

## Gun Laws and Related Information

[David McGuffey](#) Nov 16th, 2021 [Caregiving](#), [Consumer Protection](#), [Decision-Making](#), [Guardianship & Conservatorship](#), [Healthy Living](#), [Legal Capacity](#)

Many people have questions about guns and gun rights, especially as they relate to the elderly. The general answer is that in the United States, guns are poorly regulated. EZ Elder Law has no opinion regarding gun ownership generally, but guns and dementia are a poor mix. It is estimated that [9% of older Americans have dementia and about 45% of people over 65 have guns.](#)

The law in most, but not all, States does not allow authorities to seize guns based on a diagnosis of dementia or other mental incapacity. Some states have enacted "[Red Flag" laws](#)" allow authorities in some states to seize guns from unsafe owners. Connecticut was the first State to adopt a Red Flag law. Since then, they have been adopted in California, Colorado, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington and the District of Columbia.

Most courts ruling on the issue have, thus far, found Red Flag laws constitutional and have found they are not in conflict with [District of Columbia v. Heller](#), 554 US 570 (2008). There, after finding that citizens have an individual right to keep and bear arms, the Court nonetheless stated:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Notwithstanding the notion that guns ownership is completely unregulated, federal law does limit gun ownership in certain situations. [18 USC § 922\(g\)](#) provides:

It shall be unlawful for any person—

- (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) who is a fugitive from justice;
- (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been **adjudicated as a mental defective** or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to **a court order** that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) **restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;** and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

An [ATF bulletin](#), embedded below, states that a person is “adjudicated as mentally defective” within the meaning of subsection (g)(4) if he or she lacks the mental capacity to contract or manage his own affairs. This means a person under a guardianship has no right to possess firearms. Similarly, individuals subject to a domestic violence restraining order are prohibited from possessing guns. However, as discussed in a recent Jon Stewart interview, these laws are poorly enforced.

For most people, the following suggestions are a good starting point:

- If there are guns in the home, find out how many and where they are located
- Lock handguns in a safe and change the combination
- Remove guns from the home
- Consider [establishing a gun trust](#) so a successor trustee can legally take possession of the guns if the gun owner is incapacitated
- Call your local Sheriff's Department and make them aware of the situation. Ask for advice
- Talk with your loved one's doctor about the guns and related dangers
- Consider whether a petition for guardianship should be filed so the guardian has a legal right to remove the guns