

CHAPTER 11

Extreme Risk Protection Order Laws

Too often following a mass shooting we learn that people who knew the shooter saw warning signs of potential violence but felt powerless to do anything. If the person has not yet broken any law and may not meet the mental health standards for involuntary commitment, what can be done?

A number of states have attempted to answer this question, at least in part, through “**extreme risk protection order**” (**ERPO**) laws. Also known as gun violence protection orders, risk warrants, or red flag laws, these state laws provide law enforcement (and in some instances, family members) with a legal, temporary way to prevent individuals who pose a threat to themselves or others from possessing or purchasing firearms.

President Trump has called on states to adopt ERPO laws that protect the due process rights of law-abiding citizens.¹ This section describes the state laws that have been enacted, reviews the limited research on their effectiveness, and offers several recommendations.

ERPO laws: what they are and how they work

In every state, some form of protection or restraining order is already available in cases involving domestic violence, harassment, stalking, sexual assault, and, in some states, workplace issues. But outside of the context of domestic violence, most protection orders do not result in a temporary legal prohibition against possessing firearms.² Additionally, most protection order laws focus on threats directed at the specific person requesting the order. Generalized threats (e.g., against a school) may not qualify under state laws.

ERPO laws seek to fill these gaps by providing a temporary mechanism for removing firearms from individuals found by a court to be a danger to themselves or others. Thirteen states currently have an ERPO law in effect, including eight states that have enacted laws since the Parkland shooting.³

The terms of each state statute are summarized in Table 11.1. While state laws differ, the basic process in each state is largely similar:

President Trump has called on states to adopt ERPO laws that protect the due process rights of law-abiding citizens.

Initial Petition. A law enforcement officer, an attorney for the state, or, in some states, a family or household member offers a court evidence that an individual presents an imminent threat to himself or herself or to others and is in possession of a firearm. Depending on the jurisdiction, the evidence can include a history or pattern of recent threats or acts of violence, dangerous past behavior with firearms, substance abuse, and mental illness.

Temporary Order. If the petitioner offers sufficient evidence, the court issues either a search and seizure warrant or a temporary protective order. The initial evidentiary threshold varies by jurisdiction, including reasonable cause, substantial likelihood, clear and convincing evidence, and probable cause.

Seizure of Firearms. Once a warrant or protection order is issued, law enforcement seizes and temporarily holds for safekeeping the firearm(s) the at-risk individual owns or has access to.

Hearing. Typically, within 14 to 21 days of the issuance of the temporary order or warrant, the court holds a hearing at which the at-risk individual has the opportunity to present evidence that he or she is not an imminent threat to himself or herself or to others.⁴

Extension of Prohibition. If the court agrees with the finding that generated the initial warrant or temporary order (though the evidentiary standard may be higher at this point), it can extend the prohibition such that

Thirteen states currently have an ERPO law in effect, including eight states that have enacted laws since the Parkland shooting.

the individual may not retain or purchase firearms for a period of, typically, one year.

While the basic features of these state laws are largely similar, there are a number of notable differences. They include the following:

Scope. Both ERPOs and risk warrants provide for initial seizure of firearms already in the possession of the at-risk individual. However, ERPO statutes provide a clearer prohibition against future purchases or possession by the individual, while risk warrant statutes focus on seizure of firearms at the outset of the warrant's issuance.

Petitioners. In five states, only a law enforcement officer or other designated state official may file a petition. In eight states, a family or household member may file a petition with the court. One state also authorizes petitions by mental health professionals.

Standard of Proof. At the hearing that takes place after the issuance of the initial order, most states require the petitioner to prove that the individual continues to be a threat to himself or herself or to others by clear and convincing evidence. In three states, the standard of proof is a preponderance of the evidence.

False Petitions. Filing a false petition or filing a petition with the intent to harass an individual is punishable in nine jurisdictions, either as a misdemeanor or a felony.

Additional Notice. In one state, if the court finds that the individual poses a risk of imminent personal injury to himself or herself or to others, it provides notice to that state's Department of Mental Health and Addiction Services, as it deems appropriate. In five states, the order must be made available to the National Instant Criminal Background Check System (NICS).⁵

ERPO laws: do they work?

ERPO laws are of relatively recent vintage—the oldest is less than 20 years old, and more than half have been in effect for less than a year. So it is not surprising that there is little research on their effectiveness. Two studies (in the states where such laws have been around

the longest) suggest a positive impact on suicide prevention.

In the first study, researchers examining Connecticut's risk warrant law concluded that the removal of firearms from high-risk individuals may have prevented up to 100 suicides.⁶ They estimated the law resulted in one averted suicide for every 10–11 cases. In 44 percent of cases, the risk warrant led to the respondents receiving psychiatric treatment they may not have received otherwise. Importantly, the study examined the impact of the law on suicides only, not violence against others.

A more recent study looked at both the Connecticut and Indiana risk warrant laws.⁷ It found that Indiana's law was associated with a 7.5 percent decrease in firearm suicides during the 10 years following its enactment. Connecticut's law was associated with a 1.6 percent decrease in firearm suicides immediately after its passage, and a 13.7 percent decrease between 2007 and 2015, following increased enforcement in the wake of the Virginia Tech shooting. Like the other study, it did not examine effects on gun violence more generally.

Commission Observations

A growing number of states is adopting ERPO laws in an effort to prevent gun violence. The available evidence suggests that the older risk warrant laws may have a positive impact on suicide prevention. We do not know whether they impact gun violence more generally, and it appears no studies have yet evaluated the more recent ERPO laws in other states.

Table 11-1

Summary of State Extreme Risk Protection Order and Risk Warrant Laws*

	Type	Who can petition?	Standard of proof for initial order or warrant	Hearing held within	Standard of proof at hearing to continue prohibition	How long is firearm held initially?	Order MUST BE made available to the NICS	Penalty for false petition/ harassment
California Cal. Pen. Code § 18100	ERPO	Law enforcement (LE) officer; immediate family member	Ex parte order: Substantial likelihood that person poses a significant danger Temporary emergency order (available to LE only): Reasonable cause that person poses immediate and present danger	21 days	Clear and convincing evidence	One year	No	Misdemeanor
Connecticut C.G.S.A. § 29-38c	Risk Warrant	State's Attorney; Assistant State's Attorney; or 2 LE officers	Probable cause	14 days	Clear and convincing evidence	Not more than one year	No, but must report to Dept. of Mental Health and Addiction Services	N/A
Delaware H.B. No. 222 (effective Dec. 27, 2019)	ERPO	LE officer, family member	Nonemergency hearing: Petition may be filed, but no ex parte order available Emergency hearing (available to LE only): Preponderance of the evidence that respondent poses an immediate and present danger	15 days	Clear and convincing evidence	Not more than one year	No	Perjury
Florida Fla. Stat. § 790.401	ERPO	LE officer; LE agency	Reasonable cause	14 days	Clear and convincing evidence	Not more than one year	Yes	Third-degree felony

* This table is not intended to provide an exhaustive account of the differing provisions of these state laws. For more detailed information, please consult the various state statutes.

	Type	Who can petition?	Standard of proof for initial order or warrant	Hearing held within	Standard of proof at hearing to continue prohibition	How long is firearm held initially?	Order MUST BE made available to the NICS	Penalty for false petition/ harassment
Illinois H.B. 2354 (effective Jan. 1, 2019)	Firearms Restraining Order	LE officer; family member	Probable cause	14 days (30 days if petitioner requests a six-month order and not an ex parte order)	Clear and convincing evidence	Six months	No	Felony (perjury)
Indiana IC 35-47-14	Risk Warrant	LE officer	Probable cause	14 days	Clear and convincing evidence	At least 180 days, after which the individual may petition the court for return of firearm	No	N/A
Maryland Md. Code Ann., Pub. Safety § 5-601	ERPO	Physician; mental health provider; LE officer; spouse; co-habitant; relative; person with whom the individual has a child in common; current dating or intimate partner; current or former legal guardian	Reasonable grounds for initial interim ERPO (good for up to two days); probable cause for temporary ERPO (good for up to additional seven days)	A temporary ERPO hearing must be held within two business days of issuance of the interim ERPO A final ERPO hearing must be held within seven days after service of temporary ERPO (The parties may waive the temporary ERPO hearing and proceed directly to final hearing)	Clear and convincing evidence	Not more than one year	No	No affirmative sanction, but statute says person who files a petition in good faith is not civilly or criminally liable
Massachusetts H. 4670 (not yet codified)	ERPO	Family or household member; licensing authority (local police department)	Reasonable cause	10 days	Preponderance of the evidence	One year	Yes	Fines between \$2,500 and \$5,000 and/or imprisonment for not more than 2.5 years

	Type	Who can petition?	Standard of proof for initial order or warrant	Hearing held within	Standard of proof at hearing to continue prohibition	How long is firearm held initially?	Order MUST BE made available to the NICS	Penalty for false petition/ harassment
New Jersey A-1217; P.L. 2018, c. 35 (not yet codified)	ERPO	LE officer; family or household member	Good cause	10 days	Preponderance of the evidence	One year	No	N/A
Oregon ORS 166.525	ERPO	LE officer; family or household member	Clear and convincing evidence	Respondent has 30 days to request hearing, which must take place within 21 days of request; if the respondent does not request a hearing, the protection order is effective for one year	Clear and convincing evidence	One year	Yes	Class A misdemeanor
Rhode Island S. 2492 (not yet codified)	ERPO	LE agency	Probable cause	14 days	Clear and convincing evidence	One year	Yes	Felony
Vermont 13 V.S.A. § 4051	ERPO	State's Attorney or Office of the Attorney General	Preponderance of the evidence	14 days	Clear and convincing evidence	Up to six months	No	Imprisonment up to a year and/or fine up to \$1,000
Washington RCWA § 7.94.010	ERPO	Family or household member; LE officer or agency	Reasonable cause	14 days	Preponderance of the evidence	One year	Yes	Gross misdemeanor

Recommendations

Based on the information contained in this chapter, the Federal Commission on School Safety offers the recommendations below.

▣ STATES & LOCAL COMMUNITIES

1. States should adopt ERPO laws that incorporate an appropriate evidentiary standard to temporarily restrict firearms access by individuals found to be a danger to themselves or others.

- States' ERPO laws should ensure that the due process rights of the at-risk individual are respected. Notice and an opportunity to be heard are foundational principles of American law, guaranteed by the Fifth and Fourteenth Amendments, and gun ownership and possession are protected by the Second and Fourteenth Amendments.

These rights must be upheld through appropriate processes, beginning with the initial consideration of a temporary order and continuing through all subsequent steps. For example, state laws that do not require a full hearing promptly after a temporary order is issued, but that put the burden on the respondent to seek a hearing, do not afford as meaningful and robust of an opportunity to be heard as those state laws that do require full hearings. State laws should also provide for prompt return of firearms at the conclusion of the order's duration, assuming no other lawful restrictions apply.

- States should likewise be thoughtful about who can file a petition for an ERPO so that the laws effectively address safety concerns without inviting misuse by individuals who are less likely to possess reliable information relevant to a person's dangerousness.

Some existing state laws have prompted concerns that the scope of possible petitioners might be too broad and poorly defined, potentially allowing the filing of petitions by people who are unlikely to have relevant and reliable information. To mitigate such concerns, states should adopt clear and narrow definitions identifying appropriate persons with standing to file a petition. States can deter misuse or abuse of the ERPO process through appropriate criminal penalties for false (bad faith) or harassing petitions.

- States with ERPO laws, and those considering them, should require and establish procedures for sharing information regarding issued protection orders (including their expiration dates) with the National Instant Criminal Background Check System (NICS), by submitting those orders to the appropriate database (the National Crime Information Center or NICS Indices). Prohibitions on the purchase of firearms can be enforced only if the information is made available to the NICS in a timely and accurate manner. States wishing to explore how to accomplish this should contact the Federal Bureau of Investigation's NICS Section at CJIS-STATE@fbi.gov.

Chapter 11 Endnotes

- 1 <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/>.
- 2 The federal Gun Control Act contains a provision that makes it unlawful for persons subject to certain qualifying domestic violence restraining orders to possess firearms during the pendency of the order. See 18 U.S.C. § 922(g)(8). State laws may also impose such a restriction, or the restriction may be included as part of the underlying restraining order itself.
- 3 Connecticut (1999); Indiana (2006); California (2014); Washington (2016); Oregon (2017); Delaware (2018); Florida (2018); Illinois (2018); Maryland (2018); Massachusetts (2018); New Jersey (2018); Rhode Island (2018); and Vermont (2018). The earliest laws (Connecticut and Indiana) are known as “risk warrant” laws and bear a closer resemblance to the process followed by law enforcement to obtain search warrants. Later ERPO statutes in other states bear a stronger resemblance to protection order processes. Similar bills have been introduced in a number of other states. In addition, Texas provides a different mechanism for seizing firearms from certain mentally ill people who are taken into custody. TEX. HEALTH & SAFETY CODE § 573.001(h).
- 4 Oregon appears to be the only state in which a subsequent hearing is not required. Instead, a respondent has 30 days to request a hearing after he or she is served; if the respondent does not request a hearing, the ex parte order remains in effect for one year, unless terminated by a court.
- 5 Some of these states direct entry of the order into the National Crime Information Center (NCIC), which is one of three databases accessed by the NICS. However, these orders may not meet the criteria for entry in the protective order file of NCIC. In these instances, the order may qualify for entry into a separate NCIC file. The orders may also be entered into the NICS Indices (one of the other databases accessed by the NICS). In addition, although some states do not require orders to be made available to the NICS by statute, they may submit the orders to state agencies that do so as a matter of policy.
- 6 Swanson, J.W., et al., (2017). Implementation and effectiveness of Connecticut’s risk-based gun removal law: Does it prevent suicides? *Law and Contemporary Problems*, 179. Available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4830&context=lcp>.
- 7 Kivisto, A.J., et al. (2018). Effects of risk-based firearm seizure laws in Connecticut and Indiana on suicide rates, 1981–2015. *Psychiatric Services*. Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/29852823>.