

# Restoring the Right to Possess Firearms under Federal Law

The laws that govern the ownership and use of firearms are a highly complex web of state and federal regulations, which has generated a great deal of confusion about exactly when and how an individual's firearms rights are forfeited and the circumstances under which they can be restored.

The purpose of this section is to summarize briefly when a conviction prohibits someone from possessing guns or ammunition, as well as the available avenues of relief for the removal of such "civil disabilities," thereby restoring a person's federal firearms rights.

If you have been convicted of a disqualifying offense, it is essential that you have a basic understanding of the rules in this area, because the possession of most ordinary firearms by a prohibited person, even if only for hunting or sporting purposes, is potentially a serious criminal offense for which you could be incarcerated.<sup>1</sup>

## I. The Felon-In-Possession Statute

The Gun Control Act of 1968, 18 U.S.C. § 922(g), makes it a criminal offense for a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to knowingly possess or receive "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." This provision is commonly known as the "felon-in-possession" statute, although it also applies to several other categories, including illegal aliens, fugitives, drug addicts, dishonorably discharged veterans, and persons subject to a protective order.

Each of these elements is discussed below.

### Prior Felony Conviction

First, a prohibited person must have been convicted of a crime "punishable by imprisonment for a term exceeding one year," regardless of the actual sentence imposed. In other words, it is not necessary that the defendant was in fact sentenced to prison for more than a year,

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<sup>1</sup> Firearms laws are subject to frequent revision and judicial interpretation. Moreover, this summary does not attempt to address the adverse consequences of a state conviction, due to the variety and complexity of state firearms laws and relief mechanisms. Accordingly, this summary is provided for informational purposes only, as an aid to further inquiry, and should not be construed as legal advice. If you have been convicted of any offense, state or federal, you should consult with a competent attorney about the specific circumstances of your case before you attempt to acquire or use firearms.

but only that the maximum authorized penalty for the offense of conviction is more than one year's imprisonment. Under federal law, any such offense is classified as a "felony."

If the maximum authorized penalty is one year or less, then the offense is classified as a "misdemeanor" and a conviction does not give rise to a firearms disability, unless it was "misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Section 921(a)(33) defines this term as a misdemeanor offense, such as a simple assault, that involves "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." Although these are typically state offenses, it is possible to be convicted of a misdemeanor crime of domestic violence in federal court.

The President's authority to pardon "offenses against the United States" includes violations of the criminal code of the District of Columbia. Although the District of Columbia has no general statute that defines the term "felony," the local courts have defined it to mean "any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors." Hence, the same rules apply to those convicted in the Superior Court of the District of Columbia.

The President is also authorized to pardon military convictions. The Uniform Code of Military Justice does not classify offenses as "felonies" or "misdemeanors." However, under military law, only general courts-martial are authorized to impose a penalty of confinement for more than one year. Thus, a conviction for any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, is the functional equivalent of a felony and can serve as a predicate conviction for purposes of 922(g)(1).

The effect of the statute, then, is to impose a permanent lifetime firearms disability on anyone convicted of a disqualifying offense, regardless of whether the underlying facts involved the misuse of a weapon or assaultive behavior. For example, filing a false tax return carries a maximum penalty of three years' imprisonment and is thus sufficient to trigger the lifetime ban. The only types of felonies that do not have this consequence are "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices."

## **Knowing Possession of a Firearm**

The second requirement for conviction under the felon-in-possession statute is that the weapon in question must be defined under federal law as a "firearm" or as "ammunition." However, these definitions are quite broadly written and, unlike some state laws, cover not only handguns, but also most rifles and shotguns. Thus, a "firearm" is defined as "any weapon . . .

which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3).<sup>2</sup>

Strictly speaking, the legally operative part of a firearm is the “frame” or “receiver.” This is the part of the weapon that is designed to hold the firing mechanism in place, to which is attached the grip, trigger housing, stock, barrel, and so on. Hence, a collection of parts that appears to be a weapon does not qualify as a firearm if it lacks a receiver. On the other hand, an inoperable or broken weapon generally does qualify as a firearm, at least if it can be readily restored to a functional condition.

Generally speaking, there are two exceptions to this definition: (1) an “antique firearm” manufactured before 1898, or a replica thereof; and (2) a “muzzle loading” rifle, shotgun, or pistol, “which is designed to use black powder . . . and which cannot use fixed ammunition.” If a weapon is composed of a receiver that was manufactured before 1898 and one or more newer parts, then it qualifies as an unregulated antique firearm.

Ammunition is defined under the statute as “ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.” 18 U.S.C. § 921(a)(17)(A). As this definition makes clear, any one of the component parts of ammunition is sufficient to qualify as “ammunition” under the statute.

## **In or Affecting Commerce**

The third element requirement for conviction under the felon-in-possession statute is that the defendant’s possession of the firearm or ammunition in question was “in or affecting interstate or foreign commerce.” This element merely requires the government to make the minimal showing that the firearm at issue crossed a state or international boundary at some point prior to its possession by the defendant, which is true of most commercially available firearms and ammunition. It does not require proof that the defendant himself traveled across a state or international boundary in possession of the firearm. Nor is it necessary to prove that the defendant was aware that the firearm had crossed such a boundary.

Finally, although not technically an element of the offense, it is important to stress that the government generally does not have to prove that a defendant had actual knowledge of his status as a felon or that his possession of a firearm was illegal, but only that he was a prohibited person who knowingly possessed a “firearm” or “ammunition” as those terms are defined under

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<sup>2</sup> The definition of a firearm also includes a silencer or a muffler and any “destructive device,” such as a grenade, rocket launcher, or bomb. 18 U.S.C. § 921(a)(3). In addition, the National Firearms Act of 1934 prohibits anyone from, among other things, possessing a machine gun or a short-barreled shotgun or rifle without proper registration. These firearms are defined in 26 U.S.C. § 5845.

federal law. *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995); *United States v. Dancy*, 861 F.2d 77 (5th Cir. 1988).<sup>3</sup>

## II. Removal of Federal Firearms Disabilities

Through a convoluted series of events, if you have been convicted of a disqualifying federal or military offense, the only method currently available for obtaining relief from the resulting firearms disability is a presidential pardon.<sup>4</sup>

In 1986, Congress amended the Gun Control Act with the passage of the Firearms Owners Protection Act (FOPA), which was the first comprehensive reform of the federal firearm laws in nearly twenty years. The FOPA clarified a variety of anomalies in the existing law, including that the definition of a “felony conviction” must be “determined in accordance with the law of the jurisdiction in which the proceedings were held.” This is the so-called “choice of law clause.”

The FOPA further provides that “[a]ny conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction” for purposes of the felon-in-possession statute. This is the so-called “exemption clause.” It means that a prohibited person’s firearms disability is removed if his civil rights have been fully restored through any of the enumerated relief mechanisms.

The United States Supreme Court finally resolved this question in *Beecham v. United States*, 511 U.S. 368 (1994), which holds that the restoration of firearms rights, like the classification of the offense, is governed by the law of the convicting jurisdiction. Thus, if a person is convicted of a disqualifying federal or military offense, his firearms rights must be restored through a federal relief mechanism. It follows that a state restoration of civil rights does not remove a federal felon’s firearms disability, even if it specifically restores his firearms rights under state law, as some federal courts had previously held. After *Beecham*, a federally convicted person will be hard-pressed to claim that he reasonably believed that a state restoration of rights permitted him to possess firearms.

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<sup>3</sup> There is a limited exception to this rule if the defendant is unintentionally “entrapped” by relying on the advice of a federally licensed gun dealer who erroneously informs him that he is permitted to possess a firearm. *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987). However, the federal ban on firearms possession for a felony conviction is so widely known that this defense will rarely be a viable option. *United States v. Brebner*, 951 F.2d 1017 (9th Cir. 1990) (estoppel defense to federal firearms charge only available when defendant can demonstrate that he reasonably relied on the erroneous advice of a federal agent authorized to give such advice); *see also United States v. Etheridge*, 932 F.2d 318 (4th Cir. 1991) (estoppel defense rejected based on erroneous advice of state trial judge).

<sup>4</sup> For a catalogue of the many other civil disabilities that arise under federal law as a result of a felony conviction, *see, e.g.*, *Internal Exile: Collateral Consequences of Conviction under Federal Laws and Regulations* (Washington, DC: American Bar Association, 2009).

Unlike many states, the federal criminal code contains no provision for the expungement of a felony conviction.<sup>5</sup> In the original statutory scheme, Congress did create an administrative procedure specifically designed to grant relief from firearms disabilities to deserving persons. Under this provision, a prohibited person could petition the Secretary of the Treasury for relief from firearms disabilities. 18 U.S.C. § 925(c).<sup>6</sup> The Secretary delegated the exclusive authority to act on such requests to the Director of the Bureau of Alcohol, Tobacco and Firearms, who would grant the petition “if it [was] established to [his] satisfaction . . . that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest.” 27 C.F.R. § 178.144(d). If the Director denied the petition, the applicant was entitled to seek judicial review of the decision in a United States district court.

While this provision remains on the books, as a practical matter, the procedure it outlines is no longer available. Since 1992, Congress has prohibited the agency from expending any appropriated funds to investigate or act upon applications for relief from firearms disabilities. Moreover, the United States Supreme Court has held that the agency’s refusal to adjudicate such applications, pursuant to the congressional funding ban, does not amount to a “denial” of the request. As a result, the district courts are without jurisdiction to review the agency’s failure to act.

Accordingly, a person with a disqualifying conviction remains subject to the federal firearms disability until his civil rights are restored through a federal, not a state, procedure. And, given the current state of the law, a full and unconditional presidential pardon is the only available mechanism for restoring firearms rights for federal and military offenders.

## **Final Note of Caution for Military Defendants**

As noted above, Section 922(g) prohibits firearms possession by several different categories of persons, and a defendant may be charged with being more than one type of prohibited person. Thus, if a person is convicted in a general court-martial and receives a dishonorable discharge or a dismissal, he is prohibited from possessing firearms under both

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<sup>5</sup> The only existing expungement provision under federal law is limited to certain misdemeanor drug possession offenses. The Federal First Offender Act (FFOA) applies to first-time drug offenders who are convicted of simple possession. If the defendant was less than 21 years old at the time of the offense, the court is authorized to expunge the conviction after the successful completion of a probationary period. Under the FFOA, the effect of an expungement is to restore the defendant “in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings.” 18 U.S.C. § 3607. In March 2009, Rep. Charles Rangle (D-NY) introduced H.R. 1529, The Second Chance for Ex-offenders Act, which would amend the federal criminal code to permit first-offenders to petition a district court for the expungement of nonviolent felony offenses. The prospects for passage of the bill are uncertain.

<sup>6</sup> After the events of September 11, 2001, the Bureau of Alcohol, Tobacco and Firearms was transferred to the Justice Department and renamed the Bureau of Alcohol, Tobacco, Firearms, and Explosives. The current version of Section 925(c) thus states that the Attorney General has the ultimate authority to review such petitions, although the delegation to the Director remains unchanged.

922(g)(1), which applies to felons, and 922(g)(6), which applies to those who have “been discharged from the Armed Forces under dishonorable conditions.”<sup>7</sup>

While the pardon of a military offense removes the firearms disability imposed because of the conviction, a pardon does not automatically change the character of a military discharge. An upgrade or other change to a military discharge may only be accomplished by action of the appropriate military authorities.<sup>8</sup> Thus, a military pardon recipient would no longer be prohibited from possessing firearms under 922(g)(1). However, in these limited circumstances, he would remain under a federal firearms disability pursuant to 922(g)(6), unless and until he also obtains an upgrade of his discharge from the relevant service branch.

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<sup>7</sup> The term “discharged under dishonorable conditions” has been interpreted to include both enlisted persons who have been dishonorably discharged and commissioned officers who have been dismissed from service by a general court-martial. See 27 C.F.R. § 478.11.

<sup>8</sup> See Office of the Pardon Attorney, U.S. Department of Justice, Information and Instructions on Pardons, ¶ 6, Pardon of a Military Offense.