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## The GSH 60-Second Memo

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### Guns in the Workplace: A Refresher

By Bethany C. McCurdy, Esq.

For many people, the advent of fall means the start of hunting season and weekend hunting trips. And for some employees, those hunting trips start right after the workweek ends. Given this yearly ritual in many states and the recent press attention on cases about the right to bear arms, it is worth taking time to give employers a refresher of their right to prohibit guns both at work and on work property.

In April 2009, Wisconsin Attorney General J.B. Van Hollen issued an advisory memorandum to all prosecutors in the state, advising them that a citizen cannot be arrested for and charged with disorderly conduct merely for openly carrying a firearm. The memorandum was issued in an effort by the Attorney General's office to help reconcile Wisconsin's constitutional right to "to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose," with the state's disorderly conduct statute. (Wisconsin law prohibits concealed carry.)

While the advisory opinion does not have the force of law, its effects have been far reaching. However, despite the far-reaching consequences of the advisory memorandum on state prosecutors, it does not bar private employers from prohibiting open carry by employees at the workplace. After all, the right to bear arms, as with most constitutional rights whether state or federal, applies differently within the workplace than it does outside the workplace. Consider freedom of speech. While the government generally may not prohibit you from saying something or punish you for saying it, your employer certainly can. Of course, that is a

simplification. Longstanding law interprets the freedom of speech, as well as other constitutional rights, to apply to not only the federal government, but also the states, state agencies, municipalities, and, in certain circumstances, private employers receiving public funds or running public programs.

A few federal constitutional rights actually are protected even from private actors. Technically, a private citizen who infringes another's right to vote does not violate the Fifteenth Amendment, because it only bars the federal government and the states from denying a citizen the right to vote. But the 1957 Civil Rights Act included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections, and the 1965 Voting Rights Act went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. So, an employer can violate an employee's constitutional right to vote, even though the employer is not the federal government or a state. However, there are no comparable provisions in the Wisconsin statutes that prevent one private citizen (employer) from infringing the right of another private citizen (employee) to keep and bear arms.

Prohibiting employees from carrying weapons in the workplace seems like a simple question, but what about the ability of employers to prevent employees from having weapons in their cars on work property, such as in the parking lot? In many states, this is an issue of contention. Proponents of these laws contend that, without such laws, workers are effectively disarmed on the way to and from work. Opponents contend that prohibiting firearms in employer-owned parking lots prevents workplace violence.

Wisconsin has no "Guns-at-Work" law, but at least thirteen states (Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, Oklahoma, and Utah) guarantee employees' rights to keep firearms in their cars in employer-owned parking lots. Employers in those states should consult with their attorneys before attempting to ban weapons in employee parking lots.

Of course, the right to keep and bear arms, and the right to openly carry a firearm, is for all practical purposes, merely a defense that a citizen can raise if charged in criminal court. So far, no one in Wisconsin has successfully sued even police officers who have infringed the right. Earlier this year, a federal district court in Wisconsin dismissed a civil rights suit brought by a customer who merely entered a retail store with a gun in a holster. The customer was arrested for disorderly conduct, notwithstanding the Wisconsin Attorney General's memorandum, and sued the officer and the village. Dismissing the case, the court wrote, "No reasonable person would dispute that walking into a retail store openly carrying a firearm is highly disruptive conduct which is virtually certain to create a disturbance. This is so because when employees and shoppers in retail stores see a person carrying a lethal weapon, they are likely to be frightened and possibly even panicky. Many employees and shoppers are likely to think that the person with the gun is either deranged or about to commit a felony or both." *Gonzalez v. Village of West Milwaukee*, 2010 WL 1904977 (E.D. Wis.,

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2010).

As the issue of Wisconsin's loosely defined open-carry law continues to gain attention within the state, employers should be prepared for the matter to arise in their own workplace. It is advisable for companies to review their policies with regard to weapons in the workplace. Policies should clearly define the limitation, ideally the prohibition, of firearms and other weapons from the workplace and all employer premises to the extent possible under the law. Employers should also ensure the policy includes the consequences for violation and be sure they are consistent in the application of the policy. As always, it is important the policy is clearly communicated to employees before an incident occurs.

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