



Synopsis of SFI#5 Amendment

Senate Floor #5 amendment clarifies that when a law enforcement officer is the respondent in proceeding under ERFPA, the petition shall be filed by a district attorney or the attorney general.

Synopsis of SFI#4 Amendment

Senate Floor #4 amendment changes the required standard of proof for a court to issue a one-year ERFPO Order from probable cause to preponderance of the evidence, and provides a court with discretion to require the relinquishment of firearms under an ERFPO Order sooner than 48 hours after the order is served.

Synopsis of SFI#3 Amendment

Senate Floor #3 amendment clarifies that the bill’s requirements for relinquishing firearms apply to temporary and one-year ERFPO Orders.

Synopsis of SFI#2 Amendment

Senate Floor #2 amendment changes “school principal” in the definition of a reporting party who may request a law enforcement officer to petition for an ERFPO Order to “school administrator,” and provides that a one-year ERFPO Order is a final, immediately appealable order.

Synopsis of SFI#1 Amendment

Senate Floor #1 amendment deletes the bill’s provisions that increased the caps on monetary damages against a government entity or public employee under the Tort Claims Act and makes corresponding changes in the bill’s title.

Synopsis of Original Bill

The Senate Judiciary Committee substitute for Senate Bill 5 creates the Extreme Risk Firearm Protection Order Act (“ERFPO Act”). The Act provides for a new civil process where a law enforcement officer can petition the appropriate district court for an extreme risk firearm protective order (“ERFPO Order”) against a respondent who “poses a significant danger of causing imminent personal injury to self or others” by having custody or control of or purchasing, possessing or receiving a firearm.

ERFPO Orders

SB5 requires a law enforcement officer to file a petition for an ERFPO Order if the officer receives credible information from “a reporting party” that gives the officer probable cause to believe a respondent poses a significant danger of causing imminent personal injury to self or others by possessing, purchasing or receiving a firearm. A “reporting party” includes a parent, spouse, grandparent, child, person with whom the respondent has “a continuing personal relationship,” an employer, or a school principal.

The petition is filed with the district court in the county in which the respondent resides, and requests an order enjoining the respondent from having possession or control of any firearm and

from purchasing, receiving or attempting to purchase or receive a firearm while the order is in effect.

When a petition for an ERFPP Order is filed, the court may file a temporary ERFPP Order if the court finds there is probable cause to believe the respondent poses a significant danger of causing imminent personal injury to self or others by having or receiving a firearm before notice can be served and a hearing held. Within ten days of issuing a temporary ERFPP Order, the court must hold a hearing to determine if a one-year ERFPP Order should be issued. The court may continue the hearing for up to 30 days at the request of the respondent. A temporary ERFPP Order is served on the respondent by the petitioning law enforcement officer.

After the hearing, the court is required to issue a one-year ERFPP Order if the court finds the requisite probable cause. A one-year ERFPP Order is personally served on the respondent by sheriff's office in the county where the respondent resides or, if the respondent resides in a municipality with a police department, by the police department.

SB5 sets forth the minimum factors regarding the respondent a court must consider in determining whether grounds exist for issuing an ERFPP Order. These include recent or any pattern of acts or threats of violence, mental health history, abuse of drugs or alcohol, previous violations of any court order, criminal history, and history of physical violence against or stalking another person or cruelty to animals.

#### Termination or Extension of ERFPP Order

A respondent may request termination of a one-year ERFPP Order at any time before the order expires. A petitioner may petition the court to extend a one-year ERFPP Order at any time up to one month before the order expires. The bill permits multiple one-year extensions.

#### Relinquishment and Return of Firearms

A respondent who receives an ERFPP Order must relinquish all firearms in the respondent's possession, custody or control in a safe manner to a law enforcement officer, a law enforcement agency, or a federal firearms licensee within 48 hours of service of the order. (A federal firearms licensee is licensed by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives to engage in the business of manufacturing, importing or selling firearms.) The law enforcement officer or other entity to which the firearms are relinquished must prepare a receipt identifying the firearms and provide a copy to the respondent, petitioner, and court that issued the ERFPP Order.

A person who fails to relinquish, possesses, obtains, or attempts to obtain a firearm in violation of an ERFPP Order is guilty of a misdemeanor.

A firearm that has been relinquished must be returned to the respondent with ten days after an ERFPP Order expires or is terminated, unless respondent is prohibited from possessing firearms under state or federal law. The bill permits a respondent subject to an ERFPP Order to request in writing that a firearm be transferred to a licensed firearms dealer or private party who has purchased the firearm from the respondent. It is a misdemeanor for the purchaser to return the firearm back to the respondent while the ERFPP Order is in effect.

#### Reporting of Orders

The clerk of the court is required to provide copies of ERFPP Orders to any law enforcement

agency designated to provide information to the national instant criminal background check system (“NCIS”). Upon receipt of an ERFPO Order, the law enforcement agency must enter the order into the NCIS, state and federal computer databases used to identify prohibited purchasers of firearms, and criminal intelligence information systems used by law enforcement agencies. When an ERFPO Order expires or is terminated, the law enforcement agency must remove the order from state databases and notify NCIS and other federal databases and criminal information systems.

The court issuing an ERFPO Order and AOC are required to maintain aggregate statistical data showing the number of ERFPO Orders issued, renewed, denied or terminated.

#### Tort Claims Act

In addition to creating the ERFPO Act, SB5 amends the Tort Claims Act by:

- amending Section 41-4-12 to waive tort immunity for liability stemming from “failure to comply with duties established pursuant to statute or law” caused by law enforcement officers while acting within the scope of their duties, and defining “law enforcement officer” for purposes of that section; and

- increasing the caps on monetary damages against a government entity or public employee in Section 41-4-19 from \$300 thousand to \$1 million for medical expenses and from \$400 thousand to \$1 million for claims other than real property damage and medical expenses.

SB5 does not contain an effective date. It is assumed that the effective date is 90 days following adjournment of the Legislature.

#### **FISCAL IMPLICATIONS**

The public liability fund is used by the Risk Management Division (RMD) of GSD to purchase tort liability insurance for state and local government entities and to defend, save harmless and indemnify insured government entities for claims made under the Tort Claims Act. The bill’s amendment to the Tort Claims Act that waives immunity from liability for law enforcement officers for “failure to comply with duties established pursuant to statute or law” appears quite expansive and might result in an increase in tort claims against law enforcement officers and damages paid if those claims are successful. Similarly, state and local law enforcement agencies might see an increase in their premiums and assessments for insurance coverage required by the Tort Claims Act.

GSD states that SB5 will increase litigation costs associated with the defense of claims arising from Section 41-4-12 of the Tort Claims Act. While the actual amount of increase is presently unknown, the cost of defense claims from the Department of Public Safety is not insignificant. In total, RMD spent over 7 million dollars defending and settling DPS cases in calendar year 2019. Although this number includes claims that did not arise from the Torts Claims Act, this number signifies the already high cost of defense for RMD and DPS.

According to AOC, there will be minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase the caseloads in the

courts, thus requiring additional resources to handle the increase. It is likely that the district courts, which are responsible for issuing ERFPOs under the bill, would be significantly impacted by the requirements of SB5. Implementation of this new law could result in courts requesting additional judicial positions to accommodate the many additional responsibilities the bill places on the courts.

AODA states that the bill creates two new crimes with misdemeanor penalties (Sections 11 & 13(F)) that may affect law enforcement, district attorneys, public defenders, local jails and probation offices, but that the cost is unknown.

LOPD states that while it likely would be able to absorb some increase in cases, any increase in LOPD expenditures brought about by the cumulative effect of the bill and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

DPS states that it will absorb any costs associated with its recordkeeping responsibilities under the bill.

## **SIGNIFICANT ISSUES**

SB5 is New Mexico's version of a so-called "red flag" gun law. According to an August 2019 New York Times article, 17 states currently have some version of such a law. These states include Florida, New York, Connecticut, Illinois, Indiana, and California. NMAG notes that, in September 2019, a Florida appeals court upheld the Florida version of the law against constitutional challenges that the statute was overbroad and vague and violated due process. *See Davis v. Gilchrist County Sheriff's Office*, 280 So.3d 524 (Fla. App. 2019).

The bill may impact a respondent's Second Amendment right to keep and bear arms. According to NMAG, courts generally employ intermediate scrutiny to classifications involving the Second Amendment. *See State v. Murillo*, 2015-NMCA-046, ¶ 9, 347 P.3d 284. LOPD states that the state counterpart to the Second Amendment in Article II, Section 6 of the New Mexico Constitution applies to "arms" and has long been viewed as more extensive than the Second Amendment because it does not limit its application to military or self-defense purposes. *State v. Dees*, 1983-NMCA-105, ¶ 5.

LOPD states that the bill may have a disparate impact on respondents who are indigent because they may not be able to afford to pay for an attorney to represent them in a proceeding under the ERFPO Act. A public defender is currently only provided to individuals charged with crimes punishable with jail time. Other states with laws similar to the bill, such as Colorado, have mandated that an attorney be appointed to represent respondents at a hearing on the issuance of an ERFPO Order.

LOPD refers to the "probable cause" standard set by the bill for issuing a one-year ERFPO Order, and states that it is a comparatively low standard for depriving someone of a fundamental right under the federal and New Mexico Constitutions. This could lead to litigation over whether such a low standard is constitutional.

LOPD notes that the bill requires a one-year ERFPO Order to be "personally served upon the respondent," but does not indicate what happens when personal service is not possible.

NMAG notes that the bill’s definition of “law enforcement agency” includes district attorneys and NMAG and the definition of “law enforcement officer” includes an attorney employed by a district attorney or the attorney general. These definitions mean that assistant attorneys general would be among the law enforcement officers required to file petitions for ERFP Orders and to present their arguments on the petitions at a hearing held within ten days of the issuance of a temporary ERFP Order. Under the bill, ERFP Order proceedings must be filed, heard and determined in the district court for the county in which the respondent resides. It would be difficult for the OAG to comply with the ten day hearing requirement, as NMAG attorneys are not located statewide. Additionally, if the volume of proceedings is large, NMAG may be precluded from timely compliance. This statutory duty would require additional resources in NMAG to ensure compliance with the mandates of the bill statewide.

NMAG also observes that, as a law enforcement agency under ERFP, NMAG would be responsible for taking possession of firearms relinquished pursuant to an ERFP Order. NMAG has very limited capacity to take possession of firearms in a safe manner. According to NMAG, the majority its employees are not vested with the legal certification or skills to perform the duties required for law enforcement officers under the bill, such as taking possession of firearms. Consequently, NMAG contends that defining attorneys employed by NMAG as “law enforcement officers” is problematic.

AOC reports that Section 12 of the bill, which pertains to reporting of ERFP Orders, does not reflect current law and practice. Specifically, Section 12(A) requires a court clerk to provide copies of ERFP Orders to “any law enforcement agency designated to provide information to [NCIS].” This requirement is inconsistent with Section 34-9-19(A) NMSA 1978, which directs AOC to “obtain and electronically transmit information from court proceedings relating to a person’s eligibility to receive or possess a firearm or ammunition pursuant to state or federal law to the federal bureau of investigation’s national criminal background check system.” AOC states that, according to the FBI, AOC is the only entity in New Mexico now reporting data to the FBI for entry into the NCIS. AOC reports crimes, convictions, orders and other matters to NCIS according to categories specified in federal law. *See* 18 U.S.C. § 922(g).

AOC also refers to Section 12(C), which requires the law enforcement agency to enter a copy of a one-year ERFP Order into federal and state computer-based systems used to identify prohibited purchasers of firearms. According to AOC, other than NCIS, there is no federal or state computer-based system used by law enforcement or others to identify prohibited purchasers of firearms.

AOC states that the bill’s stipulation in Section 13 that a respondent is not required to acquire a court order for the return of respondent’s firearms after an ERFP Order expires might interfere with a law enforcement agencies or federal firearms licensee’s ability to verify whether the respondent is prohibited from possessing firearms.

According to DPS, the bill, if enacted, will save lives because it allows the removal of firearms from people who can do harm to themselves or others.

Quoting statistics from the Centers for Disease Control and Prevention, DOH states in its analysis of the original bill that 394 residents in New Mexico died from a firearm injury in 2017, and the firearm mortality rate was 18.7 per 100,000 population. In the United States as a whole, 39,733 persons died from a firearm injury in 2017, and the firearm mortality rate was 12 per

100,000 population, making the N.M. firearm death rate in 2017 33 percent higher than the U.S. rate. New Mexico had the 8<sup>th</sup> highest firearm suicide rate in the U.S., the 9<sup>th</sup> highest overall firearm death rate, and the 20<sup>th</sup> highest firearm homicide death rate in 2017.

DOH states that from 2017 to 2018, the firearm death rate in New Mexico increased 11 percent from 18.7 per 100,000 to 20.8 per 100,000. Firearms are used in 53 percent of suicides and 63 percent of homicides in New Mexico.

DOH cites instances where extreme risk protection laws adopted by other states appear to have been effective in preventing mass homicides. A case study from California described at least 21 cases in which extreme risk protection orders were used to disarm people who threatened mass shootings. At the time the case study was published, none of the threatened shootings had occurred, and no other homicides or suicides by persons subject to the orders were identified by the researchers. In Maryland, at least four individuals who made threats of violence against schools were disarmed in just the first three months after Maryland implemented its extreme risk protection law, and similar state laws were used to remove firearms from a Florida resident who said that murder would be “fun and addicting” and a Vermont resident who kept a diary titled “Journal of an Active Shooter.” (Wintemute, G., Pear, V., Schleimer, J., Pallin, R., Sohl, S., Kravitz-Wirtz, N., & Tomsich, E. (2019). Extreme Risk Protection Orders Intended to Prevent Mass Shootings. *Annals of Internal Medicine*, 171(9), 655. doi: 10.7326/m19-2162.)

Regarding suicide prevention, DOH refers to a study showing that for every ten to twenty firearm removals under Connecticut’s and Indiana’s extreme risk laws, approximately one life was saved through an averted suicide. Connecticut’s and Indiana’s extreme risk laws have been shown to reduce firearm suicide rates by 14 percent and 7.5 percent, respectively. (“Suicide,” Mental Health America, [www.mentalhealthamerica.net/suicide](http://www.mentalhealthamerica.net/suicide))

DOH reports that the American Academy of Pediatrics (“AAP”) supports federal legislation to provide grants to states to incentivize enactment of extreme risk protection order legislation. In addition to preventing homicides, extreme risk protection order laws can be used to remove a firearm from the environment of a child or adolescent at risk of committing suicide. These types of laws can play a valuable role in preventing deaths and injuries due to firearms.” (AAP Policy, Firearm-Related Injuries in the Pediatric Population, [pediatrics.aappublications.org/content/130/5/e1416.full](http://pediatrics.aappublications.org/content/130/5/e1416.full))

With respect to the bill’s amendment of Section 41-4-12 of the Tort Claims Act, GSD states that while the amendment is only a single addition to the waivers of liability in that section, it represents an overall decrease in qualified immunity defenses available to law enforcement officers. This particular addition has the potential to significantly increase claims against law enforcement officers. Moreover, this amendment goes beyond the original SB5, providing that law enforcement officers can be sued for not upholding any statute or law.

GSD further notes that, while the intent of the amendment is to ensure officer compliance and equal application of laws, it will increase claims against officers, and therefore increase defense costs. Further, this waiver is expanded each time a public body creates a new law or ordinance. Thus, depending on the jurisdiction that an officer patrols, the statutes or laws that the officer is required to uphold change; and the officer is open to suit for either a mistake or conscious decision not to enforce a specific law, which will limit officer discretion.

The Municipal League opposes the bill's amendments to the Tort Claims Act for several reasons. First, the Municipal League states that waiver from immunity for "failure to comply with duties established pursuant to statute or law" appears to be an attempt to statutorily take away a "qualified immunity" defense from law enforcement with respect to state tort claims. According to the Municipal League, qualified immunity defenses are intended to protect an officer from liability where the law has not been clearly established under particular circumstances. Removal of this qualified immunity defense adversely impact the defenses available to law enforcement officers regarding claims involving interactions between law enforcement and the public.

Second, the Municipal League believes that the definition of "law enforcement officer" added by the bill would include mayors of municipalities. The Municipal League explains state law gives a mayor the power to exercise, within the municipality, powers conferred upon sheriffs to suppress disorders and keep the peace (Section 3-11-4(B) NMSA 1978). It is unlikely that the Legislature intended to the definition of law enforcement officer for purposes of the Tort Claims Act to include mayors.

Third, the Municipal League states that the increase in the tort claim damages limits appears extreme. According to the Municipal League, New Mexico has, for many years, had among the highest caps in the country. To increase the potential liability of local and state governments in such a large measure will result in higher premiums being paid for coverage by very small units of local governments. Local governments have limited resources to provide essential services to their constituents and causing an increase in the cost of insuring against risk will further limit the resources available to local governments to provide those services.

Finally, the Municipal League suggests that the bill may be vulnerable to a legal challenge under Article IV, Section 16 of the state constitution because it "embraces more than one subject." Specifically, the bill pertains to the issuance of ERFPS Orders and amends the liability waiver and damages provisions of the Tort Claims Act, which appear to be two different and unrelated issues. The purpose of Article IV, Section 16's "one subject" limitation is to prevent the practice of "logrolling" where a bill includes two unrelated measures so that the passage of one measure is "piggyback[ed] ... on the popularity of the other." *State ex rel. Clark v. State Canvassing Bd.*, 1995-NMSC-001, ¶ 26 (applying the similar limitation in N.M. Const. Art. XIX, § 1, which requires that two or more amendments to the constitution be submitted "so as to enable the electors to vote on each of them separately"). A bill violates the one subject limitation if it includes "discordant provisions having no rational or logical relation to each other." *State v. Roybal*, 1960-NMSC-012, ¶ 9.

## ADMINISTRATIVE IMPLICATIONS

AOC states that SB5's requirement that a temporary ERFPS Order be dismissed if a hearing is not held within 10 days would have a significant affect on the judiciary. In calendar year 2019, over 11,000 temporary domestic violence orders of protection (DVOPs) were issued by the district courts throughout the state under the Family Violence Protection Act. That Act requires that temporary DVOPs be set for a hearing within 10 days, but, in contrast to SB5, does not automatically terminate the temporary order if a hearing cannot be held within 10 days. Without additional judicial resources, adding temporary ERFPS Order hearings to the temporary DVOP hearings currently required, coupled with SB5's automatic termination requirement, may result in the unnecessary automatic termination of orders contrary to the legislative purpose of the temporary ERFPS Order process.

AODA notes that district attorney offices prosecute violations of the criminal code. The bill would add more duties/work to attorneys who will have to become familiar with the civil procedures of ERFPOA. Also, depending on the number of referrals, there may be problems prioritizing cases; serious violent felonies will always have to be addressed before any civil matter.

DPS states that the responsibilities imposed on law enforcement officers and agencies under the proposed ERFPO Act would require additional record keeping and tickler systems to ensure proper and timely required notifications to petitioners and respondents; changes to current “evidence” tracking logs to distinguish firearms stored for civil purposes; additional training of officers and development of policies and procedures to implement the bill; and may require additional storage space for guns.

To the extent SB5 creates new crimes, LOPD states that the bill might result in more criminal cases being brought. Any increase in the number of trials or prosecutions would require a concomitant increase in resources for the courts, district attorneys, LOPD and NMCD. Additionally, if representation for respondents is required, the burden of representation might fall on the Public Defender Department. In particular, the “short fuse” nature of the proceedings, combined with “hard” deadlines, will impose a considerable burden on courts and any attorneys who may become involved.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to:

HB7 - Extreme Risk Firearm Protection Order Act

HB35 - increases sentence enhancements for a firearm used in a crime

HB113 - increases the penalty for a felon in possession of a firearm

HB114 - creates crime of carrying a firearm while trafficking a controlled substance

## **TECHNICAL ISSUES**

NMAG states that it is unclear if issuance of a temporary ERFPO Order requires a specific request to the court in a petition or if the court is mandated to consider the issuance of a temporary order on every petition presented to it.

AOC refers to Section 12(G), which directs the clerk of the court to forward a copy of an order terminating an ERFPO Order before its expiration date to the office of the attorney general and the petitioner. AOC states that it is not clear why the bill singles out the attorney general for receipt of a copy of the termination order.

## **OTHER SUBSTANTIVE ISSUES**

AODA is concerned about the amendment to the Tort Claims Act made by the SJC substitute which waives immunity for “failure to comply with duties established pursuant to statute.” AODA acknowledges that, as defined for purposes of the waiver, “law enforcement officer” does not obviously include district attorneys and other criminal prosecutors. Nevertheless, AODA notes that if the waiver were interpreted to include district attorneys, they might be exposed to liability for failure to file criminal charges, prosecute a criminal case or take other action that traditionally falls within a district attorney’s or other prosecutor’s discretion.

**AMENDMENTS**

NMAG recommends amending the bill to make clear that attorneys in district attorney's offices or NMAG may file a petition, but that service of orders and enforcement of orders, including transfer of any firearm, be handled by a sheriff's office or police department in the jurisdiction where the order is entered.

BG/rl/sb/al/rl/al