



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Assistant Director

Washington, DC 20226

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OPEN LETTER TO TRIBAL LAW ENFORCEMENT DEPARTMENTS

This letter is to provide you with information about a recent amendment to the Federal Gun Control Act (GCA) and to clarify an existing provision of the GCA. The Omnibus Consolidated Appropriations Act of 1997, enacted September 30, 1996, made it unlawful for any person convicted of a misdemeanor crime of domestic violence (MCDV) to ship, transport, possess, or receive firearms or ammunition. 18 U.S.C. § 922(g)(9). It also made it unlawful for any person to sell or otherwise dispose of a firearm or ammunition knowing or having reasonable cause to believe that the recipient has been convicted of an MCDV. 18 U.S.C. § 922(d)(9).

The 1996 GCA definition of MCDV only included misdemeanors under Federal or State law. On January 5, 2006, Public Law 109-162 (119 Stat. 2960), amended the GCA to provide that misdemeanors "under tribal law" now may qualify as MCDVs. Below is a discussion of how the GCA, including its recent amendment, affects law enforcement officers.

As currently defined in the GCA, an MCDV means an offense that:

- (1) is a misdemeanor under Federal, State, or tribal law; and
- (2) 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.

18 U.S.C. § 921(a)(33). This definition includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon (e.g., simple assault, assault and battery), if the offense is committed by one of the defined parties. Therefore the underlying offense does not have to be specifically defined as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault where the victim was his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

Significantly, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the law's effective date. Every court to address this issue has found that applying the prohibition to pre-September 30, 1996 MCDV convictions is constitutional, and not retroactive punishment. Similarly, therefore, as of January 5, 2006, any person with an MCDV conviction based on a tribal offense is prohibited from possessing firearms and ammunition, even if the underlying conviction occurred prior to January 5, 2006.

Please note, a conviction does not make firearms possession unlawful if the conviction has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) AND the person is not otherwise prohibited from possessing firearms or ammunition. 18 U.S.C. § 921(a)(33)(B)(ii).

Moreover, a person is not considered convicted unless they were represented by counsel in the proceeding for the underlying offense, or knowingly and intelligently waived the right to counsel. 18 U.S.C. § 921(a)(33)(B)(i). If a person has no constitutional or statutory right to appointed counsel for a particular offense, then he or she cannot knowingly and intelligently waive that right. Therefore, such a person cannot be considered convicted of an MCDV if they were not represented by counsel. Similarly, a person is not considered convicted of an MCDV, unless they had a jury trial or knowingly and intelligently waived the right to a jury trial. However, in contrast with the right to counsel discussed above, this exception only applies if the person was entitled to a jury trial. 18 U.S.C. § 921(a)(33)(B)(i)(II).

The GCA does contain an "official use" exception that exempts law enforcement officers who are employees of Federal, State or local government agencies whose government is a political subdivision of the State from certain of the Federal firearm prohibitions. 18 U.S.C. 925(a)(1). Please note: the official use exception does not include tribal law enforcement officers, unless they have been deputized by the Bureau of Indian Affairs or another Federal agency or a State or local government agency. Consequently, unless they are so deputized, tribal law enforcement officers would be prohibited from possessing any firearms or ammunition if they are subject to any of the Federal firearms prohibitions in the GCA.

Moreover, significantly, the official use exception does not include the MCDV prohibition. Therefore all law enforcement officers with qualifying MCDV convictions are prohibited from possessing any firearms or ammunition for any purpose, including performing their official duties. This disability applies to firearms and ammunition issued or purchased by their government agency, as well as firearms and ammunition personally purchased by the law enforcement officer for official use.

In 1996, after this law took effect, ATF sent an open letter to State and Local Law Enforcement Officials (it is currently posted on-line at <http://www.atf.gov/firearms/domestic/opltrleo.htm>) explaining that departments may want to determine if any employee who is authorized to carry a firearm is subject to the MCDV disability and what appropriate action should be taken. We explained that employees subject to this disability must immediately dispose of all firearms and ammunition in their possession. The firearms could be turned over to a third party such as the employing agency, an attorney, or a firearms dealer. The continued possession of firearms and ammunition by persons under this disability is a violation of law and may subject the possessor to criminal penalties. In addition, such firearms and ammunition are subject to seizure and forfeiture.

In addition to the MCDV prohibition, in this letter we wanted to provide information on the Federal law that provides that persons with qualifying restraining orders cannot possess or receive firearms and ammunition. 18 U.S.C. § 922(g)(8).

Specifically, the GCA prohibits persons from possessing or receiving firearms or ammunition if they are subject to a restraining order that:

1. Was issued after a hearing of which the person received actual notice, and at which they had an opportunity to participate;
2. (a) Restrains the person from harassing, stalking, or threatening:
 - (i) his child,
 - (ii) an intimate partner (which includes a spouse, former spouse, someone who cohabitates or has cohabitated with the person, or someone who is a parent of the person's child), or
 - (iii) a child of such intimate partner; or(b) restrains such person from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
3. Either: (a) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (b) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

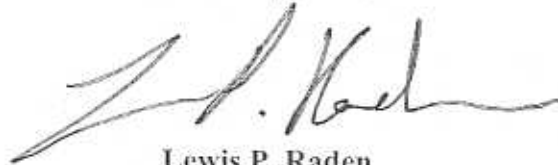
The official use exception contained in section 925(a)(1) does apply to the 922(g)(8) prohibition. Importantly, the official use exception does not extend to personal firearms.

However, as discussed above, the official use exception only applies to Federal, State, and local agencies whose government is a political subdivision of the State. Therefore, as mentioned above, it only applies to tribal law enforcement officers who have been deputized by the Bureau of Indian Affairs or another Federal agency as Federal law enforcement officers or deputized by State or local law enforcement departments. (Please note, State or Tribal law, or an individual agency, may impose an independent restriction on possession). For any other tribal officer under a qualifying restraining order, it is unlawful to possess or receive firearms or ammunition, in a personal or professional capacity. Moreover, it is unlawful to transfer a firearm or ammunition to a person if you know or have reasonable cause to believe they are subject to a qualifying restraining order. 18 U.S.C. § 922(d)(8).

Please note, the restraining order prohibition is temporary. It only applies while the restraining order is in effect.

We recognize that the recent amendment to the GCA expands the universe of persons covered by the MCDV prohibition. Moreover, we realize you may not previously have been aware of the scope of the restraining order prohibition. If your department has questions about these prohibitions, ATF would be happy to provide whatever assistance we can. We also would be happy to provide guidance in how to enforce these laws in the communities that you serve. Please contact the Firearms Programs Division at (202) 927-7770 if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "L. P. Raden", written in a cursive style.

Lewis P. Raden
Assistant Director
Enforcement Programs and Services