



**ARMY NATIONAL GUARD TRIAL DEFENSE SERVICE**  
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REPLY TO  
ATTENTION OF

NGJA-OR-TDS

7 April 2013

MEMORANDUM FOR Soldiers

SUBJECT: Felonies and the Lautenberg Amendment affecting Arms and Ammunition

1. Purpose. The purpose of this memorandum is to generally describe conditions that adversely affect the ability of a Soldier / Airman to carry firearms due to felonies and domestic violence convictions which generally fall in to the “Lautenberg” Act category. In all cases, early discussion with an attorney (typically a civilian attorney for civilian court) and a defense Judge Advocate in coordination with the Attorney is usually most advantageous the mitigate the situation. Judge Advocates assigned as Legal Assistance Attorneys (LAA) or Trial Defense Counsel (TDC) in the Trial Defense Service are the Judge Advocates you wish to talk to have an attorney client privileged communication. Herein references to Soldier apply equally to Airmen.
2. Felony Convictions. Depending on your State law, and the type of felony conviction, there may be a restriction to your possession of firearms, and even if there is an exception to possession while in a duty status, that exception often is affected by laws that provide that certain felonies have no exception or for multiple felonies. If you have a felony, you should presume that it adversely affects your National Guard Status, and just like Lautenberg, take action to have it removed from your record, or possibly reduced from felony to misdemeanor. Many things are time sensitive, so changes to the nature of a conviction, such as reduction from a felony to misdemeanor usually need to be done during the course of probation, whereas expungments (set aside of the conviction) occur after a period of time passes after the conviction. Some states do not even allow for expungements making immediate appropriate action critical. No matter what, just consult with a private attorney and or JAG about the affect the particular conviction(s) may have on your military career and options you may have.
3. The Lautenberg Amendment. The Federal Gun Control Act of 1968, as amended in 1996, makes it a federal felony for anyone who has a qualifying misdemeanor conviction for domestic violence to ship, transport, possess, or receive firearms or ammunition. Army regulations have made the act applicable to domestic violence felonies.
  - a. It’s also a felony for you to issue or dispose of firearms or ammunition to anyone with a qualifying conviction if you know, or should know, about the conviction.

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- b. To qualify as a conviction under the Lautenberg Amendment, there must be:
  1. A conviction, not a mere arrest; AND
  2. The crime must have involved the use or attempted use of force, or the threatened use of a deadly weapon; AND
  3. At the time of the crime, the Soldier/Airman must have had a particular relationship with the victim, such as current or former spouse, parent/guardian, or the like.
  
- c. In Oregon, the charging instrument may reflect domestic violence but don't let that designation or lack thereof be the only thing that makes you think you have or don't have a domestic violence conviction. Any State law designation of domestic violence is just that, a State law designation and whether Federal Law considers it's a violation is based on those matters in 'b'.
  
- d. In Oregon, based on Lautenberg and Army Regulation, any offense that involves the use or attempted use of force, or the threatened use of a deadly weapon on someone with whom you had the 'qualifying' relationship, may be domestic violence under federal law even if Oregon (or any other state for that matter) does not recognize such when the charges are plead. In Oregon, the least offense that could apply is harassment by offensive physical contact, and often is charged along with Assault 4 domestic violence, and while the harassment is not shown as domestic violence if the offensive contact arises to a qualifying use of force against the other person then it may be a Lautenberg Violation.
  1. Whenever a Soldier is charged with something that appears that it may be a Lautenberg violation then the Soldier should have their civilian attorney coordinate with a Legal Assistance Attorney (or TDC via the JAG office referral) about recommended courses of action. While the goal is no conviction, a conditional discharge leading to dismissal of the charge or diversion with eventual dismissal of the charge, if a conviction is the only alternative then there are some alternatives that prosecutors will usually accept. For harassments of the described nature, for example, a plea clearly to "Non-violent diminimus force" that being force less than that necessary to constitute the use of force under Lautenberg might be advised, and recommended to be documented in a Judgment Order or at least the plea petition. The 'diminimus' contact rule arises out of the federal 9<sup>th</sup> Circuit and may not have applicability outside the 9<sup>th</sup> Circuit.
  2. For Assault 4 cases, a plea to a mental state of 'reckless' should also take one out of Lautenberg.
  3. Both diminimus contact (minimal non-qualifying contact, or a reckless rather than intentional or knowing act, should be set forth in the conviction document as a judicial finding in order for the facts making the situation not covered by Lautenberg to be readily identifiable.

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- e. There is no time limit on how old or recent the conviction need be, and all qualifying convictions, no matter their age, are covered under the law.
  - f. If you have a qualifying conviction, do not accept possession of firearms or ammunition, military or otherwise. To do so violates the law and subjects you to criminal prosecution, as well as possible adverse administrative action by the military.
4. If you know of someone in the your State National Guard who has a qualifying conviction, tell them they need to work to address the issue and that they should speak with a civilian or military attorney. Under some rules, and depending on your position, you may have a duty to report this fact to your Commander or First Sergeant, and you must not issue that person firearms or ammunition. Issuing firearms or ammunition to someone who has a qualifying conviction, which you know or should have known about, is also a federal felony, which would subject you to criminal prosecution and adverse administrative action.
  5. Remember, it is not a federal felony under the Lautenberg Amendment to merely have a qualifying conviction. You are committing a felony only if you have such a conviction, and then possess firearms or ammunition. Therefore, if you have a qualifying conviction, or may have one, it is in your interest to avoid possessing firearms or ammunition and violating the Lautenberg Amendment.
  6. If you have a qualifying conviction, or if you are unsure whether you have one, you may contact the you State JAG office for legal assistance (referrals may be made to TDS depending on your State's options to provide certain services), and or opt to see your Commander (remembering that such contact is not privileged and your communication to the commander may be repeated and used against you). Your access to firearms and ammunition will be suspended, but you will also be referred to a legal assistance attorney, who will work with you to find out if you have a qualifying conviction. If you do not have such a conviction, your access to weapons and ammunition will be restored. If you have a qualifying conviction, it's in your interest to know, so you can avoid violating the Lautenberg Amendment, thereby committing a federal felony. In that case, your legal assistance attorney will explore with you your legal options to obtain relief from the Lautenberg Amendment's restrictions.
  7. Each State has different rules on whether a conviction can be 'expunged' and removed from your record, whether the case has to be reopened and somehow the case dismissed anew, or whether you have to seek a pardon from the Governor. In any event, ignoring the issue is not the answer.
  8. Many of you may be wondering what may happen to your military career if you have a qualifying conviction under the Lautenberg Amendment. Each State addresses the policy differently but remember that you cannot possess firearms or ammunition and that means you cannot perform your Soldier duties; and as a result your ability to perform your National Guard duty is significantly restricted. Commonly, you may expect a counseling from your line commander or supervisor, probably in writing, and allowed a reasonable

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period of time to clear the problem, or be processed for separation. If you have a qualifying conviction, it's possible that you may never be able to legally possess weapons or ammunition again. What is certain is that if you knowingly violate the Lautenberg Amendment, you are committing a crime and the consequences on your civilian life and military career will likely be much worse than if you merely have a qualifying conviction.

9. POC for this memorandum is the current Regional Defense Counsel. The 4133d can be emailed at NG.OR.ORARNG.LIST.JAG-4133-TDS@mail.mil. The Oregon 653d Trial Defense Counsel message phone number is 503.269.5523. The unit Website is located at <http://www.oregon.gov/OMD/JAG>.

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