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Employer considerations for navigating evolving gun laws

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In 2022, gun laws remain top of mind for many Americans, but particularly employers. The Supreme Court ended its 2022 term with a series of bombshell opinions, and one opinion in particular may indirectly impact gun rights in the workplace.

Bruen tested the limits of Heller's caveat, examining exactly what type of gun restrictions could be enacted in "sensitive places."

The Supreme Court's opinion in *New York State Rifle and Pistol Association v. Bruen*[1] resulted in the overturning of a century-old New York gun safety law, which required a license to carry concealed weapons in public places. The Supreme Court ruled that this law was unconstitutional, meaning that New York's law — and similar laws covering roughly a quarter of the people in the United States — are no longer viable.

This article discusses the implications of *Bruen* for employers, as well as recent congressional and state action related to gun safety, before providing a general overview of workplace-related gun laws on a state-by-state level.

New York State Rifle & Pistol Association v. Bruen

Bruen was the first significant Second Amendment decision from the Supreme Court since *District of Columbia v. Heller* was decided in 2008. In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to possess a handgun for traditionally lawful purposes disconnected with service in a militia, such as the self-defense of one's home.

The Supreme Court also acknowledged, though, that "the right to bear arms" is not a right without limits. To this end, the Court held that gun restrictions in "sensitive places" — such as areas outside of one's home, like schools, churches, or other public places — remained permissible.

Bruen tested the limits of *Heller*'s caveat, examining exactly what type of gun restrictions could be enacted in these "sensitive places." The facts of *Bruen* were as follows.

Petitioners are two members of the New York State Rifle & Pistol Association, each of whom applied for a license to carry a firearm on a concealed basis in New York for the purpose of self-defense. Under the challenged New York law, a resident could obtain an unrestricted license to have and carry a concealed firearm outside their home or business for self-defense only if they could establish, among other things, that "proper cause" for the license existed.

New York courts defined proper cause as requiring the applicant to "demonstrate a special need for self-protection distinguishable from that of the general community."[2] If an applicant could make that showing, they would receive a license for public carry, which allowed the applicant to carry a firearm for a limited purpose.

Applying this standard, a licensing officer denied both of the petitioners' applications, finding that neither individual met the "proper cause" standard dictated by New York law.

Seven states have similar gun safety laws, and at least one (Maryland) has already suspended its law in the wake of the Bruen decision.

The petitioners subsequently filed suit against the state official who oversees the process of licensing applications, alleging their Second and Fourteenth Amendment rights were violated when the licensing officer denied their unrestricted-license applications for failure to meet the proper cause requirement. They argued that New York's law violated the Second Amendment by requiring that applicants for unrestricted concealed-carry licenses demonstrate a special need for self-defense.

The district court dismissed the suit, and the United States Court of Appeals for the Second Circuit affirmed, relying on a previous Second Circuit opinion holding that New York's proper cause requirement did not violate the Second Amendment because it was substantially related to an important governmental interest. The petitioners then appealed to the U.S. Supreme Court.

The Supreme Court began its analysis by rejecting the two-step framework that the Second Circuit had applied for analyzing Second

Amendment challenges, which combined history with a means-end scrutiny. It did so because, according to the Court, applying means-end scrutiny would result in interest balancing by judges, and "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."

The Court further held that precedent did not support the two-step approach, because past methodology centered on constitutional text and history. The Court emphasized that, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. Thus, to justify a firearm regulation, the government must show that the regulation is "consistent with this Nation's historical tradition of firearm regulation."

While the new [federal] law presently remains in full effect, one of the impacts of Bruen *is that many gun control restrictions previously believed to be permitted may now be constitutionally suspect.*

The Court ultimately held that New York's concealed-carry licensure restrictions did not meet this standard and that New York's proper cause licensure requirement was not sufficiently rooted in an American tradition to pass muster.

The Court also found that New York's law provided licensure officials too much discretion and subjectivity in deciding whether someone applying for a concealed carry license had met the state's proper cause requirements. As such, the proper cause requirement violated the Second and Fourteenth Amendments by preventing citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

Bruen related specifically to New York's gun licensure law, but the ramifications of its holding will likely be felt in other states as well. Seven states have similar gun safety laws, and at least one (Maryland)[3] has already suspended its law in the wake of the *Bruen* decision.

Further, gun restrictions that implicate the Second Amendment in any jurisdiction must now comply with the standard set forth in *Bruen*, which requires "affirmative[ ] pro[of] that its firearms regulation is part of the historical tradition."

Recent federal legislation on gun control

Around the same time the Supreme Court issued its *Bruen* decision, the U.S. Congress passed its first gun safety restrictions in decades. Specifically, the same day the Supreme Court issued the *Bruen* opinion, June 23, 2022, the Senate passed a bipartisan gun safety bill aimed both at increasing investments in the country's mental healthcare system and preventing dangerous individuals from accessing guns. The next day, the House passed the bill, and on June 25, 2022, the bill was signed into law.

The legislation contains several restrictions relating to gun safety, including:

- Expanding background checks for potential gun buyers under 21 years old by providing authorities with up to 10 business days to study mental health and juvenile records.
- Authorizing $750 million to help states implement and run crisis intervention programs, including to enact "red flag" laws, which provide mechanisms to take guns out of the hands of those who pose a threat to themselves or others.
- Providing for millions of dollars to be allocated to school safety.
- Closing "the boyfriend loophole," meaning that anyone who is convicted of a domestic violence crime against someone with whom they have a "continuing serious relationship of a romantic or intimate nature" is prohibited from possessing a gun. Previously, this restriction applied primarily to spouses, partners who cohabitate with, or with whom the parties shared children, but not other forms of serious interpersonal relationships.
- Investing in mental health resources, including millions of dollars to be allocated to states to run mental health and drug courts, as well as other intervention programs.

To be sure, at least some of these restrictions could come under attack on similar grounds to New York's now-invalid gun licensure law. Challengers could argue that a red flag law or ban on domestic abusers buying firearms are not "part of the historical tradition," and thus run afoul of *Bruen*. While the new law presently remains in full effect, one of the impacts of *Bruen* is that many gun control restrictions previously believed to be permitted may now be constitutionally suspect.[4]

States take action

This unsettled landscape has not stopped states from enacting new gun control legislation in response to *Bruen*. Approximately half a dozen states with similar laws to NY are now considering their next steps, and several states have already signed new bills into law in the wake of *Bruen*.

Those states include:

- *New York*. Governor Hochul has signed two laws: (1) banning guns in certain places, including subways, mass transit, theatres, stadiums, museums, casinos, polling places, parks, and bars and restaurants (unless they post a sign explicitly allowing guns) — although a lawsuit has already been filed challenging the law and characterizing it as "blatantly unconstitutional"; and (2) making it a crime to carry a firearm onto private property unless the owner has posted signage permitting firearms on the property (effective September 1, 2022). In addition, NY bans gun permits for those with a history of dangerous behavior and requires background checks for ammunition purchases.

- *California*. Governor Newson recently signed into law two bills: (1) restricting firearms that do not have a unique mark of identification or serial number, and (2) making companies liable for marketing certain types of firearms to minors. California lawmakers have also proposed a law that requires an assessment of a concealed carry applicant's potential for danger. Such assessments would include an examination of the applicant's arrest records, criminal convictions, and restraining orders. Also on the table in California is a plan to ban concealed weapons in places deemed "sensitive," such as parks, amusement parks, and sporting venues. Lastly, California enacted a "bounty" law similar to one at least temporarily upheld in the context of abortion by the U.S. Supreme Court, which allows Californians to sue anyone who distributes banned assault weapons or ghost guns.
- *New Jersey*. Governor Murphy signed into law a bill that prohibits certain rifles, increases penalties for crimes for manufacturing and constructing ghost guns, requires gun retailers to sell microstamping-enabled firearms, mandates safety training to purchase a firearm, regulates handgun-ammunition sales, and limits the use of body armor to certain individuals (such as those in law enforcement and the armed services).
- *Additional States*. Hawaii, Massachusetts, Maryland, and Rhode Island representatives have said they are currently analyzing the *Bruen* ruling to determine how it may impact their gun laws.

On the other end of the spectrum, even before the *Bruen* decision, 17 states had no restrictions on carrying a concealed firearm, and 33 states allowed concealed carry with a permit. In total, 44 states now allow for open carry of some or all firearms (handguns, long guns, or both).[5]

Implications for employers

While the *Bruen* decision lessens the burden on individuals to obtain a concealed carry permit from the state (a public entity), it has little direct impact on **employers**. Currently, no state law restricts an employer, in its capacity as a private entity, from prohibiting weapons in the workplace, so long as the employer complies with applicable state law. Generally, those laws fall into two buckets: requiring signage, and/or permitting employees to bring firearms into parking lots on company property.

Such laws were not at issue in the *Bruen* case, and they remain in effect. Because it is plausible to conclude that the *Bruen* case will lead to an increased number of individuals with a concealed carry permit, employers may want to revisit their firearm policies as permitted by current law and communicate to employees the scope of restrictions (if any) the employer may impose on the carrying of firearms on company property.

Signage. The following states require the posting of signage if a property owner wishes to prohibit firearms, although the precise contours of the signage requirement differ from state to state:

- Alabama
- Alaska
- Arizona
- Arkansas
- Colorado
- Illinois
- Kansas
- Kentucky
- Minnesota
- Mississippi
- Nebraska
- New Mexico
- North Carolina
- Ohio
- Oklahoma
- South Carolina
- Texas
- Utah
- Virginia
- Wisconsin

Florida's laws do not mention the requirement that a sign be posted to prohibit the carrying of firearms inside a premises, but FL Statute 790.06 lists where you are not permitted to carry a concealed weapon (*e.g.*, police stations, prisons and jails, courthouses, polling places, governing body meeting locations, schools, career centers, colleges and universities, airports, and bars).

Nevada's laws do not explicitly address an employer's right to ban firearms from the workplace, but do prohibit carrying in a public airport or a public school or childcare facility. Employers may also ban firearms in buildings that have metal detectors if a sign is posted at the public entrance that no firearms are allowed in the building, with some limited exceptions.

Although not within the scope of this article, it is important to emphasize that federal laws exist that prohibit the carrying of firearms (or any weapons) into federal facilities and courts.

Parking Lots. Additionally, multiple states prohibit or restrict employees from storing firearms in privately owned vehicles parked on employer property. Other states have laws that give employees the right to keep firearms in their private vehicles even when they are parked on employer-owned property, though some of those

states have limitations on where the firearm must be stored inside the vehicle.

In total, 24 states have some form of a parking lot law that regulates the storage of firearms in a privately owned vehicle on company property,[6] and Idaho, although it does not have a parking lot law, gives immunity to employers that allow employees to store firearms in their cars in the employer's parking lot(s).

Out of those 24 states, 10 (Alabama, Arizona, Arkansas, Georgia, Illinois, Indiana, Maine, Tennessee, Utah, and West Virginia) require that the firearm be stored out of sight. While Louisiana does not require this, it does permit an employer to have a policy that the firearm be stored out of site. Nineteen of these states also require the vehicle be locked or that the firearm be in a locked compartment.

Ten states (Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Louisiana, Maine, Mississippi, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, West Virginia, and Wisconsin) grant employers immunity from liability for any injuries resulting from the storage of a firearm in a vehicle in the employer's parking lot.

Currently, no state law restricts an employer, in its capacity as a private entity, from prohibiting weapons in the workplace, so long as the employer complies with applicable state law.

In addition, Florida, North Dakota, and West Virginia prohibit inquiries about firearms that may be stored in vehicles, and prevent employers from searching employees' vehicles for firearms, although searches may be conducted by law enforcement officials.

Many of these states provide at least one exception to their parking lot laws that permit the employer to prohibit the storage of firearms in a vehicle in a parking lot. The most common exceptions include if the vehicle is owned or leased by the employer, or if firearms are prohibited by federal law.

Other exceptions are for certain types of employers that require additional levels of safety like schools, child care centers, detention and correctional facilities, nuclear stations, employers who work with explosives or combustibles, and employers who work in national defense, aerospace, or homeland security.

Recommendations for employers

Faced with an area of law that is both fast-moving and of great concern for many Americans, many employers find themselves confronting whether they should implement a weapons-in-the-workplace policy and, if so, what that policy can or should look like. Will the employer ban all weapons — whether held by customers or employees — from its premises?

As noted above, no state law restricts an employer, in its capacity as a private entity, from prohibiting weapons in the workplace, so long as the employer operates within the confines of the parking lot and signage laws previously described. Since we predict that gun-related laws will continue to proliferate, we recommend that employers consult with legal counsel to ensure their gun-law policies do not run afoul of any applicable state or federal law.

Notes

[1] https://bit.ly/3B0RTuG

[2] *E.g.,In re Klenosky*, 75 App. Div. 2d 793, 428 N.Y.S. 2d 256, 257.

[3] https://bit.ly/3Ruup8l

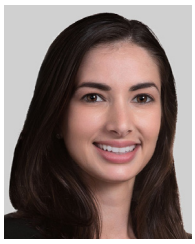
[4] For example, the Town of Superior in Colorado had adopted a ban on certain categories of firearms, including assault weapons or large-capacity firearms. Similar laws have been adopted in other jurisdictions, including by the U.S. Congress under the Assault Weapons Ban of 1994. Litigants challenged this ordinance, relying heavily on *Bruen*, and the Court — while expressing "sympath[y] to the Town's stated reasoning" — nonetheless enjoined the law, on grounds that it was "unaware of historical precedent that would permit a governmental entity to entirely ban a type of weapon that is commonly used by law-abiding citizens for lawful purposes, whether in an individual's home or in public." *See Rocky Mountain Gun Owners v. Town of Superior*, Case No. 1:22-cv-01685-RM (D. Colo. July 22, 2022).

[5] This includes Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[6] Ohio recently passed S.B. 215, a new firearm law that permits all qualifying adults to legally carry, possess or conceal a handgun that is not a restricted firearm without a license, background check or training. A *qualifying adult* is a person who is 21 years of age or older, who is not legally prohibited from possessing or receiving a firearm under federal law or state law, and who satisfies various criteria listed in Ohio Revised Code (R.C.) 2923.125. A *restricted firearm* means a firearm that is a "dangerous ordnance" or otherwise prohibited under Ohio law. Consistent with the state's prior law, the new law allows employers to enforce policies that prohibit employees from carrying firearms on company property and in company-owned vehicles. That being said, this new law does not address Section 2923.1210 of the Ohio Code, which prohibits employers from enforcing rules that prevent employees from keeping firearms in their privately-owned vehicles on company property.

About the authors





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