

Impact

An Overview of Current Legal Events of Concern and Interest

Summer 2004

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Ohio's Concealed Carry Law for Handguns: Clearing Up the Confusion for Business Owners

By: Paul B. Calico



With much fanfare, the Ohio General Assembly passed the so-called Concealed Carry Act of 2004, making it legal, in certain circumstances, for a gun owner to carry a concealed handgun.

Generally, the Act permits persons at least 21 years of age who have been Ohio residents for 45 days to carry a concealed handgun upon completion of a 12-hour certified firearm program, unless they are disqualified due to prior convictions, pending indictments/charges, or mental competency issues. The Act has caused concerns for some employers and business owners who, having experienced situations in which employees' become upset with one another, are not excited about the prospect of an armed workforce. The same concerns apply with regard to visitors to the workplace, whether customers, clients, contractors, or otherwise.

Employers' concerns fall on both sides of the issue. The first concern is that, if handguns are present in the workplace, someone may get shot, and the employer will be sued for failing to prohibit guns. The second concern is just the opposite — if the employer prohibits guns and someone is injured in an altercation, the victim may claim that his inability to carry a concealed weapon prevented proper self-defense, thereby causing his injuries. This article will review some frequently asked questions and provide guidance to employers and business owners.

May an employer prohibit employees from carrying concealed weapons at work?

Yes. Notwithstanding the fact that Ohio law permits licensed persons to carry handguns, the statute expressly states that it does not negate or restrict the rules, policies, or practices of a private employer concerning or prohibiting the presence of firearms on its premises.

If I would like to do so, may I choose to allow handguns at my place of business?

Yes, but you need not adopt a policy to that effect. Absent a prohibition against the possession of weapons,

the Concealed Carry Law does allow registered persons, including employees, to possess concealed handguns. Nothing in the act, however, *requires* a private employer to adopt any rules, policies, or practices regarding the presence of firearms on the employer's premises.

May a company be held liable for a policy either prohibiting or permitting firearms — or for not having a policy?

No, unless the employer acts with a malicious purpose. The legislature was careful to protect employers, stating that they are immune from liability in a civil action for any injury, death, or loss to person or property allegedly caused by or related to a person bringing a handgun onto the employer's property (again unless the employer acts with a malicious purpose). The statute also makes it clear that employers are immune from liability allegedly caused or related to the employer's decision to permit, or prohibit, persons from bringing handguns onto company property.

May I post a sign prohibiting firearms on company property?

Yes. While a company policy can be effectively communicated to all employees by internal communication, visitors will not be aware of the policy. The General Assembly provided that the owner or person in control of private property (such as a lessee) may post a sign in a conspicuous location prohibiting persons from carrying firearms (including concealed firearms) onto the premises. The statute provides that a person who knowingly violates a posted prohibition is guilty of both criminal trespass and a misdemeanor of the fourth degree.

My company does not have a weapons policy, but we would like to enact one. May we do so without violating employees' rights?

Yes. Company management may be required to make decisions on literally dozens of policy issues in any given week. Uneven application of those policies can be an invitation for a claim of discrimination: that certain employees are treated more or less

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Continued Employment Supports Enforcement of a Covenant-not-to-Compete

By: Thomas P. Glass

The Ohio Supreme Court recently clarified Ohio law regarding the enforceability of non-competition agreements by holding that in an at-will employment setting, continued employment alone is sufficient consideration to support the enforceability of a covenant-not-to-competite. Prior to its decision in *Lake Land Employment Group of Akron, LLC v. Columber*, 2004 Ohio 786, the Supreme Court had not addressed this specific issue and the Ohio courts of appeals were split as to whether continued employment, in and of itself, constituted sufficient consideration to support the enforceability of a covenant-not-to-competite.

In *Lake Land Employment Group of Akron*, the employee had been employed for some time when his employer presented him with a covenant-not-to-competite. The employee, an at-will employee, signed a covenant-not-to-competite and continued working for the employer for another ten years. It was undisputed that at the time the employee signed the covenant-not-to-competite he did not receive a raise, any additional benefits or remuneration, or receive any change in his employment status. After severance of his employment relationship, the employee started his own business that engaged in a business similar to that of the former employer. The former employer filed suit to enforce the covenant-not-to-competite that had been signed a decade earlier. The former employee argued the covenant-not-to-competite was unenforceable because it was not supported by consideration.

While covenants-not-to-competite are considered contracts, unlike a typical contract, courts have historically scrutinized covenants-not-to-competite because they implicate restraint of trade issues. Early in this century the mobility of a skilled labor pool was limited, and the enforcement of a covenant-not-to-competite could preclude a laborer from earning a living or bind an employee to an employer for life. However, as the economic climate changed over the course of the last century and employment opportunities dramatically increased, courts became more acceptable of reasonable covenants-not-to-competite that were balanced to protect the rights of the employer and employee. Thus, courts focused their attention on the geographic and temporal limitations contained in covenants-not-to-competite.

In *Lake Land Employment Group of Akron*, the Supreme Court held that the judicial scrutiny employed to determine the reasonableness of a covenant-not-to-competite did not extend to the issue of the sufficiency of consideration. Instead, the Supreme Court applied traditional employment and contract law principles to resolve the dispute. The Supreme Court reasoned that since the nature of the at-will relationship between the parties allowed the employer to terminate the employee, or the employee to quit his job, at any time, each party was free to propose a change to the terms of their relationship at any



time. The employer's request for the employee to sign a covenant-not-to-competite was nothing more than a proposed change to the terms of their relationship, which could have been rejected by the employee. The Supreme Court reasoned that an employer's "presentation of a noncompetition agreement ... to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties' at-will employment." As such, the Supreme Court held that "mutual promises to employ and to be employed on an ongoing at-will basis, according to agreed terms, are supported by consideration: the promise of one serves as consideration for the other."

Tom Glass is a partner in the firm's Litigation Department and has litigated issues involving non-competition agreements and other restrictive covenants.

Ohio's Concealed Carry Law *continued*

favorably than others. The best way to avoid such claims, and potential liability, is to adopt and follow a policy and procedure manual, in the form of an employee handbook. Having such policies in place eliminates the need for management to make decisions on a case-by-case basis. Assuming the policies are followed, this should eliminate claims of unequal treatment. If a company chooses to prohibit employees from possessing firearms at work, the ideal way to do so is by means of a written policy distributed to all employees as a part of the employee manual. (The company should also post a sign advising visitors of its policy.)

Until recently there was some question about whether an employer could change the terms and conditions of employment (such as by enacting a policy prohibiting employees from possessing handguns) unless it provided consideration to its employees for the change. However, as indicated in the adjoining article by Tom Glass on the *Lake Land* case, the Ohio Supreme Court has held that, absent an employment agreement, a company is free to change the terms and conditions of employment upon notice to employees, without providing consideration for the change. Employees are then free to choose to work under the new conditions or to terminate their employment, if they are unwilling to work under those conditions.

In conclusion, while the Ohio General Assembly provided the right for certain individuals to carry concealed handguns, the legislature was careful to protect the right of business owners to make decisions regarding weapons in the workplace. Ohio businesses are free to enact — or not to enact — policies and procedures either prohibiting or permitting concealed weapons in the workplace. Whether they enact such policies or do nothing, businesses are protected from liability for claims relating to firearms absent evidence of malice on the part of the employer.

Paul Calico, a partner in the Litigation Department, regularly practices in the area of employment law, including the preparation of employee handbooks and policies and procedures dealing with all aspects of the workplace.

News of the Firm

Attorneys on the Move



Andy Shott

Andy Shott spoke on the topic of *Year 15 Strategies for Disposition of Low Income Housing Tax Credit Projects* at a seminar sponsored by Local Initiative Support Corporation (LISC). The seminar was attended by developers, community development corporations, non-profit corporations, municipal housing authority representatives, property managers and others to learn more about planning for disposition of affordable housing tax credit projects when the 15-year tax credit compliance period expires.



Claudia Allen

Claudia Allen will teach a seminar at the University of Cincinnati College of Law as an adjunct professor. The seminar will be on *Employee Benefits*, and it will be open to second- and third-year students who have taken at least one tax course.



Tim Theissen

Tim Theissen was re-elected to another two-year term on the Board of Directors of the Northern Kentucky Collaborative Group, Inc., a company managing a group of independent lawyers who handle divorces in a collaborative manner, thus allowing clients to be divorced with dignity.



Paul Calico

Paul Calico was a guest lecturer in the paralegal program at the Southern Ohio College, teaching a class on Alternative Dispute Resolution, including negotiation, mediation, and arbitration. For the fourth year, Paul will serve as an adjunct professor in the MBA program at Northern Kentucky University, teaching a class on *Law, Business, and Society*.



Jeremy Hayden

Jeremy A. Hayden has been selected as a member of the 2005 class of *Leadership Northern Kentucky*, a highly respected, innovative program designed to help achieve active participation by informed and dedicated community leaders. The program uses the community as a classroom to develop a diverse group of potential, emerging, and existing community leaders to serve the region by acquiring an understanding of the strengths and challenges of the Northern Kentucky and Greater Cincinnati area and the skills necessary to motivate and engage others in collaborative efforts to address them.

Charles Ashdown made a presentation on *Practical Ways to Avoid Identity Theft* at the Spring Seminar of the Ohio Land Title Association in Columbus. There were over 1400 attendees at the event.



Charles Ashdown



Tom Glass

Tom Glass (Team Captain), **Tony Barlow**, **Jim Heldman**, **Charles Ashdown**, and several clients and friends of the firm – 22 riders in all – participated in the annual *MS 150 Bike Ride*. This year's ride marked the fourth year of Strauss & Troy's participation in this event, which covers 150 miles and



Tony Barlow



Jim Heldman

benefits Multiple Sclerosis. In the previous three years, the Strauss & Troy team has raised approximately \$50,000 for this worthwhile cause. (Figures for this year are not yet available). **Jim Heldman** also completed a 62-mile bike ride benefiting the American Diabetes Association.

Cincinnati Pool Project

Upon learning that children who could not afford a \$5 pass were being turned away from Cincinnati public pools, **Marshall Dosker** spearheaded a drive within Strauss & Troy to raise money to provide passes for children in need. The response was overwhelming. In less than a week, employees donated nearly \$1,000, which was then matched by Strauss & Troy. The Strauss & Troy donation was the largest donation of all other sources in the city. On June 23, Marshall made a ceremonial presentation of Strauss & Troy's check to the Cincinnati Recreation Commission, an event covered live on a Channel 12 newscast. In addition, there was a thank-you event at the Bond Hill Pool on July 10. Representing the firm, Marshall joined the kids in the pool to swim and play games, which they thought was great fun. We are very proud of Marshall and everyone in the firm who contributed in order to make the summer better for the children of Cincinnati.



Marshall Dosker

DOL Revises Overtime Rules

By: Claudia G. Allen



After 50 years, the Department of Labor has revamped its regulations governing who qualifies for an exemption from the minimum wage and overtime provisions of the Fair Labor Standards Act. The most significant change is that under the new rules, all employees earning \$23,660 or less, as well as all “blue collar” and public safety employees, are guaranteed overtime, regardless of pay or the duties of their positions. In addition, the tests for exempt status have been simplified and updated.

As in the past, to be classified as exempt, employees must meet certain tests regarding their job duties and salary. Job titles are not determinative; but the exemptions continue to be defined under occupational designations. In each category, specific job requirements must be met:

- 1. Executive employee exemption:** The employee’s primary duty is to manage the enterprise or a recognized department or subdivision. The employee must also regularly direct the work of at least two other full-time employees *and* have the authority to hire or fire (or be given particular weight in his preferences as to hiring and firing). A business owner with a 20% equity interest who is actively engaged in its management is deemed to fit within this exception.
- 2. Administrative employee exemption:** The employee’s primary duty must be office (non-manual work) directly related to the company’s management. These duties must include the exercise of discretion and independent judgment as to “matters of significance.”
- 3. Professional employee exemption:** The employee must perform work requiring advanced knowledge (predominantly intellectual in character) in a field of science or learning customarily acquired by a “prolonged course” of specialized instruction.
- 4. Highly compensated employee exemption:** If an employee draws at least \$455 per week as salary, his total annual compensation is \$100,000 or more, and he customarily performs at least one of the duties of an exempt executive, administrative or professional employee, he is deemed to be an exempt employee.

- 5. Computer employee exemption:** An exempt computer employee may be paid either on a salary or fee basis provided that if compensated hourly, the rate is not less than \$27.63. Analysts, programmers, software engineers, etc. are exempt if their primary duties meet those listed in the regulations.
- 6. Outside sales exemption:** The employee’s primary duties must be making sales or obtaining orders or contracts for which payment will be made by clients *and* he must be customarily engaged *away* from the employer’s place of business.

The salary requirement for “white collar” exemptions (executives, administrative personnel, professional and computer employees) has been increased from \$155 to \$455 per week (\$23,660 annually). While the paychecks of salaried employees generally may not be subject to deductions, the new rules allow docking for specific circumstances including major violations of workplace rules. There is also “safe harbor” for improper deductions which, if satisfied, will save the loss of exempt status unless the employer is shown to have willfully and repeatedly violated the overtime rules.

The final regulations expressly include “blue collar workers” or manual laborers – those who perform repetitive operations with their hands requiring physical skill and energy – as non-exempt employees. Trained through apprenticeships and on-the-job training, non-management carpenters, electricians, mechanics, plumbers, iron workers, operating engineers, longshoremen, and construction workers are included in this category, no matter how highly paid. The exemptions also do not apply to safety personnel and first responders such as police officers, detectives, deputy sheriffs, state troopers, corrections officers, parole or probation officers, park rangers, paramedics, hazardous materials workers, ambulance personnel, fire fighters, rescue workers and emergency medical technicians, no matter what their rank or pay level.

Since these new rules become effective on August 23, 2004, business owners will have to begin an immediate review of their payroll practices to ensure compliance.

Claudia Allen is a partner in the firm’s Tax Department and regularly practices in the areas of employment law and employee benefits. For more information, please feel free to contact Claudia Allen at cgalen@strausstroy.com.

Sponsorships

Strauss & Troy takes great pride in our tradition of giving to the Greater Cincinnati/Northern Kentucky community. As part of our continuing commitment to the communities in which we work and live, we are pleased to have supported the following organizations, programs, and events in the last three months:

- American Diabetes Association – Pro-Am Golf Tournament
- Arsenal Challenge Cup Soccer Tournament
- Cincinnati Recreation Commission
- Children’s Dental Care Foundation – Twelfth Annual Children’s Golf Tournament
- Commercial Real Estate Women – 2004 Charity Golf Outing
- Inner City Youth Opportunities – Swing with the Legends Golf Outing
- Jewish Federation of Cincinnati
- Kids Helping Kids
- Legal Aid Society – Help Make Things Happen Campaign
- Loveland Area Chamber of Commerce
- Midwest Regional Bankruptcy Seminar
- Northern Kentucky Leadership Foundation
- Volunteer Lawyers for the Poor Foundation
- WNKU 98.7 FM – Challenge Grant

Grad Gives Back Through Scholarship Fund

The following article is reprinted, with permission, from the Summer 2004 edition of the Dayton Lawyer:

By: Kailyn Derck '06

After graduation, **Rick Wayne** '78 never expected to land his dream job so quickly.

He joined the Cincinnati law firm Strauss & Troy in 1985, his second professional position out of school. Now Wayne is giving back to UDSL; he encouraged his firm to donate \$40,000 for scholarships.



Rick Wayne

"We want the quality to continue," Wayne said. "We are helping to bring in students that want to go to UD but can't financially."

As co-chair of his firm's litigation committee, Wayne had available funds left over in 2003. He wanted to see them put to good use.

"The University of Dayton taught me the basics of being a lawyer," he said. "They gave me the ability to understand many people with many experiences."

This experience led Wayne to complex cases and huge settlements, said UDSL professor and former dean Francis Conte, who said he had the "pleasure" of working with Wayne in fall 2003.

"His work in terms of professional skills and abilities is superb," Conte said. "He has strong intellectual abilities and is a really good person to work with."

There were many professors Wayne could list who he said influenced him. He expressed respect for them, their work ethic and their understanding of complicated issues.

He took these values to Strauss & Troy, a full-range law firm based in Ohio and Kentucky. "We have good people and interesting cases," Wayne said of the 50-person firm. "We look for people compatible with how we work. We work hard and we have fun."

Wayne said Strauss & Troy was an ideal fit for him, in that each member of the firm works together on projects. They are not typically structured by groups, but overlap to provide expertise and variety. He said the firm continues to hire alumni of UDSL, explaining that, fundamentally, they have the skills and attitude they are looking for.

The scholarship will be granted to students based on academic merit, Tim Stonecash of UDSL external relations said.

2004 Rosser Character Award

In 2001, Strauss & Troy established the **Rosser Character Award**, an Anderson High School scholarship honoring **Alan "Chip" Rosser**, our partner who died suddenly at age 54. The scholarship is presented annually to the student-athlete who has demonstrated the strength of character exemplified by Chip Rosser.



Alan "Chip" Rosser

This year's Rosser Award was presented to Rachel Osterfeld. Rachel played soccer for Anderson her freshman, sophomore, and junior years, but failed to make the team in her senior year. She overcame her disappointment and became a cross-country runner instead, filling a need for AHS and keeping herself physically challenged. She was named captain of the Anderson track team and despite the fact that she had never attempted it, this year, took on the challenge of becoming the team pole-vaulter.

While she is not a star athlete, Rachel is a role model to others, never missing a single day of conditioning or training, to be the best she could be. In high school, she played two sports while achieving over a 4.0 average in demanding honors courses. As a spokesperson, she is welcomed by area elementary school students for her enthusiasm and her message of perseverance in the face of setbacks. Her strength of character has served as an example to her peers, her family and her community. Next year, she will attend Miami University.

We're MAD About our MAD Team!!!

For the 12th year in a row, the Strauss & Troy "MAD Team" (Make A Difference Team) sponsored a week-long summer camp experience for underprivileged children at Camp Ernst in Northern Kentucky. The Team once again worked with Inner City Youth Opportunities to provide 36 children with sleeping bags, backpacks full of personal care items, and even money to spend in the Camp store. At the end of the memorable week, each child received a Camp Ernst mascot, T-shirt, and cabin photo.

During the month of August, the MAD Team will be working on the "Push for Pencils" campaign in conjunction with the Crayons to Computers organization. The campaign provides back-to-school supplies to underprivileged children. At locations in Strauss & Troy's offices, the Team is collecting pens, pencils, notebooks, glue, crayons, paper and other needed school supplies.

Never short on ideas for helping those in need, the MAD Team is working on a new and exciting Fall project with the Cincinnati Public Schools. Details will be provided as the project progresses.

The Team expresses its appreciation to all at Strauss & Troy who provide monetary support through "Dress Down Friday" and other donations!

downtown
real estate
**DEVELOPMENT
SEMINAR**

STRAUSS & TROY
Spring 2004 Real Estate Seminar

Building The Future Together

On June 23, over 75 people attended a seminar on downtown development at Strauss & Troy's Cincinnati office in the Federal Reserve Building. Four key figures in downtown and riverfront development in Cincinnati and Northern Kentucky shared their visions for the future, discussing projects planned for both sides of the Ohio River and their expected social and economic impact. Wally Pagan, the President of South Bank Partners, and Greg Jarvis, the City Manager of Covington, discussed the remarkable progress made in Northern Kentucky — from Newport on the Levee to the new Riverfront West

development. On the Ohio side, Pam Middendorff, the Cincinnati Center City Development Corporation (3CDC) Project Manager, presented information about the planned redesign of Fountain Square, and Scott Stiles, the Assistant City Manager of Cincinnati, explained Cincinnati's new centralized permitting process. The attendees provided positive feedback regarding the event and encouraged Strauss & Troy to provide more opportunities for discourse on the important issues facing Kentucky and Northern Kentucky. We are exploring other possible seminar topics and welcome any suggestions.

Certain states, including Kentucky, do not certify specialties of legal practice. Certain states, including Ohio, do not provide for recognition as a specialist in any area or field of law, except for patent, trademark or admiralty. IMPACT is published quarterly to provide information of general interest and not to provide legal advice concerning any specific situation. If you wish additional or more specific information, please contact one of the attorneys at Strauss & Troy. This is an advertisement.

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