

Avoid 'Red Flags' and Uncertainty When Navigating Michigan's Latest Act

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Michigan recently passed the Extreme Risk Protection Order Act (ERPOA), which took effect on Feb. 13. Along with this Act, deemed Michigan's new "Reg Flag Law," comes uncertainty and risk, if not followed correctly.

The ERPOA creates a process for law enforcement or private citizens to seek and obtain a restraining order. Once issued, the restraining order can prohibit certain individuals from both purchasing and possessing firearms. Additionally, the order can prohibit purchasing and possessing firearms licenses.

The law does not require an individual to possess a firearm or license at the time the Extreme Risk Protection Order (ERPO) is issued against them. However, the individual asking for the ERPO must still prove that the legal standards contained in the statute are met.

For specific information pertaining to *law enforcement*, review the later portion of this report.

"Petitioners" Versus "Respondents"

A "petitioner," is the individual who requests an ERPO. The petitioner is "petitioning," or asking the court for an ERPO. A "respondent," is the individual against whom an ERPO is brought. MCL 691.1803(j, k)

Who can Petition the Court for an ERPO?

The following is an extensive list of individuals who can petition the court for an ERPO:

- A spouse or former spouse
- An individual who has a child in common with the respondent
- An individual who has or has had a dating relationship with the respondent

1. "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context. (as defined under MCL 400.1501).
- An individual who resides or has resided in the same household with the respondent
 - A family member
 - A guardian of the respondent
 - A law enforcement officer (as defined under MCL 28.602)
 - A health care provider (if compliant with MCL 691.1805(2)(i))

MCL 691.1805(2)(a-i)

What Court Has Jurisdiction Over an ERPO?

A petitioner, who fits into one of the above categories, "may file an action in the family division of the circuit court requesting the court to enter an extreme risk protection order." MCL 691.1805(1)

Where Is an ERPO Complaint Filed?

Where the ERPO complaint is filed depends on one important question: Is the respondent an adult or are they a minor?

If the respondent is an adult who resides in the State of Michigan, then the ERPO complaint may be filed in **any county** in this state, regardless of the residency or location of any party. MCL 691.1805(8)(a)

If the respondent is a minor, then the ERPO complaint may be filed in either the petitioner's or the respondent's county of residence. MCL 691.1805(8)(b)

Finally, if the respondent does not reside in Michigan, then the ERPO complaint may be filed in the petitioner's county of residence. MCL 691.1805(8)(c)

What Does an Individual Have to Show to Obtain an ERPO?

To obtain the ERPO, the petitioner "must state facts that show that issuance of an extreme risk protection order is necessary because the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MCL 691.1805(3)

I Have Been Served With an ERPO, What Do I Do Now?

An ERPO issued by the court will state whether firearms owned or in possession of the respondent must be (1) immediately surrendered or (2) surrendered within a 24-hour period. MCL 691.1807(8)

Under the first case, immediate surrender of firearms, the court will also issue an “anticipatory search warrant,” which will be executed if the respondent fails or refuses to comply with the ERPO immediately. MCL 691.1807(8)

The respondent will be given an opportunity at a later date to request a hearing or to file a motion to rescind or modify the ERPO. MCL 691.1807(5)

It is critical to note that **refusal or failure to comply** with an ERPO or making a false statement in a complaint, under the ERPOA, may result in *serious criminal penalties*. MCL 691.1819

How Quickly can I Expect the Court to set a Hearing or Issue an ERPO?

Under the statute, the court has been tasked with expediting the process of issuing ERPOs. This means that the court will “give priority to a hearing on the issuance of an extreme risk protection order and to any other hearings required” under the ERPOA. MCL 691.1806(1)

Additionally, the court may conduct proceedings using “video conferencing technology or communication equipment as allowed under Michigan court rules and administrative orders.” MCL 691.1806(4). Video conferencing will allow the courts to streamline this process, within the limits of the Michigan court rules already in place.

If the respondent does request a hearing, the hearing must be held “not later than 14 days after the order is served on the restrained individual or after the restrained individual receives actual notice of the order.” MCL 691.1807(3)(a-b)

If the respondent is a law enforcement officer or required to carry a pistol as part of their employment and has a license to carry the pistol, the hearing must be held “not later than 5 days after the order is served on the restrained individual or after the restrained individual receives actual notice of the order.” MCL 691.1807(3)(a-b). For more details about what is required to qualify as law enforcement, or to qualify under this section as carrying a pistol in the course of employment, see MCL 691.1805(5)(a-h), or the paragraph below.

What if the Respondent is Required to Carry a Firearm as Part of Their Employment?

If the respondent is one of the following individuals, and if the petitioner knows the respondent is one of the following individuals, the petitioner must state that in the complaint that respondent is:

- An individual who is required to carry a pistol as a condition of the individual's employment and is issued a license to carry a concealed pistol
- A police officer licensed or certified under the Michigan commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.615
- A sheriff
- A deputy sheriff
- A member of the department of state police
- A local corrections officer
- An employee of the department of corrections
- A federal law enforcement officer who carries a pistol during the normal course of the officer's employment or an officer of the Federal Bureau of Prisons.

MCL 691.1805(5)(a-h)

Must an Individual own a Firearm or Possess a Firearm to Obtain an ERPO Against Them?

No. The court may be petitioned for an ERPO “regardless of whether the respondent owns or possesses a firearm.” MCL 691.1805(4)

What if the Respondent Does own or Possess a Firearm?

If “the petitioner knows or believes that the respondent owns or possesses firearms, the petitioner shall state that in the complaint and, to the extent possible, identify the firearms, giving their location and any additional information that would help a law enforcement officer to find the firearms.” MCL 691.1805(6)

What Information Must be Kept Confidential?

It is important to be aware that “the address of the petitioner must not be disclosed in any pleading or paper or otherwise.” MCL 691.1805(7)

Is the Harm the Petitioner Seeks to Prevent Immediate or Future Harm?

The difference between future and immediate harm is important. There is a different evidentiary standard for each. MCL 691.1807(1). An evidentiary standard is simply the level of evidence needed to obtain an ERPO. The standard for future harm is preponderance of the evidence, while the standard for immediate harm is clear and convincing evidence. MCL 691.1807(1, 2). Clear and convincing evidence is a higher standard.

The preponderance of the evidence standard requires a court to determine “by the preponderance of the evidence that the respondent can reasonably be expected *within the near future* to intentionally or unintentionally seriously physically injure himself, herself, or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.” MCL 691.1807(1) (emphasis added)

The clear and convincing evidence standard requires a court to determine “by clear and convincing evidence from specific facts shown by a verified complaint, written motion, or affidavit that *immediate and irreparable injury*, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an extreme risk protection order can be issued.” MCL 691.1807(2) (emphasis added)

How can law Enforcement Utilize Michigan’s Newest “Red Flag Laws?”

The ERPOA provides a special provision for law enforcement to request an “immediate emergency extreme risk protection order.” MCL 691.1807(4). Under the act, if certain conditions are met (see MCL 691.1807(4)), a **law enforcement officer may request an ERPO “verbally over the telephone”** from the judge or magistrate on duty within the jurisdiction, who may then issue an EPRO. MCL 691.1807(4).

However, law enforcement (the petitioner) must file a sworn, written petition with the court detailing the facts and circumstances presented to the court in the aforementioned request within one business day after the ERPO is entered. MCL 691.1807(2, 4)

The following steps may be taken, as spelled out in the statute:

- (4) A petitioner who is a law enforcement officer may request an immediate emergency extreme risk protection order under subsection (2) if the officer is responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm. The law enforcement officer may request an extreme risk protection order under this subsection verbally over the telephone and the judge or magistrate on duty within that jurisdiction may issue the extreme risk protection order. Within 1 business day after an extreme risk

protection order is entered under this subsection, the petitioner shall file with the court a sworn written petition detailing the facts and circumstances presented to the court. The issuing court, if other than the circuit court, shall provide a copy of the petition to the circuit court.

MCL 691.1807

What are Law Enforcement Best Practices Regarding ERPOs?

The following is a list of steps that law enforcement should take when enforcing or requesting an ERPO:

- Create a policy for enforcing ERPOs
- Review/create a policy for executing search warrants
- Provide law enforcement personnel training on the proper execution of ERPOS
- Provide law enforcement personnel training on the proper execution of search warrants
- Determine what the support level is in your jurisdiction. (Meaning, what resources are available when enforcing the ERPO? Resources include officer staffing, special response team capabilities, and assistance from neighboring jurisdictions).
- Train law enforcement personnel to actively consider whether their actions are based in a legal justification
- Conduct a comprehensive review of the Extreme Risk Protection Order Act (ERPOA) before attempting to enforce ERPOs

Conclusion

ERPOs are practical and beneficial tools for protecting individuals and the public, but law enforcement professionals and other petitioners should carefully pay attention to the ERPOA when petitioning the court for an ERPO.

Before petitioning the court for an ERPO, first **review** the specific provision(s) of the ERPOA. Second, **ensure compliance** with the required steps to submit a complaint requesting an ERPO. Third, safeguard against liability by completing the necessary follow up steps, such as adhering to mandatory reporting requirements for law enforcement after obtaining an immediate emergency extreme risk protection order.

If you have been served with an ERPO, be sure to comply, but know your rights under the act, and either request a hearing on the ERPO or file a motion to rescind or modify the ERPO in the proper court in accordance with the act.