

Extreme Risk Protective Order in Massachusetts

FREQUENTLY ASKED QUESTIONS

House Bill 3081 | INTRODUCED BY Rep. David Linsky (LD5)

An Extreme Risk Protective Order (ERPO) is a court-issued civil order that would empower Massachusetts families and law enforcement to prevent gun tragedies by reducing access to guns for individuals at an elevated risk of endangering themselves or others. An ERPO temporarily prohibits the purchase and possession of firearms and requires the removal of any firearms currently possessed while the order is in effect.

HOW DOES THE ERPO LEGISLATION FILL A GAP IN CURRENT?

Massachusetts law prohibits individuals who are at high risk of committing violence, such as violent misdemeanants and domestic abusers, from purchasing and possessing firearms.¹ However, there is often no legal process for removing firearms already possessed by family members, even if they believe them to pose an elevated risk of violence to themselves or others. Moreover, there are times when individuals are temporarily at a higher risk of violence towards self or others, but have no accompanying prohibition from purchasing and possessing firearms. This can leave families in a dangerous situation without legal tools for intervention. Waiting for an individual to act in a manner that would prompt a firearm prohibition sometimes means that the opportunity for intervention comes too late to prevent a tragedy. An ERPO fills a gap in Massachusetts' laws by initiating a stronger preventative measure through the judicial system that allows family members and law enforcement to reduce access to firearms by individuals who pose a threat to themselves or others.

2,287

People from Massachusetts were killed by gunfire in the last decade.⁷

**ONE LIFE IS
SAVED FOR
EVERY 10-20
RISK-WARRANTS
ISSUED.**

(Connecticut's ERPO-style law).⁹

55%

of Massachusetts gun deaths in 2015 were suicides.⁷

85%

of suicide attempts with a firearm are fatal, making firearms the most lethal suicide attempt method that is commonly available. Temporarily reducing access to guns significantly increases the likelihood of surviving a suicidal crisis.⁹

90%

of people who survive a suicide attempt do not ultimately die by suicide.¹⁰

WHY ARE ERPOS NEEDED?

The ERPO is a policy tool that was developed by the Consortium for Risk-Based Firearm Policy in 2013^{2,3} and first enacted into law after the deadly shooting on the University of California, Santa Barbara campus in 2014. The shooter had exhibited dangerous behaviors prior to the shooting, and his parents shared their concerns with his therapist who contacted law enforcement. The police briefly interviewed him but had no legal authority to intervene. Situations like this leave family members and law enforcement with limited options. An ERPO provides a legal process to prevent tragedies from occurring.

WHO CAN PETITION FOR AN ERPO?

Law enforcement officers, district attorneys, health care providers, and immediate family and household members⁴ of the individual exhibiting dangerous behaviors have the ability to petition for an ERPO. Health care providers are defined to include a licensed:

- Physician
- Clinical psychologist
- Social worker
- Mental health clinician

Family members may include:

- spouses, current or former
- cohabitating couples
- persons who are or were related by blood or marriage
- persons who have or are having a child with the respondent
- persons in a current or former substantive dating relationship

WHAT TYPE OF EVIDENCE HAS TO BE PROVIDED TO OBTAIN AN ERPO?

Health Care Providers: Health care providers may seek an ERPO under two circumstances:

1. When (a) the patient has communicated to the health care provider an explicit threat to kill or inflict serious bodily injury upon a reasonably identified victim or victims; (b) the patient has the apparent intent and ability to carry out the threat; and (c) the health care provider knows or has reason to believe that the patient controls, owns, or possesses a firearm.
2. When (a) the patient has a history of physical violence which is known to the health care provider; (b) the health care provider has a reasonable basis to believe that there is a clear and present danger that the patient will attempt to kill or inflict serious bodily injury against a reasonably identified victim or victims; and (c) the health care provider knows or has reason to believe that the patient controls, owns, or possesses a firearm.

Law Enforcement Officers, District Attorneys, Family Members: There are two types of ERPOs: an ex parte ERPO that may be sought by law enforcement officers, family members, or district attorneys that would only be issued if an individual poses an immediate and present danger of causing injury to themselves, the petitioner, or others by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition; and a non-emergency, year-

long ERPO if there is preponderance of the evidence that the respondent poses the risk alleged in the petition. The petitioner must allege facts based on personal knowledge that the respondent poses a threat of personal injury to themselves or others by owning, possessing, or purchasing a firearm. The petitioner must provide credible evidence that the respondent poses the risk alleged in the petition and describe the number, types, and locations of any firearms or ammunition the petitioner believes the respondent owns, possesses, or controls. The petition must also state whether the respondent is subject to an existing abuse prevention order and whether there is a pending lawsuit, complaint, petition, or other action between the parties.

HOW LONG DOES IT TAKE FOR A HEARING TO HAPPEN AFTER A PETITION IS FILED?

After a family member, law enforcement officer, or district attorney files a petition, a judge may issue an ex parte ERPO without notice to the respondent and shall be issued or denied on the same day the petition is submitted to the court, unless it was submitted too late in the day to permit effective review, in which case the order shall be issued or denied on the next judicial business day. However, a full hearing where the respondent has an opportunity to be present must be scheduled within 10 days. At this hearing, the judge will determine if the order should remain in effect for a longer time period, typically up to one year, or if it should be terminated.

HOW ARE DUE PROCESS PROTECTIONS ADDRESSED DURING AN EX PARTE ERPO?

Similar to the domestic violence ex parte order, an ex parte ERPO requires a petitioner to file an affidavit with the court alleging that the respondent poses a substantial likelihood of immediate and present danger of physical harm to themselves, the petitioner, or others by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition. The judge must then determine whether the petitioner has met the standard of proof to issue the ex parte ERPO. If it is issued, the person subject to the order is entitled to a full hearing before a judge within 10 days to determine if the order should remain in effect or be dismissed. The ERPO process provides the respondent with adequate due process before restricting his or her access to firearms. The due process protections afforded by the ex parte ERPO are nearly identical in substance and form to those afforded by the domestic violence ex parte (or temporary) protective order.

HOW WILL THE RESPONDENT'S INFORMATION BE SHARED?

No names, addresses, or other identifying data of any individuals or firearms identified in the ERPO will become a public record.

WHAT HAPPENS TO THE RESPONDENT'S FIREARMS?

Upon issuance of the order, the respondent's firearms identification card and license to carry firearms are immediately suspended. The respondent must relinquish those licenses, as well as any firearms and ammunition he or she controls, owns, or possesses, to the law enforcement officer serving the ERPO. If someone other than a law enforcement officer serves the ERPO, the respondent has eight hours from the time of service to relinquish his or her firearms and licenses to the licensing authority where the respondent resides. In accordance with existing Massachusetts law, the respondent has the right to arrange for the transfer or sale of the relinquished firearms to any federally licensed dealer (FFL) or individual who is legally allowed to possess the weapons. Once the order has expired, the respondent may petition the court to have their firearms returned.

CAN THE RESPONDENT REQUEST THAT THE ERPO BE TERMINATED?

Yes, the respondent may file one written request for a hearing to terminate an ERPO at any time during the period that the order is in effect. The court must set a hearing no sooner than 14 days from service on the petitioner. At the hearing, the respondent bears the burden of proving by a preponderance of the evidence that he or she does not pose a significant danger of causing physical injury to him- or herself, or others, by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

DOES THE ERPO VIOLATE AN INDIVIDUAL'S SECOND AMENDMENT RIGHTS?

No, the ERPO is a tool to empower families and law enforcement that is permissible under the Second Amendment. The Supreme Court noted in the 2008 *Heller* decision that the Second Amendment is not unlimited and there are categories of people, such as people with felony convictions and people who have been adjudicated as a "mental defective" or have been "committed to any mental institution," that should be prohibited from possessing firearms.⁵ Subsequent court rulings in Connecticut and Indiana have upheld ERPO laws stating that states may restrict access to firearms by dangerous people if it is in the interest of public safety or an individual's welfare.⁶

WHICH STATES HAVE SIMILAR LAWS?

In 2014, California became the first state to enact an ERPO-type law, known as both the Gun Violence Restraining Order (GVRO) and Firearms Restraining Order (FRO). In November 2016, Washington voters overwhelmingly passed an Extreme Risk Protective Order law. Connecticut and Indiana have had longstanding similar laws that enable only law enforcement to petition the court system to temporarily remove firearms from an individual who is at risk of harming themselves or others.

1 E.g. Cal. Penal Code §§ 29800(a), 29805, 29825, 29900-29905.

2 Consortium for Risk-Based Firearm Policy. Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy. December 2013. <http://efsgv.wpengine.com/wp-content/uploads/2014/10/Final-State-Report.pdf>

3 The GVRO is known as the Gun Violence Restraining Order (GVRO) in the Consortium for Risk-Based Firearm Policy report.

4 Refer to individual state law to see state definitions of family and household members.

5 *D.C. v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008)

6 *Hope v. State*, 163 Conn. App. 36, 133 A.3d 519 (2016); *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013).

7 National Center for Injury Prevention and Control, CDC. Massachusetts Firearm Deaths and Rates per 100,000. *Fatal Injury Reports 1999-2015, for National, Regional, and States (RESTRICTED)*. Retrieved April 19, 2017, from http://www.cdc.gov/injury/wisqars/fatal_injury_reports.html.

8 Swanson, Jeffrey W. and Norko, Michael and Lin, Hsiu-Ju and Alanis-Hirsch, Kelly and Frisman, Linda and Baranoski, Madelon and Easter, Michele and Gilbert, Allison and Swartz, Marvin and Bonnie, Richard J., Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides? (August 24, 2016). Law and Contemporary Problems, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2828847>

9 Miller, M., Azrael, D., & Barber, C. (2012). Suicide mortality in the United States: the importance of attending to method in understanding population-level disparities in the burden of suicide. *Annual review of public health*, 33, 393-408.

10 Owens, D., Horrocks, J., & House, A. (2002). Fatal and non-fatal repetition of self-harm. Systematic review. *British Journal of Psychiatry*, 181(3), 193-199.

ABOUT THE EDUCATIONAL FUND TO STOP GUN VIOLENCE

The Educational Fund to Stop Gun Violence (Ed Fund) was founded in 1978 as a 501(c)(3) organization that makes communities safer by translating research into policy to reduce gun violence. The Ed Fund achieves this by engaging in policy development, advocacy, community and stakeholder engagement, and technical assistance.

ABOUT THE LAW CENTER TO PREVENT GUN VIOLENCE & AMERICANS FOR RESPONSIBLE SOLUTIONS

Led by former Congresswoman Gabrielle Giffords and Navy combat veteran and retired NASA astronaut Captain Mark Kelly, Americans for Responsible Solutions and the Law Center to Prevent Gun Violence are committed to advancing commonsense change that makes communities safer from gun violence. Operating out of offices in Washington DC, San Francisco, and New York, our staff partners with lawmakers and advocates at the federal, state, and local levels to craft and enact the smart gun laws that save lives. We provide expertise in critical firearms litigation, lead grassroots coalitions, and educate the public on the proven solutions to America's gun violence epidemic.