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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 AND BRADY FINDINGS<sup>1</sup>

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 cases, 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>2</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.”

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.

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<sup>1</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>2</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).

### ***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>3</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>4</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
- ORS 166.190 -- Pointing Firearm at Another
- ORS 163.445 -- Sexual Misconduct

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<sup>3</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>4</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).

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.

### ***Brady Act***

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.

### ***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.

### ***Recommendations***

Oregon judges and court staff can take several steps to comply with federal laws and ensure that data is entered in appropriate databases. By taking these steps, courts help make certain that information concerning firearms prohibitions is available to law enforcement, which enhances safety for police, victims, and the public, and it facilitates prosecution for violation of federal firearm laws.

1. Judges should notify respondents in qualifying Family Abuse Prevention Act (FAPA), EPPDAPA, and stalking cases that they may be in violation of federal law if they possess, receive, ship, transport, or purchase a firearm or ammunition while the protective order is in effect.

***Action Needed:*** Use OJD’s model FAPA, EPPDAPA, and Stalking Protective Order forms, which contain this notice. *See Section 2, Firearms Notification.*

2. Judges should make federal firearms findings (Brady) in all FAPA, EPPDAPA, and Stalking Protective Orders when the Order is a qualifying protective order under 18 USC §922(g)(8)<sup>5</sup>.

**Action Needed:** Use OJD’s FAPA Order After Hearing form, OJD’s EPPDAPA Order After Hearing form, and OJD’s Stalking Protective Order form.

3. Judges should incorporate federal firearms findings (Brady) in pretrial release agreements with No Contact Orders (NCO) when the NCO is a qualifying protective order under 18 USC §922(g)(8).

**Action Needed:** Use OJD’s Release Agreement addendum after hearing when defendant is granted pretrial release with a No Contact Order and defendant and victim are intimate partners or victim is a child of defendant or defendant’s intimate partner.

4. Judges should make federal firearms findings (Brady) at sentencing on qualifying misdemeanor crimes of domestic violence.

**Action Needed:** Use OJD’s MCDV “Federal Firearms Findings (Brady),” also called “MCDV Brady certificate,” at sentencing on misdemeanor crimes of domestic violence.

5. Court staff should forward Federal Firearms Findings (Brady) to the Sheriff’s Office for entry into LEDS and national databases.

**Action Needed:** Develop procedures to ensure Federal Firearm Findings (Brady), also known as Brady certificates, are sent to the Sheriff’s Office (or other entering agency) promptly.

Court staff should enter Federal Firearms Findings in OJIN using entry code **ORBY**. It is important that the Sheriff or other entering agency has full names of the parties and a numerical identifier for respondents/defendants (such as date of birth, Social Security number, or driver’s license number) to facilitate entry of data in LEDS and national databases. It is possible for courts to obtain this information at various stages of court proceedings.

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<sup>5</sup> Federal firearm prohibitions do not apply to ex parte orders. When a hearing about a protective order is scheduled, respondent receives actual notice, and respondent has an opportunity to participate, the judge should make federal firearms findings (Brady) if the protection order is continued and it meets the requirements of 18 USC §922 (g)(8).

Here are links:

The FAPA Order After Hearing form that incorporates the federal firearms findings:

<http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/forms/2010FAPAUpdate/Packet1/FAPAOrderAfterHearingOBTAIN5-11.pdf>

The EPPDAPA Order After Hearing form that incorporates the federal firearms findings:

<http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/forms/2010EAPAUpdate/EAPAPacket1/EAPAPACKET1MAY2011.pdf>

The Stalking Protective Order form that incorporates the federal firearms findings:

[http://www.ojd.state.or.us/web/ojdpublishations.nsf/Files/StalkingOrder052011.pdf/\\$File/StalkingOrder052011.pdf](http://www.ojd.state.or.us/web/ojdpublishations.nsf/Files/StalkingOrder052011.pdf/$File/StalkingOrder052011.pdf)

The [MCDV Federal Firearms Findings \(Brady\)](#) for use with qualifying misdemeanor crimes of domestic violence.

[Pretrial Release Agreement Addendum](#) for use in DV criminal cases with No Contact Orders.

[Table summarizing firearms laws](#) discussed in this memo.

[Bench guides summarizing federal firearms laws](#)

## 2. 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 OJIN 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. **Here is a link to the [Firearms Notification form](#).**

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. The OJD arraignment video sent to the courts on July 7, 2010 includes the required notice.

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. OJD model FAPA and Stalking Protective Orders 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.

The OJD Firearms Notification form incorporates this language. This language also has been incorporated into the OJD arraignment video, the Uniform Plea Petition, and the Uniform Criminal Judgment. Some local courts have amended their plea petitions to provide this notice.

## **3. 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, and Stalking Protective Order forms include Full Faith and Credit language.

#### **4. MODEL FIREARM SURRENDER PROTOCOLS**

The Oregon Firearms and Domestic Violence Task Force developed model protocols for the surrender of firearms when a respondent or defendant is prohibited from purchasing or possessing firearms under state law. If a county wants to implement surrender protocols, judges and court staff may want to meet with law enforcement, district attorneys, defense lawyers, victims' advocates, legal services, and Community Corrections staff to adapt the protocols for local use. This is the link to the [model firearm surrender protocols](#).

#### **5. 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. Several counties have developed procedures for entry of NCOs into LEDS. The Oregon Firearms and Domestic Violence Task Force developed model protocols for LEDS entry and removal of No Contact Orders.

## 6. OJIN DATA ENTRY CODES

OJD tracks the issuance of judicial orders and notices related to firearms. OJIN data entry codes have been assigned and should be entered in green screen OJIN by court staff when applicable.

Codes are:

<b>Firearms Notification:</b>	<b>NOGR</b> (Notice of Gun Restrictions)
<b>Federal Firearms Findings (Brady):</b>	<b>ORBY</b> (Order re Brady)
<b>Order Restricting Firearms under State law:</b>	<b>FQOR</b> (Firearms Restrictions Order)

The OJIN domestic violence flag, PGM1, may be used to identify domestic violence cases in OJIN. The OJD Domestic Violence Protocols provide a uniform directive on the use of the PGM1 code. A court also may add the CDMV “Constituting Domestic Violence” modifier to a criminal charge in GUI OJIN. When this modifier is added, “Constituting Domestic Violence” will print on the judgment. The Domestic Violence Protocols do not include a directive on the use of the CDMV modifier.