

**AMERICAN BAR ASSOCIATION
SPECIAL COMMITTEE ON GUN VIOLENCE
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association supports the traditional property rights
- 2 of private employers and other private property owners to exclude from the workplace
- 3 and other private property, persons in possession of firearms or other weapons and
- 4 opposes federal, state, territorial and local legislation that abrogates those rights.

REPORT

Background

On July 9, 2003, a disgruntled factory worker at a Lockheed Martin assembly plant in Meridian, Mississippi, retrieved a shotgun and semi-automatic rifle from his vehicle and went on a killing rampage in the plant, killing five and injuring nine co-workers before taking his own life. Afterward, investigators recovered three additional guns from the killer's truck, which was parked 50 feet from the factory. This example is just one of thousands of incidents in which supervisors and co-workers have been shot by disgruntled employees, domestic violence has spilled over into the workplace, or other incidents of gun violence have taken place on business premises.

Workplace violence and the prominent role of guns in workplace injuries and death are serious problems. Each year, on average, at least 1,000,000 people in the United States are victims of workplace violence and 1,000 of these are victims of homicide, according to the Bureau of Labor Statistics. The Bureau estimates that firearms are used in close to 80 percent of workplace homicides and that nearly 90 percent of workplace firearm homicides take place in the private sector. Murder was the third leading cause of occupational fatalities in 2003, but the leading cause of death for women in the workplace.¹

Many companies have responded to this threat by prohibiting individuals from having weapons on their property, particularly in parking lots or places of business.

A legislative campaign is underway, however, to erode the rights of private property owners by prohibiting them from barring weapons on their property. In particular, state legislatures are being lobbied to enact statutes to require employers to permit employees to bring firearms on to company property. Legislation modeled after a first-of-a-kind statute enacted in Oklahoma in 2004 and amended in 2005² is being used in this nationwide effort to enable gun owners to possess and carry guns on the private property of others, in derogation of the rights of employers and other private property owners to determine the terms of entry on their land and property. The legislation is characterized by some as "forced entry" legislation because it seeks to override the traditional right of a private property owner to exclude whomever he or she chooses from his or her property and determine the terms on which others may enter on or use that property.

The Oklahoma law was enacted in response to the 2002 firing of some employees by the Weyerhaeuser Corporation after the employees were found in breach of a company policy prohibiting gun possession on company property. The fired employees had been

¹ Women's Safety and Health Issues at Work, National Institute for Safety and Health, available <http://www.cdc.gov/niosh/topics/women>.

² See Okla. Stat. tit 21 Section 1289.7a.

found with firearms in their cars in the company parking lot. In 2004, largely in response to the controversy that grew out of the Weyerhaeuser firings, the Oklahoma legislature enacted a new law that strips employers and other property owners of the legal power to regulate possession of firearms on their own property. It provides: “no person, property owner, tenant, employer, or business entity shall maintain, establish, or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle.... on any property set aside for any motor vehicle.”

A decision by the Court of Criminal Appeals of Oklahoma has held that the Oklahoma law is a criminal statute that subjects violators to imprisonment in the county jail or a fine, or both. *Whirlpool Corp. v Henry*, 110 P.3d 83, 85 (Okla. Crim. App. 2005). It also creates a civil cause of action for persons seeking to enforce the statute against persons who ban gun possession on their property and provides for the award of attorney’s fees and court costs to persons who successfully sue to enforce the law.

A number of Oklahoma-based companies challenged the forced entry statute in federal court, including ConocoPhillips, a company that has become the subject of a nationwide boycott promoted by the gun lobby. Plaintiff corporations maintained that the state statute conflicts with federal duties owed to employees under the Occupational Health and Safety Act, and that it violates constitutionally protected private property rights and due process rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution. A temporary restraining order granted by the federal court in 2004 against enforcement of the Oklahoma statute remains in effect at this writing. Meanwhile, legislation based on the Oklahoma forced entry statute has been introduced in most state legislatures during the 2006 legislative terms and is expected to be reintroduced in 2007. Some of the proposed laws apply only to parking areas; others are more broad and would affect all private property owners, including homeowners.

The ready accessibility of firearms in any work environment creates potential liabilities and risks that even the most conscientious business owner cannot protect against and should not be forced to shoulder. For this reason, laws that prohibit employers from excluding from the workplace persons possessing firearms violate the due process and property rights of private property owners and must be rejected on these grounds.³

³ Forced entry statutes typically not only prevent employer property owners from excluding persons it chooses to exclude from its property, they force them to admit persons to its property who are in violation of the Brady Handgun Violence Prevention Act (“Brady Act”), 18 U.S.C. §922(g). Section 922(g) prohibits nine (9) categories of persons from possessing firearms: (1) a felon; (2) a fugitive from justice; (3) an unlawful user of or person addicted to any controlled substance; (4) a mental defective or one who has been committed to a mental institution; (5) an alien; (6) a person dishonestly discharged from the Armed Services; (7) a person who has renounced U.S. Citizenship; (8) a person subject to a domestic restraining order; and (9) a person convicted of a misdemeanor crime of domestic violence. Yet, forced entry statutes would force employer businesses to admit persons in categories (2) – (9) onto Plaintiff’s property with firearms in their vehicles who are engaged in criminal conduct *i.e.*, possession of handguns in violation of the Brady Act.

Analysis

Forced Entry Laws Infringe on Constitutionally Protected Property Rights

Forced entry laws violate fundamental rights that are guaranteed by the due process clause of the United States Constitution and State constitutions. Such enactments deprive employer business owners of their fundamental property and liberty rights.⁴ It is well established that state legislatures cannot authorize a violation of either the federal constitution or their state constitution. *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573, 77 L.Ed.2d 22 (1983). It is equally well-established that owners of private property have property and liberty rights that are protected from improper state action by the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. *See Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917). The due process clauses of the Fifth and Fourteenth Amendments provide, respectively, as follows:

No person... shall be deprived of life, liberty, or property, without due process of law (Fifth Amendment);

nor shall any state deprive any person of life, liberty, or property, without due process of law (Fourteenth Amendment).

Forced entry laws violate the traditional rights to exclude others from one's private property, as well as the liberty to decide how, whether and when to do so. Property rights, especially real property rights, "have always been fundamental to and part of the preservation of liberty and personal freedom in the United States." David L. Callies and J. David Breemer, "*The Right to Exclude Other from Private Property: A Fundamental Constitutional Right*", 3 Wash. U. J. L. & Pol. 39 (2000). In *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), the United States Supreme Court referred to the property owner's "right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176. Sixty years earlier, Justice Brandeis made a similar statement in *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918), when he remarked that "[a]n essential element of individual property is the legal right to exclude others from enjoying it."

This same principle has also been recognized numerous times by various courts and other legal authorities. *See, e.g. Hodel v. Irving*, 481 U.S. 704, 716, 107, S.Ct. 2076, 2083, 95 L.Ed.2d 668 (1987) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed. 2d 868 (1982) ("the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of rights"); *Hall v. City of Santa Barbara*,

⁴ Reference to property rights in the proposed recommendation and report includes tenants, lessees and other assignees of such rights.

833 F.2d 1270, 1277 (9th Cir. 1986) (same); and Jan Laitos, *Law of Property Protection*, § 5.03[A] (1999) (the right to exclude is one of those property “rights valued so highly that the abolishment will result in the offending law being declared unconstitutional”). In *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991), the Federal Circuit described the nature of the property owner’s right to exclude, as follows: “In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the government. The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual’s right to be let alone – the ability to exclude freeriders – is now understood as essential to economic development, and to the avoidance of wasting of resources found under common property systems.”

Similarly, Professor Thomas W. Merrill wrote as follows regarding the property owner’s right to exclude: “The right to exclude others is more than just ‘one of the essential’ constituents of property – it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e. a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.” “*Property and the Right to Exclude*”, Thomas W. Merrill, 77 Neb.L.Rev. 730 (1998). See also Restatement of Property Section 7 (1936) (possessor interest in land exists when person has such control over it as to be able to exclude other members of society in general from the land).

Numerous state courts have recognized this same principle regarding the fundamental nature of a property owner’s right to exclude. See, e.g., *Sammons v. American Automobile Association*, 912 P.2d 1103, 1105 (Wyo. 1996) (“[o]wnership of property implies the right of possession and control, and includes the right to exclude others... exclusive possession is a fundamental element of property ownership...”); *Gardener v. New Jersey Pinelands Commission*, 593 A.2d 251, 262 (N.J. 1991) (distinguishing a restrictive covenant “because it does not impair plaintiff’s right to exclude others from his land, arguable a more fundamental element of the bundle of property rights than even the freedom to use property as desire.”); *Alderwood Associates v. Washington Environmental Council*, 635 P.2d 108, 120 (Wash. 1981) (“[t]he right to exclude others is an essential stick in the bundle of property rights”).

Forced entry laws deprive employer businesses and other property owners of their fundamental right to exclude individuals who possess firearms from their property. Further, such laws place substantial burdens on employer businesses by subjecting them to the risks associated with firearms in their workplaces without due process. Therefore, these forced entry laws should be subject to a “strict scrutiny” test in determining whether they are constitutional. *Lange – Kessler v. Dept. of Education of the State of New York*, 109 F.3d 137, 141 (2d Cir. 1997). These laws serve no compelling state interest because these laws increase, rather than decrease, the risk of personal injury in the workplace. Arguably, they do not even meet a rational basis test. Certainly if personal safety is the policy objective of the forced entry laws, that objective can be achieved by much less restrictive means than the forced entry law. *Dunn v. Blumstein*, 405 U.S. 330, 343, 92

S.Ct. 995, 1003, 31 Ld. 2d 274 (1972); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed. 2d 772 (1997); and *United States v. Deters*, 143 F.3d 577 (10th Cir. 1998).

Such legislation fails to serve the state interest of public safety. Even those forced entry laws that prohibit private property owners from excluding firearms from only parking areas have no rational basis because firearms are just as capable of being fired in a parking area as they are inside a building or home. Thus, while the state interest in public safety is proper, such laws not only fail to serve that state interest, they are plainly not the least restrictive measures that could be used to serve that interest. Accordingly, forced entry legislation clearly cannot satisfy the strict scrutiny test.

Forced Entry Laws May Be a Taking of Private Property

The prospect of enactment of forced entry law raises the issue of governmental “taking” – governmental action that is a physical taking of property without just compensation.⁵ As already noted, forced entry laws override or “take” rights to control entry and use of one’s private property. In effect, the forced entry laws are a mandatory easement for individuals with weapons, taking the right of property owners to exclude such individuals. Forced entry laws result in heightened duties to supervise those granted entry onto property in possession of firearms and impose exposure to liability as a result of increased risk of harm on the property. The taking by governmental policy in this case imposes costs and shifts risks of additional costs to private property owners without compensation. As such, the requirement that a business must allow weapons in its private parking lot may be considered a physical invasion or otherwise violate the Fifth Amendment. If found to be a compensable taking, the result is likely to end with the relief that courts award as compensation to affected owners, as required by the Fifth Amendment’s Taking Clause. Enactment of forced entry laws will inevitably result in lengthy and complex litigation. See Laurence H. Tribe, *American Constitutional Law*, at 604-05 n.33 (2d ed. 1988) (“[U]ncompensated physical invasions by third parties under the express authorization of government are just as unconstitutional as are takings in which the government itself is the trespasser”).

Forced Entry Laws Conflict With Federal And State Obligations to Provide a Safe Workplace.

The federal Occupational Health and Safety Act of 1970 (OSHA) requires that “each employer furnish to each of his employees...a place of employment ..free from recognized hazards that are likely to cause death or serious harm to his employees.” This statutory duty applies to all private employers in the United States.

⁵ See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucan v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The courts have interpreted this duty to include criminal acts of violence in the workplace among other “feasibly preventable” hazards. At present, employers have adopted policies that forbid employees from possessing firearms on company property as a means of fulfilling this statutory duty. Once subject to a forced entry statute, these employers would be required to permit employees access to guns on business premises, including parking areas that could be accessed readily by angry or disgruntled employees. These employers would be unable to meet their duty under OSHA if they comply with that forced entry statute.

The vast majority of employers are also subject to state workplace safety statutes and regulations that impose a duty to provide a safe workplace. In the absence of state statutory law, the common law has generally imposed a duty of care on employers to protect the safety of invitees on their property. If employers are required to permit persons in actual or constructive possession of guns on their premises, they open themselves up to greatly increased risk that incidents of gun violence will occur on their property for which employers may be held liable. Employers would also be required to expend substantial sums of money to ensure that employees who bring guns on the premises are supervised more closely. When employers are aware of a safety hazard, such as guns on their property, the courts have held that they must take reasonable steps to ensure that the guns are safeguarded and secured. Employers in states that have not adopted forced entry laws generally avoid potential legal liability by prohibiting the possession of guns on the business premises. Under the forced entry statutes, employers no longer have this option unless they wish to risk criminal and civil liability under the forced entry law.

Numerous courts have also addressed this issue. See *Dunn v. Nordstron, Inc.* No. IP 98-1599 C-M/S, 2000 US Dist. LEXIS 20513 at 18, 2000 WL 33309373 at 6 (S.D. Ind June 27, 2000)(terminating employee for violating company prohibition against bring firearms onto premises is legitimate and justifiable reason for termination), aff’d in part and rev’d in part on other grounds, 260 F.3d 778 (7th Cir. 2001); *Misco, Inc. v. United Paperworkers Int’l Union*, 768 F.2d 739, 742-43 (5th Cir. 1985) (“In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law, but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it is scarcely open to doubt that rules forbidding the introduction of ...firearms (loaded or not) [onto plant premises] would be valid...”), rev’d on other grounds, 484 US 29 (1987)

ABA Policy

The Association has adopted broad policy urging employers to take action to reduce workplace violence and has adopted numerous recommendations aimed at reducing gun violence in our society but has not addressed the issue raised by legislation to require employers to permit gun possession on employer premises.

The ABA House of Delegates at the 1998 Annual Meeting approved a recommendation sponsored by the National Association of Women Lawyers, the National Association of Women Judges, the Criminal Justice Section, the Tort and Insurance Practice Section and the Commission on Domestic Violence... “urging employers to address work place violence by adopting policies and practices to help them better prevent and manage on-site violence and threats.” While this policy provides support for employer actions to reduce workplace violence, it does not address policies related to state legislation to override employer property rights to permit employees to possess firearms on employer or other private property; nor do the numerous ABA-approved recommendations regarding policies to reduce gun violence. A new resolution is needed for the Association to express its views and advocate sound policy on this issue.

Respectfully Submitted,

John C. Cruden
Chair, ABA Special Committee
on Gun Violence
February 2007

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Special Committee on Gun Violence

Submitted By: John C. Cruden

1. Summary of Recommendation(s).

The recommendation supports the traditional right of private employers and other private property owners to exclude from the workplace and other private property, persons in possession of firearms or other weapons and opposes federal, state, territorial and local legislation to override those rights.

2. Approval by Submitting Entity.

The Special Committee on Gun Violence approved the recommendation in November 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA House of Delegates has approved numerous recommendations over several decades addressing policy regarding the sale, transfer and possession of firearms. The House of Delegates approved a recommendation in August 1983, reaffirmed in February 1994, supporting effective and proven measures to control the possession of firearms. The proposed recommendation has is consistent and complementary to existing Association policy.

5. What urgency exists which requires action at this meeting of the House?

Adoption of this policy will provide a basis for the ABA to advocate its views during upcoming 2007 state legislative sessions during which forced entry legislation will be considered.

6. Status of Legislation. (If applicable.)

Legislation is expected to be introduced during 2007 legislative sessions in the majority of state legislatures.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

Concurrently with submission of this recommendation and report to the ABA Policy Administration Office for calendaring on the February 2007 House of Delegates agenda, it is being circulated to the following ABA entities: Commission on Domestic Violence, Commission on Women in the Profession, Section of Real Property, Probate and Trust Law, Section of Labor and Employment Law, Tort Trial and Insurance Practice Section, Criminal Justice Section, Legal Services Division, Young Lawyers Division and Senior Lawyers Division.

10. Contact Person. (Prior to the meeting.)

John C. Cruden
Chair, Special Committee on Gun Violence

11. Contact Person. (Who will present the report to the House.)

John C. Cruden
950 Pennsylvania Ave.
Washington, DC 20530
Tel: 202/514-2718
Fax: 202/514-0557
Email: john_cruden@usdoj.gov

EXECUTIVE SUMMARY

1. Summary of the Recommendation

The recommendation supports long-established common law rights of private property owners, including private employers, homeowners and lessees or tenants, to exclude entry onto workplace or other private property persons in possession of firearms or other weapons, and opposes federal, state, territorial and local legislation to abrogate those rights.

2. Summary of the Issue that the Resolution Addresses

The issue the resolution addresses is that of “forced entry” legislation first passed by the State of Oklahoma in 2004 that seeks to override or nullify common law property rights of employers to prohibit employees from bringing firearms on to employer parking lots. Legislation based on the Oklahoma statute or to more broadly override private property owners’ rights to exclude persons possessing weapons from entry on their property was introduced in a large number of state legislatures during 2006 legislative sessions and is expected to be introduced in most state legislatures again in 2007.

3. Please Explain How the Proposed Policy Position will Address the Issue

The resolution opposes enactment of such legislation and supports maintaining the traditional right of private property owners to determine the terms of entry by third parties on to their property. Adoption of the resolution would allow the Association to join with business and community organizations across the United States which have recently worked to defeat such legislation. For example, in Florida, the Chamber of Commerce and Retail Federation took very strong stances against “forced entry” legislation in 2006 and prevented it from reaching a vote in either chamber of the Florida legislature. Similar business coalitions in Georgia, Indiana, Virginia, and elsewhere helped block “forced entry” bills in 2006.

4. Summary of Minority Views

There were no minority or dissenting views voiced in discussions during drafting of the resolution by the sponsoring Committee members.