

Demystifying The Second Amendment Preservation Act:

A Guide For Cities And Police Departments

Missourians can be forgiven for not realizing that the Second Amendment was in need of preservation. The General Assembly has spent decades dramatically scaling back Missouri's already loose restrictions on firearms, and curtailing the ability of cities to enact local restrictions. It is legal in Missouri for people to carry firearms most anywhere, without a permit.¹ Having pared Missouri's restrictions down to a minimum, the General Assembly set its sights on federal law. In 2021, the General Assembly enacted the "Second Amendment Preservation Act," (SAPA), purporting to invalidate federal firearms laws it deems invalid.

Under the U.S. Constitution, federal law is the supreme law² of the land. Even SAPA's proponents seem to acknowledge that it may be invalid.³ Still, it has had an immediate impact. The chief in O'Fallon resigned shortly after SAPA's passage.⁴ Police departments withdrew⁵ from federal task forces. St. Louis City and St. Louis County filed suit.⁶ A judge denied their request for an injunction, ruling that they must raise their claims in other lawsuits.⁷ The case is now before the Missouri Supreme Court. That SAPA may eventually be invalidated is little comfort to cities that must now grapple with what law enforcement activities could trigger liability.

SAPA manages to both be sweeping in scope and yet only enforceable in narrow factual scenarios. That may be the point, as the law is chilling law enforcement agencies from cooperating with the federal government, even if officers are not directly engaged in activities that would violate SAPA. The end result is a statute with huge practical consequences for cities, but that is unlikely to result in actual liability except in rare circumstances.

Section 1.420 of SAPA purports to nullify the following federal firearms laws: (1) any "tax, levy or stamp imposed on firearms;" (2) "registration, or tracking of firearms;" (3) registration or tracking of ownership of firearms; (4) any "act forbidding the possession, ownership, use or transfer of firearms," accessories or ammunition by "law-abiding citizens;" and (5) any "act ordering the confiscation of firearms ... from law-abiding citizens."

Rather than penalizing individual officers, SAPA's enforcement provisions (§§ 1.460 and 1.470, RSMo) penalize a city or its police department for its employees' acts. SAPA provides two ways in which a city/department could be liable:

1. by employing an officer who *knowingly* enforces or attempts to enforce the federal laws identified in § 1.420, or who knowingly deprives a Missouri citizen of his/her rights under the Second Amendment (or Missouri's counterpart, Mo. Const. Art. I, § 23); or
2. by knowingly employing an individual acting (or who formerly acted) as a federal agent, "or otherwise acted under the color of federal law within the borders of this state," who has knowingly ... [e]nforced or attempted to enforce any of the infringements identified in Section 1.420; or ... [g]iven material aid and support to the efforts of another" who does so.

Penalties for cities that violate SAPA include a \$50,000 fine, plus attorney's fees.

Section 1.460

To assess a city's liability under § 1.460, one must determine if a police officer *knowingly* enforced (or attempted to enforce) one of the federal laws listed in § 1.420, or knowingly deprived a person of his/her rights under the Second Amendment (or Missouri's counterpart).

Several of the federal laws listed in § 1.420, such as those regarding registration or taxes on firearms, are laws that a municipal officer would not typically be called upon to enforce. Section 1.420 includes federal laws forbidding possession, ownership, use, transfer or confiscation of a gun by "law abiding citizens." A "law abiding citizen" is a lawful resident of Missouri "who is not otherwise precluded under state law from possessing a firearm ..."⁸ Federal law provides several categories of persons who are ineligible to possess a firearm who are not disqualified under Missouri law, including persons convicted of misdemeanor domestic

violence, persons subject to a full order of protection, persons dishonorably discharged from the military, unlawful users of drugs, and persons under 18.⁹ However, a city would only be liable under § 1.460 if an officer knowingly enforces (or attempts to enforce) federal laws listed in § 1.420, and local officers are not typically involved in the enforcement of federal firearms laws. Cities and law enforcement agencies should work to ensure that officers distinguish between those persons prohibited by state law from possessing a firearm and those prohibited by federal law.

While § 1.460 purports to penalize cities that employ a person who violated someone's Second Amendment rights, this is likely less of a concern. While there are many things that someone can do with a gun that are not *illegal* under Missouri law, that does not mean that such acts are *protected* by the Second Amendment. States cannot expand the meaning of the U.S. Constitution.¹⁰ The U.S. Supreme Court held in *Heller v. District of Columbia*¹¹ that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." However, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."¹² Bans on carrying concealed firearms were historically held not to violate the Second Amendment, and *Heller* did not disturb that conclusion.¹³ The Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of

firearms in sensitive places such as schools and government buildings ..."¹⁴ In other words, states have some ability to restrict who may carry firearms and where they may be carried¹⁵ without violating the Second Amendment.

Police officers enforcing such laws generally would not be violating the Second Amendment. Since the General Assembly has preempted any firearms ordinances that do not "conform exactly"¹⁶ with Missouri statutes (with a few narrow¹⁷ exceptions), it is unlikely that an officer's actions enforcing state law or a city ordinance would violate the Second Amendment. A federal court in Missouri ruled that the lawful seizure of a firearm from a person does not violate the Second Amendment, so long as a person is not entirely prohibited from possessing any firearms.¹⁸ However, improperly seizing (or retaining) a firearm could violate the due process clause of the Fourteenth Amendment.¹⁹

Though Article I, § 23 of the Missouri Constitution appears more expansive than the Second Amendment, the Missouri Supreme Court has found that they are functionally equivalent, both before and after Missouri's amendment in 2016.²⁰ Furthermore, "Article I, Section 23 did not itself authorize a person to carry a concealed weapon, but that did not prohibit the legislature from authorizing the public to do so."²¹ Thus, an officer preventing a person from carrying a firearm in a particular place would not necessarily violate the Second Amendment or Missouri's counterpart.

Since actions by local police officers are unlikely to directly violate the Second Amendment, and since local officers

COMMITTED TO SERVING THE COMMUNITIES WHERE WE LIVE AND WORK

LASHLY & BAER, P.C.
ATTORNEYS AT LAW



 Lisa O. Stump	 Julie Z. Devine	 Jimmie M. Edwards	 James C. Hetlage	 Brian J. Malone
 Matthew S. McBride	 Rhonda A. O'Brien	 Allison S. Ringwald	 Alexandra S. Sievers	 Lawrence J. Wadsack

A History of Serving Missouri Municipalities and Public Agencies
For over 45 years, Lashly & Baer, P.C. has provided sound legal counsel to municipalities and other public sector institutions. During this time, we have earned a solid reputation for prompt legal services at a reasonable cost. We believe that providing smart legal advice is vital, but providing this help in a timely manner is just as critical to meeting the needs of our clients. Our attorneys are experienced and trial-tested at addressing legal issues and regulations affecting government and public agencies.

714 Locust Street • St. Louis, Missouri 63101
PHONE: 314.621.2939
www.lashlybaer.com

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

5 TOP BENEFITS OF MML Membership. . .

1

Access to Tools and Resources

Sample ordinances and policies; articles; Attorney General's opinions; municipal survey results (e.g. tax rates and salary data).

2

Responses to Your Questions

From animals to zoning, your municipal questions are promptly answered by expert MML staff.

3

Advocacy at the Capitol

MML represents your community at the state and federal level. The League works to protect local decision making for local communities.

4

Publications for Members Only

Members receive the MML Review magazine, a weekly e-newsletter, technical bulletins and weekly legislative updates.

5

Training and Networking

Learn and network through conferences, training sessions, regional meetings, webinars and the MML Municipal Governance Institute.

Contact Us!

-  info@mocities.com
-  www.mocities.com
-  (573) 635-9134

Follow Us!

-  www.twitter.com/mocities
-  www.facebook.com/mocities
-  www.linkedin.com/company/mocities

*Thank you for
serving your
community!*

typically do not *knowingly* enforce federal firearms law in their day-to-day duties, liability under § 1.460 seems likely to be relatively rare, though officers should exercise care in determining who is a “law-abiding citizen” of Missouri.

Section 1.470

Section 1.470 imposes liability on a city that knowingly employs a person who, after the effective date of SAPA, acts as an agent of the U.S. Government, “or otherwise acted under the color of federal law” to enforce a federal law identified in § 1.420, or gives “material aid and support” to the efforts of another who does so or attempts to do so. “Material aid and support” is defined to “include voluntarily giving or allowing others to make use of lodging; communications equipment or services, including social media accounts; facilities; weapons; personnel; transportation; clothing; or other physical assets.”²²

A few quick points on this statute ... First, it applies only to actions taken by an employee “after the adoption of this section.” That would be either June 12, 2021 (the day the bill was signed) or Aug. 28, 2021 (the date listed in § 1.480.5, RSMo). Either way, a city would not violate SAPA by hiring someone who enforced a federal firearms law *prior* to the effective date.

Second, the statute applies only to actions taken by an employee who acts or has acted as a federal agent or “under the color of federal law” within Missouri. To determine if a person is acting under “color of law” ... “we look to see whether a sufficient nexus exists between the official’s public position and the official’s harmful conduct.”²³ “A person acts under color of federal law in respect to a cause of action by claiming or wielding federal authority in the relevant factual context.”²⁴ In most instances of an officer’s day-to-day work, he/she is going to be acting pursuant to state law, not federal law.

Finally, §1.470 makes no mention of the Second Amendment or Missouri’s counterpart. It is concerned only with federal employees/agents enforcing the federal firearms laws listed in §1.420.

Section 1.470 is more troublesome than § 1.460 because it penalizes not just enforcing prohibited federal laws, but giving “material aid and support” to one who does so. “Material aid and support” is defined broadly so that virtually anything could potentially qualify. While there are exceptions listed in the statute, they are convoluted enough to fill another article. Suffice it to say these exceptions will rarely come into play and would be difficult to formulate policy around.

However, because § 1.470 applies only to acts taken under color of federal law, and only to acts taken after June 12, 2021, (or Aug. 28, 2021), it likely would not apply to most actions taken by local police officers. That being the case, there would not be a need to determine if the officer gave “material aid and support” to someone enforcing a federal firearms law.

The two most concerning areas for law enforcement under § 1.470 are likely: (1) entering data into federal databases, such as the National Crime Information Center (NCIC), or the National Integrated Ballistic Information Network (NIBIN); and (2) working with state/federal task forces. Both NCIC and NIBIN are voluntary systems used as a resource for both state and federal law enforcement.²⁵ To show a violation of SAPA, a plaintiff would have to show that such officer was knowingly enforcing or attempting to enforce a federal firearms law. Or, a plaintiff would need to show that the officer was working under color of federal law by entering such data and thereby knowingly gave material aid and support to a person enforcing a federal firearms law. It may be a stretch for a plaintiff to argue that an officer knowingly gave material aid and support (or that the officer acted under color of federal law) merely by entering data into a voluntary database used by state and federal agencies, solely because that data was later used in a federal prosecution.

Task forces involving federal and state officials likely would present problems for municipal officers. While an officer could reasonably endeavor to not *personally* enforce any federal firearms laws as a member of the task force, the officer could be construed as operating under color of federal law if another member of the task force attempts to enforce a federal firearms law. In such case, the officer could be deemed to have given material aid and support in a way that violates SAPA.

Conclusion

SAPA is a very convoluted statute. Even experienced lawyers, police officers and gun enthusiasts may struggle to understand it. Below are some bullet points for cities to keep in mind:

forward slash
TECHNOLOGY

Managed Services
Cyber Security
Network Security Audits
IP Telephony/VoIP
Web Management
Video Surveillance
Audio Visual
Cloud Computing

314-403-1225
fwslash.com

Managed Services
Network Engineering, Security,
Application Support, Live Help Desk,
Cloud Computing, Wireless
Forward Slash Technology offers managed
services and IT support to allow you to
concentrate on your core business with fewer
interruptions due to IT problems.

**Servicing
Missouri
Municipalities**

Designed for Technology, Engineered to Last

- The Second Amendment permits states to restrict certain persons from carrying firearms, and restricting certain locations where a person can carry a firearm and most existing state and federal laws restricting possession/use of firearms have not been found to violate the Second Amendment;
- Missouri’s counterpart to the Second Amendment, Mo. Const. Art. I, § 23, has been construed to be substantially similar to the Second Amendment;
- Seizing a firearm pursuant to an arrest or search warrant generally does not violate the Second Amendment, unless the owner is thereby prohibited from possessing any firearms (and even then it may not violate the Second Amendment);
- Cities could be liable under SAPA in two ways:



- § 1-460 – If the city employs an officer who knowingly enforces or attempts to enforce federal firearms laws against a “law-abiding citizen;” or
- § 1-470 – If the city employs an officer who acts or acted as a federal agent or who acted “under color of federal law” within Missouri, and after June 12, 2021, and such officer knowingly enforces a federal firearms law, or knowingly gives material aid and support to another who does so.

As always, cities and law enforcement agencies should work closely with their attorneys to ensure that their officers do not put the city at risk of liability under SAPA. 🍃

Brian Malone is an attorney at *Lashly & Baer, P.C.* in St. Louis. Brian advises cities, school districts, library districts and other governmental bodies in Missouri.

End Notes:

¹ § 571.030, RSMo.

² *Arizona v. United States*, 567 U.S. 387, 399 (2012) (“The Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.’ Art. VI, cl. 2.”).

³ “Gov. Parson will sign Second Amendment bill declaring federal gun laws ‘invalid’ in Missouri,” Jean Kuang, *Kansas City Star*, June 10, 2021 (“Parson’s spokeswoman Kelli Jones wrote in a statement, ‘The Governor is aware of the legal implications of this bill, but also that, now more than ever, we must define a limited role for federal government in order to protect citizen’s rights guaranteed by the Second Amendment of the United States Constitution.’ *Emphasis added.*); <https://www.msn.com/en-us/news/politics/gov-parson-will-sign-second-amendment-bill-declaring-federal-gun-laws-invalid-in-missouri/ar-AAKVgo8>, last accessed August 27, 2021.

⁴ “O’Fallon, Mo. police chief resigns over new second amendment protection law,” June 18, 2021, *Fox2Now*; <https://fox2now.com/news/ofallon-mo-police-chief-resigns-over-new-second-amendment-protection-law/>, last accessed August 27, 2021.

⁵ “Cole County judge sinks lawsuit by St. Louis, St. Louis County over new gun law,” Jack Suntrup, *St. Louis Post-Dispatch*, August 27, 2021, https://www.stltoday.com/news/local/govt-and-politics/cole-county-judge-sinks-lawsuit-by-st-louis-st-louis-county-over-new-gun-law/article_e11e59fb-bb28-5171-9399-8df568841f89.html, last accessed August 28, 2021.

⁶ *City of St. Louis, et al. v. State of Missouri*, 21AC-CC00237, Supreme Court case no. SC99290.

⁷ The two lawsuits were apparently 21AC-CC00280, a lawsuit filed by an inmate against the City of St. Louis arguing that his conviction is the result of the City’s enforcement of federal gun laws, and another lawsuit in Ripley County alleging that a law enforcement agency violated SAPA, but that lawsuit, 21RI-CV00361, has now been dismissed.

⁸ § 1.480.1, RSMo.

⁹ See 18 U.S.C. § 922(g); § 571.070, RSMo.

¹⁰ See *Rose v. City of Mulberry*, 533 F.3d 678, 680 (8th Cir. 2008).

¹¹ 554 U.S. 570 (2008).

¹² *Id.* at 595.

¹³ *Id.* at 626.

¹⁴ *Id.* at 626-627.

¹⁵ The U.S. Supreme Court will soon hear a case, *New York State Rifle Association, et al. v. Corlett, et al.*, that could expand the rights protected by the Second Amendment. This case will challenge a New York state statute requiring a license to carry firearms outside one’s home, and such a license can be denied upon “proper cause.” This case could establish that the Second Amendment right to carry firearms

outside one's home, which would be an expansion on the Supreme Court's decision in *Heller*. Since Missouri law already permits most citizens to carry a firearm most anywhere, it is unlikely the New York case will have much impact here.

¹⁶ § 21.750.3, RSMo.

¹⁷ *Id.* (authorizing ordinances that go beyond state law regulating discharging, or open carrying firearms in a city, though CCW permit holders are exempted by the statute from these open carry ordinances).

¹⁸ See *Walters v. Wolf*, 660 F.3d 307, 318 (8th Cir. 2011).

¹⁹ *Id.*

²⁰ The 2016 amendment “did not substantially change article I, section 23 but rather simply set out ‘a declaration of the law as it would have been declared by this Court after McDonald mandated that the fundamental right to bear arms applied to the states.’” *State v. Clay*, 481 S.W.3d 531, 536 (Mo. banc 2016) (internal citations omitted).

²¹ *Id.* at 538.

²² § 1.480.2, .3, & .4, RSMo.

²³ *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009).

²⁴ *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 313, (2011).

²⁵ See 28 U.S.C. § 534 and 28 C.F.R. § 20. “Pursuant to 28 U.S.C. § 534(a), the Attorney General of the United States is required to acquire, retain and disseminate criminal records. . . . The acquisition, preservation and dissemination of criminal records fulfills the compelling public need

for an effective criminal identification procedure, thereby promoting effective law enforcement.” *United States v. Rabadi*, 889 F. Supp. 757, 759 (S.D.N.Y. 1995). “The NCIC information is available to all federal and state law enforcement agencies nationwide.” *United States v. Walker*, 92 F.3d 714, 715 (8th Cir. 1996); see also 2018 WL 4929337, News Release, October 18, 2018, “Justice Department and ATF Name 22 Sites To Receive New National Integrated Ballistic Information Network Equipment,” – “As the only crime gun ballistic network in the United States, NIBIN compares images of cartridge casings recovered at crime scenes and firearms recovered by law enforcement to connect shooting incidents and identify shooters.”



Local Government Workers

**ALWAYS
ESSENTIAL**

Thank you to all public servants working to keep our communities safe and healthy.



MISSOURI LAGERS

A Secure Retirement for All

800-477-4334 | molagers.org