

**COMMENTARY FOR EXTREME RISK PROTECTION ORDER  
MODEL LEGISLATION  
June 7, 2021**

Research has shown that states can save lives by authorizing courts to issue extreme risk protection orders (ERPOs) that temporarily prevent a person in crisis from accessing firearms. This model legislation provides a framework for states to consider as they determine whether and how to craft laws allowing law enforcement, concerned family members, or others to seek these orders and to intervene before warning signs turn into tragedy. The model draws on a significant number of similar laws adopted across the country. Orders of this nature may be sought in some jurisdictions, for example, by family members or others concerned that an individual who is suicidal or otherwise in crisis will use a firearm to seriously injure or kill himself or herself or another person.

The model legislation is designed to identify the main features (and varying specifics) of existing ERPO statutes that have been adopted in a number of states. These existing statutes may be of two types – “warrant” statutes that authorize courts to issue orders permitting law enforcement to search for and seize the firearms of dangerous individuals, and “order” statutes that authorize courts to issue temporary orders prohibiting dangerous individuals from possessing or acquiring firearms.

The “warrant” statutes provide an immediate basis for law enforcement to seek court orders temporarily preventing individuals in crisis from accessing or possessing guns. However, standing alone, these warrants do not provide an ongoing prohibition against such persons’ possession or acquisition of firearms, and do not provide a basis for entering those persons into the National Instant Criminal Background Check System and corresponding state firearm background check systems as individuals prohibited from possessing firearms.

The “order” statutes provide for ongoing prohibitions of firearms possession and acquisition, and a basis for entering dangerous individuals into the background check systems as ineligible to possess firearms. However, their design may require a law enforcement officer to initially present the order to the dangerous person and ask him or her to surrender his or her firearms. If the person does not comply, and the firearms are not in plain view during the encounter, a second step may be required in which the law enforcement officer goes back to court and secures a search warrant to look for and seize the subject’s firearms. The delay may inadvertently give the subject advance notice and time to hide the firearms – or potentially time to use them to seriously injure or kill someone before the police can return with a search warrant.

This model legislation combines both approaches. It includes language that would authorize the judicial issuance of no-firearms orders for dangerous individuals and the concurrent issuance of search warrants to search for and seize their firearms. It further provides that, in qualifying emergency circumstances, the subject may be served with the order concurrently with or after the search is carried out. The process would be overseen by a court to ensure the protection of the individual’s rights. Legislation authorizing ERPOs would supplement, not replace, existing laws authorizing the issuance of protection orders to prevent intimate partner

violence. This legislation similarly would not displace existing state laws on involuntary commitments.

ERPO laws are likely to be more effective when their implementation is adequately funded and supported by a broad array of affected stakeholders. Law enforcement, health care providers, community leaders, victim advocates, and others may not only help shape the appropriate scope of a state's particular legislation, but also be critical to ensuring that people in the community are aware of the process for petitioning for an ERPO. Similarly, law enforcement should receive adequate training on ERPO laws, including on issues, for example, like filing a petition and executing an ERPO, implicit bias, de-escalation techniques, and crisis intervention.

The Department is not endorsing any particular formulation of an ERPO statute, and the model is not intended to provide a comprehensive scheme that could be adopted wholesale. Rather, this model statute draws from the state laws already in existence; identifies key provisions that may be important to help ensure fair, effective, and safe implementation for such a law; and identifies options for states to consider. In drafting its own legislation, each state must account for its own policy, legal, constitutional, administrative, and operational considerations and requirements. States may also wish to review any proposed federal legislation that would create incentives for establishing particular forms of ERPO laws.

The provisions of the model legislation are as follows:

## **SEC. 1. EXTREME RISK PROTECTION ORDERS**

Section 1 provides a framework for identifying the classes of persons who may apply for ERPOs. Several states currently permit only law enforcement officers or agencies to apply for an ERPO, while others also include immediate family and household members as eligible petitioners. Some states further authorize petitions by dating or intimate partners (*e.g.*, Colorado,<sup>1</sup> Maryland<sup>2</sup>), certain employers or coworkers (California,<sup>3</sup> Hawaii<sup>4</sup>), certain health care providers (*e.g.*, District of Columbia<sup>5</sup>, Maryland<sup>6</sup>), or school or school system officials (*e.g.*, Hawaii,<sup>7</sup> New York<sup>8</sup>). This model bill includes a number of these eligible petitioners.

Section 1 further provides that there are two types of authorized orders: *ex parte* emergency orders, which a court may issue immediately, as provided in Section 2, and long-term orders, which a court may issue following a hearing, as provided in Section 3. States may wish to evaluate the need for instructions on what specific paperwork must be submitted by the petitioner in applying for these orders (and whether to create forms specific to these cases).

## **SEC. 2. EMERGENCY EX PARTE ORDER**

Section 2 would authorize a court, in qualifying emergency circumstances, to issue an immediate order based on probable cause prohibiting a person who poses a danger from possessing or acquiring firearms, and requiring that person to surrender any firearm in his or her possession or control. States have adopted different formulations as to what must be proved (*e.g.*, Delaware<sup>9</sup> (respondent poses an immediate and present danger), Florida<sup>10</sup> (significant

danger), Hawaii<sup>11</sup> (imminent danger)). Section 2 would authorize the issuance of an order where possession or receipt of a firearm would pose an extreme risk or meets another appropriate state-law standard. It would not require a finding that the respondent currently possesses a particular firearm and could apply, in appropriate cases, even if the respondent has voluntarily surrendered certain firearms.

Under the basic framework of Section 2, the order would generally remain in effect pending a hearing to determine whether a longer-term order should be issued, with the hearing to be held within a time period specified by state law. A court could concurrently issue warrants for searches and seizure of the subject's firearms based on probable cause. States may wish to consider mechanisms for establishing receipts for seized firearms.

### **SEC. 3. ORDER AFTER HEARING**

Section 3 would authorize the court to issue after a hearing an order effective for a period determined in each state's law. These orders prohibit the subject from possessing or acquiring firearms and direct him or her to surrender any firearms in his or her possession. The respondent must be afforded due process, and states may wish to create express procedural protections in their own statutes.

Some states authorize such orders to be in effect for 180 days/six months (*e.g.*, Illinois,<sup>12</sup> Vermont<sup>13</sup>), but most provide for the orders to remain in effect for up to one year unless terminated early (*e.g.*, Colorado,<sup>14</sup> Florida<sup>15</sup>). The order would be based on proof by the standard specified in state law. Some states have opted for clear and convincing evidence (*e.g.*, California,<sup>16</sup> Maryland<sup>17</sup>) while others have chosen proof by a preponderance of the evidence (*e.g.*, New Mexico,<sup>18</sup> Washington<sup>19</sup>). States often require proof that the respondent poses a significant danger (*e.g.*, Rhode Island<sup>20</sup>) of personal injury or death to the subject or another, while others have chosen different formulations (*e.g.*, New York<sup>21</sup> (likely to cause serious harm), Vermont<sup>22</sup> (extreme risk)).

In determining whether this is the case, the court would consider all relevant facts and circumstances, such as past violence or threats or the reckless brandishing of a firearm by the respondent. Existing state laws often expressly identify several specific factors that must be considered, such as recent threats of violence or a violation of a civil protection order.

Section 3 would further authorize the court to concurrently issue a search warrant for the subject's person and places in which he or she may have firearms, so that law enforcement can promptly locate and secure firearms to which he or she has access. If any seized firearms are owned by someone other than the subject of the order, provision is made for the owner to retrieve the firearms from the law enforcement agency, subject to a background check to ensure the owner is not disqualified from possessing firearms. The owner could secure return of the firearms by providing an affidavit affirming ownership and providing assurance he or she will safeguard the firearms against access by the respondent.

Renewed orders could be sought for additional periods, typically six months or one year, under the same standards and requirements as for an initial order. The subject of an order may

seek early termination of an order once during the pendency of the order, with the burden shifting to the respondent to demonstrate, by the same standard required at the original hearing, that he or she no longer poses a danger.

#### **SEC. 4. ENTRY INTO BACKGROUND CHECK SYSTEMS**

Section 4 would provide for the prompt entry of orders issued under Section 3 into the national and state firearm background check systems that identify persons prohibited from possessing firearms. For assistance in determining the appropriate databases into which to enter the orders, states should contact their respective state CJIS systems officer.

Ensuring prompt entry of orders into the national and state firearm background check system is critical to keep firearms out of the hands of individuals prohibited from possessing a firearm under an ERPO.

#### **SEC. 5. PENALTIES FOR VIOLATIONS**

Section 5 would authorize criminal penalties for applicants who make false or harassing applications for orders, for subjects who knowingly violate orders, and for owners who knowingly violate their assurance in retrieving a seized firearm that they will safeguard the firearm against access by the subject. The penalties authorized by this section would be in addition to other authorized legal penalties and sanctions, such as the general penalties for perjury or false statements under oath, and the authority of courts to impose contempt sanctions for persons who violate their orders.

---

<sup>1</sup> COLO. REV. STAT. § 13-14.5-102(2)(g).

<sup>2</sup> MD. CODE ANN., PUB. SAFETY § 5-601(e)(vii).

<sup>3</sup> CAL. PENAL CODE § 18150(a)(1)(B)-(C), 18170(a)(1)(B)-(C).

<sup>4</sup> HAW. REV. STAT. § 134-61.

<sup>5</sup> D.C. CODE § 7-2510.01(2)(C).

<sup>6</sup> MD. CODE ANN., PUB. SAFETY § 5-601(e)(2)(i).

<sup>7</sup> HAW. REV. STAT. § 134-61.

<sup>8</sup> N.Y. C.P.R.L. 6340(2).

<sup>9</sup> DEL. CODE ANN. tit. 10, § 7703(d).

<sup>10</sup> FLA. STAT. § 790.401(4)(c).

<sup>11</sup> HAW. REV. STAT. § 134-64(f).

<sup>12</sup> 430 ILL. COMP. STAT. 67/40.

<sup>13</sup> VT. STAT. ANN. tit. 13, § 4053(e)(2).

<sup>14</sup> COLO. REV. STAT. § 13-14.5-105(2).

<sup>15</sup> FLA. STAT. § 790.401(3)(b).

<sup>16</sup> CAL. PENAL CODE § 18175(b).

<sup>17</sup> MD. CODE ANN., PUB. SAFETY § 5-605(c)(1)(ii).

<sup>18</sup> N.M. STAT. ANN. § 40-17-8(A).

<sup>19</sup> WASH. REV. CODE § 7.94.040(2).

<sup>20</sup> R.I. GEN. LAWS § 8-8.3-5(a).

<sup>21</sup> N.Y. C.P.L. R. 6343(2).

<sup>22</sup> VT. STAT. ANN. tit. 13, § 4053(e)(1).

# **EXTREME RISK PROTECTION ORDER MODEL LEGISLATION**

## **SEC. 1. EXTREME RISK PROTECTION ORDERS**

(a) DEFINITIONS. –

(1) “Petitioner” means:

- (A) A law enforcement officer or agency, including an attorney for the state;
- (B) A member of the family of the respondent, which shall be understood to mean a parent, spouse, child, or sibling of the respondent;
- (C) A member of the household of the respondent;
- (D) A dating or intimate partner of the respondent;
- (E) A health care provider [as defined by state law] who has provided health services to the respondent;
- (F) An official of a school or school system in which the respondent is enrolled or has been enrolled within the preceding [six months/one year/two years/other appropriate time period specified by state law];  
or
- (G) [Any other appropriate persons specified by state law.]

(2) “Respondent” means the person against whom an order under Section 2 or 3 has been sought or granted.

(b) TYPES OF ORDERS. – The petitioner may apply for an emergency ex parte order as provided in Section 2 or an order following a hearing as provided in Section 3.

## **SEC. 2. EMERGENCY EX PARTE ORDER**

(a) BASIS FOR ORDER. – The court shall issue an emergency ex parte extreme risk protection order upon submission of an application by a petitioner, supported by an affidavit or sworn oral statement of the petitioner or other witness, that provides specific facts establishing probable cause that the respondent’s possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard established by state law] of personal injury or death to the respondent or another person. The court shall take up and decide such an application on the day it is submitted, or if review and decision of the application on the same day is not feasible, then as quickly as possible but in no case later than [appropriate time period specified by state law].

(b) CONTENT OF ORDER. – An order issued under this section shall –

(1) prohibit the respondent from possessing, using, purchasing, manufacturing, or otherwise receiving a firearm;

(2) order the respondent to provisionally surrender any firearms in his or her possession or control, and any license or permit allowing the respondent to possess or acquire a firearm, to any law enforcement officer presenting the order or to a law enforcement agency as directed by the officer or the order; and

(3) inform the respondent of the time and place of the hearing under Section 3 to determine whether he or she will be subject to a continuing prohibition on possessing and acquiring firearms.

(c) SEARCH AND SEIZURE. –

(1) If the application and its supporting affidavit or statement establish probable cause that the respondent has access to a firearm, on his or her person or in an identified place, the court shall concurrently issue a warrant authorizing a law enforcement agency to search the person of the respondent and any such place for firearms and to seize any firearm therein to which the respondent would have access.

(2) The court may subsequently issue additional search warrants of this nature based on probable cause that the respondent has retained, acquired, or gained access to a firearm while an order under this section remains in effect.

(3) If the owner of a firearm seized pursuant to this subsection is a person other than the respondent, the owner may secure the return of the firearm as provided in Section 3(c)(3).

(d) TIME FOR SERVICE AND SEARCHES. – The responsible law enforcement agency shall serve the order on the respondent, and carry out any search authorized under subsection (c)(1), [promptly/immediately/within other appropriate time period specified by state law] following issuance of the order. If a search is authorized under subsection (c)(1), the agency may serve the order on the respondent concurrently with or after the execution of the search.

### **SEC. 3. ORDER AFTER HEARING**

(a) ORDER AFTER HEARING. – Upon application for an extreme risk protection order, supported by an affidavit or sworn oral statement of the petitioner or other witness that provides specific facts giving rise to the concern about the [significant danger/extreme risk/other appropriate standard established by state law] described in Section 2(a), the court may issue an order under this section, which shall be effective for a period of up to [one year/other appropriate time period specified by state law], after a hearing. An order issued under this section shall –

(1) prohibit the respondent from possessing, using, purchasing, or otherwise receiving a firearm; and

(2) order the respondent to surrender any firearm in his or her possession or control, and any license or permit allowing the respondent to possess or acquire a firearm, to any law enforcement officer presenting the order or to a law enforcement agency as directed by the officer or the order.

(b) BASIS FOR ORDER. – The court shall issue such an order based on [a preponderance of the evidence/other appropriate standard specified by state law] that the respondent’s possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard specified by state law] of personal injury or death to the respondent or another person. In determining the satisfaction of this requirement, the court shall consider all relevant facts and circumstances after reviewing the petitioner’s application and conducting the hearing described in Section 2(d). The court may order a psychological evaluation of the respondent, including voluntary or involuntary commitment of the respondent for purposes of such an evaluation, to the extent authorized by other law.

(c) SEARCH AND SEIZURE. –

(1) If the evidence presented at the hearing establishes probable cause that the respondent has access to a firearm, on his or her person or in an identified place, the court shall concurrently issue a warrant authorizing a law enforcement agency to search the person of the respondent and any such place for firearms and to seize any firearm therein to which the respondent would have access.

(2) The court may subsequently issue additional search warrants of this nature based on probable cause that the respondent has retained, acquired, or gained access to a firearm while an order under this section remains in effect.

(3) If the owner of a firearm seized pursuant to this subsection is a person other than the respondent, the owner may secure the prompt return of the firearm by providing an affidavit to the law enforcement agency affirming his or her ownership of the firearm and providing assurance that he or she will safeguard the firearm against access by the respondent. The law enforcement agency shall return the firearm to the owner upon its confirmation, including by a check of the National Instant Criminal Background Check System and the applicable state firearm background check system, that the owner is not legally disqualified from possessing or receiving the firearm.

(4) [Any provisions under state law permitting the transfer of seized firearms to a person not prohibited from possessing them.]

(d) TIME FOR HEARINGS AND SERVICE. –

(1) A hearing under this section shall be held within [appropriate time period specified by state law] days of the filing of the application, or within [appropriate time

period specified by state law] days of the issuance of an emergency ex parte order under Section 2, if such an order is issued. The responsible law enforcement agency shall serve notice of the hearing on the respondent [promptly/immediately/within 72 hours/within an appropriate time period specified by state law] after the filing of the application or issuance of an emergency ex parte order, but notice may be provided by publication or mailing if the respondent cannot be personally served within the specified period. The respondent shall be entitled to one continuance of up to [appropriate time period specified by state law] days on request, and the court may thereafter grant an additional continuance or continuances for good cause. Any emergency ex parte order under Section 2 shall remain in effect until the hearing is held. The court may temporarily extend the emergency order at the hearing, pending a decision on a final order.

(2) The responsible law enforcement agency shall serve an order issued under this section on the respondent, and carry out any search authorized under subsection (c)(1), [promptly/immediately/within an appropriate time period specified by state law] following issuance of the order. If a search is authorized under subsection (c)(1), the agency may serve the order on the respondent concurrently with or after the execution of the search.

(e) TERMINATION AND RENEWAL OF ORDERS. –

(1) A respondent may file a motion to terminate an order under Section 3 one time during the effective period of that order. The respondent shall have the burden of proving, by the same standard of proof required for issuance of such an order, that he or she does not pose a [significant danger/extreme risk/other appropriate standard specified by state law] of personal injury or death to himself or herself or another.

(2) The petitioner may seek renewals of an order under this section for an additional [six months/one year/other appropriate time period specified by state law] at any time preceding its expiration. Renewals after the initial order shall be granted subject to the same standards and requirements as an initial order. The preceding order shall remain in effect until the renewal hearing is held and the court grants or denies a renewed order.

(3) If the respondent fails to appear at, or cannot be personally served in relation to, any hearing or renewal hearing under this section, the default does not affect the court's authority to issue an order or entitle the respondent to challenge the order prior to its expiration. The order will lapse after [the period established in Section 3(a)] if no eligible petitioner seeks its renewal.

#### **SEC. 4. ENTRY INTO BACKGROUND CHECK SYSTEMS**

The court shall forward any order issued under Section 2 or 3 to an appropriate law enforcement agency on the day it is issued. Upon receipt of an order under Section 3, the law enforcement agency shall make the order available to the National Instant Criminal Background



Check System and any state system used to identify persons who are prohibited from possessing firearms.

## **SEC. 5. PENALTIES FOR VIOLATIONS**

The following persons shall be subject to [appropriate criminal penalties specified by state law]:

(1) **FILER OF FALSE OR HARASSING APPLICATION.** – Any person filing an application under Section 2 or 3 containing information that he or she knows to be materially false, or for the purpose of harassing the respondent.

(2) **RESPONDENT NOT COMPLYING WITH ORDER.** – Any person who knowingly violates an order under Section 2 or 3, including by possessing or acquiring a firearm in violation of the order or failing to surrender a firearm as required by the order.

(3) **PROVIDER OF PROHIBITED ACCESS TO RESPONDENT.** – Any person who knowingly provides the subject of an order under Section 2 or 3 access to a firearm, in violation of an assurance the person has provided in an affidavit under Section 2(c)(3) or 3(c)(3) that he or she will safeguard the firearm against access by the respondent.