

HODGE & FRANCOIS

October 25, 2011

TO: Darren K. Indyke, Esquire
FROM: Gaylin Vogel, Esquire 
RE: Firearm ownership by L.S.J., LLC employee residing on Little St. James Island

This office has been asked to research the issue of whether an employee of L.S.J., LLC who, as a condition of his employment resides on Little St. James in employer provided housing, can possess a firearm and not be in violation of 18 U.S.C. § 922(h). Section 922(h) prohibits:

any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment

- (1) To receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or
- (2) To receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(h). Section 922(g)(1) prohibits firearm possession by any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

- (g) It shall be unlawful for any person -
- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

18 U.S.C. § 922(g)(1).

Read together, sections 922(g) and (h), prohibit the employee of any person who has been convicted of a felony, while in the course of being employed for such person, from receiving, possessing or transporting any firearm or ammunition in or affecting interstate or foreign commerce. There are no firearm or ammunition manufacturers in the Virgin Islands. Therefore, the purchase of a firearm or ammunition affects interstate commerce because the firearm or ammunition would have to come from a state or territory other than the Virgin Islands, and both sections (1) and (2) of Section 922(h) are implicated.

From the plain reading of section 922(h), if an employer is prohibited from owning or possessing a firearm, then the employer cannot give or purchase a firearm for the employee to possess. The law does not prohibit an employee from possessing a firearm outside the course of his employment. The difficult question becomes what is outside the course of employment when the employee resides on the employer's property and the employee uses the firearm on the employer's property. There is no case law or common law interpreting section 922(h) and scope of employment where

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the employee lives in employer provided housing.¹ Facially, the statute does not appear to be a prohibition against a residential employee to purchase, use and possess a firearm for that employee's personal use only. However, the firearm cannot be used or in any way supported by the covered employer. The covered employer cannot in anyway direct the use of the firearm. The employer cannot require the employee to possess a firearm. The employee cannot take any direction from the covered employer with respect to the firearm.

For the purposes of this memo, it is presumed that the employee residing on Little St. James Island is required to live there by virtue of his job duties and remains on call when he is off duty. Given the absence of applicable case law interpreting section 922(h), we have looked to Workers' Compensation law² for the definition of scope of employment because the definition is the most developed in that context. The expansive Workers' Compensation definition of scope of employment however would criminalize many activities³ that are not encompassed by the legislative intent of 922(h).

When Congress enacted the precursor to the modern gun control laws, what is now § 922(h) was enacted to keep firearms out of the possession of the "Mafia" and "goon squads". Senator Russell Long stated in debate on passage of the bill:

Mr. President, there is an additional provision which I recommend would take care of the underworld element which has been so successful. Having been found guilty of felonious conduct and denied the right to possess weapons themselves, they proceed to hire bodyguards, triggermen, and goon squads to go out and do their dirty work for them, all in the same general course of conduct. The murder-incorporated types, or the major underworld characters have been known to have so-called triggermen working for them.

If the boss is the kind of person whom I have described and he hires a triggerman to do his shooting for him, then while he is in the performance of his duties he would not be permitted to possess firearms.

Many people are concerned about the Mafia and concerned that some member of the Mafia may (*sic*) have a number of guncarrying (*sic*) lieutenants working for them who would otherwise be permitted to possess firearms to endanger the lives of good citizens who are interested to do that which is right, as the Lord gives them the right to see it.

¹ *U.S. v Weaver*, Criminal Action No. 2:09-cr-00222, 2010 WL 2739979, at *2 (S.D.W.Va. July 9, 2010) ("Despite its long tenure in the United States Code, no court in any jurisdiction has had occasion to expound upon the meaning of § 922(h) or its predecessor in a written opinion.")

² Applying the Workers' Compensation definition of scope of employment for a residential employee under the above presumptions, then the simple presence of the residential employee on the Island can be within the scope of employment. To determine if the residential employee's activities are within the scope of employment the courts look to see if the employee is also in the zone of danger. "The 'zone of special danger' standard requires a court to focus not only upon the place of employment, but also upon the conditions and obligations of the employment." *Jones v Halliburton Co.*, --- F.Supp.2d ---, No. 4:07-cv-2719, 2011 WL 2066621, at *8 (S.D.Tex. May 24, 2011). The Workers' Compensation laws are civil laws where the term scope of employment is interpreted broadly. Our research has not resulted in any cases where the liberal definition of scope of employment from Workers' Compensation laws is applied to § 922(h).

³ For example, possessing a firearm while traveling to and from work or going to work when off duty to get paycheck.

See 114 Cong. Rec. 14773 (1968) (reprinted as appendix to *Stevens v. United States*, 440 F.2d 144 (6th Cir.1971)). Congress was attempting to stop employers barred from possessing a firearm from using their employees as a proxy to continue organized criminal activities.

Here, the circumstances are different from what Senator Long described: where an employee is required to live on a small privately owned island, where for sporadic times the employee is the only inhabitant, and where the island is very close to a larger more developed and more populated island, such as St. Thomas, can be a work obligation that puts the employee in a situation where he wants a firearm for personal protection. Injuries from actions the employee takes to protect him or herself can then be deemed to within the scope of employment under Workers' Compensation laws. In enacting 922(h) Congress intended a more narrow view of firearm possession in the course of employment to encompass activities like being a body guard or where the employer may direct the employee to brandish or use the firearm to do his or her job. *Id.* In the instant context the employer could not direct the employee to brandish the firearm.

There is no indication that Congress intended to criminalize a residential employee from possessing a firearm for personal use and protection. An employee of L.S.J., LLC who, as a condition of his employment resides on Little St. James in employer provided housing, can possess a firearm and not be in violation of 18 U.S.C. § 922(h) as long as the firearm is for the employee's personal use only.