall issue" to residents and non-residents. However, a resident Arizona conceal carry permit will be recognized in Idaho but not in Nevada. USA Carry, *Concealed Carry Permit Reciprocity maps*, available at http://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html.