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# Firearms Prohibitions in Domestic Violence Cases

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A Guide for Oregon  
Courts

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Violence Against Women Act  
Project -  
Oregon Judicial Department

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## 1. FEDERAL FIREARMS LAWS

Provisions of the federal Gun Control Act of 1968, 18 USC §921 *et seq*, prohibit firearm possession by certain domestic violence perpetrators.

### ***Protective Orders***

It is a federal crime for persons subject to qualifying protective orders to possess firearms or ammunition. In addition to Family Abuse Prevention Act (FAPA) Restraining Orders, firearms restrictions may apply to orders issued pursuant to the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), civil Stalking Protective Order cases, Sexual Abuse Protective Orders (SAPO) and pretrial release conditions and probation conditions in criminal cases.

To qualify under 18 USC §922(g)(8), a protective order must:

- 1) Have been issued after a hearing of which respondent/defendant received actual notice and at which respondent/defendant had an opportunity to participate;
- 2) Restrain respondent/defendant from harassing, stalking, or threatening an intimate partner of respondent/defendant or a child of the intimate partner or respondent/defendant ***or*** engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or the partner's child; ***and***
- 3) Include a finding that respondent/defendant represents a credible threat to the physical safety of the intimate partner or child ***or*** by its terms explicitly prohibits 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.

Federal law defines “intimate partner” for purposes of §922(g)(8) as a spouse or former spouse of respondent/defendant, a person who is a parent of the child of respondent/defendant, or a person who cohabits or has cohabited with respondent/defendant<sup>1</sup>. 18 USC §921(a)(32).

The federal prohibition lasts for the life of the protective order. 18 USC §922(g)(8).

Law enforcement officers and military personnel are partially exempted from the restriction in 18 USC §922(g)(8) in that they are permitted to use a service weapon in connection with that governmental service. 18 USC §925(a)(1). This exemption is often referred to as the “official use exception.”

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<sup>1</sup> Although the term “cohabit,” within the meaning of “intimate partner,” is not defined, the word is sufficiently precise in ordinary and common meaning. *U.S. v. Chapman*, WL 2403791 (W. Va. 2010). “Cohabit” implies a sexual relationship. See *Webster's II New College Dictionary* 218 (2001).

Under 18 USC §922(d)(8), it is a federal crime to sell or otherwise dispose of a firearm or ammunition to a person if the transferor knows or has reasonable cause to believe that such person is subject to a qualifying protective order.

### ***Misdemeanor Crimes of Domestic Violence***

18 USC §922(g)(9) makes it a crime for persons who have been convicted of qualifying misdemeanor crimes of domestic violence to purchase, receive, ship, transport, or possess firearms and ammunition. This prohibition is a lifetime ban<sup>2</sup>. A qualifying “misdemeanor crime of domestic violence” (MCDV) is defined by 18 USC §921(a)(33) as an offense that is a misdemeanor under state, federal or tribal law and:

- 1) Has, as an element, the use or attempted use of physical force or the threatened use of a deadly weapon;
- 2) Is committed by a current or former spouse of the victim; parent or guardian of the victim; a parent of the victim’s child; a person who is cohabiting or has cohabited with the victim as a spouse, parent or guardian; or a person similarly situated to a spouse, parent or guardian of the victim<sup>3</sup>;
- 3) Defendant was represented by counsel or knowingly and intelligently waived counsel; and
- 4) If defendant was entitled to a jury trial, the case was tried to a jury or defendant knowingly and intelligently waived the right to jury trial.

Note that the prohibition of 18 USC §922(g)(9) is specifically excluded from the official use exception. 18 USC §925(a)(1). Thus, a member of the armed forces or a law enforcement officer who has a qualifying misdemeanor conviction is not able to possess a firearm or ammunition, even while on duty.

Under 18 USC §922(d)(9), it is a violation of federal law to sell or otherwise dispose of any firearm or ammunition to any person if the transferor knows or has reasonable cause to believe that such person has been convicted in any court of a misdemeanor crime of domestic violence.

The FBI has designated six Oregon misdemeanors that may meet MCDV requirements if a qualifying relationship exists and the charge includes, as an element, the use or attempted use of physical force or threatened use of a deadly weapon:

- ORS 163.160 -- Assault in the Fourth Degree
- ORS 163.187 -- Strangulation
- ORS 163.435 -- Contributing to the Sexual Delinquency of a Minor
- ORS 166.025 -- Disorderly Conduct

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<sup>2</sup> Exclusions: convictions that have been expunged, set aside, or where defendant was pardoned or had civil rights restored, unless preserved by a state or federal judge.

<sup>3</sup> The 8<sup>th</sup> Circuit Court of Appeals interpreted the phrase “similarly situated” to the spouse of the victim to apply where there is an intimate personal relationship and no cohabitation. *US v. Cuervo*, 354 F3d 969 (8<sup>th</sup> Cir 2004).

- ORS 166.190 -- Pointing Firearm at Another
- ORS 163.445 -- Sexual Misconduct

The U. S. Attorney in Oregon, however, will prosecute a firearms violation after an Oregon MCDV conviction only if the defendant was convicted of **Assault in the Fourth Degree** or **Strangulation**, and the victim and defendant had the required relationship.<sup>4</sup>

## 2. STATE FIREARMS LAWS

SB 525, passed in 2015, created two state crimes that make it unlawful under state law for certain perpetrators of domestic violence to possess firearms and ammunition. These crimes mirror the federal prohibitions at 18 USC §922(g)(8) and 18 USC §922(g)(9), discussed above. Consequently, individuals who are prohibited from possessing firearms and ammunition under federal law are also prohibited from possessing under state law. Thus, state and local law enforcement officers and District Attorney's offices can take action against domestic violence perpetrators who possess unlawfully even when the federal government does not enforce and/or prosecute. The substance of SB 525 was codified at ORS 166.250 and ORS 166.255.

ORS 166.255 contains two scenarios that make possession of a firearms or ammunition unlawful. They are described below.

**SUBJECT TO A COURT ORDER:** ORS 166.255(1)(a) makes possession by a person subject to a court order unlawful when the order:

1. Was issued or continued after a hearing for which the person had actual notice and an opportunity to be heard;
2. Restrains the person from stalking, intimidating, molesting or menacing an intimate partner, a child of an intimate partner, or a child of the person; and
3. Includes a finding that the person is a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the person.

The term "intimate partner" is defined at ORS 166.255(3)(d) and means a person, a person's spouse, a person's former spouse, a parent of the person's child, or another person who has cohabited or is cohabiting with the person in a relationship akin to a spouse.

Under ORS 166.255(1)(a), possession is unlawful only for so long as a person is subject to a court order, i.e., the duration of the order. Also, the prohibition does not apply to possession of a firearm or ammunition imported for, sold or shipped to, or issued for the use of federal or state

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<sup>4</sup> The United States Supreme Court case, *Voisine ET AL., vs. United States (slip opinion, 2016)* determined that misdemeanor domestic violence convictions for reckless conduct (as opposed to intentional or knowing) can also trigger the federal firearm prohibition. Formerly, the US DOJ for the District of Oregon would only accept Assault convictions if they were charged and proven "intentionally or knowingly."

government entities. In other words, Oregon’s law includes the ‘official use exemption’ that applies to 18 USC §922(g)(8) cases.

**CONVICTED OF A QUALIFYING MISDEMEANOR:** ORS 166.255(1)(b) makes possession unlawful if a person has been convicted of a qualifying misdemeanor and at the time the person was a family member of the victim of the offense.

1. “Convicted” is defined at ORS 166.255(3)(a) and means:
  - a. The person was represented by counsel or knowingly and intelligently waived the right to counsel;
  - b. The case was tried to a jury, if the person was entitled to a jury trial, or the person knowingly and intelligently waived the right to a jury trial; and
  - c. The conviction has not been set aside or expunged, and the person has not been pardoned.
2. “Family member” is defined at ORS 166.255(3)(c) means with respect to the victim:
  - a. The victim’s spouse,
  - b. The victim’s former spouse,
  - c. A person with whom the victim shares a child in common,
  - d. The victim’s parent or guardian, and
  - e. A person cohabiting with or who has cohabited with the victim as a spouse, parent or guardian, or a person similarly situated to a spouse, parent or guardian of the victim.
3. “Qualifying misdemeanor,” defined at ORS 166.253(f), is one that has, as an element of the offense, the use or attempted use of physical force or the threatened use of a deadly weapon.<sup>5</sup>

The terms “deadly weapon” (ORS 166.255(3)(b) and “possess” (ORS 166.255(3)(e) have the meaning given those terms in ORS 161.015. “Deadly weapon” means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury. ORS 161.015(2). “Possess” means to have physical possession or otherwise to exercise dominion or control over property. ORS 161.015(9)

ORS 166.255(1)(b) does not include an official use exemption and is a lifetime prohibition. ORS 166.250(1)(c)(G) states that a person commits the *crime of unlawful possession of a firearm* if

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<sup>5</sup> SB 525 went into effect in January 2016. In light of the few months that have passed, it is as yet unknown what crimes state prosecutors will consider “qualifying misdemeanors”

the person knowingly possesses a firearm and the possession of the firearm by the person is prohibited under ORS 166.255.<sup>6</sup>

### 3. BRADY ACT<sup>7</sup>

In 1993, Congress enacted the Brady Handgun Violence Prevention Act (Brady Act). Public Law 103-159 (1993). It requires all federally licensed gun dealers to obtain a criminal background check of firearm purchasers before completing a sale. 18 USC §922(t)(1), *et seq.* In most cases the check is made through the National Instant Criminal Background Check System or “NICS,” which is made up of several computer databases managed by the FBI. During a background check, the FBI will search databases to determine whether the sale of the firearm would violate state or federal laws. The FBI search is limited to three business days. In Oregon, the background checks are conducted by Oregon State Police Identification Services. If no state or federal prohibitions are found within three business days, the sale will be allowed to take place.<sup>8</sup>

Oregon law that requires court staff to deliver protective orders to county sheriffs for entry into the Law Enforcement Data System (LEDS) and the federal National Crime Information Center (NCIC) facilitates the effectiveness of criminal background checks required by the Brady Act. *See e.g.*, ORS 107.720(1)(a) (FAPA); ORS 124.030(1) (EPPDAPA); ORS 163.741(2) (Stalking); and ORS 163.733(1) (SAPO).

#### ***The NICS Improvement Amendments Act of 2007***

The NICS Improvement Amendments Act of 2007, Public Law 110-180 (2008), requires states to provide complete information to NICS on persons prohibited from receiving, possessing, or purchasing firearms. States must comply to avoid a match requirement on certain federal grants.

#### ***SB 525 Implications***

Because Oregon’s new laws mirror the federal domestic violence firearms crimes, any case that imposes federal liability will also impose state liability. For this reason, the firearms certificates for protective order and misdemeanor criminal cases have been revised slightly to reflect their applicability to both federal and state law. Judges, however, will need to complete only one firearms certificate in each case. Local civil deputies will enter the data into LEDS to flag that the respondent/defendant is prohibited from possessing or purchasing under both federal and

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<sup>6</sup> ORS 166.274 provides the authority and sets out a process by which individuals who are barred from possessing firearms under ORS 166.250 or ORS 166.270 or barred from purchasing firearms under ORS 166.470 may file a petition for relief from the bar in circuit court.

<sup>7</sup> “Brady findings” are judicial findings to indicate that the terms of a protective order or a misdemeanor conviction may disqualify a respondent or defendant from possessing or other use of firearms and ammunition under federal law; document is labeled “Federal Firearms Findings (Brady)” and often is called a “Brady certificate.”

<sup>8</sup> SB 941 passed in 2015 and codified at ORS 166.435 requires criminal background checks for some transfers of firearms by private parties.

state law. So doing will provide state law enforcement officers with information that will enable them to enforce state law and will facilitate criminal background checks required for firearms purchases.

#### 4. FIREARMS NOTIFICATION

##### *Violence Against Women Act (VAWA) Notice*

The Violence Against Women Reauthorization Act of 2005 (VAWA), 42 USC § 3796gg-4(e), requires as a condition of eligibility for VAWA grants that the state certify that its judicial and administrative policies and practices include notification to domestic violence offenders of the requirements of the Brady firearm laws and any applicable related federal, state, or local firearms laws. Failure to notify in at least 90% of Oregon's domestic violence cases will cause Oregon to lose VAWA STOP grant funds.

Courts must enter the notice in Odyssey using code **NOGR**. This will allow Oregon to certify compliance with the VAWA judicial notice requirement. Use of the Firearms Notification form may help ensure that the NOGR code is entered in appropriate cases. Notice may be given orally or in writing. According to the FBI, best practice is to give the notice early in criminal cases, preferably at arraignment, although notice may be given at several stages of the criminal proceedings. In protection order proceedings, notice may be written in the order, written on other documents served on respondents, and/or given orally during 21-day, 5-day, and modification hearings. The OJD's model FAPA, Stalking Protective Orders, SAPO, and EPPDAPA Notice to Respondent/Request for Hearing forms include the notice.

##### *ORS 135.385 Notice*

ORS 135.385(2)(f) requires judges to inform a defendant at a plea of guilty or no contest that, if the defendant enters a plea of guilty or no contest to an offense involving domestic violence, federal law may prohibit the defendant from possessing, receiving, shipping, or transporting a firearm or ammunition, and the conviction may negatively affect the defendant's ability to serve in the Armed Forces of the United States or to be employed in law enforcement.

#### 5. FULL FAITH AND CREDIT

VAWA includes full faith and credit provisions that require enforcement of protection orders across jurisdictional lines. Codified at 18 USC §2265-2266, these provisions require states to recognize and enforce valid protection orders issued in any jurisdiction in the United States. Full faith and credit provisions apply to explicit firearm restrictions in protection orders and require

that such restrictions be enforced even if the enforcing jurisdiction does not authorize judges to restrict firearm possession.

A protection order is entitled to full faith and credit if the order was issued by a state, tribal, or territorial court, and the court had jurisdiction over the parties and subject matter under the laws of the state, tribe, or territory, and the person who is restrained was given reasonable notice and an opportunity to be heard. In the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by the issuing court's laws, and in any event within a reasonable time after the order is issued. These orders must be enforced even if the order is not registered in the enforcing state and even if a hearing was not held after the *ex parte* order was issued.

The issuing jurisdiction determines whom the order protects, the terms and conditions of the order, and how long the order remains in effect. The enforcing jurisdiction determines how the order is enforced, the arrest authority of the responding law enforcement agency, detention and notification procedures, and penalties for violations.

OJD's model FAPA, EPPDAPA, SAPO, and Stalking Protective Order forms include Full Faith and Credit language.

## **6. NO CONTACT ORDER ENTRY**

ORS 107.720(1)(a) requires the sheriff to enter FAPA orders into Law Enforcement Data System (LEDS) and National Crime Information Center (NCIC) once service is complete. ORS 135.250(2)(d) provides that ORS 107.720 applies to no contact orders (NCO) in release agreements executed by defendants charged with domestic violence offenses.