

Relevant Information State Governments May Hold Relevant to the Fix NICS Act of 2018

Information is relevant for the National Instant Criminal Background Check System (NICS) if it can identify an individual as being someone who is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms law. There are ten federal categories of such persons, however, only seven of those categories are areas where a state agency may have relevant records. Those seven categories are:

- (1) Persons who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year and state misdemeanors punishable by imprisonment for more than two years;
- (2) Persons who are fugitives from justice;
- (3) Persons who are unlawful users of or addicted to any controlled substance;
- (4) Persons who have been adjudicated as mental defectives or who have been committed to a mental institution;
- (5) Persons subject to a court order that restrains them from harassing, stalking, or threatening an intimate partner or child of such intimate partner, or from engaging in other conduct that would place the partner or child in reasonable fear of bodily injury. This includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child;
- (6) Persons convicted in any court of a misdemeanor crime of domestic violence;
- (7) Persons who are under indictment or information for a crime punishable by the imprisonment for a term exceeding one year.

This section provides information about each of these ten categories, based on statutory and regulatory text and court decisions interpreting them¹ so that your agency can assess what records may be relevant.

A. Persons who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year and state misdemeanors punishable by imprisonment for more than two years

Pursuant to Title 18, United States Code (U.S.C), Section 922(g)(1), any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year” is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws.

Please note the following three important things about this prohibitor:

First, this category applies to any person who has been convicted—including by general court-martial—of any offense that is *punishable* by imprisonment for a term exceeding one year, whether or not such term of imprisonment was imposed.

Second, the term “offense punishable by imprisonment for a term exceeding one year” does not include (a) any federal or state offenses pertaining to antitrust violations, unfair trade practices,

restraints of trade or other similar offenses relating to the regulation of business practices, or (b) any state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less.

Third, what constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held: Any conviction that 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, unless such pardon, expungement or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

Relevant Records: Records that are relevant to this prohibitor include final criminal dispositions including dismissals, crime severity levels/classifications, statute citations and subsections, pardons, judgment and commitment orders from the courts, certificates of relief, and expungements.

B. Persons who are fugitives from justice

Pursuant to 18 U.S.C. § 922(g)(2), any person “who is a fugitive from justice” is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws. This prohibitor covers the following categories of individuals:

- (1) Any person who has fled from any state to avoid prosecution for a felony or a misdemeanor;
- (2) Any person who leaves the state to avoid giving testimony in any criminal proceeding;
- (3) Any person who knows that misdemeanor or felony charges are pending against such person and who leaves the state of prosecution.

Note that a person is not a fugitive from justice merely because he or she has an outstanding civil traffic citation; a criminal warrant must have been issued.

Relevant Records: Misdemeanor and felony warrants and charging documents

C. Persons who are unlawful users of or addicted to any controlled substance

Pursuant to 18 U.S.C. § 922(g)(3), any person “who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C. 802])” is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws.

The ATF has clarified through regulations that this prohibitor covers the following categories of individuals:

- (1) Any person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance;
- (2) Any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.

Please note the following three important things about this prohibitor:

First, unlawful use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before receiving a firearm. Instead, the unlawful use only needs to have occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an

unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm.

Second, an inference of current use may be drawn from evidence of recent use or possession of a controlled substance, or a pattern of use or possession that reasonably covers the present time. For example,

- A conviction for use or possession of a controlled substance within the past year; or
- Multiple arrests for use or possession of a controlled substance within the past five years if the most recent arrest occurred within the past year.

Third, the term “controlled substance” includes but is not limited to marijuana, depressants, stimulants and narcotic drugs. It does not include distilled spirits, wine, malt beverages or tobacco (as those terms are defined or used in Subtitle E of the Internal Revenue Code of 1986, as amended). See 21 U.S.C. § 802; 21 C.F.R. Part 1308. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance. 21 U.S.C. § 812(c)(10). There are no exceptions in federal law for marijuana used for purported medicinal purposes. Accordingly, as a matter of federal law, anyone who uses marijuana, regardless of whether their state has passed legislation purporting to authorize marijuana use and regardless of whether they possess a state-issued marijuana card, is considered an “unlawful drug user” under 18 U.S.C. § 922(g)(3).

Relevant Records: Records that are relevant to this prohibitor include drug-related convictions, drug-related arrests, failed drug test reports, probation reports, final criminal dispositions, crime severity levels/classifications, statute citations and subsections, pardons, certificates of relief, and expungements.

D. Persons who have been adjudicated as mental defectives or who have been committed to a mental institution

Pursuant to 18 U.S.C. § 922(g)(4), any person “who has been adjudicated as a mental defective or who has been committed to a mental institution” is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws. The ATF has clarified through regulations that this prohibitor covers the following circumstances and categories of individuals:

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

- Is a danger to himself, herself, or others; or
- Lacks the mental capacity to contract or manage his or her own affairs.

This includes (1) a person found to be insane by a court in a criminal case, and a person found incompetent to stand trial or found not guilty by reason of lack of mental responsibility;

(2) A formal commitment of a person to a mental institution by a court, board, commission or other lawful authority. This includes commitment to a mental institution involuntarily, commitment for mental defectiveness or mental illness or commitment for other reasons, such as for drug use. It does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Please note the following important things about this prohibitor:

First, “mental institution” includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

Second, “mental defective” does not include a person

- who has been granted relief from the disability through a qualifying federal or state relief from disability program as authorized by the NICS Improvement Amendments Act of 2007;
- The adjudication or commitment has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision or monitoring;

Relevant Records: Involuntary commitments to a mental health facility for treatment, negative adjudications of mental health in a criminal matter, a finding by a court, board, commission, or other lawful authority that a person represents a danger to himself or others, or is unable to contract or manage his/her own affairs.

E. Persons subject to a court order that restrains them from harassing, stalking, or threatening an intimate partner or child of such intimate partner, or from engaging in other conduct that would place the partner or child in reasonable fear of bodily injury. This includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child

Title 18, U.S.C. § 922(g)(8) prohibits the shipping, transporting, possessing or receiving firearms under federal firearms laws by any person who is subject to a court order that—

- Was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
- 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*
- Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child, *or* by its terms expressly 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 ATF has clarified through regulation that the term “intimate partner” means (1) the spouse of the person, (2) a former spouse of the person, (3) an individual who is a parent of a child of the person, and (4) an individual who cohabits or has cohabited with the person.

Relevant Records: Records that are relevant to this prohibitor include protective/restraining orders, the relationship of the protected parties to the respondent.

F. Persons convicted in any court of a misdemeanor crime of domestic violence

Pursuant to 18 U.S.C. § 922(g)(9), any person “who has been convicted in any court of a misdemeanor crime of domestic violence” is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws. This prohibitor covers any person who has been convicted of a local, state, tribal or federal offense that meets all of the following criteria:

(1) The offense is a misdemeanor under local, state, tribal or federal law, *or*, in states that do not classify offenses as misdemeanors, is an offense that is punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine (this is true whether or not the state statute specifically defines the offense as a “misdemeanor” or as a “misdemeanor crime of domestic violence”);

(2) The offense has, as an element, the use or attempted use of physical force (*e.g.*, assault and battery), or the threatened use of a deadly weapon; and

(3) The offense was 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 (*e.g.*, the equivalent of a “common law” marriage even if such relationship is not recognized under the law), or by a person similarly situated to a spouse, parent or guardian of the victim (*e.g.*, two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

Note that a person is not considered to have been convicted of a misdemeanor crime of domestic violence if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the jurisdiction in which the proceedings were held provides for the loss of civil rights upon conviction for such an offense), unless the pardon, expungement or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms and the person is not otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

Relevant Records: Records that are relevant to this prohibitor include misdemeanor level final criminal dispositions, specific statute and subsections of misdemeanor convictions, relationship of the victim to the defendant, specific behaviors the subject has been convicted of committing, or specific behaviors the subject has pled guilty to committing.

G. Persons who are under indictment or information for a crime punishable by the imprisonment for a term exceeding one year

Pursuant to 18 U.S.C. § 922(n), any person “who is under indictment for a crime punishable by imprisonment for a term exceeding one year” is prohibited from shipping, transporting or receiving firearms under federal firearms laws. The ATF has clarified through regulations that this prohibitor covers:

(1) A person under indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted; or

(2) A military service member charged with any offense punishable by imprisonment for a term exceeding one year which has been referred to a general court-martial.

Relevant Records: Notation on criminal history records when a subject has been placed under indictment by a grand jury or placed under information by a prosecuting attorney, as well as the projected trial date.

ⁱ Information is based on the Gun Control Act of 1968, Title 18, United States Code (U.S.C.), Sections 921 and 922; Title 27, Code of Federal Regulations (C.F.R.), subpart 478.11; and court decisions interpreting those provisions.