

# Senate Select Committee on Violence in Schools & School Security

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# What are Extreme Risk Protection Orders?

- Also referred to as gun violence protection order laws or “red flag” laws.
- Similar to domestic violence laws that allow a victim to seek a court order to prevent further acts of abuse and restrict the abuser’s access to guns.
- Allow courts to order the temporary restriction of an individual’s access to guns.



# States with ERPO laws

- California (2016)
- Connecticut (1999)
- Florida (2018)
- Indiana (2005)
- Maryland (2018)
- Oregon (2017)
- Vermont (2018)
- Washington (2016)
- Delaware, New Jersey, & Rhode Island just passed



# Who Can File?

Most states allow one or more of the following to file an ERPO

- Law Enforcement
- District or State Attorneys
- Family Member
- Household Member
- Mental Health Professional



# Considerations by Court

- Most states require courts to determine a person's level of risk and consider certain types of evidence, including:
  - Recent threats or acts of violence to self or others
  - Recent acts of cruelty to animals
  - Previous convictions
  - Recent violation of a domestic violence protective order
  - Reckless use of a firearm or brandishing
  - Recent purchase or attempt to purchase firearm(s)
  - Drug abuse
- ERPO laws also generally require petitioners to include any information they may have about firearms (and in some cases ammunition) the respondent possesses.



# Temporary Ex Parte Hearings

- ERPOs can be issued on an emergency basis or for a longer period.
- In a temporary ex parte hearing, a court may issue a removal order without giving notice to the respondent.
  - Allow law enforcement to act quickly.
  - In most states, last up to 14 days until a hearing can be held where the individual has an opportunity to contest the order.
  - Maryland has interim (1-2 days) and temporary order (7 days)
  - Oregon's order lasts 30 days and becomes final if respondent doesn't request hearing



# Final Orders

- Generally, last up to 12 months
- Can be extended if petitioner seeks and proves by clear and convincing evidence continued need for ERPO
- Respondent can seek review of the ERPO during 12 month period – generally limited to once every 6 months



# Burden of Proof

- For emergency orders, typically probable cause or reasonable cause.
- At hearing on final order, clear and convincing evidence in every state, except Washington (preponderance of the evidence).





# Jurisdiction

- Clarifying which type of court should hear these cases is important.
- Some states permit filing in both general and limited jurisdiction courts.
- Others allow in juvenile and probate courts.
- Florida didn't specify, which has caused some issues.



# Court-Appointed Counsel & Psychiatric Evaluation

- States provide right to counsel for respondent
- If respondent can't afford, court appoints counsel
- Some states require mental health evaluation of respondent
- Considerations:
  - Any requirements for court-appointed counsel?
  - Who sets fees?
  - Who pays for the cost?
    - State pays for parental consent court-appointed attorneys



# Procedural Protections for Respondents

- Notification of respondent of his or her rights
  - Respondent has right to request a hearing to vacate the order
  - Right to seek advice of an attorney
  - Notice of hearings required to extend temporary or emergency order
  - Notice that at hearing court may extend order up to one year.
  - All states require OCA to promulgate forms
- Some states make it a crime to knowingly file false or intentionally harassing petition



# Surrender/Return of Firearms

- Most ERPOs require respondents to surrender firearms
  - Some states provide deadline and location to surrender
  - Some states permit law enforcement to seek search warrant if probable cause to believe firearms/ammunition not surrendered
- Most states do not authorize search of respondent's home for confiscation of firearm(s) without additional process
- Some states authorize respondent to transfer to persons eligible to possess
- Most require law enforcement to immediately return firearms upon expiration of order
  - Most states require respondent to initiate process with a request
  - Law enforcement required to confirm with court the expiration of order & perform background check before returning firearm



# Expected Caseload

- Data from other states consistently show relatively low number of filings, slight impact on judicial resources

State	Filings
Connecticut	10 (1999) – 184 (2013)
Indiana	55 (2006) – 78 (2007)
Washington	121 (2018)
Oregon	34 (5 months of 2018)

- Most states require data collection on filings and dispositions



# Legal Challenges

- *District of Columbia v. Heller* (USSC, 2008) – individual right to bear arms under 2<sup>nd</sup> Amendment
  - For purpose of self-defense and other lawful purpose
  - Not unlimited & includes exceptions such as for felons & mentally ill, sensitive places, and with certain qualifications – Heller “safe harbor”
- *McDonald v. Chicago* (USSC, 2010) – extended right to the states through the 14<sup>th</sup> Amendment
- CT law challenged in 2016 – found constitutional under *Heller*, because protections apply to “law-abiding, responsible citizens.”
- IN law challenged in 2013 – found constitutional because right to bear arms was not absolute and legislature could limit based on public safety.

