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1117 Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence

The following is the full text of an announcement that was sent by the Criminal Division to the United States Attorneys' Offices upon the passage of Title 18, United States Code, Section 922(g)(9) (the Lautenberg Amendment) in the fall of 1996. This provision amends the Federal Gun Control Act of 1968 by banning the possession of firearms by individuals convicted of a misdemeanor crime of domestic violence.

GUN BAN FOR INDIVIDUALS CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE -- 18 U.S.C. § 922(g)(9)

The 1968 Gun Control Act and subsequent amendments codified at 18 U.S.C. § 921 *et seq.* prohibit anyone convicted of a felony and anyone subject to a domestic violence protective order from possessing a firearm. The intended effect of this new legislation is to extend the firearms ban to anyone convicted of a "misdemeanor crime of domestic violence."

This bill passed with almost unanimous support and represents Congress's recognition that "anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms." *Congressional Record*, p. S11878, September 30, 1996. This new provision affects law enforcement in three interrelated ways. First, it will assist in preventing those individuals who have demonstrated a propensity for domestic violence from obtaining a firearm. Second, it will assist law enforcement by providing a tool for the removal of firearms from certain explosive domestic situations thus decreasing the possibility of deadly violence. Finally, it will serve as a federal prosecution tool in certain situations where alternatives have failed.

Qualifying Offenses: As enacted the statute defines "misdemeanor crime of domestic violence" (MCDV) as any state or federal 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."

This definition includes *all* misdemeanors that involve the use or attempted use

of physical force (e.g., simple assault, assault and battery), if the offense is committed by one of the defined parties. This is true whether or not the statute specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms. It is anticipated that this issue will be subject to litigation. In the event of such litigation, the Terrorism and Violent Crime Section should be notified so that assistance can be provided.

Date of Previous Conviction: The prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. See *United States v. Brady*, 26 F.3d 282 (2d Cir.), *cert. denied*, 115 S.Ct. 246 (1994) (denying ex post facto challenge to a 922(g)(1) conviction) and *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994) (ex post facto based challenge to a 922(g)(4) conviction).

Limitations on Previous Convictions -- 18 U.S.C. § 921(a)(33)(B). To qualify: (1) at the time of previous conviction, the defendant must have been represented by counsel, or knowingly and intelligently waived the right to counsel; (2) if the offense of previous conviction entitled the person to a jury trial in the jurisdiction in which the case was tried, either the case was tried by a jury, or the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise; and (3) the conviction can not have been expunged or set aside, or be an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. The issue of restoration of civil rights must be carefully researched for each potential defendant. For example, in some states a person automatically loses his/her civil rights upon the execution of a sentence of imprisonment (felony or misdemeanor) only to have the rights restored upon the defendant's release from prison or sentence. However, in those states, a person who does not serve a sentence of imprisonment may not lose their civil rights and, therefore, this limitation may not be applicable. But, in *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996), the Court held that in at least some instances if one group of felons may possess a firearm because their rights were automatically taken away and then restored then those who do not have their rights taken away may also possess a firearm. The Terrorism and Violent Crime Section can provide assistance in analyzing particular cases.

There is no law enforcement exception: One of the provisions of this new statute removed the exemption that 18 U.S.C. § 925(a)(1) provided to police and military. Thus, as of the effective date, any member of the military or any police officer who has a qualifying misdemeanor conviction is no longer able to possess a firearm, even while on duty. We now have the anomalous situation that 18 U.S.C. § 925(a)(1) still exempts felony convictions for these two groups. Thus if a police officer is convicted of murdering his/her spouse or has a protection order placed against them, they may, under federal law, still be able to possess a service revolver while on duty, whereas if they are convicted of a qualifying misdemeanor

they are prohibited from possessing any firearm or ammunition at any time. Currently pending before Congress are at least two bills that would substantially modify the impact of the amendment to this section.

Prosecution Considerations: In determining whether a particular case merits federal prosecution, you should consider the following factors: the date of the previous conviction; under what circumstances the firearm was obtained; whether there are indications of current potential for violence (*i.e.*, recent incidents of domestic violence would be a stronger argument for prosecution than if a number of years had passed since any domestic problems had occurred); alternatives available to federal prosecution (state prosecutions, voluntary removal of the weapons); whether the potential defendant was "on notice" that his/her possession of a firearm was illegal; whether the potential defendant had made any false statements in obtaining the firearm.

Even if a determination is made that prosecution is not warranted, steps should be taken to assure that the firearm is removed from the possession of the prohibited individual. Depending upon the situation, this might be done by having a local/state/federal law enforcement officer notify the individual of the application of the new law and offer to take temporary custody of the firearm. In other, more volatile situations, it may be necessary to obtain a search and seizure warrant to assure that the firearm is removed immediately.

ATF has primary investigative responsibility over this section. However, in many locales ATF agents may not be immediately available. The Department will be working with the other federal agencies to determine what if any other investigative alternatives are available. In the meantime, United States Attorneys' Offices should be working with state and local law enforcement to establish guidelines for handling these cases which will often arise in emergency situations, such as when a local officer responds to a domestic complaint and learns that a firearm is present and that one of the parties is prohibited under this statute.

If you need guidance or assistance under this statute you should contact the Terrorism and Violent Crime Section at (202) 514-0849.

[cited in [USAM 9-60.1100](#); [USAM 9-60.1112](#)]