A "Local Officials: *Stronger, Together*" Podcast Publication

"Local Governments and Firearms: Avoiding a Jam"

(Updated portions are highlighted in gray.)

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What is the "Local Officials: *Stronger, Together"* Podcast Series and why should I be listening?

The "Local Officials: *Stronger, Together* Podcast (STP) Series" is designed to help local officials and their employees understand key legal concepts and the services the Pool provides. Each 15-minute episode provides easy action items to help keep a local government's citizens, employees, volunteers, and property safe, all while saving public dollars.

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Educating local officials has been Scott's passion for over two decades, and the STP Series is the culmination of those efforts.

Questions or comments? Visit www.tmlirp.org, call 512-791-4158, or email scott.houston@tmlirp.org.

What's in this paper?

This paper is designed for local government officials. It isn't a completely comprehensive paper covering everything a person who wants to carry a gun should know. Instead, it covers the state laws that govern in which government buildings or on what government property a person can go with a pistol or long gun, whether licensed or not. And it covers the very limited authority of local officials to prohibit carry in certain places. You can find the statutes on the *Texas Legislature Online* website. A "cheat sheet" for local officials that summarizes the most important points is also available at www.tmlirp.org, at the *Local Officials: Stronger, Together Podcast Series* button. This paper covers where a person in Texas can carry a firearm (licensed or not) under state law, and the very limited ways in which a local government can enact more stringent regulations. It doesn't cover the process to become licensed.

What does the Texas "licensed carry" law authorize?

Texas Government Code Chapter 411, Subchapter H, allows a person who obtains a license from the Texas Department of Public Safety to carry a handgun in a concealed manner or openly in a holster. Licensed concealed carry became effective in 1995, and licensed open carry became effective in 2015.

What does the so-called "constitutional" or "permitless" carry legislation authorize?

House Bill 1927 (2021), known as the "Firearm Carry Act of 2021," authorizes most Texans over 21 years of age to carry a handgun in a concealed manner or openly in a holster, without the requirement to first obtain a license. It does so by modifying language in the Texas Penal Code to make it a crime to carry "on or about his or her person a handgun" *only* if he or she "is younger than 21 years of age" or "has been convicted of, in the five-year period preceding the date the instant offense was committed:"

1. assault causing bodily injury, including to their spouse [TEX. PENAL CODE § 22.01(a)(1)];
2. deadly conduct, including discharging a firearm at persons, a habitation, a vehicle or a building [*Id*. § 22.05];
3. making a terroristic threat [*Id*. § 22.07]; or
4. disorderly conduct by: (a) discharging a firearm in a public place other than a public road or a sport shooting range; or (b) displaying a firearm or other deadly weapon in a public place in a manner calculated to alarm [*Id*. § 42.01(a)(7) or (8)].

Tex. Penal Code § 46.02. In addition, a person convicted of a felony or a family violence offense is prohibited from possessing a firearm, with some limited exceptions. *Id.* § 46.02 & 46.04(a-1)(Sections 46.15(b); (j); & (l) sometimes allow some who would otherwise be prohibited from carrying to do so, such as at an emergency shelter discussed below.) Oddly, a quirk in the law means that a member of a criminal street gang is now authorized to unlicensed carry in public but may not carry in a motor vehicle or watercraft. *Id.* § 46.04(a-1).

What about someone convicted of more serious offenses, like murder? The federal Gun Control Act, codified at 18 U.S.C. § 922(g), makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition. *See also Id.* § 46.02(a-1)(2)(B). Examples or those who are prohibited by the Gun Control Act from possessing a firearm include, among others, a person who is:

1. convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
2. who is a fugitive from justice;
3. who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);
4. who has been adjudicated as a mental defective or has been committed to any mental institution;
5. who is an illegal alien;
6. who has been discharged from the Armed Forces under dishonorable conditions;
7. who has renounced his or her United States citizenship;
8. who is subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner; or
9. who has been convicted of a misdemeanor crime of domestic violence.

Interestingly, H.B. 1927 (2021) does *not* repeal licensed carry. Why leave that bureaucracy in place? At least two reasons: (1) reciprocity – several other states still require a license to carry, and a Texan must have a Texas-issued license to take advantage of it; and (2) ease of purchasing a firearm – license holders get to skip the background check. The decision may also be beneficial to employers who want to allow employees to carry, but only if the employee has completed the requirements for a license. More on that appears later in this paper.

The bill mandated that the Texas Department of Public Safety develop free-of-charge and post online a course on firearms safety and handling (now available), and that DPS prepare an annual report to the legislature related to handgun carry (2021). TEX. GOV'T CODE § 411.02096 & 411.02097.

In what places is a person *prohibited* by *state law* from carrying a firearm?

State law prohibits the carrying of certain types of firearms in certain places. A "firearm" generally means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. TEX. PENAL CODE § 46.01(3). A "handgun" is a subset of "firearm" and means any firearm that is designed, made, or adapted to be fired with one hand. *Id.* § 46.01(3)(a)(5).

A person commits a third-degree felony if the person intentionally, knowingly, or recklessly possesses or goes with *any* firearm, whether or not they hold a license:

1. on the physical premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or a

passenger transportation vehicle of a school or educational institution, whether the school or educational institution is public or private, unless pursuant to written regulations or written authorization of the institution. *Id*. § 46.03(a)(1).

Note: The attorney general has concluded that this provision "prohibits handguns from places on which a school-sponsored activity is occurring, which places can include grounds such as public or private driveways, streets, sidewalks or walkways, parking lots, parking garages, or other parking areas." Tex. Att'y Gen. Op. No. KP-0050 (2015). Other local governments frequently allow schools or educational institutions to host activities on their facilities. During that time, no person may come onto the "grounds" of the facility, and no signage is required. (A local government *might* decide to post temporary signage to notice those carrying a firearm that a school-sponsored activity is taking place (e.g., "School Activity Occurring Now – All Firearms Prohibited on these Grounds"), but the law doesn't require it. Does, however, the law allow it? That's debatable. (Note: See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," below, for a discussion of whether a local government is authorized to post a Section 46.15 sign for this purpose.) The law does allow the attorney general's office to investigate what they deem improper signage. TEX. GOV'T CODE § 411.209. But, as a matter of logic, how would a person know about the school-sponsored activity if no sign is posted?)

Additional Note: A "campus concealed carry exception" applies to this provision and allows a *license holder* to carry a *concealed* handgun on the premises of an institution of higher education, including the premises of a junior college or private or independent institution of higher education, on any grounds or building on which an activity sponsored by the institution is being conducted, or in a passenger transportation vehicle of the institution, subject to rules of the institution adopted only as authorized by state law. *Id*. § 46.03(a)(1); TEX. GOV'T CODE § 411.2031. (In July 2016, three UT professors sued to enjoin the law. One year later, the court dismissed their case.) The Penal Code also includes criminal offenses for improper campus carry. *Id*. § 46.02(a-2); (a-3); (a-4).

2. on the premises of a polling place on the day of an election or while early voting is in progress. TEX. PENAL CODE § 46.03(a)(2).

   Note: The Texas attorney general has concluded, in Opinion No. KP-0212 (2018) that a presiding election judge who is licensed to carry a handgun may do so at most polling places during the voting period, see discussion of special carry rules for certain positions, below. That probably means a judge who isn't licensed, but who may otherwise carry a handgun under H.B. 1927, can do so as well.

3. on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court. *Id*. § 46.03(a)(3).

   Note: Attorney general opinions KP-0047 and KP-0049 offer opinions about this provision with which some local government attorneys disagree, and courts have disagreed with the conclusions in the opinions as well – see question below specific to courts for details.

Opinion KP-0332 (2020) confirms that a judge can issue written permission to individuals allowing them to carry in the court or court offices.)

4. on the premises of a racetrack. *Id*. § 46.03(a)(4).

5. in or into a secured area of an airport, i.e., "an area of an airport terminal building to which access is controlled by the inspection of persons and property under federal law." *Id*. § 46.03(e-1) & (e-2).

   Note: Penal Code Sections 46.03(e-1) and (e-2) provide a defense to this offense. The defense essentially provides that a person who makes a mistake at security by forgetting that he possesses a handgun can leave upon notice. H.B. 1927 (2021) adds the defense to open carry as well. But if someone can't remember that they are openly carrying a firearm, perhaps they shouldn't? Finally, H.B. 1920, also passed in 2021, provides – among other things - an affirmative defense to a person who has permission from the airport operator to carry in otherwise prohibited areas.

6. within 1,000 feet of premises the location of which is designated by the Texas Department of Criminal Justice as a place of execution on a day that a sentence of death is set to be imposed on the designated premises and the person received notice that doing so is prohibited (unless the person is on a public road and going to or from his home or business). *Id*. § 46.03(a)(4).

7. on the premises of a business that is licensed by the Texas Alcoholic Beverage Commission and that derives 51 percent or more of its business from the on-premises sale of alcohol. *Id*. § 46.03(a)(7).

   Note: Some local government facilities, such as convention and expo centers, could conceivably meet this threshold.

   Additional note: This prohibition applies to a *license holder* only if he or she is given written notice by a "51 percent sign" as defined in TEXAS GOV'T CODE Section 411.204(c). *Id*. § 46.15(p).

8. on the premises where a high school, collegiate, or professional sporting event is taking place, unless the handgun is used for the event. *Id*. § 46.03(a)(8).

   Note: Open carry is prohibited on collegiate premises, but Texas Gov't Code Section 411.2031 authorizes *licensed* concealed carry, subject to rules of the institution. Because of that, licensed concealed carry on the premises of a collegiate sporting event generally appears to be allowed unless a Penal Code Section 30.06 notice is given that it is prohibited.

   Additional note: This prohibition applies to a *license holder* only if he or she is given written notice by a 30.06 and/or 30.07 sign. *Id*. § 46.15(p).

9. on the premises of a correctional facility or a civil commitment facility. *Id*. § 46.03(9) & (10).

10. on the premises of a state-licensed hospital* or nursing home*, or a mental hospital, unless the administration has granted written permission to the license holder. *Id*. § 46.03(11) & (12).

    *This prohibition applies to a *license holder* only if he or she is given written notice by a 30.06 and/or 30.07 sign. *Id*. § 46.15(p).

11. in certain amusement parks.* *Id*. § 46.03(13). (Note: Section 46.03(c)-(1) very narrowly defines amusement park, and only a few "six flags"-type parks would meet the definition.)

    *This prohibition applies to a *license holder* only if he or she is given written notice by a 30.06 and/or 30.07 sign. *Id*. § 46.15(p).

12. any time the handgun is intentionally displayed in a public place, except if the handgun is partially or wholly visible and carried in a holster. *Id*. § 46.02(a-5).

13. if the person carrying is intoxicated, unless the person (get a load of these) is: (1) on the person's own property or on private property with the consent of the owner; or (2) inside of or directly *en route* to a motor vehicle or watercraft that is owned by the person or under the person's control or with the consent of the owner or operator of the vehicle or watercraft. (Presumably operating the car or boat under the influence remains a crime?!) *Id*. § 46.02(a-6).

14. for an unlicensed carrier, into the room or rooms where a meeting of a governmental entity is held, if the meeting is an open meeting subject to the Open Meetings Act, and if the entity provides notice as required by the Open Meetings Act (i.e., posts the OMA-required agenda notice of the meeting). A local government is not required to provide notice of this provision. (A detailed discussion of whether a local government *may* post notice is included below in "Can a local government prohibit handgun carry in its building or facilities – Meetings of Governmental Entity.")

    Section 46.15(b) statutorily exempts certain people from the prohibition, such as – among others – *a person who is traveling* or *en route between the premises and the person's residence*, *motor vehicle, or watercraft*. A person who is lawfully carrying a handgun without a permit is barred from entering an open meeting, *unless* they fall into such an exception. Of course, the "travelling" or "*en route*" exceptions have been interpreted narrowly. Typically, a stopover at a governing body's meeting between work and home, for example, should make the exception go poof. *See, e.g., Moosani v. State*, 866 S.W.2d 736, 738 (Tex. App. 1993), aff'd, 914 S.W.2d 569 (Tex. Crim. App. 1995).

15. A license holder isn't prohibited from carrying into the room or rooms where a meeting of a governmental entity is held as described in (14), above, *unless the entity provides notice*

that doing so is prohibited using a Penal Code 30.06 and/or 30.07 sign. *Id*. § 46.03(a)(14); 46.15(b)(6); 30.06; and 30.07.

Note: Prior to the passage of H.B. 1927 (2021), a license holder could carry concealed or openly into an open meeting, *unless* a governmental body had prohibited carry by posting a 30.06 and/or 30.07 sign at the entrance to the meeting room while the meeting was taking place. Section 23 of the bill eliminated the notice requirement that used to be in Penal Code Section 46.035(c) by virtue of a cross-reference to 46.035(i), which stated that "Subsections…(c)…do not apply if the actor was not given effective notice under Section 30.06 or 30.07." That means after H.B. 1927, 46.03(a)(14) – read alone – *would* mean that *no one* (licensed or not, with some exceptions for peace officers, etc.) could go into an open meeting with a handgun, period. But wait, there's more!

Section 46.03(a)(14) is an absolute prohibition that *cannot* be "waived" by the governmental body or anyone else. But, importantly, a "non-applicability" list in 46.15(b)(6) also includes: "a person who holds a license to carry, and the handgun is concealed or in a holster." *Id*. § 46.15(b)(6). That section takes the prohibition "full circle" to where it actually allows a license holder to carry into an open meeting, *unless* the governmental body has posted the usual Penal Code 30.06 and/or 30.07 signs, discussed in more detail below, prohibiting them from doing so. (A more detailed discussion of whether a local government may prohibit licensed carry in a meeting is included below in "Can a local government prohibit handgun carry in its building or facilities – Meetings of Governmental Entity.")

16. on the premises of employment if prohibited by the person's employer (including a local government employer), but an employee may generally leave a handgun in a private, locked car in parking lot. TEX. GOV'T CODE § 411.203; TEX. LABOR CODE § 52.061 et seq; Tex. Att'y Gen. Op. No. GA-0972 (2012).

17. on the property of any of the 10 state hospitals listed Section 552.002 of the Health and Safety Code by providing specific written notice as stated in that section. TEX. HEALTH & SAFETY CODE § 552.002.

18. to a public place in plain view of another, unless in a holster. TEX. PENAL CODE § 46.02(a-5).

"Premises" generally means a building or a portion of a building, but not including any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area. *Id*. § 46.03(c)(4).

All of the prohibitions above are subject to a defense to prosecution if a person: (1) carries a handgun on a premises or other property into or on a prohibited place listed above; (2) personally received from the owner of the property, or from another person with apparent authority to act for the owner, notice that carrying a firearm or other weapon on the premises or other property was prohibited; and (3) *promptly departed from the premises or other property.* TEX. PENAL CODE § 46.03(m).

A note about religious institutions because it's not uncommon for government functions to take place there: Penal Code Section 43.035(b)(6), relating to carry on the premises of a church, synagogue, or other established place of religious worship, used to prohibit the carrying of firearms in a religious institution. However, it was repealed in 2019 by S.B. 535. That was done in the wake of attorney general opinion KP-0176 (2017). The repeal of the prohibition puts churches on par with other private businesses, i.e. a person can carry there, unless the church has provided proper notice that carrying is prohibited.

Finally, it is illegal to possess, manufacture, transport, repair or sell a machine gun ("any firearm that is capable of shooting more than two shots automatically, without manual reloading, by a single function of the trigger") or short-barreled gun ("a rifle with a barrel length of less than 16 inches or a shotgun with a barrel length of less than 18 inches, or any weapon made from a shotgun or rifle if, as altered, it has an overall length of less than 26 inches"), unless federally registered under the National Firearms Protection Act. *Id.* § 46.01(10).

What type of signage is required to provide notice that firearm carry isn't allowed?

Firearm with or without a License – Prohibited Locations under State Law

House Bill 1927 (2021) modifies some of the required signage for firearm carry – be it licensed or unlicensed. Penal Code Section 46.15(o) allows a "person" to provide notice to anyone carrying a firearm that doing so is prohibited in that location by the posting of a sign stating that "Pursuant to Section 46.03 Penal Code (places weapons prohibited), a *person* may not carry a firearm or other weapon on this property." (Emphasis added.) Is a political subdivision a "person" as defined in Penal Code Section 1.07(a)(38)? This paper previously concluded not, but the conclusion has been called into question. It appears a city actually *could* be a "person" under the Penal Code definition:

- Penal Code § 1.07(a)(38) defines "Person" to mean an individual or a corporation, *association*, limited liability company, or other entity or organization governed by the Business Organizations Code.
- Penal Code § 1.07(a)(6) further defines "Association" to mean a government or *governmental subdivision* or agency, trust, partnership, or two or more persons having a joint or common economic interest.
- Several cases support the conclusion that government is a "person" as defined in the Penal Code. In particular, it seems that criminal defendants who are accused of trespassing on government property or of stealing government property have argued that the government isn't an "owner" because an "owner" (Penal Code 1.07(a)(35) is a *person* who…")(emphasis added). However, courts have rejected this argument, finding that governments qualify as a "person" because they are an "association."
    - *See, e.g. Echenwune v. State*, 2018 WL 1386319 (Tex. App. Ct. – Houston [14th Dist.] 2018, no pet.) "To establish a theft, the State was required to prove that appellant unlawfully appropriated property with the intent to deprive the "owner" of property. See Tex. Penal Code § 31.03. The word "owner" is defined as a

"person" who has to title to or possession of the property. *Id*. § 1.07(a)(35). The word "person" means "an individual, corporation, or association." *Id*. § 1.07(a)(38). And the word "association" includes a "governmental subdivision or agency." *Id*. § 1.07(a)(6).

- In *Ex Parte Austin Independent School Dist.,* 23 S.W.4d 596, 598 (Tex. App. Ct. – Austin 2000, pet. ref'd), the Third Court cited these same definitional sections to find that AISD was a "person" that could be criminally prosecuted for the acts of its agent.

If accepted as true, the position above would mean that local government is authorized to post a Section 46.15 sign at any place where Section 46.03 prohibits carry, for the purpose of giving any firearm carrier notice of that fact.

But it would also have much broader implications. That's because H.B. 1927 (2021) also added signage language to Section 30.05. Section 30.05 is the "criminal trespass" law and allows a "person" to prohibit unlicensed carry anywhere on property they own or control. If a local government is a "person," it would then have the same authority as any private property owner to post a Section 30.05(c) sign to prohibit unlicensed carry on its "property" in any place it so chooses. Of course, acting on that interpretation would almost certainly draw a legislative reaction to prohibit it, so the discussion may simply be academic.

Note that a *city* is preempted somewhat by the Local Government Code. Section 229.001(b)(5)(A) provides that a city may not prohibit carry at a public park; public meeting of a municipality [don't panic, see more detailed discussion of whether a local government may prohibit licensed carry in a meeting is included below in "Can a local government prohibit handgun carry in its building or facilities – Meetings of Governmental Entity]; political rally, parade, or official political meeting; or nonfirearms-related school, college, or professional athletic event.)

Other, specific provisions may also apply to prohibit a local government from posting a 30.05 sign. For example, Section 30.05(f-1) allows a person renting an apartment to carry to and from the apartment and keep a firearm there, which could affect housing authority powers.

Handgun with a License – Optional Open Meeting Prohibition

Besides the secure area of a law enforcement facility, discussed below, a political subdivision really has only one "optional" place it can choose to prohibit *licensed* handgun carry, and that's in a meeting subject to the Open Meetings Act. (Remember that unlicensed carry is prohibited there by law.) In other words, the other prohibited carry locations aren't "optional" – they are instead expressly prohibited by state law in Section 46.03. The language in the required sign to provide notice that licensed carry is not allowed in a meeting room is as follows:

- Texas Penal Code § 30.06(c)(3)(A) requires that the sign prohibiting concealed carry contain language *identical to the following*: "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun".

- Texas Penal Code § 30.07(c)(3)(A) requires that the sign prohibiting open carry contain language *identical to the following*: "Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly".

The signs must include the *exact* language above in *both English and Spanish,* be printed in contrasting colors with block letters *at least one inch in height* and be displayed *in a conspicuous manner clearly visible to the public*.

Section 30.07 adds the words "at each entrance to the property," which creates some confusion about where that sign should be posted, especially in relation to the optional "meeting room prohibition" for local governments in number (15) in the list of prohibited places, above – the current consensus appears to be that both signs should be posted at the entrance to the meeting room itself.

In 2019, legislation was passed that provides a defense to prosecution to the offenses of trespass by a license holder with a concealed or openly carried handgun (i.e., going where a "30.06" or "30.07" sign prohibits carry) if the license holder was personally given notice by oral communication and promptly departed from the property. *Id*. § 30.06(g) & 30.07(h).

As one would expect, judges, peace officers, prosecutors, certain security guards commissioned by the Texas Board of Private Investigators and private security agencies, members of the armed forces, corrections officers, and officers of a court are exempt in certain circumstances. *Id.* § 46.03(b) & (h); § 46.15. Some of those exemptions are discussed in more detail below – see "Are certain people allowed to carry a handgun where others may not?"

How has the statutory prohibition against carrying a firearm onto the premises of a court or court office been interpreted?

A 2015 attorney general opinion called into question local government attorneys' previous understanding of where firearms can be carried in and around courts. Attorney general opinion request RQ-0040-KP (July 24, 2015) asked numerous questions about the statutory prohibition against carrying a firearm onto the premises of any government court or office utilized by the court. A discussion of each subsequent opinion, along with an explanation of their practical effects, follows.

- Tex. Att'y Gen. Op. No. KP-0047 (2015) concluded that a person is prohibited from carrying a firearm *only into the room* that houses a court or court office. That opinion is contrary to what most attorneys had been advising for years under the concealed carry law.

  Most governmental entities took that position because of the confusing nature of the law. In other words, because it wasn't (and still isn't) exactly clear into what "portion" of a

building a licensee can carry, the licensee could (and still perhaps can) inadvertently commit a third-degree felony for going into the wrong portion of the building.

The opinion states that "[w]hile we can't be sure what the outside limits of the prohibition are, it is clear that 'the legislature intended to prohibit concealed handguns from the rooms that house government courts and offices central to the business of the courts...in order to provide clarity, we construe subsection 46.03(a)(3) to encompass only government courtrooms and those offices essential to the operation of the government court."

The opinion further states that "[w]e routinely acknowledge that decisions like this are for the governmental entity in the first instance, subject to judicial review. Accordingly, the responsible authority that would notify license holders of their inability to carry on the respective premises must make the determination of which government courtrooms and offices are essential to the operation of the government court." That statement is a "gotcha." Why? Because the court prohibition *does not require notice*. (Note: See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of whether a local government is authorized to post a Section 46.15 sign.) Thus, the opinions shift the risk of compliance onto the person carrying to know where he or she can carry.

In the wake of KP-0047, some local governments called foul. For example, TML, the Texas District and County Attorneys Association, and the Texas Conference of Urban Counties all questioned the attorney general's conclusions.

Whether a local official agrees or disagrees with the conclusions in the opinion, it seems safe to say that many are having trouble deciding how to deal with them. CUC's advice to its county members was that the opinions are:

> not consistent with the plain language found in Texas statutes, nor the very clear evidence of legislative intent…[t]he question of whether "premises of a court" means only a courtroom should be a question of law to be decided by the trial judge in the first instance, subject to appeal. Interestingly, as of this writing, the judges of the Texas Supreme Court and the Texas Court of Criminal Appeals don't permit any weapons to be brought into the Supreme Court building.

TDCAA's advice was similar. Again, regardless of one's opinion on where guns *should* be allowed, it's tough to properly interpret the courts prohibition.

In the wake of the opinion, Waller County, located northwest of Houston, filed a lawsuit to find the answer. On November 28, 2016, a district judge in Waller County issued an order in the case of *Waller County v. Terry Holcomb*. The order concluded that the *entire building that houses a court* is off-limits to anyone carrying a firearm, including the holder of a license to carry. The order also concluded that the attorney general had no authority under the law at that time to investigate the county's signs providing notice that no firearms are allowed.

Terry Holcomb is the leader of the group known as Open Carry Texas, and he spent some of his time complaining about governmental entities posting licensed carry signage in what he alleges is the wrong place or with the wrong wording. He sent a written complaint to Waller County officials claiming that – based on the attorney general opinion mentioned above – they can't prohibit licensed carry in the entire courthouse building. He also claimed that the attorney general's office, under its investigatory authority over signage, can seek civil penalties against the county if it refuses to remove its signs. He was wrong at the time, and so was the attorney general when he agreed in Opinion No. KP-0049 (2015). But both of their opinions "became correct" when legislation clarified the attorney general's investigatory authority in 2019. *See* TEX. GOV'T CODE § 411.209.

The county filed a lawsuit against Mr. Holcomb seeking a declaratory judgment from a district court that: (1) the entire courthouse is off-limits to licensed carriers; and (2) the attorney general's office doesn't have as much enforcement authority as it claims. The court's order agreed fully with the county's position. But the order isn't precedential, and it was later dismissed on procedural grounds for the county's lack of standing.

The attorney general then filed a separate lawsuit against Waller County in Travis County District Court on the exact same issues. That case, *Ken Paxton v. Waller County et al.*, was decided on purely procedural grounds on March 4, 2021, which provided no substantive guidance, and the case was remanded to the trial court.

The attorney general's office also filed a lawsuit against the City of Austin to require licensed carry at city hall, even though the city claimed a municipal court is housed there. The Austin city hall houses the city's "community court." According to its website, the court's purpose is "to collaboratively address the quality-of-life issues of all residents in the downtown Austin community through the swift, creative sentencing of public order offenders." The court "seeks to hold people responsible while also offering help to change behavior."

The court is in city hall. Because of that, the city took the position that the entire building is off-limits to license holders carrying handguns. A "no guns" sign (a handgun with a slash through it – see photo to the left) was posted on the window, and a guard posted at a metal detector provided verbal notice that licensed carry was not allowed.

The attorney general's lawsuit asked the court to order the city to remove its sign and authorize licensed carry in city hall. It also sought civil penalties from the city. In 2018, the district court judge in *Paxton v. City of Austin* disagreed, concluding that the attorney general had no jurisdiction under Government Code Section 411.209 to investigate, seek an injunction, or seek civil penalties for the display of any sign other than a 30.06 sign or verbal notice under that same section. (Again, keep in mind that the legislature subsequently granted attorney general enforcement of any sign or communication through H.B. 1791 in 2019.)

In a letter explaining her decision to deny the attorney general's motion for summary judgment, the judge eviscerated the attorney general's arguments based on the plain language of the law. Her conclusions can be summarized as follows:

1. Texas Government Code Section 411.209 provides that: "[A] political subdivision of the state may not provide notice by a communication described by Section 30.06, Penal Code, or by any sign expressly referring to that law or to a license to carry a handgun, that a license holder carrying a handgun…is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03 or 46.035, Penal Code."*
2. The section above refers only to Section 30.06 signs, which allow a city to prohibit licensed carry only in a meeting room while a meeting subject to the Open Meetings Act is taking place.
3. The plain language of the section above does not grant the attorney general any authority whatsoever to investigate or enforce against any other type of sign relating to firearms.
4. The section above does not prohibit a city from giving notice by a sign providing a gun with a slash through it (or presumably a "no firearms allowed" sign) that all firearms are prohibited under some other law. (Such as the prohibition against anyone carry any firearm – licensed or not – onto the premises of a building with a court or offices utilized by the court.)
5. The city's argument that the entire building that contains a court or offices utilized by the court is off limits to anyone – licensed or not – carrying a firearm is correct because "premises" is defined Penal Code Section 46.035(f)(3)* law to mean "a building or portion of a building." (Note: An older appeals court opinion concluded that, in a criminal proceeding, the carrying of a pistol into a district court clerk's office was sufficient to uphold a conviction for a violation of Section 46.03. *Wooster v. State*, No. 08-05-00177-CR, 2007 WL 2385925 (Tex. App. Aug. 16, 2007).)
6. Number (5), above, is true because the prohibition against carry in a building or portion of a building is a criminal offense, and means that a person with a firearm can't go into any portion of the building housing a court or offices utilized by a court.
7. A building or portion of a building that houses a court or offices utilized is off limits to anyone – licensed or not – who is carry a firearm at all times (not just when court is in session).

*H.B. 1927 (2021) repealed Section 46.035, but both Westlaw and the Texas Legislature online left the provision in statute – with only a note stating it was repealed. (See "Can a local government prohibit handgun carry in its building or facilities – Meetings of Governmental Entity," below, for detailed reasoning about the repeal.)

The case was scheduled for a full bench trial in December 2018. After the bench trial, the judge did an "about face" and ordered the city to remove its signs and allow carry in city hall. The judgment was appealed to the Third Court of Appeals, but the main issue was the amount of the civil penalty imposed on the city. The trial court imposed $9,000, and the attorney general sought over $5 million. The Court of Appeal affirmed the trial court's judgment and refused to increase

the fine or remand for that purpose. The Texas Supreme Court subsequently denied a petition for review.

In a separate 2019 criminal case, the Waco Court of Appeals in *Thomas v. State* concluded that:

> The common areas inside a building that are adjacent to courtrooms and offices used by the court are clearly part of the definition of "premises." This is supported by the legislative history of § 46.03, which expanded the definition of the prohibited area from a "government court or offices utilized by the court" to the *premises* of any government court or offices utilized by the court, in conjunction with the definition of premises in § 46.035(f). *See* Act of May 16, 2003, 78th Leg., R.S., ch. 1178, § 3(a)(3), sec. 46.03(a)(3), 2003 Tex. Gen. Laws 1042, 1178.

No. 10-17-00138-CR, 2019 WL 4072073, at *4 (Tex. App. Aug. 28, 2019), *petition for discretionary review refused* (Mar. 25, 2020). However, *Thomas* is an unpublished opinion, which may limit its precedential value.

What are the practical effects of the attorney general opinions and court cases above? They mean we still don't have a concrete answer as to how firearm carry interacts with court buildings. One option might be to take no action at all. The prohibition against carrying in a court or court office is a state law and requires no signage or implementing action by a local government. If an employee or citizen sees a person carrying a firearm in a courtroom or a court office, law enforcement can be summoned. Another option could be simply a sign ensuring that citizens know they are entering a building that houses a court. While it hasn't been tested in court, a third option could be posting the new Penal Code Section 46.15(o) sign language:

> Pursuant to Section 46.03 Penal Code (places weapons prohibited),
> a person may not carry a firearm or other weapon on this property.

Previous versions of this paper advised local governments to avoid posting a Section 46.15 sign, but subsequent interpretations may mean that advice is no longer the best. (Note: See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of whether a local government is authorized to post a Section 46.15 sign.)

The above analysis relates to courts and court offices, but it might also be used for signage relating to the prohibition against carrying on the premises of a school sponsored activity or polling place during early voting or on Election Day.

Previous version of this paper advised that one possible option a local government could use to address the confusion is to adopt a resolution making findings as to which of its room(s), portion(s) of building(s), or buildings are off-limits based on the court exception. Considering the rulings in the Austin and Waller cases, however, the advice to adopt such a resolution may no longer make sense. It may be better to simply wait for additional guidance from the courts.

Is a person *allowed* by state law to carry a concealed handgun on a college campus?

A license holder may carry a *concealed* handgun on the campus of an institution of higher education or private or independent institution of higher education in this state – a person *without a license* may not carry any handgun onto a campus. ("Institution of higher education" means any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education. "Private or independent institution of higher education" includes only a private or independent college or university that is organized under the Texas Non-Profit Corporation Act, exempt from taxation under the Texas Constitution and as a 501(c)(3), and accredited by the Commission on Colleges of the Southern Association of Colleges and Schools, the Liaison Committee on Medical Education, or the American Bar Association. TEX. EDUC. CODE § 61.003.) "Campus" means all land and buildings owned or leased by an institution of higher education or private or independent institution of higher education. TEX. GOV'T CODE § 411.2031(a)(1). This provision *does not allow open campus carry*, and it *does not allow unlicensed carry on a college campus*.

Attorney general opinion KP-0167 (2017) concluded that a "license holder who carries a concealed handgun into an open meeting of a junior college district board of trustees in which no Penal Code section 30.06 trespass notice was posted would have a defense to the prosecution of Penal Code subsection 46.035(c). Though unnecessary within the context of Government Code subsection 411.2031(d-1), a junior college district board of trustees could adopt a rule authorizing concealed handguns in its open meetings to affirm or publicize a license holder's right to carry the concealed handgun into the open meeting held on the institution's campus."

An institution of higher education or private or independent institution of higher education may establish rules, regulations, or other provisions concerning the storage of handguns in dormitories or other residential facilities that are owned or leased and operated by the institution and located on the campus of the institution. *Id*. at § 411.2031(d). After following certain procedures, the president of an institution of higher education must adopt rules as necessary for campus safety, but those rules may not generally prohibit concealed carrying. *Id*. at § 411.2031(d-1) & (d-2)(The board of regents may, by a two-thirds vote, overrule the decisions of the president relating to the rules). If the rules prohibit carrying in any particular premises, the institution must give notice pursuant to Section 30.06, Penal Code. *Id*. It appears that the rulemaking authority is meant to allow an institution to prohibit carrying in sensitive areas, such as those related to secret research or similar endeavors. Any institution that adopts such rules must annually submit them to the legislature explaining why it has done so. *Id*. at § 411.2031(d-4). The attorney general has concluded that an institution may not adopt rules that are so strict they, as a practical matter, prohibit concealed carry by a license holder. Tex. Att'y Gen Op. Nos. KP-0051 (2015) and KP-0120 (2016).

A private or independent institution of higher education may also establish rules prohibiting license holders from carrying handguns on the campus of the institution, any grounds or building on which an activity sponsored by the institution is being conducted, or a passenger transportation vehicle owned by the institution. *Id*. at § 411.2031(e). This provision was explained on the Senate floor as balancing Second Amendment rights with private property rights.

House Bill 1927 (2021) repealed three additional criminal provisions that were in Penal Code Section 43.065's list of license holder prohibitions and inserted them into Section 43.06.

Those provisions provide a criminal offense for a license holder who carries a partially or wholly visible handgun, regardless of whether the handgun is holstered, and intentionally or knowingly displays the handgun in plain view of another person: (1) on the premises of an institution of higher education or private or independent institution of higher education; or (2) on any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area of an institution of higher education or private or independent institution of higher education. TEX. PENAL CODE § 46.03(a-2).

It also creates a criminal offense for a license holder who carries a concealed handgun on the campus of a private or independent institution of higher education that has prohibited carry by rule and given notice under Penal Code Section 30.06 that carrying is prohibited. *Id*. at § 46.03(a-3). Finally, it creates a criminal offense for a license holder who carries a concealed handgun in any area on the campus of an institution of higher education in which the institution has by rule prohibited such carry. *Id*. at § 46.03(a-4).

In what places is a person *allowed* by state law to *openly* carry a firearm?

Long Guns (e.g., Rifles and Shotguns)

The state has no licensing scheme for long guns. Because state law does not prohibit the carrying of a rifle or shotgun in a public place, a person is generally allowed to carry those weapons in "public" in Texas. Of course, Penal Code Section 46.03 prohibits carry of any firearm in the places listed therein.

Article I, Section 23, of the Texas Constitution, the "Right to Keep and Bear Arms" provision, provides that:

> Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

The above provision is the starting point for whether a person may possess or openly carry a firearm. It allows lawful carrying of firearms, but it also authorizes the Texas Legislature to regulate to prevent crime.

Contrary to some opinions, neither the Texas Constitution's provision above, nor the U.S. Constitution's provision, is absolute. U.S. Const., Amend. II ("A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."); *District of Columbia v. Heller*, 554 U.S. 570 (2008)("the Second Amendment right is not unlimited…[i]t is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."); *United States v. Anderson,* 559 F.3d 348, 352 (5th Cir. 2009)(Assertation that federal law prohibiting felon from possessing firearms was unconstitutional

"was foreclosed in this circuit by *United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir.2003).); *Reyes v. State*, 906 S.W.2d 256 (Tex. App. – Fort Worth, 1995), *petition for discretionary review granted, reversed* 938 S.W.2d 718, *rehearing on petition for discretionary review denied* (State constitutional right to bear arms does not prevent legislature from prohibiting possession of arms with intent to prevent crime.).

New York State Rifle & Pistol Association Inc. v. Bruen, Docket 20-843, is before the U.S. Supreme Court at the time of the latest update to this paper. New York state requires anyone who wants to purchase a handgun to apply for a state license. But there is an additional level of scrutiny for people who want a license that allows them to carry their gun outside their home. The two petitioners before the Supreme Court are challenging the laws governing the carrying of handguns. Twenty-five states – including Texas – allow their citizens to carry guns without a permit. Thus, depending on the breadth of the ruling, it shouldn't have too much of an impact on Texas.

Changes made by H.B. 1927 (2021) clarify that a "person" (which could arguably include a local government) can prohibit a person from carrying a long gun onto their "property" by giving notice under the criminal trespass statute:

> (c) A person may provide notice that firearms are prohibited on the property by posting a sign at each entrance to the property that:
> (1) includes language that is identical to or substantially similar to the following: "Pursuant to Section 30.05, Penal Code (criminal trespass), a person may not enter this property with a firearm";
> (2) includes the language described by Subdivision (1) in both English and Spanish;
> (3) appears in contrasting colors with block letters at least one inch in height; and
> (4) is displayed in a conspicuous manner clearly visible to the public.

TEX. PENAL CODE § 30.05(c). (Note: See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of whether a local government is authorized to post a Section 30.05 sign to prohibit long gun carry in places not otherwise addressed by Section 46.03.)

Handgun without a License

Until the passage of H.B. 1927 (2021), the open carry of handguns in public was prohibited in Texas, unless the person held a license to carry a handgun or during certain disasters (see below and next question).

House Bill 1927 (2021), known as the "Firearm Carry Act of 2021," authorizes most Texans over 21 years of age to carry a handgun in a concealed manner or openly in a holster, without the requirement to first obtain a license. It does so by modifying language in the Texas Penal Code to make it a crime to carry "on or about his or her person a handgun" *only* if he or she "is younger than 21 years of age" or "has been convicted of, in the five-year period preceding the date the instant offense was committed:"

5. assault causing bodily injury, including to their spouse [TEX. PENAL CODE § 22.01(a)(1)];

6. deadly conduct, including discharging a firearm at persons, a habitation, a vehicle or a building [*Id*. § 22.05];
7. making a terroristic threat [*Id*. § 22.07]; or
8. disorderly conduct by: (a) discharging a firearm in a public place other than a public road or a sport shooting range; or (b) displaying a firearm or other deadly weapon in a public place in a manner calculated to alarm [*Id*. § 42.01(a)(7) or (8)].

Tex. Penal Code § 46.02. In addition, a person convicted of a felony or a family violence offense is prohibited from possessing a firearm, with some limited exceptions. *Id.* § 46.02 & 46.04(a-1)(Sections 46.15(b); (j); & (l) sometimes allow some who would otherwise be prohibited from carrying to do so, such as at an emergency shelter discussed below.) Oddly, a quirk in the law means that a member of a criminal street gang is now authorized to unlicensed carry in public but may not carry in a motor vehicle or watercraft. *Id.* § 46.04(a-1).

What about someone convicted of more serious offenses, like murder? The federal Gun Control Act, codified at 18 U.S.C. § 922(g), makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition. *See also Id.* § 46.02(a-1)(2)(B). Examples or those who are prohibited by the Gun Control Act from possessing a firearm include, among others, a person who is:

1. convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
2. who is a fugitive from justice;
3. who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);
4. who has been adjudicated as a mental defective or has been committed to any mental institution;
5. who is an illegal alien;
6. who has been discharged from the Armed Forces under dishonorable conditions;
7. who has renounced his or her United States citizenship;
8. who is subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner; or
9. who has been convicted of a misdemeanor crime of domestic violence.

Interestingly, H.B. 1927 (2021) does *not* repeal licensed carry. Why leave that bureaucracy in place? At least two reasons: (1) reciprocity – several other states still require a license to carry, and a Texan must have a Texas-issued license to take advantage of it; and (2) ease of purchasing a firearm – license holders get to skip the background check. The decision may also be beneficial to employers who want to allow employees to carry, but only if the employee has completed the requirements for a license. More on that appears later in this paper.

The law also continues to expressly allow an unlicensed person who is over 21 or who holds a license to concealed or openly carry a handgun on private property or in a car or boat (technically, in a "watercraft"). For those younger than 21 years of age and who do not hold a license, a handgun in a car or boat must be concealed. For that narrow class of persons, the Penal Code provides that a person commits a Class A misdemeanor if he or she intentionally, knowingly, or recklessly

carries on or about his or her person a handgun if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly *en route* to a motor vehicle or watercraft that is owned by the person or under the person's control. TEX. PENAL CODE § 46.02(a)(3).

While H.B. 1927 (2021) makes several findings in its preamble, such as "the Second Amendment of the United States Constitution protects an individual right to keep and bear arms, and to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home," courts have concluded that states have a right to regulate the carrying of handguns, and that neither the Texas nor U.S. Constitutions limit that authority. The constitutional right "to keep or bear arms in self-defense or in the defense of the state," is no defense to an indictment for carrying a pistol contrary to the statute. *Heller*, 554 U.S. 570; *Masters v. State,* 685 S.W.2d 654 (Tex. Crim. App. 1985), *certiorari denied* 106 S.Ct. 155, 474 U.S. 853, 88 L.Ed.2d 128 (Article 1, Section 23, of the Texas Constitution, providing that the legislature shall have power to regulate wearing of arms authorizes Penal Code limitations that define the crime of unlawfully carrying a weapon.).

Handgun with a License

A license holder may generally openly carry a handgun in a holster. *See generally* TEX. GOV'T CODE Chapter 411, Subchapter H. But see the previous questions ("In what places is a person *prohibited* by state law to carry a firearm?" and "Is a person *allowed* by state law to carry a concealed handgun on college campuses?") for numerous limitations on that authority.

In what places is a person *allowed* by state law to *concealed* carry a firearm?

Long Guns (e.g., Rifles and Shotguns)

The state has no licensing scheme for long guns. Because state law governs firearms, and because it does not prohibit the carrying of a rifle or shotgun in a public place, a person is generally allowed to carry those weapons in public in Texas.

Handguns without a License

Until the passage of H.B. 1927 (2021), the open carry of handguns in public was prohibited in Texas, unless the person held a license to carry a handgun or during certain disasters. (See "Are there special rules related to the carry of a handgun during a disaster," below).

House Bill 1927 (2021) authorizes most Texans over 21 years of age and who can otherwise lawfully possess a firearm to carry a handgun in a concealed manner or openly in a holster, without the requirement to first obtain a handgun license to carry.

The law also continues to expressly allow an unlicensed person who is over 21 or who hold a license to concealed or openly carry a handgun on private property or in a car or boat (technically, in a "watercraft"). For those younger than 21 years of age and who do not hold a license, a handgun

in a car or boat must be concealed. For that narrow class of persons, the Penal Code provides that a person commits a Class A misdemeanor if he or she intentionally, knowingly, or recklessly carries on or about his or her person a handgun if the person is not: (1) on the person's own premises or premises under the person's control; or (2) inside of or directly *en route* to a motor vehicle or watercraft that is owned by the person or under the person's control. TEX. PENAL CODE § 46.02(a)(3).

But see the previous questions ("In what places is a person *prohibited* by state law to carry a firearm?" and "Is a person *allowed* by state law to carry a concealed handgun on college campuses?") for numerous limitations on that authority.

Handguns with a License

A license holder may generally concealed carry a handgun. *See generally* TEX. GOV'T CODE Chapter 411, Subchapter H. But see the previous questions ("In what places is a person *prohibited* by state law to carry a firearm?" and "Is a person *allowed* by state law to carry a concealed handgun on college campuses?") for numerous limitations on that authority.

Are there special rules related to the carry of handguns during a disaster?

The Penal Code provides that a person – licensed or not – may carry a handgun during a disaster in certain circumstances as follows:

1. a person, regardless of whether he or she holds a license, may carry a handgun if: (a) the person carries the handgun while evacuating from an area following the declaration of a state or local disaster with respect to that area or reentering that area following the person's evacuation; (b) not more than 168 hours have elapsed since the state of disaster was declared, or more than 168 hours have elapsed since the time the declaration was made and the governor has extended the period during which a person may carry a handgun under the bill; and (c) the person is not prohibited by state or federal law from possessing a firearm;

2. a person may carry a handgun, regardless of whether the handgun is concealed or carried in a holster, on the premises of a location operating as an emergency shelter in a location listed in (3), below, during a declared local or state disaster if the owner, controller, or operator of the premises or a person acting with apparent authority authorizes the carrying of the handgun, the person carrying the handgun complies with any rules and regulations of the owner, controller, or operator of the premises, and the person is not prohibited by state or federal law from possessing a firearm; and

3. regardless of any state law prohibition, a person may carry, with the consent of the owner, et al., required by (2), above, on the premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or a passenger transportation vehicle of a school or educational institution, on the premises of a polling place on the day of an election or while early voting

is in progress, on the premises of any government court or offices utilized by the court, on the premises of a racetrack, on the premises of an institution of higher education or private or independent institution of higher education, on any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area of an institution of higher education or private or independent institution of higher education, on the premises of a business that has a permit or license issued by the Alcoholic Beverage Code, in an amusement park, or on the premises of a church, synagogue, or other established place of religious worship.

TEX. PENAL CODE § 46.15(k) & (l). In addition, H.B. 1500 – passed in 2021 – removes the authority of a city to regulate firearms "in the case of an insurrection, riot, or natural disaster."

Are certain people allowed to carry a handgun where others may not?

Yes. The legislature has seen fit to exempt certain people from many of the restrictions discussed above.

Judges/Presiding Election Judges and Prosecutors

An active judicial officer, district attorney, assistant district attorney, criminal district attorney, assistant criminal district attorney, county attorney, or assistant county attorney, or *municipal attorney* who holds a license to carry a handgun can lawfully carry anywhere that would otherwise be prohibited by Section 46.03. TEX. PENAL CODE § 46.15(a).

In addition, the Texas attorney general has concluded, in Opinion No. KP-0212, that a presiding election judge who is licensed to carry a handgun may do so at most polling places during the voting period. Section 46.03 of the Penal Code provides that a "person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm…on the premises of a polling place on the day of an election or while early voting is in progress." However, the same section exempts "active judicial officers" from the prohibition. The judge of a district court is such an officer under state law. Interestingly, state law grants a presiding election judge "the *power of a district judge* to enforce order and preserve the peace."

All that is to say that a presiding election judge with a license to carry may do so "from the time the judge arrives at the polling place on election day until the judge leaves the polling place after the polls close." Regarding location, the presiding election judge's law enforcement authority exists "in the polling place and in the area within which electioneering and loitering are prohibited." That probably means a judge who isn't licensed, but who may otherwise carry a handgun under H.B. 1927, can do so as well.

Other prohibitions could limit when a licensed presiding judge can carry. For example, a private business owner has the authority under other law to prohibit carry by the posting of a Penal Code 30.05(c) sign, 46.15(o) sign, or so-called 30.06 and/or 30.07 signs. Thus, for example, the owner of a grocery store being used as a polling place has the authority to prohibit a presiding judge from carrying on the premises if proper notice is given. (Note: See "What type of signage is required to

provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of whether a local government is authorized to post a Section 30.05 sign to prohibit carry in places not otherwise addressed by Section 46.03 and/or to give a Section 46.14 sign notice that carry is prohibited by Section 46.03.)

Peace Officers/Law Enforcement

Of course, law enforcement officers are authorized to carry essentially anywhere:

- Peace officers and special investigators as defined by the Code of Criminal Procedure can carry a weapon essentially anywhere, whether on or off duty.

- Parole officers, community supervision and corrections department officers, and certain juvenile probation officers can carry essentially anywhere when in the discharge of their duties and in accordance with their agency's policy.

- Honorably retired peace officers, qualified retired law enforcement officers, federal criminal investigators, or former reserve law enforcement officers who hold a certificate of proficiency and are carrying a photo identification that is issued by a federal, state, or local law enforcement agency meeting certain criteria, can carry essentially anywhere. (H.B. 1522 in 2019 made various changes to the rules related to retired law enforcement officers.)

- A bailiff designated by an active judicial officer who holds a handgun license and is engaged in escorting the judicial officer can carry essentially anywhere.

TEX. PENAL CODE § 46.15 (This provision, titled "nonapplicability," allows certain other persons, such as members of the military, personal protection officers, and others to carry in expanded areas.)

Volunteer Emergency Services Personnel

Chapter 112 of the Civil Practices and Remedies Code provides certain liability protections to a governmental unit that allows volunteer emergency services personnel *with a license to carry* a handgun while engaged in providing emergency services. A "governmental unit" means:

1. this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;
2. a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
3. an emergency service organization; and

4. any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

The Code provides that:

1. "volunteer emergency services personnel" includes a volunteer firefighter, an emergency medical services volunteer, and any individual who, as a volunteer, provides services for the benefit of the general public during emergency situations;
2. a governmental unit is not liable in a civil action arising from the discharge of a handgun by an individual who is volunteer emergency services personnel and licensed to carry the handgun;
3. the discharge of a handgun by an individual who is volunteer emergency services personnel and licensed to carry the handgun is outside the course and scope of the individual's duties as volunteer emergency services personnel;
4. the bill may not be construed to waive the immunity from suit or liability of a governmental unit under the Texas Tort Claims Act or any other law; and
5. volunteer emergency services personnel who are engaged in providing emergency services: (a) enjoy a defense to prosecution for carrying into a place under which an owner has lawfully excluded licensed carry by providing notice under current law, bars, jails, sporting events, hospitals that provide notice, open meetings if notice is provided, amusement parks, or places of worship; and (2) are permitted to carry into a school, institution of higher education, polling place, court or court offices, racetrack, secured area of an airport, or place of execution.

Local officials should note that the bill does not mandate that they allow volunteer emergency services personnel who hold a license to carry their handgun. It merely attempts to provide liability protections should that carry be allowed. Moreover, while it appears to provide complete immunity under a state law claim, a state law can't provide immunity for a federal civil rights law. Instead, the law provides that a volunteer who discharges her handgun is "outside the course and scope of the individual's duties." That's an attempt to protect a local government from a civil rights lawsuit. (See more detailed questions about liability, below.)

Paid First Responders

H.B. 1069 (2021) authorizes certain first responders who hold a license to carry to do so while on duty in certain circumstances. Specifically, the bill:

1. Defines "first responder" to include a public safety employee whose duties include responding rapidly to an emergency, specifically including:
    a. fire protection personnel, which means: (i) permanent, full-time law enforcement officers designated as fire and arson investigators by an appropriate local authority; (ii) aircraft rescue and fire protection personnel; or (iii) permanent, full-time fire department employees who are not secretaries, stenographers, clerks, budget analysts, or similar support staff persons or other administrative employees and who are assigned duties in one or more of the following categories: (A) fire

suppression; (B) fire inspection; (C) fire and arson investigation; (D) marine fire fighting; (E) aircraft rescue and fire fighting; (F) fire training; (G) fire education; (H) fire administration; and (I) any other position necessarily or customarily related to fire prevention or suppression.

b. emergency medical services personnel, which means: (i) emergency care attendants; (2) emergency medical technicians; (3) advanced emergency medical technicians; (4) emergency medical technicians – paramedic; or (5) licensed paramedics.

2. Excludes from the bill: (a) volunteer emergency services personnel; (b) an emergency medical services volunteer, which means emergency medical services personnel who provide emergency prehospital care without remuneration, except reimbursement for expenses; (b) a peace officer or reserve law enforcement officer who is performing law enforcement duties.
3. prohibits a city with a population of 30,000 or less that has not adopted collective bargaining from adopting or enforcing an ordinance, order, or other measure that generally prohibits a first responder who holds a license to carry a handgun, holds an unexpired certification of completion of a handgun training course for first responders, and has the required liability insurance from: (a) carrying a concealed or holstered handgun while on duty; or (b) storing a handgun on the premises of or in a vehicle owned or leased by the city if the handgun is secured with a device approved by the Texas Department of Public Safety (DPS);
4. provides that the prohibition in (1) does not prohibit a city from adopting an ordinance, order, or other measure that: (a) prohibits a first responder from carrying a handgun while on duty based on the conduct of the first responder; or (b) limits the carrying of a handgun only to the extent necessary to ensure that carrying the handgun doesn't interfere with the first responder's duties;
5. authorizes a city with a population of 30,000 or less that has not adopted collective bargaining to adopt a policy authorizing a first responder who holds a license to carry a handgun, holds an unexpired certification of completion of a handgun training course for first responders, and has the required liability insurance to: (a) carry a concealed or holstered handgun while on duty; or (b) store a handgun on the premises of or in a vehicle owned or leased by the city if the handgun is secured with a device approved by DPS;
6. provides that a first responder may not engage in the conduct described in (3)(a)-(b) unless the city has adopted a policy authorizing the conduct;
7. provides that a first responder may discharge a handgun while on duty only in self-defense;
8. provides a that a city that employs or supervises a first responder is not liable in a civil action arising from the discharge of a handgun by a first responder who is licensed to carry a handgun;
9. provides that the discharge of a handgun by a first responder who is licensed to carry a handgun is outside the course and scope of the first responder's duties;
10. provides that one or more complaints received by a city with respect to a specific first responder constitutes grounds for prohibiting or limiting that first responder's carrying a handgun while on duty; and
11. requires the public safety director of DPS to establish a handgun training course for first responders.

School Marshals and "Guardian Plans"

State law provides several methods through which a school district can implement security measures.

A guardian plan (that term isn't in statute) allows a district to authorize certain employees with a license to carry on school premises. TEX. PENAL CODE § 46.03(a)(1). A district may go further and appoint school marshals who receive specialized training prior to serving. TEX. EDUC. CODE § 37.0811. The Texas Commission on Law Enforcement has a web page dedicated to the school marshal program.

Or a district may use a combination of guardian(s) and marshal(s). Tex. Att'y Gen. Op. No. GA-1051 (2014). *Id.* at § 37.0813. The Texas Association of School Boards has prepared an excellent memo with detailed information about school security planning and options.

Private schools may also appoint school marshals. *Id.* at § 37.0813. While state law may give the license holders above additional authority to carry on school premises, it doesn't necessarily mean they can carry in other places that weapons are prohibited.

In what ways does state law expressly *preempt* a *city* from regulating firearms?

Most local governments don't have the same ordinance-making authority as cities. Because of previously-broad city authority in the area of firearms regulation, the legislature has expressly preempted city authority over: (a) the transfer, possession, wearing, carrying, ownership, storage, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories; (b) commerce in firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories; or (c) the discharge of a firearm or air gun (e.g., a pellet, BB, or paintball gun) at a sport shooting range (defined as a business establishment, private club, or association that operates an area for the discharge or other use of firearms for silhouette, skeet, trap, black powder, target, self-defense, or similar recreational shooting). TEX. LOCAL GOV'T CODE §§ 229.001(a); 229.001(e)(1) & (e)(2); Tex. Att'y Gen. Op. No. KP-0252 (2019). (Local Government Code Section 236.002 includes similar limitations on counties.)

In addition, Government Code Section 411.209, which is the statute that the attorney general uses to investigate and/or sue cities that allegedly have signs governing license holders that posted in unallowable places, provides that:

1. a state agency or a political subdivision of the state may not take any action, including an action consisting of the provision of notice by a communication described by Section 30.06 or 30.07, Penal Code, that states or implies that a license holder who is carrying a handgun is prohibited from entering or remaining on a premises or other place owned or leased by the governmental entity unless license holders are prohibited from carrying a handgun on the premises or other place by Section 46.03, Penal Code, or other law;
2. a state agency or a political subdivision of the state that improperly posts notice is liable for a civil penalty of: (a) not less than $1,000 and not more than $1,500 for the first

violation; and (b) not less than $10,000 and not more than $10,500 for the second or a subsequent violation;

3. a citizen of this state or a person licensed to carry a concealed handgun may file a complaint with the attorney general that a state agency or political subdivision has improperly posted notice;
4. before a suit may be brought against a state agency or a political subdivision of the state for improperly posting notice, the attorney general must investigate the complaint to determine whether legal action is warranted;
5. if legal action is warranted, the attorney general must give the chief administrative officer of the agency or political subdivision charged with the violation a written notice that gives the agency or political subdivision 15 days from receipt of the notice to remove the sign and cure the violation to avoid the penalty; and
6. if the attorney general determines that legal action is warranted and that the state agency or political subdivision has not cured the violation within the 15-day period, the attorney general or the appropriate county or district attorney may sue to collect the civil penalty, and the attorney general may also file a petition for a writ of mandamus or apply for other appropriate equitable relief.

TEX. GOV'T CODE § 411.209.

As written, the law originally applied only to a concealed handgun sign under Texas Penal Code Section 30.06. The attorney general later asserted that the law grants his office authority over *any sign* and even over verbal trespass warnings. Tex. Att'y Gen. Op. No. KP-0049 (2015). That was an incorrect conclusion at the time, but H.B. 1791 (2019) ultimately clarified the attorney general's broad authority to investigate virtually any sign or communication. *Id*.

In what ways does state law expressly *authorize* a *city* to regulate firearms?

Most local governments – except for cities – have little if any authority to regulate firearms by ordinance. For a city, the Local Government Code expressly authorizes a city to regulate the following:

1. the discharge of firearms or air guns within the limits of the city, other than at a sport shooting range (a city can prohibit or regulate the discharge of a firearm or other weapons within the city's original city limits but may not do so in annexed areas and the extraterritorial jurisdiction in certain circumstances – see next question). Tex. Atty. Gen. Op. No. GA-0862 (2011);

2. using authority of other law: (a) adopt or enforce a generally applicable zoning ordinance, land use regulation, fire code, or business ordinance (but not if the ordinance or regulation is designed or enforced to effectively restrict or prohibit the manufacture, sale, purchase, transfer, or display of firearms, firearm accessories, or ammunition that is otherwise lawful in this state); (b) regulate the carrying of a firearm by a person licensed to carry a handgun in accordance with express state law authority; or (c) regulate or prohibit an employee's carrying

or possession of a firearm, firearm accessory, or ammunition in the course of the employee's official duties;

3. the exception provided by Section (2)(c), above, does not authorize a city to regulate an employee's carrying or possession of a firearm in violation of Labor Code provisions relating to storing a handgun in a parking lot;

4. the carrying of a firearm or air gun *other than a handgun carried by a person not otherwise prohibited by law from doing so* at a:

    a. public park (Prior to H.B. 1927 (2021), a city could prohibit anyone other than a handgun license holder from carrying a firearm in a city park. Tex. Atty. Gen. Op. No. DM-364 (1995). Now, a city *may not* prohibit a license holder or lawful constitutional carrier from bringing a *handgun* into a city park. A city *may* prohibit long guns in city parks. Why is that? As discussed above, Section 229.001(a) of the Local Government Code preempts essentially any city regulation of the carrying (and other things related to) a firearm. However, Section 229.001(b) provides some exceptions to that prohibition, specifically):

    "Subsection (a) does not affect the authority a municipality has under another law to…(5) regulate the carrying of an air gun or firearm, other than a handgun carried by a person not otherwise prohibited by law from carrying a handgun, at a…(A) public park. Subsection (b) provides an "exception to the exception," which reads to mean a city *may not* prohibit licensed or constitutional *handgun* carry in a city park. But a city may prohibit *long gun carry* in a park.

    b. public meeting of a city, county, or other governmental body (A city may prohibit license holders by posting a 30.06 and/or 30.07 sign, which appears to be at odds with this section, as does Penal Code Section 46.03(a)(14), which prohibits carry at a meeting by an unlicensed person. It seems everyone is in agreement that this section is superseded by those more specific ones in the Penal Code that either prohibit unlicensed carry in a meeting or allow a local government to prohibit licensed carry with proper signage.);

    (Note: Items 4a and 4b do not allow municipal regulation if the firearm or air gun is in or is carried to or from an area designated for use in a lawful hunting, fishing, or other sporting event and the firearm or air gun is of the type commonly used in the activity. TEX. LOCAL GOV'T CODE § 229.001(c).)

    c. political rally, parade, or official political meeting; or

    d. nonfirearms-related school, college, or professional athletic event.

5. the hours of operation of a sport shooting range, except that the hours of operation may not be more limited than the least limited hours of operation of any other business in the

municipality other than a business permitted or licensed to sell or serve alcoholic beverages for on-premises consumption; or

6. the carrying of an air gun by a minor on: (a) public property; or (b) private property without consent of the property owner.

Id. § 229.001(b) (Subsection (b-4), which allowed a city to regulate "the use of firearms or air guns in the case of an insurrection, riot, or natural disaster if the city finds the regulations necessary to protect public health and safety," was repealed in 2021 by H.B. 1500.)

The exceptions above are relatively narrow. For example, the Local Government Code preempts a city housing authority from regulating a tenant's otherwise lawful possession of firearms. Tex. Atty. Gen. Op. No. DM-71 (1991).

Moreover, if a city regulates in violation of state law, the attorney general may bring an action in the name of the state to obtain a temporary or permanent injunction against and costs for prosecuting the violation. *Id*. § 229.001(f).

The Texas Constitution, Article I, Section 34, was amended in 2015 (by voter approval) to: (1) enshrine in that document that the people have the right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to laws or regulations to conserve and manage wildlife and preserve the future of hunting and fishing; and (2) provide that: (a) hunting and fishing are preferred methods of managing and controlling wildlife; (b) the amendment does not affect any provision of law relating to trespass, property rights, or eminent domain; and (c) the amendment does not affect the power of the legislature to authorize a city to regulate the discharge of a weapon in a populated area in the interest of public safety. (The amendment clarifies existing law relating to city regulation of the discharge of firearms.)

Finally, H.B. 29 passed in 2021 and provides that: (1) allows a political subdivision to provide a person temporary secure weapon storage when entering a building or portion of a building used by the political subdivision that is generally open to the public and in which carrying a firearm, knife, club or other weapon is prohibited by state law or the political subdivision; (2) allows weapon storage to be provided via self-service weapon lockers or other temporary secure weapon storage operated at all times by a designated employee of the political subdivision; (3) allows a political subdivision to collect a fee of not more than $5 for the use of a self-service weapon locker or other temporary secure weapon storage; and (4) addresses how a political subdivision must handle an unclaimed weapon. TEX. LOCAL GOV'T CODE § 365.001 et seq.

In what additional ways does state law expressly *prohibit city* regulation of firearms?

Most local governments – except for cities – have no authority to regulate firearms by ordinance. For a city, the legislature has preempted most inherent authority. In addition to the general state law preemption of municipal authority discussed in the question above, other laws have been enacted in recent sessions that expressly prohibit municipal regulation in certain circumstances.

At the request of various landowners and other groups, the legislature has limited municipal authority over certain firearm discharges. According to the bill analysis for the legislation:

> In some parts of the state, large tracts of land that have traditionally been used for hunting leases have been annexed. Upon annexation, the municipality frequently informs the owners of these large tracts that they can no longer discharge firearms on the property, thereby ending their right to lease their property for hunting. Many owners of these large tracts depend on the revenue generated from their hunting leases.

Because of that analysis and the subsequent passage of legislation, a city may not apply a regulation relating to the discharge of firearms or other weapons in the extraterritorial jurisdiction of the city or in an area annexed after September 1, 1981, if the firearm or other weapon is:

1. a shotgun, air rifle or pistol, BB gun, or bow and arrow discharged on a tract of land of 10 acres or more and more than 150 feet from a residence or occupied building located on another property in a manner not reasonably expected to cause a projectile to cross the boundary of the tract; or
2. a center fire or rim fire rifle or pistol of any caliber discharged on a tract of land of 50 acres or more and more than 300 feet from a residence or occupied building located on another property; and in a manner not reasonably expected to cause a projectile to cross the boundary of the tract.

Id. § 229.002. The 1981 date is relevant because that was the date of enactment of another law commonly known as the Agriculture Protection Act (APA) – Chapter 251 of the Agriculture Code. The APA generally prohibits a city from applying nuisance regulations to an agricultural operation if doing so would negatively affect the operation. The Local Government Code provisions reference back to the APA, which makes the firearms limitations above retroactive to property annexed after 1981.

The law, in response to alleged shotgun pellets raining down on a school adjacent to a dove lease, was later amended to give cities in Collin and Tarrant Counties additional authority. *Id*. §§ 229.003 & 229.004.

Also, the Texas Legislature was busy in the 2021 regular session passing further preemptive legislation – the following four bills passed:

- H.B. 957 relates to silencers and: (1) prohibits a city council or an officer, employee, or other body that is part of a city (including a police department) from: (a) adopting a rule, order, ordinance, or policy under which the city enforces, or by consistent action allows the enforcement of, a federal statute, order, rule, or regulation that purports to regulate a firearm suppressor if the statute, order, rule, or regulation imposes a prohibition, restriction, or other regulation that does not exist under Texas law; and (b) enforcing or attempting to enforce any federal statute, order, rule, or regulation described in (1)(a); (2) provides that a violation of the prohibition in (1) may be enforced by denying certain state grant funds to the city; (3) authorizes any citizen residing in the jurisdiction of a city to file a complaint with the attorney general if the citizen offers evidence to support an allegation that the city

violated the prohibition in (1); (4) authorizes the attorney general, upon receipt of a valid citizen complaint, to file a writ of mandamus or seek other equitable relief to compel a city to comply with the requirements in the bill, and allows the attorney general to recover reasonable expenses in obtaining such relief; and (5) removes the prohibition in state law against possessing a firearm suppressor, and provides that any pending criminal action n for that offense is dismissed on the effective date of the bill. TEX. GOV'T CODE § 2.001 et seq.

- H.B. 2622 provides that: (1) notwithstanding any other law, an agency of this state, a political subdivision of this state, or a law enforcement officer or other person employed by an agency of this state or a political subdivision of this state may not contract with or in any other manner provide assistance to a federal agency or official with respect to the enforcement of a federal statute, order, rule, or regulation that: (a) imposes a prohibition, restriction, or other regulation that does not exist under the laws of Texas; and (b) relates to: (i) a registry requirement for a firearm, a firearm accessory, or ammunition; (ii) a requirement that an owner of a firearm, a firearm accessory, or ammunition possess a license as a condition of owning, possessing, or carrying the firearm, firearm accessory, or ammunition; (iii) a requirement that a background check be conducted for the private sale or transfer of a firearm, a firearm accessory, or ammunition; (iv) a program for confiscating a firearm, a firearm accessory, or ammunition from a person who is not otherwise prohibited by the laws of Texas from possessing the firearm, firearm accessory, or ammunition; or (v) a program that requires an owner of a firearm, a firearm accessory, or ammunition to sell the firearm, firearm accessory, or ammunition; (2) the prohibition in (1) does not apply to a federal statute, order, rule or regulation in effect on January 19, 2021; and (3) a violation of the prohibition in (1) may be enforced: (a) by denying certain state grant funds to the political subdivision; and (b) through certain court action by the attorney general that is initiated by citizen complaint. TEX. PENAL CODE § 1.10.

- S.B. 19 relates to government contract provisions and - among other things, (1) prohibits a governmental entity from entering into a contract with a value of $100,000 or more that is to be paid from public funds with a company with more than 10 full-time employees for the purchase of goods or services unless the contract contains a written verification from the company that it: (a) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and (b) will not discriminate during the term of the contract against a firearm entity or firearm trade association; and (2) provides that the prohibition in (1) does not apply to a city that (a) contracts with a sole-source provider, or (b) the city does not receive any bids from a company that is able to provide the required verification required by (1) . TEX. GOV'T CODE § 2274.001 et seq.

Can a governmental entity prohibit handgun carry in its buildings or facilities?

Generally

As mentioned in the fifth question in this paper, the most common state law provisions that prohibit any person from carrying a handgun are on the premises of: (1) a polling place on the day of an election or while early voting is in progress; and (2) any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court. (See detailed discussion above regarding interpretations of the "courthouse exception.") Local governments have the *option* to prohibit carry under the following circumstances.

Meeting of Governmental Entity

As a preliminary matter, an *unlicensed carrier* is never allowed into the room or rooms where a meeting of a governmental entity is held, if the meeting is an open meeting subject to the Open Meetings Act, and if the entity provides notice as required by the Open Meetings Act (i.e., posts the OMA-required agenda notice of the meeting). A local government is not required to provide notice of this provision, but can the local government do so if it chooses? See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of that topic.

With regard to *licensed carriers*, the common interpretation has been that the law remains as it has for some time: By providing proper notice, a local government may prohibit licensed concealed carry, licensed open carry, or both.

However, some now argue that H.B. 1927 (2021) allows a license holder to carry into a local government's meeting by right. In other words, they argue that a local government no longer has the option to provide notice that doing so is prohibited using a Penal Code 30.06 (concealed carry) and/or 30.07 (open carry) sign. The legal argument in favor of the optional prohibition is somewhat complicated, but this step-by-step may help:

1. This provision prohibits *anyone* from carrying a handgun into an open meeting:

    - Penal Code Section 46.03(a)(14): "A person commits an offense if the person…goes with a firearm…in the room or rooms where a meeting of a governmental entity is held, if the meeting is an open meeting subject to [the Open Meetings Act] and if the entity provided notice as required by that chapter."

2. This provision provides that the above *does not apply to a license holder*, meaning a license holder *is authorized to carry into a meeting*:

    - Penal Code Section 46.15(b)(6): "Sections…46.03(a)(14)…do not apply to a person who…is carrying a license and…a handgun… concealed manner or [openly] in a holster"

3. These provisions, which are essentially identical in two sections of the Penal Code (one for concealed and one for open carry), appear to bring everything full-circle – they seem to allow a political subdivision to *prohibit licensed carry (concealed, open, or both) if it chooses to do so* in an open meeting:

- Penal Code Sections 30.06(a)&(e) and 30.07(a)&(e): "A license holder commits an offense if the license holder…carries a concealed handgun…[and] received notice that entry on the property…was forbidden [but, if the property is owned by a governmental entity, the property must be one] on which the license holder is prohibited from carrying the handgun under Section 46.03[(a)(14)]."

As noted above, Section 46.03(a)(14) prohibits a license holder from carrying into a meeting. The provision that exempts a license holder from that prohibition is Section 46.15(b)(6), and neither 30.06 nor 30.07 reference that section. Thus, many believe that a local government is still authorized to post signage to prohibit licensed carry in a meeting

The other position is that, because 46.15(b)(6) provides an exemption for license holders to carry in meetings, the reference in Sections 30.06(e) and 30.07(e) no longer allows optional 30.06 and 30.07 signs to prohibit it. Does that interpretation comport with rules of statutory construction? It doesn't appear to, but no case or attorney general opinion is thus far directly on point.

In terms of the rules of statutory construction, perhaps the most relevant precedent comes from *Taylor v. Taylor*, 608 S.W.3d 265 (Tex. App. – Houston [1st Dist.] 2020). In *Taylor*, the court examined a complex system of statutory cross-references related to family violence orders. It essentially concluded that one section's failure to expressly reference another prohibited a court from entering a family violence protective order based on a respondent's violation of a temporary *ex parte* order. According to the court:

> To hold otherwise would amount to rewriting the exception to include an additional statutory cross-reference to [other] provisions…which the exception lacks. We cannot rewrite the exception." *Silguero v. CSL Plasma*, 579 S.W.3d 53, 59 (Tex. 2019).(can't add terms legislature omitted); *Upjohn Co. v. Rylander*, 38 S.W.3d 600, 607 (Tex. App.—Austin 2000, pet. denied) (court couldn't ignore statute's cross-reference to single statutory provision and hold that statute also incorporated another statutory provision that wasn't cross-referenced).

Taylor, 608 S.W.3d at 270. *Upjohn v. Rylander* reaches a similar conclusion. In that case, Upjohn argued that then-Section 171.104 of the Tax Code should allow it to deduct certain drug and medicine receipts from gross receipts to reduce its state franchise tax because it was "earned surplus." Essentially, the company argued that the court should infer a reference to a cross-referenced statute that wasn't included in the referencing provision. *Upjohn,* 38 S.W.3d at 605–06. The court restated the relevant rules of statutory construction, several of which are instructive (emphasis is added):

1. The fundamental and dominant rule of construction requires us to ascertain the Legislature's intent in enacting the statute and to effectuate that intent.
2. The Legislature's intent should be determined by examining the language used in the statute.
3. Courts look to the entire act in determining the Legislature's intent with respect to a specific provision.

4. Every word, phrase, and expression in a statute should be read as if it were deliberately chosen for a purpose.
5. *Moreover, every word excluded from a statute must be presumed to have been excluded for a purpose.*
6. The supreme court has noted that, in construing statutes: "Courts must take statutes as they find them…They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere...*They are not responsible for omissions in legislation.* They are responsible for a true and fair interpretation of the written law."
7. *There is generally an inference that omissions in a statute are intentional.* See 2A Norman J. Singer, Sutherland Statutory Construction § 47.25 (6th ed.2000).
8. Because canons of statutory construction may be cited to support conflicting interpretations of the disputed statute, we look to "[t]he good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language."

Id. (Emphasis added.) The *Upjohn* court concluded that, "[u]nder the rules of statutory construction, we need not construe unambiguous statutes…Recognizing, however, that the issue is a complex and important one, we turn to the legislative history of the related sections." *Upjohn*, 38 S.W.3d at 607. Refusing to modify the statute based on legislative intent, the court held that:

> [H]ad the Legislature intended for the exclusion to apply to both the taxable capital and earned surplus components of the franchise tax, it could easily have amended the exemption provision to expressly refer to section 171.1032(a)(1) as well as section 171.103(1). This the Legislature did not do. The legislative intent becomes even more clear when we consider that the Legislature is presumed to enact a statute with complete knowledge of the existing law and with reference to it.

Upjohn, 38 S.W.3d at 608-09 (emphasis added)(citations omitted). These two cases and those cited therein seem to support the interpretation that the legislature could have cross-referenced Penal Code Section 46.15, had it intended to do so.

Because the best position is that a 30.06 and/or 30.07 sign may still be used to prohibit licensed carry in a meeting, attorney general opinion No. KP-0098 (2016) speaks to various issues related to the posting of notice. Sections 30.06 and 30.07 of the Penal Code provide the language to be used in a notice to prohibit entry with a concealed handgun and entry with a handgun that is carried openly. The request for the opinion was meant to clarify where the signs should be posted. That clarification was sought because Section 30.06 states that the concealed carry prohibition sign should be "displayed in a conspicuous manner clearly visible to the public." Section 30.07, for some inexplicable reason, has additional language stating that the open carry prohibition sign should be "displayed in a conspicuous manner clearly visible to the public *at each entrance to the property*."

The confusion came from the fact that a governmental entity can't generally prohibit licensed open carry in its public facilities, so it wouldn't make sense to post that sign "at each entrance to the property." Most attorneys had simply advised that a governmental entity wanting to prohibit carry

in the meeting room do so by temporarily posting the signs at the entrance to the room when a meeting is taking place. The opinion essentially agreed, but it also included an analysis related to "closed meetings."

Legislation passed in 2015 prohibits licensed carry "in the room or rooms where a meeting of a governmental entity is held and if the meeting is an *open meeting*." It was added to clarify that only meetings of bodies governed by the Open Meetings Act are off limits, and only then if a local government posts signage. The phrase "open meeting" in that statute clearly means one that is subject to the Open Meetings Act. However, the attorney general office reads it literally to not include a "closed meeting (i.e., an executive session)."

In other words, the opinion incorrectly concludes that a governmental entity can't prohibit a person from licensed carrying into an executive session. Of course, only members of the governing body have an absolute right to be in an executive session anyway. And a local government can prohibit its employees from carrying at all while at work. But it's conceivable that the governing body could invite some other person to attend an executive session. If that's the case, the attorney general says, again incorrectly, the governing body can't prohibit that citizen from licensed carrying in that meeting.

The law also allows a person to receive notice from the owner of the property (i.e., the governmental entity) or someone with apparent authority to act for the owner by oral or written communication. TEX. PENAL CODE § 30.06(b) & 30.07(b). For example, a governmental entity's employee could ask a license holder who is carrying to leave a meeting, even if the written notice is not posted, if the entity has adopted a prohibition. Another method of providing notice could be a card with the statutory language to hand to attendees or the printing of the Penal Code 30.06 or 30.07 statements on the actual agenda. *Id*. at § 30.06(c)(3)(A) & 30.07(c)(3)(A).

A license holder who ignores notice commits a Class C misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that, after entering the property, the license holder was personally given the notice by oral communication and subsequently failed to depart. *Id*. at § 30.06(d) & 30.07(d).

Local elected officials who hold a handgun license have no special right to carry a handgun into a meeting. However, if a local government does not prohibit carrying in the meeting room, *any* person who is licensed to carry may do so (unless the building or portion of a building where the meeting room is located also houses a polling place during an election or a court and/or and office used by the court, see detailed discussion above). School districts are the exception because they have express authority to allow carry through written regulations. The Texas Association of School Boards has prepared an excellent memo with detailed information about school security planning and options.

A final wrinkle related to carry in a meeting arose recently based on how *Westlaw* and the *Texas Legislature Online* codified H.B. 1927 and a handful of other bills. The other bills ostensibly did nothing more than delete the requirement that a handgun be carried in a "shoulder or belt" holster, meaning an authorized carrier can now carry in any type of holster.

Section 26(10) of H.B. 1927 repealed Penal Code Section 46.035. Section 46.035 ("Unlawful Carry by License Holder") used to be necessary because only license holders could carry a handgun in public. The legislature saw fit to prohibit license holders from carrying in places in addition to the general firearms carry prohibitions in Section 46.03. When the requirement to hold a license was eliminated, most of the prohibitions that applied only to license holders were moved into Section 46.03, thus eliminating the need for Section 46.035.

The following bills relate to eliminating the "shoulder or belt" language from the holster requirement:

- Acts 2021, 87th Leg., R.S., Ch. 481 (H.B. 2112), Sec. 4, eff. September 1, 2021. (Last legislative vote in Senate on May 20, 2021 – Senate passage.)
- Acts 2021, 87th Leg., R.S., Ch. 518 (S.B. 550), Sec. 1, eff. September 1, 2021. (Last legislative vote in House on May 19, 2021 – House passage.)
- Acts 2021, 87th Leg., R.S., Ch. 1027 (H.B. 1407), Sec. 1, eff. September 1, 2021. (Last legislative vote in Senate on May 20, 2021 – Senate passage.)

Each of the above was enacted prior to H.B. 1927 (last legislative vote May 26, 2021 – Senate adopted conference committee report), which means the repeal in H.B. 1927 could – arguably – mean they shouldn't have been codified.

Westlaw indicates that H.B. 1927 repealed most of the Section 46.035 subsections, but it also continues to show the ones that were amended by the bills above, including the meeting prohibition for license holders:

> (c) A license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of Subchapter H, Chapter 411, Government Code, regardless of whether the handgun is concealed or carried in a holster, in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to Chapter 551, Government Code, and the entity provided notice as required by that chapter.

The subsection above used to be modified by a subsequent subsection (i), which was repealed by H.B. 1927 and is shown as such. Subsection (i) provided that the prohibition above applied only if a local government posted a Penal Code Section 30.06 and/or 30.07 sign.

Texas Legislature Online has the following statement above Section 46.035:

> Without reference to the amendment of this section, this section was repealed by Acts 2021, 87th Leg., R.S., Ch. 809 (H.B. 1927), Sec. 26(10), eff. September 1, 2021.

Westlaw's "Editor's Notes" say the following:

> REPEAL
>
> <Without reference to the amendments by Acts 2021, 87th Leg., ch. 481 (H.B. 2112), § 4, Acts 2021, 87th Leg., ch. 518 (S.B. 550), § 1, and Acts 2021, 87th Leg., ch. 1027 (H.B.

1407), § 1, Acts 2021, 87th Leg., ch. 809 (H.B. 1927), § 26(10) repealed this section effective September 1, 2021.>

The Texas Government Code provides the following:

> Sec. 312.014. IRRECONCILABLE AMENDMENTS.
> (b) If amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails...
> (d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

Based on all of the above, the fact that *Westlaw* and *TLO* left Section 46.035 in codification is confusing to many. Regardless of how those organizations decided to codify the laws, it seems clear that Section 46.035 was repealed by H.B. 1927 and should be disregarded. The author provided this information to Westlaw, which is investigating at the time of this update. TLO decided to wait until a 2023 recodification bill to decide whether or how to address it.

Law Enforcement Facilities

One bit of special authority relates to the secure area of a law enforcement facility. The handgun license law allows:

> a peace officer who is acting in the lawful discharge of the officer's official duties to temporarily disarm a license holder when a license holder enters a nonpublic, secure portion of a law enforcement facility, if the law enforcement agency provides a gun locker where the peace officer can secure the license holder's handgun. The peace officer shall secure the handgun in the locker and shall return the handgun to the license holder immediately after the license holder leaves the nonpublic, secure portion of the law enforcement facility.

TEX. GOV'T CODE § 411.207(c). To avail itself of the authority above, a law enforcement facility shall prominently display at each entrance to a nonpublic, secure portion of the facility a sign that gives notice in both English and Spanish that, under this section, a peace officer may temporarily disarm a license holder when the license holder enters the nonpublic, secure portion of the facility. The sign must appear in contrasting colors with block letters at least one inch in height, and shall be displayed in a clearly visible and conspicuous manner. *Id*.

The law defines a "law enforcement facility" as a building or a portion of a building used exclusively by a law enforcement agency that employs peace officers…and support personnel to conduct the official business of the agency." The term does not include any portion of a building not actively used exclusively to conduct the official business of the agency or any public or private driveway, street, sidewalk, walkway, parking lot, parking garage, or other parking area. *Id*. CODE § 411.207(d).

"Nonpublic, secure portion of a law enforcement facility" means that portion of a law enforcement facility to which the general public is denied access without express permission and to which access is granted solely to conduct the official business of the law enforcement agency. *Id*.

In addition, H.B. 1927 (2021) provides similar authority over unlicensed carriers:

> a peace officer who is acting in the lawful discharge of the officer's official duties to temporarily disarm a person when a person enters a nonpublic, secure portion of a law enforcement facility, if the law enforcement agency provides a gun locker where the peace officer can secure the person's handgun. The peace officer shall secure the handgun in the locker and shall return the handgun to the person immediately after the person leaves the nonpublic, secure portion of the law enforcement facility.

The section above is essentially the same as that for license holders, except it appears that no sign is required.

Government Property Leased to Private Person/Entity

In August 2016, the attorney general's office released Opinion No. KP-0108, which concludes that: (1) nothing prohibits a private entity that is leasing government property from posting notice that licensed carry is prohibited on the property; and (2) a licensed carrier who does so anyway would not commit the criminal offense of trespass by license holder under the Texas Penal Code. (The reasoning is presumable applicable to a constitutional carrier as well.)

The request for the opinion asked whether a non-profit entity with offices on land owned by a city may restrict the carrying of concealed handguns on the property. Many local government attorneys have opined that the Penal Code provisions allowing a private entity to prohibit licensed carry on its property (Section 30.06 for concealed carry and Section 30.07 for open carry) can't be used to criminally enforce the trespass by license holder statute on local government-owned property. That's because both sections provide that "it is an exception to the application of this section that the property on which the license holder openly carries the handgun is owned or leased by a governmental entity…"

The attorney general's office agreed with that position. However, the opinion also reviewed Section 411.209 the Government Code authorizing the attorney general to investigate and sue a state agency or a political subdivision that improperly posts a 30.06 notice. It concludes that the section applies *only* to state agencies and political subdivisions. Thus, the attorney general's office has no authority to investigate a sign placed by the person or entity that is leasing local government property, so long as the government has no control over the placement. In other words, it appears to be a "don't ask, don't tell" opinion.

How can the person or entity that is leasing the government property and chooses to post signs then enforce the prohibition? The criminal trespass statute in Penal Code Section 30.05(c) as added by H.B. 1927 (2021) allows the private leasee to also post notice that unlicensed carry is prohibited. Because an authorized carrier wouldn't necessarily commit a criminal offense by disregarding a

sign in this case, the opinion mentions *civil* trespass, which presumably allows the person or entity to prohibit entry.

Of course, assuming one agrees with the opinion's conclusion, the recourse of law enforcement responding to a call of an unwelcome carrier at the leased property may be limited to other criminal offenses.

Can a governmental entity prohibit the carry of long guns in its buildings or facilities?

Perhaps. A local government might be able to prohibit the carry of a long gun onto city property if it adopts a policy to that effect and provides notice that carrying firearms is prohibited in the building. Under Penal Code 30.05(a)(1) & (2), the state's criminal trespass statute, "[a] person commits an offense if the person enters or remains on or in property of another…without effective consent and the person…had notice that the entry was forbidden…or received notice to depart but failed to do so."

"Notice" means oral or written communication by the owner or someone with apparent authority to act for the owner. (Note: See "What type of signage is required to provide notice that firearm carry isn't allowed – Firearms with or without a license – Prohibited locations under State Law," above, for a discussion of whether a local government is authorized to post a Section 30.05 sign to prohibit long gun carry in places not otherwise addressed by Section 46.03.)

Finally, it is a Class A misdemeanor if a person carries a deadly weapon during the commission of the offense or is on a "critical infrastructure facility." A critical infrastructure facility means, among other places, if completely enclosed by a fence or other physical barrier that is obviously designed to exclude intruders:

1. an electrical power generating facility, substation, switching station, electrical control center, or electrical transmission or distribution facility;
2. a water intake structure, water treatment facility, wastewater treatment plant, or pump station; or
3. a natural gas transmission compressor station.

Id. § 30.05(d) & (h). Certain public safety officers and employees of the owner are exempt from this provision. *Id.* § 30.05(e).

How can a local government regulate employee carry?

Generally

The handgun licensing law expressly allows a local government to prohibit employee carry while on the job:

> RIGHTS OF EMPLOYERS. This subchapter does not prevent or otherwise limit the right of a public or private employer to prohibit persons who are licensed under this subchapter from carrying a handgun on the premises of the business. In this section, "premises" has the meaning assigned by Section 46.03, Penal Code.

TEX. GOV'T CODE § 411.203. The law generally allows an employee to leave an otherwise lawful handgun in a private, locked car in the parking lot. TEX. LABOR CODE § 52.061 et seq. That exception does not, however, "apply to…a vehicle owned or leased by a public or private employer and used by an employee in the course and scope of the employee's employment, unless the employee is required to transport or store a firearm in the official discharge of the employee's duties." *Id*. at § 52.062(a)(2)(A).

Moreover, the authority of an employee to leave a handgun locked in a car in the parking lot doesn't apply to a school district; an open-enrollment charter school, or a private school. *Id*. at § 52.062(a)(2)(B)-(C). The "parking lot" law "except in cases of gross negligence, [provides that] a public or private employer…is not liable in a civil action for personal injury, death, property damage, or any other damages resulting from or arising out of an occurrence involving a firearm or ammunition that the employer is required to allow" in the parking lot. *Id*. at § 52.063; 52.064 (an employee who shoots someone is not protected by this law, it protects only his employer).

In 2018, the attorney general received a request (RQ-0252-KP) as to whether a county can prohibit employees and elected officials from carrying in the county courthouse. Aside from the complex courthouse analysis described elsewhere in this paper, the provision above would clearly allow an entity to prohibit employees from carrying. The request was subsequently withdrawn, so we never got an opinion from the attorney general on that issue.

Allowing or Prohibiting Employee Carry While at Work

A local government can, but is not required to, prohibit employee (and volunteer and contractor) carry. A local government can also adopt a written policy expressly allowing it, and a decent number have done so.

Without hard data, it's unclear how many allow and how many prohibit (and how many have implicitly allowed it by doing nothing). Anecdotally, it's probably safe to say that most prohibit weapons of any type by a personnel or other policy. Please read this entire section, including the liability explanation, prior to acting on this issue. You should always consult with your local legal counsel and local law enforcement prior to acting on a matter of this importance. H.B. 1927 (2021) authorizes a broad class of persons to carry without a license. Each local government should decide whether allowing only licensed carry makes sense (the following policies deal only with that because – the author hasn't seen any that allow constitutional carry – that doesn't mean there aren't some out there, of course), or whether to add unlicensed carry. When deciding, local officials should consider whether the minimal training to become licensed, and the licensing process (including a background check), make any difference.

This is an example of a simple personnel policy that *prohibits weapons at the workplace*:

> **Possession of Weapons**

The City prohibits all employees from possessing weapons while on duty or in the City's offices with the sole exception of law enforcement personnel who have been authorized to carry a weapon.

This is an example of a comprehensive personnel policy that *prohibits weapons and provides for reporting of any threat or act of violence at the workplace*:

Weapons Control and Violence Prevention Policy

The City strives to provide a safe and secure working environment for its employees. This policy is designed to help prevent incidents of violence from occurring in the workplace and to provide for the appropriate response when and if such incidents do occur.

Zero Tolerance. This policy prohibits harassment, intimidation, threats, and violent behavior by or towards anyone in the workplace, that is in any way job- or City-related, that is or might be carried out on City-property, or that is in any way connected to the employee's employment with the City, whether the conduct occurs on-duty or off-duty. The City has a zero tolerance policy for this type of misconduct.

Weapons Banned. Unless specifically authorized by the City Manager, no employee, other than a City licensed peace officer, shall carry or possess a firearm or other weapon on City property. Employees are also prohibited from carrying a weapon while on duty or at any time while engaging in City-related business. Prohibited weapons include firearms, long guns, clubs, explosive devices, knives with blades exceeding 5 ½ inches, switchblades, etc. Employees do not have an expectation of privacy and the City retains the right to search for firearms or other weapons on City property.

Employees licensed by State of Texas to carry a handgun, or who otherwise lawfully possess a firearm, may have a permitted weapon only on the City parking lot if it is locked in the employee's vehicle. Such employees must report to [insert name or title] their identity and license plate numbers of all vehicles that employee may park in City parking lots.

Mandatory Reporting. Each City employee must immediately notify his/her supervisor, Department Director, the Director of Human Resources and/or the Police Department of any act of violence or of any threat involving a City employee that the employee has witnessed, received, or has been told that another person has witnessed or received. Even without an actual threat, each City employee must also report any behavior that the employee regards as threatening or violent when that behavior is job-related or might be carried out on City property, a City-controlled site or City job site, or when that behavior is in any manner connected to City employment or activity. Each employee is responsible for making this report regardless of the relationship between the individual who initiated the threat or threatening behavior and the person or persons threatened or the target of the threatening behavior. A supervisor who is made aware of such a threat or other conduct

must immediately notify his/her Department Director and the Director of Human Resources.

Protective Orders. Employees who apply for or obtain a protective or restraining order which lists City locations as being protected areas must immediately provide to the Director of Human Resources and the City's Police Department a copy of the petition and declarations used to seek the order, a copy of any temporary protective or restraining order which is granted, and a copy of any protective or restraining order which is made permanent. City employees must immediately advise their Department Director and the Director of Human Resources of any protective or restraining order issued against them.

Confidentiality. To the extent possible, while accomplishing the purposes of this policy, the City will respect the privacy of reporting employees and will treat information and reports confidentially. Such information will be released or distributed only to appropriate law enforcement personnel, City management, and others on a need-to-know basis and as may otherwise be required by law.

City Property. For purposes of this policy, City property includes but is not limited to owned or leased vehicles, buildings and facilities, entrances, exits, break areas, parking lots and surrounding areas, recreation centers, swimming pools, and parks.

Documentation. When appropriate, threats and incidents of violence will be documented. Documentation will be maintained by the Director of Human Resources and/or the Police Department.

Policy Violations. Violations of this policy may lead to disciplinary action, up to and including termination of employment. Policy violations may also result in arrest and prosecution

This is an example of a simple personnel policy that *allows concealed carry by a license holder*:

Handguns

Unless otherwise prohibited or posted (Municipal Court, Secured Areas of Mathis Field Terminal building and City Council Meetings), Texas Penal Code 30.06 and 30.07 permits employees licensed to carry a handgun under Texas law to carry a handgun into a City facility, in a City vehicle, or on the employee's person while on duty as a City employee. Under Texas Government Code §411.203, the City of San Angelo can prohibit the carrying of handguns by employees while on duty on City property and in City vehicles.

Pursuant to Texas Government Code §411.203, employees of the City of San Angelo are prohibited from the open carry of any handgun while on duty or in City vehicles. Concealed carry by employees who are handgun license holders will be permitted pursuant to this policy. In order to comply with this policy, employees who have their handgun license and wish to carry their concealed handgun to work must self-identify themselves in writing as handgun license holders to their immediate Supervisor

and the Director of Human Resources. This information will be kept strictly confidential in the office of the Director of Human Resources.

This is an example of a comprehensive personnel policy that *allows concealed carry by a license holder:*

Possession of Firearms on District Property

Ensuring a safe work environment and the prevention of workplace violence is of paramount importance for Austin County Appraisal District (the "District"). Except as otherwise provided for by this Possession of Firearms on District Property ("Policy"), nothing in the District's Employment Manual shall be interpreted or applied to: (a) allow or permit the open carry of any weapon or firearm on District Property in the course of District business; (b) prohibit any District employee from carrying a concealed weapon in the course of employment if the employee holds a valid license to carry a concealed weapon ("CHL") issued by the State of Texas, or (c) prohibit the carrying of a concealed weapon in the course of employment by an employee who is a *bona fide* resident of another state, and who holds a CHL from the employee's state of residence, if the State of Texas has granted reciprocity to CHL licensees of the employee's state of residence.

Employees who hold a valid CHL license may carry a concealed weapon while operating a vehicle owned by the District.

Nothing in this Policy shall be interpreted or applied as waiving the right of the District to prohibit any individual employee from carrying a concealed weapon in the course of employment, whether permanently or temporarily, whether for cause or for any non-discriminatory reason.

No employee may carry a concealed weapon in the course of employment unless the employee has (1) notified the Chief Appraiser ("CA"), Director of Collections Administration ("DCA"), or Office Manager ("OM") in writing that the employee holds a CHL and intends to carry the weapon in the course of employment, using the District form approved for that purpose, and (2) provided a copy of the employee's CHL to be placed in the employee's personnel file. An employee whose CHL license is suspended, or who is otherwise prohibited by a court from carrying a weapon, shall immediately notify the CA, DCA, or OM of that fact, in writing.
The District strictly prohibits the OPEN carry of weapons on District property or during the course of District business.

A decision by an employee to carry a concealed weapon during the course of employment is solely a choice by the employee to exercise the employee's individual right to bear arms. Nothing in this policy shall be interpreted or applied as a directive or authorization to any employee to carry or use a weapon in the scope of the employee's employment or agency.

Nothing in this policy shall be interpreted or applied to allow an employee who holds a CHL to carry a concealed weapon in any building or area where doing so is posted as prohibited in accordance with the laws of the State of Texas, whether public or private, and whether owned by the District or any person. Nothing in the policy shall be interpreted to authorize any employee to carry a concealed weapon in any area prescribed by Texas Government Code, Chapter 411, Subchapter H. No employee shall carry a concealed weapon in the course of

employment in any private vehicle or on private property owned or leased by another person over the objections of the owner or leasee. No employee may openly carry any weapon in any District building.

It is the sole responsibility of the employee to maintain control of the employee's concealed weapon and ammunition (if any) at all times.

Except as provided below, an employee who chooses to carry a concealed weapon during the course of employment shall have the weapon concealed and on the employee's person, carried in a holster or other appropriate carrying device, at all times, unless lawfully using the weapon.

An employee who stores a concealed weapon in a vehicle owned by the District during the course of employment must store the weapon in a locked case and place the case out of plain view from the exterior of the vehicle.

An employee who stores a concealed weapon in a vehicle owned by the employee (or any, other private vehicle, with the consent of the owner), in a parking lot owned or controlled by the District during the course of employment must place the weapon out of plain view from the exterior of the vehicle.

Nothing in the District's Employment Manual shall be interpreted or applied to construe the mere carrying of a concealed weapon as a violent, threatening or intimidating act on the part of the employee. Nothing in this policy shall be construed to support or permit violent, threatening or intimidating behaviors related to the possession of a concealed weapon. Threatening and intimidating behaviors may include, but are not limited to, intentionally displaying a concealed weapon to any person, referring to the concealed weapon, or referring to a weapon not on the employee's person, with the intent to implicitly or explicitly threaten or intimidate another person.

Conduct in violation of this policy is punishable by discipline, up to and including discharge. Violation of this policy which also constitutes a criminal act may be referred to law enforcement. Nothing in this policy shall be construed as providing implicit or explicit authorization for the violation of any federal, state, or local statute, administrative code or local ordinance.

Here's another comprehensive policy that *allows concealed carry by a license holder*:

Gun Carry Restrictions

Except as provided by subsection (a) below, no employee, other than a licensed peace officer of the City, may carry or possess a firearm or other weapon on City premises, including, without limitation, buildings, entrances, exits, break areas, surrounding areas and parks. The City's policy prohibits employees, other than licensed peace officers, from carrying or using any weapons, concealed or otherwise, on City's premises. This ban includes keeping or transporting a weapon in any City-owned or leased vehicle. Employees are also prohibited from carrying a weapon while on duty or at any time while engaging in City-related business. Prohibited weapons include firearms, clubs, explosive devices, knives with blades exceeding 5½ inches, etc., as defined by Texas Penal Code Section 46.01.

- Pursuant and subject to Section 52 of the Texas Labor Code, an employee who holds a valid license to carry a handgun under Subchapter H, Chapter 411, of the Texas Government Code, or who lawfully carries a firearm in accordance to State and

Federal laws, may possess a firearm and ammunition, or store a firearm and ammunition, in a locked, privately-owned vehicle in a city parking lot, parking garage or other parking area provided by the City. Additionally, an employee who holds a valid handgun license under Subchapter H, Chapter 411, of the Texas Government Code may carry a handgun in a concealed manner on City property, unless otherwise prohibited by the Texas Penal Code. Open carry of a handgun by employees is strictly prohibited on City property.

- No existing City policy, practice or procedure will be interpreted to conflict with decisions designed to prevent a threat from being carried out, a violent act from occurring or a life-threatening situation from developing.

- Employees authorized to carry must notify their Director of their intent to carry. The Director will notify the Police Department.

- Employees licensed under Subchapter H, Chapter 411, Government Code (Handgun Licensing Law), may not enter on the premises of any government court or offices utilized by the court (such as the City Council Chambers, while court is in session), unless pursuant to written regulations or written authorization of the court. This includes the non-public, controlled access, secure portion of the Crowley Police Department.

- Any violation of this policy may lead to discipline up to and including termination.

It bears repeating that the examples above are *not samples* to be adopted as-is. No local government should adopt a policy without consulting with local legal counsel. Another recommendation might be to form a committee of elected and appointed officials and employees to discuss what's best for each local government.

Liability under Federal and State Law

The number one question related to employee carry is "will my local government be liable if an employee is authorized to carry at work and shoots someone?" The answer is "we can't know for sure." Any local government considering whether to allow employees to carry should consult with local legal counsel related to the potential for liability if an employee injures or kill someone with a firearm while on duty.

A complete liability discussion is beyond the scope of this paper, but a person who is shot by a local government employee, or his or her family if the person dies, is likely to bring a lawsuit. Both federal and state laws could give rise to liability, but both also provide some protections. (As of June 2021, the only statute that attempts to expressly limit a local government's liability is related to licensed carry by paid or volunteer first responders. TEX. CIV. PRAC. & REM. CODE Chapter 112. See discussion elsewhere in this paper.)

42 United States Code Section 1983 is the primary federal law that provides a remedy for the actions of a local government employee. It provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress."

To succeed using a Section 1983 claim, a plaintiff must prove his constitutional rights were violated, and the violation was caused by a person acting under color of law. *West v. Atkins*, 487 U.S. 4242 (1988). Only intentional conduct is actionable under Section 1983. *Daniels v. Williams*, 474 U.S. 327 (1986).

If an employee shoots and injures or kills a person, whether justified or not, the person or his or her surviving family would likely bring Section 1983 claim based on a violation of that person's constitutional Fourth Amendment right to be free from unreasonable force. In the law enforcement context, deadly force is justified only if an objectively reasonable police officer (and presumably an employee for licensed carry purposes) facing the same circumstances as the defendant would conclude that the suspect posed an imminent threat of death or serious bodily harm. *Tennessee v. Garner*, 471 U.S. 1 (1985).

An officer (and presumably a local government employee) may not use more force than is reasonably necessary to make an arrest (or stop deadly conduct), and the amount of force must be proportional to the threat posed by the subject. *Graham v. Conner*, 490 U.S. 386 (1989). The reasonableness of the force depends on the totality of the facts and circumstances known to the officer (or employee) at the time the force is applied. *Fundamentals of Section 1983 Litigation: Common Claims, Defenses and Immunities*, Michael D. Bersani and Michael W. Condon, Hervas, Condon & Bersani (2016).

According to *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a local government can be sued under Section 1983 only when its own policies, customs, or practices cause the constitutional deprivation. This means a local government employer that adopts a policy allowing carry by its employees, or even one that has no written policy – but knowingly allows employees to carry through a "don't ask, don't tell" rule – could be liable for the actions of the employee.

Of course, a local government could argue that the employee's duties did not include using a firearm, and thus an employee wasn't acting in the "course and scope of employment" when the shots rang out. No Texas case has considered whether liability attaches to a "rank-and-file" employee (or her employing local government) who, if legally allowed to carry and authorized to do so at work, shoots someone. A court would likely apply the legal precedent relating to unreasonable force claims against law enforcement officers.

A state law claim would typically be brought pursuant to the Texas Tort Claims Act (Act). In Texas, sovereign or governmental immunity deprives a trial court of jurisdiction for lawsuits

against the state or certain governmental units, unless the state consents to suit. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

The Act is a state law providing a limited waiver of that immunity, which can allow a plaintiff to sue most local governments in certain, well-defined circumstances (and with caps on monetary awards). TEX. CIV. PRAC. & REM. CODE §§ 101.001-101.109. Under the Act, injuries arising out the use of tangible personal property, such as a handgun, can be actionable. *Miranda*, 133 S.W.3d at 225; *see* TEX. CIV. PRAC. & REM. CODE § 101.021-.022.

"A governmental unit in the state is liable for personal injury caused by a condition or use of tangible personal or real property [such as a firearm] if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id*. at § 101.021(2).

If an employee, while on duty, shoots a citizen, will the employee or local government employer be liable under the Act? It depends. If the employee shoots and kills the citizen, and the citizen's family sues the local government, that local governmental entity retains immunity if the complained-of act was intentional instead of negligent. *Id*. § 101.057; *City of Watauga v. Gordon*, 434 S.W.3d 586 (Tex. 2014).

An employee sued individually may file a motion to be dismissed when damages are sought against them. They merely need to show they are sued for acts performed within the course and scope of their employment. They may do so regardless of whether the governmental entity will ultimately be immune based on its defense of sovereign or governmental immunity. TEX. CIV. PRAC. & REM. CODE § 101.106; *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011); *Conditions and Uses of Property Under the Texas Tort Claims Act*, Heather Scott and Ysmael Fonseca, Guerra and Sabo, P.L.L.C. (2016). Again, a local government could argue the intentional act of shooting someone was outside the employee's course and scope of employment.

In no case should a local government employer tell an employee their job is to "police" their work area. In fact, it should be made clear the exact opposite is true - except in the rarest of circumstances when there is an imminent threat of serious bodily injury or death – the appropriate action is to retreat and summon law enforcement. A workplace violence policy and regular training should include actions employees should take in the event of an active shooter or similar event. (TML IRP provides online training for employees.)

What federal law governs a police officer's authority to question a person who is legally carrying a firearm?

The Fourth Amendment of the U.S. Constitution. That amendment protects "[t]he right of the people to be secure in their persons…against unreasonable searches and seizures." U.S. CONST., Amend. IV. "The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 554 (1976)).

Although brief encounters between police and citizens require no objective justification, it is clearly established that an investigatory detention of a citizen by an officer must be supported by reasonable articulable suspicion that the individual is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 1968).

In Texas, the interplay between the Fourth Amendment and the statutory provisions relating to carry are complex. Some take the position that openly carrying a handgun is suspicious enough to justify detention, which is debatable without more.

Other circuits have concluded that "where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention." *U.S. v. Black*, 707 F.3d 531 (4th Circ. 2013). At least one federal appeals court has stated that "permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." *Id*. However, those states – unlike Texas – do not appear to have express statutory authority to disarm someone who is carrying in public.

Most attorneys will likely advise law enforcement to use discretion in making contact, considering the totality of the circumstances. Each law enforcement officer should follow the advice of his or her local legal counsel, as well as any local policy directives. In any case, state law provides express authority relating to authorized carriers (see next question).

Local government employees should arguably follow the same restrictions. For example, if a person enters a city library or recreation facility with a holstered handgun, the employees should do nothing, unless the person is otherwise acting suspiciously or causes a disturbance. If that happens, summoning law enforcement is the best course of action. In every case, each law enforcement agency should consult with legal counsel to understand its authority to investigate a person who is openly carrying in Texas.

Are there specific rules relating to whether a police officer can question or disarm a person who is openly carrying a holstered handgun in public?

Yes. State law gives a peace officer express authority to disarm a license holder who is carrying a handgun. See TEX. GOV'T CODE § 411.207. If a license holder is carrying a handgun on or about the license holder's person when a peace officer demands that the license holder display identification, the license holder shall display both the license holder's driver's license or identification certificate and the license holder's handgun license. *Id*. at § 411.205.

Moreover, and in relation to permitless carry, a peace officer who is acting in the lawful discharge of the officer's official duties may disarm any person at any time the officer reasonably believes it is necessary for the protection of the person, officer, or another individual. The peace officer shall return the handgun to the person before discharging the person from the scene if the officer determines that the person is not a threat to the officer, person, or another individual and if the person has not violated any law that results in arrest. TEX. CODE CRIM. PROC. Art. 14.03(h)(1).

Can a police officer arrest or disarm a person who is legally carrying a long gun (e.g., a rifle or shotgun) in public?

This one is tricky as well. Probably not, without a reasonable suspicion of other illegal conduct. Because the Texas Constitution allows it, and because the legislature has not prohibited it, carry of a long gun is legal.

Of course, state law does provide restrictions to ensure public safety. Penal Code Section 42.01 governs "disorderly conduct." It provides that a person commits a Class B misdemeanor offense if he or she intentionally or knowingly "displays a firearm or other deadly weapon in a public place in a manner calculated to alarm." TEX. PENAL CODE § 42.01(8); *see also* TEX. LOCAL GOV'T CODE § 229.001(7)(d).

If a peace officer encounters a person with a long gun, it is within his or her authority to inquire about the weapon. However, if the person is not holding the weapon at ready, pointing the weapon, brandishing it in a threatening manner, or otherwise using it in a manner calculated to cause alarm, the officer – without more – may have limited authority to disarm the person. Those decisions should be based on an officer's training as applied to all the facts in each instance.