

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 503 Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008

**SPONSOR(S):** Environment & Natural Resources Council; Evers and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1130

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Environment &amp; Natural Resources Council</u>	<u>11 Y, 6 N, As CS</u>	<u>Kaiser / Smith</u>	<u>Dixon / Hamby</u>
2) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The bill creates "The Preservation and Protection Right to Keep and Bear Arms in Motor Vehicles Act of 2008." The bill provides that no public or private entity may prohibit any customer, employee<sup>1</sup> or invitee from possessing any legally owned firearm locked inside, or locked to, a private motor vehicle in a parking lot if the person is lawfully in such area. The bill further prohibits public or private entities from violating the privacy rights of said persons by verbal or written inquiry regarding the presence of a firearm inside a private motor vehicle in a parking lot or by an actual search of the private motor vehicle in the parking lot to ascertain the presence of a firearm. The bill prohibits the public or private entity from taking action against the person based upon verbal or written statements and requires any searches of the vehicle to be conducted by on-duty law enforcement personnel. The search must be based upon due process and comply with constitutional protections.

Employers are prohibited from conditioning employment upon either an employee's or a prospective employee's holding or not holding a license to carry a concealed weapon or firearm, or any agreement by an employee or a prospective employee that prohibits an employee from keeping a legal firearm locked inside a motor vehicle when the firearm is kept for lawful purposes. Additionally, an employer cannot prevent or prohibit an employee, customer, or invitee from entering the parking lot of the employer's place of business because the person's motor vehicle contains a legal firearm, which is out of sight within his/her vehicle. Neither may an employer terminate the employment of, or discriminate against, an employee or expel a customer or invitee when the person is exercising his/her right to keep and bear arms or for exercising the right of self-defense as long as the firearm is not exhibited on company property for any reason other than lawful defensive purposes.

The provisions of this act do not apply to:

- Property owned or leased by an employer or the landlord of an employer upon which activities involving national defense, aerospace, or domestic security are conducted;
- Property owned or leased by an employer or the landlord of an employer upon which the primary business involves the manufacture, use, storage, or transportation of combustible or explosive materials regulated under state or federal law;
- A motor vehicle owned, leased, or rented by an employer or the landlord of an employer;
- Any other property owned or leased by an employer or the landlord of an employer upon which possession of a firearm or other legal product is prohibited pursuant to any federal or state law on the effective date of this act;
- Any school property as defined and regulated under s. 790.115, F.S.; or
- Any state correctional institution regulated under s. 944.47, F.S.

The bill provides for immunity from liability for employers under certain conditions and provides for enforcement by the Attorney General.

The bill appears to have an insignificant fiscal impact on state or local governments. The bill takes effect upon becoming law and applies to causes of action accruing on or after that date.

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<sup>1</sup> An employee is defined as any person who possesses a valid license to carry a concealed weapon or firearm and works for salary, wages or other remuneration; is an independent contractor; or is a volunteer, intern, or other similar individual for an employer.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0503a.ENRC.doc

**DATE:** 3/13/2008

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Safeguard individual liberty:** The bill restricts an employers' ability to implement certain policies related to the workplace and its premises. The bill also permits the lawful possession of a legal firearm that is locked in, or to, a motor vehicle parked in a lot owned by a private or public entity.

**Promote personal responsibility:** The bill provides immunity from civil liability to any employer, or its lessor, for damages in certain circumstances resulting from the use, or threatened use, of a firearm that was stored by an employee, customer or invitee in a private motor vehicle on property that was set aside for parking of said vehicles.

**Maintain public security:** The bill implements policies regarding the possession of legal firearms in vehicles in certain locations.

#### B. EFFECT OF PROPOSED CHANGES:

Florida law<sup>2</sup> defines firearm as "any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime."

Current law<sup>3</sup> prohibits persons openly carrying any firearm or electric weapon or device. Chemical sprays used in self-defense and non-lethal stun guns or other non-lethal electric weapons that do not fire a projectile and are designed solely for defensive purposes are legal. Persons found in violation of this provision are guilty of a misdemeanor of the second degree, punishable by a term of imprisonment not to exceed 60 days or a fine of \$500.

By the authority of s. 790.06, F.S., the Department of Agriculture and Consumer Services (department) issues licenses to qualified persons to carry concealed weapons. Those applying for a concealed weapons permit must:

- Be a resident of the United States or be a consular security official of a foreign government that maintains diplomatic relations and treaties of commerce, friendship, and navigation with the United States and is certified by the foreign government and by the appropriate embassy in this country;
- Be 21 years of age or older;
- Not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm;
- Be eligible pursuant to s. 790.23, F.S., having never been convicted of a felony;
- Have not been committed for the abuse of a controlled substance or been found guilty of a crime relating to drug abuse in Florida or any other state relating to controlled substances within a 3-year period immediately preceding the date of which the application is submitted;
- Not chronically and habitually use alcoholic beverages or other substances to the extent that his/her normal faculties are impaired;
- Desire a legal means to carry a concealed weapon or firearm for lawful self-defense;
- Demonstrate competence with a firearm;
- Not have been adjudicated as an incapacitated person under s. 744.331, F.S., unless 5 years have elapsed since the applicant's restoration to capacity by court order;

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<sup>2</sup> s. 790.001(6), F.S.

<sup>3</sup> s. 790.053, F.S.

- Not have been committed to a mental institution unless the applicant produces a certificate from a licensed psychiatrist that he/she has not suffered from disability for at least 5 years prior to the date of submission of application;
- Not have had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless 3 years have elapsed since probation of any other conciliations set by the court have been fulfilled, or the records have been sealed or expunged;
- Not have been issued an injunction that is currently in force relating to committing acts of domestic or repeat violence; and
- Not be prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law.

Persons holding valid permits may not carry concealed weapons into any place of nuisance<sup>4</sup>, any police, sheriff, or highway patrol station; any detention facility, prison, or jail; any courthouse; any courtroom<sup>5</sup>; 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; any elementary or secondary school facility; any career center; any college or university facility<sup>6</sup>; inside the passenger terminal and sterile area of any airport<sup>7</sup>; or any place where carrying of firearms is prohibited by federal law. Persons violating this provision commit a misdemeanor of the second degree, punishable by a term of imprisonment not to exceed 60 days or a fine of \$500.

Section 790.25, F.S., provides for the lawful and unlawful ownership, possession and use of firearms and other weapons. It specifically prohibits the carrying of a concealed weapon without a permit. This section provides that the provisions of s. 790.053, F.S., and s. 790.06, F.S., discussed above, do not apply to:

- Members of the military, law enforcement, or persons carrying out or training for emergency management duties;
- Guards or messengers of common carriers;
- Members of any organization duly authorized to purchase or receive weapons;
- A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition;
- A person engaged in the business of manufacturing, repairing, or dealing in firearms;
- A person firing weapons for testing or target practice;
- A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession;
- A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business;
- A person possessing arms at his or her home or place of business; or
- Investigators employed by the several public defenders of the state or the capital collateral representative.

Current law<sup>8</sup> provides that it is "lawful 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

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<sup>4</sup> As defined in s. 823.05, F.S.

<sup>5</sup> Except that nothing in this section precludes a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his/her courtroom.

<sup>6</sup> Unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or non-lethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or a projectile.

<sup>7</sup> No person shall be prohibited from carrying any legal firearm into the terminal, when said firearm is encased for shipping purposes as checking such firearm as baggage to be lawfully transported on any aircraft.

<sup>8</sup> s. 790.25(5), F.S.

conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use.”

### **Other States**

Oklahoma, Alaska, Kentucky, and Mississippi have laws similar to this legislation. However, the United States District Court for the Northern District of Oklahoma found the Oklahoma statute to be preempted by federal law, and enjoined the state from enforcing the statute.<sup>9</sup> According to the National Conference of State Legislatures (NCSL), other than Florida, Arizona and Georgia have similar legislation pending this year.

### **Effect of Proposed Changes**

The bill creates “The Preservation and Protection Right to Keep and Bear Arms in Motor Vehicles Act of 2008.” Legislative intent is provided regarding the constitutional rights of citizens to:

- Privacy,
- Possess and keep legally owned firearm in their motor vehicles, and
- Not lose said rights subject to becoming a customer, employee, or invitee of a business entity.

The bill provides that no public or private entity may prohibit any customer, employee or invitee from possessing any legally owned firearm locked inside, or locked to, a private motor vehicle in a parking lot if the person is lawfully in such area. The bill further prohibits public or private entities from violating the privacy rights of said persons by verbal or written inquiry regarding the presence of a firearm inside a private motor vehicle in a parking lot or by an actual search of the private motor vehicle in the parking lot to ascertain the presence of a firearm. The bill prohibits the public or private entity from taking action against the person based upon verbal or written statements and requires any searches of the vehicle to be conducted by on-duty law enforcement personnel. The search must be based upon due process and comply with constitutional protections.

Employers are prohibited from conditioning employment upon either an employee’s or a prospective employee’s holding or not holding a license to carry a concealed weapon or firearm, or any agreement by an employee or a prospective employee that prohibits an employee from keeping a legal firearm locked inside a motor vehicle when the firearm is kept for lawful purposes. Additionally, an employer cannot prevent or prohibit an employee, customer, or invitee from entering the parking lot of the employer’s place of business because the person’s motor vehicle contains a legal firearm, which is out of sight within his/her vehicle. Neither may an employer terminate the employment of, or discriminate against, an employee or expel a customer or invitee when the person is exercising his/her right to keep and bear arms or for exercising the right of self-defense as long as the firearm is not exhibited on company property for any reason other than lawful defensive purposes.

The provisions of this act do not apply to:

- Property owned or leased by an employer or the landlord of an employer upon which activities involving national defense, aerospace, or domestic security are conducted;
- Property owned or leased by an employer or the landlord of an employer upon which the primary business involves the manufacture, use, storage, or transportation of combustible or explosive materials regulated under state or federal law;
- A motor vehicle owned, leased, or rented by an employer or the landlord of an employer;
- Any other property owned or leased by an employer or the landlord of an employer upon which possession of a firearm or other legal product is prohibited pursuant to any federal or state law on the effective date of this act;
- Any school property as defined and regulated under s. 790.115, F.S.; or
- Any state correctional institution regulated under s. 944.47, F.S.

The bill provides immunity from civil liability, except for the exemptions previously listed, to any employer based on actions or inactions taken in compliance with this legislation. The immunity does

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<sup>9</sup> *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282 (N.D. Okla. 2007)

not apply to civil actions based on actions or inactions of public or private entities or employers that are unrelated to compliance with this legislation.

The bill provides for enforcement by the Attorney General on behalf of the aggrieved person if there is reasonable cause to believe there has been a willful violation of this act. In these cases, the Attorney General is instructed to commence a civil or administrative action for damages, injunctive relief and civil penalties, and such other relief as may be appropriate under the provisions of s. 760.51, F.S.<sup>10</sup> The bill also authorizes the Attorney General to negotiate a settlement on behalf of persons aggrieved under this act. The bill does not prohibit a person aggrieved under this act from bringing their own civil action for violation of rights protected under this act. The bill states that, in any successful action brought by a person aggrieved under this act, the court shall award all court costs, attorney's fees, and reasonable personal costs and losses suffered by the aggrieved person as a result of the violation of rights under this act.

The bill provides the following definitions:

- "Parking lot" means any property that is used for parking motor vehicles and is available to customers, employees, or invitees for temporary or long-term parking or storage of motor vehicles.
- "Motor vehicle" means any automobile, truck, minivan, sports utility vehicle, motor home, recreational vehicle, motorcycle, motor scooter, or any other vehicle operated on the roads of this state and required to be registered under state law.
- "Employee" means any person who possesses a valid license issued pursuant to section 790.06, Florida Statutes<sup>11</sup>, and:
  1. Works for salary, wages, or other remuneration;
  2. Is an independent contractor; or
  3. Is a volunteer, intern, or other similar individual for an employer.
- "Employer" means 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.
- "Invitee" means any business invitee, including a customer or visitor, who is lawfully on the premises of an entity described in paragraph (d).

The term "firearm" includes ammunition and accouterments attendant to the lawful possession and use of a firearm.

The effective date of this legislation is upon becoming law and the law applies to causes of action accruing on or after that date.

#### C. SECTION DIRECTORY:

**Section 1:** Creates s. 790.251, F.S.; relating to the lawful possession of firearms that are locked in, or to, a motor vehicle parking in a parking facility owned by a private or public entity.

**Section 2:** Provides an effective date of upon becoming law.

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<sup>10</sup> Provides for a penalty not to exceed \$10,000 per violation.

<sup>11</sup> Licensed to carry a concealed weapon or firearm.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

Indeterminate. See Fiscal Comments.

#### 2. Expenditures:

Indeterminate. See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None

#### 2. Expenditures:

None

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The economic impact on the private sector is unclear. Employers having policies regarding the possession of legal firearms in vehicles in their parking lots may no longer have the authority to implement said policies. However, employers may enjoy greater protection from liability regarding the use of a firearm in the employer's parking lot that was lawfully stored in a vehicle. It is unknown how many employers have these policies in place and how many will be affected by this legislation

### D. FISCAL COMMENTS:

While the bill provides that it may be enforced by the Attorney General, the Office of the Attorney General has not provided a cost estimate of the bill's provisions and it is unknown to what extent the Attorney General will be called upon to enforce it. Any damages recovered as a result of the Attorney General's action shall accrue to the injured person. Further, any civil penalty (of not more than \$10,000 per violation) associated with such actions shall accrue to the state's General Revenue Fund unallocated.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds, reduce the authority of counties or cities to raise revenues in the aggregate or reduce the percentage of a state tax shared with counties or cities.

#### 2. Other:

##### **Preemption**

There may be some federal laws that specifically regulate the premises of certain employers, including their parking lots. The United States District Court for the Northern District of Oklahoma recently ruled that an Oklahoma statute, very similar to the proposed language in HB 503, was preempted by the federal Occupational Safety and Health Act (OSHA), and enjoined the state from enforcing the statute. 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 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. The Oklahoma Federal District Court stated that the Oklahoma statute was invalid because the area of employee safety has been preempted by the federal OSHA and the Oklahoma statute was in conflict with certain provisions of OSHA.<sup>12</sup> The Court found that the Oklahoma statute was preempted based on obstacle conflict preemption, due to the fact that the law materially impeded the plaintiff's attempts to reduce workplace violence and comply with the general policies and obligations under OSHA. However, the court did emphasize that their reasoning was based in part upon the fact that the statute contained criminal penalties against employers who violated the statutory provisions. The current bill does not contain criminal penalties; however, employer's under this bill still face the threat of civil or administrative actions by the Attorney General for damages, injunctive relief and civil penalties, and civil actions by persons aggrieved under this bill.

### **Access to Courts**

The bill provides immunity for persons and entities from civil liability in lawsuits for certain actions involving the use and possession of personal private property. This provision may implicate the "access to court" protections of the Florida Constitution.<sup>13</sup> The Florida Supreme Court, in *Kluger v. White*, 281 So. 2d 1(Fla. 1973), 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.<sup>14</sup> 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.

### **Right to Bear Arms**

The Florida Constitution<sup>15</sup> and the United States Constitution<sup>16</sup> contain provisions protecting a citizen's right to bear arms. However, these provisions are not implicated without some sort of state action.<sup>17</sup> The Second Amendment's "right to keep and bear arms" imposes a limitation on only federal, not state, legislative efforts.<sup>18</sup> The Florida Supreme Court, in interpreting Article 1, Section 8 of the Florida Constitution, held that while "the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen."<sup>19</sup> State laws regulating the acquisition or possession of guns have been upheld as reasonable exercises of the state's police power. This basis of state regulatory action has been recognized with respect to concealed-weapon statutes and the possession of weapons by proscribed persons such as convicted felons.

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<sup>12</sup> *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282 (N.D. Okla. 2007)

<sup>13</sup> 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." *See generally* 10A FLA. JR. 2D CONSTITUTIONAL LAW §§ 360-69.

<sup>14</sup> *See Kluger v. White*, 281 So. 2d 1(Fla. 1973).

<sup>15</sup> "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." Art. I, s. 8(a), Fla. Const.

<sup>16</sup> "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." U.S. Const. amend. II.

<sup>17</sup> *See* Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R. 4<sup>th</sup> 93; Constitutional right to bear arms—Federal constitution; generally—Relationship of right to bear arms to preservation of a militia 79 Am. Jur. 2d Weapons and Firearms § 6.

<sup>18</sup> *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), cert. denied, 126 S. Ct. 1341 (U.S. 2006).

<sup>19</sup> *Rinzler v. Carson*, 262 so.2d 661(Fla. 1972).

## Contract Clause

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."<sup>20</sup> "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."<sup>21 22</sup>

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.<sup>23</sup> The *Pomponio* Court indicated that the "well-accepted principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

[T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation,

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<sup>20</sup> Article I, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

<sup>21</sup> 10a Fla. Jur. s. 414, Constitutional Law.

<sup>22</sup> The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

<sup>23</sup> The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.



courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

*U.S. Fidelity and Guar. Co.*, 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

The bill restricts business entities from being able to prohibit current employees from bringing legal firearms locked in their motor vehicles into the employer's parking lot. Currently, employers and employees enter into legally valid employment contracts, which provide that the employee agrees as a condition of his/her employment not to bring legal firearms in their motor vehicles on the business's property. This bill appears to invalidate these prior employment contracts and could be challenged as an unconstitutional impairment of contracts in violation of Article I, Section 10 of the Florida Constitution.

### **Substantive Due Process under the United States Constitution**

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides that "no state shall deprive any person of life, liberty, or property, without due process of law." When a state law limits the ability of all persons to engage in some activity, a person affected by that state law can challenge the law by arguing that the limitation by the state violates their substantive due process under the 14<sup>th</sup> Amendment. In determining whether a law violates substantive due process, the court will first identify what "right" is being infringed upon by the state. This allows the court to identify which test will be used to determine whether a state law is unconstitutional under the 14<sup>th</sup> Amendment.

When a law limits any of the "fundamental" rights identified by the U.S. Supreme Court, which include the right to travel, the right to privacy, the right to vote and all of the First Amendment Rights, the court will use the "strict scrutiny" test. Under this test, a law will be upheld only if it is necessary to promote a compelling or overriding government purpose. The court will always consider whether less burdensome means for accomplishing the legislative goals are available. When strict scrutiny is applied, the government will have the burden of proving that the law is necessary. In all other cases, where a law does not affect a "fundamental" right, the court will use the "rational basis" test. Under this test, the court will uphold the law if it is rationally related to a legitimate state interest. Most state governmental actions examined under this standard are upheld unless they are arbitrary or irrational. Under the rational basis test, the law is presumed valid, and the challenger has the burden of proof.

This bill seeks to enact a law limiting the ability of "public and private entities" to prohibit customers, employees, or invitees from possessing a legally owned firearm when the firearm is lawfully possessed and locked inside or locked to a private motor vehicle. This bill also limits the ability of an employer to prevent any customer, employee, or invitee from entering the parking lot of the employer's place of business because the customer's, employee's, or invitee's motor vehicle contains a legal firearm that is out of sight within the vehicle. This bill appears to limit a private property owners "right" to the use and enjoyment of his property and the right to exclude invitees from his property. In order to determine whether this limitation violates the 14<sup>th</sup> Amendment's Substantive Due Process Clause, the court would first have to determine whether this violation is a limitation of a "fundamental" right, as described above.

The U.S. Supreme Court, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), stated that it had "long eschewed heightened scrutiny when addressing substantive due process challenges to government regulation of property rights", and indicated that the "arbitrary and irrational" test must be applied to regulation of property rights. Several federal circuit court and district courts have also held that under a substantive due process analysis the right to exclude and the right to the use and enjoyment of one's property is not a "fundamental right" and would be subject to a rational basis analysis, not a strict scrutiny analysis.<sup>24</sup> Furthermore, the court in *ConocoPhillips Co. v. Henry*, 520

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<sup>24</sup> See *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015-16 (8th Cir.2006); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1580 (10th Cir.1995); *Coalition for Equal Rights, Inc. v. Owens*, 458 F.Supp.2d 1251, 1263 (D.Colo.2006); *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1373 (7th Cir.1982); *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282, 1319 (N.D. Okla. 2007).

F.Supp.2d 1282 (N.D. Okla. 2007), which applied a substantive due process analysis to an Oklahoma law very similar to this bill, ruled that the law “did not affect a fundamental right for the purposes of substantive due process analysis, and the law is only subject to rational basis review.”<sup>25</sup> Therefore, it appears that the limitation on property rights associated with the current bill could possibly be upheld as long as the limitation is rationally related to a legitimate state purpose and not found to be arbitrary or irrational.

### **Substantive Due Process under the Florida Constitution**

Florida’s Constitution also includes a due process provision. Article I, Section IX of the Florida Constitution provides that “No person shall be deprived of life, liberty or property without due process of law.” In Florida, substantive due process protects a person’s property from unfair governmental interference, unwarranted encroachment or taking.<sup>26</sup> The test to be applied in determining whether a statute violates due process is whether the statute bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive.<sup>27</sup> Furthermore, the Florida Constitution does not secure property rights against reasonable and just statutory regulations, restraints, and prohibitions duly administered to conserve the best interests of the public affected by the regulations.<sup>28</sup> All property rights are held and enjoyed subject to the fair exercise of the police power to establish regulations that are reasonably necessary to secure the general welfare of the state.<sup>29</sup> Often, this exercise of police power clashes with the full enjoyment of property by its owner,<sup>30</sup> but in the interests of the public welfare, a property owner must submit to reasonable regulations and limitations upon the use of his or her property, and when private interests and public welfare conflict, the former must give way to the latter.<sup>31</sup>

If the limitations in this bill were found not to be affecting any fundamental rights, they would be upheld by the court as long as they are rationally related to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and are not discriminatory, arbitrary, or oppressive. The courts would uphold the limitations in this bill if the courts found the regulations to be a fair exercise of the state’s policy powers that are necessary to secure the general welfare of the state. In order to survive a state substantive due process challenge, the challenger would have to prove that the limitations in the current bill are not rationally related to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and are arbitrary or oppressive. The State of Oklahoma argued and presented testimony that the Oklahoma gun law, which is similar to HB 503, was passed to “promote the goal of public health, safety, and welfare by allowing citizens to arm themselves in their vehicles, to deter crime, and to protect the community as a whole. The Oklahoma Federal District Court upheld the state law ruling that although the testimony presented probably was not enough to meet a heightened scrutiny analysis and another scheme to achieve these goals probably would have been better, the law was not “wholly irrational” or arbitrary, and therefore, met the rational basis test.

#### **B. RULE-MAKING AUTHORITY:**

Not applicable.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

As a general rule, when drafting legislation, the short title and any definitions included in the bill are placed at the front of the legislation. Both the short title and the definitions are at the end of this legislation.

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<sup>25</sup> *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282, 1319 (N.D. Okla. 2007).

<sup>26</sup> *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991)

<sup>27</sup> *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1215 (Fla. 2000).

<sup>28</sup> *Department of Community Affairs v. Moorman*, 664 So. 2d 930, 20 Fla. L. Weekly S500 (Fla. 1995).

<sup>29</sup> *Harris v. Martin Regency, Ltd.*, 576 So. 2d 1294, 16 Fla. L. Weekly 98 (Fla. 1991)

<sup>30</sup> *Town of Bay Harbor Islands v. Schlapik*, 57 So. 2d 855 (Fla. 1952).

<sup>31</sup> *State v. City of Miami*, 157 Fla. 726, 27 So. 2d 118 (1946).

Certain paragraphs of the legislation seem to be inconsistent. In section 790.251(2)(a), F.S., legal firearms are required to be **locked inside or locked to** a private motor vehicle in a parking lot. In paragraph (2)(d) of section 790.251 F.S., the legal firearm is required to be **out of sight** within the person's motor vehicle.

#### D. STATEMENT OF THE SPONSOR

#### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On Wednesday, March 12, 2008, the Environment and Natural Resources Council adopted a proposed council substitute to HB 503 and passed the bill as a council substitute. The differences between CS/HB 503 and HB 503 are as follows:

- The term employee was redefined to mean a person who possesses a valid license to carry a concealed weapon or firearm and works for salary, wages or other remuneration; is an independent contractor; or is a volunteer, intern, or other similar individual for an employer.
- Employers are prohibited from conditioning employment upon either an employee's or a prospective employee's holding or not holding a license to carry a concealed weapon or firearm, or any agreement by an employee or a prospective employee that prohibits an employee from keeping a legal firearm locked inside a motor vehicle when the firearm is kept for lawful purposes.