

The Federal Law of “Firearms Trafficking”

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In July 2021, the U.S. Department of Justice announced the creation of five Firearms Trafficking Strike Forces to focus on the illegal movement of firearms along familiar interstate routes. Two of those strike forces implicate Nevada as a source of firearms being trafficked to California.

But what is “firearms trafficking?” It is not a term defined in federal law. There is no federal “firearms trafficking” statute. Instead, it is a term used by law enforcement to describe the diversion of firearms out of the legal market for

criminal purposes. Violators are prosecuted for underlying crimes, such as making a false statement during the acquisition of a firearm, willfully dealing in firearms without a license, or knowingly transferring a firearm to a prohibited person. This article explains some of the federal laws that constitute “firearms trafficking” offenses.¹ But first: some history.

History

On November 22, 1963, Lee Harvey Oswald used a rifle to assassinate President John F. Kennedy and a revolver to murder Dallas Police Officer J.D. Tippit. Oswald bought both firearms through mail order using an alias. This event (along with the subsequent assassinations of Dr. Martin Luther King Jr., and Robert F. Kennedy, as well as rising crime rates and widespread civil unrest) prompted Congress to pass the Gun Control Act (GCA) of 1968.

Gun Control Act

The GCA expanded interstate controls over common firearms, like pistols, revolvers, shotguns, and rifles. It requires those who “engage in the business” of manufacturing or dealing in firearms to be licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).² Such licensed persons are known as Federal Firearms Licensees (FFLs). Licensed manufacturers must mark the firearms they make with serial numbers.³ All FFLs must keep records of the transfer of firearms.⁴

The GCA also prohibits certain categories of persons—including convicted felons, qualifying domestic abusers, illegal drug users, fugitives, and others—from possessing any firearms.⁵ It is a crime to transfer a firearm to a person one has reason to believe is prohibited from possessing it.⁶

Brady Act

To help enforce those prohibitions and keep guns out of the hands of people who cannot legally possess them, Congress passed the Brady Handgun Violence Prevention Act in 1993. The “Brady Act” created the National Instant Criminal Background Check System (NICS), which is run by the FBI. It requires FFLs to submit a potential buyer’s information to NICS before transferring a firearm.⁷ NICS searches available records and attempts to determine if the buyer is prohibited from receiving firearms.

Unlicensed Persons

Congress expressly passed the GCA to help law enforcement in the “fight against crime and violence” but added that it was not to “place any undue ... burdens on law-abiding citizens” who use firearms for lawful personal purposes. So, while the GCA requires FFLs to record sales of firearms and to mark firearms with serial numbers, it does not impose those same requirements on *unlicensed* persons.

An unlicensed person can privately sell a firearm and has no obligation to keep a record of the sale, or conduct a

background check, or even know the identity of the buyer. However, if the person has reason to believe the buyer is prohibited from possessing firearms, the transfer would be illegal. It would also be illegal for an unlicensed person to transfer a firearm to someone he has reason to believe is not a resident of the same state.⁸

Similarly, an unlicensed person can privately *make* a firearm and is under no obligation to place a serial number on it, nor register it, nor notify anyone of its existence.⁹

This process is lawful as long as the person’s activities do not rise to the level of being “engaged in the business” of selling or manufacturing firearms. If they do, the person must be licensed. It is a crime under the GCA to engage in the business of dealing in or manufacturing firearms without a license.¹⁰ However, prosecution for this offense requires proof of willfulness.¹¹ There is no bright-line number of firearms sold or made to determine whether a person’s activities rise to the level of being “engaged in the business.” Rather, it is a fact-specific legal determination that can only be made through application of several factors.

How Prohibited Persons Obtain Firearms

The majority of firearms in America are in the hands of responsible, law-abiding adults who use them for recreation, self-defense, or other lawful purposes. Only a small fraction of firearms will ever be used by relatively few people to commit a violent crime—and many of these people are already prohibited from possessing firearms. These prohibited people obtain their firearms in a variety of ways.

Theft

Federal law makes it a crime to steal a firearm from an FFL.¹² Nonetheless, between 2017 and 2021, ATF documented the theft of about 34,000 firearms from FFLs. Federal law does not require FFLs to implement any particular security measures. While this may seem like a lot of firearms, it is dwarfed by the number of firearms stolen from individual gun owners. Federal law reaches these thefts too, if the firearm has moved in interstate commerce.¹³ Even if a person did not steal

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Firearms Trafficking

the firearm, it is a federal crime to knowingly possess a stolen firearm that has moved in interstate commerce.¹⁴

Straw Purchases

The law attempts to keep firearms out of the hands of prohibited persons by requiring buyers to appear in person at an FFL's place of business. An FFL is required to positively identify the buyer using government-issued identification, run a background check on the buyer, and keep a record of the transaction. Generally, people who are prohibited from possessing firearms do not attempt to purchase them directly from FFLs. When they do, NICS background checks usually deny them.

More commonly, criminals defeat the controls placed on FFLs by using "straw purchasers." In those cases, the *actual* buyer (typically a prohibited person) recruits a person with a "clean" background (the *straw* buyer) to purchase the firearm on his behalf. These "straw purchases" implicate several federal crimes, most notably making a false statement to an FFL about the identity of the actual buyer.¹⁵ However, they usually also involve other violations, like illegal transfer of a firearm, unlicensed dealing, or conspiracy. And, of course, the prohibited person breaks the law when they take possession of the firearm.

Private Market

Rather than risk getting arrested for theft or recruiting a straw purchaser and creating a paper trail, many prohibited persons simply turn to private sellers, since (as noted above) unlicensed persons are not required to keep record of



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sales, run background checks, or verify identities. These private sellers often advertise firearms for sale through social media, on websites, in newspaper classified ads, or simply display them at gun shows, flea markets, or swap meets. However, a prohibited person who obtains a firearm this way still breaks the law by possessing the firearm, and the seller violates the law if they have reason to know the buyer is prohibited. The seller may also be “engaged in the business” of dealing firearms without a license.

Privately Made Firearms

Recall that the GCA allows unlicensed persons to make a firearm and does not require them to place a serial number on it. While the phenomenon of privately made firearms is not new, until recently it was mostly the pursuit of hobbyists and firearms enthusiasts. It also required a certain level of skill and equipment, such as a milling or Computer Numerical Control machine.

However, the emergence of commercially manufactured “kits” has made it much easier to build a firearm at home with little time, effort, or expertise. Because firearms parts (except

the “frame or receiver”) are not regulated by federal law, many people just make the “frame or receiver” of a firearm and then assemble it using commercially produced parts.

Once again, however, a prohibited person who obtains a firearm in this way violates the law by possessing the firearm once made. A person who is “engaged in the business” of manufacturing firearms also breaks the law if he is not licensed.

3D Printed Firearms

The final way a prohibited person may obtain a firearm is a new one: they may print it. Federal law, however, does not regulate the way a firearm is made. Consequently, it is not illegal to make a firearm using a 3D printer. Some prohibited persons have begun making firearms, or firearm frames or receivers, in this way. Like other privately made firearms, they may be assembled using commercially manufactured parts. The same limitations described above, on possession by prohibited persons or engaging in the business of manufacturing or dealing in firearms, would apply.



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ENDNOTES:

1. This article deals only with federal law and does not consider or cover Nevada law.
2. 18 U.S.C. § 923(a).
3. 18 U.S.C. § 923(i).
4. 18 U.S.C. § 923(g).
5. 18 U.S.C. § 922(g).
6. 18 U.S.C. § 922(d).
7. 18 U.S.C. § 922(t).
8. 18 U.S.C. § 922(a)(5).
9. Again, this article deals only with federal law, and does not consider Nevada law, including A.B. 286, nor the ongoing litigation surrounding it.
10. 18 U.S.C. § 922(a)(1)(A).
11. 18 U.S.C. § 924(a)(1)(D).
12. 18 U.S.C. § 924(m).
13. 18 U.S.C. § 924(l).
14. 18 U.S.C. § 922(j).
15. 18 U.S.C. § 924(a)(1)(A).