I. INTRODUCTION

During the past decade, the proposed enactment of concealed weapons legislation ("CCW laws") has sparked heated legislative debate and contentious public discussion in many states. Proponents of the legislation, relying largely upon Second Amendment constitutional guarantees, argue that law-abiding citizens have a right to carry weapons to protect themselves and their families from violent predators. In contrast, opponents of CCW laws raise the specter of
an impending return to a “Wild West” mentality which would invariably lead to an increase in gun-related violent crimes. Thus, the pre-enactment debate focuses primarily upon the dichotomous relationship between the right to individual and community protection (individual rights theory) and the state’s right to control private weapon ownership (collective rights theory). Once the legislation is enacted, however, and the proverbial “smoke clears,” the debate then shifts to the numerous complex implementation concerns that are the inevitable consequence of such controversial legislation. More specifically, although CCW laws authorize law-abiding citizens to legally carry concealed weapons, many of the statutes fail to explicitly address the rights of employers and business owners in light of this new legislation. Thus, employers and business owners are left in a quandary concerning the practical implications of dealing with a lawfully armed citizenry.

Prior to enactment of CCW legislation, employers and business owners could prohibit weapons on their premises on the assumption that such restrictions reasonably protect the safety of employees and other invitees on the premises. With the enactment of CCW laws, however, these assumptions are themselves being challenged as unreasonable. The principal argument against banning lawfully concealed weapons in certain locations is that CCW laws are enacted, in part, to give citizens an extra measure of protection against the criminal element. Consequently, banning weapons on certain premises...

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4. See, e.g., Mark Katches, Concealed Weapons Bill Killed, Senate Panel Defeats Measure that Would Ease Permit Criteria, L.A. DAILY NEWS, July 3, 1996, at N4 (“The citizens of this state do not want to return to the Tombstone era when everyone is allowed to carry a gun and disputes are settled by . . . whoever is the quickest draw.” (quoting Los Gatos police chief Larry Todd)).

5. See Cottrol, 80 Geo. L.J. at 314. See also Lawrence Delbert Cress & Robert E. Stalhope, The Second Amendment and the Right to Bear Arms: An Exchange, 71 J. Am. Hist. 587 (1984) (discussing whether the correct interpretation of the Second Amendment involves the individual right to bear arms or communal prerogatives implied in the Militia Clause); Stephen P. Halbrook, The Right of the People or the Power of the State: Bearing Arms, Arming Militia and the Second Amendment, 26 Val. U. L. Rev. 131 (1991). Halbrook concludes that because the language of the Second Amendment contains an “ostensibly harmless philosophical declaration about the militia” proponents of gun control argue that the Amendment somehow protects only the power of the state to maintain a militia. Halbrook, 26 Val. U. L. Rev. at 206. Halbrook counters this argument by noting that because of the use of the terms “right,” “the people,” “keep and bear,” and “infringed,” the Second Amendment demands an individual rights interpretation. Id.

makes those locations potential criminal targets and conceivably *reduces* safety rather than increasing it. In light of these arguments and challenges, employers and business owners must now assess the likelihood of liability from various perspectives. First, if concealed weapons are permitted on the premises, what is the employer or business owner’s potential liability if an accidental or intentional shooting occurs on the premises? In contrast, if concealed weapons are prohibited on the premises, what is the potential liability for acts of violence that could have been prevented if lawfully carried weapons had been available to individuals on the premises? Additionally, does an employer or business owner incur any additional responsibility for the safety of employees and invitees if lawfully carried weapons are prohibited on the premises? Finally, can employers and business owners develop and implement concealed weapons policies that safely and effectively strike a balance between the individual right of self-defense and the collective right to safety and security in the employment and business environment?

This Article explores each of those issues. Specifically, in Part II, the Article provides a brief historical discussion of the right to bear arms and the right of self-protection in order to appropriately contextualize the current significance of those rights in the concealed weapons debate. In Part III, the Article considers selected concealed weapons statutes that exemplify how various states have chosen to address the issue of concealed weapons. Part IV focuses on liability and practical implementation concerns that arise in the employment and business contexts once CCW laws are enacted. Finally, Part IV also proposes specific implementation recommendations for employers and business owners seeking to maximize the potential for safety while simultaneously minimizing the potential for liability in an era of expanding concealed weapons legislation.

II. WEAPONS AND SELF-DEFENSE: AN HISTORICAL PERSPECTIVE

The individual right to bear arms has an extensive philosophical, political and military history. Ancient philosophies discussing this right can be divided into two diametrically opposed schools of thought. One perspective recognized the critical need to maintain and support

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standing armies to effectively guard against foreign and domestic aggression. As a necessary corollary to preventing domestic aggression or insurrection, the government often sought to disarm its citizens. At other times throughout history, the government would actively support an armed citizenry as a means of promoting “citizen self-defense” against foreign and domestic enemies. Thus, an individual’s right to bear arms at any particular historical juncture depended primarily upon the prevailing political and military philosophy.

As the early predecessor to American law, the English monarchy recognized the advantages of having an armed citizenry and, by law, directed that citizens own and carry weapons commensurate with the value of their lands and goods. The duty to own and carry arms to protect the Crown was eventually supplanted by the recognition of an individual right to bear arms with Parliament’s approval of the Declaration of Rights. Later, American colonists acquired a similar right to own and carry weapons since, as English subjects, they had the same “rights, liberties, and immunities of free and natural-born [English] subjects.”

8. ARISTOTLE, POLITICA (POLITICS) in THE BASIC WORKS OF ARISTOTLE 1127, 1253, 1273, 1288 (Richard McKeon ed., 1941) (discussing arming and disarming the people under oligarchies, tyrannies, and republics); NICCOLO MACCHIAVELLI, THE PRINCE, in THE CHIEF WORKS AND OTHERS 5 (Allan Gilbert trans., 1965) (explaining when a prince should arm and disarm his people and the populace of defeated states); PLATO, PLATO’S REPUBLIC 210-17 (G.M.A. Grube trans., 1974) (recognizing that a despot consolidates his power and turns on his subjects after disarming them).

9. During the Middle Ages, the English Crown preferred and relied upon citizen-soldiers to maintain public order because of the expense of maintaining a standing army and the widespread hatred of mercenaries. JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1 (1994) [hereinafter MALCOLM]. Citizens were also expected to act as policemen, aiding the local constable or sheriff in pursuit of culprits, taking turns “keeping watch at night or ward during the day” over town gates, and helping the sheriff suppress riots as members of the sheriff’s “posse comitatus.” Id. at 3.

10. See generally MALCOLM, supra note 9 (discussing the English history and evolution of the right to bear arms); HALBROOK, supra note 7 at 1-64 (discussing the ancient and English origins of the right to bear arms); CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 19-29 (1994) (discussing the English origins of the right to bear arms). But cf. Roy G. Weatherup, Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment, in GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT 185, 198 (Robert J. Cottrol ed., 1994) [hereinafter Weatherup] (“There was obviously no recognition of any personal right to bear arms on the part of subjects generally, since existing law forbade ownership of firearms by anyone except heirs of the nobility and prosperous landowners.”).

11. The First Continental Congress stated, in its resolutions in October of 1774: “Resolved, . . . 1. That they are entitled to life, liberty, & property, and that they have never ceded to any sovereign power whatever, a right to dispose of either without their consent. Resolved, . . . 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England. Re-
In addition to the individual right to bear arms derived from the English Declaration of Rights, American colonists also possessed the natural right of self-defense. Although viewed for centuries as a natural right, the right of self-defense was eventually transformed into a legal right under the English common law and ultimately became the law of the American colonies.

These laws gained increasing importance as American colonists experienced first-hand the violation of their rights to bear arms and solved, . . . That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.” Weatherup, supra note 10, at 201-02 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 67-68 (Oct. 14, 1774) (W. C. Ford ed., 1904-1907)).

12. The right of self-defense has existed since Roman times as a natural right. In 53 B.C., Cicero, arguing on behalf of a client, explained: And indeed, gentlemen, there exists a law, not written down anywhere but in-born in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await pronouncements. For people who decide to wait for these will have to wait for justice, too — and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defence, because it does not actually forbid men to kill; what it does, instead is to forbid the bearing of a weapon with the intention to kill. When, therefore, an inquiry passes beyond the mere question of the weapon and starts to consider the motive, a man who has used arms in self-defence is not regarded as having carried them with a homicidal aim.

HALBROOK, supra note 7, at 17 (quoting CICERO, SELECTED POLITICAL SPEECHES 222 (M. Grant trans., 1969)).

This natural right of self-defense was recognized by other political leaders as well, including Hugo Grotius, Thomas Hobbes and John Locke. For example, Grotius relied upon Aristotle for the proposition that “every one ought to use arms for himself, if he has received an injury, or to help relatives, benefactors, allies who are injured.” HALBROOK, supra note 7 at 26 (quoting I HUGONIS GROTIUS, DE JURE BELLII ET PACIS 23-33 (W. Whewell trans., 1853)). Similarly, Hobbes observed: “The summe of the Right of Nature is, by all means we can, to defend our selves.” THOMAS HOBBES, LEVIATHAN 190 (C.B. MacPherson ed., 1968). Finally, John Locke believed “[e]ach individual has an equal right to his own life, liberty, and property, and may defend his natural rights against any person or group, it being reasonable and just I should have a right to destroy that which threatens me with destruction.” JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 14 (1955).

13. According to William Blackstone, Englishmen had “other auxiliary subordinate rights” which served principally to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136-40 (Chicago, 1st ed., 1828) (London 1765-1769). In order to vindicate these rights, “when actually violated or attacked, the subjects of England [were] entitled . . . to the right of having and using arms for self-preservation and defense.” Id. “[T]he transplantation of an English legal framework [to the American colonies] was official policy. The entire body of the [English] common law was to be applied in the new [colonies] except where circumstances made it impracticable.” MALCOLM, supra note 9, at 137-38.
act in self-defense with Britain’s oppressive tactic of disarmament prior to the American Revolution. Not surprisingly, many American colonists advocated an armed citizenry to resist the British invasion. Despite this reactionary advocacy, however, there was still no universal agreement on the issue of establishing and relying upon a standing army for the national defense versus instituting a well-trained citizen militia for that same purpose.

At the conclusion of the American Revolution, the considerable political debate surrounding the necessity of a standing army continued. In this debate, Federalists advocated a standing army while simultaneously promising that the people, far from ever being disarmed, would be sufficiently armed to check an oppressive standing army. Anti-Federalists, on the other hand, argued against a standing army, fearing that the body of the people as a citizen militia would be overpowered by an “elite militia” or standing army unless there was a specific recognition of the individual right to keep and bear arms. The Second Amendment was enacted, in part, as response to Anti-Federalist concern that Congress would disarm or disband the citizen militia, thereby disarming the population and granting the government a monopoly on arms. Within this historical context, the meaning of the Second Amendment’s language was apparently clear to the Framers of the Constitution at the time of its enactment. However, the passage of years and shifting political philosophies have significantly obscured its original meaning. This long-standing controversy concerning the original intent of the Second Amendment shapes the parameters of the modern day debate surrounding the enactment

14. Patrick Henry, in his famous “give me liberty or give me death” speech to the Virginia convention, stated,

    They tell us ... that we are weak — unable to cope with so formidable an adversary. But when shall we be stronger? ... Will it be when we are totally disarmed, and when a British guard shall be stationed in every house? ... Three million people, armed in the holy cause of liberty ... are invincible by any force which our enemy can send against us.

William Wirt, The Life of Patrick Henry 121 (1903).

15. The War for Independence was fought by fourteen different military organization[s] — the Continental Army under Washington and the thirteen colonial militia. The debate over the relative merits of standing armies and the [citizen] militia continued even during the fighting. See Weatherup, supra note 10, at 203.


17. See Weatherup, supra note 10, at 219. See also Halbrook, 26 Val. U. L. Rev., at 180 (stating that the Second Amendment originated in part from Samuel Adam’s proposal that Congress could not disarm any peaceable citizens).

18. See Halbrook, 26 Val. U. L. Rev. at 206 (The “Framers, supporters and opponents of the original Constitution all agreed on the political ideal of an armed populace and the unanimous interpretation of the Bill of Rights ... was that the Second Amendment guaranteed the individual right to keep and bear arms.”).

19. See supra note 5 and accompanying text.
of CCW laws. The next section will analyze how several states have chosen to give effect to the individual right to bear arms in varying degrees through the enactment of concealed weapons legislation.

III. ANALYSIS OF SELECTED CCW LEGISLATION

A. GENERAL OVERVIEW

An overview of CCW legislation in the selected states reveals that each of the states may be characterized as follows:

1) States that issue concealed weapons permits to qualified applicants without discretion — the "shall issue" states (Arizona, Nevada, and Washington);

2) States that allow local discretion concerning the issuance of concealed weapons permits — the "show cause" states (California and Colorado);

3) Jurisdictions that prohibit private citizens from carrying concealed weapons under most circumstances (District of Columbia and Nebraska).

In general, the "shall issue" states, which are considered to have fairly "liberal" policies concerning concealed weapons permits, are also more likely to have legislation and/or informal policies that prohibit carrying concealed weapons in certain locations even with a valid permit. When those prohibitions have been formally incorporated into

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20. See supra notes 3-5 and accompanying text.
28. The selected states were chosen primarily because of the availability of reported case authority and/or news media reports concerning the interpretation and impact of the CCW legislation.
the CCW statute, they typically identify federal and/or state government offices, courtrooms, and schools as the forbidden venues. None of the "shall issue" statutes in the selected states include a provision specifically authorizing businesses and private property owners to exclude customers who are lawfully carrying concealed weapons. However, the statutes have been interpreted so as to encompass such a right.\textsuperscript{30} To enforce those rights, business and/or private property owners must disclose to the public (i.e., post signs) that concealed weapons are not allowed on the premises and may refuse entry or bring a criminal trespass action against anyone who violates that mandate.\textsuperscript{31}

The discretion or "show cause" states usually have very restrictive policies concerning the issuance of concealed weapons permits.\textsuperscript{32} As such, they are correspondingly less likely to have formal or informal provisions or policies prohibiting concealed weapons in certain locations. As a practical matter, the lack of formal or informal prohibitions results from the fact that very few private citizens are authorized to carry concealed weapons since those seeking permits must demonstrate a need or "show cause" to carry a concealed weapon. Such a showing typically entails proof of immediate fear of injury to person or property. Because few private citizens are able to meet this burden of proof, the multitude of concerns that accompany a "heavily armed" citizenry have not yet materialized.

Interestingly, in at least two of the "show cause" states, there have been recent attempts to enact "shall issue" legislation. For example, after heated debate, legislators in California and Colorado recently rejected legislation that would have "liberalized" the concealed weapons laws.\textsuperscript{33} In Colorado, the primary reason for rejection of the liberal "shall issue" legislation was the inability to compromise on specific locations where concealed weapons would be prohibited.\textsuperscript{34}

Lastly, several jurisdictions still prohibit private citizens from carrying concealed weapons under most circumstances.\textsuperscript{35} In fact, the

\textsuperscript{30} See infra notes 42, 52, 57 and accompanying text.

\textsuperscript{31} See, e.g., infra notes 43 and accompanying text.


\textsuperscript{33} See infra notes 85 & 90 and accompanying text.

\textsuperscript{34} See infra note 91 and accompanying text.

\textsuperscript{35} In addition to the District of Columbia and Nebraska, the following states also prohibit concealed weapons: 720 Ill. Comp. Stat. Ann. \S\ 24-1 (West Supp. 1996); Kan. Stat. Ann. \S\ 21-4201 (Supp. 1996); Mo. Ann. Stat. \S\ 571.030 (West Supp. 1996); N.M.
District of Columbia is considered by many to be the most restrictive jurisdiction in the country. Once again, private property rights are not addressed in these statutes and are probably not a cause for significant concern because of the highly restrictive nature of the statutes.

B. SELECTED STATUTES AND RELEVANT CASE AUTHORITY

This section will summarize pertinent provisions of the concealed weapons legislation in each of the selected states as well as any relevant case authority and/or informal interpretations and discussions of the statutes.

1. The “Shall Issue” States

a. Arizona

The Arizona statute provides that the Department of Public Safety shall issue a concealed weapon permit to a qualified person. Specified qualifications include residency in the state; age 21 or over; no indictments or convictions for felony offenses; mental competence; lawful presence in the United States; and satisfactory completion of an approved firearms safety training program. Once issued, the permit is good “for a period of not more than four years.”

A separate but related statute addresses the issue of “misconduct involving weapons” and expressly provides that:

- entering any public establishment or attending any public event and carrying a deadly weapon . . . after a reasonable request by the operator of the establishment or the sponsor of the event or his agent to remove [the] weapon and place it in the custody of the operator of the establishment or the sponsor of the event . . . [u]nless specifically authorized by law.

However, the statute also provides that section 13-3102(A)(10) shall not apply to “[a] person specifically licensed, authorized or permitted” to carry a concealed weapon pursuant to Arizona or United States statutes. Thus, while section 13-3102(A)(10) allows the operator of a public establishment or sponsor of a public event to require the removal of deadly weapons by an attendee of the establishment/event, section 13-3102(D)(3) specifically excludes licensed weapons carriers from that provision.


36. See infra note 94 and accompanying text.


Despite this statutory language, the statute has been interpreted to allow businesses to post signs that require licensed weapons carriers to remove their weapons before entering the premises.\textsuperscript{42} Anyone violating the "no guns" policy would be subject to a criminal trespass prosecution.\textsuperscript{43} Thus, it appears that under the Arizona statute, private property owners retain the right to prevent licensed weapon carriers from bringing weapons onto their premises.

In the most recent Arizona legislative session, a bill was introduced that would have required restaurants that serve alcohol, public places, private businesses, arenas and Arizona universities to allow customers with lawfully concealed weapons to bring their weapons onto the premises unless a sign was posted \textit{and} a "gun check" was provided at the door or entrance.\textsuperscript{44} After contentious debate, the bill was defeated, losing by two votes.\textsuperscript{45} Presumably then, the previous statutory interpretation remains the law in Arizona and private businesses may continue to exclude patrons and employees from bringing concealed weapons onto the premises.

b. Nevada

The Nevada statute provides that any person may apply for a permit to carry a concealed weapon and the sheriff of the county \textit{shall issue} such permit to any person who is a resident of the state; 21 years of age or older; and demonstrates competence in handling firearms by successfully completing an approved course.\textsuperscript{46} The sheriff may deny the application if it appears that the person has a history of criminal violations and/or convictions, mental illness or drug or alcohol abuse.\textsuperscript{47}


\textsuperscript{43} See, e.g., ARIZ. REV. STAT. ANN. § 13-1502(A)(1) (West 1989). This statute provides that a person commits a criminal trespass in the third degree by "knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry." Id.

\textsuperscript{44} S.B. 1099, 42d Leg., 2d Reg. Sess. (Ariz. 1996). According to John Greene, the sponsor of the bill, "[a]nybody that wants to bring someone into their environment and tell them they don't have the right to protect themselves is trampling on their rights." Howard Fischer, \textit{Bill Loosens Concealed-Gun Curb at Business Sites}, \textit{Arizona Daily Star}, Jan. 31, 1996, at 4B. Notably, S.B. 1099 would have granted "immunity for business owners against lawsuits if someone legally carrying a concealed weapon or a person who gained possession of it killed someone on the premises." Id.


\textsuperscript{46} NEV. REV. STAT. § 202.3657(2) (Supp. 1995).

\textsuperscript{47} NEV. REV. STAT. § 202.3657(3) (Supp. 1995).
A separate statute outlines areas where concealed weapons permittees are prohibited from carrying concealed firearms.\(^48\) Such prohibited areas include law enforcement agencies, prisons, jails, courthouses, courtrooms, public and private school facilities, buildings owned or occupied by the federal, state, or local government, and any other place where carrying a concealed weapon is prohibited by state or federal law.\(^49\) Specific exceptions to these prohibitions allow judges to carry and authorize other permittees to carry concealed weapons in the courthouse or courtroom and provide that the prohibited areas outlined in section 202.3673(1) are not applicable to employees of those facilities while on the premises of the facility.\(^50\)

The Nevada “shall issue” statute was enacted in July, 1995. Prior to that time, Nevada had “show cause” legislation that allowed local sheriffs to exercise discretion concerning the issuance of concealed weapons permits.\(^51\) Although the current CCW statute does not address the rights of business and private property owners, the current statute has been interpreted to authorize business owners to post signs that forbid carrying concealed weapons on their premises.\(^52\)

c. Washington

The Washington statute provides that the chief of police of a municipality or the sheriff of a county shall issue a license to an applicant to carry a concealed weapon “for purposes of protection or while engaged in business, sport, or while traveling.”\(^53\) The statute further provides that “[t]he applicant’s constitutional right to bear arms shall not be denied, unless he or she” has a criminal history or is under the

\(^{49}\) Id.
\(^{51}\) See Ed Vogel, Concealed Weapon Rules Unified, The Las Vegas Review-Journal, July 8, 1995 at 1A. After enactment of the “shall issue” legislation, the number of concealed weapons permits “skyrocketed.” Glenn Puit, Concealed Weapons, The Las Vegas Review-Journal, August 11, 1996, at 1A. For example, in Carson City County 208 permits were issued after the legislation as compared to 6 permits the year before, a 3,666% increase. Id.
\(^{52}\) See Ed Vogel, New Gun Law Now in Effect, The Las Vegas Review-Journal, Oct. 1, 1995, at 1B. Vogel observes that during the legislative debate, “some legislators sought a provision to [specifically] allow . . . business owners to post signs that concealed weapons” were not permitted on the premises. Id. However, such a provision was ultimately rejected because of fear that legislators would have been subjected to lawsuits accusing them of infringing Second Amendment rights. Id. Nonetheless, legislative attorneys advised “that businesses themselves could place restrictions on patrons, including posting signs that prohibited concealed weapons.” Id. John Riggs, a lobbyist for Nevada’s concealed weapons law, said such a restriction “goes back to the old West and the idea that you had to check your guns at the bar.” Id.
The statute makes no mention of a private property owner's right to exclude lawfully concealed weapons from the premises.

Notably, the statute has a preemption provision that specifies that the State "fully occupies and preempts the entire field of firearms regulation within the boundaries of the State" and that "[c]ities, towns, and counties or other municipalities may enact only those laws and ordinances relat[ed] to firearms that are specifically authorized by [and consistent with] Washington law." Notwithstanding this preemption provision, the State Attorney General has determined that the State CCW law "does not bar a municipality from regulating or restricting the possession or use of firearms in [certain] places [ ] such as taverns, cocktail lounges, public and private schools and institutions of higher learning" and courtrooms and jails. Additionally, the Washington Supreme Court has concluded that nothing in the law prohibits municipal authorities from regulating or prohibiting municipal employees from possessing firearms "while on the job or in the workplace."

In Cherry v. Municipality of Metropolitan Seattle, the plaintiff, a city bus driver, was dismissed from his job for bringing a concealed weapon to his place of employment. At the time, Cherry had a valid permit to carry a concealed weapon. Nonetheless, Cherry was dismissed from his position for gross misconduct and chose to review his discharge through arbitration. After an unfavorable decision from the arbitrator, Cherry filed an action in the superior court alleging that his constitutional right to bear arms had been violated and that the preemption statute invalidated and preempted the city's firearm rules.

56. 14 Op. Att'y Gen. (Wash. 1983), available in 1983 WL 162412. According to the Attorney General, "a concealed weapons permit . . . does not give rise, . . . to an unqualified right to be in possession of such weapon at any time or any place within the state." Id.
59. Cherry, 808 P.2d at 747. In addition to a "loaded .38 caliber pistol," Cherry also had "an electric cattle prod that measured . . . 12 to 18 inches in length and a 6-inch brass rod pointed at both ends." Id. at 746-47. Cherry indicated that he carried these weapons for protection in case he was attacked. Id. at 746.
60. Cherry, 808 P.2d at 747.
61. Id. After a two day hearing, "the arbitrator rendered an opinion upholding Cherry's termination." Id.
62. Cherry, 808 P.2d at 747. The trial court ruled that the city's "no weapons" policy was not preempted by Washington Revised Code Section 9.41.290 and dismissed Cherry's claims. Id. Thereafter, the Washington Court of Appeals reversed the dismissal, concluding that "[t]here is simply no statutory authority granting municipalities the
On appeal to the Washington Supreme Court, the court concluded that the municipal regulation banning concealed weapons in the workplace did not violate Cherry's constitutional rights because the preemption statute was intended to preempt *laws and ordinances*, but did not address internal employment rules limiting on-duty possession of firearms by public employees in the workplace.\(^{63}\) Thus, the court determined that public employers could internally control the possession of weapons on their premises. The court also observed that nothing in Washington Revised Code section 9.41.290 "would operate to prevent private employers from having internal workplace policies prohibiting the possession of any type [of] weapon, including firearms, by employees on the job."\(^ {64}\)

2. **The Discretion or "Show Cause" States**

a. California

The California CCW statute provides that a permit may be issued upon proof that the person "is of good moral character, that good cause exists for the issuance, and that the person . . . is a resident of the county" where the permit is sought.\(^ {65}\) Licenses are good "for any period of time not to exceed one year from the date of" issuance and the "license may include any reasonable restrictions or conditions . . . as to the time, place, manner, and circumstances under which the person may carry" the concealed weapon.\(^ {66}\) While the statute is silent on the ability of private property owners to prohibit concealed weapons on the premises, two California cases are instructive on the issue of private property rights and concealed weapons.\(^ {67}\)

In *People v. Barela*,\(^ {68}\) the defendant was arrested and charged with carrying a loaded concealed weapon in a public place without a license.\(^ {69}\) California Penal Code section 12026 permits a citizen to authority to regulate the possession of firearms by its employees." *Cherry* v. Municipality of Metro. Seattle, 787 P.2d 73, 75 (Wash. Ct. App. 1990), *rev'd*, 808 P.2d 746 (Wash. 1991).

\(^{63}\) *Cherry*, 808 P.2d at 749. The court reached this conclusion by referring to the legislative history of the preemption provision. *Id*. The court observed that section 9.41.290 was enacted to prevent counties, cities and towns from enacting "conflicting criminal codes regulating the general public's possession of firearms." *Id*. According to the court, the legislation simply did not deal with the authority of a public employer to prevent "employees from carrying firearms" into the workplace. *Id*.

\(^{64}\) *Cherry*, 808 P.2d at 750.


Although there was some conflict in the testimony at trial, the defendant alleged that he
own, possess, keep or carry an open or concealed weapon without a license anywhere within the person's "place of residence, place of business, or on private property owned or lawfully possessed by the citizen." To qualify as a place of business, the person must have a "proprietary, possessory, or substantial ownership interest in the place." Thus, the primary question in *Barela* was whether the defendant had a possessory interest in the restaurant sufficient to invoke the protection of section 12026 which allows a person to own, possess, keep or carry an unlicensed weapon at his place of business.

In determining that *Barela* did not fit the parameters of section 12026, the court concluded that a possessory interest includes "the right to exclude others from using the real property, and the right to control activities occurring on the real property." Since *Barela* did not possess either of those rights with respect to the restaurant premises, the court affirmed his conviction for carrying a concealed weapon without a permit.

In a factually similar situation, the defendant in *People v. Melton* brandished a concealed weapon while working in a convenience store after being assaulted by customers. Although the weapon was unlicensed, the defendant argued, among other things, that he was carrying the weapon in his place of business. According to the court, the underlying question in this case was whether section 12026 "authorizes or allows a person to carry concealed upon his person any pistol, revolver or other firearm capable of being so concealed without a permit or license." In reaching its decision on this issue, the court interpreted section 12026 very narrowly so as to only permit citizens to own, possess, keep or carry concealable weapons at their place of business or residence. Thus, the court drew a distinction between one was carrying the concealed weapon as part of his job providing security guard services at the restaurant where he was arrested. *Barela*, 286 Cal. Rptr. at 459.

70. **CAL. PENAL CODE § 12026** (West Supp. 1996). This statute was enacted to prevent the government from "imposing any requirements, such as 'good moral character,'... [on] the right to possess a weapon at certain [locations]." See *Galvan v. Superior Court*, 452 P.2d 930, 935 (1969).

71. *Barela*, 286 Cal. Rptr. at 459 (citation omitted).

72. *See supra* note 69 and accompanying text.

73. *Barela*, 286 Cal. Rptr. at 461.

74. *Id.* at 461-62.


77. *Melton*, 253 Cal. Rptr. at 663-64.

78. *Id.* at 670 (emphasis added). In framing this question, the court relied upon the legislative history that had construed § 12026 as applying only to weapons capable of being concealed and not concealed weapons. *Id.* Thus, according to the court, nothing in section 12026 "speaks in terms of concealed weapon, nor does the [legislative history]. Rather, they refer specifically and exclusively to a weapon capable of being concealed." *Id.* (emphasis added).
who carries a weapon capable of being concealed and one who actually carries a weapon that is concealed. Because the defendant was actually carrying the weapon concealed on the premises, the court concluded that he had violated the express provision of section 12025 which prohibits the unlicensed carrying of concealed weapons.79

Although these cases concerned unlicensed weapons holders, they provide several insights into how a California court might interpret issues that may directly impact licensed weapons holders. First, it is clear that a citizen needs a permit to carry a concealed weapon beyond the boundaries of his or her place of business (as defined by the court in Barela) or residence. Second, the state legislature and courts have legitimized and given definition to private property owners' rights, even to the extent of allowing the unlicensed and open carrying of weapons in one's residence, place of business or private property. Presumably, such a recognition and interpretation of private property rights would be equally applicable to a property owner's right to exclude those who bring licensed concealed weapons onto the premises.

One additional mechanism that further restricts the rights of licensed weapons holders in California is the language in the CCW statute that provides that the "license may include any reasonable restrictions or conditions which the issuing authority deems warranted, including restrictions as to the time, place, and manner, and circumstances under which a person may carry a [weapon]."80 Consistent with this provision, some issuing officers specify when, where, and under what circumstances weapons may be carried. For example, some jurisdictions prohibit carrying weapons within 1000 feet of schools or invalidate the permit if the license holder carries the weapon while drinking.81 Some jurisdictions simply provide that permit holders should use their "common sense" when determining whether to carry their weapons to certain locations.82 Further, although there is no broad statewide policy, handguns are prohibited at airports, federal buildings, polling places and any place prohibited by county or city law.83 Many employers have also adopted informal policies prohibiting concealed weapons in the workplace even if the employee has a permit.84 Perhaps the main reason for the lack of a

79. Melton, 253 Cal. Rptr. at 670. In 1989, the legislature responded to Melton by amending § 12026 to provide that an unlicensed person may carry a concealable weapon "either openly or concealed" in his place of business or residence. See CAL. PENAL CODE § 12026(a) (West Supp. 1996).
82. Id.
83. Id.
84. Id.
statewide policy or consensus on the issue of prohibited locations is that so few concealed weapons permits are issued. Therefore, the right to exclude properly licensed concealed weapons owners has not become a bona fide issue. For example, in 1995, the City of Los Angeles, with a population of 3,593,700 issued just 42 concealed weapons permits; while San Francisco, with a population of 759,300 issued just 6 concealed weapons permits.85

On July 2, 1996, the California Legislature defeated “a measure that would have allowed virtually anyone in California to carry a concealed weapon.” Thus, for the present, California will continue to adhere to the “show cause” standard which makes it exceptionally difficult for the overwhelming majority of citizens to qualify to carry a concealed weapon.

b. Colorado

The Colorado statute provides that the sheriff or chief of police may issue a permit to carry a concealed weapon after a background check to determine if the applicant would be a danger to himself or to others if granted the permit.87 The statute also provides that the issuing authority will “not be liable for” damages “that may result from granting” the permit if, prior to granting the permit, the agency requested “a criminal history check” from the Colorado Bureau of Investigation.88

A separate section of the Colorado statute makes it unlawful to carry concealed weapons on the grounds of any public or private school, “college, university, or seminary.”89 The statute provides an exception to this provision if, “prior to the time of carrying a concealed weapon,” the individual has been issued a written permit.90

Colorado recently considered legislation that would have “liberalized” concealed weapons laws and allowed law abiding citizens to carry concealed weapons “in most public places, including schools and college campuses.”91 The bill was ultimately defeated due to an in-

85. Id.
86. See Mary Lynne Vellinga, Panel Rejects Eased Concealed Gun Permits, THE SACRAMENTO BEE, July 3, 1996, at A3. Although the bill was approved by the Republican-controlled Assembly, it failed to pass the Democratic-controlled Senate. Id. The bill’s failure followed an “acrimonious hearing in which lawmakers sniped at each other and at the witnesses appearing before them.” Id.
88. Id.
89. COLO. REV. STAT. ANN. § 18-12-105.5(1) (West Supp. 1996).
91. See Hector Gutierrez, Bill Puts Few Limits on Hidden Gun, ROCKY MOUNTAIN NEWS, Feb. 9, 1996, at 20A. Under the proposed bill however, airports and federal buildings continued to be off-limits for concealed weapons permittees. Id.
ability to compromise concerning the proposed restrictions on places where concealed weapons could be prohibited.\textsuperscript{92}

Although the permit issuance standard in Colorado appears somewhat vague, it is in fact quite restrictive. Only 5,000 permits have been issued in Colorado, which has a population of 3,500,000.\textsuperscript{93} The CCW statute is silent on the rights of private property owners to exclude lawfully carried concealed weapons from their premises. Again, it may be logically inferred that because such a small percentage of the population can obtain permits to carry concealed weapons, prohibited places and locations have not become an issue. It is also likely that employers and business owners have informal policies prohibiting lawfully carried concealed weapons on their premises.

3. Concealed Weapons Prohibited

a. District of Columbia

The District of Columbia statute provides that “no person shall carry within the District of Columbia either openly or concealed . . . a [weapon] without a license issued pursuant to District of Columbia law.”\textsuperscript{94} Statutory exceptions to this broad prohibition include law enforcement officers, military personnel and authorized Federal Government employees.\textsuperscript{95} Additionally, the statute provides that the issuing authority may issue a license to any person having a “bona fide place of residence or place of business within the District of Columbia or . . . the United States and a license to carry” a concealed weapon issued by the lawful authorities of any other state.\textsuperscript{96} To obtain such a license, it must also appear that “the applicant has good reason to fear injury to his . . . person or property or has any other proper reason for carrying” a weapon and is a suitable person to be licensed.\textsuperscript{97} The license is valid “for not more than one year from [the] date of [issuance].”\textsuperscript{98}

Since this is a highly restrictive standard (in fact, it has been labelled one of the most restrictive anywhere), the result is that the overwhelming majority of private citizens in the District of Columbia

\textsuperscript{92} See Thomas Frank, Gun Bill Dies in Senate, DENV. POST, Mar. 21, 1996, at B1. According to one theory, the bill seemed to be a “victim of regional politics and the large number of Judiciary Committee members whose districts are urban and suburban — areas where support for gun access tends to be weakest.” \textit{Id.}


\textsuperscript{94} D.C. CODE ANN. § 22-3204 (1996).

\textsuperscript{95} D.C. CODE ANN. § 22-3205 (1996).

\textsuperscript{96} D.C. CODE ANN. § 22-3206 (1996).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}
are prohibited from carrying concealed weapons.\textsuperscript{99} Moreover, because of the virtual prohibition on the right to lawfully carry concealed weapons, the issue of private property rights and concealed weapons laws has not been substantively addressed.

b. Nebraska

The Nebraska statute provides that “any person who carries a weapon . . . concealed on or about his or her person . . . commits the offense of carrying a concealed weapon.”\textsuperscript{100} The statute provides an affirmative defense to a charge of carrying a concealed weapon if the accused can prove that:

[they were] engaged in any lawful business, calling, or employment at the time he or she was carrying any weapon or weapons and the circumstances in which such person was placed at the time were such as to justify a prudent person in carrying the weapon or weapons for the defense of his or her person, property, or family.\textsuperscript{101}

The Nebraska Legislature is likely to consider concealed weapons legislation in the 1997 session.\textsuperscript{102} Under the current initial draft of the concealed weapons proposal, a person could obtain a concealed weapons license if he/she does not have a history of criminal convictions or mental illness. Additionally, applicants would be required to pass a certified handgun safety and training course. Most importantly however, the proposed CCW legislation would allow employers and business owners to prohibit concealed weapons on their premises.\textsuperscript{103}

\textsuperscript{99} See Michael Janofsky, \textit{Thousands Seek Permits to Carry Concealed Arms}, N.Y. Times, July 6, 1995, at A14 (describing reaction to the new “liberal” CCW law in Virginia and comparing it to neighboring District of Columbia “where violent crime rates are among the highest in the country [and] the handgun law is one of the most restrictive anywhere.”).

\textsuperscript{100} NEB. REV. STAT. § 28-1202(1) (1995). Weapon is described in the statute as a “revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon. . . .” Id.

\textsuperscript{101} NEB. REV. STAT. § 28-1202(2) (1995).

\textsuperscript{102} See Paul Hammel, \textit{Nebraska To Debate Concealed Weapons}, OMAHA WORLD-HERALD, Sept. 22, 1996, at 1A.

\textsuperscript{103} Paul Hammel, \textit{Draft of Weapons Proposal Includes Checks, Restrictions}, OMAHA WORLD-HERALD, Sept. 22, 1996, at 7A.
IV. LIABILITY AND PRACTICAL IMPLEMENTATION CONCERNS

A. THE CONSTITUTIONAL DILEMMA: PRIVATE PROPERTY RIGHTS VS. THE RIGHT TO BEAR ARMS

Concealed weapons legislation is fundamentally rooted in the Second Amendment right to bear arms.\(^{104}\) While the breadth of the constitutional right to bear arms has been subject to considerable debate, it has long been recognized that the right is not absolute and is subject to reasonable regulation by the state.\(^{105}\) Similarly, in the area of private property rights, courts have historically recognized that such rights are not absolute and are subject to governmental regulation.\(^{106}\) Thus, the practical implementation concerns related to CCW legislation implicate the theoretical intersection of two historically recognized, although non-absolute, rights. The question thus becomes one of mutually accommodating the competing interests embodied in both rights. Although the United States Supreme Court has not addressed the convergence of the right to bear arms and private property rights, the Court, in an analogous context, has considered the contours of the First Amendment as it relates to private property rights.

For example, in *Lloyd Corp. Ltd. v. Tanner*,\(^{107}\) the respondent, Tanner, and others sought to distribute handbills in the interior mall
area of petitioner's large privately owned shopping center. Petitioner's security guards subsequently requested that respondents discontinue the distribution of the handbills under threat of arrest. Thereafter, respondents brought an action for injunctive and declaratory relief alleging that petitioner's actions violated their First Amendment rights.

On appeal, the United States Supreme Court succinctly framed the issue as whether "respondents, in the exercise of First Amendment rights, may distribute handbills on [petitioner's] private property contrary to [the petitioner's] wishes and contrary to a policy enforced against all handbilling." Analyzing this issue, the Court reasoned that the extent of the invitation to the public is to come to the mall to do business with the tenants and thus there "is no open-ended invitation to . . . use the [mall] for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." The Court then cautioned that "it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only." Given that specific limitation, the Court observed that:

although accommodations between values protected by the [First, Fifth and Fourteenth Amendments] are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or uninvited guest may exer-

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108. *Lloyd*, 407 U.S. at 552. The interior of the mall did not contain any public streets or sidewalks. *Id.* at 553. The respondents utilized the private sidewalks inside the mall to distribute "handbill invitations to a meeting of the 'resistance Community' to protest the draft and Vietnam War." *Id.* at 556. The distribution was quiet, "orderly, and there was no littering." *Id.*

109. *Lloyd*, 407 U.S. at 556. The mall had a strict policy "against the distribution of handbills within the building complex and its malls." *Id.* at 555.

110. *Lloyd*, 407 U.S. at 556. The district court concluded that the mall was "open to the general public" and was the "functional equivalent of a public business district." *Id.* Thus, the rule prohibiting the distribution of handbills violated First Amendment rights. Tanner v. Lloyd Corp., Ltd., 308 F. Supp. 128, 130 (D. Or. 1970), aff'd, 446 F.2d 545 (9th Cir. 1971), rev'd, 407 U.S. 551 (1972). The Court of Appeals affirmed. Tanner v. Lloyd Corp., Ltd., 446 F.2d 545 (9th Cir. 1971), rev'd, 407 U.S. 551 (1972).


112. *Id.* at 555. The Court further elucidated this point by quoting from Justice White's opinion in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1967). *Lloyd*, 407 U.S. at 565. Specifically, the Court observed that "[i]n no sense are any parts of the shopping center dedicated to the public for general purposes. . . . The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold." *Logan*, 391 U.S. at 338 (White, J., dissenting).

exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.\textsuperscript{114} Thus, the Court concluded that a privately owned shopping center could prohibit distribution of handbills in the interior mall area without violating the distributors' First Amendment rights.

The Supreme Court has, however, acknowledged that a state may provide more protection for constitutional rights in the context of freedom of speech and private property rights.\textsuperscript{115} In Pruneyard Shopping Center v. Robins,\textsuperscript{116} the California Supreme Court held "that the California constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."\textsuperscript{117}

Upon review, the United States Supreme Court acknowledged that a state has the right "to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."\textsuperscript{118} Notwithstanding this additional constitutional protection, the Court determined that such state laws must also be examined to determine whether they unlawfully infringe upon a landowner's property interest under the Takings Clause.\textsuperscript{119} According to the Court, this "requires an examination of whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."\textsuperscript{120} Further, "this examination entails inquiry into such factors as the character of the governmental action, its economic impact and its interference with

\begin{itemize}
  \item \textsuperscript{114} Id. at 567-68.
  \item \textsuperscript{115} See Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). In Pruneyard, the appellees, while on the premises of appellants' privately owned shopping center, began soliciting signatures from passersby for petitions in opposition to a United Nations resolution. Pruneyard, 447 U.S. at 77. When informed that such activity violated the shopping center's regulations prohibiting expressive activity not directly related to the center's commercial purposes, appellees left the premises. Id. Later, appellees filed suit to enjoin the appellants from denying them access to the center for purposes of circulating their petitions. Id.
  \item \textsuperscript{116} 447 U.S. 74 (1980).
  \item \textsuperscript{117} Pruneyard, 447 U.S. at 78. The California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a).
  \item \textsuperscript{118} Pruneyard, 447 U.S. at 81 (citing Cooper v. California, 386 U.S. 58, 62 (1967)).
  \item \textsuperscript{119} Pruneyard, 447 U.S. at 82-83. The appellants argued that by permitting appellees to engage in petitioning activity on their premises, their right to exclude others was being "taken" in violation of the Fifth Amendment. Id. at 82. The Court thus analyzed the landowners' interest in the context of the Fifth Amendment guarantee against the taking of property without just compensation. Id. at 82.
  \item \textsuperscript{120} Pruneyard, 447 U.S. at 83 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
\end{itemize}
reasonable investment-backed expectations." Applying these factors, the Court determined that permitting appellees to exercise state protected rights of free expression did not amount to an unconstitutional infringement under the Takings Clause. The Court indicated that "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center."

While the courts have not specifically addressed the conflict between the exercise of Second Amendment rights and private property rights, the First Amendment/private property cases provide some insight into the analytical framework that courts might utilize in the Second Amendment context. Such an analysis would likely incorporate two significant factors that seem to mitigate in favor of the supremacy of private property rights. First, unlike the First Amendment, the right to keep and bear arms has not been considered a fundamental right. Thus, excluding citizens who lawfully carry concealed weapons from private property does not present the controversial dichotomy of exercising fundamental rights versus private property interests. Second, and perhaps more importantly, carrying concealed weapons, even lawfully, presents the likelihood of increased physical violence and endangerment above and beyond the concerns typically contemplated in First Amendment cases. Specifically, in a retail establishment context, a forceful argument could be made that the exercise of Second Amendment rights is incompatible with the interests of the stores and shoppers and potentially impairs the value of the property as a shopping center because citizens might refuse to patronize establishments with permissive weapons policies.

B. "GUN FREE" ZONES AND POTENTIAL LIABILITY

The current state of the law appears to allow employers and private property owners to establish "gun free" zones which prohibit citizens from carrying lawfully concealed weapons on the premises. However, because the citizen is engaging in a lawful activity that is based upon the historical right of self-protection, an employer or business owner considering adopting a "gun free" zone must analyze and weigh the potential liabilities that might accompany such a decision.

121. Id. at 83 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).
122. Id. at 84.
123. Id. at 83. Pruneyard did however retain the right to restrict the "expressive activity by adopting time, place and manner regulations" in order to "minimize any interference with its commercial functions." Id.
124. But cf. Halbrook, 26 VAL. U. L. REV. at 206 (While it has not discussed the Second Amendment in any detail . . . the Court has recently denied that some Bill of Rights freedoms "are in some way less fundamental than others."
Because there are different potentialities in the contexts of employment and private property owners, the next sections will separately address those contexts and potential liabilities. It should be noted at this point that the recent proliferation of concealed weapons legislation has, for the moment, outpaced legislative and judicial interpretations of the statutes in the areas of employment and private property rights. Accordingly, although logical inferences may be drawn, there is a conspicuous dearth of legislative and judicial authority on many of these issues.

1. Employers

In recent years, workplace violence has increased at an alarming rate. According to the United States Department of Justice National Crime Victimization Survey, nearly one million employees are victims of workplace violence each year. Moreover, homicide is the leading cause of workplace fatalities for women and the second leading cause for men. In light of these disturbing statistics, employers in states that permit lawfully concealed weapons must balance the substantial potential for workplace violence against an individual employee's right to lawfully carry a concealed weapon. When balancing those considerations, the employer must weigh at least two primary (and seemingly contradictory) questions. First, by establishing a "gun free" workplace, will the employer be liable for acts of violence that could have been prevented if weapons were allowed in the workplace? Second, if weapons are permitted in the workplace, will the employer be liable if another employee or third party is injured as a result of a gun-related incident, whether accidental or intentional?

Given the increasing levels of workplace violence, it is not unreasonable to expect that many employers will want to adopt workplace policies that significantly reduce the potential for violence. Such policies are entirely consistent with established legal and common law duties.

a. OSHA

The Occupational Safety and Health Administration (OSHA) has promulgated regulations that require employers to provide a safe and healthful workplace. The "general duty clause" of section 654 pro-

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127. This latter question will be addressed in Section C.
vides that "[e]ach employer shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees."\(^{129}\) To establish a violation of the general duty clause, OSHA must demonstrate that "(1) the employer failed to render its workplace free of a hazard; (2) the hazard was 'recognized'; (3) the hazard caused or was likely to cause death or serious physical harm; and (4) the hazard was preventable."\(^{130}\)

In at least one instance, OSHA has cited an employer for violating the general duty clause by failing to provide a workplace free from the recognized hazard of violence.\(^{131}\) In *Megawest Financial, Inc.*,\(^{132}\) a security guard was employed to quell violent occurrences at an apartment complex office.\(^{133}\) After five weeks, however, the security guard was dismissed due to financial constraints. Employees of the apartment complex were subsequently injured and threatened. The employees filed a petition with OSHA when the employer failed to reinstate the security guard.\(^{134}\)

After a hearing, the Administrative Law Judge ("ALJ") determined that failure to provide a workplace free of violence could in fact constitute a violation of the general duty clause.\(^{135}\) Yet, the ALJ con-

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\(^{130}\) Georgia Elec. Co. v. Marshall, 595 F.2d 309, 320-21 (5th Cir. 1979) (citing Getty Oil v. OSHRC, 530 F.2d 1143, 1145 (5th Cir. 1976)). In explaining the notion of a "recognized hazard," the court stated that it "is a condition that is known to be hazardous." *Marshall*, 595 F.2d at 321. Further, "this element can be established by proving that the employer had actual knowledge that a condition is hazardous or proving that the condition is generally known to be hazardous in the industry." *Id.* at 321 (citations omitted). The court noted that "whether or not a hazard is 'recognized' is a matter of objective determination." *Id.*

\(^{131}\) *Megawest Financial, Inc.*, 1995 OSHA LEXIS 80, at *2 (1995). Perhaps foreshadowing the ultimate decision in this case, the administrative law judge (ALJ) observed at the outset of the opinion that in the area of OSHA's function in reducing workplace violence, "certain facts must be accepted." *MegaWest*, 1995 OSHA LEXIS 80, at *4. First, the legislative history does not state or imply that OSHA should be utilized to police "social behavior." *Id.* Second, and perhaps more importantly, the potential for violence in the workplace is so widespread that the use of OSHA regulations "would most surely tax OSHA's limited resources in ways difficult to control." *Id.*


\(^{133}\) *Megawest*, 1995 OSHA LEXIS 80, at *5. The apartment complex was located in one of the highest crime areas in the city and staff members working at the complex "were often subjected to threats, belligerent conduct and, . . . [occasionally], physical attacks." *Id.* at *7.

\(^{134}\) *Megawest*, 1995 OSHA LEXIS 80, at *10-11. The employees, in a letter to management, specifically requested that Megawest provide a security guard during operating hours to avoid "life threatening situations." *Id.* at *10.

\(^{135}\) *Megawest*, 1995 OSHA LEXIS 80, at *23-24. At the hearing, the government contended that Megawest had violated OSHA's general duty clause and "ur[ged] that violence in the workplace should not be considered fundamentally different from traditional 'recognized' hazards." *Id.* at *12. Megawest argued that the acts of violence were unforeseeable and had not occurred in the residential apartment industry before.
cluded that, in this instance, OSHA failed to establish a violation of the general duty clause. The ALJ observed that:

[while the threat of workplace violence is omnipresent, an employer may legitimately fail to recognize the potential for a specific violent incident exists. [The employer] may reasonably believe that the institutions to which society has traditionally relegated control of violent criminal conduct, i.e., the police, can appropriately handle conduct... a high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence.** 136

In light of this conclusion, it appears that the ALJ was reluctant to extend the application of OSHA’s “recognized hazard” element beyond those “hazards that arise from some condition inherent in the environment or the processes of the employer’s workplace.”** 137

Recently, OSHA adopted two sets of guidelines related to workplace violence. On March 13, 1996, OSHA promulgated Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers.** 138 Subsequently, on April 5, 1996, OSHA issued Draft Guidelines for Workplace Violence Prevention Programs for Night Retail Establishments.** 139 These guidelines encourage effective workplace violence prevention through management and employee involvement and commitment, as well as hazard prevention and control. It is noteworthy that, in the Health Care and Social Service Worker’s guide, OSHA specifies that one of the risk factors for increased work-related assaults among employees in the health care

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**Id. at *13. Megawest also asserted that it was not a member of a high risk industry. Id. The ALJ determined that Megawest denied its employees the protection anticipated by the contractual relationship by not adequately training employees to diffuse anger or lessen the impact of potential incidents. Id. at *22-24. “Nor did Megawest take active preventative measures, such as assuring the availability of properly functioning two-way radios, alarm buttons or similar devices.” Id. at *22.

136. Megawest, 1995 OSAHRC LEXIS 80, at *28-29. The ALJ also noted that the apartment management industry had not previously been cited as an industry where there was a high incidence of violence. Id. at *33.


138. OSHA Guidelines for Preventing Workplace Violence Among Health Care and Social Service Workers, 25 O.S.H. Rep. (BNA) 1439, 1439 (March 13, 1996) [hereinafter Guidelines]. OSHA indicates in the text of these guidelines that they are “advisory in nature, informational in content, and intended for use by employers seeking to provide a safe and healthful workplace.” Guidelines, 25 O.S.H. Rep. (BNA) at 1439. OSHA further observes that “employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it.” Id.

and social service fields is "[t]he prevalence of handguns . . . among patients, families and their friends."\(^{140}\)

Although OSHA has not addressed the issue of carrying concealed weapons in the workplace, an analysis of an employer's liability would likely begin with the general duty clause factors outlined above. To establish a violation of the general duty clause in the context of lawfully concealed weapons in the workplace, OSHA would first have to demonstrate that lawfully carried concealed weapons present a hazard to employees. Given the current workplace violence statistics, it does not require a great leap of imagination to conclude that allowing employees to bring weapons into the workplace, even lawfully, would increase the potential hazard of workplace violence.\(^{141}\) Moreover, a cogent argument could be made that such hazards are now objectively "recognizable" and, therefore, employers are on notice of the hazard of workplace violence in light of the recent publication of various statistics as well as the promulgation of OSHA guidelines.

Essentially then, employers are forced to choose between the two alternatives of permitting individuals to exercise the right to lawfully carry concealed weapons and ensuring the maximum safety of all employees in the workplace. In the current climate of increasing workplace violence, it would not be unreasonable for employers to choose the latter option. Therefore, employers can reasonably adopt policies of prohibiting concealed weapons in the workplace predicated upon the employer's legal duty to provide a safe workplace for employees.

The employer's responsibility is not fulfilled, however, by simply establishing a policy prohibiting weapons in the workplace. Because one of the premises supporting concealed weapons legislation is self-protection, employers must provide reasonable assurances that the "gun free" workplace will also be a safe workplace for employees. The first step then is to adopt a comprehensive policy prohibiting weapons in the workplace. All employees should be instructed on the policy and the potential consequences (i.e., termination) for violating the policy. The policy should also specifically designate those areas (i.e.,

\(^{140}\) Guidelines, 25 O.S.H. Rep. (BNA) at 1440. The guidelines report that 25 percent of major trauma patients treated in the emergency room carried weapons. \textit{Id.} at 1440 n.5. Additionally, 17.3 percent of psychiatric patients searched were carrying weapons. \textit{Id.}

\(^{141}\) As the ALJ in Megawest opined, when dealing with the issue of workplace violence, "Humans introduce a wild card into the scenario. Employers have less control over employees than they do over conditions because employees have a will, an intention, and an intellect that drives their behavior. . . . The hazard of physical assault arises . . . from anger and frustration of people . . . [and] may be fueled by drugs, alcohol or mental health problems." \textit{Megawest}, 1995 OSAHRC LEXIS 80, at *26-28. This "wild card scenario" is arguably exacerbated by the introduction of weapons into the workplace.
parking lots) of the employer's property that are "gun free" zones. As a necessary second step, the employer must then implement training programs for management and employees that enhance awareness of the potential for workplace violence, develop effective conflict resolution skills to diffuse potentially violent situations, and effectively communicate a "zero tolerance" attitude toward workplace violence.

A comprehensive "no weapons" policy that is consistently enforced, coupled with workplace violence prevention programs, should provide the requisite "hazard free" workplace and conceivably shield employers from potential OSHA violations.

b. Common Law Duties

In addition to the legal requirements under OSHA, employers have a common law duty to exercise ordinary care to maintain a safe workplace. An employer may be liable under a negligence theory if there is a breach of that common law duty that results in injury to an employee or third party. Exercising ordinary care has been interpreted to include taking measures to prevent the commission of legally "foreseeable" crime. In Massie v. Godfather’s Pizza, the plaintiff, a waitress at Godfather’s restaurant, brought an action to recover "damages for a rape and assault she sustained during a robbery" of the restaurant. Discussing the defendant's potential liability for the rape of one of its employees while on duty, the court in Massie explained:

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142. This standard of care is based upon a theory of negligence that is applicable when there is a duty owed by one person to another. While the question of duty is one of law, it is well established that an employer may be held responsible in tort for assaults committed by an employee while he is acting within the scope of his employment, even though he may act wantonly and contrary to his employer's instructions. New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909).

143. See, e.g., Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942 (Tex. App. 1994) (concluding that the employer/employee relationship is a special relationship creating a duty on the part of the employer to control the employee's conduct so as to prevent injury to third parties), aff'd, 907 S.W.2d 472 (Tex. 1995). "[T]here are two theories that might result in liability for an employer: respondeat superior and negligent hiring." Boys Club, 868 S.W.2d at 950 (citing Dieter v. Baker Service Tools, 739 S.W.2d 405 (Tex. App. 1987)). Under the respondeat superior theory, the employer is liable for the acts of the employee that are performed within the course and scope of his employment. Id. at 950. While "negligent hiring does not require that the employee be acting within the course and scope of employment," it does require that the harm be a result of the employment. Id. See also Dieter v. Baker Service Tools, 739 S.W.2d 405, 408 (Tex. App. 1987) (stating that if the negligent hiring theory did not require some connection to employment, "an employer would . . . be [the] insurer of every person who happens to come into contact with [the] employee.").

144. See, e.g., Massie v. Godfather’s Pizza, Inc., 844 F.2d 1414 (10th Cir. 1988).

145. 844 F.2d 1414 (10th Cir. 1988).

146. Massie, 844 F.2d at 1415.
 foreseeable means to know or reasonably anticipate beforehand. Thus, [the jury] should determine ... whether . . . a reasonably prudent corporation . . . should have reasonably anticipated or foreseen that a criminal assault generally of the same kind as occurred here could have occurred as a result of its negligence.147

Foreseeability is generally a fact-sensitive inquiry based upon the totality of the circumstances.148 For example, if there have been previous acts of violence in or around the employer's premises, then a logical inference may be raised that acts of violence are foreseeable.149

The importance of the foreseeability standard is that employers are not required to protect employees against all danger. Yet, the limitation of foreseeability provides little guidance as to when liability will attach.150 For example, because of increasing levels of workplace violence nationwide, are all employers effectively "on notice" that violence may erupt in the workplace? Or, would the foreseeability inquiry be limited to particular industries that have a history of violence?

While the foreseeable parameters in this context are somewhat unclear at this time, it may be logically inferred that permitting weapons in the workplace increases the foreseeability that violence may occur. Applying the Massie court's foreseeability standard, it seems that "a reasonably prudent person" would anticipate the dangers created by allowing employees to bring weapons into the workplace, even if those weapons are lawfully carried. Moreover, the increased potential for violence with weapons in the workplace is likely enough considering modern statistics on workplace violence that a "reasonably

147. Id. at 1419-20.
148. See, e.g., Isaacs v. Huntington Memorial Hospital, 695 P.2d 653, 659-61 (Cal. 1985) (stating that foreseeability is determined in light of the totality of the circumstances including such factors as the nature, condition and location of the premises). See also Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207, 217 (1993) (Mosk, J., dissenting) (stating that foreseeability "is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.").
149. See, e.g., Graham v. M & J Corp., 424 A.2d 103, 105-08 (1980) (holding that high crime neighborhood and prior minor acts of trespass and vandalism may give notice of the potential for an arson to occur). See also Isaacs, 211 Cal. Rptr. 356 (1985) (dismissing plaintiff's suit because he failed to show that prior incidents of similar violence had occurred on the premises).
150. Ann M., 863 P.2d at 217 (Mosk, J., dissenting). In his dissenting opinion, Justice Mosk noted that a rule that limits evidence of foreseeability to prior similar criminal acts raises a number of troubling questions. Id. at 217 (Mosk, J., dissenting). For example, "how close in time do the prior incidents have to be? How near in location must they be?" Id. (Mosk, J., dissenting) (quoting Isaacs, 695 P.2d at 659).
thoughtful person would take account of it in guiding practical
conduct."\textsuperscript{151}

\textbf{2. Business and Private Property Owners}

Business and private property owners must take reasonable care
to prepare the premises and make them safe for invitees.\textsuperscript{152} An invi-
tee can be either a public invitee or a business visitor. A public invitee
is "invited to enter and remain on the land as a member of the public
for a purpose for which the land is held open to the public."\textsuperscript{153} A business
visitor "is a person who is invited to enter and remain on the land
for a purpose directly or indirectly connected with business dealings
with the possessor of the land."\textsuperscript{154} Additionally,

[an owner] who holds [the land] open to the public for entry
for his business purposes is subject to liability to members of
the public while they are upon the land for such purpose, for
physical harm caused by the accidental, negligent, or inten-
tionally harmful acts of third persons . . . and by the failure of
the possessor to exercise reasonable care to (a) discover that
such acts are being done or are likely to be done, or (b) give a
warning adequate to enable the visitors to avoid the harm, or
otherwise protect them against it.\textsuperscript{155}

The comment to this section of the Restatement explains that this
rule applies to "theatres, restaurants, shops and stores, business of-

151. \textit{See supra} note 144 and accompanying text.
152. \textit{Restatement (Second) of Torts} § 333 (1965).
153. \textit{Id.} at § 332.
154. \textit{Id.}
155. \textit{Id.} at § 344.
156. \textit{Id.} at § 344 cmt. a.
157. \textit{Id.} at § 344 cmt. f.
158. \textit{See supra} note 144 and accompanying text. \textit{See also} Galloway v. Bankers
Trust Company, 420 N.W.2d 437 (Iowa 1988).
159. 420 N.W.2d 437 (Iowa 1988).
160. \textit{Galloway}, 420 N.W.2d at 438.

ices and any other premises held open to the public for admission for
the business purposes of the possessor."\textsuperscript{156} Typically, the owner is

not liable for the safety of visitors "until he knows or has reason to
know . . . [from] . . . the place or character of his business, or past
experience[s] . . . that he should reasonably anticipate careless or
criminal conduct on the part of third [parties]."\textsuperscript{157} As in the employer/
employee context, the key to liability will be foreseeability under the
totality of the circumstances.\textsuperscript{158}

In \textit{Galloway v. Bankers Trust Co.},\textsuperscript{159} the plaintiff sued the owner-
ship and management of a mall based upon the mall's "alleged failure
to protect him from a homosexual rape" in the mall restroom.\textsuperscript{160} Ana-
alyzing the foreseeability component, the court acknowledged that the mall's past history of property crimes was probative on the question of foreseeability.\(^{161}\) Moreover, the court found that "the repetition of criminal activity, regardless of its mix, may be sufficient to the place property owners on notice of the likelihood that personal injury, not merely property loss, will result."\(^{162}\)

A "no weapons" policy on business premises creates an atmosphere of safety for invitees and avoids the liability that could result from the accidental or intentional discharge of a weapon. However, because a "gun free" policy essentially removes the measure of lawful self-protection available to citizens, business owners must be vigilant in exercising reasonable care to prevent foreseeable criminal activity in and around the business premises. In other words, the business owner must take reasonable steps to prevent the "gun free" zone from becoming a target for the criminal element. Depending upon the circumstances (including the location and the past criminal history surrounding the location), such precautions might include additional security personnel, video surveillance cameras and regular patrols of the parking lot areas.

3. **Implementation**

Once an employer or business owner chooses to establish a "gun free" zone to ensure the safety of employees and invitees, effective implementation must be a priority. Effective implementation requires, among other things, instituting measures to ferret out those who violate the policy, as well as possibly providing a method for employees and invitees to safely secure lawfully carried weapons as soon as they enter the premises.

In the employment context, effective implementation might include a "whistle blower" program that allows employees to provide tips on those who might be violating the "no weapons" policy. Additionally, employers might require that employees consent to searches of various locations on the employer's premises such as offices, desks, and lockers in order to detect violations of the policy.\(^{163}\) Employers should also establish severe penalties (i.e., termination) for violations of the policy in order to provide a categorical deterrent to those who might violate the policy. Finally, since employees have a right to carry

\(^{161}\) *Id.* at 438-39.

\(^{162}\) *Id.* at 439. *See also* Jardel Co. v. Hughes, 523 A.2d 518, 526 (Del. 1987) (holding that crimes of whatever type and whenever occurring on the premises are part of the circumstantial setting in which security needs are measured).

\(^{163}\) *But see* O'Connor v. Ortega, 480 U.S. 709 (1987) (holding that searches and seizures by government employers or supervisors of the private property of their employees are subject to Fourth Amendment constraints).
concealed weapons while away from the employer's premises, it may be incumbent upon the employer to provide a secure "gun check" facility so as to properly balance the employer's policy against the employee's right to lawfully carry a weapon.

Preventing invitees from bringing weapons onto business premises presents numerous complexities. Posting a sign that clearly mandates "no weapons" is the obvious first line of attack. Physically searching invitees to the premises is not only costly and impractical, but is likely to be met with invasion of privacy challenges and reduced customer traffic. The next best alternative is a weapons checkpoint (i.e. metal detector) at the entrances and exits to detect individuals who violate the policy. In the event a violation is discovered, the invitee might be refused entrance and invited to return without the weapon. Alternatively, the invitee might be requested to secure the weapon in an established and secure "gun check" facility on the premises.

Once again, the key implementation components of "gun free" zones in either the employment or business context are effective "zero tolerance" enforcement policies and reasonable safety precautions.

4. Stigma

Recently, several business establishments have attempted to implement "no weapons" policies. In response, local affiliates of national "pro-gun" associations established a "hit list" and letter writing campaigns aimed primarily at large retail and restaurant chains that had adopted "no weapons" policies. Essentially these organizations vow not to patronize businesses that prohibit licensed citizens from carrying handguns. There have been a number of responses to the letter writing campaigns including: (a) maintaining the "no weapons" signs despite the protests; (b) removing the signs and apparently disavowing the "no weapons" policy; (c) removing the signs but maintaining the policy, thereby creating a virtual "don't ask, don't tell" policy; and (d) maintaining the signs, but including a message on the sign that warns customers that there is "no private right of enforcement." In the final analysis, a "no weapons" policy is a multifaceted business decision requiring consideration of significant legal, policy and implementation concerns.

164. See, e.g., Sylvia Moreno, Some Firms Drop Attempt to Ban Guns, DALLAS MORNING NEWS, July 11, 1996, at 1A.
If employers and business owners choose a permissive policy that allows employees and invitees to bring concealed weapons onto the premises, they face a different set of potential liabilities. The next sections will separately discuss those liabilities in the employment and business context.

1. Employers

A policy that allows employees with concealed weapons permits to bring weapons into the workplace also raises issues of potential liability. Although the employer is allowing the employee to exercise the right to lawfully carry concealed weapons, the employer must nevertheless be cognizant of the aforementioned OSHA guidelines and common law duties. Because weapons in the workplace logically create an increased hazard of workplace violence, an employer will have to be proactive in establishing standards that ensure safety despite the fact that concealed weapons are on the premises. In addition to programs that seek to prevent workplace violence, employers may be required to implement policies that provide: 1) that weapons are to be secured (i.e. the safety lever is enabled) while on the premises; 2) that weapons are not accessible to those not licensed to carry concealed weapons; and 3) that specific sanctions will be imposed for improper display or use of weapons in the workplace. Such policies are an extremely critical precaution to avoid potential liability in the form of OSHA citations or common law negligence lawsuits.

2. Business and Private Property Owners

From a feasibility and practicality standpoint, it is perhaps easier for businesses to adopt permissive weapons policies. Consistent with the tort standard for liability, a business owner that allows weapons on the premises should give adequate warning to visitors in order to allow them to avoid any potential harm. While such a warning is certainly not required by statute, and may indeed create unnecessary apprehension, it can nevertheless provide a potential shield against liability. Of course, such a warning should be coupled with additional precautionary measures that seek to reduce other potentially harmful situations for invitees while on the premises.

165. See supra notes 125-47 and accompanying text.
166. See supra notes 136-37 and accompanying text.
167. For a discussion of some of the practical implementation concerns, see Section IV.B.3 of this Article.
168. See supra note 151 and accompanying text.
V. CONCLUSION

The proliferation of concealed weapons legislation has created numerous complex legal and practical difficulties for employers and business owners. Although citizens with permits may lawfully carry concealed weapons, it is likely that courts will uphold the rights of private property owners to prevent exercise of the right to carry if the employer, business or private property owner chooses to prohibit concealed weapons on the premises.

Because of the increase in workplace violence and recent OSHA guidelines, employers should consider adopting and effectively implementing and enforcing "no weapons" policies in the workplace predicated on the employer's legal and common law duty to provide a safe workplace.

Similarly, business owners should adopt a "no weapons" policy in an effort to exercise reasonable care in providing for the safety and security of invitees. However, business owners must carefully calculate the cost and practical feasibility of implementation procedures to determine if the benefits outweigh the disadvantages of such a policy.