

**Subject:** Extreme Risk Protection Orders (ERPOs).

**Principal Issues:** New legislation authorizing ERPOs; process and conditions for issuance; passive and active dispossession; storage of firearms.

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On January 1, 2024, Minnesota’s new law on extreme risk protection orders, or ERPOs, will go into effect. PATROL is developing an ERPO course for release in the first part of next year. In the meantime, this guide will give you some basic information to get you started. Because the ERPO law is both new and leaves room for interpretation, it’s quite possible that practices will differ from one jurisdiction to another. Please consult with your city or county attorneys as questions arise.

**Overview:**

An ERPO is a court order issued by a judge in a civil proceeding. It prohibits the respondent from possessing or purchasing any firearms for as long as it remains in effect.<sup>1</sup> Courts may issue ERPOs with a hearing or without one. Without a hearing, the orders are “emergency” in nature and will generally remain in effect for only 14 days.<sup>2</sup> Orders issued after a hearing may remain in effect for a period not to exceed one year.<sup>3</sup> In some cases, officers will have an active role in going out and collecting firearms from respondents.<sup>4</sup> In other cases, law enforcement might obtain or serve the orders but not be involved in the collection or receipt of firearms.<sup>5</sup> Officers will be able to access ERPOs as part of the Minnesota hot files.

**Who may seek an ERPO?**

ERPOs may be sought by a chief law enforcement officer or their designee, a city or county attorney,

a guardian, or any family or household member.<sup>6</sup> The ERPO law defines family and household members as:

- Spouses and former spouses of the respondent
- Parents and children of the respondent
- Persons who are presently residing with the respondent, and
- Persons involved in a significant romantic or sexual relationship with the respondent.<sup>7</sup>

**How does someone apply for an ERPO?**

A person initiates the process of seeking an ERPO by filling out and filing a petition with the court, similar to the process for seeking an order for protection or harassment restraining order.<sup>8</sup> The petition forms will be available on the Minnesota courts website. When filling out the forms, petitioners must indicate whether they are a law enforcement agency, city or county attorney’s office, or a family/household member.

**What are the different roles of law enforcement and city/county attorneys for ERPOs?**

The law doesn’t say. Instead, it gives authority to both law enforcement agencies and city and county attorneys to file ERPO petitions with the court. Preliminarily, some concerns have arisen among city and county attorneys about acting as petitioners, as this could give the appearance that they are representing themselves in court against a respondent. You should have discussions locally about how law enforcement and city and county attorneys will work together in the ERPO process.

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<sup>1</sup> Minn. Stat. § 624.7171, subd. 4(a) (2023).

<sup>2</sup> Minn. Stat. § 624.7174(e) (2023).

<sup>3</sup> Minn. Stat. § 624.7172, subd. 2(e) (2023).

<sup>4</sup> Minn. Stat. § 624.7175(d) (2023).

<sup>5</sup> Minn. Stat. § 624.7175(a).

<sup>6</sup> Minn. Stat. § 624.7171, subd. 4(b).

<sup>7</sup> Minn. Stat. § 624.7171, subd. 1(b).

<sup>8</sup> Minn. Stat. § 624.7171, subd. 4.

### **Are there any concerns about including health information in or with an ERPO petition?**

Yes. If your agency plans to file an ERPO petition that will include—or be accompanied by—any health information or records, you should consult with your city or county attorney first. The Minnesota Supreme Court issued an [order dated August 8, 2023](#), with important guidelines about the classification and handling of this information. It directs filers to use specific procedures to protect privacy. Mishandling the information could expose sensitive personal data to public view. Please obtain legal guidance to help you handle this information correctly.

Note that health information is not required to support an ERPO petition.

### **What happens when a petition is filed?**

When a petition is filed with the court, it is routed to a judge for review. The judge has three options. The judge can issue an emergency ERPO, order a hearing to consider whether a non-emergency ERPO should be issued, or dismiss the case because the petition fails to show that either an emergency order or hearing is warranted.

### **What are the different types of ERPOs?**

There are two different types of ERPOs: “emergency” ERPOs and long-term ERPOs. Emergency orders are issued without a court hearing. Long-term ERPOs may only be issued after a hearing.

To obtain an emergency order, the court must find probable cause that: (1) the respondent poses a significant danger of bodily harm to others or is at significant risk of suicide by possessing a firearm, and (2) the respondent presents an immediate and present danger to self or others.<sup>9</sup> An emergency order is generally valid for 14 days.<sup>10</sup>

To obtain a long-term order at hearing, a petitioner “must prove by clear and convincing evidence that the respondent poses a significant danger to other

persons or is at significant risk of suicide by possessing a firearm.”<sup>11</sup> Minnesota Statutes, [section 624.7172, subdivision 2\(b\)](#), sets forth a list of factors that courts must consider in deciding whether an order should be granted. The statute also permits courts to consider “any other evidence that bears on whether the respondent poses a danger to others or is at risk of suicide.”<sup>12</sup> Orders issued after a hearing are valid for no less than six months and no longer than one year but may be renewed or extended by the court.<sup>13</sup>

When the court issues or extends an ERPO, the court administrator must forward the order within 24 hours to the local law enforcement agency with jurisdiction over the respondent’s residence.<sup>14</sup> Patience with this process might be required, as court administrators may not have a ready means of determining which agency this will be.

### **What do ERPOs prohibit?**

An ERPO prohibits a respondent from “possessing or purchasing a firearm for the duration of the order.”<sup>15</sup> However, the “ineligible persons” statute, section 624.713, subdivision 1(14), makes it unlawful for one who is the subject of an ERPO to possess firearms *or ammunition*. This bar on possessing ammunition could come as a surprise to some persons who are the subject of an ERPO, since the ERPO law requires the court to inform respondents they are prohibited from possessing or purchasing firearms but is silent with regard to ammunition.<sup>16</sup> Nor does the ERPO law authorize law enforcement to seize ammunition.<sup>17</sup>

The penalties under the ERPO law and the “ineligible persons” statute are also different. Under the ERPO law, possessing a firearm in violation of an order is a misdemeanor.<sup>18</sup> But possession of a firearm or ammunition by an ineligible person—including one who is the subject of an ERPO—is a gross misdemeanor under the ineligible persons statute.<sup>19</sup> Minnesota caselaw addresses situations where different criminal laws appear to cover the same conduct.<sup>20</sup>

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<sup>9</sup> Minn. Stat. § 624.7174(c).

<sup>10</sup> Minn. Stat. § 624.7174(e).

<sup>11</sup> Minn. Stat. § 624.7172, subd. 2(a).

<sup>12</sup> Minn. Stat. § 624.7172, subd. 2(c)(2).

<sup>13</sup> Minn. Stat. § 624.7172, subd. 2(e).

<sup>14</sup> Minn. Stat. § 624.7171, subd. 4(m).

<sup>15</sup> Minn. Stat. § 624.7172, subd. 2(d).

<sup>16</sup> *Id.*

<sup>17</sup> *Cf.* Minn. Stat. § 624.7175(d).

<sup>18</sup> Minn. Stat. § 624.7177, subd. 2 (2023).

<sup>19</sup> Minn. Stat. § 624.713, subd. 2(c) (2023).

<sup>20</sup> *See, e.g., State v. Cox*, 798 N.W.2d 517, 522 (Minn. 2011).

Please confer with your city or county attorney as to how ERPO-related violations should be charged in your jurisdiction.

### **What do ERPOs require?**

All ERPOs require the respondent to dispossess themselves of firearms. In some cases, law enforcement will have only a passive role in the dispossession process. In other cases, law enforcement will be actively involved in retrieving or seizing firearms. The issuance of an ERPO also results in voiding any transferee permit or permit to carry that has been issued to the respondent and requires that the permit be returned and revoked.

*Passive dispossession:* Whenever a court issues an ERPO, it is also required to issue a “transfer order under section 624.7175.”<sup>21</sup> The transfer order is directed to the respondent and requires that they dispossess themselves of all firearms in their possession. Respondents have three options for doing this:

- They may transfer their firearms to a federally licensed dealer.<sup>22</sup>
- They may turn them over to a law enforcement agency.<sup>23</sup>
- In the case of relic or curio firearms, they may transfer them to a relative who does not live with them.<sup>24</sup>

The transfer should take place as soon as reasonably practicable but must be completed within 24 hours.<sup>25</sup> The law enforcement agency or federally licensed dealer accepting the firearms must provide proof of transfer to the respondent.<sup>26</sup> If the respondent transfers the firearms to a dealer, the respondent must file a copy of the proof of transfer with the law enforcement agency and also attest that all firearms have been transferred.<sup>27</sup> If the respondent claims they had no firearms in their

possession when the ERPO was served, they must file a declaration to that effect with the law enforcement agency.<sup>28</sup>

*Active dispossession:* Law enforcement will have an active role in retrieving firearms from respondents in two circumstances. One is when the court has issued an emergency ERPO. The other is when the court conducts a hearing without an emergency order in place and finds that there is an immediate and present danger.<sup>29</sup> In either case, if there is probable cause that the respondent possesses firearms, the court must “issue a search warrant to the local law enforcement agency to take possession of all firearms in the respondent’s possession as soon as practicable.”<sup>30</sup> Law enforcement agencies will need to apply for these search warrants through the eCharging system. The statute further directs that the chief law enforcement officer or their designee must notify the respondent of the option to voluntarily comply and turn over their firearms prior to the execution of the search warrant—and that officers may execute the search warrant only if the respondent refuses to do so.<sup>31</sup> When a law enforcement agency seizes firearms under an ERPO warrant, it must transfer them to a federally licensed dealer if the respondent directs them to do so in writing.<sup>32</sup>

Agencies should carefully consider the strategies and tactics they will employ to keep officers, the public, and respondents safe when effecting ERPO dispossessions and serving ERPO search warrants. The law does not specify how officers must implement the option for respondents to turn over their firearms voluntarily, and it bears remembering that officers generally have discretion in determining how to best manage volatile situations.<sup>33</sup> Officers also have discretion to assess risks and respond accordingly in the service of search warrants.<sup>34</sup> If officers determine that a search warrant cannot be executed without exposing the respondent, themselves, or others to unreasonable danger, then immunities should

<sup>21</sup> Minn. Stat. § 624.7172, subd. 2(d).

<sup>22</sup> Minn. Stat. § 624.7175(a).

<sup>23</sup> *Id.*

<sup>24</sup> Minn. Stat. § 624.7175(b).

<sup>25</sup> Minn. Stat. § 624.7175(a).

<sup>26</sup> Minn. Stat. § 624.7175(c)(1).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Minn. Stat. §§ 624.7175(d), 624.7172, subd. 2(f).

<sup>30</sup> Minn. Stat. § 624.7175(d).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988).

<sup>34</sup> *McGovern v. City of Minneapolis*, 480 N.W.2d 121, 126 (Minn. Ct. App. 1992).

protect the officers and their agency from liability for delaying the warrant service until the undue risk can be mitigated.<sup>35</sup> Officers should, of course, consider alternative steps to protect those who may be in danger. In considering tactics, bear in mind that if the respondent is known to have a physical, mental health, developmental, or intellectual disability, officers will be expected to exercise “special care” toward the respondent.<sup>36</sup>

*Revocation of transferee and carry permits:* By law, a transferee permit issued under Minnesota Statutes, section 624.7131, becomes void when the permit holder has an ERPO issued against them.<sup>37</sup> Upon issuance of an ERPO, the permit holder must return the permit to the issuing authority within five days.<sup>38</sup> If the chief law enforcement officer who issued the transferee permit learns that the permit holder has become ineligible to possess firearms, he or she must revoke the transferee permit and give written notice to the permit holder.<sup>39</sup> Parallel provisions under section 624.714 apply to permits to carry. They become void once someone becomes subject to an ERPO, and the sheriff must give notice that the permit is voided in the same manner as issuing a permit denial.<sup>40</sup>

### **What about gun parts?**

Does one violate an ERPO by possessing gun parts? What about officers who have been issued an ERPO warrant to search for firearms—may they also seize gun parts? The answers to these questions are nuanced. The ERPO law does not explicitly address the possession or seizure of gun parts. But recent precedent from the Minnesota Supreme Court suggests that if enough parts of the same gun are present, then the set of them could constitute a firearm.<sup>41</sup> The court illustrated this point with the

example of a disassembled clarinet in a case. Even if one or two parts of the clarinet is missing from the case, the remaining group of parts might still reasonably be recognized as a musical instrument.<sup>42</sup> The fact that a firearm has been disassembled and is missing some parts, even ones that are essential to make it operate, does not necessarily defeat its character as a firearm for purposes of laws prohibiting possession.<sup>43</sup> In possession cases, it is ultimately up to the jury to decide whether a given collection of gun parts constitutes a firearm.<sup>44</sup> Contact your city or county attorneys with questions.

### **What responsibilities fall on my agency for dealing with dispossessed firearms?**

Agencies must accept temporary and permanent transfers of firearms from persons who are ordered by an ERPO to dispossess them.<sup>45</sup> With a temporary transfer, the law enforcement agency will possess the firearms but not own them.<sup>46</sup> With a permanent transfer, the agency will possess *and own* the firearms. Federally licensed firearms dealers may charge transferors a reasonable fee for storage, but law enforcement agencies may not.<sup>47</sup>

If the respondent elects to permanently transfer their firearms to a law enforcement agency, the agency must compensate the respondent at fair market value (FMV) and may not charge any processing or other fees.<sup>48</sup> The failure to pay the transferor the FMV for firearms being permanently transferred could amount to an unconstitutional taking under the Fifth Amendment and Minnesota Constitution.<sup>49</sup> Unless an accurate FMV for a particular firearm can be readily ascertained, agencies should consider obtaining one or more reliable appraisals to protect

<sup>35</sup> *Id.*; *Elwood*, 423 N.W.2d at 678.

<sup>36</sup> Minn. Stat. § 609.066, subd. 1a(4) (2023).

<sup>37</sup> Minn. Stat. § 624.7131, subd. 7 (2023) (permit becomes void when the holder becomes prohibited from possessing or receiving a pistol under section 624.713); Minn. Stat. § 624.713, subd. 1(14) (a person who is subject to an ERPO may not possess a pistol, ammunition, or any other firearm).

<sup>38</sup> Minn. Stat. § 624.7131, subd. 7.

<sup>39</sup> *Id.*

<sup>40</sup> Minn. Stat. 624.714, subd. 8 (2023).

<sup>41</sup> *State v. Stone*, 995 N.W.2d 617 (Minn. 2023) (holding that a disassembled shotgun that was missing two parts could constitute a firearm under section 609.165).

<sup>42</sup> *Id.* at 623-24.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 626.

<sup>45</sup> Minn. Stat. § 624.7175(a).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *E.g.*, *Frein v. Pennsylvania State Police*, 47 F.4th 247 (3rd Cir. 2022); *c.f. Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 366 (4th Cir. 2020) (The state did not effect a taking by enacting a law banning possession of trigger activators where there was no requirement that they be turned over to the government or a third party).

themselves against claims for undercompensating a transferor.

Law enforcement agencies are permitted to establish policies for disposing of abandoned firearms, so long as these policies require that the respondent be notified prior to the disposal.<sup>50</sup> The POST Board is required to develop model procedures and standards for the storage of ERPO firearms, [available here](#), but there is no explicit requirement that agencies adopt these guidelines.<sup>51</sup>

After the ERPO expires or is terminated by the court, a law enforcement agency that is temporarily storing firearms for an ERPO respondent must return the firearms, provided that the respondent is not otherwise prohibited from possessing firearms under state or federal law.<sup>52</sup>

### **Who is responsible for service of hearing notices, orders, and other legal process?**

The law is clear with respect to some situations but not others. Section 624.7171, subdivision 4(h), provides that sheriffs, law enforcement officers, and corrections officers shall not charge a fee to a petitioner for performing their “duties relating to service of process” under the ERPO law. In addition:

- Section 624.7172, subdivision 1(d), provides that personal service of the hearing notice will generally be required but does not specify who is responsible for doing so. If in doubt as to your responsibilities, consult your agency’s legal advisor.
- Section 624.7172, subdivision 1(c) makes the petitioning agency responsible for service of an ERPO issued by the court, and also for executing any legal process required for the seizure and storage of firearms under the order.
- Under the same provisions, if a family or household member has obtained an ERPO,

then the “primary law enforcement agency servicing the jurisdiction of residency of the respondent” shall be responsible for the execution of any legal process for the seizure and storage of firearms subject to the order.

- When a law enforcement or prosecuting agency files a petition for an ERPO, it must provide notice to the sheriff of the county where the petitioner resides. When a sheriff’s office files a petition for an ERPO against a respondent who lives in another county, the petitioning agency must provide notice to the sheriff of the county where the respondent resides.<sup>53</sup>

In addition, courts considering an ERPO may subpoena peace officers to give written or sworn testimony about their contacts with a respondent.<sup>54</sup>

### **How should ERPO data be classified under the Minnesota Government Data Practices Act?**

Your city or county attorney (and responsible authority) should be involved in making this determination. Your city or county attorney might decide that a civil legal action is pending under Minnesota Statutes, section 13.39, when your agency petitions for an ERPO or investigates to determine whether one is appropriate. This could result in at least portions of the data being classified as confidential.<sup>55</sup> Note that a Tennessee warning should be provided when interviewing individuals or seeking information from them as part of civil ERPO investigations, as the law enforcement exception to the Tennessee warning requirement does not apply in these circumstances.<sup>56</sup> Data relating to criminal violations of ERPOs or ERPO laws should generally be classified under Minnesota Statutes, section 13.82.

### **Does the ERPO law provide for immunities?**

Yes. Chief law enforcement officers and their designees, and city and county attorneys who decide in good faith *not* to petition for an ERPO

<sup>50</sup> Minn. Stat. § 624.7175(a) and (d).

<sup>51</sup> Minn. Stat. § 626.8481 (2023).

<sup>52</sup> Minn. Stat. § 624.7176, subd. 1 (2023).

<sup>53</sup> Minn. Stat. § 624.7172, subd. 1(f).

<sup>54</sup> Minn. Stat. § 624.7172, subd. 2(c)(1).

<sup>55</sup> Minn. Stat. § 13.39, subd. 2 (2023).

<sup>56</sup> Minn. Stat. § 13.04, subd. 2 (2023).

are immune from criminal or civil liability.<sup>57</sup> Agencies are immune from civil or criminal liability for damage to or deterioration of any ERPO-dispossessed firearms that they transport or store, so long as the damage isn't the result of recklessness, gross negligence, or intentional misconduct.<sup>58</sup> Agencies and officers acting in good faith are not liable, civilly or criminally, for harms caused by a person after being served with an ERPO or ERPO search warrant.<sup>59</sup>

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<sup>57</sup> Minn. Stat. § 624.7178, subd. 1 (2023).

<sup>58</sup> *Id.*, subd. 2.

<sup>59</sup> *Id.*, subd. 3.