

{ Top Ten Things You Need to Know about Federal Firearms Law }

BY KEITH WILLIAMS, ESQ.

Federal law regulates firearms and ammunition in many different ways. There are, however, 10 critical issues that every lawyer and citizen should know:

No Guns for Felons

Most of us are familiar with the rule that a convicted felon cannot possess a gun. The federal rule is found in 18 U.S.C. § 922(g)(1). Rather than using the term “felony conviction,” it says anyone “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year” is barred from possessing a gun. The only felonies not covered by the federal gun ban are those “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,” per 18 U.S.C. § 921(a)(20)(A).

What about domestic violence convictions?

“It shall be unlawful for any person ... who has been convicted in any court of a misdemeanor crime of domestic violence ... to possess in or affecting commerce any firearm or ammunition.” 18 U.S.C. § 922(g)(9).

Under 18 U.S.C. § 921(a)(33), a “misdemeanor crime of domestic violence” is any misdemeanor that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”

The required element is not the existence of the domestic relationship, but the use of a deadly weapon or the use of physical force. *United States v. Hayes*, 555 U.S. 415, 426 (2009).

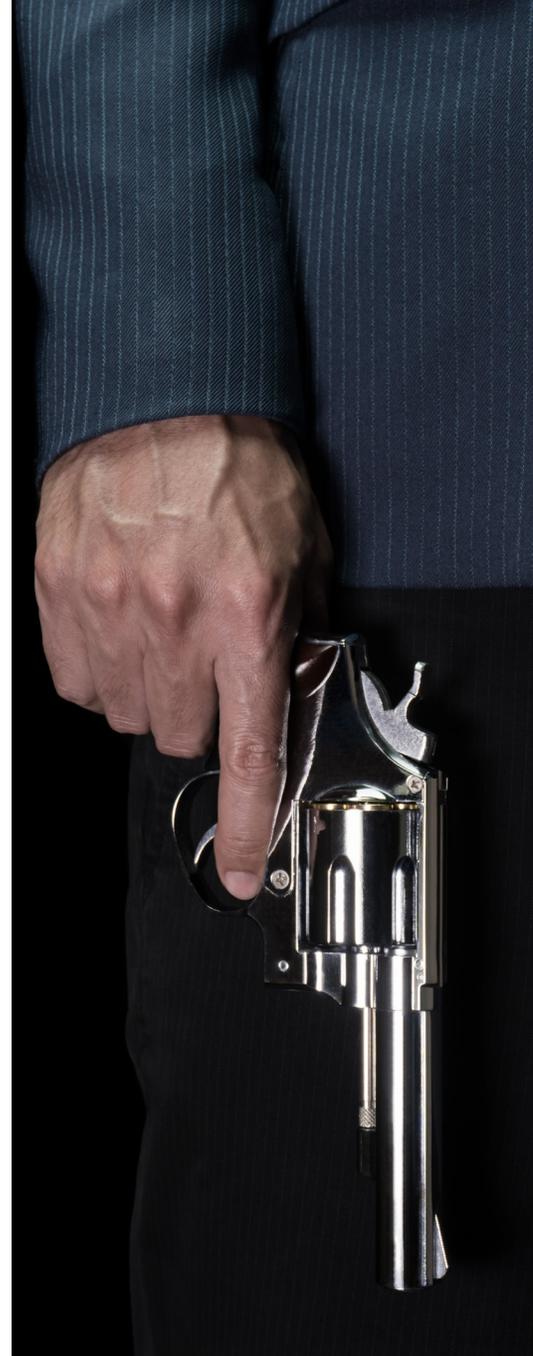
The federal gun ban includes some people who are only under indictment.

Anyone who is “under indictment for a crime punishable by imprisonment for a term exceeding one year” is not allowed “to ship or transport ... any firearm or ammunition or receive any

such firearm or ammunition.” 18 U.S.C. § 922(n).

The meaning of this statute is a bit unclear. At the very least, it bars anyone under indictment from “receiving” or acquiring a gun they did not own before being indicted. But what about guns someone owned before indictment? Are they required to get rid of them after indictment?

The express terms of the statute mention only shipping, transporting and receiving a gun, not possessing one. In comparison, the federal ban for convicted felons expressly bans possession, as well as shipping, transporting, and receiving. 18 U.S.C. § 922(g)(1). You can make a strong argument based on the wording of the



statute that someone under indictment is allowed to possess a gun he owned before being indicted, even if he is not allowed to ship, transport or receive it.

But how far can the person move the gun before possession becomes transporting or shipping? In my opinion, the issues are too murky, and the stakes are too high. The safer and better practice is probably to advise all clients under indictment not to possess firearms or ammunition while the indictment is pending.

Does a state law expungement or restoration of rights allow a person to possess a firearm under federal law?

Yes. The statutory language is in 18 U.S.C. § 921(a)(20). Whether a person has a “conviction” triggering the federal gun ban is determined by “the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or had civil rights restored shall not be considered a conviction.”

Can someone possess firearms after an involuntary mental health commitment?

Federal law bans firearm possession by anyone “who has been adjudicated as a mental defective or who has been committed to a mental institution.” 18 U.S.C. § 922(g)(4). As interpreted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the statute means anyone who has ever been involuntarily committed (IVC) at any age is prohibited from possessing a gun. <https://www.atf.gov/file/58791/download> It is “effectively a lifetime prohibition on possessing firearms.” *Bureau of Justice Statistics*, <https://www.bjs.gov/index.cfm?ty=tp&tid=49> (*BJS Website*).

Congress addressed the issue as part of the NICS Improvement Amendments Act (NIAA) of 2007 and allowed states to enact statutes

ending the gun ban for someone with a past IVC. The NIAA provides such statutes must require a showing “the person will not be likely to act in a manner dangerous to public safety and that the granting of [] relief would not be contrary to the public interest.” NIAA § 105(a)(2). When a state-level program “implemented in accordance” with NIAA makes such findings, the NIAA says the IVC “is deemed not to have occurred for purposes of” 18 U.S.C. § 922(g)(4). NIAA § 105(b).

As of this writing, the ATF has approved state-level programs in Nevada, New York, Oregon, Florida, Idaho, Illinois, New Jersey, Texas, Wisconsin, Arizona, Iowa, Kansas, Kentucky, North Dakota, Virginia, Indiana, Nebraska, Missouri, West Virginia, Alabama, Delaware, Louisiana, Maryland, Alaska, Hawaii, South Carolina, Utah, Oklahoma, Tennessee, Massachusetts, North Carolina and Colorado.

Nevada’s process for transmitting mental health information to the National Instant Criminal Background Check System and National Crime Information Center, and for petitioning to remove a person’s information from those databases, was established in 2009 through Assembly Bill 46, and it is currently set forth in NRS 179A.163.

Be ready to use the declaratory judgment big stick under 18 USC § 925A.

If you have someone who is permitted to own a firearm and is wrongly denied because of a NICS background check, you can appeal the denial to the FBI using the voluntary appeal process. A faster and more forceful approach is to file a lawsuit in federal court asking the judge to declare your client is eligible to possess firearms.

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Any person denied “may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.” 18 U.S.C. § 925A.

No guns for drug users.

Federal law also says that any person “who is an unlawful user of or addicted to any controlled substance” is barred from possessing guns. 18 U.S.C. § 922(g)(3). The statute has “a limited temporal reach.” *United States v. Carter*, 750 F.3d 462, 466 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 273 (2014). The “prohibition lasts only as long as the individual remains an unlawful drug user or addict.”

The term “controlled substance” is defined by 21 U.S.C. § 802 to include “a drug ... or immediate precursor” and to exclude “distilled spirits, wine, malt beverages, or tobacco.”

Is there an exception for guns that someone keeps in their own home or business, or for long guns?

No, even if state law tries to allow it. “[T]he fact that state law permitted [the defendant] to possess a firearm in his home despite his status as a convicted felon whose civil rights had not been restored [was] not sufficient to insulate him from federal prosecution.” *United States v. King*, 119 F.3d 290, 293 (4th Cir. 1997).

The federal gun ban applies to any “firearm,” defined by 18 U.S.C. § 921(a)(3) as “any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” The term “firearm” also includes the frame of a weapon and silencers. The length of the gun is irrelevant; whether long or short, it cannot be possessed by a felon.

It is not just a ban on guns – it also includes ammunition.

The federal statute prohibits possession of “any firearm or ammunition.” 18 U.S.C. § 922(g). “Ammunition” is defined as “cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.” 18 U.S.C. § 921(a)(17)(A).

Ignorance of the law is no excuse.

It does not matter if someone is unaware of the federal firearms ban. In *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000),

cert. denied, 531 U.S. 849 (2000) the Fourth Circuit said that the government is not required to show that a defendant knew that federal law prohibited him from possessing a gun. If the defendant knew that he possessed the gun and knew that he was a convicted felon (or knew that he was a person with a conviction for a misdemeanor crime of domestic violence, a drug addict, etc.), that is enough for him to be prosecuted in federal court.

“The only knowledge the government was required to prove ... was knowledge of the possession.” *Id.* (citations omitted).

All Nevada lawyers should be aware of these important nuances surrounding federal laws regulating firearms and ammunition so that they can properly advise their friends, family and clients. **NL**



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