

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1130

INTRODUCER: Judiciary Committee and Senators Peaden and Baker

SUBJECT: Firearms in Motor Vehicles

DATE: March 26, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/2 amendments
2.	Daniell	Maclure	JU	Fav/CS
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill codifies the right of persons to possess firearms in or on their vehicles while parked on the property of businesses, employers, and other public or private entities. Specifically, the bill provides that no public or private entity may prohibit any customer, employee, or invitee from possessing any legally owned firearm locked inside or to a private motor vehicle in a parking lot, if the person is lawfully in the area. The bill further prohibits an employer from inquiring as to whether a person has a firearm in his or her vehicle, conditioning employment on an agreement not to have a legal firearm locked inside a vehicle, or terminating employment of an employee for the same. Additionally, the bill provides that an employer cannot expel a customer or invitee for having a legal firearm in a vehicle.

The bill relieves entities of certain duties and limits civil liability so long as the entity complies with the statute.

The prohibitions of the bill do not apply to:

- School property;
- Any correctional institution;

- Property where substantial activities involving national defense, aerospace, or domestic security are conducted;
- Property where combustible or explosive materials regulated under state or federal law are manufactured, used, stored, or transported;
- A motor vehicle owned, leased, or rented by an employer or his landlord;
- Any other property where possession of a firearm is prohibited by any federal law or general law of this state.

This bill creates section 790.251, Florida Statutes.

II. Present Situation:

There are few statutes that limit the rights of a person to carry a firearm¹ on the property of another.² Existing statutes do not address the extent to which the possession of firearms may be prohibited by a public or private property owner.³ However, most case law has held that an employer may prohibit the possession of firearms on his or her property.

The right to keep and bear arms and property rights are both rooted in the Florida Constitution. The extent to which the Legislature may limit or create a right for a person to possess firearms on the property of another has not been completely resolved by the courts, although the issue is being litigated across the country.

Property Rights

The Florida Constitution declares that every person has the right to “acquire, possess and protect property.”⁴ The Constitution further provides that the right to property may not be deprived without due process of law.⁵

Property rights have been described as follows:

The ownership of property carries certain rights and responsibilities. Those rights control the relationship between the property and all persons. The owner has the right to possession, control and use of the property, including the right to income or benefits from the use of the property. The owner has the right to exclude others from possession, use or control of the property. Within limits, the owner has the right to change, modify,

¹ Florida law defines a firearm as “any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun.” Section 790.001(6), F.S. The term does not include an antique firearm, unless it was used in the commission of a crime.

² See s. 258.157, F.S. (prohibiting the possession of firearms in the Savannas State Reserve); s. 790.145, F.S. (prohibiting the possession of concealed firearms within a pharmacy); and s. 790.115(2), F.S. (prohibiting the possession of firearms on school property).

³ But see s. 790.115(2)(a)3., F.S. (providing that limitations can be placed on bringing weapons or firearms onto school property).

⁴ FLA. CONST., art. I, s. 2.

⁵ FLA. CONST., art. I, s. 9.

improve, add to or subtract from the property. An owner may sell, transfer or encumber the property.⁶

The right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁷ Additionally, “property does not ‘lose its private character merely because the public is generally invited to use it for designated purposes.’”⁸

It is generally accepted that property owners, or businesses, can create rules regulating what is or is not allowed on the property. For example, in *Pelt v. Department of Transportation*, the court upheld the department’s suspension of an employee for carrying a handgun at work, despite obtaining a license under s. 790.06, F.S.⁹ The court held:

Sound policy reasons exist for allowing an employer, be it public or private, to regulate the conduct of its employees as it relates to the possession and use of firearms. These relate to the safety of its employees and others who may be injured by the weapons, and the exposure of an employer to liability for the actions of its employees.¹⁰

Nevertheless, the “Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.”¹¹ For example, state and federal law prohibit hotels, restaurants, and other places of public accommodation from discriminating based on race, color, religion, or national origin.¹²

Moreover, the U.S. Supreme Court, in *PruneYard Shopping Center v. Robins*, has held that a state has a right to adopt “individual liberties more expansive than those conferred by the Federal Constitution.”¹³ In *PruneYard*, high school students set up a table inside a shopping center and distributed pamphlets and asked passersby to sign petitions. A security guard suggested that the students move to a public sidewalk on the perimeter of the shopping center. The students left and later filed a lawsuit seeking to enjoin the shopping center from denying access to circulate petitions.¹⁴

On appeal, the U.S. Supreme Court upheld the right granted by the California Constitution permitting individuals to exercise the rights of expression and petition on the property of a privately owned shopping center.¹⁵ In so holding, the Court rejected the claim that recognition of the students’ rights violated the shopping center owner’s federally protected property rights.¹⁶

⁶ *Scripps Howard Cable Co. v. Havill*, 665 So. 2d 1071, 1075 (Fla. 5th DCA 1995).

⁷ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

⁸ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)).

⁹ *Pelt v. Dep’t of Transp.*, 664 So. 2d 320, 321 (Fla. 1st DCA 1995).

¹⁰ *Id.*

¹¹ *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

¹² 42 U.S.C § 2000a; ss. 509.092, and 760.08, F.S; *Hamm v. City of Rock Hill*, 379 U.S. 306, 317 (1964) (upholding the constitutionality of the Civil Rights Act of 1964).

¹³ *PruneYard Shopping Ctr.*, 447 U.S. at 81.

¹⁴ *Id.* at 77.

¹⁵ *Id.* at 88.

¹⁶ See generally *id.* at 89-90 (Marshall, J., concurring).

Right to Keep and Bear Arms

The right to keep and bear arms is addressed by both the Florida and U.S. Constitutions. The Second Amendment to the U.S. Constitution states: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”

Article I, subsection 8(a) of the Florida Constitution states: “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.”

This right, however, is not absolute. A state may enact laws that “regulate the use and the manner of bearing” arms.¹⁷ For example, the Florida Constitution was amended in 1990 to include a three-day waiting period on the delivery of a purchased handgun.¹⁸

In *Rinzler v. Carson*, the Florida Supreme Court decided that a statute prohibiting the possession of a short-barreled rifle, shotgun, or a machine gun did not violate a machine gun owner’s constitutional right to bear arms. In so doing, the Court held “the right to keep and bear arms is not an absolute right, but is one which is subject to the right of the people through their legislature to enact *valid police regulations to promote the health, morals, safety and general welfare* of the people.”¹⁹

The Legislature has exercised its “valid police power” many times to regulate the possession of firearms, including such matters as who may possess them, in what manner, of what type, and in what locations. Chapter 790, F.S., is dedicated exclusively to laws governing weapons and firearms.

Florida law expressly provides that a firearm may be possessed in a vehicle or a person’s place of business.²⁰ Unless otherwise permitted by law, a firearm located in a vehicle must be “securely encased” or “not readily accessible for immediate use.”²¹ As a result, one who is lawfully in possession of a firearm in a vehicle is not subject to criminal prosecution. Moreover, a person in a vehicle may use a firearm in self defense against a person who unlawfully and forcefully attempts to enter the vehicle.²²

Although there are statutory restrictions on carrying concealed weapons, there is statutory authorization to carry firearms in many situations specified in s. 790.25, F.S. For example, subsection (5) states:

POSSESSION IN PRIVATE CONVEYANCE.--Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person

¹⁷ *Rinzler v. Carson*, 262 So. 2d 661, 665 (Fla. 1972)

¹⁸ FLA. CONST., art. I, s. 8(b).

¹⁹ *Rinzler*, 262 So. 2d at 666 (emphasis added).

²⁰ Section 790.25(3)(l) and (n), F.S.

²¹ Section 790.25(5), F.S.; compare s. 790.25(3)(l), F.S. (stating that a firearm must be “securely encased and not in the person’s manual possession”).

²² Section 776.013, F.S.

18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.

Additionally, a person may carry a firearm in a vehicle pursuant to s. 790.25(5), F.S., on school property so long as the school district has not adopted policies prohibiting this action.²³

These statutes are clear examples of the Legislature's constitutionally authorized exercise of its police powers.

“At-Will” Employment

Florida is an “at-will” employment state. Essentially this means that, absent an employment contract, either party, employer or employee, may terminate the employment relationship at any time, for any reason, so long as the reason is not prohibited by law.²⁴

Actions for wrongful termination of employment, under the *constitutional theory* of a violation of “basic rights” as set forth in Article I, Section 2 of the Florida Constitution, must be based upon a *state action*, and not the action of one citizen (employer) against another (employee).²⁵ One citizen's rights “shall not be construed to deny or impair others retained by the people.”²⁶

The application of the right to equal protection in Article I, Section 2 is activated when the *government* intrudes into a citizen's most basic, personal freedom from such intrusion. Consequently, there is no constitutional right to employment in Florida in the private sector.

Florida's Constitution states:

Basic Rights. -- All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for

²³ Section 790.115(2)(a), F.S.

²⁴ See *Smith v. Piezo Technology and Prof'l Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) (“[t]he established rule in Florida relating to employment termination is that “[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract.””) (quoting *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980)); *Leonardi v. City of Hollywood*, 715 So. 2d 1007, 1008 fn. 1 (Fla. 4th DCA 1998) (“[t]he general rule of at-will employment is that an employee can be discharged at any time, as long as he is not terminated for a reason prohibited by law, such as retaliation or unlawful discrimination”).

²⁵ *Schreiner v. McKenzie Tank Lines*, 432 So.2d 567, 569-70 (Fla. 1983).

²⁶ FLA. CONST., art. 1, s. 1.

industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.²⁷

The Legislature has enacted *statutes* addressing discrimination based upon race, color, religion, sex, national origin, age, handicap, or marital status.²⁸

These statutes provide causes of action for employment discrimination, and the methods by which they are to be pursued, against employers who employ 15 or more employees for each working day in each of 20 or more calendar weeks.²⁹ Many small businesses would not fit the statutory threshold of 15 or more employees.

The statutory protections set forth protect employees from discrimination based upon *who they are*, not matters that are necessarily matters of choice or preference. These statutory protections could be viewed as an expansion, or at least a clarification from a public policy standpoint, of the constitutional basic rights enumerated in Article I, Section 2 of the Florida Constitution.

Reasons not inherently “identity-related,” for employing or not employing, retaining, or terminating an employee are matters within the discretion of the employer and are neither constitutionally nor statutorily governed.

Right to Possess Firearms in the Parking Lot of an Employer

A few courts from other jurisdictions have addressed whether an employer may regulate the possession of firearms in a parking lot controlled by the employer. These cases have generally held that an employer may regulate the possession of firearms on an employee parking lot.

Plona v. United Parcel Service

In *Plona v. United Parcel Service*, an employee was terminated by his employer after an unloaded and disassembled handgun was discovered in his vehicle.³⁰ The employee’s vehicle was parked in a public access parking lot used by employees and customers of the United Parcel Service (UPS). The employee filed a lawsuit for wrongful termination, and UPS moved to dismiss the lawsuit for failing to state a claim.

The federal trial court denied the motion to dismiss and found that “the public policy of Ohio permitting citizens to bear arms, as stated in . . . the Ohio constitution, is clear enough to form the basis of a wrongful termination claim.”³¹ UPS based its arguments on *Petrovski v. Federal Express Corp.*, where the court found that an employer has an interest in regulating free speech

²⁷ FLA. CONST., art. 1, s. 2.

²⁸ Florida Civil Rights Act, ss. 760.1-760.11, F.S.; s. 509.092, F.S.

²⁹ Section 760.02(7), F.S.

³⁰ *Plona v. U.P.S.*, 2007 WL 509747, *1 (N.D. Ohio 2007).

³¹ *Id.* at *2.

at the workplace.³² Specifically, “burdens on employees while at work do not jeopardize their rights; they are instead permissible limits on the rights enshrined in the Ohio constitution.”³³ However, for the purposes of the motion to dismiss, the court in *Plona* assumed that the employee’s vehicle was not on UPS property and denied UPS’s motion to dismiss because “[p]ermitting UPS to terminate Plona for possession of a firearm off of company property” is a larger violation of public policy.³⁴ The court also stated that the parties may revisit the issue raised by the motion to dismiss if it was later determined that the handgun was on UPS property.

Hansen v. America Online, Inc.

In *Hansen v. America Online, Inc.*, several off-duty America Online employees met at their employer’s parking lot.³⁵ While in the parking lot, the employees transferred their firearms into one vehicle before going target shooting at a local gun range. The employees’ activities in the parking lot were captured on a video camera. Several days later the employees were discharged. The employees filed a lawsuit alleging that their termination violated public policy. The court said it had to balance competing legitimate interests: “the interests of an employer to regulate the workplace environment to promote productivity, security, and similar lawful business objectives, and the interests of the employee to maximize access to their statutory and constitutional rights within the workplace.”³⁶ The court held that an employee, absent an agreement to the contrary, does not have the right to carry a firearm on his employer’s property. Specifically, “the right of an employee to keep and bear arms cannot supplant the right of an employer to regulate the possession of firearms by employees within the workplace environment.”³⁷

Bastible v. Weyerhaeuser

In *Bastible v. Weyerhaeuser*, an employer became concerned about drug use on the property and arranged for a sheriff to use dogs to conduct a search of the employee parking lot for drugs.³⁸ However, the dogs also signaled the presence of firearms in the vehicles. The employees found with firearms in their vehicles were terminated. The employees sued claiming that the terminations violated their constitutional right to bear arms, as well as several state statutes allowing a person to carry firearms in his or her vehicle.³⁹ The *Bastible* court found that a person’s right to keep and bear arms is not absolute and upheld the terminations.

Legislation and Constitutional Challenge in Oklahoma

Subsequent to the decision in *Bastible v. Weyerhaeuser*, the Oklahoma Legislature enacted statutes that essentially prohibited employers from enforcing policies that would prevent employees from keeping secured firearms in their vehicles on company property. The language

³² *Petrovski v. Fed. Express Corp.*, 210 F.Supp.2d 943 (N.D. Ohio 2002).

³³ *Plona*, 2007 WL 509747, *2.

³⁴ *Id.* at *3.

³⁵ *Hansen v. America Online, Inc.*, 96 P.3d 950, 951 (Utah 2004).

³⁶ *Id.* at 953.

³⁷ *Id.*

³⁸ *Bastible v. Weyerhaeuser Co.*, 437 F.3d 999, 1002 (10th Cir. 2006).

³⁹ *Id.* at 1005 (the Oklahoma Firearms Act of 1971 permits a person to “transport in a motor vehicle a rifle, shotgun or pistol, open and unloaded, at any time” and “to allow such loaded firearms also to be carried ‘in the interior compartment of the vehicle’”).

of the Oklahoma legislation was very much like the language and apparent intent of this bill. In response to the statutes enacted by the Oklahoma Legislature, several businesses filed a lawsuit in federal court challenging the laws.⁴⁰

The businesses raised three separate constitutional arguments in support of a permanent injunction against the enforcement of the statutes: the statutes resulted in an unconstitutional deprivation of private property interests; the statutes were unconstitutionally vague; and the statutes were preempted by various federal statutes.⁴¹ The court fully analyzed all of the challenges and although it had “serious concerns about these criminal laws, which deprive Oklahoma property owners of the right to exclude those individuals carrying and transporting firearms in their vehicles,” the court was unable to find that the statutes constituted an unconstitutional taking of property or that they were an unconstitutional deprivation of a fundamental right.⁴²

The court, however, did rule, in October 2007, that the statutes were pre-empted by federal law, specifically the Occupational Safety and Health Act (OSHA). The general duty clause of OSHA requires that an “employer owes a duty of reasonable care to protect his employees from recognized hazards that are likely to cause death or serious bodily injury.”⁴³ The court found that because the statutes criminally prohibit an effective method of reducing gun-related workplace injuries, they could not co-exist with OSHA and, therefore, were preempted by federal law.⁴⁴

Policy Questions – The Law is Evolving

For the first time since 1939, the United States Supreme Court accepted jurisdiction on a case regarding the meaning of the Second Amendment to the U.S. Constitution.⁴⁵ The Court heard oral arguments on March 18, 2008, and a decision is expected by late June. It is anticipated that the question of whether a person has an individual constitutional right to possession of firearms for personal safety, compared to the right to possess firearms as a more general, “well regulated militia” right, may be addressed by the Court.

On one hand, if the Court does address these questions and puts the Second Amendment into a clearer perspective, the issues raised in this bill may not become any clearer. This is so because even if the Court does find an individual right exists, the case will not likely (because of its facts) decide whether that right deserves greater or lesser constitutional protection when pitted against the rights of real property owners. On the other hand, the Court’s jurisprudence on the extent to which the Second Amendment protects an individual’s rights versus a collective right may be cited in legal arguments regarding whether state legislation, such as that contemplated by this bill, is constitutionally permissible.

⁴⁰ *ConocoPhillips Co., v Henry*, 520 F.Supp.2d 1282 (N.D.Okla. 2007) (the Federal Court for the Northern District of Oklahoma was petitioned by the businesses to block the enforcement of the Oklahoma statutes and to declare the statutes unconstitutional).

⁴¹ *Id.* at 1295.

⁴² *Id.* at 1340.

⁴³ *Id.* at 1334. Although OSHA does not have precise regulations on how to prevent gun-related injuries at work, “an employer is required to comply with the general duty clause by implementing policies and measures to prevent gun-related workplace violence.” *Id.* at 1336.

⁴⁴ *Id.* at 1340.

⁴⁵ *District of Columbia v. Heller*, 128 S. Ct. 645 (2007).

III. Effect of Proposed Changes:

This bill creates the “Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008,” which will codify legislative policy regarding statutory rights of lawful firearm owners and carriers as contrasted with the statutory rights of public or private entities.

This bill prohibits entities, including all public-sector employers, from violating what are called the “constitutional rights” of a customer, employee, or invitee in the following ways:

- Prohibiting the lawful possession of properly secured firearms within or upon a private motor vehicle in the entity’s parking lot;
- Inquiring, verbally or in written form, as to the presence of a firearm or by conducting a search of a vehicle for a firearm. Searches are limited to those lawfully conducted by on-duty law enforcement personnel;
- Conditioning employment upon not keeping a firearm in a motor vehicle;
- Limiting access to the entity’s parking lot based upon whether there is a firearm within the vehicle; and
- Discriminating or terminating employment or expelling a customer or invitee because he or she exercises the right to keep and bear arms or lawfully defend oneself.

The prohibitions listed above do not apply, under the bill, to:

- School property;
- Any correctional institution regulated under s. 944.47, F.S., or ch. 957, F.S.;
- Property where substantial activities involving national defense, aerospace, or domestic security are conducted;
- Property where combustible or explosive materials regulated under state or federal law are manufactured, used, stored, or transported;
- A motor vehicle owned, leased, or rented by an employer or his landlord;
- Any other property where possession of a firearm is prohibited by any federal law or general law of this state.

The bill provides that “school property” is defined under s. 790.115, F.S. This section does not define “school property” but states that “school” means “any preschool, elementary school, middle school, junior high school, secondary school, career center, or post-secondary school, whether public or nonpublic.”⁴⁶ Although the definition of “school” includes a “post-secondary school,” because the language of the relevant statute refers specifically to policies developed by “school districts,” it may result in uncertainty about the extent to which junior colleges, community colleges, colleges, or universities may adopt policies prohibiting guns in vehicles.⁴⁷ The Legislature may wish to specifically prescribe a definition for “school property,” which includes these institutions of higher learning, rather than referring to the definition of “school” in s. 790.115, F.S.

⁴⁶ Section 790.115(2)(a), F.S.

⁴⁷ *But see State v. Ragland*, 789 So. 2d 530 (Fla. 5th DCA 2001) (dealing with language in a *community college* handbook prohibiting a student from having a firearm in a vehicle, but finding in this particular case that the handbook did not provide sufficient notice to charge the student with a violation of s. 790.115, F.S.)

The bill declares that, except for those employers or entities listed above, other public or private entities or employers are relieved of certain duties that relate to the bill. The bill specifically eliminates the duty to:

- Prohibit lawfully possessed firearms within vehicles in the parking lot;
- Search vehicles or inquire about the presence of firearms;
- Condition employment upon an agreement about the employees' possession of a firearm in the parking lot; or
- Terminate employment based upon lawful firearm possession or use for lawful defensive purposes.

Accordingly, the bill provides immunity from civil liability to entities or employers based on actions or inactions taken in compliance with the bill. The immunity does not apply to civil actions based on the actions or inactions of entities or employers that are unrelated to compliance with the bill. The bill does not create a new duty on the part of the employer, property owner, or property owner's agent.

The bill provides for enforcement of the act by the Attorney General, who is instructed to commence a civil or administrative action for damages, injunctive relief, civil penalties, and any other relief that may be appropriate. The Attorney General is authorized by the bill to negotiate a settlement on behalf of the aggrieved person. The bill does not prohibit a person from bringing his or her own civil suit for violations of rights protected by the act. In any successful action, the court shall award all court costs, attorney's fees, and reasonable personal costs and losses suffered by the aggrieved party as a result of the violation of rights under this act.

The bill provides the following definitions:

- "Parking lot" means any property that is used for parking motor vehicles and is available to customers, employees, or invitees for temporary or long-term parking or storage of motor vehicles.
- "Motor vehicle" means any automobile, truck, minivan, sports utility vehicle, motor home, recreational vehicle, motorcycle, motor scooter, or any other vehicle operated on the roads of this state and required to be registered under state law.
- "Employee" means any person who:
 - Works for salary, wages, or other remuneration;
 - Is an independent contractor; or
 - Is a volunteer, intern, or other similar individual for an employer.
- "Employer" means any business that is a sole proprietorship, partnership, corporation, limited liability company, professional association, cooperative, joint venture, trust, firm, institution, or association, or public-sector entity, that has employees.
- "Invitee" means any business invitee, including a customer or visitor, who is lawfully on the premises of an entity.
- "Firearm" includes ammunition and accouterments attendant to the lawful possession and use of a firearm.

The bill provides that this act shall take effect upon becoming law and applies to causes of action accruing on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Legislation that allows persons the right to bring their lawfully owned and possessed firearms onto the property of another may touch upon a number of constitutional issues. Following are some of the constitutional issues that may be relevant in analyzing this bill.

Preemption

There may be some federal laws that specifically regulate the premises of certain employers, including their parking lots. Federal law is considered to have preempted a specific area of law when Congress has shown its intent to occupy a given field. When Congress is determined to have shown such intent, a court may strike down a state law that attempts to regulate this same field of law. A court may find that Congress has completely preempted an area of law, or it may find that the preemption is only a partial preemption and some state regulation may be allowed. As discussed earlier, a federal court in Oklahoma held that Oklahoma statutes, similar to this bill, were pre-empted by the general duty clause of the Occupational Safety and Health Act (OSHA).

Access to Courts

The bill provides immunity for persons and entities from civil liability in lawsuits for certain actions involving the use and possession of personal private property. This provision may implicate the “access to court” protections of the Florida Constitution.⁴⁸ This right of access only applies to rights that existed in common law or prior to the enactment of the Declaration of Rights of the Florida Constitution.⁴⁹ The Florida Supreme Court, in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), held:

⁴⁸ Article I, s. 21 of the Florida Constitution provides: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

⁴⁹ 10A FLA. JUR 2D *Constitutional Law* § 360 (2007).

[W]here a right of access ... has been provided ... the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁵⁰

If a person is injured by a gun on the property of someone who has been provided immunity under this bill, the person could argue that the bill denies him or her access to the courts. To the extent that the cause of action in such a situation is grounded in general negligence, which existed at common law, a court might decide that this bill has to be evaluated under the *Kluger* standard.

Right to Bear Arms

The Florida Constitution⁵¹ and the United States Constitution⁵² contain provisions protecting a citizen's right to bear arms. However, these provisions are not implicated without some sort of state action.⁵³ The Second Amendment's "right to keep and bear arms" imposes a limitation on only federal, not state, legislative efforts.⁵⁴ The Florida Supreme Court, in interpreting Article 1, Section 8 of the Florida Constitution, held that while "the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen."⁵⁵ State laws regulating the acquisition or possession of guns have been upheld as reasonable exercises of the state's police power. This basis of state regulatory action has been recognized with respect to concealed-weapon statutes and the possession of weapons by proscribed persons such as convicted felons.

Contract Clause

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."⁵⁶

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979), held that laws impairing contracts can be unconstitutional if

⁵⁰ *Kluger*, 281 So. 2d at 4.

⁵¹ FLA. CONST., art. I, s. 8(a), provides "[t]he right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."

⁵² U.S. CONST., amend. 2 provides "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

⁵³ See 86 A.L.R. 4th 931; 79 AM. JUR. 2D *Weapons and Firearms* § 6.

⁵⁴ *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005).

⁵⁵ *Rinzler*, 262 So. 2d at 665.

⁵⁶ 10A FLA. JUR. 2D *Constitutional Law* § 414. The term "impair" is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken."

they unreasonably and unnecessarily impair the contractual rights of citizens.⁵⁷ The *Pomponio* Court indicated that the “well-accepted principle in this state is that virtually no degree of contract impairment is tolerable in this state.”⁵⁸ When seeking to determine what level of impairment is constitutionally permissible, a court “must weigh the degree to which a party’s contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy.”⁵⁹

In other words, “[t]his method requires a balancing of a person’s interest not to have his contracts impaired with the state’s interest in exercising its legitimate police power.”⁶⁰ The Florida Supreme Court enunciated what should be reviewed when considering this balancing test:

[T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption. Unless the State itself is a contracting

⁵⁷ The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *U.S. Fidelity and Guar. Co. v. Dep’t of Ins.*, 453 So. 2d 1355, 1360-61 (Fla. 1984).

party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.⁶¹

The bill restricts business entities from being able to prohibit current employees from bringing legal firearms locked in their motor vehicles into the employer's parking lot. Currently, employers and employees may enter into legally valid employment contracts which provide that the employee agrees as a condition of his or her employment not to bring legal firearms in their motor vehicles on the business's property. This bill appears to invalidate these prior employment contracts and could be challenged as an unconstitutional impairment of contracts in violation of Article I, Section 10 of the Florida Constitution.

Substantive Due Process

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁶² When a state law limits the ability of all persons to engage in some activity, a person affected by that state law can challenge the law by arguing that the limitation by the state violates their substantive due process under the 14th Amendment. In determining whether a law violates substantive due process, the court will first identify what "right" is being infringed upon by the state. This allows the court to identify which test will be used to determine whether a state law is unconstitutional under the 14th Amendment.

When a law limits any of the "fundamental" rights identified by the U.S. Supreme Court, which include the right to travel, the right to privacy, the right to vote, and all of the First Amendment Rights, the court will use the "strict scrutiny" test. Under this test, a law will be upheld only if it is necessary to promote a compelling or overriding government purpose. The court will always consider whether less burdensome means for accomplishing the legislative goals are available. When strict scrutiny is applied, the government will have the burden of proving that the law is necessary. In all other cases, where a law does not affect a "fundamental" right, the court will use the "rational basis" test. Under this test, the court will uphold the law if it is rationally related to a legitimate state interest. Most state governmental actions examined under this standard are upheld unless they are arbitrary or irrational. Under the rational basis test, the law is presumed valid, and the challenger has the burden of proof.

This bill seeks to enact a law limiting the ability of "public and private entities" to prohibit customers, employees, or invitees from possessing a legally owned firearm when the firearm is lawfully possessed and locked inside or locked to a private motor vehicle. This bill also limits the ability of an employer to prevent any customer, employee, or invitee from entering the parking lot of the employer's place of business because the

⁶¹ *Id.* (internal citations and quotations omitted).

⁶² Florida's Constitution also includes a due process provision. Article I, Section IX of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law."

customer's, employee's, or invitee's motor vehicle contains a legal firearm that is in the vehicle. This bill appears to limit a private property owners "right" to the use and enjoyment of his property and the right to exclude invitees from his property. In order to determine whether this limitation violates the 14th Amendment's Substantive Due Process Clause, the court would first have to determine whether this violation is a limitation of a "fundamental" right, as described above.

The U.S. Supreme Court, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), stated that it had "long eschewed ... heightened scrutiny when addressing substantive due process challenges to government regulation"⁶³ of property rights. Several federal circuit courts and district courts have also held that under a substantive due process analysis the right to exclude and the right to the use and enjoyment of one's property is not a "fundamental right" and would be subject to a rational basis analysis, not a strict scrutiny analysis. Furthermore, the court in *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282 (N.D. Okla. 2007), which applied a substantive due process analysis to an Oklahoma law very similar to this bill, ruled that the law did "not affect a 'fundamental right' for purposes of substantive due process analysis, and the Amendments are subject only to rational basis review."⁶⁴ Therefore, it appears that the limitation on property rights associated with the current bill could possibly be upheld as long as the limitation is rationally related to a legitimate state purpose and not found to be arbitrary or irrational. However, the Florida Supreme Court has held that "it is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right,"⁶⁵ and the right to "acquire, possess and protect property" is "[e]nunciated as one of the 'basic' and 'inalienable' rights by our present Constitution."⁶⁶ Therefore, if a court follows this line of thought, the bill would have to pass the strict scrutiny test, which would require a compelling or overriding government purpose in order to be upheld.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

⁶³ *Lingle*, 544 U.S. at 545

⁶⁴ *ConocoPhillips Co.*, 520 F.Supp.2d at 1319.

⁶⁵ *North Fla. Women's Health and Counseling Servs., Inc. v. State of Fla.*, 866 So. 2d 612, 635 (Fla. 2003).

⁶⁶ *Bell v. Cox*, 642 So. 2d 1381, 1386 fn. 2 (Fla. 5th DCA 1994) (Harris, J., dissenting).

VII. Related Issues:

Generally, when drafting legislation the short title and any definitions included in the bill are placed at the front of the legislation. However, both the short title and the definitions are at the end of this legislation.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 25, 2008:

The committee substitute clarifies that the bill does not create any new duties on the part of an employer, a property owner, or the property owner's agent. The bill also includes private correctional institutions among those entities to which the bill's prohibitions do not apply.

- B. **Amendments:**

None.