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## MEMORANDUM OF LAW

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**From: C. D. Michel**

**Re: Effective January 1, 2013: Ban On Carrying Long Guns In Public**

**Date: January 22, 2013**

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### I. INTRODUCTION

Assembly Bill 1527 (“AB 1527”) was signed by Governor Brown on September 28, 2012, and went into effect on January 1, 2013. AB 1527 is effectively a general ban on the carrying of *unloaded* “firearms that are not handguns” (presumably long-guns) outside of a vehicle in most public places. AB 1527 is a follow-up to last year’s AB 144, which prohibited the open carry of *unloaded* handguns in most public places.<sup>1</sup> After AB 144 was enacted, people protested by carrying unloaded rifles and shotguns in public places, which remained legal after AB 144. AB 1527 was passed in response, intending to prohibit such activity.

AB 1527 amends Sections 7574.14 and 7582.2 of the Business and Professions Code, and Sections 626.92, 16520, 16750, 16850, and 17295 of the California Penal Code, while adding Sections 16505, 26366.5, 26390, 26391, and Chapter 7 (commencing with 26400) to the California Penal Code.<sup>2</sup>

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<sup>1</sup> The carrying of loaded firearms (whether handguns or non-handguns) in most public places was already unlawful. (P.C. § 25850(a).)

<sup>2</sup> This memorandum only addresses the ban on the public carrying of firearms which are not handguns.

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## II. THE BAN ON OPEN CARRY OF FIREARMS THAT ARE NOT HANDGUNS

AB 1527's prohibition on carrying an unloaded "firearm that is not a handgun" applies when you are outside of a vehicle in an incorporated city, or city and county, unless an exception applies. (P.C. § 26400). While almost identical to its handgun-restriction counterpart, AB 144, there are at least two significant differences in the scope of AB 1527. Namely, AB 1527 does not apply within a vehicle. So, unlike with handguns, which must generally be transported in a locked container at all times when in public areas (even when inside a vehicle), non-handguns need not be under California law, and can be left open and unlocked within a vehicle.<sup>3</sup> And, AB 1527 does not extend its restrictions on carrying unloaded non-handguns at all to unincorporated areas, whereas AB 144 expressly includes such areas in its restrictions. (P.C. § 26350(a)).

### A. "Firearm That is Not a Handgun"

A "firearm" is a device that is designed to be used as a weapon, which expels a projectile through a barrel through the use of force from an explosion or other combustion. (P.C. § 16520). A "firearm" can be a handgun, rifle, shotgun, or miscellaneous guns that do not fit neatly in those categories. AB 1527 only applies to *non*-handguns.

Since the legislation is phrased in the negative (firearm that is not a handgun), it is necessary to define "handgun." "Handgun" is defined as "any pistol, revolver, or firearm capable of being concealed on the person." (P.C. § 16640). The terms "firearm capable of being concealed upon the person," "pistol," and "revolver" apply to and include:

[A]ny device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.

P.C. § 16530(a).

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<sup>3</sup> Note, however, that while California's exception only requires *handguns* be in a locked container, when in a "school zone" federal law additionally requires that *all firearms* also be in locked containers. 18 U.S.C. § 922(q)(2)(B).

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Thus, any firearm that does not fit under these definitions will be subject to Penal Code Section 26400. Generally, such firearms include rifles, shotguns, carbines, and those firearms that fit neither the handgun nor traditional long-gun definitions (e.g., a stockless firearm of legal length that shoots shotgun shells, which is not a “shotgun” because it does not have a stock and thus is not intended to be fired from the shoulder, nor is it a “short-barreled shotgun” or a “handgun” because of its length).

However, according to Section 16520, an “antique” firearm is not considered a “firearm” for purposes of AB 1527’s non-handgun carry restriction. An “antique firearm” in this context has the same definition as used in the Federal Code in Title 18 Section 921(a)(16). (P.C. § 16170(b)), which is:

- (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
- (B) any replica of any firearm described in subparagraph (A) if such replica--
  - (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
  - (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
- (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.<sup>4</sup>

This means that long-guns made before 1898, certain but not all replicas thereof, or ones using black powder that are incapable of using fixed ammunition, are not prohibited from being publicly carried under the new Section 26400 (if unloaded).

## **B. “Carry”**

Although the term “carry” has not been definitively defined in the Penal Code, the term has been

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<sup>4</sup> 18 U.S.C. § 921(a)(16).

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construed as not requiring actual locomotion (*i.e.*, movement from one place to another).<sup>5</sup> Rather, to be considered “carried” according to the law, a firearm need only be so connected with the person in a way that the locomotion of the body *would* carry with it the firearm.<sup>6</sup> For example, a firearm within a suitcase is still legally considered as being “carried” “on your person.”<sup>7</sup>

### C. Unloaded

For purposes of A.B. 1527, a firearm that is not a handgun is “unloaded” if it is not “loaded” as defined in P.C. §16840(b). (P.C. § 17295). According to Section 16840(b), a firearm is considered “loaded” when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or “attached in any manner” to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm.<sup>8</sup>

In *People v. Clark*, the California Court of Appeal clarified the phrase “attached in any manner.”<sup>9</sup> In *Clark*, the police seized defendant’s shotgun, which did not have a shell in the firing chamber. Three shells, however, were located in a covered compartment at the rear of the shotgun’s stock. The defendant was convicted, but the appellate court reversed, reasoning that “attached to the firearm” applies where “the [ammunition] is placed in a position from which it can be fired” or if it is “ready for firing.”<sup>10</sup> Additionally, the court interpreted the statute to *not* “indicate a clear intent to deem a gun ‘loaded’ when the ammunition. . . is in a storage compartment which is not equivalent to either a magazine or clip and from which the ammunition cannot be fired.”<sup>11</sup>

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<sup>5</sup> *People v. Smith*, 72 Cal.App.2d Supp. 875, 879 (1946)(citing *Thomas v. State*, 9 Ala.App. 67, 69-70 (Ala. Ct. App. 1913)).

<sup>6</sup> See *People v. Smith*, 72 Cal.App.2d Supp. 875 (1946).

<sup>7</sup> *People v. Dunn*, 132 Cal. Rptr. 921, 922 (Cal. App. Dep’t Super. Ct.1976).

<sup>8</sup> A muzzle-loader firearm shall be considered loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder. (P.C. § 16840(b)).

<sup>9</sup> *People v. Clark*, 45 Cal.App.4th 1147 (1996).

<sup>10</sup> *Id.* at 1154.

<sup>11</sup> *Id.*

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The court distinguishes a permissible separate storage compartment “from which ammunition cannot be fired” from “a magazine or clip” (which likely includes a speed loader).<sup>12</sup> Of course, this language was intended to explain what does *not* constitute “loaded,” and it is possible, and even likely, that such language does *not* mean that having ammunition in a magazine, clip, or speed loader that is ejected from the firearm makes that firearm “loaded.”

In general, it is not illegal to possess ammunition for a non-handgun while in possession of that non-handgun, as long as it is not loaded. However, as explained below, if you are not in lawful possession of the non-handgun that you are carrying unloaded in public, merely possessing ammunition for that firearm can result in a harsher punishment.

#### **D. Penalties for Unlawful Carry**

If you carry an unloaded firearm that is not a handgun on your person outside of a vehicle in an incorporated city, or city and county, you are guilty of a misdemeanor punishable by up to 6 months in county jail or a maximum \$1,000.00 fine, or both unless you meet one of the applicable exceptions discussed below. You can be sentenced to one year in county jail or a maximum \$1,000.00 fine, or both, if the unloaded firearm that is not a handgun and the ammunition for that firearm are in your immediate possession and you are not lawfully in possession of the firearm.<sup>13</sup> (P.C. § 26400(a) and (b)).

Each non-handgun carried in violation of Section 26400(a) is chargeable as a separate offense. For example, if you are carrying two unloaded non-handguns unlawfully at the same time, you can be charged with two separate misdemeanors. (P.C. § 26400(d)).

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<sup>12</sup> *Id.*

<sup>13</sup> “Lawful possession” means that the person who has possession of the firearm either lawfully acquired and lawfully owns the firearm or has the permission of the lawful owner. (P.C. § 16750(b)). In other words, if you are prohibited by law from possessing firearms based on a criminal conviction, mental illness, restraining order, etc., or acquired the firearm by stealing it, borrowing it without permission or exceeding California’s time limits for a lawful loan, or without going through a licensed firearm dealer (unless acquired prior to that requirement becoming law or you meet an exception thereto), you are *not* in “lawful possession” of the firearm per Section 26400(b)(2).

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### **III. EXCEPTIONS TO PROHIBITION ON CARRYING AN UNLOADED “FIREARM THAT IS NOT A HANDGUN”: IN PUBLIC**

#### **A. “Locked Container” or “Encased”**

Pursuant to Section 26405, a person may carry an unloaded firearm that is not a handgun if the firearm is either (1) in a locked container, or (2) encased, *and* “it is being transported directly between places where a person is not prohibited from possessing that firearm and the course of travel shall include only those deviations between authorized locations as are reasonably necessary under the circumstances.” (P.C. § 26405(c)).

A “locked container” means a secure container that is fully enclosed and locked by a padlock, keylock, combination lock, or similar locking device. The definition, while including a vehicle’s trunk, does not include its utility or glove compartment. (P.C. § 16850).

A firearm is “encased” “when that firearm is enclosed in a case that is expressly made for the purpose of containing a firearm and that is completely zipped, snapped, buckled, tied, or otherwise fastened with no part of that firearm exposed.” (P.C. § 16505).

This definition of “encased” poses a huge problem. The term “expressly made for the purpose of containing a firearm” is not as clear as it sounds. There is no clear definition of what this would be. Is it sufficient that the manufacturer calls a box a “firearm case?” Or must a case be approved or recognizable by law enforcement? There are a number of gun cases available that are expressly made for the purposes of containing a firearm, but do not readily appear to be. Would the case require a certain type of material to be used? Could a gun sock suffice?<sup>14</sup>

#### **B. The Ban on Carrying Firearms That Are Not Handguns Does Not Apply to the Following:**

1. A person within a place of business, a place of residence, or on private property, if that person, by virtue of subdivision (a) of Section 25605 (over the age of 18 who resides or is temporarily within this state and is not prohibited from possessing firearms), may carry a firearm within that place of business, place of residence, or

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<sup>14</sup> Essentially, a “gun sock” is what the name implies: a “firearm case” that resembles a sock that can be tied or otherwise fastened at the open end, leaving a firearm secured in cloth fabric.

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- on that private property owned or lawfully possessed by that person;
2. A person within a place of business, a place of residence, or on private property, if done with the permission of a person who, by virtue of subdivision (a) of Section 25605, may carry a firearm within that place of business, place of residence, or on that private property owned or lawfully possessed by that person;
  3. (A non-handgun carried in a locked container or encased as discussed above;
  4. A person who reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This paragraph may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety;
  5. A peace officer or an honorably retired peace officer if that officer may carry a concealed firearm pursuant to Article 2 (commencing with Section 25450) of Chapter 2, or a loaded firearm pursuant to Article 3 (commencing with Section 25900) of Chapter 3;
  6. A person to the extent that person may openly carry a loaded firearm that is not a handgun pursuant to Article 4 (commencing with Section 26000) of Chapter 3;
  7. Merchandise firearms carried by a person who is engaged in the business of manufacturing, importing, wholesaling, repairing, or dealing in firearms and who is licensed to engage in that business, or the authorized representative or authorized agent of that person, while engaged in the lawful course of the business;
  8. A duly authorized military or civil organization, or the members thereof, while parading or while rehearsing or practicing parading, when at the meeting place of the organization;
  9. A member of a club or organization organized for the purpose of practicing shooting at targets upon established target ranges, whether public or private, while
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- the members are using handguns upon the target ranges or incident to the use of a firearm that is not a handgun at that target range;
10. A licensed hunter while engaged in hunting or while transporting that firearm when going to or returning from that hunting expedition;
  11. Incident to transportation of a handgun by a person operating a licensed common carrier, or by an authorized agent or employee thereof, when transported in conformance with applicable federal law;
  12. A member of an organization chartered by the Congress of the United States or a nonprofit mutual or public benefit corporation organized and recognized as a nonprofit tax-exempt organization by the Internal Revenue Service while on official parade duty or ceremonial occasions of that organization or while rehearsing or practicing for official parade duty or ceremonial occasions;
  13. A person within a gun show conducted pursuant to Article 1 (commencing with Section 27200) and Article 2 (commencing with Section 27300) of Chapter 3 of Division 6;
  14. A person within a school zone, as defined in Section 626.9, with the written permission of the school district superintendent, the superintendent's designee, or equivalent school authority;
  15. Firearms carried in accordance with the provisions of Section 171b (exceptions for carrying a firearm in a state or local public building or public meeting as provided in that section);
  16. A person engaged in the act of making or attempting to make a lawful arrest;
  17. A person engaged in firearms-related activities, while on the premises of a fixed place of business that is licensed to conduct and conducts, as a regular course of its business, activities related to the sale, making, repair, transfer, pawn, or the use of firearms, or related to firearms training;
  18. An authorized participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture, television or video production, or entertainment
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- event, when the participant lawfully uses that firearm as part of that production or event, as part of rehearsing or practicing for participation in that production or event, or while the participant or authorized employee or agent is at that production or event, or rehearsal or practice for that production or event;
19. Where incident to obtaining an identification number or mark assigned for that firearm from the Department of Justice pursuant to Section 23910;
  20. Using the firearm upon an established public target range;
  21. A person summoned by a peace officer to assist in making arrests or preserving the peace, while the person is actually engaged in assisting that officer;
  22. Where incident to any of the following:
    - (1) Complying with Section 27560 or 27565, as it pertains to that firearm (Personal firearm importer and Collector bringing Curio or Relic firearm into California, registration requirements respectively)
    - (2) Section 28000, as it pertains to that firearm. (Transfer of firearms by persons not required to use a licensed firearm dealer)
    - (3) Section 27850 or 31725, as it pertains to that firearm.
    - (4) Complying with Section 27870 or 27875, as it pertains to that firearm (Transfers by immediate family members)
    - (5) Complying with Section 27915, 27920, or 27925, as it pertains to that firearm (Taking title or possession of firearm by operation of law).
  23. Where incident to, and in the course and scope of, training of, or by an individual to become a sworn peace officer as part of a course of study approved by the Commission on Peace Officer Standards and Training;
  24. Where incident to, and in the course and scope of, training of, or by an individual to become licensed pursuant to Chapter 4 (commencing with Section 26150) (license to carry concealed) as part of a course of study necessary or authorized by the person authorized to issue the license pursuant to that chapter.;
  25. Where incident to and at the request of a sheriff, chief, or other head of a municipal police department;
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26. If all of the following conditions are satisfied:
  - (1) The open carrying occurs at an auction or similar event of a nonprofit public benefit or mutual benefit corporation at which firearms are auctioned or otherwise sold to fund the activities of that corporation or the local chapters of that corporation;
  - (2) The unloaded firearm that is not a handgun is to be auctioned or otherwise sold for that nonprofit public benefit or mutual benefit corporation;
  - (3) The unloaded firearm that is not a handgun is to be delivered by a person licensed pursuant to, and operating in accordance with, Sections 26700 to 26925, inclusive.
27. Where pursuant to paragraph (3) of subdivision (b) of Section 171c (exception for carrying a loaded firearm within state capitol and certain buildings);
28. Where pursuant to Section 171d (exception for carrying loaded firearm in certain state and federal government buildings);
29. Where pursuant to subparagraph (F) of paragraph (1) of subdivision (c) of Section 171.7 (exception from possessing firearm in sterile area of public transit facility);
30. On publicly owned land, if the possession and use of an unloaded non-handgun is specifically permitted by the managing agency of the land and the person carrying that firearm is in lawful possession of that firearm;
31. Where incident to any of the following:
  - (1) The carrying of an unloaded firearm that is not a handgun that is regulated pursuant to Chapter 1 (commencing with Section 18710) of Division 5 of Title 2 (a destructive device) by a person who holds a permit issued pursuant to Article 3 (commencing with Section 18900) of that chapter, if the carrying of that firearm is conducted in accordance with the terms and conditions of the permit;
  - (2) The carrying of an unloaded firearm that is not a handgun that is regulated pursuant to Chapter 2 (commencing with Section 30500) of Division 10 (“assault weapon” and .50 BMG rifle) by a person who holds a permit issued pursuant to Section 31005, if the carrying of that firearm is conducted in accordance with the terms and conditions of the permit;

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(3) The carrying of an unloaded firearm that is not a handgun that is regulated pursuant to Chapter 6 (commencing with Section 32610) of Division 10 (machinegun) by a person who holds a permit issued pursuant to Section 32650, if the carrying of that firearm is conducted in accordance with the terms and conditions of the permit;

(4) The carrying of an unloaded firearm that is not a handgun that is regulated pursuant to Article 2 (commencing with Section 33300) of Chapter 8 of Division 10 (short-barreled shotguns and rifles) by a person who holds a permit issued pursuant to Section 33300, if the carrying of that firearm is conducted in accordance with the terms and conditions of the permit.

32. A licensed hunter while actually engaged in training a dog for the purpose of using the dog in hunting that is not prohibited by law, or while transporting the firearm while going to or returning from that training;
33. Where pursuant to the provisions of subdivision (d) of Section 171.5 (exception to restriction against possessing firearm in sterile environment of airport);
34. A person who is engaged in the business of manufacturing ammunition and who is licensed to engage in that business, or the authorized representative or authorized agent of that person, while the firearm is being used in the lawful course and scope of the licensee's activities as a person licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and regulations issued pursuant thereto; and
35. When on the navigable waters of this state that are held in public trust, if the possession and use of an unloaded non-handgun is not prohibited by the managing agency thereof and the person carrying the firearm is in lawful possession of the firearm.

(P.C. § 26405).

#### IV. CONCLUSION

AB 1527 (and its multitude of exceptions) is, for lack of a better word, stupid. It was passed as a knee-jerk reaction by legislators in Sacramento who are afraid of people who lawfully possess firearms.

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Over the next couple of years countless law abiding citizens (most of whom have no criminal record) will be prosecuted for violating this law and will have to go through the stress of facing criminal prosecution, the expense of hiring a lawyer to defend them against a ridiculous law, and face potential consequences of having a misdemeanor conviction (which can include a fine, court costs, probation, and/or the possibility of jail time). In addition to the foregoing, this law will waste invaluable law enforcement, prosecutorial, and court time as the hapless California citizen is ushered through the criminal process.

Despite its being absurd, AB 1527 is the law. And while it would take an expert to decipher its actual scope, assuming doing so is even possible, it is somewhat simple to comply with generally: keep all non-handguns encased when outside of your home until you arrive at a location where they can be lawfully used.

#### **For Further Assistance:**

For links to free information on firearms laws, the Legal Resources section of our [www.calgunlaws.com](http://www.calgunlaws.com) website has subsections on various firearms law topics. To stay updated on firearm law issues we encourage you to subscribe to our firearms law newsletters, Facebook pages, and Twitter feed.

[CalGunLaws.com](http://CalGunLaws.com), CalGunLaws' e-Bulletins, the [Self-Defense Defense](#), [Right to Keep and Bear Arms](#), [MichellLawyers](#), and [Shooting Range Lawyers](#) informational Facebook pages and the [@MichellLawyers](#) Twitter feed are produced as a pro bono public service by [Michel & Associates, P.C.](#), a full service law firm.

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