

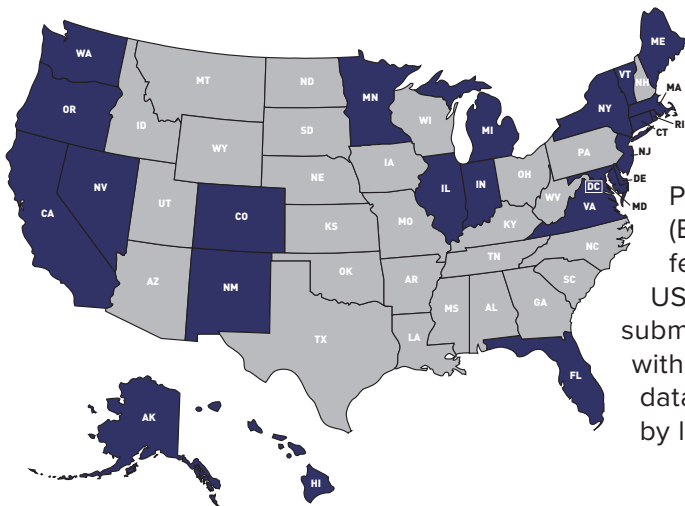
“RED FLAG” LAWS: DUE PROCESS IS CRUCIAL

Federal law prohibits certain individuals from purchasing or possessing firearms or ammunition.ⁱ Among these prohibitions is anyone with a (i) misdemeanor domestic violence conviction or (ii) a person involuntarily committed to a mental institution or adjudicated a “mental defective.” However, federal law does not authorize law enforcement to seize firearms from individuals who law enforcement believes are a threat to themselves or others or those who may have a mental illness but have not been involuntarily committed or adjudicated a “mental defective.”

State laws vary on the ability of law enforcement to intervene, e.g. take a person into custody to an emergency room for a psychiatric evaluation. Many states have prohibiting categories that extend beyond those set by federal law. Whether it is expanding the definition of domestic violence to cover siblings and parents or extending the time-period when an individual is a prohibited person to cover a period before a court hearing occurs, state laws vary.

STATES WITH LAWS ALLOWING THE SEIZURE OF FIREARMS FROM “DANGEROUS” INDIVIDUALS

Twenty-two states and the District of Columbia have



implemented broader laws to authorize law enforcement to seek a court order to temporarily prevent access to firearms in certain situations where an individual is suspected of being an immediate threat to themselves or others. These states have laws that are sometimes called Extreme Risk Protective Orders (ERPOs), also known as “Red Flag” laws or “Gun Violence Restraining Orders”. The laws in these states are very similar. They allow law enforcement and, in most cases, immediate family members and others with a very close relationship with the person to seek an ex parte court order authorizing law enforcement to seize a person’s firearms for a

period of time, thereby infringing upon that person’s Second Amendment Rights. Because these Extreme Risk Protection Orders (ERPOs) do not involve federal prohibitors, (18 USC 922(g)), they are not submitted to and contained within the FBI NICS databases, unless specified by law.



CONSTITUTIONAL REQUIREMENT FOR DUE PROCESS

The ERPO laws in place provide for some level of due process. Whether the due process provided in those laws is constitutionally adequate for the deprivation of a fundamental civil liberty and constitutional rights is a serious concern. Normally, to deny a fundamental civil liberty there must be a pre-deprivation hearing on notice and with an opportunity to participate, unless given the exigencies of the circumstances it is not feasible to hold a pre-deprivation hearing. In that case, due process requires a prompt post-deprivation hearing, e.g. 24-72 hours. For example, when a person is arrested and in custody, he or she must be arraigned before a judge within 24-72 hours. It is unconstitutional and a violation of due process for one to be held in jail for a week or more before being arraigned before a judge. Several of the existing state “red flag” laws do not provide for a pre-deprivation hearing. They also do not provide for a post-deprivation hearing until 14 days have passed. Two weeks to

wait for a due process hearing when a person’s fundamental civil liberties – their Second Amendment right to keep and bear arms – has been infringed upon by the government is simply not consistent with the constitutional requirements of the Due Process Clause. In addition to the constitutional requirement for adequate due process, an ERPO bill should provide that it can only be issued upon sworn testimony and showing by clear and convincing evidence that the person that is subject of the petition (“respondent”) is an immediate and imminent threat to themselves or others. ERPO legislation should provide for the appointment of counsel paid for by the government if the respondent is unable to afford counsel.

The legislation should also provide that making a false statement in support of a petition for an ERPO order is a criminal offense. And, the

respondent should have a statutory civil cause of action against a person making a false statement.

Other considerations when drafting ERPO legislation is the duration of the order and providing for periodic judicial review of the order to determine whether the respondent remains an immediate and imminent risk to themselves or others.

When lawmakers are drafting new “red flag” proposals, these details must be considered to protect the Second Amendment and Due Process rights of Americans.

EXTREME RISK PROTECTION ORDERS FAILING

While ERPO laws are said to prohibit certain individuals from purchasing or possessing firearms and ammunition, new data reveals that ERPOs are failing to keep these items out of the wrong hands.

Applying the FBI’s definition of a “mass shooting,” there have been 19 instances of mass shootings taking place in states between 1999-2024 that have an ERPO. NSSF analyzed data over the last 10 years (2014-2025) and found that 60 percent of true criminal mass shooting events have taken place in states that have had a “red flag” law in place. More than half – 18 of 30 – took place in states with ERPO laws and 15 of those 18 mass murderers committed their horrific crimes in a state with a “red flag” law in place had demonstrated prior signs of mental health issues. Nearly 50 percent (48.8) of mass murderers in the data set had a criminal history and/or police intervention prior to the tragic eventⁱⁱ

ⁱ Full list of prohibiting categories is available here: <https://www.atf.gov/firearms/identify-prohibited-persons>

ⁱⁱ NSSF Research Analysis