

EXTREME RISK PROTECTION ORDER & COURT-ORDERED MENTAL HEALTH TREATMENT HOW DO THEY DIFFER?



Bloomberg American
Health Initiative

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Extreme Risk Protection Orders (ERPOs) temporarily remove firearms from individuals at risk of harming themselves or others. Criteria for an ERPO focus on dangerous behaviors, not mental illness diagnoses.

Court-ordered mental health evaluation and treatment are primarily concerned with ensuring that a person with a suspected or diagnosed mental illness receives appropriate treatment.

WHAT IS AN EXTREME RISK PROTECTION ORDER?

An ERPO (also known as a Gun Violence Restraining Order or Lethal Violence Protection Order, among other terms) is a civil order that temporarily prohibits individuals at risk of harming themselves (including suicide) or others from purchasing and possessing firearms, and requires the removal of any firearms in the respondent's (subject of the order) possession. ERPOs are a direct and timely tool to remove firearms from individuals in crisis, while providing due process to protect law-abiding gun owners' rights.

There are usually two types of ERPOs.

- **Ex parte:** May be issued by a court without notice to the respondent and without the respondent's participation in the hearing.
- **Final order:** Issued only if the court finds, after hearing in which both the petitioner and respondent had an opportunity to participate, that the respondent poses a significant danger of harm to self or others by having access to a firearm. A final order usually expires between six months and one year after it is issued.

An ERPO is a public safety measure that neither requires nor creates a criminal record *unless* an order is violated.

As of July 10, 2019, 17 states and the District of Columbia have enacted extreme risk laws: California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington. ERPOs are based on the well-established precedent of issuing and enforcing Domestic Violence Restraining Orders.

WHAT IS COURT-ORDERED MENTAL HEALTH TREATMENT?

Every state and the District of Columbia allows for court-ordered mental health treatment. These laws vary among the states, but generally provide legal processes for:

- Detaining a person for a short period to assess their mental health and/or provide emergency treatment; and
- Hospitalizing a person for a longer term of court-ordered mental health treatment (i.e., "civil commitment") if the person is found by clear and convincing evidence to have a mental illness and to be in need of treatment to mitigate a danger to themselves or others, or an inability to care for their basic needs.

HOW ARE ERPOS DIFFERENT?

Petitioners

The categories of people who may petition for an ERPO vary among the states. State laws authorize different combinations of the following groups to petition for an ERPO: law enforcement officer, state's attorney, family or household member, school administrator, and health professional.

Mental illness diagnosis

In most states, mental illness, or suspected mental illness, is not a factor courts must consider to issue an ERPO. ERPOs are a tool for intervening when someone is behaving dangerously. Therefore, a petitioner needs to demonstrate that the respondent is at risk of harming self (including suicide) or others.

Judicial review

Ex parte ERPOs are issued only after a judicial officer has reviewed a petition, which includes a sworn affidavit or sworn testimony from the petitioner (except in Indiana). ERPOs issued after a full hearing include judicial review, petitioner testimony, and respondent testimony.

Firearm prohibition

ERPOs temporarily prohibit individuals at risk of harming themselves (including suicide) or others from purchasing and possessing firearms for the duration of the order. In addition, many state ERPO laws include language requiring the removal of firearms in the respondent's possession.

A person may be legally prohibited from possessing firearms but the law and the law enforcement infrastructure may not include a requirement or process for that person to turn over their firearms to law enforcement, a federally licensed firearms dealer, or third party. When such processes are not defined or in place, implementation and enforcement of these orders can be more challenging.

Statutory language about dispossession processes is important to assuring full implementation and enforcement of ERPO laws but is often missing from court-ordered mental health treatment statutes.

HOW IS COURT-ORDERED MENTAL HEALTH TREATMENT DIFFERENT?

Petitioners

The categories of people who may petition for court-ordered mental health treatment also vary among the states. A health professional, law enforcement officer, judge, social worker, and other interested person are among those specified under state laws as eligible petitioners.

Mental illness diagnosis

In most states, court-ordered mental health treatment processes require that the respondent is at risk of harming self or others as a result of mental illness.

Judicial review

The review process for court-ordered mental health treatment varies by state. Judicial review may not be required for short-term (less than a week) detentions, such as an emergency hold. However, a judicial officer, hearing officer, or similar body generally reviews an application for a longer term civil commitment that follows an emergency detention intervention.

Firearm prohibition

Under federal law,¹ individuals receiving mental health treatment are not prohibited from purchasing or possessing firearms unless they have been "involuntarily committed" to a mental hospital or psychiatric inpatient facility. (This prohibition is mirrored in the laws of most states.) However, the types of involuntary hospitalizations that count as a commitment under state law vary. One issue is whether a short-term emergency hold results in a loss of firearm rights; Currently, less than half of states temporarily prohibit firearms from individuals who have been subjected to a short-term psychiatric emergency hold. In the remaining majority of states, psychiatric patients discharged after a brief involuntary admission – many of whom have some lingering risk of suicide – could go to a licensed gun dealer, pass a background check, and legally buy a gun.

Many states provide a process for restoring firearm rights after a period of time, but some states do not currently have a functional dispossession process for persons prohibited from possessing firearms due to an emergency hold, involuntary hospitalization, or involuntary commitment.

Under federal law it is "unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been committed to any mental institution" and it is "unlawful for any person . . . who has been committed to a mental institution" to possess or receive any firearm or ammunition.¹

ENDNOTES

¹ 18 USC § 922(d)(4), (g)(4).