

## **Gun Laws - Essential Information and Recent Developments**

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### **“Red Flags” - Ethics and Malpractice Considerations**

1. Family Law
  - a. Protective Orders/Injunctions/TRO's
  - b. “Possession” of firearms, ammo, and components
  - c. Consequences: Federal felony, \$250,000.00 fine, 10 years (subject to sentencing guidelines)
  - d. Must advise clients of this
2. Criminal Law
  - a. “Misdemeanor crimes of domestic violence”
  - b. Must advise clients of this
  - c. Heller and McDonald - must stay informed about these cases

### **State Law**

1. **Why do I have the gun (or what am I doing with it)?**
  - a. For protection
    - i. UCW - “Carrying” handguns is generally prohibited - PC § 46.02
    - ii. Carrying under authority of CHL is permitted
  - b. Castle Doctrine
    - i. Passed in 2007
    - ii. No duty to retreat from anywhere you have a legal right to be
  - c. Common law/statutory exceptions
    - i. Hunting or other sporting purposes, and direct route to and from - allows you to “carry”
    - ii. Traveling
    - iii. Repairs, ammo, etc.
    - iv. Obscure and dubious defenses from old case law
  - d. While intoxicated
    - i. NOT defined by BAC
    - ii. Prohibited for CHL's but not for others
    - iii. BUT no protection under Motorist Protection Act
  - e. To commit a crime - enhances offenses
2. **Current Issues**
  - a. CHL holders aren't penalized for not producing CHL's (HB 410/SB 838)
  - b. CHL administration streamlined
  - c. Local authorities are challenging gun shows as nuisances
  - d. See other current issues under the discussions of particular laws

## Federal Law

### 1. Who can buy and sell guns?

- a. Private sales are legal between residents of the same state
- b. Retail sales (by someone in the gun business) are regulated
  - i. Buyer must complete Form 4473
  - ii. Seller must hold FFL and comply with requirements
  - iii. Seller must run NICS check (except for CHL holders)
- c. Unlawful Transfers - State law (PC 46.06) prohibits transfer of guns or ammo to drunks, people under 18, felons, handgun to people under protective orders
- d. Interstate Purchases - Resident can buy guns, etc. in any other state where allowed by law. HB 267/SB 1188 (PC 46.07). Now consistent with federal law.
- e. "Gun Show Loophole" means having to get government permission for EVERY transfer

### 1. Recent Developments

- a. Heller
  - i. Challenge to D.C. gun laws
  - ii. Supreme Court held that the 2<sup>nd</sup> Amendment protects an individual right
  - iii. Holding only applied to acts of the federal government (incl D.C.)
  - iv. Dicta: Right is not unlimited, doesn't void bans on felons and mental ill, restrictions on places, and regulating commercial sales
  - v. Over 60 cases heard in lower courts since Heller, most or all have upheld the laws
  - vi. Ironically, the dissent from the COA ruling in Heller said the 2<sup>nd</sup> Amendment didn't apply to DC residents because DC isn't a state and has no militia
- b. McDonald v. Chicago
  - i. Challenge to Chicago's handgun ban, identical to that struck down in D.C. by the Heller case
  - ii. Certiorari granted
  - iii. Issue: Does the 2<sup>nd</sup> Amendment apply to the states?
    - (1) Substantive due process
    - (2) Privileges and Immunities
  - iv. Put another way: Do all Americans have the same constitutional rights?
  - v. Oral arguments 3/2/10
  - vi. Amicus briefs:
    - (1) 251 Congressmen, 58 Senators
    - (2) 891 state legislators and officials
    - (3) AG's from 38 states - asking the Court to subject their states to restrictions on what they can do!
  - vii. Eyewitnesses to oral arguments said five justices clearly supported incorporation
- c. Intrastate transactions: Montana and Tennessee have passed measures seeking to exempt guns made and kept in-state from national gun control laws. Introduced in Texas by Leo Berman as HB 1863 in 2009.

### 2. Current issues

- a. Microstamping, taggants, etc.
- b. Limits on number of guns bought
- c. Terror watchlist
- d. UN Treaties
- e. Gun tax bill - no legs, urban legend
- f. Blair Holt Bill - licensing and registration - no legs

## Resources

1. [www.HealyMilneLaw.com](http://www.HealyMilneLaw.com)
2. [www.atf.gov](http://www.atf.gov)
3. <http://www.nraila.org/gunlaws/>
4. [http://www.txdps.state.tx.us/administration/crime\\_records/chl/chlsindex.htm](http://www.txdps.state.tx.us/administration/crime_records/chl/chlsindex.htm)
5. Call me for other specific sites

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<b>Federal Firearms Laws</b>	<b>Texas Firearms Laws</b>
<p><b><u>Overview</u></b></p> <ol style="list-style-type: none"> <li>1. Federal law regulates who can have guns, what kind of guns you can have, what you have to do to be allowed to sell them as a business, and to some extent, where you can have them.</li> <li>2. The constitutional authority for Congress to regulate guns comes from 1) the Commerce Clause (general gun control laws), and 2) the authority to tax (NFA firearms)., subject to the right to keep and bear arms in the 2<sup>nd</sup> Amendment to the U.S. Constitution.</li> <li>3. There is no national requirement to register guns or to obtain an ID or license before acquiring them. You must complete a form (kept by the seller until he goes out of business) and run a NICS check (which must be deleted from the system).</li> <li>4. State law overlaps in many areas, and is generally more lenient.</li> <li>5. Federal law rarely preempts state law, but because of dual sovereignty something legal under state law can be prosecuted under federal law.</li> <li>6. Project Safe Neighborhoods (formerly Project Exile) assigns a federal prosecutor to each district strictly to prosecute gun laws.</li> </ol>	<p><b><u>Overview</u></b></p> <ol style="list-style-type: none"> <li>1. Texas law regulates where you can have a gun, for what purposes, and to some extent, who can have a gun and what kinds of guns you can have.</li> <li>2. The authority to regulate guns comes from the state's general police power, subject to the qualified right to keep and bear arms in the Texas Constitution.</li> <li>3. Texas has no requirement to register guns or to obtain an ID or license before acquiring them.</li> <li>4. Texas permits open carry of rifles and shotguns, although specific conduct may violate laws against disorderly conduct, deadly conduct, or aggravated assault.</li> <li>5. Carrying of handguns is prohibited, with exceptions for CHL holders and persons complying with the Motorist Protection Act, and with common law and statutory exemptions.</li> <li>6. It generally doesn't matter whether the gun is open or concealed, except CHL holders must conceal theirs and people relying on the Motorist Protection Act can't have theirs in plain view.</li> <li>7. State law preempts local ordinances in most cases. I reviewed and testified regarding the Tyler firearms ordinance, and cities have very little discretion.</li> <li>8. A law-abiding person is a lot more likely to get prosecuted under state laws than federal laws.</li> </ol>

Federal Firearms Laws	Texas Firearms Laws
<p><b>Who can have a gun?</b></p> <ol style="list-style-type: none"> <li>1. <u>Prohibited Persons</u> - 18 U.S.C. § 922(g) - cannot possess firearms, ammunition, or components <ol style="list-style-type: none"> <li>a. Convicted of crime punishable &gt; 1 yr, or indicted for one <ol style="list-style-type: none"> <li>i. Crime punishable by more than one year</li> <li>ii. excludes certain business-related crimes</li> <li>iii. excludes state misdemeanors punishable by confinement for two years or less</li> <li>iv. key is the maximum punishment for the crime, rather than the sentence you actually received</li> </ol> </li> <li>b. Fugitives from justice</li> <li>c. Addicted to or unlawful user of drugs</li> <li>d. Adjudicated mentally defective/committed to institution</li> <li>e. Illegal aliens and nonimmigrant visas</li> <li>f. Dishonorably discharged</li> <li>g. Renounced citizenship</li> <li>h. Subject to domestic court order (protective Orders, injunctions, extensions of TRO's, etc.)</li> <li>i. Misdemeanor crime of domestic violence <ol style="list-style-type: none"> <li>i. Lautenberg Amendment</li> <li>ii. reckless conduct (Penal C. Sec. 22.05) - not MCDV</li> <li>iii. terroristic threat (PC Sec. 22.07) - not MCDV</li> <li>iv. Represented or "knowing and intelligent waiver"</li> </ol> </li> </ol> </li> <li>2. <u>Underage Persons</u> - must be 18 to possess a rifle or shotgun, 21 to possess a handgun or handgun ammo, with some exceptions.</li> <li>3. <u>Restoration of firearms rights</u> <ol style="list-style-type: none"> <li>a. See above list for events that make someone a "prohibited person"</li> <li>b. No exception for hunting (common misconception)</li> <li>c. Methods of restoring rights, and "workarounds" <ol style="list-style-type: none"> <li>i. Black powder guns - some are not "firearms"</li> <li>ii. Is it a felony under the definition?</li> <li>iii. Is it a MCDV under the definition?</li> <li>iv. Is it a domestic order that meets the definition?</li> <li>v. Deferred adjudication? <ol style="list-style-type: none"> <li>(1) expunged, won on appeal, set aside,</li> </ol> </li> </ol> </li> </ol> </li> </ol>	<p><b>Who is not allowed to have a gun?</b></p> <ol style="list-style-type: none"> <li>1. <u>Prohibited persons</u> - PC § 46.04 <ol style="list-style-type: none"> <li>a. Felons: <ol style="list-style-type: none"> <li>i. within five years of release from confinement, parole, etc.</li> <li>ii. Thereafter, prohibited from possessing a gun anywhere other than premises where he lives</li> </ol> </li> <li>b. Person convicted of assault family violence (PC § 22.01) (Class A misdemeanor, family member or household, within 5 years of release from confinement, parole, etc.</li> <li>c. Person subject to certain orders: <ol style="list-style-type: none"> <li>i. Protective Orders (TFC Sec 6.504 or Chap 85)</li> <li>ii. Magistrate's Emergency P.O.'s (CCP Article 17.292) <ol style="list-style-type: none"> <li>(1) May issue, shall issue if serious bodily injury or use or exhibition of deadly weapon</li> <li>(2) Supersedes conflicting parts of prior visitation order</li> <li>(3) P.O. under TFC Chap 85 supersedes conflicting parts</li> <li>(4) Ex Parte PO can supersede it if the Court knows of the MEPO and says it's superseded</li> <li>(5) Magistrate can now modify them</li> <li>(6) Can transfer jurisdiction to criminal court</li> </ol> </li> <li>iii. Order issued to protect victim of sexual assault (CCP Chapter 7A)</li> </ol> </li> </ol> </li> </ol>

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<p style="text-align: right;">pardoned or civil rights restored (2) BATFE application - implicitly repealed</p> <p>4. <u>Warnings</u></p> <p>5. <u>Law Enforcement Officers' Safety Act</u>, 18 U.S.C. § 926B and 926C - allows 2 classes of people to carry nationwide, regardless of state or local laws</p> <p style="margin-left: 20px;">a. "qualified law enforcement officer"</p> <p style="margin-left: 20px;">b. "qualified retired law enforcement officer"</p> <p>6. <u>Bills</u> introduced to allow nationwide reciprocity for CHL holders, not passed</p>	

Federal Firearms Laws	Texas Firearms Laws
<p><b>Where</b> can I take a gun?</p> <ol style="list-style-type: none"> <li>1. <u>Interstate transportation</u> - Firearms Owners Protection Act - safe harbor for interstate transportation of guns, must be locked in trunk and unloaded; unclear if it includes intrastate transportation</li> <li>2. <u>Federal installations</u> - such as post offices, possibly including premises - guns prohibited</li> <li>3. <u>National parks</u> - new law now effective Feb. 22, 2010 allows possession of guns in national parks and wildlife refuges if you comply with state law</li> </ol>	<p><b>Where</b> can I take a gun?</p> <ol style="list-style-type: none"> <li>1. <u>Residence</u> (including RV's) - owner can "carry" handguns</li> <li>2. <u>Place of business</u> - manager or owner can "carry" handguns</li> <li>3. <u>Vehicle you own or control</u> - Motorist Protection Act: <ol style="list-style-type: none"> <li>a. In 2005 I testified for the predecessor bill, as the expert witness for NRA and TSRA. These bills comprise the biggest reform of Texas' gun laws EVER, way bigger than the CHL law</li> <li>b. Requirements: <ol style="list-style-type: none"> <li>i. NOT in plain view</li> <li>ii. Not a prohibited person</li> <li>iii. Not committing crime above Class C misdemeanor traffic offense</li> <li>iv. Not member of criminal street gang</li> </ol> </li> <li>c. Consequence: Generally legal to have a gun in your car</li> </ol> </li> <li>4. <u>Places Weapons Prohibited for EVERYONE</u> - PC § 46.03 <ol style="list-style-type: none"> <li>a. School, activity, transportation</li> <li>b. Polling place</li> <li>c. Court or offices</li> <li>d. Racetrack</li> <li>e. Secured area of airport</li> <li>f. Within 1000' of execution, on execution day, with notice</li> </ol> </li> <li>5. <u>Places weapons prohibited (UCW) by CHL HOLDERS</u> - PC 46.035 <ol style="list-style-type: none"> <li>a. Places deriving 51% or more of their income from alcohol</li> <li>b. Premises of sporting events</li> <li>c. Premises of correctional facility</li> <li>d. Premises of hospital or nursing home (REQUIRES NOTICE)</li> <li>e. Amusement park (REQUIRES NOTICE)</li> <li>f. Church, etc. (REQUIRES NOTICE)</li> <li>g. Meeting of governmental entity (REQUIRES NOTICE)</li> <li>h. While intoxicated</li> </ol> </li> </ol>

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	<p>6. <u>Other States, with CHL</u></p> <p>a. <u>Reciprocity</u></p> <ul style="list-style-type: none"> <li>i. Includes formal reciprocity agreements allowing CHL holders of each state to carry in the other</li> <li>ii. Also includes reciprocity by operation of law, where the state's law require it to recognize Texas CHL's</li> <li>iii. 29 states have reciprocity, including all four contiguous states (LA, AR, OK, NM), and all states touching them</li> <li>iv. NOT CA, CT, DC, HI, IA, IL, MA, MD, ME, NE, NH, NJ, NV, NY, OH, OR, RI, WA, WI, or WV.</li> <li>v. Some recognize only licenses issued to residents</li> </ul> <p>b. <u>Unilateral States</u> - Texas unilaterally recognizes their CHL's. Includes CA, CN, HI, IA, MD, MA, NV, NJ, NY, RI, WA</p> <p>c. MUST COMPLY with place and manner of carry laws in each state</p> <p>7. <u>Parking Lot Bill</u>: HB 1301/SB 730: Would have allowed employees to keep guns and ammo in their locked vehicles. Did not pass - slowdown in House killed Voter ID and every subsequent bill on the calendar. This controversy began when a group of hunters in Oklahoma were fired by their employer the opening day of hunting season when their rifles were discovered in their vehicles. The Oklahoma Legislature was in session and immediately passed legislation to protect the legal contents of an employee's vehicle when parked on the employer's property.</p> <p>8. <u>Campus Carry</u>: HB 1893/SB 1164: Would have allowed students who hold CHL's to carry on college campuses. Now students and staff can be fired or expelled. Members of the public can carry on campuses but not in buildings.</p>



Federal Firearms Laws	Texas Firearms Laws
<p><b><u>What kinds of guns can I have?</u></b></p> <ol style="list-style-type: none"> <li>1. <u>Handguns</u> - no special restrictions on ownership if over 21</li> <li>2. <u>Rifles and shotguns</u> - no special restrictions if over 18</li> <li>3. <u>NFA Firearms</u> <ol style="list-style-type: none"> <li>a. Machine guns</li> <li>b. Suppressors and silencers</li> <li>c. Short barreled rifles and shotguns</li> <li>d. Destructive devices such as grenades, missiles, and non-sporting firearms with bores over 1/2"</li> <li>e. "Any other weapon" such as pen guns, cane guns, handguns with a forward vertical grip, etc.</li> </ol> </li> <li>4. <u>Imports</u> <ol style="list-style-type: none"> <li>a. must pass "sporting purposes" test, similar to AWB</li> <li>b. Not an import if it has enough American-made parts</li> <li>c. Illegal to take an import and add parts so it doesn't pass the test</li> </ol> </li> <li>5. <u>"Assault weapons ban"</u> <ol style="list-style-type: none"> <li>a. The name is inaccurate               <ol style="list-style-type: none"> <li>i. "Assault rifle" refers to a machine gun</li> <li>ii. "Assault weapon" is a political term meaning "ugly gun"</li> </ol> </li> <li>b. Federal "Assault Weapons Ban" expired 9/13/04</li> </ol> </li> <li>6. <u>"Large capacity ammunition feeding device" ban</u> <ol style="list-style-type: none"> <li>a. Went along with the AWB</li> <li>b. Expired 9/13/04</li> </ol> </li> <li>7. <u>Antique firearms</u> are not "firearms" under the main gun control act (GCA '68)</li> </ol>	<p><b><u>What kind of gun can I have?</u></b></p> <ol style="list-style-type: none"> <li>1. <u>Handguns</u> are under special restrictions from "carrying"</li> <li>2. <u>Rifles and shotguns</u> are not subject to the restrictions</li> <li>3. <u>NFA Firearms</u> are illegal but possessing them pursuant to a valid ATF Form 4 (federal approval of transfer) is a defense.</li> <li>4. <u>Prohibited Weapons</u>: Includes NFA firearms without Form 4, plus switchblades, knuckles, AP ammo, zip guns, etc.</li> </ol>

<b>Federal Firearms Laws</b>	<b>Texas Firearms Laws</b>
<p>a. Definition:</p> <ul style="list-style-type: none"><li>i. Any firearm manufactured before 1899, incl matchlock, flintlock, percussion cap, and similar ignition systems</li><li>ii. Any replicas thereof, as long they are not redesigned to use rimfire or conventional centerfire ammo</li><li>iii. Any replica that uses rimfire or conventional centerfire ammo that is no longer manufactured in US and not readily available in ordinary channels of commercial trade</li><li>iv. No exception under the NFA - so antique machine guns, short barreled rifles, etc. are "firearms" under NFA</li><li>v. LOOK AT THE DEFINITIONS to be sure</li></ul>	