



CHANGING SYSTEMS  
TRANSFORMING LIVES



## FEDERAL, STATE, AND CASE LAW OVERVIEW

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# Federal, State, and Case Law Overview

## Summary of Federal Law

Under the Federal Gun Control Act of 1968 and passage of the Lautenberg Amendment (18 U.S.C. §922[g][9]), individuals who have been convicted of a misdemeanor crime of domestic violence in state or federal court are generally prohibited from possessing firearms. The enacted statute (18 U.S.C. § 921 [a][33][A]) defines a misdemeanor crime of domestic violence as any state, federal, or tribal misdemeanor that involves “the use or attempted use of physical force, or the threatened use of a deadly weapon.” The offense must have been committed “by a current or former spouse, parent, or guardian, a person with whom the victim shared a child in common, a person who is cohabiting with or had cohabitated with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.”

The addition of the Lautenberg Amendment greatly increased the breadth of coverage provided under federal law, removing a previously existing exemption for police and military personnel as well as applying retroactively, prohibiting any persons convicted of qualifying misdemeanors at any time from purchasing, possessing, or transferring a firearm.

Federal law further prohibits individuals subject to certain restraining orders from purchasing or possessing a firearm.

As part of the Violent Crime and Law Enforcement Act, 18.U.S.C. § 922(g)(8), it is unlawful for any person who is subject to a court order (issued after a hearing in which the person received notice) that restrains such person from harassing, stalking, or threatening an intimate partner or child or engaging in conduct that would place an intimate partner in reasonable fear of injury, and represents a credible threat to the physical safety of the intimate partner or child to possess a firearm or ammunition. Unlike the Lautenberg Amendment, law enforcement officers and military personnel have limited exemption from this statute.

## Summary of Case Law

Recent case law has trended toward enforcing the limits established by the federal statutes on perpetrators of crimes found to qualify as misdemeanor crimes of domestic violence. In *United States v. Hayes* (2009), the Supreme Court held that all misdemeanors involving the use or attempted use of physical force (such as simple assault or battery) committed by an individual in a domestic relationship with the victim would prohibit the perpetrator from possessing firearms. Notably, the Hayes holding clarified that the Lautenberg Amendment applies to an offender who committed or commits a violent misdemeanor against another with whom they had or have a

domestic relationship (i.e. a partner, spouse, child), even if a state statute does not explicitly define the offense as a domestic violence misdemeanor.

Further, *United States v. Castleman* (2014) held that a perpetrator's state conviction for misdemeanor domestic assault, such as intentionally or knowingly causing injury to the mother of one's child, qualifies as a misdemeanor act of domestic violence under 18 U.S.C. § 922(g)(9), therefore prohibiting the individual from possessing or selling firearms.

While one may wonder how limiting an individual's right to possess firearms could be legal when the Constitution protects a citizen's right to bear arms, the restrictions placed on individuals with past convictions via 18 U.S.C § 922 (g)(8) and (9) do not conflict with the Second Amendment. When dealing with Second Amendment challenges, a majority of courts apply and follow the Supreme Court's holding that firearms can be used by law abiding citizens for self-defensive purposes. However, most people with previous convictions do not qualify as responsible, law abiding citizens, and, as a result, the holding in *District of Columbia v. Heller* does not extend to them.

## Summary of State Law

A number of states have adopted firearm restrictions that apply in domestic violence-related cases. More than a dozen states prohibit people who commit a misdemeanor crime of domestic violence from possessing firearms and approximately two-thirds of states ban abusers subject to domestic violence protective orders from possessing a firearm. State laws can vary in strength, with some states expanding the narrow federal definition of a "misdemeanor crime of domestic violence" to include individuals convicted of any violent misdemeanor (regardless of whether a domestic relationship exists between the offender and victim) or prohibiting an abuser from purchasing and possessing ammunition. While policies differ from state to state, they can commonly be grouped into two categories: policies that grant law enforcement the authority to remove guns from an abuser's possession when responding to a domestic violence incident and policies that give courts the power to order alleged batterers to turn over their firearms.

## Limitations of the Law

Current law undoubtedly protects victims of domestic violence and prevents their offenders from possessing firearms in many cases, however, there are limitations to the federal, state, and tribal prohibitions in place that affect their ability to faultlessly prevent offenders from purchasing and possessing firearms.

### **Dating Violence and Stalking**

While the legal definition of an "intimate partner" includes a current or former spouse, a parent of a child in common with the abuser, or an individual with whom the abuser does or has

cohabited, persons in relationships that fall outside of the listed categories experience domestic violence as well. Currently, an individual who experiences dating violence or stalking is not protected by federal law (unless the individual either lives or lived with or has a child with their abuser), despite findings that indicate that the proportion of intimate homicides involving a boyfriend or girlfriend is increasing. As a result, many states have enacted laws expanding the scope of relationships subject to firearm purchaser prohibitions to address this gap in federal law.

### **Removing Firearms**

Enforcing the removal of firearms already in the possession of an offender falls primarily on state and local law enforcement, which can present a number of challenges. The federal law does not ensure that guns an abuser possesses are removed following conviction for an act of domestic violence and state courts have no responsibility to enforce the removal of firearms, only to notify respondents that their access to firearms and ammunition may be restricted by federal and possibly state laws. As a result, many jurisdictions have no laws or policy directing the removal of firearms from domestic abusers. Even in jurisdictions where removal laws are in place, the implementation and enforcement of firearm removal tend to be lacking – it is not uncommon to hear of a court ordering the abuser to transfer firearms or ammunition to a third party, often a close friend or family member, which can lead to compliance problems.

### **Background Checks and Legal Databases**

Performing background checks on those seeking to purchase a firearm may prevent some offenders, but placing the onus on states to report those who qualify as perpetrators of domestic violence to the proper databases has allowed some individuals to slide under the radar when attempting to purchase a weapon. Background checks conducted by federally licensed firearms dealers rely on state and local authorities to collect and submit complete records on misdemeanor convictions and protective orders to state and federal databases. Some states fail to enter the necessary domestic violence protective order information into the National Crime Information Center database in a timely manner, if at all, as it is not required by law to do so.

Simply gaining access to the federal and state legal databases can prove to be an issue. Currently, tribal governments, law enforcement, and courts do not have clear, easy access to federal and state databases on prohibited individuals, nor an easy way to enter tribal perpetrators into federal and state databases. Despite the passage of the Tribal Law and Order Act of 2010, which mandated that the federal government provide access to federal databases, many tribes are still without direct access to the National Crime Information Center database. As tribes are still commonly barred from submitting data by state authorities, many have entered into agreements with local authorities to enter the relevant information into databases for them; however, many tribes have no involvement with federal or state databases, allowing some perpetrators to slip through the cracks.