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2019

### Domestic Violence Convictions and Firearms Possession: The Law as It Stands and as It Moves

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#### Recommended Citation

Britt, Kate E. "Domestic Violence Convictions and Firearms Possession: The Law as It Stands and as It Moves." *Mich. B.J.* 98, no. 7 (2019): 66-7.

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# Domestic Violence Convictions and Firearms Possession

## The Law as It Stands and as It Moves

By Kate E. Britt

**R**esearch supports a clear relationship between domestic violence and the presence of firearms. Familicides, in which a perpetrator kills multiple close family members in quick succession, are the most common form of mass murder.<sup>1</sup> Most family mass murderers kill their wives or girlfriends, and two of three such perpetrators kill with a gun.<sup>2</sup> In fact, incidents of domestic violence where a gun is present are five times as likely to end in a fatality as incidents with no gun present.<sup>3</sup> Even when domestic violence does not end in death, firearms are frequently used to facilitate coercive control, which is defined as “an intentional pattern of repeated behavior by an abuser to control, denigrate, intimidate, monitor, and restrict an intimate partner.”<sup>4</sup> In 2017 alone, firearms were used in the commission of more than 1,700 domestic violence offenses in Michigan.<sup>5</sup>

Legislatures have attempted to curb instances of gun use in fatal and nonfatal domestic violence by passing statutes restricting possession of firearms for perpetrators of domestic violence. This article explains federal and Michigan law as it stands and discusses current efforts to further limit perpetrators’ access to firearms.

### Federal law

Convicted felons, drug addicts, and dishonorably discharged military personnel, among other classes of persons, are prohibited from possessing firearms by the Gun Control Act of 1968.<sup>6</sup> Those subject to a qualifying protection order may not possess a firearm or ammunition under the Gun Control Act Amendment of 1994.<sup>7</sup> Ex parte emergency and temporary orders do not qualify under this amendment, and the

amendment only applies when the petitioner and respondent to the order are intimate partners. The amendment narrowly defines “intimate partner” as a spouse or former spouse, the parent of the abuser’s child, or current or former cohabitant.

Additionally, an “official use exemption” means that these restrictions do not apply to military personnel, law enforcement officers, and government officials who are required to possess the weapons as a part of their official duties, so long as they are on duty.<sup>8</sup>

Passed in 1993 (25 years after the Gun Control Act prohibited felons from purchasing firearms), the Brady Handgun Violence Prevention Act requires federally licensed gun dealers to conduct background checks using the National Instant Criminal Background Check System, which searches the records of multiple state and federal databases.<sup>9</sup> This system has several significant problems. If the background check takes longer than three days, the law permits sellers to go ahead with the sale. These “default proceeds” accounted for more than 300,000 firearm sales in 2016.<sup>10</sup> Additionally, state databases are only as good as the records states include, and reporting is voluntary. Many databases are incomplete, and often states simply opt out of reporting criminal history records, mental health records, and drug abuse records.<sup>11</sup> Perhaps the biggest shortcoming of the Brady Act is that it applies only to federally licensed dealers, not unlicensed dealers online or at gun shows.

Persons convicted in any court (including state and tribal courts) of a misdemeanor crime of domestic violence are barred from possessing any firearm or ammunition under the Domestic Violence Offender Gun Ban of 1996, aka the Lautenberg Amend-

ment.<sup>12</sup> A misdemeanor crime of domestic violence is defined as any 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.<sup>13</sup>

The United States Supreme Court ruled that the underlying crime need not specify that the defendant and the victim were intimate partners for the Lautenberg Amendment to apply.<sup>14</sup> Additionally, the Court has found that the physical force requirement of a misdemeanor crime of domestic violence is satisfied by the common-law meaning of “force,” and thus includes simple assault and battery.<sup>15</sup> Finally, the Court found in 2016 that a conviction for a “reckless” misdemeanor offense may also satisfy the requirements of the Lautenberg Amendment.<sup>16</sup> The Department of Justice’s *Criminal Resource Manual* elaborates on how this statute should be enforced, including limitations on the previous conviction, the lack of a law enforcement exception, and other considerations in the course of prosecution.<sup>17</sup>

Currently pending in the House of Representatives, the Violence Against Women Reauthorization Act of 2019 would broaden the restrictions on domestic violence offenders in a number of ways.<sup>18</sup> The act would change the definition of “intimate partner” to include former and current dating partners and anyone who lives or has lived with the offender. Additionally, the act would restrict the firearm possession of those convicted of misdemeanor stalking offenses.

Congress.gov provides the full text of these proposals as well as the names of cosponsors and updates regarding their progress.

## State law

States are free to legislate additional provisions restricting the possession of firearms by domestic violence offenders, and these provisions take a variety of forms.<sup>19</sup> Some states broaden the definition of domestic violence to include a violent misdemeanor against more classes of persons, like current or former dating partners, cohabitants, or family members. A handful of states prohibit the purchase or possession of firearms by anyone convicted of a violent misdemeanor, regardless of the status of the victim.

Federal law restricts firearm purchases but does not require offenders to surrender firearms upon conviction; some states shut down this opportunity for possession by authorizing or requiring subject offenders to surrender firearms in their possession. Federal law narrowly defines the type of victim who may seek a qualifying protective order, and some states extend this protection to additional victims—for example, anyone who has had a romantic relationship with, resided with, or is the family member of the person subject to the order.

Additionally, some states prohibit firearm possession by persons subject to ex parte protection orders, instead of only those who received actual notice and a hearing. As of this writing, the only additional restrictions provided by the Michigan legislature authorize a court to restrain or enjoin a respondent from purchasing or possessing a firearm when subject to a domestic relationship personal protection order or nondomestic stalking or nondomestic sexual assault personal protection order.<sup>20</sup> The Michigan Judicial Institute's *Domestic Violence Benchmark* is a good source of the law on statutory firearms and ammunition restrictions in domestic violence cases in the state.<sup>21</sup>

One controversial way states enhance existing gun violence protection laws is through passing “red flag” laws. Red flag laws allow family members or law enforcement officers to apply for an order to temporarily remove

access to firearms from a person who may commit violence.<sup>22</sup> Different states refer to these orders by various names, most commonly “extreme risk protection orders.” Opponents criticize these protection orders for infringing on the constitutional rights of due process and to bear arms.<sup>23</sup>

As of April 2019, 15 states and the District of Columbia have enacted red flag laws,<sup>24</sup> and a similar law is under consideration in the Michigan legislature. The Extreme Risk Protection Order Act would provide for the issuance of an extreme risk protection order; it is pending under House Bill 4238 and Senate Bill 0156.<sup>25</sup> An additional pair of bills—House Bill 4284 and Senate Bill 0157—would amend the current gun law to exclude individuals under an extreme risk protection order.<sup>26</sup> You can track the progress of these bills and subscribe to bill updates through the Michigan Legislature website at [http://www.legislature.mi.gov/\(S\(rj41bx00u31aasbxafnof4\)\)/mileg.aspx?page=Bills](http://www.legislature.mi.gov/(S(rj41bx00u31aasbxafnof4))/mileg.aspx?page=Bills). ■



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