

# 96-03: Recent Federal Firearms Law Changes And Their Effect Upon Law Enforcement

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One of your agency's good officers is John Doe. When he was hired as an officer at the age of 24, it was known that he had, at the age of nineteen and upon advice of his appointed defense attorney, pled guilty to a misdemeanor battery charge based upon slapping his wife open-handed. The incident was observed by a police officer, who arrested Doe at the time. Doe entered counseling, and by all measures, has successfully modified his behavior. He remains married to his wife, celebrating their 25th Anniversary this year. Doe has never had an excessive force complaint filed against him, and other than the misdemeanor conviction over two decades ago, he has had no blemish on his career. However, today John Doe faces a career crisis and his agency faces a real dilemma since by reason of a new federal law, Doe is prohibited from possessing any firearms or ammunition, whether on or off duty. This Bulletin discusses the effects of the recent federal law changes.

In the final hours of the 104th Congress, the Omnibus Consolidated Appropriations Act of 1997 ("the Act") was passed. Included in the Act were amendments to the Gun Control Act of 1968 that now make it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition. The amendments also make it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing, or having reasonable cause to believe, that the recipient has been convicted of such a misdemeanor. The new prohibitions apply to all persons, including law enforcement officers.

There is no "possessing during the course of official duties" exemption in the Act. As a consequence, there probably are law enforcement officers in Florida who are now prohibited by federal law from possessing firearms and ammunition whether on or off duty.

The Federal law has no exemption for law enforcement officers even when on duty.

## **"Misdemeanor crime of domestic violence" defined:**

A "misdemeanor crime of domestic violence" is defined as a misdemeanor under Federal or State law which "...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...."

## **What constitutes a "conviction" is subject to certain restrictions specified in the law.**

While the definition is very broad, particularly in considering who is a "person similarly situated..." there are exceptions. A person is not considered to have been "convicted" for purposes of the federal law if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored *unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.*

A person is not considered "convicted" for purposes of the federal law unless the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case, and if the offense offered the right to a jury trial, there was either a jury trial or the person

knowingly and intelligently waived the right to have the case tried by jury, either by guilty plea or otherwise.

A "withhold" may or may not subject a person to the federal law. Federal authorities will consider one "convicted" during the period of time a court has the power to modify a sentence by adjudicating a person or revoking probation. Once that period time has passed, so that the court cannot change its "withhold," one receiving a "withhold" is not considered "convicted." See: U.S. v. Gispert, 864 F.Supp. 1193 (So. Dist. Fla. 1994).

Determining what offenses constitute a "conviction" under the law will not be easy. For example, Florida Statute 784.011, Assault, is a second degree misdemeanor related to threatening by word or act to "do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Criminal history records will reflect simply a conviction for Assault, F.S. 784.011. The determination of whether a particular assault conviction reflects the factors that would make the assault a "misdemeanor crime of domestic violence" is a labor-intensive effort. It will require either an admission by the defendant that the situation was domestic in nature, or a review of court or arrest records to determine the relationships involved.

For older convictions, the records that might provide the necessary information may have been purged as a routine part of records retention schedules. (Under Florida's "General Records Schedule GS2-Law Enforcement Records," second degree misdemeanor criminal investigative records shall be retained only a minimum of one year after the offense was committed before they may be destroyed pursuant to established public records destruction procedures approved by the Florida Secretary of State's Division of Library and Information Services, Bureau of Archives and Records Management. First degree misdemeanor criminal investigative records need be retained only two years after the offense was committed before they may be destroyed pursuant to approved schedules.)

**The scope of behavior that constitutes a "misdemeanor crime of domestic violence" is very broad-reaching.**

The BATF has, in an "open letter to all state and local law enforcement officials" related that the definition includes "all misdemeanors that involve the use or attempted use of physical force (e.g. simple assault, assault and battery) if the by one of the defined parties." The offense is committed BATF further warns that or local ordinance specifically this is true whether or not the State statute defines the offense as a "domestic violence misdemeanor."

The scope of the definition is far-reaching. The law applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date of September 30, 1996. Since the law indicates it applies to any misdemeanor crime of domestic violence, it would make no difference if the crime was committed years earlier.

The prohibition against possessing firearms and ammunition applies to government-issued firearms and ammunition as well as privately-owned firearms and ammunition. The BATF advises, "Employees subject to this disability must immediately dispose of all firearms and ammunition in their possession. 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." The BATF continues to advise that such firearms and ammunition are subject to seizure and forfeiture. The BATF advises that all its forms are being revised to reflect the new category of prohibited persons.

**The Impact Upon Florida Law Enforcement Agencies:**

Every law enforcement agency must now confirm that its firearms-carrying personnel are not disabled from possessing firearms and ammunition by operation of the new federal law. At least two possible methods of verification may be considered, although other methods may also be utilized.

First, an agency may wish to prepare a statement to be made under oath before a notary that causes each employee to affirm that he or she had not been convicted of offenses falling within the definition of a "misdemeanor crime of domestic violence." Some federal agencies apparently will be utilizing this method of verification. If this method is selected, the affidavit's wording should be carefully done to assure there is no "confusion" by the Affiant as to what types of offenses are within the scope of the federal law. Since the scope of offenses included in the federal law is not readily apparent, settling upon appropriate language in the affidavit may be difficult. The "affidavit" method is also limited by the fact that an agency head is relying upon the subjective interpretation of the affected officers.

A second alternative is for the agency to run a criminal records check on all affected employees. Upon securing the records, the histories should be carefully reviewed to determine if any convictions appear to be within the federal law's prohibitions. This may require secondary efforts of securing the details for convictions. A conviction for an assault will not necessarily indicate that the assault occurred in a domestic situation. A review of the charging document or the arrest affidavit in the case may be required to determine the true nature of the conviction. This is the method utilized by FDLE.

Background investigations units must be advised that entries suggesting any conviction that might fall under the federal prohibitions should be carefully reviewed, with appropriate follow-up inquiry into the circumstances of the conviction being done.

If an agency determines that one of its employees falls under the federal prohibitions, it should assure that the firearms disabled employee is not in possession of agency-owned or issued firearms or ammunition. The BATF points out that continued possession by a firearms disabled person is a criminal violation and the firearms and ammunition are subject to seizure and forfeiture.

Agencies may have to revise their policies if their sworn personnel become firearms-disabled under the federal law. If an agency's policy requires all sworn personnel to demonstrate firearms proficiency by qualifying on a regular basis, how can a firearms-disabled officer meet the requirement if he or she cannot lawfully possess a firearm or ammunition?

Ultimately, an agency head may have to determine the employment status of an employee. Can the agency justify maintaining a sworn employee at the pay and benefits level of other sworn employees if the employee is prohibited from possessing what the agency has defined as an essential "tool of the trade" for law enforcement? On the other hand, does the sworn officer have a protected interest in maintaining his status?

The collective bargaining, career service, and other labor related issues will be challenging. Agency heads should consult with legal counsel before taking any employment related actions against firearms-disabled personnel, knowing there will be additional concerns regarding actions against sworn personnel..

#### **Effect On An Officer's Certification:**

In order to successfully complete basic recruit training, those certified by the Criminal Justice Standards and Training Commission must demonstrate high-liability proficiency skills (11B-35.0024, Florida Administrative Code.) Among the required courses to obtain the skill is CJD-705, Criminal

Justice Weapons, required of all law enforcement, corrections, and correctional probation officers. This course requires demonstrated proficiency in the use of both a service handgun and shotgun.

Since one who falls under the federal law's firearms disability cannot legally possess firearms or ammunition, completing the basic recruit training successfully will be impossible unless the recruit violates federal law. Consequently, agencies should carefully review their recruits' criminal histories to assure they can validly participate in basic training before the candidates begin that training. Those training centers that allow independent candidates to attend recruit training should implement some method of assuring that they are not facilitating the violation of federal law by providing firearms training to a student who is firearms disabled under the law.

Once certification has been granted, the Criminal Justice Standards and Training Commission does not require continued firearms training, although continued training is strongly recommended. Once an officer becomes a part of an agency, the issue of being "firearms disabled" then becomes one for the agency to address.

**BATF Information Sites:** The BATF advises that persons having questions regarding the Act may contact a local BATF office, or may call the BATF Firearms and Explosives Regulatory Division at (202) 927-8300. Information regarding the federal law is available on the BATF's web site. The BATF's internet address is: <https://www.atf.gov/content/atf-online>

Once on BATF's home page, click on the "firearms" entry, then select "information" and then scroll down to the section labeled "Misdemeanor Crimes of Domestic Violence." At that site, a copy of the federal law and open letters from BATF Director John W. Magaw can be accessed.

**For Further Information Contact:**

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