

95-02: Domestic Violence Gun Prohibition--Effects Upon Law Enforcement

March 7, 1995

The federal Violent Crime Control and Law Enforcement Act of 1994, Public Law No. 103-322, 108 Stat. 1796, became effective on September 13, 1994. By reason of one of the law's provisions, law enforcement officers could find themselves in violation of federal law by possessing a firearm while under a domestic violence injunction.

The provision of concern is found at Title XI, Section 110401, of the Crime Bill, "Prohibition Against Disposal Of Firearms To, Or Receipt Of Firearms By, Persons Who Have Committed Domestic Abuse."

The prohibition against shipping, transporting, receiving or possessing firearms or ammunition applies to anyone who is subject to a domestic violence injunction, described in the law as a:

...court order that restrains such persons from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing or which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) 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.

This new section has been numbered 18 USC § 922(g)(8).

As noted in an October 26, 1994, advisory memorandum from Roy Caldwell Kime, International Association of Chiefs of Police (IACP) Legislative Counsel to IACPNet Subscribers which was distributed November 2, 1994, the above section makes it a federal crime for any person, including law enforcement officers, to possess firearms if they are under a court issued adult/spouse abuse order issued after notice and opportunity to appear.

It is a violation of federal law for the officer to receive, purchase, or possess a firearm during the term of the order. In his memorandum, Kime also stated that an IACP member had been advised that another federal statute, 18 USC § 925(a)(1) exempted law enforcement officers while "on duty," but that when the officer went off duty, the weapon would have to be left at the agency and an off duty officer could not "go to a place of residence where firearms are kept."

In a letter to Mr. Daniel Rosenblatt, Executive Director of the IACP, dated November 21, 1994, Daniel R. Black, signing for ATF Director John W. Magaw attempted to clarify and state the Bureau of Alcohol, Tobacco, and Firearms' position that the new section (922(g)(8)) makes it unlawful for a person subject to a restraining order to receive, ship, transport or possess firearms or ammunition. ATF noted the domestic violence injunction must include a specific restraint from harassing, stalking, or threatening an "intimate partner" of the person; must have been issued after hearing of which notice and opportunity to be heard was provided; and must include language finding that the person subject to the order represents a credible threat to the "intimate partner" or child of the "intimate partner" or language explicitly prohibiting the use, attempted use, or threatened use of force against the partner.

ATF noted that "Notwithstanding the above, 18 U.S.C. §925(a)(1) states that the provisions of the (Gun Control Act) do not apply with respect to the transportation, shipment, receipt, possession or

importation of any firearm or ammunition sold or shipped to, or issued for, the use of any Federal or State governmental entity."

The ATF has interpreted the federal law as not prohibiting possession of a firearm or ammunition by a law enforcement officer whether on or off duty IF the officer's official duties require the possession. Possession in a personal capacity would be prohibited.

Addressing the "on duty or off duty issue," ATF indicated that it has "...interpreted the (Gun Control Act) as not prohibiting a person having Federal firearms disabilities, including being subject to a disabling restraining order, from receiving or possessing a firearm or ammunition for use in performing official duties on behalf of a Federal, State, or local law enforcement agency. This provision applies to an officer's possession of a firearm or ammunition whether on or off duty, as long as the officer's official duties require the possession of the firearm or ammunition. On the other hand, Federal law would be violated if an officer subject to a disabling restraining order receives or possesses a firearm or ammunition in a personal capacity." (Emphasis supplied.)

The ATF position relies in part on legislative history suggesting that language was added to §925(a)(1) to clarify that the provisions of the act do not apply to possession of a firearm by an employee of Federal, State or local government agencies in connection with official duties.

A member of the Department of Justice's Criminal Division in Washington, DC has indicated that to date no formal advisory has been issued by DOJ regarding this matter. Even in the absence of a formal statement from DOJ, it would appear that law enforcement agencies could reasonably give the publicly stated position of ATF appropriate weight.

Assuming that the ATF interpretation is correct, and that the U.S. Attorney in your jurisdiction would look to whether an officer meets the criteria for relief from the firearms prohibition, it would appear, that law enforcement agencies should address the following concerns:

(1) Does your agency have a mechanism in place requiring an officer to notify you immediately when he/she has had an domestic violence injunction entered against him/her?

(If no mechanism is in place, should one be implemented to assure notification of the employing entity's management as soon as possible after an injunction has been issued? While management may not personally be aware of an injunction, the agency may have been placed on notice by receiving a copy of the injunction, by the injunction having been served by a deputy of the agency, or by other means.)

(2) Once notified of an injunction, the agency should determine whether the injunction falls within the type of injunction invoking the federal firearms prohibition. Certain specifics as required by the law must be present to make the injunction one of concern. Not every domestic violence injunction may contain the necessary elements to bring under the federal firearms prohibition.

Certain specifics must be present in the injunction to bring it under the federal firearms prohibition language.

Keep in mind, however, that many "boiler plate" injunctions will include language making them of concern, so it is likely that an injunction issued after notice and opportunity to be heard will have the required language in it. If the injunction invokes the firearms prohibition, then an agency response is needed.

(3) If an officer falls within the federal firearms disability, the employing agency must carefully weigh the language of the federal law and determine for itself to what extent an officer's "official duties" require possession of a firearm and ammunition.

An agency must carefully determine an officer's "official duties."

While it is ATF's interpretation that the 18 U.S.C. § 925(a)(1) exception from disability will apply to officers both on and off duty, "as long as the officer's official duties require the possession of the firearm or ammunition," an employing agency must determine whether "off duty" hours require the officer, as part of his/her "official duties" to possess a firearm or ammunition.

(If certain firearms are considered possessed as part of "official duties," the agency may wish to document to what extent the "official duties" exemption will apply. An agency may need to document the firearm types and serial numbers to assure that only specified firearms are included in the agency's concept of "official duties.")

If a decision is made that an officer is to possess a firearm only while on duty, then the agency may need to make arrangements for the officer to secure his/her firearm and ammunition at an agency location during off duty hours.

An agency may need to obtain an officer's assurance that s/he has taken steps to avoid violating the federal law.

(4) If an officer falls under the injunction prohibition, the agency may want to consider whether it should obtain the officer's assurance that any personally-owned firearms other than those that might be possessed as part of "official duties" are no longer in the officer's possession. Otherwise, the officer may be standing in criminal violation of federal law. In the least, an agency may wish to place the officer on notice that discipline and possibly prosecution could result if the officer is found to be possessing firearms and ammunition in violation of the federal law.

In determining "official duties," agencies may have to make separate determinations as related to on duty and to off duty status. It is possible that an officer's "official duties" could be narrowly defined to be applicable only when the officer is "on duty." On the other hand, such distinctions may be difficult to draw or defend, as many officers may arguably be determined to have "official duties requiring the possession of a firearm or ammunition" 24 hours a day, whether technically "on duty" or "off duty."

For example, a member of a technical response team may be subject to call out at any hour of the day, and as a part of the officer's responsibilities, is required to maintain specialized firearms in the officer's vehicle or at his residence.

Many officers may have personal security concerns about not being allowed to carry a firearm off-duty for protection, particularly in smaller communities where the officer may be commonly known to be a law enforcement officer even when he or she is off duty. Department obligations imposed upon officers such as having a duty to "enforce the law when a violation is apparent whether on duty or off" may impact the decision as to the nature and extent of "official duties" since officers may claim they cannot engage in such activity if they are not armed.

If a decision is made to allow the officer to possess a firearm only when "on duty," then other factors may need to be carefully considered. Should the officer be allowed to drive a readily identifiable patrol car when off-duty or wear his/her uniform to and from home to work? Is it wise to allow an officer who is unarmed to be in uniform, drive a patrol car, or otherwise "appear" to be in a position where those seeing the officer would believe the officer to be armed? Will the ultimate decision of the agency may have an impact on agency administration concerns such as collective bargaining issues or payment of officers' wages?

Some departments allow officers to check "on duty" from their residences as soon as they enter their take-home patrol cars. If such officers are to possess a firearm only when "on duty" then where must the firearm be maintained while "off duty?" In the trunk of the patrol car? Such an option places "form" over "substance" since the enjoined officer presumably maintains the keys to the trunk of the assigned vehicle and could easily access the firearm if he intended to violate the injunction, and raises a question whether the officer actually remains "in possession" of the firearm.

On the other hand, the intent and spirit of the injunction should not be casually ignored. If, after

notice and opportunity to be heard (where presumably the officer's employment status is known) a court still imposes restrictions invoking the firearms limitations, should an agency in effect invalidate the court's restrictions in whole or in part by relying upon the "relief from disabilities" language? Isn't there an expectation that the officer who is subject to the injunction be deprived of firearms while the injunction is valid? Should not the potential victim(s) be granted the protection the injunction attempts to provide? Such concerns may weigh heavily in favor of limiting an officer's "official duties" to "on duty" times only.

As can be seen by the above discussion, the practical problems of trying to reach a balance between the interests of the agency, the officer, those sought to be protected by an injunction, the court, and all others involved in this issue are myriad. There is no easy resolution of the problem. In the least, however, an agency should place itself in the position to determine whether a problem exists by assuring that any officers potentially falling under such injunctions bring the matter to the agency's attention promptly. Once the problem has been identified, the agency, working carefully with its legal advisor, will have to fashion its individual response to the situation.

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