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Firearms Eligibility: Stalking- and Domestic Violence-Related Provisions in H.R. 1585

On March 27, 2019, the House Committee on the Judiciary reported, as amended, the Violence Against Women Reauthorization Act of 2019 (H.R. 1585). This bill includes several provisions that seek to reduce firearms-related intimate partner violence (homicides and injury) by amending federal law to prohibit persons convicted of misdemeanor stalking crimes from receiving or possessing a firearm or ammunition, as well as revising related provisions governing domestic violence protection orders and a definition of “intimate partner” under current law. This bill also includes other provisions related to leveraging state, local, tribal, and territorial resources to increase federal investigations and prosecutions of firearms-related eligibility offenses related to domestic violence and stalking.

Prohibited Persons and Domestic Violence

Under current law, 18 U.S.C. §922(g) prohibits nine categories of persons from receiving or possessing firearms or ammunition; and 18 U.S.C. §922(d) prohibits any person from transferring or otherwise disposing of a firearm or ammunition to any person if the transferor has reasonable cause to believe the transferee would be prohibited under one of those nine categories. Two of those categories speak directly to domestic violence:

persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner (18 U.S.C. §§922(d)(8) and (g)(8)); and

persons convicted of a misdemeanor crime of domestic violence (18 U.S.C. §§922(d)(9) and (g)(9)).

“Intimate Partner” Definition

Under current law, the term “intimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person (18 U.S.C. §921(a)(32)). H.R. 1585 would expand the “intimate partner” definition to include

a dating partner or former dating partner (as defined in section 2266 [of Title 18, United States Code]); and

any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

Under 18 U.S.C. §2266(a)(10), the term “dating partner” refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser; and the existence of such a relationship is based on a consideration of: (1) the length of the relationship; (2) the type of relationship; and (3) the frequency of interaction between the persons involved in the relationship.

“Misdemeanor Crime of Stalking”

H.R. 1585 would make any person convicted of a “misdemeanor crime of stalking” a tenth category of prohibited persons. The bill would define such a crime as any misdemeanor stalking offense under federal, state, tribal, or municipal law; and one that in a course of harassment, intimidation, or surveillance of another person that places that person in reasonable fear of material harm to the health or safety of her or himself, an immediate family member of that person, a household member of that person, or a spouse or intimate partner of that person; or that causes, attempts to cause, or would reasonably be expected to cause emotional distress to any of those persons.

The proposed definition is subject to certain mitigating factors. A person would not be considered to have been convicted of a misdemeanor crime of stalking, unless (1) the person was represented by counsel in the case, or (2) they knowingly and intelligently waived the right to counsel in the case. In the case of a prosecution for a misdemeanor crime of stalking for which a person was entitled to a jury trial, a person would not be considered convicted in the jurisdiction in which the case was tried, unless (1) the case was tried by a jury; or (2) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea, or otherwise.

“Protection Orders” or “Court-Order Restraints”

H.R. 1585 would also expand the scope of “protection orders” or “court-order restraints” under 18 U.S.C. §§922(d)(8) and (g)(8). Under current law these provisions prohibit any person from firearms receipt, possession, or transfer, who is subject to a court order that:

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

(B) restrains such person 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; and

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

H.R. 1585 would substantively amend the domestic violence protection order prohibition (18 U.S.C. §922(g)(8), and §922(d)(8), by reference) to include specifically restraining orders under state, tribal, or territorial law that are issued after an **“ex parte”** hearing, and to expand it to include restraining orders related to **“witness intimidation.”** The legal term “ex parte” (“for one party”) refers generally to court motions, hearings or orders granted on the request of and for the benefit of one party only without the respondent/defendant being present. H.R. 1585 would add the following at the end of 18 U.S.C. §922(g)(A):

in the case of an ex parte order, relative to which notice and opportunity to be heard are provided—
(I) within the time required by State, tribal, or territorial law; and (II) in any event within a reasonable time after the order is issued, sufficient to protect the due process rights of the person.

Notwithstanding the reference to “due process” in the amending language, this language could potentially generate considerable debate about the balance between due process and public safety. In addition, at the end of clause 18 U.S.C. §922(g)(B), it would add, “intimidating or dissuading a witness from testifying in court,” which may appear less controversial, but critics might observe that such language has little to do with domestic violence.

Firearms Background Checks and Investigations and Prosecutions of Denied Persons

The Gun Control Act of 1968 (GCA, 18 U.S.C. §921 et al.) sets out certain recordkeeping and background check requirements for persons licensed federally to deal in firearms, otherwise known as federal firearms licensees (FFLs). The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473 is the linchpin to the GCA recordkeeping process, in addition to the maintenance of a bound log of firearms acquisitions and dispositions. As part of any firearms transaction between an FFL and an unlicensed, private person, both the FFL and prospective unlicensed purchaser must truthfully and completely fill out, and sign, an ATF Form 4473.

For his or her part, the FFL must verify the prospective purchaser’s name, date of birth, state residency, and other information by examining government-issued identification, which most often probably includes in part a state-issued driver’s license. The prospective purchaser attests to three things, that he or she: (1) is not a prohibited person, (2) is who he or she says he or she is, and (3) is the actual buyer. Straw purchases are a federal crime: It is illegal to pose as the actual buyer, when in fact you are buying the firearm for another person. Making any materially false statement to an FFL is punishable by up to

10 years’ imprisonment. The completed and signed Form 4473 serves as the FFL’s authorization to initiate the National Criminal History Background Check System (NICS) pursuant to 18 U.S.C. §922(t). Administered by the Federal Bureau of Investigation (FBI), NICS queries several data systems for records disqualifying an individual from receiving and possessing a firearm under federal or state law. NICS will respond with one of three instructions: proceed, denied, or delayed. In the latter case, a firearms transaction is delayed for up to three business days, at which point, the FFL may proceed with the transaction at his or her own discretion, if he or she has not received a final NICS determination, either proceed or denied. Nevertheless, the FBI nearly always processes a background check until a final NICS eligibility determination is made.

Following these background checks, the FBI routinely makes referrals to the ATF on persons who have been denied a firearms transfer (standard denial); and those who were found to be ineligible, but were transferred a firearm after the delayed sale period before a final determination of ineligibility (deferred denial). ATF agents often refer to such cases colloquially as “lying and trying” and “lying and buying,” respectively. In the case of a deferred denial, based on an FBI-referral and when justified, ATF and/or the chief law enforcement officer (CLEO) in the relevant jurisdiction will initiate a firearms retrieval action.

With regard to NICS denials in general, denied persons could potentially be prosecuted for making false statements to an FFL. However, the Government Accountability Office reported in September 2018 that few individuals are federally prosecuted for such offenses. For FY2016-FY2017, six individuals were prosecuted for standard denials and 19 for deferred denials, even though the ATF referred 23,777 such cases to its field divisions for investigation. (See GAO-18-440, *Few Individuals Denied Firearms Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions.*)

H.R. 1585 includes several provisions designed to increase NICS denial investigations and prosecutions, particularly in those cases related to domestic violence and stalking. For example, provisions of the bill would require NICS to notify certain federal, state, local, and tribal law enforcement agencies about any NICS denial related to domestic violence or stalking, including deferred denials upon discovery by the FBI. It would also authorize the Attorney General to cross-deputize state, local, tribal, and territorial attorneys and law enforcement officers for the purposes of investigating and prosecuting NICS denial cases. In addition, the bill would require the Attorney General to identify no less than 75 jurisdictions with high rates of firearms-related violence among intimate partners, where local authorities lack the resources to address such violence, as a criterion for prioritizing the cross-deputization of state, local, tribal, and territorial government attorneys and law enforcement officers to assist in criminal cases related to NICS denials.

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