PUBLICATION

Guns in the Trunks: Employees Now Can Sue Their Employers!

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It has long been a crime to carry a gun on private property if prohibited by the owner. The enactment two years ago of the so-called "Guns in the Trunks" law changes this long standing law. *See* Tenn. Code Ann. 39-17-1313. Generally, the "Guns in the Trunks" law provides that a person with a valid handgun carry permit could transport or store firearms or ammunition in their personal vehicle in parking area even if on private property, including an employer's private property. Employers remained uncertain whether an employee could still be disciplined for bringing a firearm to work in his car in violation of company policy. The Tennessee Attorney General issued an opinion that the "Guns in the Trunks" law only de-criminalized this conduct, and that employers were still free to prohibit guns in the parking lot and discipline violators. The General Assembly's Office of Legal Services then issued a conflicting legal opinion. It opined that the "Guns in the Trunks" law prohibited employers from both banning firearms in the parking lot and terminating employees who brought them there. As a result, there was much confusion over what rights employers had under the new law.

The General Assembly has now made its intent clear by passing another "Guns in the Trunks" related statute. The new statute gives an employee a cause of action against his employer if the employee suffers an adverse employment action for transporting and storing a firearm in his personal vehicle on his employer's parking lot. This new employment statute, Tenn. Code Ann. § 50-1-312, signed into law by the governor on April 6, 2015 (effective on July 1, 2015), provides:

No employer shall discharge or take any adverse employment action against an employee solely for transporting or storing a firearm or firearm ammunition in an employer parking area... .

Since "employee" is defined by the statute as one who possesses a valid handgun carry permit, the law only protects those employees. Under the law, a wronged employee can sue his employer to enjoin similar future acts violating the statute and also to recover economic damages and reasonable attorney's fees. Once the case is brought, a *McDonnell Douglas* type burden shifting analysis is employed. The employee has the burden of establishing a prima facie case of an adverse employment action based solely on the employee's transporting or storing a firearm or ammunition in the employer's parking area. If the employee satisfies this burden, the employer has a burden of production to demonstrate that it had one or more legitimate reasons for the employee's adverse employment action. If the employer produces such evidence, the presumption of discharge for adverse employment action raised by the employee's prima facie case is rebutted, and the burden shifts to the employee to demonstrate that the reason given by the employer was not the true reason and pretext for the storing or transporting a firearm. The employee at all times retains the burden of persuading the trier of fact that the employee has been a victim of an adverse employment action based solely on the employee's compliance with the "Guns in the Trunks" law. The statute of limitations is one year from the time of the adverse employment action. A safe harbor provision in the statute provides that the presence of a firearm or ammunition within an employer's parking area in accordance with the "Guns in the Trunks" law does not by itself constitute a failure by the employer to provide a safe workplace. Further, except for conduct in compliance with the "Guns in the Trunks" law, nothing in the new statute is to be construed as preventing an employer from prohibiting firearms or ammunition on the employer's premises.

So, what does this new law, which further erodes the employment at-will doctrine, mean to Tennessee employers? First of all, it only protects those employees with a valid handgun carry permit recognized in

Tennessee. These employees must still comply with the "Guns in the Trunks" law to be protected: handgun carry permit holders may lawfully store firearms and ammunition in the permit holder's privately owned vehicle on any public or private parking area in a location where it is permitted to be, so long as the firearm and ammunition are kept from ordinary observation if the permit holder is in the vehicle; or if not in the vehicle, kept from ordinary observation and locked in the trunk, glove box, container affixed to the vehicle, or interior. Thus, employees without a handgun permit are not protected. Additionally, employees with a handgun carry permit are not protected if they do not comply with the above requirements. The firearm must be stored in their own vehicle, not a borrowed vehicle, a rental car, or company owned vehicle. Importantly, employees still can be prohibited by employers from possessing firearms inside the workplace or on their person; and visitors can be banned from even bringing their firearms onto the property, even when in a locked vehicle in the parking lot.

Employers now-a-days always need a legitimate, non-discriminatory documented business reason before taking an adverse employment action against an employee. A big ambiguity in the statute is what constitutes an adverse employment action? The phrase is not defined. A discharge is an adverse action because it is specifically mentioned in the statute. Presumably, a tangible employment action, as defined in discrimination case law, would also constitute an adverse employment action. But what about a poor performance evaluation? A written warning? Or requiring an employee to work on something he or she does not want to do? The statute leaves it to the courts to define this phrase.

Even so, suits by employees under the statute may be relatively rare. While not mentioned in the statute, the employee in all likelihood must show that the employer knew of the firearm in the vehicle before taking the adverse action. If the firearm was properly locked in the vehicle out of ordinary observation, the employer would not know of the existence of the firearm unless someone told it. Further, the addition of the word "solely" in the employee's burden of proof sets a high hurdle, which should in and of itself discourage lawsuits despite the attorneys' fee provision included in the statute. As long as an employer can demonstrate a legitimate reason for its employment action, the employer should prevail. Pretext is difficult to prove.

In view of this new firearm statute and others recently enacted by the General Assembly, employers should review all policies pertaining to firearms in the workplace with their employment lawyer. These new laws should be a part of routine training to company managers and supervisors. An employer should consider this new law before taking an adverse employment action against a known handgun permit holder. As always, good documentation for the reason for taking an adverse employment action is the best defense against any employment case.