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March 24, 2020

OPINION NO. 2019-08

PUBLIC SAFETY; FIREARMS; PERMITS
FOR UNLICENCED PERSONS: Nevada's Background Check Act requires that background checks be performed for all sales and transfers of firearms between persons not licensed under federal law to manufacture, import, or deal in firearms. This background check requirement includes any such sale or transfer to a person who holds a state-issued permit to carry a concealed weapon.

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Dear Director Togliatti and Ms. McKay:

On behalf of the Nevada Department of Public Safety (Department), you have requested an opinion from the Office of the Attorney General on the Background Check Act (Act), codified at Nevada Revised Statutes (NRS) 202.2544 to .2549. You have asked whether the Act's background check

requirement applies to an “unlicensed person” who possesses a permit issued pursuant to NRS 202.366, or a permit described at NRS 202.3688.

As used herein, “unlicensed person” means a person not licensed under federal law to manufacture, import, or deal in firearms, *see* NRS 202.2545(7) and 18 U.S.C. § 923(a), and “concealed carry permit” means a permit issued pursuant to NRS 202.366, or a permit described at NRS 202.3688. Your specific question has been restated as follows:

QUESTION

As the prospective buyer or transferee in a firearms transaction between unlicensed persons, must the holder of a concealed carry permit submit to a background check before receiving a firearm?

SHORT ANSWER

Yes, the Act requires background checks to be performed for all sales and transfers of firearms between persons not licensed under federal law to manufacture, import, or deal in firearms. Unless so licensed pursuant to 18 U.S.C. § 923(a), every person who wishes to transfer or receive a firearm in Nevada, including a person who holds a concealed carry permit, is defined as an “unlicensed person” for purposes of the Act’s background check requirement. NRS 202.2546(7); NRS 202.2547. While the Act separately enumerates specific exceptions to the background check requirement, *see* NRS 202.2548, none pertain to the possession of a concealed carry permit. The Act is unambiguous in its application to persons not licensed pursuant to 18 U.S.C. § 923(a), but even if it were ambiguous, the history, public policy, and reason for it demonstrate clear legislative intent for the law to apply to persons who possess a concealed carry permit.

BACKGROUND

This Office has previously opined on Nevada’s background check requirements. *See* Op. Nev. Att’y Gen. No. 2016-12 (Dec. 28, 2016). As recognized in that opinion, Nevada voters in November 2016 approved State Ballot Question No. 1, a ballot initiative that, with certain exceptions,

criminalizes the private sale or transfer of a firearm absent a background check. *Id.* at 2. As described by Question 1's proponents, it was intended to "close the loophole that makes it easy for convicted felons, domestic abusers, and people with severe mental illness to buy guns without a criminal background check." NEVADA SECRETARY OF STATE, SUMMARY OF STATEWIDE BALLOT QUESTIONS (2016) at 4.¹ As set forth in the initiative information provided to voters, the measure outlined specific exceptions to the mandatory background check requirement. *Id.* at 2. However, no such exception was extended to persons with concealed carry permits. *Id.*

In response to Question 1's passage, the Federal Bureau of Investigation (FBI) announced that it would not and could not conduct background checks in the manner required by Question 1. *See* FBI Letter (12/14/2016), attached to Op. Nev. Att'y Gen. No. 2016-12. Specifically, the FBI noted that "the recent passage of Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied" and that private-party background checks are the "responsibility of Nevada to be conducted." *Id.* Under those circumstances, this Office issued its December 28, 2016 opinion, stating that it would not enforce Question 1 as passed by the Nevada voters. *See* Op. Nev. Att'y Gen. No. 2016-12 at 7.

In 2019, the Nevada Legislature enacted Senate Bill No. 143 (S.B. 143) in order to effectuate the will of Nevada voters as expressed through the passage of Question 1, by addressing the implementation issues raised by the FBI and this Office's prior opinion. *See* Act of February 15, 2019, ch. 2, §§ 1-10, 2019 Nev. Stat. 3 (S.B. 143). The Act became effective on January 2, 2020. *Id.* at § 10.

ANALYSIS

I. Principles of Statutory Construction

When interpreting a statute, legislative intent "is the controlling factor . . ." *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). The

¹ Available at <https://www.nvsos.gov/sos/home/showdocument?id=4434>.

starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court can not go beyond the statute in determining legislative intent." *Id.* But when "the statutory language lends itself to two or more reasonable interpretations," the statute is ambiguous, and we may then look beyond the statute in determining legislative intent. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). To interpret an ambiguous statute, courts look to the legislative history and construe the statute in a manner that is consistent with reason and public policy. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

II. By its Plain Language, Nevada's Private-Party Background Check Requirements Apply to All Non-Excepted "Unlicensed Persons" Including those with a Concealed Carry Permit

The Act's plain language is clear. An "unlicensed person" means a person who does not hold a license as a dealer, importer or manufacturer in firearms issued pursuant to 18 U.S.C. § 923(a)." NRS 202.2546(7). Since the text of § 923(a) does not attribute federal licensee status to persons who hold concealed carry permits issued pursuant to state law, such persons are "unlicensed persons" for purposes of the Act's background check requirement. *See* NRS 202.2547(1) ("Except as otherwise provided in NRS 202.2548, an unlicensed person shall not sell or transfer a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee in compliance with this section.").

The Act prohibits the private-party sale or transfer of a firearm to an "unlicensed person" unless a federally licensed dealer (FFL) first conducts a background check as an intermediary to the transaction. *See* NRS 202.2547(2). The Act enumerates multiple exceptions; however none state an exception for a person who holds a concealed carry permit. *See* NRS 202.2548. That "the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Because the Legislature enumerated specific exceptions to the Act's background check requirement, it is presumed that it intended to exclude any additional, unstated exceptions. Accordingly, the

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Act's plain language is clear and unambiguous that it does not except from the background check requirement persons who hold concealed carry permits.

This Office's opinion on Nevada law is unaffected by the August 26, 2011 Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) "Open Letter" allowing Nevada's concealed carry permit to qualify as an alternative to federal background check requirements under the Brady Handgun Violence Prevention Act, as amended (Brady Law). See 18 U.S.C. § 922(t) (pertaining to unlawful acts). There, the ATF has recognized an exception to the federal background check requirements of the Brady Law. Here, the question concerns the provision in Nevada law requiring background checks *in addition* to those required by the Brady Law. Although Nevada law defines "unlicensed person" consistent with 18 U.S.C. § 923(a), it adopts *different* exceptions than those permitted by the ATF's interpretation of the Brady Law. Whether those who hold a concealed carry permit should be exempted from Nevada's additional background check requirement is a policy question that could perhaps be revisited by the Legislature at some point, but it is not currently a feature of Nevada law, nor is it a requirement of federal law. At the moment, there is no overlap between the types of firearms transactions that are governed by the Act and those that are governed by federal law.

The Nevada Firearms Coalition, in its November 6, 2019 letter to the Department, has argued that the Act is ambiguous insofar as it directs the FFL intermediary for a private-party transaction to "comply with all requirements of federal and state law as though the licensed dealer were selling or transferring the firearm from his or her own inventory to the buyer or transferee . . ." See NRS 202.2547(2). This argument is mistaken by the plain terms of the state and federal law, specifically including the Act's explicit directive that the FFL intermediary comply "with all requirements of . . . state law." See *id.*

The Act, by its plain terms, requires background checks in connection with all firearms transactions not expressly exempted by state law. The ATF Open Letter, by contrast, *authorizes*, but does not require, a federally-licensed firearms dealer to accept a concealed carry permit in lieu of performing the federally-required "NICS" background check in connection

with a transaction governed by federal law. With respect to transactions governed by federal law, the ATF has recognized only that a person's possession of a concealed carry permit "may qualify as [an] alternative[] to the NICS check if certain other requirements are satisfied." Therefore, even though it may be customary in Nevada for an FFL to accept a concealed carry permit in lieu of performing a background check on a retail purchaser, the FFL is under no legal compulsion to do so. A custom among retailers does not amount to a "requirement" of federal law, much less a requirement of state law.

III. Even if Ambiguous, the Act Cannot, in Light of its Legislative History and Public Policy Considerations, be Construed to Extend an Exemption to an Unlicensed Person with a Concealed Carry Permit

Even if it is ambiguous, the law's history, public policy, and underlying rationale further bolster the conclusion that its background check requirement applies to any non-excepted unlicensed person, including anyone with a concealed carry permit. The record conclusively demonstrates that when considering S.B. 143, the Legislature recognized that it would apply to persons with concealed carry permits if enacted in its current form.

For example, when asked by a member of the Legislature whether S.B. 143 would apply to the holder of a concealed carry permit, the legal counsel for various background check advocacy groups responded matter-of-factly that it would. *See Minutes of the Joint Meeting of the Senate and Assembly Judiciary Committee*, 2019 Leg., 80th Sess. 10-11 (Feb. 12, 2019). The National Rifle Association lobbyist, when testifying against S.B. 143, stated that "even though CCW holders have already been vetted, they must undergo background checks [pursuant to S.B. 143 as drafted]." *Id.* at 40. Sheriff Gerald Antinoro of Storey County similarly recognized that the law, if enacted in its current form, would not exempt CCW holders from background checks. *Id.*

For these reason, critics of the bill attempted to amend it by adding an exception to the background check requirement for "[t]he sale or temporary or permanent transfer of a firearm to a person who holds a current and valid

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permit authorizing the person to carry a concealed firearm.” Senate Daily Journal (Feb. 13, 2019) at 6. The proposed amendment was rejected before passage by the Legislature, signaling that the Legislature wanted the background check requirement to apply broadly to transactions not governed by federal law. *Id.* at 10.

Further, the public policy and reason for S.B. 143 was to finally implement Question 1, which did not exempt persons in possession of concealed carry permits from the requirement to submit to background checks in connection with private-party firearms transactions. NEVADA SECRETARY OF STATE, SUMMARY OF STATEWIDE BALLOT QUESTIONS 2016 at 2. Indeed, the preamble to the bill states that the Legislature’s intent was to close the existing “loophole” in federal law, *see* NRS 202.2545(4), and thereby implement a comprehensive system of background checks for all private-party firearms transactions. To read an implied exception into the Act would be contrary to the stated public policy consideration.

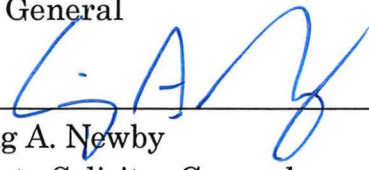
CONCLUSION

The Act requires the parties to a firearms transaction between “unlicensed persons” to submit to a background check of the prospective buyer or transferee before consummating the sale or transfer. The only exceptions to this requirement are stated at NRS 202.2548, and they do not include an exception for a prospective buyer or transferee who holds a concealed carry permit.

Sincerely,

AARON D. FORD
Attorney General

By: _____


Craig A. Newby
Deputy Solicitor General

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