

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal Justice Committee

BILL: CS/SB 2356

INTRODUCER: Criminal Justice Committee and Senators Peaden and Baker

SUBJECT: Private Personal Property

DATE: March 28, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

The bill creates protection for the possession of any secured, personal, legal private property within or affixed to one’s motor vehicle, out of sight, while parked at work or elsewhere. It prohibits private and public entities from taking certain actions against employees, customers, and invitees with regard to personal private property stored securely in their motor vehicles while the vehicle is parked on the public or private property of the entity.

The bill codifies legislative policy that definitively settles, at least statutorily, the interplay and balance between employment, public and private real property, and private personal property (and specifically, firearms) rights.

This bill creates a new section within Chapter 790 of the Florida Statutes.

II. Present Situation:

Over the past several years, citizens throughout the country who reside in states that are governed by the “employment at will” doctrine of private labor relations have been terminated from employment for failing to abide by their employer’s policies regarding the possession of firearms on company property.

These terminations of employment have resulted in litigation seeking redress based upon various claims of employment discrimination, claims alleging violations of constitutional rights (civil rights violations), and under general public policy considerations. Additionally, statutes in several states have been created or amended to codify or clarify legislative intent with regard to the lawful possession of firearms on public and private property.

This area of the law is in a state of flux, as between the rights of employers and employees, as to what personal private property rights are or should be in relation to private and public real property rights, and with regard to the meaning or interpretation of the United States Constitution and the various State Constitutions.

While it is well known and recognized that the founders of our country secured the right to bear arms to U.S. citizens, this right is generally interpreted - given the era and the declaration of our independence from the Crown - to secure us from the Congressional erosion of the people's collective right to rise up and form a militia to protect the country from the Sovereign.

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." (ratified December 15, 1791)

Although there are areas which Congress has occupied (e.g. interstate commerce), that have federal influence and precedence in the regulation of firearms, it is to the organic laws of the states that we must first look for our more personal rights regarding possessing and using firearms.

Therefore, depending upon the language of the state's constitution, the state's body of employment law, statutory law, and the interpretation thereof, and the facts of the cases that have occurred, legal precedent for Florida courts and policymakers may or may not be provided upon the battlefields of other states.

Florida is an "at-will" employment state

Florida is an "at-will" employment state. Essentially this means that, absent an employment contract, either party, employer or employee, may terminate the employment relationship at any time, for any reason, so long as the reason isn't prohibited by law.

Actions for wrongful termination of employment, under the *constitutional theory* of a violation of "Basic Rights" as set forth in Article I, Section 2 of the Florida Constitution must be based upon a *state action*, and not the action of one citizen (employer) against another (employee). *Schreiner v. McKenzie Tank Lines*, 432 So.2d 567 (Fla. 1983). One citizen's rights "shall not be construed to deny or impair others retained by the people". *Article I, Section 1, Florida Constitution*.

The application of the right to equal protection in Article I, Section 2 is activated when the *government* intrudes into a citizen's most basic, personal freedom from such intrusion. Consequently, there is no constitutional right to employment in Florida in the private sector.

Florida's Constitution, in Article I, Section 2, states:

"Basic Rights. All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the

ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”

The Legislature has enacted *statutes* addressing discrimination based upon *race, color, religion, sex, national origin, age, handicap or marital status*. *The Florida Civil Rights Act of 1992*, s. 760-01-760.11 and s. 509.092, F.S.

These statutes provide causes of action for employment discrimination, and the methods by which they are to be pursued, against employers who employ 15 or more employees for each working day in each of 20 or more calendar weeks. Many small businesses would not fit the statutory threshold of 15 or more employees.

The statutory protections set forth protect employees from discrimination based upon *who they are*, not matters that are necessarily matters of choice or preference. These statutory protections could be viewed as an expansion, or at least a clarification from a public policy standpoint, of the constitutional Basic Rights enumerated in Article I, Section 2 of the Florida Constitution.

Reasons not inherently “identity-related,” for employing or not employing, retaining or terminating an employee are matters within the discretion of the employer and are neither constitutionally nor statutorily governed.

The Right to Bear Arms in Florida

Article I, Section 8 of the Florida Constitution states:

“Right to Bear Arms. The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state *shall not be infringed, except that the manner of bearing arms may be regulated by law.*”

This section of the Constitution was amended in 1990 to include a three-day waiting period on the delivery of a purchased handgun.

In *Rinzler v. Carson*, 262 So.2d 661 (Fla. 1972), the Supreme Court decided that a statute prohibiting the possession of a short-barreled rifle, shotgun, or a machine gun did not violate a machine gun owner’s constitutional right to bear arms. In so doing, the Court stated: “the right to keep and bear arms is not an absolute right, but is one which is subject to the right of the people through their legislature to enact *valid police regulations to promote the health, morals, safety and general welfare* of the people.”

The Legislature has exercised its prerogative many times, using its “valid police power” to regulate the possession of firearms, including such matters as who may possess them, in what manner, of what type, and in what locations. Chapter 790 of the Florida Statutes is dedicated exclusively to laws governing weapons and firearms.

One example of statutory regulation in this area is found in s. 790.06 (12), F.S., which governs the licensure to carry a concealed weapon or firearm. It states:

“No license issued pursuant to this section shall authorize any person to carry a concealed weapon or firearm into any place of nuisance as defined in s. 823.05; any police, sheriff, or highway patrol station; any detention facility, prison, or jail; any courthouse; any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom; any polling place; any meeting of the governing body of a county, public school district, municipality, or special district; any meeting of the Legislature or a committee thereof; any school, college, or professional athletic event not related to firearms; any school administration building; any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose; any elementary or secondary school facility; any career center; any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile; inside the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft; or any place where the carrying of firearms is prohibited by federal law. Any person who willfully violates any provision of this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.”

Although there are statutory restrictions on carrying concealed weapons, there is statutory authorization to carry firearms in many situations specified in s. 790.25, F.S. For example, subsection (5) states:

“POSSESSION IN PRIVATE CONVEYANCE.--Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.”

These statutes are clear examples of the Legislature's constitutionally authorized exercise of its police powers.

Policy questions

It has been widely reported that some Florida citizens have been terminated from employment by private businesses because they possessed a firearm inside their vehicles, in the employer's parking lot, in contravention of company policy. Under the provisions of s. 790.25(5), F.S., quoted above, this is a statutorily protected action.

Under Florida's "at will" employment doctrine, the same action can lawfully result in termination from employment where there is a company policy to the contrary.

Additionally, there is an issue as to where the rights of private (*and public*, under the provisions of the bill) real property owners fall on the "rights continuum," with regard to the ability to restrict certain actions upon their property.

These various rights seem to be at odds, and Senate Bill 2356 addresses this situation.

III. Effect of Proposed Changes:

The bill creates protection for the possession of any secured, personal, legal private property within or affixed to one's motor vehicle, out of sight, while parked at work or elsewhere. Specific reference is made to "firearms," rather than the more general "personal private property" in various places in the bill.

The new law is created in ch. 790, F.S., the Weapons and Firearms chapter.

The intent of the bill, as set forth in Section 1, is to codify legislative policy regarding the individual's constitutional right to privacy, and a constitutional right to possession of legal personal property (or constitutionally significant private property, as it is sometimes referred to in the bill) within one's motor vehicle.

Specifically, the bill prohibits any public or private entity from violating the constitutional rights of an employee, customer, or invitee on the entity's property in the manners set forth in Section 2 of the bill, "Prohibited Acts." These include:

- prohibiting possession of legal personal private property locked inside or on a motor vehicle, out of sight;
- verbal or written inquiry, search or action concerning such personal possessions
 - searches or seizures must be conducted by law enforcement with the attendant 4th Amendment safeguards against unreasonable searches and seizures;
- conditioning employment upon an agreement that prohibits possession of any product protected by or incidental to the lawful exercise of individual constitutional rights;
- prohibiting entry to the parking lot when such product is in the employee's, customer's, or invitee's lawful possession; and

- terminating employment or otherwise discriminating against an employee, or expelling a customer or invitee for exercising his or her constitutional right to bear arms or right of self-defense in a lawful manner.

The bill conveys an immunity from liability to employers (later defined in the bill as “any business that is a sole proprietorship, partnership, corporation, limited liability company, professional association, cooperative, joint venture, trust, firm, institution, or association, or public-sector entity, that has employees”), and public or private entities under certain circumstances.

This immunity is conveyed by the enumeration of certain “legal duties” employers and public and private entities will not “owe” others. Because a “legal duty” is a necessary element of a tort action, under the circumstances outlined in the Immunity from Liability subsection of the bill, a public or private entity or employer is not liable in a civil action based on actions or inactions taken in compliance with this section of the bill. The immunity does not extend to those entities or employers listed in the “Exceptions” subsection of the bill (e.g., schools, prisons).

The Attorney General, under s. 760.51, F.S., is required to enforce the protections set forth in the bill.

The bill specifically exempts certain properties, based primarily upon the activities conducted thereon, including school property as defined in s. 790.115, F.S., and state correctional institutions regulated under s. 944.47, F.S.

Section 790.115, F.S., prohibits possession of firearms and certain weapons on school property, school buses, at school-sponsored events, or at school bus stops. There are criminal penalties for violations of this section, and limited exceptions provided.

In addition to the statutes discussed above regarding the possession of firearms, each district school board in Florida is required to have a zero-tolerance policy regarding the possession of firearms by students on school grounds. (s. 1006.13(2), F.S.) A violation of the policy must result in at least a one-year expulsion from school and referral to the criminal justice or juvenile justice system. Trespassers that carry a weapon or firearm on school property, public or private, commit a felony of the third degree. (s. 810.095, F.S.)

Congress enacted the Gun Free School Zones Act in 1990. *P.L. 101-647, Sec. 1702(b)(1), 18 USC ss. 921 and 922*. It was subsequently overturned by the United States Supreme Court as a violation of Congress’s powers under the commerce clause to regulate inter-state commerce. *U.S. v. Lopez*, 514 US 549 (1995). The act was passed again in 1996 with changes to address the concerns of the Supreme Court that made it only applicable to guns that crossed state lines in commerce. *P.L. 104-208*. In general, the act makes it unlawful for any person to possess a firearm in a school zone. The term “school zone” means “in, or on the grounds of, a public, parochial or private school or within a distance of 1,000 feet from the grounds of a public, parochial or private school.” The term “school” means “a school which provides elementary or secondary education, as determined under State law.” Whoever violates the act may be fined up to \$5,000, imprisoned up to five years, or both. Exceptions to this act include:

- if the person is licensed to do so;
- if the firearm is not loaded and in a locked container, or a locked firearms rack which is in a motor vehicle;
- by an individual for use in a program approved by a school in the school zone;
- by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
- by a law enforcement officer acting in his or her official capacity; or
- the firearm is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

State Correctional Institutions

Section 944.47, F.S., prohibits the introduction of firearms or other weapons into or upon the grounds of any state correctional institution. A violation of the prohibition is a second degree felony offense.

The act is entitled “The Individual Personal Private Property Protection Act of 2007” and takes effect upon becoming law. The provisions apply to causes of action that accrue after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Preemption

There may be some federal laws that specifically regulate the premises of certain employers, including their parking lots. In its memorandum of law in the case challenging the Oklahoma statute in this area of the developing law, Haliburton Energy Services, Inc. argues that federal laws regulating nuclear safety, oil and gas operations, and the use of explosives, preempt the state law as it applies to the premises of these businesses. Atomic Energy Act of 1954 (*42 USCA § 2011 et seq.*); Pipeline Safety Act (*49 USCA § 60101 et seq.*); Explosives Act (*18 USCA § 841 et seq.*); *See* Brief of Halliburton Energy Services, Inc., As Amicus Curiae in Support of Plaintiff’s Complaint and Plaintiff’s Motion for A Permanent Injunction, *Whirlpool Corp. v. Henry*, Case No. 04CV 820H (J), United States District Court, N.D. Oklahoma. It has also been argued in this same case that the federal Occupational Safety and Health Act preempts the state statute. *29 U.S.C. § 651, et seq.*; *See* Plaintiff’s Opening Memorandum in Support of

Motion for a Temporary Restraining Order and/or a Preliminary Injunction on behalf of Plaintiff Whirlpool Corporation, *Whirlpool Corp. v. Henry*, Case No. 04CV 820H (J), United States District Court, N.D. Oklahoma. Federal law is considered to have preempted a specific area of law when Congress has shown its intent to occupy a given field. When Congress is determined to have shown such an intent, a court may strike down a state law that attempts to regulate this same field of law. A court may find that Congress has completely preempted an area of law or it may find that the preemption is only a partial preemption and some state regulation may be allowed.

Access to Courts

The bill provides immunity for persons and entities from civil liability in lawsuits for certain actions involving the use of firearms. This provision may implicate the “access to court” protections of the Florida Constitution. Article I, section 21 of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

The Florida Supreme Court has held that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

A litigant could argue that the bill denies him or her access to the courts if a cause of action existed under Florida law before the adoption of the access to courts provision in 1968. Should a court find a cause of action did not exist, the judicial inquiry would end at that point. But it is also possible that a court could hold that pre-1968 Florida law would have allowed such suits under the common-law cause of action for negligence. If so, this bill might be evaluated under the *Kluger* standard.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The potential impact of the bill on the private sector is unknown and difficult to quantify.

The citizens who are employed by or patronize businesses or visit public entities that prohibit firearms on their property will presumably no longer be required to leave their firearms at home.

C. Government Sector Impact:

Public sector entities are effected by the provisions of the bill in the same manner as private sector entities.

It is unknown what fiscal impact the Attorney General's office may experience if it is called upon to enforce the provisions in the bill.

VI. Technical Deficiencies:

It is suggested that federal correctional institutions situated in Florida as well as private state prisons, like state correctional institutions, should be exempted from the requirements of the bill.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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