

# “The Good Fight”

VOLUME 6, ISSUE 2

SEPTEMBER 8, 2015

## The 2015 Legislative Session: What Now?



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The 2015 legislative session adjourned on July 6<sup>th</sup> at 6:04 pm. An exceptionally large number of DV-related bills were considered during the months-long session. On the following pages you will find a list of some of those that passed including links to each of the enrolled bills. **(Continued on page 2)**

## SB 525B: DV Perpetrators and Guns

In 1994, the US Congress passed a very important law to protect domestic violence victims when it amended the Gun Control Act of 1968 and made it a federal crime for a person who is subject to a

“qualifying protection order” to possess a firearm or ammunition. Two years later, Congress passed the “Lautenberg Amendment” (after Frank Lautenberg, a New Jersey Congressman) which made it a

federal crime for a person convicted of a “qualifying misdemeanor or crime of domestic violence” to possess a firearm or ammunition.

**(Continued on page 4)**

**2015**

**Session:**

A snapshot of some of the DV-related bills that passed this session.

**Interpreters for Victims: HB 2339: Effective Now**

Requires court to appoint interpreter and provide appropriate assistive communication device when necessary for crime victim who seeks to exercise certain constitutional rights in open court and in critical stages of criminal proceeding.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2339/Enrolled>

**Invasion of Personal Privacy: HB 2356B: Effective 1/1/16**

Modifies crime of “invasion of personal privacy” and establishes two degrees of crime; provides court discretion to order sex offender registration for first degree offense.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2356/Enrolled>

**“Upskirting”: HB 2596: Effective Now**

The bill addresses behavior known as “upskirting” - it amends the invasion of privacy statute to expand the definition of nudity to include areas covered by undergarments, if worn under clothing and when the expectation of privacy extends to those areas.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2596/Enrolled>

**Removal of Filing Fee for Filing Stalking Protective Order: HB 2628:**

**Effective Now**

Disallows all filing fees, service fees and hearing fees in action for court's protective stalking order, even if stalking order is not only relief sought in action. Declares emergency, effective on passage.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2628/Enrolled>

**Protecting Confidentiality of Health Care Information: HB 2758:**

**Effective Now**

This bill protects certain health information upon request by patient. If a confidentiality request is filed by patient, an insurer must ensure that any explanation of benefits, appointment, coverage determination, provider information, and other protected health information is not provided to anyone other than the patient. Under current law, this information can be provided to the policy holder, but this bill allows a patient to select greater confidentiality from the policy holder. Insurers must provide forms that patients can use to request this protection.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2758/Enrolled>

(Continued on page 3)

**Emergency Protective Order: HB 2776: Effective 1/1/16 (See Page 5 for more Info)**

Authorizes peace officer to apply for and circuit court to enter ex parte emergency protective order when court finds probable cause that person was victim of domestic disturbance or abuse and protective order is necessary to prevent abuse. Provides that emergency protective order expires seven days after entry.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2776/Enrolled>

**Improved In-Custody No Contact Orders: HB 3466: Effective 1/1/16**

Provides that release decision for defendant charged with sex crime or crime constituting domestic violence must include order prohibiting attempted contact with victim and third-party contact with victim while defendant is in custody.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3466/Enrolled>

**Expanding Coercion: HB 3468: Effective 1/1/16**

Adds threatening to cause physical injury to animal to induce other person to engage in conduct as manner of committing crime of coercion.

<https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB3468>

**Amending Strangulation and Assault in the Fourth Degree: HB 3469: Effective 1/1/16**

Increases penalty for crime of strangulation when committed knowing victim was pregnant. Expands types of previous convictions that elevate crime of assault in the fourth degree to Class C felony in certain circumstances to include other degrees of assault, strangulation and menacing.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3469/Enrolled>

**Advocate Privilege: HB 3476: Parts of Bill Effective Now**

Establishes privilege in civil, criminal, administrative and school proceedings for certain communications between persons seeking services related to domestic violence, sexual assault or stalking and victim services programs and advocates. Prohibits disclosure of communications without consent of person seeking services.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3476/Enrolled>

**Creating Crime of Endangering Person Protected by FAPA: SB 3: Effective 1/1/16**

Creates crime of endangering person protected by Family Abuse Prevention Act restraining order.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB3/Enrolled>

**Creating Crime of Unlawful Dissemination of Intimate Image: SB 188: Effective Now**

Creates crime of unlawful dissemination of intimate image.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB188/Enrolled>

(Continued on page 5)

# DV Perpetrators and Guns

(Continued from cover page) Since that time, a large number of states have enacted similar laws. Until a few months ago, Oregon was not one of the states that had recognized the dangerous intersection of guns and domestic violence; there was no Oregon law which prohibited the possession of a firearm by qualifying protection order respondents or those convicted of qualifying domestic violence misdemeanors. This legal gap was dangerous for domestic violence victims since there is a clear link between the access and possession by domestic violence perpetrators and protection order respondents of firearms and increased abuse and potential for lethality. Oregon's lack of legal authority on this issue increased a victim's vulnerability and also put at risk Oregon's law enforcement, and the safety of the public at large.

However, due to the hard work of a lot of people, building upon the foundational efforts of dedicated advocates who so diligently labored on this issue for years, safety for victims, law enforcement, and the public has improved: On June 18<sup>th</sup> of this year, Governor Kate Brown signed into law SB 525B. This landmark legislation essentially mirrors the federal laws referenced above, making it a state crime, under ORS 166.250 and 166.274, for persons subject to qualifying court orders and those persons convicted of a misdemeanor crime of domestic violence to possess firearms or ammunition. SB 525B becomes effective January 1, 2016.

Here is an outline of the new law and how it stacks up against the existing federal statutes:

Under SB 525B, it is unlawful for a person to knowingly possess a firearm or ammunition if:

- The person is the subject of a **COURT ORDER** that:
  - ⇒ Was continued after a hearing for which the person had actual notice and during the course of which the person had an opportunity to be heard;.
  - ⇒ Restrains the person from stalking, intimidating, molesting or menacing an intimate partner, a child of an intimate partner or a child of the person; and
  - ⇒ Includes a finding that the person represents a credible threat to the physical safety of an intimate partner, a child of an intimate partner or a child of the person; OR
- The person has been **CONVICTED** of a qualifying misdemeanor and, at the time of the offense, the person was a family member of the victim of the offense.

(Continued on page 6)

**Landlord-Tenant Protections for Survivors SB 390: Effective January 1, 2016**

Current landlord-tenant law contains several provisions specific to survivors, prohibiting discrimination, and allowing for lock changes or early lease terminations for safety reasons. This bill adds to those protections by specifying that a tenant who is a victim may not be held responsible for damage that results from the conduct of a perpetrator relating to domestic violence, sexual assault or stalking committed against the tenant. A landlord may require a tenant to provide verification that the tenant or a member of the tenant's household is a victim of domestic violence, sexual assault or stalking as provided by ORS 90.453.

**Sick or Personal Leave for Victims: SB 492: Effective Now**

Authorizes use of accrued sick leave or personal business leave by certain employees who are victims of domestic violence, harassment, sexual assault or stalking.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB492/Enrolled>

**Gun dispossession of domestic violence misdemeanants and protective order respondents: SB 525B: Effective 1/1/16**

Prohibits possession of firearm or ammunition by person who is subject to qualifying court order or who has been convicted of certain misdemeanor crimes involving domestic violence.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB525/Enrolled>

**Disclosure of Protective Order: SB 788: Effective 1/1/16**

Requires Petitioners in family law proceedings to disclose protective orders.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB788/Enrolled>

**Requiring Domestic Violence Curriculum In Schools: SB 790: Effective 1/1/16**

Requires Department of Justice to encourage and support services, programs and curricula to educate and inform students in grades 7 through 12 about domestic violence. Requires school district boards to adopt policies that incorporate age-appropriate education about domestic violence into training programs for students in grades 7 through 12 and school employees. Authorizes Department of Human Services to make grants to and enter into contracts with nonprofit private organizations or public agencies for programs and projects designed to prevent, identify and treat domestic violence.

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB790/Enrolled>

**HB 2776: Temporary Emergency Protective Order**

Pursuant to HB 2776, the Oregon State Police is tasked with developing and distributing the forms associated with the Emergency Protective Order. A workgroup has been created and has been active in developing the necessary forms. However, the bill also directs that other agencies and professionals have affirmative responsibilities in the implementation of the temporary EPO. Check out these directives in the link to the bill on page 3.

**Comparison of requirements for COURT ORDER to qualify for possible prosecution:**

<b>Federal</b>	<b>Oregon (SB 525B)</b>
<u>Relationship: “Intimate Partner”</u> The person’s spouse The person’s former spouse An individual who is a parent of a child of the person An individual who cohabitates or has cohabited with the person.	<u>Relationship: “Intimate Partner”</u> The person’s spouse The person’s former spouse A parent of the person’s child Person who has cohabited or is cohabiting with the person in a relationship akin to a spouse
Hearing/Notice/Opportunity to be heard	Hearing/Notice/Opportunity to be heard
Restrains the person from harassing, stalking, or threatening an intimate partner of the person or a child of the person or the intimate partner; <b>or</b> engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;	Restrains the person from stalking, intimidating, molesting or menacing an intimate partner, a child of an intimate partner or child of a the person
Finding that the person subject to the order represents a credible threat to the physical safety of a intimate partner or child <b>or</b> a prohibition against the use, attempted use or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury	Finding that the person represents a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the person

**Anticipated Questions**

**What does it mean to “cohabit” or to be in a relationship “akin to a spouse?”**

**Oregon:** “Persons cohabiting with each other” refers to persons living in the same residence in a relationship akin to that of spouses.” *State ex rel. Juvenile Dep’t of Washington Cnty. v. C.M.C.*, 243 Or App 335, 339, 259 P3d 938, 940 (2011) The court also cited its holding in *Edwards and Edwards*, 73 Or App 272 (1985), that focused on a common domicile, shared living expenses, and a sexual relationship when interpreting the term “cohabitation” in a spousal support modification case.

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### Anticipated Questions, continued:

**Federal:** The main case interpreting the phrase “cohabiting as spouses” is *United States v. Costigan*, 18 Fed Appx 2, 5 (1st Cir 2001). In *Costigan*, the Court considered a number of factors before ultimately determining that the Defendant and Victim were “cohabiting.” The factors include: length of the relationship; shared residence as indicated by spending the night and keeping one’s belongings at the residence; intimate relations; expectations of fidelity and monogamy; shared household duties; regularly sharing meals together; joint assumption of child care; providing financial support; moving as a family unit; joint recreation and socialization; and recognition of the live-in relationship by family and friends as indicated by visits to the residence. “These factors, while by no means exhaustive, are strong indicators that a relationship has functioned like a marriage, thereby bringing the relationship within the ambit of section 921 (a)(33)(a).”

- Link to *US v. Costigan*: [http://www.med.uscourts.gov/Opinions/Hornby/2000/DBH\\_06162000\\_1-00cr9\\_U\\_S\\_V\\_COSTIGAN.pdf](http://www.med.uscourts.gov/Opinions/Hornby/2000/DBH_06162000_1-00cr9_U_S_V_COSTIGAN.pdf)

#### **What qualifies as a “hearing?”**

**Was there a hearing?** An in-court stipulation by the parties to the order is enough, *U.S. v. Banks*, 339 F.3d 267 (5th Cir. 2003); *U.S. v. Lippman*, 369 F. 3d 1039 (8th Cir. 2004); However, stipulation about an order done out of court where no hearing was scheduled or occurred is not enough. (*U.S. v. Spruill*, 292 F.3d 207 (5th Cir. 2002) This is true especially when a prosecutor provides the stipulation and Respondent has no attorney. *U.S. v. Quast*, 2008 U.S. Dist. Lexis 62343 (D.S.D. 2008) An in-court request for set-over is enough, *U.S. v. Calor*, 340 F.3d 428 (6th Cir. 2003).

#### **What protections are the Respondent/Defendant entitled to at a “hearing?”**

**Protections:** Defendant / Respondent is not entitled to criminal safeguards at the hearing. *U.S. v. Baker*, 197 F.3d 211 (6th Cir. 1999). Even after *Heller*. *U.S. v. Luedtke*, 589 F. Supp. 2d 1018 (E.D. Wis. 2008); The Defendant/Respondent is not entitled to a court-appointed attorney or jury trial, and there is no beyond reasonable doubt standard.

#### **What qualifies as “having notice?”**

**Notice:** Actual notice, not advance notice, regarding a hearing is necessary. Notice *at* the hearing is enough. In the context of arraignment, issuing a “No Contact Order” is OK: *U.S. v. Young*, 458 F.3d 998 (9th Cir. 2006).

**Insufficient Notice:** Where “just moments” pass between motion to renew and issuance of the renewed order at the end of unrelated divorce hearing and defendant has no opportunity to object. *U.S. v. Collins*, (E.D. Ky .2008); No “opportunity to participate” where defendant not given chance to speak. *U.S. v. Heintz*, 2005 U.S. Dist. Lexis 27773 (E.D. Wash. 2005)

#### **What qualifies as having “an opportunity to be heard?”**

**Opportunity to be heard:** A minimal “opportunity” to participate is required. Evidence and witnesses are not required. Addressing the merits of the order is not required. It is required that the Defendant/Respondent could have objected or otherwise engaged with the court regarding that order; *U.S. v. Young*, 458 F.3d 998 (9th Cir. 2006). 8th and 6th Circuits in accord; According to *U.S. v. Leary*, 86 Fed. Appx 559 (4th Cir. 2004): It is required that the Defendant/Respondent is “not prevented” from discussing protective order at hearing. *U.S. v. Falzone*, 1998 U.S. Dist. Lexis 22409 (D. Conn. 1998): Attorney’s strategic choice not to contest did not negate “opportunity” to be heard.

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### Anticipated Questions, Continued:

**Failing to Attend Hearing:** Defendant/Respondent's failure to attend a noticed hearing still equals opportunity to be heard. There is no requirement that the Defendant/Respondent have been served the final order after hearing in order for the hearing requirements to have been met, so long as the Defendant/Respondent had notice of the hearing and the opportunity to appear and be heard. *U.S. v. Miles*, 2006 U.S. Dist. Lexis 27123 (W.D. La.2006).

### **Does a Renewed Order qualify?**

**Renewed Order:** Whether a renewed order qualifies depends on language of order. Where there is a qualified order followed by renewed/modified order, the question is does the second order need to contain findings? Or only refer to the qualified order? *U.S. v. Skillern*, 2009 U.S. Dist. Lexis 34370 (W.D. Ky. 2009). Ex parte amended order (involving only a change of petitioner's address) did not replace but only supplemented the original order under state law, which original order was the basis of liability. *U.S. v. Wynne*, 2003 U.S. App Lexis 186 (10th Cir. 2003).

### **How do we prove that the Court Order accurately restrains the future conduct and makes the appropriate findings regarding "credible threat to the physical safety?"**

This language already appears on the boilerplate Restraining Order documents. Also, the Oregon Judicial Department (OJD) created a Release Agreement Addendum which contains this language, as well. It is available on the OJD website: <http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/frelease.pdf>

### **Requirements for MISDEMEANOR CRIME OF DV to qualify for prosecution**

<b>Federal</b>	<b>Oregon</b>
<u>Relationship:</u> Person's current spouse Person's former spouse Person with whom the victim shares a child in common Person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, <i>OR</i> Person similarly situated to a spouse, parent, or guardian of the victim	<u>Relationship: "Family Member"</u> The victim's spouse Victim's former spouse Person with whom the victim shared a child in common Victim's parent or guardian Person cohabiting with or who has cohabited with the victim as a spouse, parent or guardian, <i>OR</i> Person similarly situated to a spouse, parent or guardian of the victim
<u>Elements:</u> "The use or attempted use of physical force, <i>OR</i> the threatened use of a deadly weapon."	<u>Elements:</u> "The use or attempted use of physical force or the threatened use of a deadly weapon."
<u>Due Process:</u> Party was represented by counsel, or knowingly waived; Party had jury trial or knowingly waived; No expunction or conviction.	<u>Due Process:</u> Party was represented by counsel, or knowingly, waived Party had jury trial or knowingly waived No expunction or conviction

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### Anticipated Questions

#### **How is the definition of “family or household members” under ORS 135.230 different than the “intimate partner” and “family member” definitions in SB 525B?**

**Relationship differences:** The qualifying “intimate partner” relationship under SB 525B is narrower than the definition of “family or household members” used in ORS 135.230. Therefore, there are some relationships that may constitute “domestic violence” under ORS 135.230 that will not qualify for prosecution under SB 525. Those relationships include:

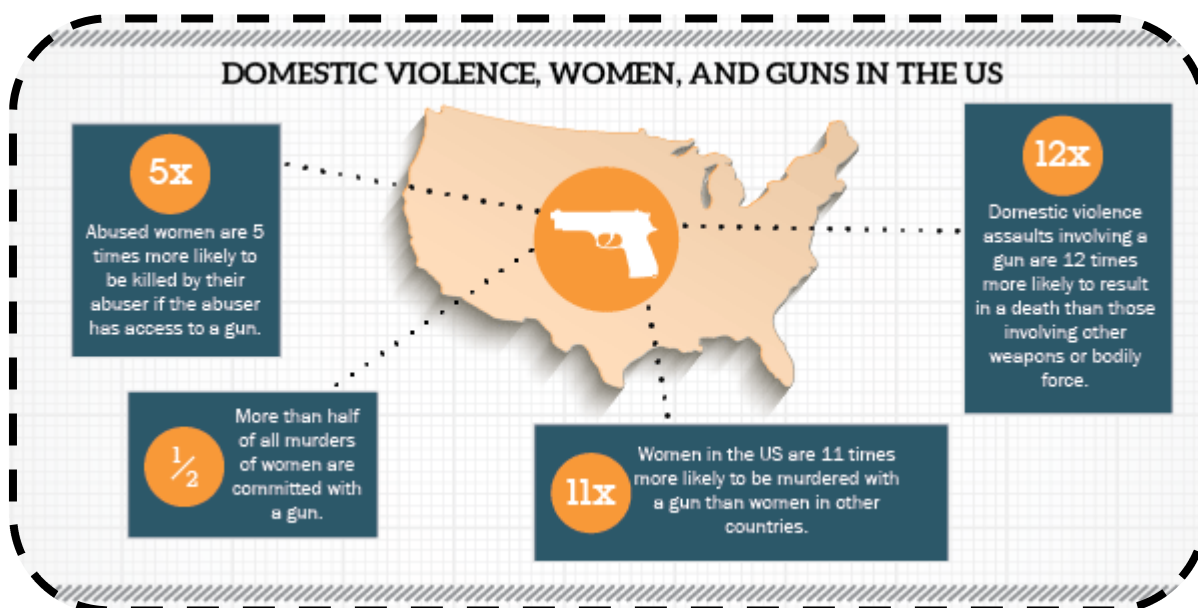
- Adult persons related by blood or marriage. (Example: Adult mother/son; adult step-father/daughter; adult brothers or sisters, etc.)
- [P]ersons who have been involved in a sexually intimate relationship. (Example: Dating partners who are sexually intimate but who are not ‘cohabiting’ with one another.)

The qualifying “family member” definition under SB 525B *does* cover parents or guardians of minor victims which isn’t included in the “family or household member” definition under ORS 135.230.

#### **What state crimes qualify for prosecution under SB 525?**

**Qualifying crimes:** The FBI has designated six Oregon crimes which it believes qualifies for federal prosecution under the federal definition. The United States Department of Justice has historically only prosecuted two of those FBI-designated crimes: Assault in the Fourth Degree and Strangulation (and attempts thereof). A recent United States Supreme Court case, *United States v. Castleman\**, raised hopes that additional crimes would be added to the USDOJ’s list, but that has not yet happened. However, if the required elements are pleaded appropriately, it’s possible that crimes besides Assault in the Fourth Degree and Strangulation could qualify in state court, under SB 525B. For instance, a Harassment charge could be pleaded to include the requisite element of “use or attempted use of physical force.”

\*The Court in *Castleman* unanimously held that respondent’s Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a “misdemeanor crime of domestic violence.” The Court reasoned that §921(a)(33)(A) incorporates the common law definition of “force,” which is mere offensive touching. The Court therefore reversed the Sixth Circuit, which had held that *Johnson v. United States*, 559 U.S. 133 (2010), dictates that “violent force” is required. <http://www.supremecourt.gov/opinions/slipopinions.aspx>



## 2015 Legislative Session: What's Left To Do

Less than half of the bills introduced during the 2015 legislative session passed. Even fewer were signed into law by the Governor. Specifically, there were 2,799 bills introduced during this year's session. The House of Representatives passed 1,079 bills. The Senate passed 1,003 bills.

Governor Kate Brown signed 840 bills into law.



Here are a few that didn't pass:

### **Close the Gap in Emergency Assistance for Victims: SB 503: Not Passed**

Proposal: The TA-DVS program, established in Oregon in 1996, provides one-time emergency assistance of up to \$1200 to survivors of domestic violence seeking safety for themselves and their children. The program can pay for emergency transportation, motel vouchers, food and clothing for a family who had to leave all behind in order to get safe, security locks, and other safety-related expenses. Two improvements to the program were requested:

- Include survivors of sexual assault, so that they too may qualify for emergency funds;

- Increase the allowable assistance from a cap of \$1,200 to a cap of \$2000, to more effectively meet safety needs.

### **Statewide Capacity for the Domestic Violence DHS Co-Located Advocates Program: Not Passed**

Proposal: \$3.2 million increase in funding in the DHS Budget to allow full implementation of this nationally recognized model statewide.

### **Changing the Definition of Physical Injury: SB 526: Not Passed.**

Proposal: SB 526 sought to change the definition of physical injury by making this change: "Physical injury" means physical trauma, impairment of physical condition or substantial pain. "Physical trauma" includes but is not limited to fractures, cuts, punctures, bruises, burns or other wounds.

**The next legislative session starts February 1, 2016.**

Questions about information in this newsletter?

Please contact Erin Greenawald at  
[erin.greenawald@doj.state.or.us](mailto:erin.greenawald@doj.state.or.us)

**\*\*Thank you to Judge Maureen McKnight for much of the  
summary of federal case law highlighted in the summary of 525B.**

**\*\*Thank you to Sybil Hebb for her contribution to the legislative update.**



SEPTEMBER

OCTOBER

NOVEMBER

cool, crisp, air

BREEZY

AUTUMN

HARVEST

Happy

thankful

APPLES

FALL

y'all

falling, raking, jumping, joy

LEAVES

ACORNS

hayrides

pumpkins

thankful