

Domestic Violence and Firearms Guide for Prosecutors

Batterers who report gun possession are a dangerous subgroup. They are “more likely than other batterers to report that they had attempted homicide; had problems with gambling, drugs, and alcohol; and had used firearms to threaten their partners.” (Rothman et al. 2006, pg. 291) Therefore, compliance with firearms and domestic violence laws are crucial to the safety of their victims.

Lethality

Access to firearms increases the risk of intimate partner homicide more than five times, more than in instances where there are no weapons, according to a recent study. In addition, abusers who possess guns tend to inflict the most severe abuse on their partners.

- Women who are killed by their intimate partners in the United States are more likely to be killed with a gun than by all other methods combined (Durose et al. 2005; Fox and Zawitz 2001)
- When guns are used during domestic or family violence incidents, victims are 12 times more likely to die than during incidents when batterers have no guns (Salzman et al. 1992)

This guide provides an overview of the Illinois and Federal firearms related laws, the FOID revocation process and procedures, tips and considerations for the role of prosecution in the implementation and enforcement of firearms and domestic violence related laws.

Overview

Both Illinois and federal law govern firearms possession related to domestic violence abusers. While in some areas the laws overlap, in other areas there is a gap between federal and state laws. Below is a guide to help define and understand the process of the legal/illegal possession of firearms for respondents and defendants in domestic violence related cases.

In November 1993, the Brady Handgun Violence Prevention Act of 1993 (Brady Act), Public Law 103-159, was signed into law requiring Federal Firearms Licensees (FFLs) to request background checks on individuals attempting to purchase a firearm. In Illinois, to purchase, possess and buy any firearm and/or ammunition a Firearm Owner’s Identification (FOID) card is required. FOID cards are issued, monitored and revoked by the Illinois State Police.

Federal and Illinois Prohibitions to Possessing Firearms and a FOID Card

Under federal and Illinois law, any of the following criteria will disqualify a person from possessing a valid FOID card:

Federal Law (18 U.S.C. 922) Disqualifying an Individual from Possessing, Purchasing, or Receiving a Firearm

Most Commonly Seen in Conjunction with Domestic Violence Incidents:

1. Misdemeanor convictions of domestic violence*
2. Qualifying court orders (order of protection, restraining orders)

3. Felonies and misdemeanors (misdemeanors with possible sentence of more than 2 years confinement) **In Illinois there are no misdemeanors that carry a sentence of more than 1 year of confinement*
4. Fugitives from justice
5. Under indictment/information for a crime punishable by imprisonment for a term exceeding 1 year **In Illinois any felony charge would potentially carry a term of imprisonment which would exceed one year*
6. Unlawful users of a controlled substance

Other Possible Factors:

7. Mental Defectives¹
8. Illegal or Unlawful Aliens
9. Dishonorable discharges from the military
10. Renunciation of citizenship

*Misdemeanor conviction in which the victim was a federally defined family or household member and for which the offense or conviction had as an element the use, or attempted use of physical force, or the threatened use of deadly weapon.

Illinois Law (430 ILCS 65/8) Firearm Owners Identification Card Act.

Most Commonly Seen in Conjunction with Domestic Violence Incidents:

1. Felony convictions
2. Order of protection prohibiting firearm possession
3. Valid court order prohibiting firearm possession
4. Use or possession of a firearm in the commission of certain crimes (Battery, assault, aggravated assault, violation of OP or substantially similar offense within the last 5 years)
5. Domestic battery
6. Condition of bond
7. Condition of probation or conditional discharge
8. Clear and present danger²

Other Possible Factors:

9. Mental health admission (within the last 5 years)
10. Mentally retarded³
11. Adjudicated delinquent minor⁴
12. Minors with misdemeanor criminal convictions

1. Adjudicated as a mental defective Title 27 CFR 478.11.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetence, condition, or disease:

(1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include

(1) The finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to article 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

2. Clear and Present Danger 430 ILCS 65 / 8 (f)

A person whose mental condition is of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community; "mental condition" means a state of mind manifested by violent, suicidal, threatening or assaultive behavior.

3. Mental Retardation 405 ILCS 5 / 1-116

significantly subaverage general intellectual functioning which exists concurrently with impairment in adaptive behavior and which originates before the age of 18 years.

4. Adjudicated Delinquent Minor 705 ILCS 405 / 5-105 (3)

"Delinquent minor" means any minor who prior to his or her 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or State law, county or municipal ordinance.

There are several criteria that disqualify a person from carrying a valid FOID card in the state of Illinois. Among those disqualifiers are those specific to orders of protection and other domestic violence related crimes.

Orders of Protection Firearm Prohibitions

18 U.S.C 922(g)(8) defines the *federal criteria* for determining when a Respondent on an OP, or another qualifying order*, is prohibited from possessing/receiving firearms. *If a qualifying order, such as an OP, meets the following federal definition, the FOID revocation process will apply.*

That section states it shall be unlawful for any person to ship, transport, possess or receive firearms if that person is subject to a court order that:

- was issued after a hearing of which such person received actual notice, and at which such a person had an opportunity to participate, (interim or plenary OPs) and;
- restrains such a 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 (*Illinois Remedy 01 meets this criteria*). The following are the qualifying relationships for an “intimate partner”
 - Current or former spouse
 - Parent or guardian
 - Those who share/shared a child in common
 - Individual who cohabits or cohabitated with the victim(s) as a spouse, parent or guardian
 - A person similarly situated to a spouse, parent or guardian of the victim
 - may be same sex
 - relationship must be or have been romantic/sexual in nature
 - not merely a roommate
- includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
- 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.

The law states that this revocation does not apply to law enforcement officers while “engaged in the operation of their official duties”. An officer can apply to receive an exception of FOID revocation with documentation from their department.

** Other orders that may potentially qualify include no contact orders and restraining orders. If an order meets the criteria above, the order may be submitted to the Firearms Information and Resources Bureau (FIRB) for review, which may result in firearm/FOID prohibition/revocation.*

***Under the Illinois Domestic Violence Act a roommate relationship would meet the criteria for a valid Order of Protection however, federal law requires that the relationship must be or has been romantic or sexual in nature to qualify.*

The Illinois Domestic Violence Act (IDVA), (ILCS 60/214[b][14.5][a]), provides the Illinois criteria for determining when a Respondent on an Order of Protection is prohibited from possessing firearms.

If the following conditions are presented:

- A petition is filed requesting an order of protection which states that the Respondent has threatened or is likely to use firearms illegally against the petitioner,
- The respondent is present in court or has failed to appear after receiving actual notice and,
- The court examines under oath the petitioner, and any witnesses who may be produced.

Then,

- If court is satisfied that there is any danger of the illegal use of firearms, it will be ordered that any firearms in the possession of the respondent be turned over to the local law enforcement agency.
- If the respondent has failed to appear, the court shall issue a warrant for seizure of any firearm in the possession of the respondent.

Once the firearms are seized:

- The period of safekeeping shall be for a stated period of time not to exceed 2 years.
- The firearm(s) shall be returned to the respondent at the end of the stated period or at expiration of the order of protection, whichever is sooner.

* **Note:** The law states that this revocation does not apply to law enforcement officers while “engaged in the operation of their official duties”. An officer can apply to receive an exception of FOID revocation with documentation from their department.

If the OP does not qualify for FOID revocation (for example, an Emergency Order of Protection), it will be monitored for change and the FOID card will be revoked if the status of the order changes.

Domestic Violence Related Criminal Convictions Firearm Prohibitions

Federal

- Any person who has had a criminal conviction of domestic battery, assault, violation of an order of protection or a substantially similar offense that contains an element of violence
 - This gun ban is *permanent*, unless the conviction has been set aside.
 - **Law enforcement officers are not exempt from this provision.**

Illinois

- Any person who has had a criminal conviction of domestic battery or substantially similar offense that contains an element of violence
 - This gun ban is *permanent* for convictions after 8/18/97, unless the conviction has been set aside.

FOID Revocation and Notification Process: Orders of Protection

Once an order of protection is granted:

- The Order of Protection (OP) is entered in to the LEADS system
- As the OP is entered into the LEADS system the LEADS operator will determine if the respondent has a valid FOID card. If so, the operator will forward the information to ISP FIRB. Relevant information is gathered and a determination is made if a firearm prohibitor exists.
- Additionally, ISP FIRB may be notified of a valid OP by one of the following: Law Enforcement, States Attorney, Court System, Partner Abuse Intervention Program, Domestic Violence Advocate or the Petitioner on the order.
- **If there is a firearm prohibitor, action will be taken within 1 business day to revoke the existing FOID card.**
- A letter is sent to the cardholder to provide notification of the invalid status of the card with instructions to mail the card to the ISP FIRB.

If the OP does not qualify (for example, an Emergency Order of Protection), it will be monitored for change and the FOID card will be revoked if the status of the order changes

FOID Revocation and Notification Process: Criminal Convictions

The Firearms Information and Resources Bureau, a division of the Illinois State Police, is notified of criminal convictions of domestic battery and violations of orders of protection nightly through the Criminal History Record Information (CHRI).

- If there is a firearm prohibitor action will be taken within approximately 1 business day to revoke the existing FOID card.
- A letter is sent to the cardholder to provide notification of the invalid status of the card with instructions to mail the card to the ISP FIRB.

FOID Revocation and Notification Process: Mental Health Facilities

Each evening the Firearms Information and Resources Bureau sends the Illinois Department of Human Services (IDHS) a list of valid FOID card holders and DHS checks the list for any individuals who have been committed to a state hospital for mental health purposes. DHS then alerts the ISP FIRB of any FOID card holders that have been committed.

- If there is a firearm prohibitor, action will be taken within approximately 1 business day to revoke the existing FOID card.
- A letter is sent to the cardholder to provide notification of the invalid status of the card with instructions to mail the card to the ISP FIRB.

Process for Purchasing a Firearm

When firearms are purchased through a licensed gun dealer or gun show, the **Firearm Transfer Inquiry Program (FTIP)** is used. FTIP is an automated system used by FFL's to verify the status of a FOID card by generating a background check to determine if the purchaser is prohibited from possessing and purchasing firearms.

- When inquiring about a FOID card the FFL may receive an automatic denial, which would mean the FOID card has been revoked. The sale of the firearm is denied and the process is initiated to conduct a card seizure.
- During the FTIP process, if the FIRB discovers an OP they have not been notified of, the FTIP operator will check that the OP is valid and information will be gathered to determine if there is a firearm prohibitor. If firearm prohibitors apply, the sale will be denied.

Note: The revocation of a FOID card can be appealed through the ISP FIRB.

Role of Prosecution

Screening and Considerations

Encourage staff working with victims to assess the defendant's past history of domestic violence and use of weapons as well as the victim's knowledge of firearm possession while assessing risk through police reports and follow up questions.

When assessing the defendant's past history of domestic violence and use of weapons it is important to have the following information:

- Does the abuser own firearms?
- Does the abuser have access to firearms?
- Has the abuser used a firearm against his/her partner, children or pets?
- Has the abuser threatened to use a firearm against his/her partner, children or pets?
- Has the abuser used a firearm against another person?
- Has the abuser threatened to purchase a firearm?
- Would the abuser use firearms against law enforcement?
- Has the abuser been convicted of crimes involving a firearm?
- Does the abuser have a criminal record that includes assaults against others or crimes of violence?

- ❑ Does the abuser have a mental illness?
- ❑ Is the abuse increasing in frequency and/or severity?

Bond

Information captured from the risk assessment can be used when determining bond.

725 ILCS 5/110-5.1 requires considering the following when setting bond:

- Whether the person has a history of domestic violence or a history of other violent acts;
- The mental health of the person;
- Whether the person has a history of violating the orders of any court or governmental entity;
- Whether the person is potentially a threat to any other person;
- *Whether the person has access to deadly weapons or a history of using deadly weapons;*
- Whether the person has a history of abusing alcohol or any controlled substance;
- The severity of the alleged violence that is the basis of the alleged offense, including, but not limited to, the duration of the alleged violent incident, and whether the alleged violent incident involved serious physical injury, sexual assault, strangulation, abuse during the alleged victim's pregnancy, abuse of pets, or forcible entry to gain access to the alleged victim;
- Whether a separation of the person from the alleged victim or a termination of the relationship between the person and the alleged victim has recently occurred or is pending;
- Whether the person has exhibited obsessive or controlling behaviors toward the alleged victim, including, but not limited to, stalking, surveillance, or isolation of the alleged victim;
- Whether the person has expressed suicidal or homicidal ideations;
- Any information contained in the complaint and any police reports, affidavits, or other documents accompanying the complaint.

If a prohibition of the possession of firearms is listed as a condition of bond the Supplement Form Regarding Conditions of Bond (see attached form) can be used to give the defendant directions of when and where to turn over firearms and FOID card.

Conditions of bond that include prohibiting possession of firearms can be faxed to the ISP FIRB for FOID revocation. The defendant will receive notification that FOID privileges have been revoked. If the charges are dropped or the defendant is found not guilty, FOID privileges can be reinstated.

Consent to Search

- Law enforcement is encouraged to determine the presence of, or access to firearms, by all involved parties while at the scene of any domestic dispute. FOID inquiries should be made to determine eligibility to possess firearms.
- If a firearm(s) is used in the commission of an offense and is in plain view law enforcement should confiscate the firearm(s).
- When the firearm is not in plain view and was used in the commission of an offense, or is possessed illegally, officers should attempt to obtain consent or obtain a warrant.
- *If the abuser is not present, a person having the lawful authority to permit a search of the premises can consent. If a person of equal lawful authority to permit a search is present on the scene and objects or refuses, the search can not be accomplished through consent, and if probable cause exists to seize a firearm(s), a warrant should be obtained (**Georgia v. Randolph**).*
- If questions arise, officers should consult their *State's Attorneys Office* for advice and guidance.
- In the event that the investigation results in an arrest and firearms are lawfully present but NOT involved in the incident, **officers should encourage the victim and/or other family members to surrender said weapons to law enforcement for safekeeping.**

Convictions

Convictions that meet the criteria of misdemeanor crime of domestic violence under federal law where the victim was a federally defined family or household member and for which the offense or conviction had as an element the use, or attempted use of physical force, or the threatened use of deadly weapon may qualify for FOID revocation.

Therefore, any person who has received a criminal conviction of domestic battery, assault, violation of an order of protection or a substantially similar offense that contains an element of violence may qualify for FOID revocation.

ISP FIRB may be aware through CHRI of domestic battery convictions, but not other convictions that would potentially qualify. Therefore, it is important to fax the ISP FIRB any convictions that may qualify for FOID revocation (fax: 217-782-9139). ISP FIRB will investigate further to determine if revocation applies.

Revocation and Reporting of Invalid FOID cards

To report possible FOID revocation or turn in any FOID cards in your possession mail or fax to the following address:

Mail information to the following address:
 Illinois State Police

Firearms Information and Resources Bureau
801 S. Seventh St., Suite 400M
P.O. Box 19461
Springfield, IL 62794
Attention: Enforcement Section
Fax: (217) 782-9139

Transfer of Firearms (3rd Party Transfer)

Some defendants will want to transfer firearms to a third party, especially if they have a lifetime ban of firearms possession. It is important for both parties to be clear on how to legally transfer the firearm(s) and each party's responsibilities.

- Those receiving possession in a third party transfer become the legally responsible party for the firearm and are required to be in possession of a valid FOID card.
- If this person transfers the firearm to a prohibited person they will be in violation of firearm transfer laws and the FOID act (Illinois Compiled Statutes 430 ILCS 65/3 (a)) and may face felony prosecution and one to three years imprisonment.
- It is also the responsibility of the person transferring the firearm to keep a record of such transfer for a period of **10 years** from the date of that transfer. **(430 ILCS 65/3)**
 - Documentation must show to whom they transferred the firearm(s) and a description of the firearm(s).

Destruction of Weapons

Law enforcement departments will ask the State's Attorney's Office to prepare an Order asking the Judge for permission to destroy weapons for defendants who have permanent bans and/or have not picked up or transferred weapons to a 3rd party.

Look to department policy regarding the destruction of weapons used in the commission of an offense or for those defendant's weapons who have a permanent ban.