



INFORMATION BULLETIN:

“EMERGENCY POWERS” AND “ESSENTIAL” SERVICES OF FIREARM RETAILERS **Prohibitions Against Firearm Seizures and Other Considerations**

MARCH 18, 2020

Ongoing events concerning the COVID-19 pandemic are causing substantial disruptions to local businesses and individuals alike. These disruptions are further exasperated due to recent orders from various local health officials, none of which are uniform in their requirements. As one example, the Orange County Health Officer issued an order on March 17, 2020, prohibiting “private gatherings of any number of people” which applies to “all professional, social, and community gatherings . . . that are not engaged in Essential Activities.”¹ A few hours later, however, the County issued a press release stating the order had “caused widespread confusion” and as a result the County would be issuing an amended order.²

Because such orders carry threat of criminal prosecution and fines for any violation, it is imperative businesses and individuals be given clear and concise guidance on how to proceed. Yet CRPA has not yet been made aware of any official guidance from the California Department of Justice, Bureau of Firearms (or any state or local agency) regarding the effect such orders have on licensed firearm and ammunition retailers.

CRPA firmly believes firearm retailers serve an essential purpose in California, especially given the unprecedented demand they currently face. As a result, CRPA attorneys are advising firearm and ammunition retail businesses to continue operating pursuant to the “essential purpose” exceptions many local health official orders include.

The following information has been prepared to assist members of the public, firearm retailers, law enforcement, and state and local officials in understanding the effect of recent events on firearm and ammunition businesses in California. As shown, prohibiting lawful firearm transactions from taking place will only serve to jeopardize public safety by failing to provide a means in which lawful firearm transactions can occur. Regardless, CRPA hopes clear and concise guidance from government is promptly provided to these businesses and their customers.

¹ See <https://cms.ocgov.com/civicax/filebank/blobdload.aspx?BlobID=114362>.

² See <https://twitter.com/OrangeCountyEOC/status/1240102073305194496/photo/1>. As of the morning of March 18, 2020, it is unclear when an amended order will be issued.

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I. CONFISCATIONS OF FIREARMS DURING STATE AND FEDERAL EMERGENCIES ARE PROHIBITED

As a result of unlawful confiscation of firearms during Hurricane Katrina, state and federal governments enacted robust protections for gun owners to prevent this from happening in the future. On a federal level, the United States Congress enacted section 5207 of Title 42 of the United States Code, which states no individual acting on behalf of the federal government (including the military) while acting in support of relief from a major disaster or emergency may:

- Temporarily or permanently seize, or authorize seizure of, any firearm the possession of which is not prohibited under Federal, State, or local law, other than for forfeiture in compliance with Federal law or as evidence in a criminal investigation;
- Require registration of any firearm for which registration is not required by Federal, State, or local law;
- Prohibit possession of any firearm, or promulgate any rule, regulation, or order prohibiting possession of any firearm, in any place or by any person where such possession is not otherwise prohibited by Federal, State, or local law; or,
- Prohibit the carrying of firearms by any person otherwise authorized to carry firearms under Federal, State, or local law, solely because such person is operating under the direction, control, or supervision of a Federal agency in support of relief from the major disaster or emergency.³

Any overreach by a person acting on behalf of the federal government in violation of the above is grounds for lawsuit against that person.⁴ Remedies include the return of the seized firearm and attorney's fees.⁵

California enacted its own version of the above with the passage of Assembly Bill No. 1645 in 2007, which forbids "the seizure or confiscation of any firearm or ammunition by the Governor during a state of war emergency or a state of emergency from any individual."⁶ As a result, California's Government Code now prohibits:

The seizure or confiscation of any firearm or ammunition from any individual who is lawfully carrying or possessing the firearm or ammunition, or authorize any order to that effect, provided however, that a peace officer who is acting in his or her official capacity may disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. The officer shall return the firearm to the individual before discharging the individual, unless the officer arrests that individual or seizes the firearm as evidence pursuant to an investigation for the commission of a crime.⁷

Both federal and state protections against confiscation in emergency situations apply to *lawfully owned* firearms which are not generally prohibited in California. Examples of illegal firearms include machineguns, short-

³ 42 U.S.C. § 5207(a)(1-4). The only limitation placed on these restrictions is for the "temporary surrender" as a condition for entry into any mode of transportation used for rescue or evacuation, provided the firearm is returned at the completion of such rescue or evacuation. 42 U.S.C. § 5207(b).

⁴ 42 U.S.C. § 5207(c)(1).

⁵ 42 U.S.C. § 5207(c)(2-3).

⁶ Assem. Com. On Public Safety, Rep. on Assem. Bill No. 1645 (2007-2008 Reg. Sess.) as introduced Feb. 23, 2007.

⁷ Gov. Code § 8571.5.

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barreled rifles, short-barreled shotguns, and unregistered “assault weapons.”⁸ And as applied to California, the firearm must be *lawfully carried*, meaning the person must generally possess a valid CCW permit in order to lawfully carry a loaded and concealed firearm in any “public place.”⁹

Be aware that none of the above prevents law enforcement from seizing firearms in certain situations, including at the scene of a domestic violence incident involving a threat to human life or a physical assault, when a person is detained for a mental health examination and is found to own or possess firearms, or when the person is being served with a domestic violence restraining order or “Gun Violence Restraining Order.”¹⁰ For this reason, be sure to exercise your Fourth and Fifth Amendment Rights and immediately contact an experienced firearms attorney following any law enforcement encounter.

II. LAWFUL FIREARM LOANS

Many gun owners have been asking how to lawfully loan firearms between persons during this time of crisis. In general, all firearm transfers (including loans) must be processed by a California licensed firearms dealer.¹¹ But there are some limited exceptions, namely when the loan is to a spouse, registered domestic partner, or any of the following relations, whether by consanguinity, adoption, or step relation:

- Parent
- Child
- Sibling
- Grandparent
- Grandchild.¹²

For this exception to apply, however, the loan must also be “infrequent,”¹³ be for a lawful purpose, and cannot exceed 30 days in duration.¹⁴ The person being loaned the firearm must also possess a valid Firearm Safety Certificate.¹⁵ And if the loaned firearm is a handgun, the handgun must have an Automated Firearms System (“AFS”) record on file with DOJ.¹⁶

⁸ See Pen. Code §§ 30500-31115 (prohibitions on “assault weapons”), 32610-32750 (prohibitions on machineguns), 33210-33320 (prohibitions on short-barreled rifles / short-barreled shotguns).

⁹ See Pen. Code §§ 25400-26100 (prohibition against concealed and loaded carry), 26150-26225 (CCW permit provisions).

¹⁰ Pen. Code § 18250(a); Welf. & Inst. Code § 8102.

¹¹ Pen. Code § 27545 (requiring sale, *loan*, or transfer be processed through licensed firearms dealer).

¹² Pen. Code § 27880(a)(1-5).

¹³ Defined as less than six transactions per calendar year and in no event more than 50 total firearms per calendar year. Pen. Code § 16730.

¹⁴ Pen. Code § 27880(b-d).

¹⁵ See <https://oag.ca.gov/firearms/fscinfo>.

¹⁶ Pen. Code § 27880(e-f). It should also be noted that the act of loaning a firearm between residents of different states may also trigger federal transfer requirements, which means the firearm must first be delivered to licensed firearms dealer located in the recipient’s home state to process the transfer.

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III. FIREARM AND AMMUNITION RETAILERS PROVIDE “ESSENTIAL” BUSINESS SERVICES

The COVID-19 pandemic is causing unusual delays at licensed firearm and ammunition retailers throughout the state. Retailers are seeing unprecedented demand while simultaneously being subjected to local orders prohibiting “non-essential” businesses from operating.¹⁷ These municipal orders are often in conflict with one another, creating a patchwork of unclear and inconsistent rules between counties and municipalities. What’s more, these hodgepodge orders are inhibiting many unlisted “essential” businesses from facilitating an adequate response to this crisis.

For example, there are reports of municipal interference with employees from various trades that provide “essential” tools, equipment, maintenance, and other necessary components for the transportation and packaging of food and medical supplies. And, at this time, the federal government is limited in how they address these municipal orders under the 10th Amendment to the United States Constitution, which states:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Moreover, all California Department of Justice, Bureau of Firearms (“DOJ”) Field Offices appear to be temporarily closed, and DOJ’s “Background Check Clearance Unit” is allegedly running on skeleton crews (the effects of which remain to be seen). And if these skeleton crews are themselves exposed to the COVID-19 virus, it is likely pending background checks will be delayed. CRPA attorneys are working to obtain further information from DOJ to determine what, if any, protocols are in place to ensure the continued lawful transfer of firearms can occur. Any updates on this topic will be provided to our members as soon as they are available.

That said, California law generally requires all firearm and ammunition transfers to be processed by or through a California licensed firearms dealer or licensed ammunition vendor.¹⁸ As applied to firearms, California law imposes a 10-day waiting period, during which the licensed firearms dealer maintains possession of the firearm.¹⁹ But only upon completion of a required background check can the firearm or ammunition be delivered to the customer.²⁰ What’s more, firearm and ammunition retailers serve an important public safety function by educating customers on California laws and basic safe handling of firearms, which includes the administration of California’s Firearm Safety Certificate (“FSC”) program.²¹

¹⁷ For example, on March 16, 2020, the Health Officer of the County of Riverside issued an order prohibiting all gatherings with the expected presence of more than 10 individuals unless for “necessary shopping.” It remains unclear, however, if this prevents individuals from waiting in line at local firearm retailers. At this time, CRPA has been made aware that some firearm retailers in the San Francisco Bay Area have closed, but it is unclear if these retailers were forced to close or voluntarily chose to do so. Retailers should contact their local authorities for more information as some municipalities are making exceptions for “public safety” and “essential services,” which would appear to permit firearm retailers to continue operations – especially when compared to services expressly identified as exempted that do not address a fundamental right, e.g. laundromats and hardware stores. In this regard, firearm retailers are also akin to other essential services expressly identified as exempt based upon Constitutional protections, such as newspapers and media.

¹⁸ Pen. Code §§ 27545, 30312.

¹⁹ Pen. Code § 27540(a).

²⁰ See Pen. Code §§ 27540(d), 30370.

²¹ See <https://oag.ca.gov/firearms/fscinfo>.

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Interpreting any of the recently issued orders by local health officials as a prohibition against firearm and ammunition retailers from operating will deprive California residents of these essential public safety services. Worse, it may even serve to encourage illegal transactions as California residents fearing for their personal safety will lack the legal means of engaging in firearm transactions. This is especially true in the context of temporary loans or transfers, all of which must generally be processed through a California licensed firearms dealer. For reasons such as this, firearm and ammunition retailers most certainly qualify as an “essential” business even if not expressly listed in specific municipal orders.

A. Effect of Temporarily Restrictions on Pending Firearm Transactions

Given the unprecedented demand faced by dealers during this crisis, untold numbers of firearm transactions are currently subject to California’s 10-day waiting period. While normal circumstances would allow customers to complete the transaction, any order prohibiting firearm retailers from operating would place these pending transactions in legal uncertainty.

To make matters worse, failure to take possession of a firearm within 30-days of initiating a transaction with a dealer will result in the cancellation of the transaction as a matter of law.²² This is primarily a result of the required background check only being valid for up to 30 days upon submission. If the purchaser is unable to complete the transaction in time, they will be forced to restart the process and any fees paid in connection with the transaction will have been forfeit.

B. El Dorado County Sheriff Statement Regarding Firearm Businesses as “Essential”

In support of the arguments raised above, El Dorado County Sheriff John D’Agostini recently issued a statement that any local orders prohibiting the continued operation of licensed firearm and ammunition retailers would deprive local communities of their important and essential functions. As further stated by the Sheriff, “local health officials and state and local law enforcement should consider these businesses as ‘essential’ in the context of any local health official orders.” A copy of the Sheriff’s letter can be viewed online at <https://michellawyers.com/wp-content/uploads/2020/03/Firearms-Ammo-Covid.pdf>.

For Additional Information

To stay up-to-date on the latest firearm related news in California and the impact of the COVID-19 pandemic on Second Amendment rights, be sure to subscribe to CRPA email alerts and visit the CRPA website at www.CRPA.org.

²² See <https://oag.ca.gov/firearms/pubfaqs#20>.

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