



# Avoiding Gun Violence in the Workplace

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# **AVOIDING GUN VIOLENCE IN THE WORKPLACE**

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## **I. OVERVIEW**

In August 1986, fourteen employees were shot and killed and six were wounded at a post office in Edmond, Oklahoma, by Patrick Sherrill, a postman. Mr. Sherrill then committed suicide. In the following years, there were many other instances of a postal worker fatally shooting co-workers, supervisors, and others. Even though researchers claim that homicide rates at postal facilities are lower than at other workplaces, the phrase “going postal” has long been used as slang for becoming uncontrollably angry, usually violent, in a workplace.

In the decades since Mr. Sherrill “went postal,” workplace violence has been a growing concern for employers and employees. More often than not, guns are used in instances of workplace violence. According to the Bureau of Labor Statistics of the U.S. Department of Labor, in 2012, 81% of workplace homicides were shootings and 48% of workplace suicides were shootings. The following does not attempt to discuss the greater issues of whether there are too many guns or not enough guns, but rather what employers can do, given the present realities.

## **II. AN EMPLOYER’S DUTY TO PROVIDE A SAFE WORK ENVIRONMENT**

Section V of the Federal Occupational Safety and Health Act (“OSHA”) requires that employers provide “employment in a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees.” New Mexico has a nearly identical state OSHA provision mandating that “Every employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his

employees.” Section 50-9-5(A). Under OSHA statutes, however, it is unclear what all an employer must do to provide a workplace that is free from workplace gun violence.

In addition to OSHA issues, there are potential claims against an employer based on the employer’s failure to provide a safe working environment. These include negligent hire and/or negligent retention claims which recognize that an employer’s duty to provide a safe workplace includes the duty to hire safe employees. Since 1979, New Mexico has recognized that employers may be held liable for negligently hiring someone who injures a third party during the course of employment, if the employer knew or should have known the employee was unfit for the position. *See F & T Co. v. Woods*, 92 N.M. 697, 594 P.2d 745 (1979).

Another source of claims may arise by defeating the exclusivity provisions of the New Mexico Workers’ Compensation Act, which otherwise provide that an injured employee has an exclusive remedy under the Act. In *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, the New Mexico Supreme Court held that employees may use common law tort remedies when an employer willfully or intentionally injures a worker. The Court thus expanded an employee’s ability to recover in tort by lowering the level of employer misconduct required to escape exclusivity. In *Delgado*, Reynaldo Delgado worked at the Phelps Dodge smelting plant in Hurley, New Mexico and was ordered to take steps to stop an overflow of molten slag using equipment he was untrained to use. He also was denied assistance. Delgado suffered third-degree burns trying to stop the overflow and died three weeks later. Delgado’s estate argued that Phelps acted intentionally with knowledge that Delgado would be seriously injured or killed. The Supreme Court found that employees may use common law tort remedies when an employer willfully or intentionally injures a worker. Employers can expect *Delgado* concepts to be applied to a company’s willful or intentional failure to address workplace violence.

### **III. WHAT CAN AN EMPLOYER DO UNDER STATE LAW REGARDING GUNS?**

The gun laws in New Mexico are considered some of the least restrictive in the country. New Mexico permits the open carry of loaded firearms without a permit. The Concealed Handgun Carry Act of 2003, 29-19-1 et seq., NMSA 1978, provides for the issuance of a Concealed Handgun License (CHL) required to carry in a concealed manner a loaded handgun while on foot. An applicant for a CHL must be a New Mexico resident and at least 21 years of age. A CHL is not required for open carry, concealed carry of an unloaded firearm on foot, or concealed carry of a loaded or unloaded firearm while in a vehicle (including motorcycles, bicycles, off-road vehicles, motor homes, or riding a horse).

There are areas in New Mexico where carrying a firearm is prohibited, with or without a permit. These include K-12 schools; state and federal courthouses, unless specifically authorized by a presiding judge; state colleges and university campuses, although firearms may be kept in locked vehicles while on campus; military installations, except when authorized by the installation commander; secure areas of airports; Native American reservations, unless permitted by the respective tribal council; and while under the influence of alcohol or drugs, including certain prescription or over-the-counter medications. Even with a CHL, it is not legal to carry a firearm into a federal building, school, or restaurant that serves alcohol for on-premises consumption. Further, any person lawfully in possession of private property may prohibit the carrying of concealed handguns on such private property by posting an appropriate notice. Several states, not including New Mexico, have passed “guns-in-parking-lot” laws which prohibit employers from adopting policies which interfere with employees’ rights to transport firearms to work and keep them in their locked, private vehicles parked in an employer-provided parking lot. Texas passed such a law in 2011 and Tennessee did so in 2014.

#### **IV. CONSIDERATION OF WORKPLACE VIOLENCE POLICY**

Employers should consider having, first of all, some type of workplace violence policy and workplace violence prevention program. Under such a policy, it should be clear that certain behavior is prohibited at the workplace, including:

- Violent or threatening physical conduct, such as fights, pushing, and physical intimidation
- Indirect or direct threats by an employee to a co-worker
- Making harassing, abusive, or threatening phone calls, texts, or emails
- Destructive or sabotaging actions against the employer or any personal property of employees
- Stalking
- Violation of a court order, such as a restraining order
- Threatening or abusive language in the workplace

In addition, as a key element of a workplace violence policy, an employer can and should prohibit the possession of a weapon on a company's private property including in a company's parking lots and any inside workplace premises.

Any workplace violence policy also should have clear mechanisms for reporting threats, perceived threats, and other concerns related to potential violence, as well as protective orders such as a temporary restraining order obtained by an employee against a current or former domestic partner. All employees should be periodically trained as to what conduct is not acceptable and what to do if they witness or are subjected to workplace violence. In addition, an employer should take steps to secure the workplace, including but not necessarily limited to the installation of appropriate video surveillance, extra lighting, and the use of alarm systems and identification badges. Any workplace violence policy should be posted conspicuously.

## **V. ADDRESSING GUNS IN A WORKPLACE VIOLENCE POLICY**

As noted above, a workplace violence policy can and should include a prohibition on the possession of a weapon on company property. Despite New Mexico's concealed carry provisions, employers can still prohibit firearms in the workplace. Under Sections 29-19-12 and 30-14-6 NMSA 1978, property owners may prohibit the carrying of firearms onto property they lawfully possess by posting signage or verbally notifying persons upon entering the property. Even though a loaded firearm may be carried or transported, either openly or concealed in a vehicle without a permit, employers still may ban firearms from private property, specifically the parking lot and other areas owned by the employer. Some employment law commentators suggest that the location of a parking lot in relation to the workplace may be a factor in determining if firearms are prohibited in vehicles. If a parking lot is very close to a workplace and an employee can easily return to his or her car to retrieve a gun, then it might make it more critical that firearms in vehicles be banned. The amount of non-employee traffic in a workplace also should be taken into account when an employer considers prohibiting carrying of firearms onto company property. Further, if an employer has security personnel, it must decide whether these personnel will be armed or unarmed.

## **VI. OVERALL CONSIDERATIONS FOR A POLICY OR PROGRAM**

As noted above, if an employer opts to prohibit the carrying of firearms onto the property, that must be posted and/or persons entering the property must be verbally notified. Signage should be at the entrance to the covered area, be it a parking lot, office, entrance, or the like. Any policy should be consistently applied and disciplinary actions for violation should be uniform. Finally, as with any employee policy, any workplace violence/firearms prohibition policy should fit the company and the nature of its business.

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