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Labor & Employment ADVISORY ■

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What Employers Need to Know about Two New Georgia Laws

The Georgia legislature recently passed two noteworthy laws that will go into effect on July 1, 2014: one expanding a number of gun rights, and the other purporting to limit the liability of employers who hire workers with a criminal background. Although the practical impact of both laws is still uncertain, and likely will remain so until they are interpreted by Georgia's courts, employers should nonetheless be aware of the new laws and mindful of their ongoing implementation moving forward.

Georgia's New Gun Law

On April 23, 2014, Georgia Governor Nathan Deal signed House Bill 60 ("H.B. 60"), known as the "Safe Carry Protection Act," into law. Among other things, the new legislation significantly expands the list of places where licensed gun owners are permitted to carry firearms to include, among other locations, churches, bars, school zones, most government buildings, and anywhere outside of the security screening gates at airports. While much of the media coverage relating to H.B. 60 has focused on this aspect of the law, surprisingly little attention has been paid to the potential impact of certain other changes contained in the new law on employers, and indeed all private property owners, in Georgia.

In describing H.B. 60, Governor Deal has stated that the new law "will protect law-abiding citizens by expanding the number of places that they can carry their guns without penalty, while at the same time this bill respects the rights of private property owners who still set the rules for their land and their buildings." However, based on the text of the new law it appears that H.B. 60 may in fact create new limitations on property owners' rights to "set the rules" with regard to the carrying of firearms onto their private properties. Specifically, H.B. 60 appears to have amended the existing Georgia gun laws to limit private property owners' right to impose a general prohibition on the possession of firearms on their property.

Section 1-5 of H.B. 60 amended subsection (c) of O.C.G.A. § 16-11-127, adding the underlined language as follows:

> (c) Except as provided in Code Section 16-11-127.1 [regarding school safety zones], a license holder shall be authorized to carry a weapon…in every location in this state not listed in subsection (b)[1] or prohibited by subsection (e)[2] of this Code Section; provided, however, that private property owners or persons in legal control of private property…shall have the right to ~~forbid~~ exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135.

Based on this revised statutory language, private property owners may only "exclude or eject" a license holder carrying a firearm from their property after giving the individual notice to depart in accordance with O.C.G.A. § 16-7-21(b)(3), Georgia's criminal trespassing statute.[3] Furthermore, it is doubtful that a generalized, posted "No Firearms" sign would constitute sufficient notice under H.B. 60 or § 16-7-21(b)(3) to lawfully prohibit all persons seeking to enter onto the particular property with a firearm from doing so. Given that H.B. 60 specifically replaces the phrase "shall have the right *to forbid possession of* a weapon…on their property," with "shall have the right *to exclude or eject a person who is in* possession of a weapon…on their private property," the change appears to have been intended by the legislature to prevent such outright firearm bans. Instead, the law now appears to require written or oral notice, by or on behalf of a property owner, which is specific to the person being excluded or expelled. Thus, under the new Georgia gun law, it appears that a company or other private property owner may not preemptively prohibit the carrying of firearms on its private property by the public in general, but rather it may only ask a person carrying a weapon to leave, after the fact, under threat of a criminal trespassing charge.

Despite this shift in Georgia's law regarding a property owner's ability to exclude guns, presumably employers can still prohibit the carrying of firearms by employees on their property by providing written notice to all employees to that effect. In light of the new Georgia gun law, however, Georgia employers should strongly consider requiring employees to sign an acknowledgement of receipt of such notice, which specifically references O.C.G.A. § 16-7-21. While evaluating their policies regarding guns in the workplace in light of the new Georgia gun law, employers should also be mindful of the limitations on employers created by the existing provisions of O.C.G.A. § 16-11-135, which allow employees to carry a firearm onto an employer's property if it remains locked and out of sight in a privately owned vehicle.

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[1] Subsection (b) lists the following as unauthorized locations for carrying a weapon: (1) a government building; (2) a courthouse; (3) a jail or prison; (4) a place of worship, "unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders" (with the quoted text being newly added by H.B. 60); (5) certain state mental health facilities; (6) nuclear power facilities (with certain exceptions); and within 150 feet of any polling place. Notably, H.B. 60 removes from the prior list the provision making it unlawful to carry a weapon "[i]n a bar, unless the owner of the bar permits the carrying of weapons or long guns by license holders." Under the new law, bars will be subject to the same standards as any other private business establishment.

[2] In brief, subsection (e) creates a limited exception to subsection (b) in permitting license holders to carry weapons into certain government buildings that do not have security screening at their entrance.

[3] O.C.G.A. § 16-7-21(b)(3) provides: "A person commits the offense of criminal trespass when he or she knowingly and without authority… [r]emains upon the land or premises of another person or within the vehicle, railroad car, aircraft, or watercraft of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart."

As Georgia employers assess the impact of the new Georgia gun law on their ability to prohibit guns in the workplace, it is also important to bear in mind that the penalty to an employer for excluding an employee carrying a gun from the workplace in violation of O.C.G.A. § 16-11-126(d) remains unclear. Presumably, if the employer were required to call the police to remove an employee who had brought a gun into the workplace, the police would only do so if the requirements of O.C.G.A. § 16-11-126(d) had been met. In terms of potential redress by the employee for a termination or lesser disciplinary action for bringing a gun into the workplace, where the employer allegedly did not provide proper notice under the statute, it does not appear that O.C.G.A. § 16-11-126 creates a private right of action for individuals whose rights under the statute may have been violated. While an employee in this situation could attempt to assert a claim for wrongful discharge in violation of public policy, Georgia's courts have been very hesitant to recognize such claims absent clear guidance from the General Assembly that such a cause of action should exist. Thus, given the lack of any clear downside to employers who fail to comply with Georgia's new gun law, employers may very well opt not to change their policies and procedures for prohibiting guns in the workplace. Georgia employers should, however, consult with counsel and stay abreast of case law developments under the statute that may impact such decisions.

Georgia's New Law Regarding Hiring Individuals with Criminal Convictions

The other new law of potential interest to employers was signed by Governor Deal on April 13, 2014, and also takes effect on July 1 of this year. Senate Bill 365 ("S.B. 365") is part of Governor Deal's three-year overhaul of a number of criminal justice laws. It contains a variety of provisions intended to help ex-offenders re-enter society at the end of a prison term through various means, such as improving access to education and housing, and providing assistance with restoring suspended drivers' licenses and finding employment. In this regard, S.B. 365 seeks to provide improved liability protection for employers that hire ex-offenders who have successfully completed a Department of Corrections pre-release program while incarcerated, or who have been granted a pardon from the State Board of Pardons and Paroles. The new law creates a "Program and Treatment Completion Certificate" (PTCC) under O.C.G.A. § 51-1-54 and provides that the issuance of a PTCC "shall create a presumption of due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise engaging in activity with" a person who receives the PTCC or is granted a pardon. However, the law further states that "[s]uch presumption may be rebutted by relevant evidence which extends beyond the scope of the [PTCC] or pardon and which was known or should have been known by the person against whom negligence is asserted." O.C.G.A. § 51-1-54(b). Given the broad and somewhat vague parameters of this critical exception, it is unclear to what extent this new law will be of any actual, practical benefit to employers who seek to use its protection to insulate themselves from negligent hiring or retention claims.

Negligent hiring or retention is a claim alleged against an employer by another employee or a third party who has been injured by one of the employer's employees. It is based on a theory that the employer knew, or should have known, some information about the offending employee's background that indicated that the employee was likely to cause an injury like the one suffered by the claimant. Stated briefly, it is a claim that the employer acted negligently by hiring or retaining an individual as an employee despite red flags that were or should have been known by the employer. Defending against such claims can be particularly costly for employers because the claims often involve factual issues, such as reasonableness, that must be decided by a jury. Thus, even when a claim is frivolous, it can be difficult to defeat easily, or inexpensively, at the summary judgment stage. Instead, employers must often choose between paying a large and unjustified settlement or litigating all the way through trial, all of which creates a strong disincentive against hiring individuals with criminal backgrounds.

While S.B. 365 seeks to mollify some of these concerns, at this point the significant carve-out to the law makes it of limited utility to employers. Until the courts have had a chance to interpret and flesh out the new law, it remains unclear what sort of evidence or information will be considered "relevant" with regard to a newly hired employee that employers "should" have been aware of and that "extends beyond the scope" of the PTCC or pardon, such that the employer can lose the protection of the presumption of due care. Because these, too, are the types of issues that will likely require a jury to decide, the statute's potentially broad exception may very well subsume the intended benefits of the new rule.

Practically speaking, employers will still want to do what they can to take advantage of the new law, while also taking steps to ensure that the presumption of due care afforded to them by S.B. 365 when they hire ex-offenders with a PTCC cannot easily be rebutted. Given the wide scope of the carve-out to the new law, this means that employers cannot simply rely on the issuance of a PTCC in lieu of performing additional and more thorough inquiries into a job applicant's background for "evidence which extends beyond the scope" of the PTCC and might be relevant to a negligence claim. Obviously, this not only negates some of the risk-reducing and cost-saving benefits that the new law seeks to provide, but it also creates significant uncertainty for employers regarding what sort of additional inquiries they might need to make.[4]

Thus, while Georgia employers should familiarize themselves with S.B. 365 and the PTCC tool it creates, they must recognize that the law does not adequately insulate them from negligent hiring and retention claims arising from employing individuals with criminal backgrounds.

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[4] Furthermore, employers must remain cognizant of current Equal Employment Opportunity Commission guidelines regarding the use of background checks in the hiring process to avoid potential disparate impact discrimination claims. These guidelines require employers to use, among other things, "targeted" rather than "bright-line" screening of applicants' criminal histories so as to make an "individualized assessment" of each applicant. At a minimum, this requires consideration of the nature of the criminal activity, the time elapsed, and the relevance of such activity in light of the necessities of a particular job. For more information on these guidelines, please consult our previous advisory here.

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