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New Indiana Law Restricts Employers from Requiring Employees and Applicants to Disclose Gun Possession and Use

By Jane Ann Himsel and Brian Mosby

Can an Indiana employer with reasonable suspicion ask an employee if he has a gun in his briefcase? Not without opening itself up for liability under Indiana's new Disclosure of Firearm or Ammunition Information as a Condition of Employment Law.

What Does the New Law Prohibit?

Effective July 1, 2011, no "public or private employer doing business in Indiana" may "require an applicant . . . or an employee to disclose information about whether the applicant or employee owns, possesses, uses, or transports a firearm or ammunition, unless the disclosure concerns the possession, use, or transportation of a firearm or ammunition that is used in fulfilling the duties of the employment of the individual." Ind. Code § 34-28-8-6(1).

Employers are also forbidden from conditioning employment "or any rights, benefits, privileges, or opportunities offered by the employment" on an employee's or applicant's agreement to forgo lawfully owning, possessing, storing, transporting, or using a firearm or ammunition. Ind. Code § 34-28-8-6(2).

While it remains lawful for Indiana employers to have a policy prohibiting the possession and use of firearms and ammunition on company property (except in locked vehicles), this new law prohibits employers from taking any action to enforce that policy that might be construed as a requirement to disclose information about employees' or applicants' firearms and use thereof.

Why Should Employers Be Concerned About This Law?

One word: Damages. Individuals who believe an employer has harmed them by violating this law may sue for actual damages, punitive damages, injunctive relief, costs, and attorneys' fees.

Which Employers Does the Law Cover?

This law covers all public and private employers "doing business" in Indiana. The definition of "private employer" is particularly broad. A private employer need not have an Indiana employee to be within this law's reach. If a private employer does business in Indiana and "offers to employ one (1) or more individuals in Indiana," the employer is covered. In other words, an employer

could do business in Indiana solely through independent agents or distributors. If the employer later interviews candidates for a job it intends to create in Indiana, offers a job to an applicant who turns it down, violates the new law during the process, and ultimately decides not to fill the position, the business could still be liable under this law solely because it made the offer of the Indiana job.

More important, unlike Indiana's 2010 Possession of Firearms and Ammunition in Locked Vehicles Act, no employers are excluded from this new statute. Schools, penal facilities, facilities that care for endangered children, colleges and universities, domestic violence shelters, employers subject to the U.S. Department of Homeland Security's Chemical Facility Anti-Terrorism Standards, and public utilities are restricted in the same way as all other employers. None of these entities may require an employee or applicant to disclose firearm and ammunition information or condition employment upon an agreement to forgo activities connected to firearms and ammunition.

Even more disconcerting, the new law reaches beyond the legal possession and use of firearms and ammunition. The law clearly protects all applicants and employees without exception. In other words, if an employer requires an employee to disclose that he is carrying a gun, the employee may sue the employer for damages – even if the employee possesses the gun illegally.

Is There Any Good News?

The very last section of the new law states that “despite” the requirements prohibiting required disclosure, the law does not prevent an employer from “regulating or prohibiting the possession or carrying of a firearm by an employee during and in the course of the duties of employee on behalf of the employer or while on the property of the employer.” It also does not prohibit an employer from “enforcing” such a regulation or prohibition so long as the regulation or prohibition does not reach to firearms or ammunition locked in the glove compartment or trunk, or otherwise out of sight in an employee's locked vehicle.

What Can Employers Do?

Employers may not ask questions about owning, possessing, using or transporting firearms during a job interview. An employer also may not require its current employees to answer questions such as: “Do you own a gun?” “Are you carrying a gun?” “Do you have a gun in your car?” “Do you have a gun in your briefcase, purse, or desk?” An employer cannot deny, suspend, or terminate employment or discipline any applicant or employee who refuses to provide information concerning his or her possession or ownership of a firearm.

What else does “require to disclose” mean? Unfortunately, the implications of the new law are not fully clear, but below are some scenarios for consideration.

- Does an employer “require” disclosure if it sets up a metal detector at the door without prior notice to employees? Does the answer change if the employer provides prior notice of the metal detector?

If an employee with a gun in his pocket arrives at work and finds a metal detector at the door, he must make a choice: (1) he can return to his car and lock his gun up there, which may make him late to work and will, at a minimum, arouse suspicion that he had something he should not have had; (2) he can take the gun out of his pocket before going through, which is clearly “disclosing” the gun; (3) he can walk through the metal detector with the gun on him, which will also be “disclosing” the gun; or (4) he can refuse to go through the metal detector, which will make it crystal clear that he possesses something he should not.

If the employee makes the second or third choice, the employer arguably will have violated the new law. If the employer disciplines the employee for being late after the first choice, or fires him for job abandonment after he makes the fourth choice, has the employer also violated the law? Did the employer “require” disclosure? It is not clear.

If the employer gives prior notice of the metal detector, then the employee has a fifth choice. He can leave his gun at home or locked in his vehicle. If he walks up to the metal detector with the gun on him, he has arguably given his implied consent to the disclosure. It seems less likely the employer has required the disclosure in this circumstance. But if an employee asserts he forgot he had the gun on him and had no choice but to pull it out after the detector went off, can he not also argue that the employer “required” disclosure? Again, it is not clear.

- Does an employer “require” disclosure if it randomly searches desks, lockers, or other employer-owned property? What if the employer searches such property in the employee's presence or with the employee's consent? What if the employer asks an employee if it can search a backpack, briefcase, or purse?

There are multiple forms a search in the private sector might take. Indeed, a search might occur for multiple reasons besides firearms and ammunition – drugs, alcohol, stolen property, etc. If a private sector employer has a policy in place that makes it clear employees have no reasonable expectation of privacy in desks, lockers, and other employer-owned property, then the employer may comfortably conduct a search of these areas outside an employee's presence and without an employee's consent. While an employee might argue that simply by conducting the search, the employer "required" the employee to disclose information about his or her ownership/possession of a firearm, that argument seems quite weak. The argument grows stronger if the employer informs the employee of the search before it occurs. If the employer needs to search a purse, briefcase, backpack, or an employee's person, it is almost always going to obtain consent and, as a result, possibly look even more like it is "requiring" disclosure.

Public sector employers, who must meet the constitutional burden of "reasonable suspicion" before a search, are arguably even more likely to announce their intention to search and thus come closer to "requiring" disclosure.

Simply put, the new law leaves searches of all types in a very grey area.

- Does an employer "require" disclosure if it asks employees to disclose voluntarily the presence of firearms on their persons? In their locked vehicles?

If the employer simply wants to know where the firearms and ammunition are in case of a fire or an attack from the outside, it may not be a violation of the new law to send out a memo saying something similar to:

For safety reasons, the Company would like to know where firearms and ammunition are kept on its premises. If you have firearms or ammunition in the facility or in your car, we would appreciate you letting us know. You are under no obligation to disclose this information, but if you choose to do so, please contact Human Resources. You will not be penalized in any way if you choose not to disclose this information.

But what if employees or rogue supervisors put pressure on others to make the "voluntary" disclosure? When does disclosure transform from voluntary to "required?" More important, if the employer has a "no weapons in the workplace" policy, then making a truthful voluntary disclosure would force people to admit that they are violating the policy – an admission no one is likely to make.

How Does an Employer Comply With This Law and Keep Its Workforce Safe?

An employer can have a policy prohibiting the possession and use of firearms/ammunition on company property (except in locked vehicles), but not take any action that can be construed as a requirement to disclose information concerning such firearms. In other words, an employer can enforce its policy only when the employee voluntarily pulls out a gun to show it off, voluntarily tells a co-worker he has a gun, or accidentally drops a gun out of a purse, briefcase, or backpack. Understandably, this may not be the most attractive approach to most employers.

Employers who wish to be more aggressive may:

- Install metal detectors with significant advance notice, understanding that the use of metal detectors may lead to arguable requirements to disclose with respect to employees' objecting to submitting to such a detector, as discussed above.
- Ask employees to disclose voluntarily their intention to possess a firearm/ammunition, attach no discipline to an employee's refusal to disclose, and monitor behavior very closely to ensure that there is no peer or rogue supervisor pressure to disclose. If an employer has a "no weapons in the workplace" policy, such voluntary disclosure would need to be limited to weapons in vehicles (which is the required exception to a lawful "no weapons" policy).
- Choose to conduct random searches of the property for contraband, if a private employer, and both private and public sector employers could consider conducting reasonable suspicion searches outside of the targeted employee's presence.

As described above, however, all of these possibilities clearly carry the risk that the employer may become a "test case" for the new law.

A few other practices may be helpful:

- Listen to your employees. Employees talk about hobbies, weekend activities, etc. If you have a gun enthusiast in your ranks, this information is likely to be shared. In other words, voluntary disclosure may happen if you are listening for it.

- Do more than just distribute a “no guns” policy. Have a comprehensive policy prohibiting all weapons and ammunition on company property (with the carve-out for firearms and ammunition locked in cars) and a comprehensive workplace violence policy. Have employees sign off on both policies. Train employees on both policies. If the company believes it is better off without guns in its building, now may be the right time to explain the basis for that belief to employees.
- Consider requiring all employees to sign a form pledging that they will not bring a firearm or other weapon into the workplace in the future. This is not requiring disclosure of firearm or ammunition information, but a refusal to sign may put the employer on notice of potential future issues.

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