



AN OVERVIEW OF KEY ISSUES IN CONDUCTING NICS BACKGROUND CHECKS¹

SEARCH

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SEARCH, The National Consortium for Justice Information and Statistics, is a nonprofit organization governed by a Membership Group of governor appointees from the states and territories. SEARCH Members operate the state criminal history record repositories and related state criminal justice information systems, which are used to provide criminal history record information for criminal and civil background check screening and to assist regulatory agencies in determining a person's suitability to possess firearms etc.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) 101

NICS was created by the Brady Handgun Violence Prevention Act of 1993. It amends the Gun Control Act of 1968 to prevent firearm sales to certain people disqualified by the Act. The system was launched by the FBI in 1998 and can only be used by authorized entities for firearms related regulatory purposes. It is not a gun registry, but a system for Federal Firearms Licensees (FFLs) to quickly learn if a person purchasing a firearm is prohibited from owning or possessing a firearm. Since it was created, more than 330 million NICS checks have been performed, leading to more than 2 million denials. In 2021, over 38 million NICS background checks were made nationally.

State or federal NICS program staff perform background checks on buyers using the name and descriptive information provided by the firearms applicant to the FFL. The background check verifies the buyer does not have a disqualifying criminal record and is not otherwise ineligible to purchase or own a firearm.

There are 10 categories established in Federal law that disqualify an individual from purchasing firearms. (Note: Some states have established their own, additional disqualifying categories.)

1. Illegal/unlawful alien
2. Dishonorable discharge
3. Renounced U.S. citizenship
4. Felony conviction
5. Under indictment/information
6. Fugitive from justice
7. Unlawful use of/addiction to a controlled substance

¹ This document was prepared with assistance from the National Center for State Courts (NCSC), www.ncsc.org.

8. Involuntary commitment to mental health institution/mental adjudications
9. Domestic violence protection/restraining order
10. Misdemeanor crimes of domestic violence.

NICS background checks are typically done within seconds by launching a federated inquiry that searches each of the following justice information systems or database files:

- **Interstate Identification Index (III).** Administered by the FBI, and participated in by all states, the III is a fingerprint-supported automated criminal history records exchange system that includes arrest and disposition information for individuals charged with felonies or misdemeanors. Information that may be available via III includes: convicted felons, persons who are fugitives from justice, persons found not guilty by reason of insanity or adjudicated to be incompetent to stand trial, persons found guilty of misdemeanor crimes of domestic violence, persons under indictment, and persons who unlawfully use controlled substances.
- **National Crime Information Center (NCIC).** The NCIC is an electronic database consisting of 21 files, 10 of which are queried for a NICS-related background check. This automated, nationally accessible database of criminal justice-related records includes information on wanted persons (fugitives), known and suspected terrorists, and persons subject to domestic violence protection orders.
- **NICS Indices.** The NICS Indices is a database, separate from NCIC and III, created specifically to conduct a background check for a firearms-related purpose. The NICS Indices contains information contributed by local, state, tribal, and federal agencies pertaining to persons prohibited from receiving or possessing a firearm pursuant to state and/or federal law. While any disqualifying record may be entered into the NICS Indices, it is not intended to duplicate information entered into NCIC or III. Instead, the database was designed to house disqualifying information not otherwise available at the national level.
- **Immigration and Customs Enforcement (ICE).** For NICS purposes, the ICE database is searched only to determine if a non-U.S. citizen is illegally or unlawfully in the United States or who has been admitted to the United States under a nonimmigrant visa.

Records maintained by state criminal history repositories that are relevant to NICS

- **Arrest records.** Arrest records generally cannot be used to deny a firearms purchase. (The exception is for arrests for drug possession, cultivation, and distribution and/or drug paraphernalia or equipment violations. Multiple drug arrests occurring within the past five years are disqualifying if at least one of the arrests occurred within the past year. Drug arrest prohibitors are only valid from one year from the most recent disqualifying arrest event.) All criminal history repositories receive felony arrest fingerprints, and many repositories receive misdemeanor arrests as well.
- **Disposition records.** Dispositions reflect the outcome of criminal cases within the courts. Dispositions include findings of guilt which would disqualify someone from a firearms purchase (e.g., guilty plea, guilty verdict, no contest plea, etc.).

It is important to note that records contained within the state CCH repositories are predominantly supported biometrically by fingerprints.² A record will not be established unless fingerprints have been

² Some states maintain non-fingerprint-based dispositions which can be appended to criminal records when they match on key identification markers (e.g., name, date of birth, etc.) or when further investigation can confirm identity, and are used for in-state purposes and may be reported to the NICS Indices.

captured related to the underlying arrest. Court dispositions may only be entered if there is a corresponding fingerprint-based arrest charge or if the court requires the collection of fingerprints to support entry of the charge within the CCH system.

NCHIP and NARIP

There are two Federal grant programs, administered by the Bureau of Justice Statistics (BJS), U.S. Department of Justice, that have funded state improvements to their criminal history record repositories, generally, and the NICS specifically:

- **National Criminal History Improvement Program (NCHIP)**
- **NICS Act Record Improvement Program (NARIP)**

NCHIP and NARIP each focus on improvements to the efficiency, effectiveness, timeliness, and accuracy of criminal history record and associated data for decision-making purposes, *but each program emphasizes specific and distinct goals:*

- **NCHIP** funding allows states to focus on a *broad range* of criminal history improvement activities that are unique and specific to each state. *All states qualify for NCHIP funding.*
- **NARIP** funding focuses specifically on improving information sharing with NICS for firearms purchases. *To date, NARIP funds are only available to 34 states, as not all states qualify for the funding.*

POINT OF CONTACT (POC) AND NON-POC STATES

The FBI's NICS Program provides all firearms purchase background check services to Federal Firearms Licensees (FFLs) in 37 states and the territories. These states are known as **Non-Point-of-Contact (Non-POC) States**. In 13 states, the state criminal records repository performs their own checks through the NICS and these states operate or function as **Point-of-Contact (POC) states**. In POC States, FFLs contact the state directly to obtain NICS background checks via a telephone call or an E-Check transaction directly with the state repository. While POC states access the same systems and database files that were described earlier (NCIC, III, NICS Indices and ICE), they frequently access additional state-maintained justice information systems directly. In two states background checks for handguns are provided by the state repository, while long gun background checks are provided by the FBI. These are known as **Partial POC States**.

The 3-Day Window for Additional Research

When a NICS check cannot provide an instant decision, the FBI and POC states have three business days to research the information needed for firearms check and make a final determination on a buyer. If a decision cannot be made in that time, an FFL is allowed by law to sell the firearm, in a sale known as a "default proceed." Given deficiencies in the reporting information, and the fact that many prohibitors are name-based, the FBI's NICS Unit and POC states must frequently attempt to use the 72-hour window in the law to track down missing disposition or other information. This often involves contacting and seeking the assistance of state repositories, arresting agencies, prosecutors, and courts, which can be disruptive to the operations of these agencies that often must go through a laborious and time-consuming process of trying to locate information that may not be automated.

When NICS and POC examiners are conducting research, the court and/or LEA is frequently trying to retrieve old and archived information that is not necessarily automated. In some cases, they are pulling hard copy files or using microfilmed records which often presents challenges to completing research in a

timely way. This is especially true for old and dated records that are stored off-site. Accessing and researching non-automated records often causes firearms determinations to exceed the three-day limit.

Misdemeanor crimes of domestic violence (MCDV) records are particularly challenging. When records are incomplete, FBI or NICS POC examiners will attempt to reach out to the local courts having jurisdiction where the offense occurred to look for dispositions that may not have been reported to the state repository. If they are looking for victim/offender relationships, they will request court transcripts or minutes to help establish the relationship based on sworn testimony. They may also contact the LEA that reported the arrest to see if the victim/offender relationship was recorded in the incident/offense or arrest report that was completed by an officer.

POC states often have ways to access local law enforcement, prosecution, courts, corrections, and probation and parole information systems in researching information to make suitability determinations within the 3-business day timeline established by law. Moreover, POC states have access to additional information that is not readily available to federal NICS Examiners, including wanted person and protection orders that have not been entered into NCIC by state and local agencies, and criminal history records that have not been reported to the III but reside in state files (this can happen when records do not meet NCIC entry criteria or when records lack legible fingerprints).

JUVENILE RECORDS FOR FIREARMS BACKGROUND CHECKS

Background

As an initial matter, juvenile justice cases generally fall into two categories: (1) delinquency offenses; and (2) status offenses. Delinquency offenses relate to conduct that if committed by an adult would constitute a criminal offense under law. Status offenses are those that would not constitute a criminal offense if committed by an adult but nevertheless violate some provision of the juvenile code, such as truancy, underage possession of alcohol, or running away from home. Whether it is a status offense or a delinquency offense, cases brought in juvenile court are almost universally considered civil cases unless a court determines that the youth should be “bound over” for trial as an adult (or is “direct-filed” in adult court by the prosecutor in certain states). As noted below, in this circumstance a criminal case file is created, the trial is open, and the outcome considered an adult criminal disposition.

The juvenile court system is premised on the notion of *in loco parentis*, that is, when a youth is in trouble the courts step in as the quasi-parent of the youth fully empowered to make many parental decisions because of expectations of due process because of the youth’s age. Juvenile courts often have very broad discretion in determining how a youth is to be handled within the system, e.g., diversion, treatment, detention, dismissal, etc., and what the youth’s record will ultimately reflect. This makes the reporting of the juvenile record and the nature of the underlying juvenile conduct less clear. It also means that, in many states, access to juvenile records is controlled by a combination of state statutory law and state court rules.³ Because juvenile records are generally not public in the sense of an adult

³ In a quick survey of state court leaders, nine (9) states identified as operating under very strict dissemination standards that generally foreclose disclosure beyond the courts and immediate participants, eleven (11) states identified as reporting under restrictive but not prohibitive dissemination standards that allow disclosure of a range of information depending on state laws and court rules, and six (6) states identified as operating under broad dissemination standards where most cases involving juvenile offenses are reported to a central state agency.

criminal record, heightened standards of privacy may attach to such records. (The records reflect the proceedings of the case. If the proceedings are strictly confidential, it is highly likely that some aspects of records are also confidential or subject to restrictive usage.) Even in states with more liberal record production standards, state courts may require that certain information about a youthful offender be redacted and unavailable except to a very narrow class of persons.

In recent years, there has been some blurring between delinquency offenses and criminal offenses, as well as some blurring as to the implications of certain juvenile offenses and their relation to criminal law and criminal consequences. This can be seen in statutes that create a series of presumptions regarding the status of the offender relative to the offenses, *e.g.*, sex crimes, crimes of violence, weapons offenses. This can vary by state. What is important in the use of juvenile records is clarifying what juvenile records should be reported to the criminal history repository *and for what purposes*. For example, should a youth with a long history of court involvement due to trancies or incorrigible home behaviors be included in reports to the state repository because such cases are handled exclusively within the juvenile court?

Finally, it is important to understand an aspect of juvenile mental health proceedings and, therefore, such records. First, court cases involving purely juvenile mental health issue are very rare and generally handled outside the juvenile court system. Like adult involuntary treatment cases, juvenile mental health cases are usually handled by a state's probate court system. Accordingly, in some states, juvenile delinquency and status offense cases track in one direction while cases involving youth competency and involuntary mental health treatment (with no underlying offense) track in a different direction. Because parents have broad authority to determine what is the appropriate treatment regime for their child, courts rarely are involved in making youth mental health determinations that do not arise as part of a delinquency offense. Parents can commit a child for mental health treatment without going to court. Courts simply will not know the breadth of youth involved in purely mental health crisis situations because nothing is filed. Further, to the extent a court is involved in a purely mental health crisis case, state probate law may require courts to take other protective measures such as creating a guardianship or conservatorship for the long-term management of the youth's daily affairs.

As with many things within the juvenile justice system, even these practices vary widely between states depending on statutes and court rules.

Under current systems, a limited number of juvenile records are available for firearms background checks.

As noted, juveniles can be "charged" with a delinquency offense or a status offense. If a juvenile is adjudicated delinquent for having committed a status offense, often full information on these offenses is not made available to state criminal history repositories for purposes of NICS firearms examiners. Juvenile adjudications are not considered to be convictions in most states and most states do not allow access to juvenile adjudications for firearms background check purposes.⁴ We are aware of at least two states that allow access to juvenile adjudications for offenses that would have been a felony if committed by an adult.

⁴ In a number of states, state courts do report certain aspects of a juvenile delinquency record to the state repositories or make the record available to law enforcement. Often this depends on the nature of the crime. Information provided may be limited and age and time restraints placed on the information, *e.g.*, only felony offenses committed by a youth 14 years of age or older and available for no more than 5 years. In other states, information can only be shared upon order of the court. In still other states, broader categories of offenses may be reported, including status offenses but only for limited use purposes.

Conviction records are available for juveniles who are treated as adults.

Nearly all states have laws that allow juveniles to be certified as adults for prosecution for the commission of certain crimes—typically serious felony offenses against the person. If a juvenile is certified and charged in adult court and is found guilty, the conviction will be treated as any adult conviction and will be included in the state criminal history repository. Adult convictions are accessible for both criminal justice and civil purposes, which include firearms background checks.

Juvenile adjudication and mental health records typically exist across multiple record systems and are largely confidential by state statute.

Juvenile adjudications rarely reside within state criminal history repositories. In states with a unified judicial system, juvenile records *may* exist in a shared court case management system (CMS). Even in states with a shared CMS, access to juvenile records can be treated in multiple ways. For example, some states may share adjudication records, redacted records, or no records with other agencies absent an individual court order authorizing disclosure. In most states, juvenile “records” are maintained across a patchwork of agencies including local law enforcement, juvenile/family courts, prosecuting attorneys, juvenile probation and community service organizations, treatment providers, and juvenile detention facilities. Accessing juvenile records would require coordination across numerous state and local agencies and organizations, and such records may well be subject to HIPAA restrictions. And defining what constitutes the “juvenile record” will be important given the number of actors and types of records that may be involved with an at-risk juvenile.

EXTREME RISK PROTECTION ORDERS (ERPOS)

ERPOs are designed to authorize courts to issue an order to temporarily prevent a person in crisis from accessing firearms following a hearing.⁵ The purpose of an ERPO is to prevent a person (known as the “respondent”) from harming themselves or others, and an ERPO shall only be issued based on evidence demonstrating that the respondent’s possession or receipt of a firearm will pose a significant danger or extreme risk of injury or death to the respondent or another person. Petitioners who may request an ERPO vary by state but generally include a law enforcement officer or agency, a member of the family of the respondent, a member of the household of the respondent, a dating or intimate partner of the respondent, a health care provider who has provided health services to the respondent, or an official of a school or school system in which the respondent is enrolled or has been enrolled. Twenty states and the District of Columbia have enacted ERPO laws. The process for obtaining an ERPO is (1) a petition is filed by authorized person or agency; (2) issuance of an *ex parte* temporary order requiring the surrendering of firearms or authorizing a warrant for their seizure; and (3) an adversarial hearing on whether to grant a final order, which is generally in effect for one year. If the court determines a final order is *not warranted*, the *ex parte* order terminates, and the weapons are returned. All states have very short time frames for the disposition of ERPO petitions. ERPOs are required to be entered into the National Crime Information Center (NCIC) database, which is accessible to law enforcement and to state and federal firearms background check investigators. ERPOs are typically effective for a period of six months to one year, but orders can be terminated early or extended.

Challenges to entering ERPOs into NCIC

Starting this summer, states will begin placing ERPOs into a new NCIC file created specifically for ERPOs which will improve access to this information for both the law enforcement community and state and

⁵ <https://www.justice.gov/doi/reducing-gun-violence/commentary-extreme-risk-protection-order-model-legislation>

federal NICS examiners. Once a record is entered into NCIC, the originating agency is required to provide “hit confirmations” 24 hours a day, 7 days a week before the protection order is considered “actionable.” This may present a problem if a court is the custodian of record for the protection order, as most courts are not staffed 24/7. States must develop mechanisms to ensure that hit confirmations can be completed by working with the courts to partner with local law enforcement entities to provide hit confirmations on their behalf. In the past, courts were reluctant to submit protection orders to NCIC because of an inability to meet the hit confirmation requirements.

In some instances, protection orders (including ERPOs) may not be eligible for entry into NCIC because the order from the court does not contain all of the necessary information to meet the requirements for inclusion in NCIC. In addition to administrative data about the originating agency, the following data elements are required for subjects of protection orders: name, sex, race, protection order conditions, date of expiration, date of issue originating case number/protection order number and at least one of the following date of birth, FBI number, social security number, operator (driver’s) license number, vehicle identification number, or miscellaneous number (other government issued identification document such as a state identification card or passport).

Protection Orders in the National Instant Criminal Background Check System (NICS) Indices

For states that experience challenges entering ERPOs orders into NCIC, protection orders that do not qualify for entry into NCIC may be placed in the NICS Index. Unlike NCIC entries, protection orders in the NICS Index do not require 24/7 hit confirmations, and they are not subject to the same rigorous validation rules. While placing protection orders in the NICS Indices does not make them available for routine law enforcement purposes, it does make them available for firearms background checks.