

A “Local Officials: *Stronger, Together*” Podcast Publication



“Local Governments and Firearms: Avoiding a Jam”

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

The Texas Municipal League Intergovernmental Risk Pool proudly introduces the “Local Officials: *Stronger, Together* Podcast Series!” The Pool is producing this regular podcast series, which we’re calling STP, to help local officials and their employees understand key legal concepts and the services we provide. After arming you with that information, each 15-minute episode will give you easy action items to help keep your citizens, employees, volunteers, and property safe, all while saving public dollars.

As part of each podcast, you’ll be directed to www.tmlirp.org for written materials with additional information on that episode’s topic. You can click the link on the front page to find the podcasts and materials. You can also sign up for email notification of new episodes.

The Pool provides financial strength and stability through a partnership with over 2,800 local governments, partners with over 96 percent of all local governments in Texas, provides workers’ compensation coverage to over 165,000 public servants, and protects more than \$25 billion in government property. Our success makes us *Stronger, Together* through our core values:

- Public Service:** Serving the public good – for the benefit of local governments and their tax-paying citizens.
- Fiscal Responsibility:** Responsibly managing our members’ pooled funds for the protection of their financial stability.
- Operational Excellence:** Delivering excellent member service in all components of our risk financing and loss prevention services.
- Integrity:** Serving with honesty, integrity and professionalism.

Scott Houston, the Pool’s Member Liaison, is host of the Podcast. After serving the Texas Municipal League for over 20 years, the last half as general counsel, Scott now serves as member liaison for the Pool and part-time special counsel to the Texas Municipal League. He has served as an adjunct professor, been published in the Texas Tech Administrative Law Journal, and has received awards from the American Bar Association, Texas Bar, and International Municipal Lawyers Association. He graduated from Texas A&M University with a degree in political science and – after studying law in Austria and Argentina – received his law degree from St. Mary’s University School of Law.

Educating local officials has been Scott’s passion for two decades, and the STP Series is the culmination of his efforts. We hope to eventually provide analysis and written materials on dozens and dozens of topics.

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 which 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 circumstances. 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* link.

What does the Texas "licensed carry" law authorize?

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

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(a)(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(a)(5).

A person commits a third degree felony if the person intentionally, knowingly, or recklessly possesses or goes with *any* firearm:

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. It is very common for other local governments to lend their facilities to host activities sponsored by a school or education institution. During that time, no person may come onto the "grounds" of the facility, and no signage is required. (A local government could decide to post signage to

assist license holders in knowing a school-sponsored activity is taking place, but the law doesn't require or authorize that practice, and it has not been tested in court.)

2. 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 the case.)
3. 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](#), 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 below.);
4. 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 few local government attorneys agree, and courts have disagreed with their conclusions – see next question for details. [Opinion KP-0332 \(2020\)](#) confirms that a judge can issue written permission to individuals overriding this prohibition.)
5. on the premises of a racetrack. *Id.* § 46.03(a)(4).
6. 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.” (Note: Penal Code Sections 46.03(e-1) and (e-2) provide a defense to this offense.) The defense essentially provides that a license holder who makes a mistake at security by forgetting that he possesses a handgun can leave upon notice.)
7. 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).

“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)(2) & 46.035.

The exclusions above, with the exception of the “campus concealed carry exception” in (1), apply to the carrying of a firearm by any person, *regardless of whether the person holds a license to carry a handgun.* *Id.* § 46.03(f)(3).

Handgun license holders are subject to a number of other restrictions on concealed or open carrying of a handgun. For example, a license holder may not concealed or open carry a handgun:

1. if the license holder is given written notice by a “51 percent sign” as defined in Gov’t Code Section 411.204(c), 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.* § 46.035(b)(1). (Note: Some local government facilities, such as convention and expo centers, could conceivably meet this threshold.)
2. on the premises where a high school, collegiate, or professional sporting event is taking place, unless the handgun is used for the event. *Id.* § 46.035(b)(2). (Note: Open carry is prohibited on collegiate premises, but Gov’t Code Section 411.2031 authorizes concealed carry, subject to rules of the institution. Because of that, 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.)
3. on the premises of a correctional facility. *Id.* § 46.035(b)(3).
4. if the license holder is given written notice pursuant to Penal Code Section 30.06 and/or 30.07 that carrying is prohibited, on the premises of a state-licensed hospital or nursing home, unless the administration has granted written permission to the license holder. *Id.* § 46.035(b)(4) & (c).
5. if the license holder is given written notice pursuant to Penal Code Section 30.06 and/or 30.07 that carrying is prohibited, in certain amusement parks. *Id.* § 46.035(b)(5) & (c). (Note: Section 46.035(f) very narrowly defines amusement park, and only a few “six flags”-type parks would meet the definition.)
6. anytime the handgun is not in a belt or shoulder holster, or concealed. *Id.* § 46.035(a).
7. if the license holder is intoxicated. *Id.* § 46.035(d).
8. if the license holder is given written notice pursuant to Penal Code Section 30.06 and/or 30.07 that carrying is prohibited, into any meeting of a governmental entity that is subject to the Open Meetings Act, while the meeting is taking place. *Id.* § 46.035(c) & (i).
9. on the premises of employment if prohibited by the license holder’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 \(2012\)](#).
10. 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.

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 license holder can carry there, unless the church has provided notice that carrying is prohibited.)

The language in the required sign to provide notice that concealed carrying is not allowed *was changed in 2015*, which means any "30.06" sign posted prior to that must be replaced. A provision relating to open carry notice was also added:

- 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 adds some confusion to where that sign should be posted, especially in relation to the optional "meeting room prohibition" for local governments in (8), 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.

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?" 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.

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).

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 carry a firearm onto the premises of any government court or office utilized by the provision. 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 to 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 (or authorize) notice*.

Prior to the opinion above, it seemed clear that a license holder couldn’t go into the court building. That interpretation provided certainty. Contrary to the “would notify license holders” quote above, the court or court office prohibition *does not require signage*. 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. The 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 slightly more tempered, but 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 out 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 concludes that the attorney general has no authority 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 spends 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.

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 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 is 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 has 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 expressly 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).

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 case is, as of March 2021, [on appeal to the Third Court of Appeals](#).

In 2019, 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 licensed 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 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 some variation of quoting the Penal Code section prohibiting carry into those places:

This [building or room] houses a court or court offices.
All weapons are prohibited pursuant to Penal Code Section 46.03(a)(3).
An offense under that section is a third degree felony.

(The above analysis relates to courts and court offices, but it might also be modified 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 ruling in the Austin and Waller cases, however, and the attorney general's renewed interest in signage, 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. ("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*.

(Note: 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.

The campus carry law creates 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 § 46.035(a-1).

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 § 46.035(a-2). 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 § 46.035(a-3).

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 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.

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 state legislature to regulate to prevent crime. Contrary to the opinion of some, 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)(Assertion 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.).

Of course, the owner of property (arguably including a local government) can, with some odd quirks, prohibit a person from carrying a long gun by giving notice under the criminal trespass statute. TEX. PENAL CODE § 30.05.

Handguns without a License

The open carry of handguns in public is prohibited in Texas, unless the person holds a license to carry a handgun or during certain disasters (see below and next question). An unlicensed person may carry a handgun on private property or in a car or boat (technically, in a “watercraft”). A handgun in a car or boat must be concealed. Carrying a concealed handgun in a car or boat does not require a handgun license. More specifically, 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).

In addition, a person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person’s control at any time in which: (1) the handgun is in plain view; or (2) the person is engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating. *Id.* § 46.02(a-1). Also, a person may not carry a handgun if prohibited by law from doing so (e.g., if the person is on parole or probation or is a member of a criminal street gang).

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.).

Handguns with a License

A license holder may generally openly carry a handgun in a hip or shoulder 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

An unlicensed person may carry a handgun on private property or in a car or boat (technically, in a “watercraft”) and during certain disasters (see question above). A handgun in a car or boat must be concealed. Carrying a concealed handgun in a car or boat does not require a handgun license. More specifically, 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).

In addition, a person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person’s control at any time in which: (1) the handgun is in plain view; or (2) the person is engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating. *Id.* § 46.02(a-1). Also, a person may not carry a handgun if prohibited by law from doing so (e.g., if the person is on parole or probation or is a member of a criminal street gang).

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 shoulder or belt 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).

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

For example, a defense to prosecution is available for an “active judicial officer” (i.e., a person serving as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court, a federal judge who is a resident of this state, or a person appointed and serving as an associate judge under Chapter 201, Family Code. TEX. GOV’T CODE § 411.201.) who holds a license to carry a handgun when the officer is:

1. at a bar that is required to post the “51 percent” sign;
2. on the premises where a high school, collegiate, or professional sporting event or interscholastic event is taking place;

3. on the premises of a correctional facility;
4. on the premises of a hospital or a nursing home;
5. in an amusement park;
6. on the premises of a church, synagogue, or other established place of religious worship; or
7. at any meeting of a governmental entity.

In addition, a defense to prosecution is available for judge or justice of a federal court, a district attorney, assistant district attorney, criminal district attorney, assistant criminal district attorney, county attorney, or assistant county attorney, who holds a license to carry a handgun to carry when the person is:

1. at a bar that is required to post the “51 percent” sign;
2. on the premises where a high school, collegiate, or professional sporting event or interscholastic event is taking place;
3. on the premises of a hospital or a nursing home;
4. in an amusement park;
5. on the premises of a church, synagogue, or other established place of religious worship; or
6. at any meeting of a governmental entity.

TEX. PENAL CODE § 46.035(h-1)(Note that there are *two* (h-1) provisions, with slightly different defenses applied to different officers.)

Moreover, 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:

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;
2. on the premises of a polling place on the day of an election or while early voting is in progress;
3. on the premises of any government court or offices utilized by the court;
4. on the premises of a racetrack;
5. in or into a secured area of an airport; or
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.

TEX. PENAL CODE § 46.15(a).

Also, the attorney general or a United States attorney, assistant United States attorney, or assistant attorney general: (1) enjoys a defense to prosecution for carrying in most places otherwise off-limits to a license holder (e.g., bars, sporting events, hospitals that provide notice, open meetings if notice is provided, amusement parks, or places of worship); and (2) is 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. *Id.* at § 46.035(h-1)

Finally, 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.”

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 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.

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 (Note: This provision, titled “nonapplicability,” allows certain other persons, such as members of the military and personal protection officers, 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:

- A. 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;
- B. 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;
- C. an emergency service organization; and
- D. 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.)

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 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 or 46.035, 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 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 no 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 (3)(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 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 (This exception does not authorize the seizure or confiscation of any firearm, air gun, or ammunition from an individual who is lawfully carrying or possessing the firearm, air gun, or ammunition);
5. the carrying of a firearm or air gun by a person *other than a person licensed to carry a handgun* at a:
 - a. public park (For example, 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 \(1995\)](#).);
 - b. public meeting of a city, county, or other governmental body (A city may prohibit a license holder from attending a meeting with a handgun by posting notice under Penal Code Sections 30.06 and/or 30.07 that doing so is prohibited, but how to notice a non-license holder that carrying a long gun into a meeting is prohibited is the subject of debate – see “Can a city prohibit firearms in a city building or facility? Firearms in General, below.);

(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.
6. 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

7. 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). 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 actually clarifies existing law relating to city regulation of the discharge of firearms.)

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.

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

Generally

A governmental entity has very limited authority to prohibit a license holder from carrying in facilities to which the public has access. As mentioned in the second question, above, state law prohibits a license holder from carrying a handgun on the premises: (1) of 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 licensed carry under the following circumstances.

Meeting of Governmental Entity

In addition, a governmental entity has the option of posting a specific notice to prohibit a license holder from carrying in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to the Open Meetings Act. TEX. PENAL CODE § 46.035(c) & (i); § 30.06 & 30.07 (Texas Penal Code § 30.06(c)(3)(A) & 30.07(c)(3)(A) require that the sign giving the notice contain certain language that is printed in a certain size.); [Op. Tex. Att’y Gen. No. KP-0098 \(2016\)](#).

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 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 license holders from carrying their handguns in the meeting room, *any* license holder 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 an 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.

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.*

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 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 can't be used to prohibit entry because it provides an affirmative defense if the basis for restricting access is that a person is carrying a handgun, so long as that person is licensed to do so. Because a license holder 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.

It's possible that the recourse of law enforcement responding to a call of an unwelcome licensed carrier at the leased property is thus limited to other criminal offenses.

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

A non-license holder can't carry a handgun in public, except during certain disasters, and special rules discussed above apply to license holders. As such, this answer applies only to a non-license holder carrying a long gun onto local government property.

This paper previously advised, and some still argue, that a city can prohibit the carry of a long gun onto city property if the city 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. A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden while carrying a firearm should be sufficient. TEX. PENAL CODE § 30.05(b)(A) & (C). In other words, a sign stating "No Firearms Allowed" could be sufficient.

However, as noted above and regarding cities specifically, state law expressly preempts most city regulation of firearms. Thus, the most conservative advice is that a city can prohibit the carrying of a long gun by a non-license holder only at a:

1. public park (See [Tex. Atty. Gen. Op. No. DM-364](#) (1995));

2. public meeting of a municipality, county, or other governmental body (A city may prohibit a license holder from attending a meeting with a handgun by posting notice under Penal Code Sections 30.06 and/or 30.07 that doing so is prohibited.);
3. political rally, parade, or official political meeting; or
4. nonfirearms-related school, college, or professional athletic event.

TEX. LOCAL GOV'T CODE § 229.001. How to notice a non-license holder that carrying a long gun into one of the places above is prohibited is the subject of debate. A “No Firearms Allowed” sign could work, but some license holders may complain that such a posting is vague as to them and complain to the attorney general’s office.

Assuming criminal trespass is the appropriate offense, the penalty would generally be a Class B misdemeanor. However, 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. Certain public safety officers and employees of the owner are exempt from this provision. *Id.* § 30.05(e).

How can a local government regulate employees who hold a license to 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 46.035(f)(3), 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 Licensed 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 prior to acting on a matter of this importance.

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 with a license 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 licensed 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 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 March 2021, the only statute that attempts to expressly limit a local government’s liability is related to licensed carry by 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 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. 424 (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 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. Connor*, 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 licensed 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, with a license to carry and authorization 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 a licensed 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 Ysmal 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 licensed carry are complex. Some take the position that openly carrying a handgun is suspicious enough to justify detention because doing so without a license is still a crime.

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 Cir. 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 a license holder.

Most attorneys will likely advise law enforcement to use discretion in making contact, considering the totality of the circumstances. Unless and until Texas courts provide further guidance, 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 license holders (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 more authority to disarm a license holder who is carrying a handgun than it does for a non-licensed long gun carrier. 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, a peace officer who is acting in the lawful discharge of the officer's official duties may disarm a license holder at any time the officer reasonably believes it is necessary for the protection of the license holder, officer, or another individual. The peace officer shall return the handgun to the license holder before discharging the license holder from the scene if the officer determines that the license holder is not a threat to the officer, license holder, or another individual and if the license holder has not violated any law that results in arrest. *Id.* at § 411.207(a).

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.