

National Instant Criminal Background Check System (NICS) and Mental Health

States with ATF Approved Relief from Disabilities Programs

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April 2014

Background

At the start of the interim, the Law and Justice Interim Committee (LJIC) chose to study federal gun ownership laws, NICS, and mental health. In February 2014, the LJIC requested more information about state laws that allow a person who is ineligible to own firearms under federal law because the person had been "adjudicated as a mental defective"¹ or been committed involuntarily to a mental institution to apply to have those rights restored. Those state laws are known as "relief from disabilities" programs.

The federal NICS Improvement Amendments Act of 2007 requires a state to have a relief from disabilities program in order to be awarded certain federal grants. The grants can be used to develop and improve processes that states use to report information to the NICS. Although there is some latitude in how a state may structure a relief from disabilities program, the state's program must be certified by the U.S. Attorney General (through the Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF). The programs can be used only to restore rights removed because of a mental health adjudication or involuntary commitment.

Currently, 24 states have ATF-certified relief from disabilities programs, and South Dakota enacted legislation in its 2014 session that creates a program. Montana does not have a relief from disabilities program. The table on page 3 lists each of the 24 states and what type of court, board, commission, or other lawful authority the state uses to consider a person's application. A list of the ATF's minimum criteria for a state relief from disabilities program is available in Appendix A, which starts on page 10.²

Summary of Other States' Relief Provisions

Of the 24 states with ATF-approved relief from disabilities programs, 17 require a court to decide if a person's firearms rights should be restored. Three states require a board to decide, and three states charge a particular agency with the decision. Indiana allows a person seeking to restore firearm rights to petition either the Department of Corrections or a court, depending on which entity was responsible for making the initial

¹This is the terminology used in federal law. 18 U.S.C. 922(g)(4).

²The list is also available at:
<http://www.leg.mt.gov/content/Committees/Interim/2013-2014/Law-and-Justice/Meetings/February-2014/Exhibits/FBI-NICS-feb-2014-state-relief-12-8-09.pdf>.

determination that the person was ineligible to possess firearms. Only one state -- Delaware -- created an entity to restore firearms rights. All others used existing courts, agencies, or boards to restore firearms rights.

In the states that use a nonboard, noncourt entity to provide relief from disabilities, the entity is either a law enforcement or corrections agency or an agency with general health or mental health duties. In Illinois, the director of the Department of State Police makes the decision. In Maryland, the Health Department is in charge of the relief appeal process. New York law charges the commissioner of the Office for People with Developmental Disabilities with creating an administrative process to allow a person to petition to have firearms rights restored.

The language of state statutes creating relief from disabilities programs is mostly similar when it comes to the standard of review the court or the decisionmaking entity must use when evaluating petitions for relief. All but one state statute have language requiring the decisionmaking entity to consider public safety and the public interest, and most states have language requiring consideration of the safety of the individual making the petition, too. Nine states require the decisionmaker to grant relief if it finds by "a preponderance of the evidence" that the person is unlikely to be a danger to self or others and that granting relief is in the public interest. Six states apply the standard "by clear and convincing evidence". The remaining nine states don't have specific language about a standard.

Recently enacted legislation in South Dakota established a judicial process for a person to petition to have firearms rights restored. The statute requires the court to find the person is not a danger to self or others "based on a preponderance of the evidence presented".³

³House Bill No. 1229, 89th session, South Dakota Legislative Assembly, 2014, available from: <http://legis.sd.gov/docs/legsession/2014/Bills/HB1229P.pdf>, last accessed March 25, 2014.

Other States With Certified Relief from Disabilities Programs*

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Alabama	2013	The judge of probate of a county that entered the involuntary commitment order	Existing	No specific language
Arizona	2011	The court that entered the original order, finding, or adjudication	Existing	Clear and convincing evidence
Connecticut	2011	The probate court for the district in which the person resides	Existing	Clear and convincing evidence

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Delaware	2013	The Relief from Disabilities Board (3 member board. 1 member appointed by Secretary of Safety and Homeland Security, 2 members by the Secretary of the Department of Health and Social Services. 1 must be licensed psychiatrist)	Created	A preponderance of the evidence
Florida	2010	The circuit court that committed the person or the court that ordered a record of commitment submitted to the Department of Law Enforcement	Existing	No specific language

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Idaho	2010	The magistrate division of the court that issued the order or of the district court in the county where the individual lives	Existing	A preponderance of the evidence
Illinois	2010	The director of the Department of State Police	Existing	A preponderance of the evidence
Indiana	2012	A court or the Department of Corrections, depending on which entity was responsible for the adjudication	Existing	Clear and convincing evidence
Iowa	2011	The court that issued the order or the court in the county where the person resides	Existing	A preponderance of the evidence
Kansas	2011	A court of competent jurisdiction within the state	Existing	Clear and convincing evidence

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Kentucky	2011	The court that made the commitment, finding or adjudication	Existing	A preponderance of the evidence
Louisiana	2013	The court in the district in which the adjudication occurred	Existing	A preponderance of the evidence
Maryland	2013	The Department of Health and Mental Hygiene	Existing	A preponderance of the evidence
Missouri	2012	The circuit court in the person's place of residence or that entered the disqualifying order	Existing	Clear and convincing evidence

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Nebraska	2012	A mental health board (Each district court has at least 1 mental health board created by the presiding judge of the district. 3 members, 1 attorney and 2 with certain mental health or health qualifications that are specified in law.)	Existing	No specific language
Nevada	2009	The court that made the finding	Existing	Clear and convincing
New Jersey	2010	The court that made the finding or the Superior Court	Existing	No specific language
New York	2009	The Office for People with Developmental Disabilities	Existing	No specific language

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
North Dakota	2011	The court that issued the finding or the district court of the county where the person resides	Existing	A preponderance of the evidence
Oregon	2009	Psychiatric Security Review Board (10 members appointed by the Governor and approved by the Senate)	Existing	No specific language
Texas	2010	The court that entered the commitment order	Existing	No specific language
Virginia	2011	The general district court in the city or county in which the person resides	Existing	No specific language
West Virginia	2012	The circuit court of the petitioner's county of residence	Existing	Clear and convincing evidence

State	Year Certified	Who Has the Authority to Consider Application?	Existing Body or Created Specifically for Relief Program?	Standard of Proof
Wisconsin	2010	The court that made the determination or the court in the county in which the person resides	Existing	No specific language

* As of October 10, 2013

Source: "List of States with ATF Approved 922(d)(4)(g)(4) Relief Programs," Federal Bureau of Investigations, available from <http://www.leg.mt.gov/content/Committees/Interim/2013-2014/Law-and-Justice/Meetings/February-2014/Exhibits/FBI-NICS-feb-2014-certified-relief-programs.pdf> and statutes from each state.

**STATE RELIEF FROM DISABILITIES PROGRAMS
UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007**

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.
2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective¹ or committed involuntarily to a mental institution² to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).
3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the same State.
4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:
 - a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
 - b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.
 - c. A record of the matter must be created and maintained for review.

¹ Federal regulations at 27 C.F.R. § 478.11 define the term “adjudicated as a mental defective” as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

² Federal regulations at 27 C.F.R. § 478.11 define the term “committed to a mental institution” as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive and consider evidence concerning the following:
 - a. the circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);
 - b. the applicant's record, which must include, *at a minimum*, the applicant's mental health and criminal history records; and
 - c. the applicant's reputation, developed, at a minimum, through character witness statements, testimony, or other character evidence.

6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:
 - a. the applicant will not be likely to act in a manner dangerous to **public safety**; and
 - b. granting the relief will not be contrary to the **public interest**.

7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials consistent with the following principles:
 - a. The applicant may petition a court of appropriate jurisdiction to review the denial, including the record of the State court, board, commission, or other lawful authority that rendered the decision.
 - b. The reviewing court may, but is not required to, give deference to the decision of the lawful authority to deny the application for relief.
 - c. In cases of denial by a lawful authority other than a State court, the reviewing court must have discretion to receive additional evidence necessary to conduct an adequate review.

Note: In addition to the above-mentioned requirements, NIAA § 102(c)(1)(B) requires a State, on being made aware that the basis under which the record was made available does not apply, or no longer applies, shall, as soon as practicable—

- a. update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to NICS, consistent with the rules pertaining to the database; and
- b. notify the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.
- c. It is recommended that the State have a written procedure (e.g. State law, regulation, or administrative order) to provide for these NIAA requirements.

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