



CHANGING SYSTEMS
TRANSFORMING LIVES



COORDINATE AND COLLABORATE TO
IMPROVE ENFORCEMENT OF
FEDERAL FIREARM PROHIBITIONS

BWJF

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All levels of local/state/Tribal/federal governments work jointly to make sure that federal firearm prohibitions are enforced to disarm and prosecute abusers, especially where state or Tribal laws are lacking.

Federal law prohibits certain individuals from possessing or purchasing firearms, including individuals who have been convicted of a qualifying misdemeanor crime of domestic violence (MCDV) and individuals who are subject to a qualifying domestic violence protection order. Individuals who have been convicted of an MCDV are prohibited from possessing or purchasing firearms under 18 U.S.C. § 922(g)(9), which includes the following requirements:

- The misdemeanor is a crime under state, Tribal or federal law.
- The crime for which the offender was convicted contained one of the following elements: the use or attempted use of physical force or the threatened use of a deadly weapon.
- The defendant was represented by counsel or knowingly and intelligently waived the right to counsel.
- In jurisdictions where the defendant was entitled to a jury trial, the case was tried by a jury or the defendant knowingly and intelligently waived the right to a jury trial by guilty plea or otherwise.
- The misdemeanor must have been committed by a person who, at the time of commission of the crime, was a current or former spouse, parent, or guardian of the victim, or was a parent of a child of the victim, or had cohabited or formerly cohabited with the victim as a spouse, parent or guardian, or was similarly situated to a spouse, parent, or guardian of the victim.
- The prohibition is permanent unless the defendant has had the conviction set aside or expunged, was pardoned, or had civil rights restored (i.e., the right to sit on jury, the right to vote, and the right to hold public office).

Purchase Prevention

Individuals who are subject to a qualifying domestic violence protection order are prohibited from possessing or purchasing firearms under 18 U.S.C. § 922(g)(8), which includes the following requirements:

- The person subject to the order must have notice and an opportunity to be heard; and

- The order must restrain the person from harassing, stalking, or threatening an intimate partner of the person or a child of the person or the intimate partner; or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- The order must include either a finding that the person subject to the order represents a credible threat to the physical safety of an intimate partner or child or a prohibition against the use, attempted use or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.
- The term “intimate partner” is defined as “a current or former spouse, a current or former cohabitant with the person subject to the protection order” or an individual who is a parent of a child of the person against whom the order was issued. 18 U.S.C. §921(a)(32)

These federal firearm statutes can be potent tools for protecting victims of domestic violence from further harm and holding dangerous offenders accountable. In addition to providing the basis for convictions that may result in the imprisonment of the offender, these statutes may also enable federal authorities to order relinquishment and seizure of firearms, even when state law does not authorize such action. In addition, in many instances convictions under these statutes can result in penalties far more severe than those available under state law. Effective enforcement of the federal firearm prohibitions, however, is no simple task. Successful prosecutions and seizure actions often require close collaboration among officials at the local, state, Tribal, and federal levels. In many instances, information and evidence indicating a violation of the federal prohibitions may be known only to local or Tribal officials, while their federal counterparts, who may have the exclusive authority to take action under the federal laws, remain unaware of the federal offense. By establishing a coordinated approach to addressing domestic violence related firearm offenses, including improving communication and information sharing among relevant agencies at all levels of government, communities can take full advantage of the federal firearms prohibitions to protect victims and hold offenders accountable.

Collaborative initiatives in this arena may take on many different forms. For instance, one approach followed in some jurisdictions is the convening of a task force or similar collaborative working group consisting of local, state, Tribal, and federal authorities for purposes of:

- developing protocols and/or memoranda of understanding for triaging cases for intervention by authorities at the appropriate level (local vs. state vs. Tribal vs. federal)
- ensuring that protection order and criminal proceedings in state/Tribal courts result in orders and/or convictions that satisfy requirements for federal firearm prohibitions
- providing training to professionals in all relevant disciplines on firearms and domestic violence, including the federal laws.

Another approach that has met with success is the cross-deputization of local, state, or Tribal prosecutors and/or law enforcement officers as federal prosecutors/officers. A single person assuming both roles is ideally positioned to identify cases for further investigation, to investigate

the cases or to ask others to investigate them, and to decide (or make appropriate recommendations about) whether to pursue a prosecution at the state/Tribal level or in federal court.

Cross-Deputization

Cross-deputization has been a key component of the U.S. Department of Justice's (U.S. DOJ) Tribal Special Assistant U.S. Attorney (SAUSA) program. Under the program, Tribal prosecutors are cross-deputized as SAUSAs and therefore are able to prosecute crimes in both Tribal court and federal court, as appropriate. In 2012, the U.S. DOJ's Office on Violence Against Women (OVW) established the Violence Against Women Tribal SAUSA Pilot Project to increase the use of Tribal SAUSAs in cases involving violence against Native women. OVW granted awards to four tribes in Nebraska, New Mexico, Montana, North Dakota, and South Dakota to fund cross-designated Tribal prosecutors. The goal of the Tribal SAUSA Pilot Project was "to increase the likelihood that every viable criminal offense is prosecuted in Tribal court, federal court or both. The program enabled Tribal prosecutors to bring violence against women cases in federal court and to serve as co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective Tribal communities." SAUSAs under the project have brought several successful federal prosecutions for firearms-related domestic violence crimes that occurred on Tribal lands.

Communities developing a coordinated approach seem to have the best success in combating these crimes. Creation of formal lines of communication and information-sharing among participants at all levels of government is critical. This may include either formal or informal agreements that delineate the various participants' roles and responsibilities and establish mechanisms for making and responding to referrals for investigation by federal officials.

Purchase Prevention

Prevent Perpetrators Subject to Legal Prohibitions from Purchasing Firearms and Ammunition
All systems work together to prevent purchase of firearms by perpetrators who are legally prohibited from possessing firearms by making sure that information about criminal history and protection orders is readily available to those responsible for conducting criminal background checks.

The primary mechanism in place to prevent prohibited individuals from purchasing firearms is the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS).

Under the permanent provisions of the Brady Handgun Violence Prevention Act (Brady Act,) which took effect on November 30, 1998, federally licensed firearm dealers may not sell a firearm to an individual without initiating a background check to ascertain whether the transfer

would violate state or federal law (unless the individual possesses a valid state-issued permit that exempts him or her from a NICS check at the point of sale). Under the law, firearm dealers may transfer a firearm to the purchaser if there has been a “proceed” issued by NICS or a “delay” issued by NICS that is not resolved within three business days. If the FBI determines, after the three business days have elapsed, that an individual to whom a firearm was transferred is in fact prohibited from receiving or possessing a firearm, the FBI refers the case (called a “delayed denial”) to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) for possible retrieval of the firearm—a potentially dangerous scenario to be avoided.

To facilitate the NICS check, the dealer provides identifying information about the individual to the FBI, so that a search of three national databases may be conducted. The three databases are:

- **The Interstate Identification Index (III):** The III contains criminal history records submitted by state and federal agencies, specifically information on individuals indicted for, or who have been convicted of, a crime punishable by imprisonment for a term exceeding 1 year or who have been convicted of a misdemeanor crime of domestic violence (MCDV).
- **The National Crime Information Center (NCIC):** NCIC consists of 21 separate files (7 property files and 14 person files) made available to law enforcement and criminal justice agencies around the country. One of the files, the Protection Order File, contains information about individuals subject to protection orders issued by state and Tribal courts.
- **The NICS Index:** The NICS Index was developed by the FBI specifically for use in conducting NICS background checks. It contains information on individuals who have been ascertained to be prohibited under state, Tribal, or federal law from possessing or receiving a firearm. Protection orders not otherwise eligible for entry into the NCIC POF may be entered into the NICS Index if the determination is made that the order disqualifies the respondent from possessing or receiving a firearm. Likewise, MCDV-related court records may be entered into the NICS index.

The effectiveness of the NICS depends critically upon the timeliness, comprehensiveness, and accuracy of information submitted by states, Tribes, and federal agencies to the three national databases. Communities can adopt practices and policies for the relevant agencies (courts and law enforcement, primarily) to ensure that information about MCDVs and civil and criminal protection orders that meet the requirements of the federal firearm prohibitions are made accessible to the NICS through the national databases.

Misdemeanor Crimes of Domestic Violence

In criminal domestic violence cases, information regarding the offense of conviction should be included in charging documents, plea agreements, conviction orders, and other official court

documents, and accurate information should be transmitted to state and federal criminal history databases indicating that a criminal conviction meets the federal definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9).

Official court records (ideally, a standard record of conviction form) should include all information necessary to indicate that the offense of conviction is a predicate offense for application of the federal firearms prohibition at 18 U.S.C. § 922(g)(9), including:

- The actual elements of the applicable criminal statute under which the defendant was convicted
 - This is especially important where the criminal statute is multi-pronged or “disjunctive” and not all alternative elements satisfy the requirements of the federal law (18 U.S.C. § 922(g)(9)); a citation to the general statute will not be sufficient
- The qualifying intimate partner relationship between the parties, if available;
- That the defendant was represented by an attorney or knowingly and intelligently waived representation; and
- That the defendant had a trial by jury or knowingly and intelligently waived that right
- Records of conviction should be transmitted to the Interstate Identification Index (III) in a timely fashion
- The relationship between the victim and offender, as well as the specific subsection of the offense of conviction should be denoted on the face of the III record; this facilitates a quick and efficient determination for NICS purposes

Alternatively, any MCDV information not eligible for entry in the III should be entered into the NICS Index

Court and other agencies should respond promptly to requests by NICS personnel for information concerning criminal convictions, especially in light of the strict three-business-day limit imposed upon the NICS

Courts and other agencies should cooperate closely with the NICS Section on audits

Protection Order Cases

In civil and criminal protection order cases, qualifying orders should be indicated as meeting the requirements of the federal prohibition for protection orders under 18 U.S.C. § 922(g)(8), and all such orders should be entered immediately into state/Tribal registries and the federal National Crime Information Center Protection Order File (NCIC POF).

- Orders should satisfy all requirements for application of federal prohibitions on possession or receipt of firearms (found at 18 U.S.C. §§ 922(g)(8) and 921(a)(32)):
 - Include necessary language in the order

- Include information about the qualifying relationship of the parties (the relationship need not be included in the submitted order as long as the qualifying relationship is met)
- Indicate compliance with due process requirements
- Notify respondents about the federal firearm prohibitions (which also should be provided orally)
- Application of the federal laws prohibiting possession or receipt of firearms should be further facilitated by taking the following steps:
 - Orders are entered into state/Tribal and federal databases in a timely manner
 - Personnel responsible for entry of orders follow a protocol and are trained on accurate entry of the Brady indicator (a “field code,” or marker used upon entry of a protection order into the NCIC POF to indicate whether that order prohibits the respondent from possessing or purchasing a firearm under federal law)
 - Disqualifying orders not eligible for entry in the NCIC POF are entered into the NICS Index
 - Where state/Tribal prohibitions apply, Protection Order Condition (PCO) code 7 is used upon entry into the NCIC POF
 - Court responds promptly to requests by the NICS Section’s personnel for information concerning protection orders, especially in light of the strict three-business-day limit imposed upon NICS
 - Courts and other agencies cooperate closely with the NICS Section on audits