

September 9, 2022

## Firearms Eligibility: Domestic Violence and Dating Partners

On June 25, 2022, President Joe Biden signed into law the Bipartisan Safer Communities Act (BSCA; P.L. 117-159). Section 12005 of this law amends the Gun Control Act of 1968 (GCA; 18 U.S.C. §§921-934) to expand the misdemeanor crime of domestic violence (MCDV) firearm prohibition to include dating partners, in addition to spouses, former spouses, and cohabitants. The aim of this provision is to reduce firearms-related intimate partner violence (homicide and injury). Advocates for this provision see it as partially closing gaps in federal law in terms of firearms eligibility and persons with a history of domestic violence, otherwise known as “the boyfriend loophole.” Notably, the House-passed Violence Against Women Act (VAWA) Reauthorization Act of 2021 (H.R. 1620) would have expanded the GCA’s domestic violence protective order (DVPO) firearm prohibition to include dating partners and persons “similarly situated to spouses,” but those specific provisions were not included when H.R. 1620 was enacted as part of the Consolidated Appropriations Act, 2022 (P.L. 117-103).

### Prohibited Persons Under the GCA

Under the GCA, there are nine categories of persons prohibited from receiving and possessing firearms or ammunition (18 U.S.C. §§922(g)(1) through (9)). They include (1) convicted felons, (2) fugitives from justice, (3) unlawful drug users, (4) mentally incompetent individuals deemed to be a danger to themselves or others, (5) unlawfully present aliens, (6) persons discharged from the U.S. military under dishonorable conditions, (7) persons who have renounced their U.S. citizenship, (8) persons subject to domestic violence protection orders; and (9) domestic violence misdemeanants.

As to DVPOs, in 1994, Congress adopted an amendment offered by Senator Paul Wellstone that prohibits individuals who are subject to “protection orders” or “court-order restraints” related to harassing, stalking, or threatening an intimate partner or child of such intimate partner from receiving or possessing firearms or ammunition (S.Amdt. 1179 to S. 1607, a bill folded into P.L. 103-322; codified at 18 U.S.C. §§922(d)(8) and (g)(8)).

As to MCDVs, in 1996, Congress adopted an amendment offered by Senator Frank Lautenberg to prohibit persons convicted of a misdemeanor crime of domestic violence from receiving or possessing a firearm. Ineligible domestic violence misdemeanants include any current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim (S.Amdt. 5241 to

H.R. 3756, a bill folded into P.L. 104-208; codified at 18 U.S.C. §§922(d)(9) and (g)(9)).

Under a parallel subsection, it is also unlawful for anyone under any circumstances to sell or otherwise dispose of a firearm or ammunition to any prohibited persons, if the transferor (seller) has reasonable cause to believe that the transferee (buyer) is a person prohibited from receiving those items (18 U.S.C. §§922(d)(1) through (9)). Violations are punishable by up to 10 years’ imprisonment. In 1986, Congress amended the GCA felony prohibition, which previously prohibited persons under felony indictment from receiving or possessing firearms, to prohibit such persons from receiving, but not possessing, firearms or ammunition (P.L. 99-308; 18 U.S.C. §922(n)). Violations are punishable by up to five years’ imprisonment.

### “Current or Recent Former Dating Relationship”

Section 12005 of the BSCA amends and expands the GCA definition of “misdemeanor crime of domestic violence” to include any “person who has a current or recent former dating relationship with the victim” (18 U.S.C. §921(a)(33)(A)). Under this subparagraph, as amended (in *italics*), a qualifying offense must meet two conditions:

- (i) is a misdemeanor under Federal, State, Tribal, or local law; and
- (ii) 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, by a person similarly situated to a spouse, parent, or guardian of the victim, *or by a person who has a current or recent former dating relationship with the victim.* [Emphasis added]

Correspondingly, the BSCA amends the GCA at 18 U.S.C. §921(a)(37), to define “dating relationship” as

- (A) a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature.
- (B) Whether a relationship constitutes a dating relationship under subparagraph (A) shall be determined based on consideration of—
  - (i) the length of the relationship;
  - (ii) the nature of the relationship; and

(iii) the frequency and type of interaction between the individuals involved in the relationship.

In terms of what constitutes a “dating relationship,” subparagraph (B) of this definition is similar to that of a “dating partner” under 18 U.S.C. §2266(a)(10).

### Qualifying DVPOs and MCDVs

Under current law, a qualifying DVPO includes the following elements. The defendant/respondent must receive actual notice and opportunity to participate in a hearing before a judge, magistrate, or other judicial official. After such hearing, a DVPO may be issued by a criminal or civil court, such as a divorce court, family court, magistrate, or general jurisdiction court. A qualifying court order must also restrain the subject from harassing, stalking, or threatening an intimate partner or child of that intimate partner, or engaging in conduct that would place either of them in reasonable fear of bodily injury. There must also be a finding that the subject is a credible threat to the physical safety of the intimate partner or child, or explicitly prohibit the use of physical force. An intimate partner includes

- a spouse or former spouse of the subject;
- a person who cohabitates or cohabitated with the subject, who resides or resided in a sexual/romantic relationship with the subject; or
- a person with whom the subject has or had a child in common (regardless of whether they ever married or cohabitated).

A qualifying MCDV must include the following elements. Such offense is a misdemeanor crime under federal, state, or tribal law and involves the use or attempted use of physical force, or the threatened use of a deadly weapon. At the time of the offense, the offender must have been:

- A current or former spouse, parent, or guardian of the victim;
- A person with whom the victim shared a child in common;
- A person who was cohabitating with or had cohabitated with the victim as a spouse, parent, or guardian; or
- A person who was or had been similarly situated to a spouse, parent, or guardian of the victim.

As discussed above, the BSCA adds a fifth category: “a person who has a current or recent former dating relationship with the victim.”

### Prospective Prohibition and Eligibility Restoration

The BSCA sets several limitations on the MCDV dating partner prohibition. First, it is prospective and only affects MCDVs going forward. Misdemeanor convictions prior to enactment will not be considered prohibitive if based on the newly-added dating partner prohibition. Second, the BSCA dating partner prohibition is time-limited for offenders who do not have more than one MCDV involving a dating relationship and are not otherwise prohibited under the GCA or subsequently convicted of a violent misdemeanor. Firearms eligibility for those offenders is to be restored five years from whichever date comes later, (1) the judgment of

conviction, or (2) the completion of the person’s custodial or supervisory sentence. Third, the BSCA amendment excludes from the prohibition anyone who has had their misdemeanor conviction expunged, set aside, pardoned, or otherwise had their firearms rights restored, unless the terms of such relief expressly provide otherwise. Fourth, the BSCA requires that records accessible to the National Instant Criminal Background Checks System (NICS) be updated to reflect any firearms eligibility restoration for any dating partner domestic violence misdemeanor. In these respects, Section 12005 stands in contrast to the Lautenberg amendment provision, which was retrospective, was and remains not time-limited, and does not speak to firearms eligibility restoration to the extent that such relief might be available under state, tribal, or local law.

On the other hand, the BSCA amendment precludes firearms eligibility restoration for offenders who have subsequently been convicted under any federal, state, tribal, or local law of an offense related to:

- the use or attempted use of physical force,
- the threatened use of a deadly weapon, or
- any other disqualifying offense under the GCA.

The BSCA amendment also includes a provision that states that its provisions do not extend the possibility of firearms eligibility restoration to any person who is or would be prohibited under prior law (spouses, former spouses, and cohabitants).

### BSCA and VAWA Reauthorization

Section 12005 of the BSCA amends and expands the GCA MCDV firearm prohibition to include dating partners, but it does not similarly expand the GCA DVPO firearm prohibition to include current and former dating partners. As previously noted, the House-passed VAWA Reauthorization Act (H.R. 1620) included domestic violence firearms eligibility-related provisions that would have expanded the DVPO prohibition under 18 U.S.C. §§922(d)(8) and (g)(8) to include

- dating partners and former dating partners, and persons “similarly situated to a spouse”;
- restraining orders under state, tribal, or local law that are issued after an “ex parte” hearing, that is, a court motion, hearing, or order granted on the request of and for the benefit of one party only without the respondent or defendant being present; and
- restraining orders related to witness intimidation.

H.R. 1620 would have expanded the MCDV prohibitions under 18 U.S.C. §§922(d)(9) and (g)(9) to include dating partners, and also would have made any person convicted of a “misdemeanor crime of stalking” a tenth category of prohibited persons under the GCA. While the VAWA reauthorization was enacted as part of the Consolidated Appropriations Act, 2022 (P.L. 117-103), it did not include the House-passed MCDV, DVPO, or stalking prohibitions. See CRS In Focus IF11784, *Firearms Eligibility: Stalking- and Domestic Violence-Related Provisions in H.R. 1620*.

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**William J. Krouse**, Specialist in Domestic Security and  
Crime Policy

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