

## PROBLEMS AND CHALLENGES

The foregoing exceptions to qualifying MCDVs remain unclear in the context of their applicability to tribal court convictions for the following reasons:

- While defendants have a right to legal counsel in tribal court, many tribes do not fund public defenders for indigent defendants. For courts that do not fund public defenders, language in the court disposition becomes important. Such language might include:
  - o “The tribe offered to obtain legal counsel for the defendant but the right to counsel was knowingly and intelligently waived” ;or
  - o “The defendant was advised of his right to counsel but the defendant knowingly and intelligently waived his right by not obtaining counsel on his own”.
- For courts that do provide public defenders, judgments can include language reflecting that the tribe provides public defenders to indigents but the right was knowingly and intelligently waived.
- Lack of national databases to track tribal court convictions. However, the Bureau of Alcohol, Tobacco, Firearms & Explosives (hereinafter “ATF”) is in dialogue with NICS to incorporate tribal convictions as part of the existing national database. NICS is the agency that maintains the national database on qualifying convictions. If your tribal court is interested in getting tribal convictions in the national database, please call (304) 625-2750 or e-mail at a-nics@leo.gov.

The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) is the enforcement agency for any firearms prohibitions under chapter 18 of the U.S.C. The Office of the Chief Counsel at ATF is currently in the process of making changes to the regulation to include language that tribal convictions shall result in firearm prohibition, in the event that the convictions meet the stated exceptions. It is important to note however, that U.S.C § 921(a)(33)(A) is a self-executing statute and is in effect now, even without being codified into ATF regulations.

## RESOURCES

For information on the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) please visit:

<http://www.atf.gov/firearms/domestic/index.htm>

For more information on NICS visit:

[www.fbi.gov/hq/cjisd/nics/index.htm](http://www.fbi.gov/hq/cjisd/nics/index.htm)

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# VAWA 2006: Firearm Disqualification Clause

## The application of the Firearm Disqualification Clause to misdemeanor Domestic Violence Convictions in Tribal Courts

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# Violence Against Women Act and the Firearm Disqualifying Conviction Clause

## Introduction

*In recognition of the social and economic impact of domestic violence and to provide interstate protection for victims of domestic abuse, Congress enacted the Violence Against Women Act (VAWA), 18 U.S.C.A. §§ 2261-66 subtitled “Safe Homes for Women,” as part of the larger Violent Crime Control and Law Enforcement Act of 1994. Domestic violence crimes that involve crossing of Indian Country reservation lines and Full Faith and Credit for Tribal Court protection orders were part of the Act.*

The Omnibus Consolidated Appropriation Act of 1997 amended the Federal Gun Control Act of 1968, making it unlawful for an individual convicted in any court of law for a “misdemeanor crime of domestic violence” to ship, transport, possess, or receive firearms or ammunition. Furthermore, the law made it unlawful for any person, including governmental agencies, to sell or otherwise issue firearms or ammunition to any person knowing or having reasonable cause to believe that the person has been convicted of misdemeanor crime of violence.

The Violence Against Women Act and Department of Justice Reauthorization Act at 2005 H.R. 3402 Sec. 908 (a) further expanded the Firearm Possession Prohibition by specifically including tribal law convictions. The VAWA Reauthorization Act of 2006 amended the federal criminal code 18 U.S.C. 921(a)(33)(A)(i) stating “misdemeanor crime of domestic violence” to include “misdemeanor under Federal, State, or Tribal law”.

## WHAT IS A DISQUALIFYING CONVICTION?

Pursuant of 18 U.S.C. § 921(a)(33)(A), a conviction of misdemeanor domestic violence is disqualifying, meaning it fulfills the conditions of prohibition, if the offense 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 cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian, of the victim.

The following factors determine those misdemeanor crimes of domestic violence (hereinafter “MCDV’s”) that DO NOT qualify under the Firearm Disqualification Clause:

- \* Representation by legal counsel — unless he or she knowingly and intelligently waived the right to counsel;
  - \* Whether the defendant was entitled to a jury trial AND the case was not tried by a jury — unless the person knowingly and intelligently waived the right to jury trial; or,
  - \* Whether the conviction was set aside or expunged; the person was pardoned; or, the person’s civil rights – the right to vote, sit on a jury, and hold elected office – were restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense).
- BUT: This exception does NOT exclude the federal firearms prohibition if:
- the expungement, pardon, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms; or,
  - the person is otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

## LEGISLATIVE TIMELINE

### **1994 – VAWA 18 USCS § 2265(a) - Full faith and credit given to protection orders:**

Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State, Indian tribe, or territory.

### **1997 – The Omnibus Consolidated Appropriation Act, 18 U.S. C. § 922(g)(9):**

It shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

### **2006 - VAWA and Dept. of Justice Reauthorization Act of 2006 - H.R. 3402 Title IX Sec. 908(a):**

Firearms Possession Prohibitions, Section 921(a)(33)(A)(i) of title 18, United States Code, is amended to read: “(i) is a misdemeanor under Federal, State, or Tribal law;

### **2006 – 18 U.S.C. § 921(a)(33)(A):**

.....the term “misdemeanor crime of domestic violence” means an offense that:  
(i) is a misdemeanor under Federal, State, or Tribal law;