

TENANTS, LANDLORDS, AND GUNS

Can tenants possess guns at an apartment community? If determined solely by the United States Constitution, the answer would be yes. The Second Amendment of the United States Constitution states: “A well-regulated militia, being necessary to the security of a free state, the right of the people to bear arms, shall not be infringed.” The courts have generally interpreted the Second Amendment to mean that the public has the right to possess firearms. Thus, until the United States Supreme Court holds otherwise, currently citizens have the right to possess guns.

However, that right to bear arms is not absolute. The Constitution and the Bill of Rights were specifically intended to limit government. Accordingly, the Second Amendment protects individuals’ right to bear arms from government infringement. Thus, subject to some limitations, the Government cannot prohibit private citizens from possessing guns. This is the focus of the gun debate. Gun control advocates want the government to limit firearms. Gun proponents argue that the Second Amendment prohibits the Government from limiting a citizen’s right to bear arms.

While a citizen is protected from governmental interference, with his right to bear arms, the Second Amendment does not prevent non-governmental actors from restricting or banning firearms. Accordingly, landlords are free to limit or ban firearms and such gun restriction policies are not a violation of the Second Amendment. Ironically, the only exception to this rule is government-subsidized housing. The government funding of subsidized housing is “state action.” State action is action by a governmental entity. Since state actors (the government) are involved with subsidized housing, the Second Amendment applies and prohibits landlords from restricting guns, except in the common area.

Because the US Constitution does not prohibit citizens from regulating firearms on their private property, landlords are free to make contracts that create such prohibitions on firearms. Thus, a landlord’s lease can ban firearms. The gun issue is like the marijuana issue. When marijuana was legalized in Colorado, the state gave individuals the right to possess and use marijuana. However, the state did not give individuals the right to possess and use marijuana on the private property of another if that individual prohibited such possession and use. Accordingly, just because guns are legal, and individuals have a constitutional right to bear arms, doesn’t mean tenants are necessarily allowed to possess firearms at an apartment community.

In the absence of legal or private prohibitions, Coloradoans are free to openly carry firearms because Colorado is an “open-carry” state. However, local governments can enact ordinances regulating the open-carrying of firearms in a building or specific area in that local government’s jurisdiction if the local government posts signs that firearms are prohibited in that area.

Legally, to carry a concealed weapon, you must have a permit. Concealed permit laws are enacted by the states, and are not uniform across the country. Concealed permit law falls into four categories: unrestricted, shall issue, may issue, and no issue. Unrestricted means no permit is needed to carry a concealed weapon. In shall issue jurisdictions such as Colorado, local authorities have limited discretion to reject an individual’s application for a concealed carry

permit. In shall issue jurisdictions, carry permits will typically only be rejected for applicants with felony convictions or a history of mental health illness. May issue states have much wider discretion in determining who will be approved or rejected for a permit. No issue states prohibit the carrying of concealed weapons. Currently, Washington DC is the only no issue jurisdiction.

As set forth above, the general rule is that the government may not infringe upon your right to bear arms, but individual property owners and managers can restrict or ban guns on their property. If a Colorado landlord decides to limit or ban firearms on its property, a Colorado concealed carry permit does not alter a landlord's right. In other words, a tenant's concealed carry permit does not give the tenant the right to have a firearm at the community if the landlord has banned firearms.

Now that we are clear on the law, let's discuss some of the most common questions that we get from clients. Should we ban guns from our community? If a landlord has decided to ban guns, what is the best way to do it?

Whether to ban firearms at your community is a business decision that only you can make. A five second Google search will give you access to pro and con arguments. Most clients don't want to ban guns- and are concerned about the negative publicity that may ensue if they did ban guns. Landlords are more focused on restricting guns in the common areas, especially in the leasing office, and want to have the right to terminate a tenant's lease for discharging a firearm anywhere on the property.

Some landlords have attempted to address gun-free zones by posting signs, such as "Guns Not Allowed in Leasing Office". Signage alone is insufficient. Colorado has no "gun-free zone" laws. Signs can be posted, but signs alone are not enforceable. Tenants can waive their constitutional right to bear arms in the lease contract. If a landlord wants to evict a tenant for a gun-related incident, your gun policy must be addressed in the lease, and the lease must specify that violation of such a provision is a default constituting grounds for eviction.

If you aren't going to ban guns, but instead plan on having a common-sense gun policy, you need to thoroughly think through the policy and make sure that your lease has appropriate language supporting the policy. We run into problems handling gun-related situations for landlords because either the landlord hasn't thought through the policy, or more commonly, the lease language doesn't support the policy. For example, many landlords want to completely ban guns from the leasing office, but few landlords have appropriate language accomplishing this policy goal. Without specific lease language, landlords must rely on the general lease language, which may or may not apply. Lack of specific lease language also results in endless debates of whether lawfully concealed carry permitted weapons are covered.

Most leases do not prohibit tenants from having guns. However, many leases restrict gun rights in the common areas. Tenants have argued that common area gun restrictions are tantamount to a complete gun prohibition. Specifically, the argument goes that if a tenant is "prohibited from possessing a gun in the common area", how is the tenant going to get the gun from his vehicle to his apartment unit? While we don't agree with the tenant's argument, the entire argument could be avoided with specific lease language. For example, "possession of

firearms in the common areas is prohibited, except for the transportation of an unloaded firearm from a tenant's vehicle to his unit.”

Only individual landlords can decide where to strike the balance between tenant rights and tenant safety. If a landlord has a strict gun ban at their community, the landlord should explain this to the tenant before the tenant signs the lease. If a pro-gun tenant doesn't realize that firearms are prohibited before signing a lease, problems are sure to ensue. Problems include well-organized negative publicity campaigns against the community by gun rights advocates. If you are not going to ban guns (most landlords do not), but rather want to impose restrictions, you must think it through. You must ask yourself where and under what circumstances will guns be limited at the community? Do the limitations require guns to be unloaded, handled, or transported in a certain manner? After thinking through the issues, make sure the lease supports your policies. Finally, because tenants have been known to argue over the obvious, you may want to state the obvious. Specifically, gun limitations do not apply to law enforcement personnel whether on or off duty.