

Legislative Analysis



EXTREME RISK PROTECTION ORDER ACT ("RED FLAG" LAW)

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<http://www.house.mi.gov/hfa>

Senate Bill 83 (S-2) as passed by the Senate
Sponsor: Sen. Mallory McMorrow

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 84 as passed by the Senate
Sponsor: Sen. Dayna Polehanki

Senate Bill 85 as passed by the Senate
Sponsor: Sen. Sarah Anthony

Senate Bill 86 as passed by the Senate
Sponsor: Sen. Sam Singh

House Committee: Judiciary

Senate Committee: Civil Rights, Judiciary, and Public Safety
Complete to 3-21-23

BRIEF SUMMARY:

Senate Bill 83 would, among other things, do all of the following:

- Create the Extreme Risk Protection Order Act.
- Require a court to issue an extreme risk protection order (ERPO) if a preponderance of the evidence supports that a respondent poses a significant risk of self-injury or injury to others by possessing a firearm and allow for an emergency ERPO without first notifying the respondent under certain circumstances.
- Prohibit a restrained individual from possessing a firearm or a license to carry a concealed pistol (CPL) while an ERPO is in effect.
- Specify who may file an action for a court to issue an ERPO, where and how an action may be filed, and the information a complaint must contain.
- Prescribe actions a clerk of an issuing court and a law enforcement officer must follow regarding an ERPO.
- Specify the information that must be included in an ERPO, including that the restrained individual may not possess a firearm or CPL while the ERPO is in force.
- Require hearings to be held as prescribed in the bill.
- Allow an ERPO to be modified or rescinded.
- Allow a firearm or CPL not surrendered to be seized upon notification or service of an ERPO, require a receipt to be given for any firearm seized, require a seized firearm to be stored while the ERPO is in force, and require the firearm to be returned when the ERPO expires or is terminated as long as the individual is not otherwise prohibited from owning or possessing a firearm.
- Prescribe penalties for violations.

Senate Bill 84 would include references to the Extreme Risk Protection Order Act and ERPOs in provisions regarding a license to purchase, possess, carry, or transport a pistol and eligibility for a CPL.

Senate Bill 85 would place the maximum term of imprisonment for a felony violation created by the Extreme Risk Protection Order Act in the sentencing guidelines.

Senate Bill 86 would prohibit a fee from being charged or collected for serving process issued in an action brought under the Extreme Risk Protection Order Act and amend provisions regarding service of process in civil actions to conform with provisions in the Extreme Risk Protection Order Act.

DETAILED SUMMARY:

Senate Bill 83 would create the Extreme Risk Protection Order Act to require a court to issue an ERPO if the court determines by preponderance of the evidence that a *respondent* (an individual against whom an ERPO is requested) poses a significant risk of self-injury or injury to others by possessing a firearm. A court could issue an ERPO against a minor and could issue an ERPO regardless of whether the respondent owns or possesses a firearm.

In making a determination, the court would have to consider numerous factors listed in the bill, which include, among other things, evidence that the respondent's mental illness makes them dangerous to themselves or others; a history of attempted or threatened use of physical force against themselves or another individual (whether or not a firearm was involved); previous or existing court orders; violations of an ERPO or personal protection order; previous or existing criminal charges or juvenile delinquency petitions for the commission or attempted commission of offenses with an element of assault or threat or that were committed against the person or property of a spouse or intimate partner; and evidence of excessive alcohol use or recent unlawful use of controlled substances, as well as any other facts the court considers relevant.

A court would have to expedite and give priority to a hearing on the issuance of an ERPO and other hearings under the bill.

Who could file a request for an ERPO

Under the bill, certain individuals (referred to as *petitioners*) could file an action with a circuit court requesting that an ERPO be entered. Only the following could file an action regarding a respondent:

- A spouse or former spouse of the respondent.
- An individual who has a child in common with the respondent.
- An individual who has, or has had, a ***dating relationship*** with the respondent.
- An individual who resides, or has resided, in the same household with the respondent.
- A parent, child, sibling, grandparent, grandchild, uncle or aunt, or first cousin of the respondent.
- A guardian of the respondent.
- A ***law enforcement officer***.
- A mental health professional as defined in section 100b of the Mental Health Code.¹

Dating relationship would mean a relationship that consists of frequent, intimate associations primarily characterized by the expectation of affectional involvement. The

¹ Section 100b of the Mental Health Code defines *mental health professional* as an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is one of the following: a physician or a psychologist, or a registered professional nurse, licensed master's social worker, licensed professional counselor, or marriage and family therapist who is licensed or otherwise authorized to engage in the practice of nursing, social work at the master's level, counseling, or marriage and family therapy under provisions of the Public Health Code.

term would not include a casual relationship or an ordinary fraternization between two individuals in a business or social context.

Law enforcement officer would mean a law enforcement officer as defined under the Michigan Commission on Law Enforcement Standards Act, a prosecuting attorney, or an assistant prosecuting attorney.

Complaint requesting ERPO

The bill would do both of the following:

- Prescribe how and where to file a summons and complaint in circuit court on forms approved by the State Court Administrative Office (SCAO) in an action to request an ERPO. The complaint would have to state facts showing that an ERPO is necessary because the respondent poses a significant risk of self-injury or injury to others by possessing a firearm.
- Require a complaint to include certain information, including the following:
 - Whether the respondent is licensed to carry a concealed pistol and is either required as a condition of employment to carry that pistol or is a police officer or corrections officer as listed in the bill.
 - If the petitioner knows or believes that the respondent owns or possesses one or more firearms, a statement of that knowledge or believe that also identifies the firearms.

A petitioner could petition a court to issue, or a court on its own motion could issue, one or more extended ERPOs only if the preponderance of the evidence shows that the restrained individual still poses a risk of self-harm or harm to others. Each extension would be effective for one year after the expiration of the preceding order. The court would have to provide the restrained individual written notice of a hearing on a motion to extend the order.

ERPO provisions

An ERPO issued to a restrained individual would have to include the following provisions:

- A provision prohibiting the purchase or possession of a firearm or ammunition by the restrained individual. A valid, unused purchase license would have to be surrendered to a law enforcement agency. (“Purchase license” commonly refers to the license obtained under the handgun licensure act that is required for an individual to purchase, carry, possess, or transport a pistol in Michigan.)
- A provision prohibiting the restrained individual from applying for a CPL and suspending or revoking a previously issued license once the order is entered into the state Law Enforcement Information Network (LEIN). The restrained individual would have to surrender the license.
- A requirement that the restrained individual surrender all firearms and ammunition in their ***possession or control*** to a law enforcement agency designated in the order within 24 hours or, at the court’s discretion, immediately after being served the order.
- A specific description of any firearms to be surrendered or seized if identified by the petitioner.
- If the order was issued without written or oral notice (an emergency order), a statement that a hearing will be held in a time specified in the bill and that a modification or rescission of the order may be requested at that hearing.

- A statement that the restrained individual may file a motion to modify or rescind the order as allowed under the bill and that forms and filing instructions for doing so will be available from the clerk of the court.
- A designation of the law enforcement agency responsible for forwarding the order to the Federal Bureau of Investigation (FBI). The restrained individual would have to reside within the agency's jurisdiction.
- If the court has ordered the restrained individual to surrender the individual's firearms and ammunition immediately, a statement that the law enforcement agency designated above shall proceed to seize the restrained individual's firearms and ammunition no later than 24 hours after the restrained individual is served with or receives actual notice of the ERPO, after first giving the restrained individual an opportunity to surrender the firearms and ammunition.
- Directions to a local entering authority or the law enforcement agency designated above to enter the order into the LEIN.
- A statement that certain penalties will apply for a violation of the order, including immediate arrest, contempt powers of the court, an automatic extension of the order, and criminal penalties including imprisonment for a misdemeanor or felony penalty.
- A statement that the restrained individual has the right to seek the advice of an attorney.
- An expiration date that is one year after the date of issuance.

Possession or control would include, but not be limited to, actual possession or constructive possession by which the individual has the right to control the firearm or ammunition, even though it is in a different location than the individual. Possession or control does not require the individual to own the firearm or ammunition.

Service of an ERPO and compliance hearings

An ERPO would have to be served personally by a law enforcement officer. It would take effect and be enforceable immediately after being served on the restrained individual or after the restrained individual receives actual notice of the order. The order would be enforceable anywhere in Michigan by a law enforcement agency that receives or is shown a copy or that verifies the order's existence on LEIN or on an information network maintained by the FBI.

A court would have to schedule a compliance hearing to be held not later than three days after an ERPO was served or after the restrained individual received actual notice of the ERPO. If the restrained individual filed proofs that all firearms or ammunition in their possession or control were surrendered or seized, and that any CPL was surrendered, the court could cancel the compliance hearing.

While an ERPO is in effect, the petitioner or a law enforcement officer could file an affidavit with the court that issued the order alleging that the restrained individual has a firearm, ammunition, or a CPL in their possession or control. The court would have to determine whether probable cause exists to believe that the restrained individual has a firearm, ammunition, or a CPL in their possession or control. If the court finds that probable cause exists, the court would have to find the restrained individual in contempt of court and issue an arrest warrant. The court would have to enter an accompanying order describing the firearm, ammunition, or CPL believed to be in the restrained individual's possession or control and authorizing a designated law enforcement agency to search the locations where it is believed to be and to seize any firearm, ammunition, or concealed pistol license discovered by the search.

Emergency ERPO

An ERPO could be ordered without written or oral notice to the respondent if the court determines on evidence of specific facts submitted under oath or affirmation clearly establishing that imminent and irreparable injury will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an order can be issued. A court would have to make a determination on a request for an order under this provision not later than 24 hours after the request is filed. A hearing on the order would have to be conducted not later than 14 days after the order is served or 5 days if the individual has a CPL and is either required to carry the pistol as a condition of employment or is a law enforcement officer as prescribed in the bill.

Modification or rescission of an ERPO

An individual restrained under an ERPO could file a motion to modify or rescind the order and request a hearing under Michigan court rules. A motion could not be filed until three months after the later of the following:

- The date the original ERPO is issued.
- The date an extended order is issued.
- The date a previous motion to modify or rescind the order was denied.

The restrained individual would have to prove by a preponderance of the evidence that there has been a material change in circumstances and the ERPO is no longer justified.

After an ERPO is issued

Unless the court has ordered the restrained individual to surrender their firearms immediately, not later than 24 hours after an ERPO is served or the restrained individual receives actual notice of the order, the restrained individual must do either of the following:

- File with the court that issued the ERPO one or more proofs of surrender or seizure showing that all firearms and ammunition previously in the individual's possession or control were surrendered to or seized by the local law enforcement agency designated in the ERPO and that any CPL was surrendered to the county clerk as required by the order and provisions of the handgun licensure act, and verify to the court that at the time of the verification the individual does not have any firearms, ammunition, or a CPL in their possession or control.
- Verify to the court that both of the following are true:
 - At the time the order was issued, the individual did not have a firearm, ammunition, or a CPL in their possession or control.
 - At the time of the verification, the individual does not have a firearm, ammunition, or a CPL in their possession or control.

If the above requirements were not satisfied within 24 hours after the ERPO was issued, or if the court has ordered the restrained individual to surrender their firearms immediately, the clerk of the court that issued the order would have to inform the local law enforcement agency designated in the order of that fact. That law enforcement agency would have to make a good-faith effort to determine whether there is evidence that the restrained individual has failed to surrender a firearm or ammunition or a CPL in their possession or control as required.

Duties of the clerk of the court

Among other things, the clerk of a court that issues an ERPO would have to do the following immediately after issuing an ERPO and without requiring a proof of service on the restrained individual:

- Provide a true copy of the order to the designated law enforcement agency.
- Provide the petitioner with at least two true copies of the order.
- If the restrained individual is identified as being an individual who has a CPL and carries a pistol as a condition of employment or is in law enforcement, notify the individual's employer, if known, of the order.
- Notify the Department of State Police (MSP) and the clerk of the county where the restrained individual resides of the existence of the order for purposes of performing their duties under the handgun licensure act.
- Inform the petitioner that they may take a copy of the order to the designated law enforcement agency to be provided to the FBI and, as appropriate, entered into LEIN.

In addition, the clerk would have to immediately notify the designated law enforcement agency if any of the following occur:

- The clerk receives proof that the restrained individual has been served by a law enforcement officer from another agency.
- The order is rescinded, modified, or extended.
- The order expires without being extended.

Duties of a law enforcement officer or agency

The bill would do all of the following:

- If an ERPO has not been served on the restrained individual, allow a law enforcement officer who knows the ERPO exists to, at any time, serve a true copy of the order or advise the restrained individual of the existence of the order, the specific conduct enjoined, the penalties for violating the order, and where a copy of the order may be obtained.
- If a restrained individual is a law enforcement officer, allow the ERPO to be served by an officer from a different agency than the one that employs the restrained individual. Such service could be made outside the jurisdiction served by the employing agency.
- Require the officer who serves an ERPO or gives the oral notice to file proof of service or proof of oral notice with the clerk of the court that issued the order and to notify the petitioner immediately that the order has been served or the restrained individual has been given oral notice of it.
- Require a law enforcement agency designated in an ERPO, immediately upon receiving a true copy of the order and without requiring proof of service, to enter the order into LEIN (unless a local entering authority is designated) and report the entry of the order to the FBI.
- Require a designated law enforcement agency that receives information from a court clerk that an ERPO was served to enter the information into LEIN (unless a local entering authority is designated) and report the information to the FBI.
- If an ERPO has not been served on the restrained individual, require a law enforcement officer or law enforcement agency responding to a call alleging a violation of the order to serve a true copy of the order or advise the restrained individual of the existence of the order, the specific conduct enjoined, penalties for violating the order, and where a copy of the order may be obtained. The officer would have to give the restrained

individual an opportunity to comply with the ERPO before making a custodial arrest for a violation of the order. A failure to comply would be grounds for an immediate custodial arrest. This provision would not preclude a warrantless arrest or a warrantless arrest for domestic violence under the Code of Criminal Procedure. The officer would have to enforce the order, immediately enter or cause it to be entered into LEIN, file proof of service with the court clerk, and report or cause to be reported to the FBI that the restrained individual has actual notice of the ERPO.

- Require a law enforcement agency ordered to seize a firearm or ammunition to seize a firearm and ammunition identified in an order from any place or from any individual who possesses or controls the firearm or ammunition and require the agency to seize any other firearms or ammunition discovered that are owned by or in the possession or control of the restrained individual.
- Require a receipt to be provided for any seized firearms or ammunition, require the seized firearms or ammunition to be retained and stored, and require a court to order the firearms or ammunition returned after the order expires or is terminated, unless at that time the individual is prohibited from owning or possessing a firearm for another reason.
- Require a law enforcement agency to conduct a verification under LEIN before returning a firearm to a restrained individual to determine whether the individual is prohibited from owning or possessing a firearm for another reason.
- If a seized firearm or ammunition belongs to another person, require it to be returned to the claimant if the court determines the claimant to be the lawful owner. The other individual would have to ensure that the restrained individual does not have access to the firearm or ammunition.

Penalties

An individual who refuses or fails to comply with an ERPO, and a petitioner who knowingly and intentionally makes a false statement to the court in a complaint or in support of a complaint, would be guilty of a crime punishable as follows:

- First offense: A misdemeanor punishable by imprisonment up to 93 days or a fine of up to \$500, or both.
- Second offense: A felony punishable by imprisonment for up to four years or a fine of up to \$2,000, or both.
- Third or subsequent offense: A felony punishable by imprisonment for up to five years or a fine of up to \$20,000, or both.

In addition, an individual who refuses or fails to comply with an ERPO would also be subject to a penalty that may be imposed for another criminal offense arising from the same conduct. Further, if the restrained individual was found by a court or a jury to have refused or failed to comply with the order, the court would have to issue an extended order effective for an additional year. An ERPO could also be enforced as contempt of court or otherwise under Chapter 17 of the Revised Judicature Act.

An individual who knowingly places a firearm or ammunition in the possession of an individual who is restrained under an ERPO would be guilty of a misdemeanor punishable by imprisonment for up to 93 days or a fine of up to \$500, or both.

Annual report

The State Court Administrative Office, acting under the direction of the state supreme court, would be required to prepare an annual report on and relating to the application of the Extreme Risk Protection Order Act by the courts. The report would have to be published on the Michigan courts website and provided to the legislature and its committees with jurisdiction over judicial matters. SCAO, acting under the direction of the supreme court, would have to make data the report is based on available to individuals conducting research, such as those affiliated with institutions of higher education who are conducting academic or policy research. The report would have to contain all of the following:

- The number of actions filed for ERPOs, the number issued, and the number denied.
- The number of requests made for ERPOs for emergency ERPOs (ones issued without notice), the number issued, and the number denied.
- The number of ERPOs and emergency ERPOs that are rescinded.
- The number of ERPOs renewed.
- Demographic data regarding the individuals who are petitioners and respondents in actions for ERPOs.
- To the extent ascertainable from available state court data, the number restrained under an ERPO who, within 30 days after entry of the order, are charged with a criminal offense. The nature of the offense, whether it was an offense for the violation of the ERPO, and the disposition or status of the offense would have to be included.

Miscellaneous provisions

The bill also would do all of the following:

- Prohibit the disclosure of a petitioner's address in any pleading or paper or otherwise.
- Allow a court to change the venue of an action for any reason allowed under the Michigan Court Rules and allow the court to consider the location of firearms owned or possessed by the respondent in making such a determination.
- Allow proceedings to be conducted using video conferencing technology or communication equipment.

Senate Bill 84 would amend 1972 PA 372, known as the handgun licensure act, to include references to either the Extreme Risk Protection Order Act or an ERPO in different provisions to provide the following:

- An applicant for a purchase license to purchase, carry, possess, or transport a pistol would be disqualified if the applicant were subject to an order or disposition under the Extreme Risk Protection Order Act for which the individual received a notice and an opportunity for a hearing and that was entered into LEIN under the act.
- An individual described above could request MSP to expunge the individual's name and other information concerning the individual entered into LEIN if the individual is *not* subject to an ERPO issued under the Extreme Risk Protection Order Act.
- MSP would be prohibited from sending written notice of an entry of an ERPO into LEIN until the department has received notice that the individual who is the subject of the order has been served with or received notice of the ERPO.
- A CPL would have to be issued to an applicant who meets all the criteria listed in the act and who is *not* the subject of an order or disposition issued under the Extreme Risk Protection Order Act.
- A CPL that had been surrendered and suspended under issuance of an ERPO would have to be automatically reinstated by a county clerk upon expiration of the ERPO and

notification to the clerk. This would apply if the CPL is not expired and after the MSP has completed the required verification of eligibility required before a CPL can be issued under the act.

MCL 28.422 et seq.

Senate Bill 85 would amend the sentencing guidelines in the Code of Criminal Procedure to include the felony penalties for a violation of an ERPO under the Extreme Risk Protection Order Act or for making a false statement in a complaint for an ERPO, as shown in the table below.

Description	Category	Class	Statutory Maximum Imprisonment
Violation of an ERPO—second offense	Public Safety	F	4 years
Violation of an ERPO—third or subsequent offense	Public Safety	E	5 years
False statement in complaint for an ERPO—second offense	Public Trust	F	4 years
False statement in complaint for an ERPO—third or subsequent offense	Public Trust	E	5 years

Proposed MCL 777.15e

Senate Bill 86 would revise provisions in the Revised Judicature Act pertaining to the service of process in civil actions to conform to provisions in the Extreme Risk Protection Order Act. Currently, process in a civil action may be served by any person of suitable age and discretion who is not a party or an officer of a corporate party. The Revised Judicature Act also requires that, if service of process is to be made by leaving a summons and a copy of the complaint with a respondent personally who is in a governmental institution, hospital, or home, it must be made by the person in charge of that institution or by a staff member.

Senate Bill 86 would provide that the above provisions do not apply to service under the Extreme Risk Protection Order Act.

Currently, before filing a civil action, a fee of \$150 must be paid to the clerk of the court by the party filing the action. Under the bill, this fee would not apply to an action under the Extreme Risk Protection Order Act. In addition, the bill would add a new provision to prohibit a person from charging or collecting a fee for serving process issued in an action brought under the Extreme Risk Protection Order Act or for serving any order issued in the action.

MCL 600.1908, 600.2529, and 600.2559

Senate Bills 84, 86, and 85 cannot take effect unless SB 83 is also enacted. Senate Bill 83 cannot take effect unless SBs 84 and 86 are also enacted.

FISCAL IMPACT:

Senate Bill 83 would require an expenditure for updating the Law Enforcement Information Network to input information regarding ERPOs. Initial estimates are that the cost of the update would be in the vicinity of \$200,000.

The bill also would have an indeterminate fiscal impact on the state and on local units of government that would depend on the number of individuals convicted of misdemeanors and/or felonies under provisions of the bill. New misdemeanor convictions would result in increased costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues. The fiscal impact on the state and local court systems would depend on how provisions of the bill affected administrative costs for implementing provisions required under the bill and court caseloads and caseload related administrative costs.

Senate Bill 84 would have an indeterminate fiscal impact on the state and on local units of government. The impact would depend on the number of individuals held responsible for a civil infraction and ordered to pay a fine. Because the bill does not specify where the revenue from a civil fine would be dedicated, it is assumed the majority of the revenue would increase funding for public and county law libraries, and a small portion of the revenue would be deposited into the state Justice System Fund, which supports various justice-related endeavors in the judicial and legislative branches of government and the Departments of State Police, Corrections, Health and Human Services, and Treasury. Local units could incur additional costs depending on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Senate Bill 85 is a companion bill to SB 83 and amends sentencing guidelines to include violating an ERPO, second and third or subsequent offense, and making false statements in complaint for an ERPO, second and third or subsequent offense. The bill would not have a direct fiscal impact on the state or on local units of government.

Senate Bill 86 would have no fiscal impact on the state or local units of government.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.