

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original Amendment
Correction Substitute

Date 1/29/24
Bill No: HCPAC/HB 27-280

Sponsor: HCPAC (original: Joy Garratt & Christine Chandler)
Short Title: Extreme Risk Protection Order Changes – HCPAC Sub.

Agency Name and Code Number: 280 – Law Office of the Public Defender
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None known
Duplicates/Relates to Appropriation in the General Appropriation Act: None known

SECTION III: NARRATIVE

BILL SUMMARY

The contents of the analysis for the original bill are retained herein and changes from the HCPAC analysis are discussed with underlined text.

HB 27 seeks to amend the Extreme Risk Firearm Protection Order Act (ERFPOA), a statute enacted in 2020. Subsequent efforts to amend ERFPOA have been unsuccessful.

A number of the amendments contained in this bill are stylistic and will not be addressed. Substantive amendments are discussed below.

The ERFPOA allows for the temporary removal/relinquishment of firearms possessed by persons believed to pose a significant risk of harm to themselves or others.

This bill seeks to amend the ERFPOA to clarify who is a “law enforcement officer” for the purposes of this Act; broaden the category of people who may ask for a petition for an ERFPO to be filed (by allowing law enforcement and healthcare professionals to be reporters); speed up the process for obtaining an ERFPO once the petition is filed with a court; change reporting/recordation requirements surrounding the issuance or denial of an ERFPO; and provide some mechanisms for relinquishment, confiscation, return, destruction, and/or sale of the firearms at issue.

Section 2 seeks to more clearly define “law enforcement officer” (LEO) for the purposes of the Act as full-time, salaried, and commissioned or certified officers from police or sheriff’s departments and attorneys working for the various district attorneys or the attorney general. (If an LEO is the respondent to an ERFPO petition, only one of the aforementioned attorneys may file the petition. [Section 3]) Substitute Section 2 would also clarify that “LEO” includes university police. It also would more particularly define “health care professional” (including that the healthcare professional must be the *respondent’s* provider) and allow for filing not only in the respondent’s county of residence but alternatively, if appropriate, in the county where the respondent’s conduct gave rise to the facts supporting the petition or the county where the respondent’s firearms are suspected to be. See also Substitute Section 3.

Section 2 of the original HB 27 would significantly broaden the pool of “reporting parties” (i.e., parties who may ask an LEO to file a petition for an ERFPO). The original bill’s proposed deletion of a long list of designated family members would appear to place no familial restraints on the type of “continuing personal relationship” that must exist or have existed between the respondent and the reporting party. This provision would also add licensed healthcare

professionals and LEOs to the list of potential reporting parties. In other words, the bill would make LEOs both potential reporting parties and the sole petitioners. By contrast, Substitute Section 2 would retain the enumerated list of family members; however, it is not clear how much this matters because the substitute bill's choice to list the potential reporters in different subsections would seem to indicate that "a . . . person with whom a respondent has or had a continuing personal relationship," regardless of whether there is an enumerated familial relationship, may request a petition be filed. Substitute Section 2 also deletes the reference to LEOs being allowed reporters, but Substitute Section 4(A) would amend the Act to implicitly allow LEOs to file petitions without a separate non-LEO reporter. This is primarily a stylistic change, though it is perhaps not as clear as the original HB 27.

Substitute Section 4 (relating to Section 3 of the as-filed HB 27) would allow the petition to be accompanied by an affidavit signed by either the petitioner (always LEO) or the reporter (either LEO or one of the other enumerated parties).

Substitute Section 4 would allow petitions to be presented orally upon good cause shown, provided that a written petition shall be filed within 24 hours of the oral application. This section would require that a district court judge be available at all times to review petitions for ERFPOs and would allow the chief district court judges to delegate this job to a special commissioner. Substitute Section 4 (relating to Section 3 of the as-filed HB 27) would not expressly allow this delegation of the district courts' duty to promptly review ERFPO petitions, which is consistent with the current statute.

Substitute Section 4 also would rescind the current requirement that, if an LEO receives a request from a reporting party and decides not to file a petition thereon, they must file a notice with the sheriff in the county where the respondent resides, stating that they were asked to file a petition and declined to do so. Instead, this bill would replace that public recordation requirement with notification solely to the reporting party within 48 hours of the LEO's decision not to file.

Substitute Section 5 would appear to speed up the process of reviewing and issuing a temporary ERFPO pending a hearing by saying the court "shall review the petition immediately and shall issue a temporary" ERFPO if the court finds probable cause. In addition to previously enacted notice requirements, this section would also require the court issuing a temporary ERFPO pending a hearing to give notice to the respondent that he/she/they must relinquish any firearm the court found probable cause to believe is in their custody or control immediately upon service of the order. Substitute Section 5 would further require the issuing court to inform him/her/them of the specific firearms they must turn over (if known) and that a violation of the order would be a misdemeanor under New Mexico law. Substitute Section 5 (referring to Section 4 of the as-filed HB 27) would remove the phrase "at a minimum" from the statute and former bill, which would seem to reduce the district court's authority to issue any order that would go beyond the enumerated results of a substantiated petition for a temporary ERFPO (i.e., enjoining the respondent from possessing or buying firearms and ordering respondent to immediately relinquish any firearms they have at the time the petition is granted). See Substitute Section 5(B)(1)-(3). The substitute bill also would not require the court to describe any known firearms the respondent may possess in an order issuing a "temporary" ERFPO.

Substitute Section 5 would also require that, in situations where a temporary ERFPO is not granted by the reviewing court, the court shall dismiss the petition without prejudice.

Substitute Section 7 would require notice to any respondent who, after a hearing, becomes

subject to a 365-day ERFPO that possession or purchase of a firearm during the pendency of the order would be a misdemeanor under NM law.

Substitute Section 8 (referring to Section 7 of the as-filed HB 27) would remove the current statutory provision: “A one-year extreme risk firearm protection order is a final, immediately appealable order.”

Substitute Section 9 would speed up the process of relinquishment/confiscation of firearms from those subject to either a temporary or a 365-day ERFPO by requiring relinquishment “immediately upon service of the order or as directed by the court,” as opposed to the current 48-hour turnaround. Substitute Section 9 would further allow any LEO who has probable cause to believe a respondent is in violation of an ERFPO to request a search warrant from the court that issued the ERFPO.

Substitute Section 11 would streamline the process for entering granted ERFPOs into previously designated state and federal law-enforcement databases by shifting the burden of this entry to the issuing court instead of law enforcement. It would also require the court, rather than law enforcement, to take steps to remove ERFPOs that have expired or have been terminated from the same databases. Substitute Section 11 (referring to Section 10 of the as-filed HB-27) would require the court to enter the order into NCIC but LEOs enter the order into all other relevant databases. At the same time, Substitute Section 11 would remove the current statutory requirement that the respondent, upon request, be issued a written affidavit affirming that the information contained in the expired or terminated order has been removed from said databases.

Substitute Section 11 would also ostensibly make the aggregate statistical data already required by statute publicly available *without* request. The proposal does not prescribe a form or timeline for the publishing of that data.

Substitute Section 12 would clarify that, in order to effectuate the return of their firearm(s) after the expiration or termination of an ERFPO, a respondent has to issue a request to law enforcement.

Finally, Substitute Section 12 would provide for destruction or sale of any firearm that remains unclaimed for 365 days after notice is given to the respondent. If someone other than the respondent claims to be the lawful owner of the firearm, they may get it back only by providing written proof of ownership.

FISCAL IMPLICATIONS

It cannot be determined what the fiscal implications of this bill will be, since the 2020 version has been used so sparingly and since this bill would enact significant expansions on the still-young statute. (In Nov. 2023, the *Albuquerque Journal* reported that only 48 petitions had been filed throughout the state between the beginning of 2022 and Nov. 2023. The majority of these petitions were filed in Bernalillo County.)

LOPD believes this bill seeks to expand the use of “red flag” petitions and orders, as well as enforcement mechanisms. If the Act accomplishes that apparent goal, LOPD anticipates there will be more arrests, for the initial misdemeanor of possessing/purchasing a firearm in contravention of an order, as well as for any other contraband or crimes discovered during the confiscation of those unlawfully possessed weapons. It is difficult to predict the number of cases

of this sort that would be brought in any given year, as the law has so far been so rarely used in its current form. Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide effective assistance of counsel to their existing clients. The Legislature and LFC are well aware of the myriad constitutional concerns implicated in forcing indigent criminal defendants to proceed without effective assistance of counsel.

Barring some other way to reduce indigent defense workload, any increase in the number of misdemeanor and felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

LOPD costs are certain to be in addition to costs to the judiciary, law enforcement, prosecutors, and – if incarceration results at any time, county jails and/or Corrections. With more arrests would come more incarceration, which also costs money. Again, the amount cannot be predicted, but with the expansion of the requesting parties to include all law enforcement officers and healthcare workers, the number could be significant.

SIGNIFICANT ISSUES

This bill is clearly an effort towards taking dangerous weapons out of the hands of potentially dangerous people before they commit a violent crime. Nevertheless, some issues require consideration.

The addition of healthcare workers as requesting parties would seem to implicate privacy concerns under HIPAA and New Mexico law. While it is true that healthcare workers are already allowed/required to report people they believe to be dangerous under certain circumstances, it remains to be seen whether this law would infringe upon the heightened privacy rights granted to New Mexicans by our state constitution. Addition of these people would also seem to be unnecessary. Under current law, if a healthcare worker, household member, or officer witnesses an individual acting in a negligent manner with a gun, threatening a family member with it, or committing a crime involving a firearm, the weapon can be seized as evidence of the crime and the individual's conditions of release can prohibit possession of a firearm. In addition, for persons convicted of crimes in the past or certain categories of individuals, state and federal law already prohibit possession of firearms.

The provision of both the original and the substitute bill that would allow LEOs to be both reporters and petitioners creates a hearsay/reliability concern. See, e.g., Substitute Section 4(C)(2) (“A petition . . . shall . . . be . . . accompanied by a sworn affidavit signed by the reporting party or the petitioner”). Specifically, this language allows the petitioning LEO, even in cases where there is a civilian reporter, to sign the factual affidavit. This procedure would be fine where the LEO is both the reporter and the petitioner because he/she/they would be reporting their firsthand knowledge of the facts underlying the petition. However, where there is a civilian reporter, the LEO should not be allowed to sign the petition where the document provides the facts underlying the petition that only the civilian reporter has firsthand knowledge of. While it is true that criminal complaints/informations/indictments can contain hearsay, the procedure enumerated here does not provide the concomitant guarantees of firsthand knowledge and reliability that criminal hearings and trials requires, such as disallowing hearsay at preliminary hearings and trials and requiring the presence of the fact witnesses. This is

particularly concerning in light of the facts that: (1) the respondent is not entitled to an attorney during these hearings and (2) may have an ERFPO extended indefinitely, potentially without appeal (see below). Any bill amending the statute as currently written should require firsthand knowledge/testimony in order to effectuate the denial of the respondent's constitutional right to bear arms and retain possession of his/her/their property.

It appears the warrant provision is an attempt to give this Act “teeth,” to provide an enforcement mechanism when law enforcement believes someone deemed to be dangerous is failing to comply with the protective measures in this law. However, a provision authorizing the oral or written application for a search warrant to find firearms an officer believes a respondent may have retained in contravention of an ERFPO (particularly a temporary one) puts at issue the question of whether the New Mexico constitution will conscience the execution of a search—which could entail the entry into and search of a respondent's home, business, car, or even their associates' properties—to confiscate a firearm that might exist during a short-term period when the person is considered a potential danger. It is the use of an invasive criminal procedure with constitutional implications to try to increase public safety. This is particularly troubling in light of the fact that the offense of possessing a firearm in contravention of this act is a misdemeanor, meaning police would be seeking search warrants for private spaces to search for evidence of a relatively minor offense. This provision may also incentivize using the Act as a pretext to search a targeted person's property for other evidence without probable cause under the guise of protecting the community.

The substitute bill's deletion of the language making the ERFPO a final, immediately appealable order raises significant due process concerns. See Substitute Section 7, post (F). While a procedure like the ERFPO is an important attempt to safeguard the public, it also greatly infringes upon the respondent's constitutional right to bear arms and related constitutional liberty and property interests. The substitute bill's removal of a clear right to appeal impinges upon these important state and federal constitutional guarantees by potentially removing the opportunity for a higher court to weigh in. This is especially disconcerting because the provision applies to a one-year ERFPO that can, apparently, be indefinitely extended. See Substitute Section 7(F); see also below. The substitute bill's deletion of this provision may preclude appellate review for a taking from the respondent that could continue until the end of their natural life.

It is not currently clear that a respondent who has relinquished his firearms during the pendency of a temporary ERFPO is entitled to the prompt return of those firearms if the temporary order is terminated and a 365-day ERFPO *is not sought* (e.g., the petition is abandoned, or a written petition is not timely filed after oral application). Compare Section 4(G) with Section 6(D) (applying only when a court “declines to issue” a 365-day ERFPO). This also raises significant due process concerns.

Clarification as to how many extensions of a 365-day ERFPO are authorized is desirable, especially given the changes proposed in this substitute bill. See Substitute Section 8(F), post (F). This apparently indefinite number of extensions is particularly troubling given the fact that a respondent is not entitled to an attorney or an appeal during the “red flag” proceedings. The act may impact people disparately depending on the respondent's money or education level. The fact “respondent may consult an attorney” does not ensure the availability of an attorney for poor or disadvantaged persons who cannot afford to pay for a consultation, making them more likely to misunderstand the requirements (and therefore violate the requirements) and less likely to fight against an unjust application of the law, such as by filing a written request for relief. The only

point at which an attorney or any guidance will be provided is if someone is prosecuted for violating this (and possibly other) law. A public defender is currently only provided to individuals charged with crimes punishable with jail time.

An individual without an attorney will be especially disadvantaged if the requesting party and petitioner is a police officer, as they are comparatively well versed in the law. Likewise, giving a respondent only one opportunity to request relief in writing assumes the person can write and ensures that someone who can afford to have an attorney draft a request for relief or advise them before a hearing is in a materially better position than someone who is unable to afford such help, less educated, or unable to read or write.

Other states have mandated that an attorney be appointed to represent respondents at the hearing. See e.g., Colorado House Bill 19-1177, page 6 https://leg.colorado.gov/sites/default/files/2019a_1177_signed.pdf at 13-14.5-104(1) (“UPON THE FILING OF A PETITION, THE COURT SHALL APPOINT AN ATTORNEY TO REPRESENT THE RESPONDENT, AND...ATTORNEY FEES FOR THE ATTORNEY APPOINTED FOR THE RESPONDENT SHALL BE PAID BY THE COURT”).

Finally, Article II, Section 6 of the New Mexico Constitution applies to “arms” and has long been viewed as more extensive than its federal counterpart in that it does not limit its application to military or self-defense purposes. *State v. Dees*, 1983-NMCA-105, ¶ 5, 100 N.M. 252 (“Although the federal Second Amendment’s history is grounded squarely on the notion of a civilian militia, clearly New Mexico’s provision is broader than that.”) Thus, the law may be subject to a state constitutional challenge on broader grounds (due process, unreasonable infringement on Article II, Section 6 rights) than are available under the federal constitution.

PERFORMANCE IMPLICATIONS

To the extent HB 27 may allow for duplicative punishment for the same conduct, it could increase the severity of the penalty facing some defendants resulting in more cases going to trial. Any increase in the number of trials or prosecutions would require a concomitant increase in resources for the courts, prosecutors, defense, and jail/prison authorities. Additionally, if representation for respondents is required (either by the statute or any ensuing court case) the burden of representation might fall on LOPD, requiring more resources. In particular, the “short fuse” nature of the proceedings, combined with “hard” deadlines, will impose a considerable burden on courts, petitioners, and any attorneys who may become involved.

ADMINISTRATIVE IMPLICATIONS

The provision that requires the court to send ERFPOs to state and national databases and to removed expired or terminated ERFPOs from those same databases will require a tracking system and enforcement mechanism that do not currently exist in the statute or apparently in administrative guidelines:

“Upon the expiration of or upon receiving notice of the termination of an extreme risk firearm protection order, the court shall promptly remove the order from any state computer-based system . . . and shall notify [NCIC] and all federal computer-based systems and databases used by law enforcement or others to identify prohibited purchasers of firearms.” Section 10(C).

Even with the substitute bill’s amendments to split these duties between the courts and LEOs,

these administrative concerns remain. Removal of expired or rescinded ERFPOs from criminal databases is crucial to protect respondents' privacy and constitutional rights to bear arms and to be free from unreasonable searches and seizures.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None currently known.

TECHNICAL ISSUES

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, analyst is unaware if it has been drawn pursuant to a special message of the Governor, and it was not vetoed following the previous regular session.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

Take out language permitting duplicative punishment under criminal laws, specify the number of extensions that may be sought, provide for an attorney (but not without providing further resources and funding for LOPD).

Place some limits on healthcare workers and law enforcement officers' use of legally protected information, ability to file petitions without substantial personal knowledge of the individual, and the use of search warrants to search for and seize suspected retained firearms.

Allow for appeal of the issuance of a one-year ERFPO. Provide further safeguards against hearsay and unreliable information, both in the petition and during hearings.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. The 2020 bill has had little time to work, and there has been little education in the community about how family and community members can use it. Increased education in the community could achieve the same goals without risking improper use by law enforcement or healthcare workers.

AMENDMENTS

As noted.