



## **SUMMARY OF FIREARM AND AMMUNITION RESTRICTIONS AND RESTORATION OF GUN RIGHTS**

### **NOTICES:**

- IF YOU ARE BEING INVESTIGATED OR PROSECUTED AS A PROHIBITED PERSON IN POSSESSION OF FIREARMS OR AMMUNITION CONTACT OUR LAW OFFICE IMMEDIATELY**
  
- IF YOU ARE THE SUBJECT OF, OR JUST RECEIVED, A TEMPORARY RESTRAINING ORDER AND YOU ARE REQUIRED TO SURRENDER YOUR FIREARMS CONTACT OUR OFFICE OR AN ATTORNEY IMMEDIATELY! STATE LAW REQUIRES IMMEDIATE ACTION WITH RELATION TO YOUR FIREARMS. FAILURE TO REPLY OR REACT TO THE TEMPORARY RESTRAINING ORDER MAY RESULT IN CRIMINAL PROSECUTION, CONTEMPT OF COURT, AND COULD HAVE LONG LASTING EFFECTS ON YOUR ABILITY TO OWN AND POSSESS FIREARMS AND AMMUNITION**

### **I. Introduction**

With police dramatically increasing the use of technology to track firearm purchases, the enforcement of laws prohibiting firearm and ammunition possession has dramatically increased in recent years. The types of convictions that result in a firearm and ammunition possession disability have also expanded, with more and increasingly minor convictions triggering these prohibitions. Consequently, an increasing number of individuals are finding themselves subject to firearm and ammunition possession restrictions or, worse, finding themselves prosecuted for a restriction of which they were unaware.

For example, many people are unaware that under California and federal law **a person prohibited from possessing firearms is also prohibited from possessing ammunition**. And under California law these restrictions also include (but are not limited to) magazines, clips, speed loaders, autoloaders, or projectiles capable of being fired from a firearm.

Because of our firm's experience in this area, and our positive relationship with several self-defense civil rights organizations, we are continually referred a large number of inquiries from people confused about the law, their status, or their ability to restore their rights. We are one of the very few law firms that have developed expertise in this practice area of relief from firearm and ammunition possession disabilities.

If you think you are prohibited from possessing firearms or ammunition we strongly caution against filling out paperwork to purchase a firearm. If you are uncertain about your ability to own and possess firearms and ammunition legally you could subject yourself to prosecution. These forms are signed under penalty of perjury, and require you to state that you are not prohibited from owning a firearm. Answering falsely is itself a crime, and under Cal DOJ's California Armed Prohibited Person Program (CAPP) if you are a prohibited person and you attempt to purchase a firearm you will very likely be investigated by police.

Some of our clients have attempted to purchase a firearm and been denied, even when they have been allowed to purchase firearms in the past. This may be due to records database errors either at the time of the previous purchase, or for the current purchase, changes in the law, or new interpretations of the law by California Department of Justice and/or the FBI.

A person may be denied the right to possess firearms for any number of reasons: mental incapacity; prior illegal narcotics addiction or use; or previous criminal cases, to name a few. Even if you were convicted of a misdemeanor many years ago you may still face a firearm prohibition and in some cases a lifetime prohibition. Given the complexity of the laws in this area, the government may have not discovered you are prohibited from possessing firearms until now.

**If you possess firearms and/or ammunition and learn you are a "prohibited person," you are committing a felony by continuing to possess them.** To avoid prosecution you should immediately legally transfer the firearms and ammunition in your possession, as discussed below.

## **II. California State Firearm Restrictions**

**Note: Despite being eligible to possess firearms and ammunition under California law, a person may nonetheless be prohibited under federal law, and vice versa. Review both California AND federal firearm restrictions to determine the nature of your restriction.**

A number of circumstances can lead to a firearm and ammunition possession restriction under either or both state and federal laws. California has the dubious distinction of receiving an "A" from the gun ban lobby for its gun control laws, including laws that restrict firearm possession.

A person does not have to actually hold or touch something to "possess" it under the law. It is enough if the person has control over it or the right to control it, either personally or through another person.

In addition it is possible for more than one individual to possess a firearm through a legal doctrine known as constructive possession. Constructive possession may be individual, through an agent, or joint with another. Exclusive possession need not be shown.

Under California law, firearm restrictions are covered in Penal Code sections 12021 and 12021.1, and Welfare and Institutions Code sections 8100 and 8103.

The full list of these restrictions may be found at:

<http://oag.ca.gov/sites/all/files/pdfs/firearms/forms/prohibcatmisd.pdf>.

These restrictions are summarized below.

- There are a number of restrictions under Penal Code section 12021. The most well-known restriction is that *any* felony conviction will result in a restriction from owning and possessing firearms.
- Penal Code § 12021.1 restricts a person based on the type of conviction that person received: i.e. mayhem, attempted murder, kidnapping, carjacking, assault with a deadly weapon or force likely to produce great bodily injury. These convictions could have occurred in California or another state and can be either felony or misdemeanor convictions.
- Convictions under Penal Code § 245(a)(2) and 245(3), 246, and 417(c) all result in a lifetime restrictions regardless of whether the conviction is deemed a felony or a misdemeanor. A person who has been convicted of Penal Code section 417(a)(2) twice is also prohibited for life in California.
- Certain misdemeanor convictions trigger 10-year firearm and ammunition restrictions. The Penal Code sections that result in this restriction are sections 71, 76, 136.1, 136.5, 140, 148(d), 171b, 171c, 171d, 186.28, 240, 241, 242, 243, 243.4, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.6, 422, 626.9, 646.9, 12023, 12024, 12034(b), 12034(d), 12040, 12072(b), former Section 12100(a), 12220, 12320, and 12590. Any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, or of the conduct punished in paragraph (3) of subdivision (g) of Section 12072 also carries a 10 year firearm restriction from the date of the conviction.
- Juveniles who are adjudged a ward of the juvenile court for offenses listed under Welfare and Institutions Code section 707(b), Penal Code section 1203.073(b), Penal Code section 12021(c)(1), or any offense listed in Penal Code section 12025(a), 12031(a) or 12034(a), are prohibited from possessing firearms until age 30.
- Persons may be prohibited from possessing firearms and ammunition as a result of certain terms and conditions of probation imposed by a Court.
- A person addicted to the use of narcotic drugs is likewise prohibited.
- If a person is subject to a temporary restraining order, permanent restraining order,

protective order, or injunction issued pursuant to: Code of Civil Procedure sections 527.6 and 527.8 of; 6218 of the Family Code; 136.2 and 646.91 of the Penal Code; or 15657.03 of the Welfare and Institutions Code.

- Mental disorders outlined in Welfare and Institutions sections 8100 and 8103 also prohibit persons from possessing firearms. These restrictions apply to those who: are considered dangerous inpatients; have communicated a threat to their psychotherapist; are adjudicated to have a mental disorder, mental illness, or are a mentally disordered sex offender; are found not guilty by reason of insanity; are incompetent to stand trial; are placed under conservatorship; are committed pursuant to Welfare and Institutions Code section 5150; or are “certified” for intensive psychiatric treatment. Depending on the restriction, a person is prohibited until the person’s rights are restored by the Court, the restriction period ends, or the individual no longer falls under the category of a restricted person under the section.

### **III. Federal Firearm Restrictions**

Federal law does not have as many restrictions as California law does, but violating the federal restrictions subjects the violator to the heightened punishments attached to breaking federal law.

A person is prohibited from possessing and receiving firearms under federal law when they are:

- convicted of a any crime punishable by more than one year in prison or any state misdemeanor punishable for more than two years by imprisonment
- convicted of a misdemeanor crime of domestic violence (meaning that the offense had an element involving violence and the victim meets the definition of persons described in the federal statute)
- fugitives from justice
- addicted or users of controlled substances (this includes legal and illegal substances including medical marijuana)
- adjudicated as a mental defective, or who has been committed to a mental institution
- aliens illegally/unlawfully in country or admitted under non-immigrant visas
- discharged from armed forces under dishonorable conditions
- no longer U.S. citizens as a result of renouncing their U.S. citizenship
- subject to a restraining order where the restrained person had an opportunity to participate

in the hearing and an order was issued with conditions prohibiting the person from harassing, stalking, or threatening an intimate partner or child of an intimate partner

#### **IV. Firearm Rights Restriction Relief**

##### **A. Restoration of Firearm Rights for California Restrictions**

###### **1. Criminal Convictions**

Relief for firearm restrictions under California law is now generally either limited or nonexistent.

Those in California who are convicted of felonies considered "straight" felonies (meaning offenses that can only be punished by state prison) or those who receive state prison sentences, only have the option of a pardon to restore their firearm rights. But even a pardon will not restore firearm rights for those convicted of straight felonies involving the use of a dangerous weapon.

Convictions known as "wobblers," meaning that the offense could have been prosecuted as either a felony or a misdemeanor, may be reduced from a felony to a misdemeanor provided the individual was not sentenced to state prison.

Once you know the code section you were convicted under you can look up the code section to determine if it can be reduced at <http://www.leginfo.ca.gov/calaw.html>.

Misdemeanants with 10-year firearm restrictions (the list of offenses is mentioned above) must wait for the 10 years to expire unless their conviction was added to the list of prohibiting misdemeanors after they were convicted.

All other misdemeanor convictions will need to be pardoned in order for relief from a firearm restriction.

When a juvenile is adjudged a ward of the juvenile court and prohibited until the age of 30, the juvenile will need to have their case sealed, if possible. And any probation terms limiting the ability to possess firearms would need to terminate or be modified.

Criminal convictions entered in other state courts present unique problems. Often, an attorney from the state where the conviction was entered will need to clear the record in that state before the California firearm restriction can be eliminated.

**An expungement, under California Penal Code section 1203.4, DOES NOT restore firearm rights, despite the fact that the person's guilty/no contest plea is withdrawn, a plea of not guilty is entered, and the case is dismissed.**

A person prohibited as a result of probation conditions would need to have those conditions

modified or probation terminated.

Unfortunately, non-statutory or “common law” relief has been limited by recent court rulings. If a person wishes to attempt to use the Writ of *Habeas Corpus*, that person must still be in “custody.” Meaning that person must be still in jail, prison, on probation or parole in order to avail themselves of the “Great Writ.” In addition *Habeas Corpus* is only available in limited situations.

A Writ of Error *Coram Nobis* is only available to those who are convicted but at the time of the conviction unknown facts existed that, if known to the court and defense, would have prevented a conviction in the case. (i.e. a person is convicted of statutory rape and the victim was over the age of 18 at the time of the incident and these facts were not known to the defense or the court).

## **2. Addiction**

A person who is prohibited as a result of narcotic addiction would need to be, and stay, “clean.”

## **3. Protective Orders, Temporary Restraining Orders, Restraining Orders, and Injunctions**

Those restricted as a result of a restraining order will need to have the order removed, wait until the order terminates, or in limited cases, an order may be modified so as not to prohibit firearm possession.

## **4. Mental Health Restrictions**

Individuals restricted as a result of a mental health restriction will in some cases have a court adjudge they may safely possess firearms again and/or wait for the restriction to terminate. Persons with mental health restrictions may be prohibited under federal law as well (discussed below).

### **B. Restoration of Firearm Rights for Federal Restrictions**

For conviction restrictions under federal law (including misdemeanor domestic violence) a person is prohibited until the conviction has been expunged, set aside or until the a person has been pardoned, or has had their civil rights restored as long as the pardon, expungement, or restoration of civil rights expressly provides that the person may **not** ship, transport, possess, or receive firearms.

California does not currently offer a “set aside” or “expungement” that meets federal requirements. A person may request a pardon (and certificate of rehabilitation for a felony) to restore their firearm rights provided the offense did not involve a firearm. If a felony is reduced

to a misdemeanor (as discussed above), that too will restore a person's firearm rights under federal law provided the offense is not a domestic violence offense. This is because a felony once reduced to a misdemeanor is considered a misdemeanor for all purposes under both state and federal law.

Individuals with federal mental health restrictions cannot restore their firearm rights currently under California law. In 2007, President Bush signed the "NICS Improvement Act." This Act set forth criteria States must implement in order to restore a person's firearm rights under federal law. California has yet to implement the NICS Improvement requirements. Consequently, persons with federal mental health restrictions have no remedy at this time in California.

For the remaining restrictions little relief is available. Fugitives from justice who are prohibited from possessing firearms will need to appear before the court in which they are wanted and resolve the pending legal matter before possessing firearms. Illegal aliens, those discharged from the armed forces under dishonorable conditions, and those who renounce their United States citizenship will not be able to possess firearms. Individuals who are prohibited as a result of a harassment restraining order will need to have the order modified, removed, or wait until the order terminates. Individuals who use or are addicted to controlled substances must stop using, or no longer be considered "addicted."

Federal law does possess a firearm rights restoration mechanism within 18 USC 925. However, Congress has refused to appropriate any funds for this remedy in over 10 years. Consequently, any federal relief under this statute is not available.

## V. Determining the Nature of Your Restriction

If you are concerned about whether you are restricted, we suggest you fill out and file the "Personal Firearms Eligibility Check" form discussed above. If you are determined to be ineligible by the California Department of Justice, you may inquire as to the nature of your restriction with Cal DOJ.

The restriction type will lend guidance on the needed information to determine what, if anything, can be done to restore your firearm rights.

If you are restricted because of a criminal conviction we suggest you gather all the information you can concerning your criminal background history and conviction(s). You can request your criminal background by filling out and filing the "Request for Live Scan Service" which may be downloaded at [http://ag.ca.gov/fingerprints/forms/bcii\\_rr\\_8016.pdf](http://ag.ca.gov/fingerprints/forms/bcii_rr_8016.pdf). This form requires that you have your fingerprints taken. We also suggest you go to the court where the conviction took place and obtain any and all documents available from the court's file concerning your conviction, in addition to a "docket sheet." (Attorney's in California are only required to keep files for five years after the end of the case and your old attorney may no longer possess the file). In some cases, the information the Cal DOJ has in your Criminal History is different from the court file

and sometimes a person's firearm rights may be restored by providing Cal DOJ the information to correct their records.

Once you obtain your information you can determine the nature of your restriction and what may be done to restore your firearm rights.

If you need to apply for a certificate of rehabilitation and pardon, you usually can find a form for a certificate of rehabilitation at the website for the superior court in the county in which you reside (in some cases you will need to contact the court clerk). If a certificate is issued by the court, the court should automatically refer your case to the governor's office for application for a pardon.

In some instances when a person must apply directly for a pardon (i.e. certain felony convictions, misdemeanor convictions, and non-California residents). A form for a request for a pardon may be obtained at [http://gov.ca.gov/pdf/interact/executive\\_clemency\\_and\\_notice.pdf](http://gov.ca.gov/pdf/interact/executive_clemency_and_notice.pdf). For more information on the pardon process please visit:

[http://gov.ca.gov/pdf/interact/how\\_to\\_apply\\_for\\_a\\_pardon.pdf](http://gov.ca.gov/pdf/interact/how_to_apply_for_a_pardon.pdf).

If you have a mental health restriction we would strongly suggest requesting any and all medical and hospital records relating to your restriction. If you were certified pursuant to Welfare and Institutions Code Section 5150 you may be able to restore your firearm rights. If you were held more than 72 hours, you were more than likely committed pursuant to Welfare and Institutions Code section 5250, and consequently may not be able to restore your firearm rights as a result of a federal mental health restriction (discussed above).

If you are restricted as a result of a restraining order we likewise suggest obtaining all relevant paperwork concerning the restraining order.

**IF YOU ARE THE SUBJECT, OR JUST RECEIVED, A TEMPORARY RESTRAINING ORDER AND ARE REQUIRED TO SURRENDER YOUR FIREARMS CONTACT OUR OFFICE OR AN ATTORNEY IMMEDIATELY! STATE LAW REQUIRES IMMEDIATE ACTION WITH RELATION TO YOUR FIREARMS AND FAILURE TO REPLY OR REACT TO THE TEMPORARY RESTRAINING ORDER MAY RESULT IN CRIMINAL PROSECUTION, CONTEMPT OF COURT, AND COULD HAVE LONG LASTING EFFECTS ON YOUR ABILITY TO OWN AND POSSESS FIREARMS AND AMMUNITION**

If you are in prohibited and in possession of firearms or ammunition for any other reason contact our office we may be able to direct you how to proceed.

## **VI. If You Are Prohibited and In Possession of Firearms or Ammunition**

If you have been denied a firearm transaction as a result of a firearm prohibition, meet one of the

restriction criteria listed above as a result of a recent change of circumstances, or have recently discovered that you are prohibited from possessing firearms you may not possess firearms or ammunition. If you are prohibited from possessing firearms and ammunition and continue to possess them you can be prosecuted for a felony under California and/or federal law and face incarceration.

Persons who are prohibited from possessing firearms and still possess firearms and ammunition may transfer their property using the “Prohibited Persons Notice Form and Power of Attorney for Firearms Relinquishment, Sale or Disposal” form. This form may be downloaded from the California Department of Justice website at

<http://ag.ca.gov/firearms/forms/pdf/sb950frm1107.pdf> . By using this form a prohibited person can briefly transfer their interest in their firearms to another, non-prohibited, person and that person may then transfer or sell the firearms on the prohibited person’s behalf. This form needs to be notarized. **Use of this form does not satisfy the firearm sale or turn-in requirement for temporary restraining orders.**

In California most firearms transactions must be conducted through a licensed firearm dealer; meaning in most instances you can’t simply give a person a firearm or sell a firearm to another without going through a licensed firearm dealer. If you do not decide to use the above form, you may give a firearm that is not a handgun (and not an “assault weapon”) to an immediate family member or spouse. An immediate family member is a parent, grandparent, child, or grandchild. If the firearm is a handgun the recipient immediate family member or spouse must fill out and submit to California Department of Justice a “Report of Operation of Law or Intra-Familial Handgun Transaction” form downloadable at: <http://ag.ca.gov/firearms/forms/pdf/oplaw.pdf> . It is our STRONG suggestion that your family member or spouse store the firearm away from your residence as arguably any firearm or ammunition that remains in your place of residence could be determined to be in your possession.

## VII. Further Questions and Consultation

If you have any further questions and would like a consultation contact our office. Before you contact our office make certain you have the information discussed at the following location FIRST: <http://michellawyers.com/wp-content/uploads/2010/10/Restoration-of-Rights-Client-Questionnaire.pdf>

We can assist you in obtaining your documents however, this is a time consuming process that does not require any particular legal experience. If you would like our assistance please contact our office at (562) 216-4444. We charge \$500.00 for this, which includes evaluating the documents once received and providing you with a written explanation of your individual situation and available legal remedies, if any.