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FISCAL IMPACT REPORT

ORIGINAL DATE 1/24/2019
LAST UPDATED 2/12/2019 **HB** 83/aHCPAC/aHJC

SPONSOR Ely/Garratt

SHORT TITLE Extreme Risk Protection Order Act **SB** _____

ANALYST Torres

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications			See Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 New Mexico Sentencing Commission (NMSC)
 Administrative Office of the District Attorneys (AODA) – Declined to Respond

Responses Not Received From

Department of Public Safety (DPS)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 83 changes the name of the act from the Extreme Risk Protection Order Act to the Extreme Risk Firearm Protection Order Act and adjusts all references to include the word “firearm.” The amendment also adjusts language throughout the bill to clarify the process for hearing extensions and efforts made by the court to reasonably search existing databases for further information.

Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment to House Bill 83 changes the standard of care used to determine liability for a person who files a petition in a proceeding authorized by this legislation. The amended bill states that a person who files a petition or

provides information for a proceeding is immunized from criminal or civil liability if the person acted with reasonable care.

Synopsis of Original Bill

House Bill 83 would amend Chapter 40 (Domestic Affairs), NMSA 1978 by creating a new civil process where either a household member or a law enforcement officer can petition the district court for a protective order against an individual who “poses an immediate danger of causing personal injury to self or others by having custody, control or possession of a firearm or ammunition”. Upon issuance of an Extreme Risk Protection Order (ERPO), the court shall issue a “search warrant . . . describing the firearm or ammunition and authorizing a search of the location where the firearm or ammunition is reasonably believed to be and authorizing the seizure of any firearm or ammunition discovered pursuant to the search.” A violation by the respondent of an ERPO is a misdemeanor, punishable under section 31-19-1 NMSA 1978.

Sections 3 through 7 of HB 83 outline three different types of Extreme Risk Protection Orders (ERPOs) that can be issued by a district court judge. With regard to all three ERPO types, the petition must allege that an individual is “an immediate danger of causing personal injury to self or others by [having a firearm]”. The three different types of ERPOs created in HB 83 are:

- Emergency Order – A law enforcement officer “stating to the court, in person or through reliable electronic means” requests the court issue an emergency ERPO by contacting an on-duty judge.
- Ex Parte Order – A petitioner, as defined in Section 1 as “a household member or law enforcement officer,” requests the court issue an ex parte ERPO by filing a petition with a district court where the respondent resides or is sheltered.
- One Year Order – At a hearing, held after the issuance of either an emergency or ex parte ERPO, the court finds by a preponderance of the evidence that the respondent poses a significant danger to self or others by having possession or access to a firearm, the court may issue a one year ERPO. This order prohibits the respondent from purchasing, possessing, or receiving or attempting to purchase, possess, or receive a firearm. A one year ERPO can be extended for an additional year upon the request of the petitioner prior to the original order expiring.

If the court finds probable cause to issue an emergency or ex parte ERPO, the court shall hold a hearing within ten days to determine if a one year ERPO will be issued against the respondent.

HB 83 requires that a petition for an ERPO include the following:

- an affidavit made under oath;
- name and address of petitioner, unless a request is made to seal petitioner’s address;
- name and address of respondent, if known;
- description of number, type and location of firearms or ammunition;
- relationship between the parties;
- disclosure of whether there is an ERPO, order of protection under the Family Violence Protection Act, a civil restraining order or a similar order issued in another state between the parties or against the respondent; and

- whether there is a pending lawsuit, complaint, petition or other action between the parties in New Mexico.

HB 83 provides a mechanism for petition for early termination of the order, and for extension of the order. HB 83 also provides process for relinquishment of firearms and ammunition, and for the return of same at the expiration of the order.

HB 83 also requires that a person residing with the subject of an extreme risk protection order keep his or her firearms in a state where they are not readily accessible by the subject of the order. Violation of this section is also punishable as a misdemeanor.

Finally, the bill requires the court to report ERPOs to the FBI for entry into the national instant criminal background check system (NICS) and amends Section 4 of the Concealed Handgun Carry Act (Section 29-19-4 NMSA 1978) by adding that a concealed handgun license cannot be issued to someone who is subject to an extreme risk protection order.

FISCAL IMPLICATIONS

The Administrative Office of the Courts reports:

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 highly likely that all district courts, which are responsible for issuing ERPOs, would be significantly impacted by the additional requirements under HB 83. Implementation of this new law will likely result in courts requesting additional judicial positions to accommodate the many additional responsibilities placed on the court to comply with HB 83.

Similarly, the Public Defender Department notes that it would likely experience an increase in cases and a need for additional indigent defense funding. The department was unable to predict how many additional cases would be brought.

Due to the mechanisms for executing ERPOs, it is likely HB 83 will increase the workloads of state and local law enforcement.

SIGNIFICANT ISSUES

According to AOC, 13 states currently have enacted similar legislation to HB 83 (see California, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, and Washington). Furthermore, AOC notes that “many of these state statutes have simplified processes that should be considered to accomplish the same purpose of HB 83.”

Another significant issue in Section 5 of HB 83 is the automatic extension of the one year ERPO hearing date if the respondent is not served within seventy-two hours. AOC reports that verifying the respondent is served within seventy-two hours places a burden on both law enforcement and the judiciary. Ensuring service of process within seventy-two hours is likely to result in a large number of the one year ERPO hearings to be re-set which in turn impacts the

ability of the court to adequately set all hearings in a timely manner. Other states with ERPO laws have more streamlined processes for holding the hearings and do not require a hearing to be re-set if the respondent is not served within seventy-two hours. Some AOC suggested alternatives include:

- Washington allows the court to reset a hearing two times for service of process (7.94.040 (1)(c));
- Rhode Island allows a court to continue the hearing until the respondent can be served with no time limitation on continuance (§8-8.3-6(c)); or
- Expanding the period of time for the respondent to be served to fourteen days (Connecticut, Florida) or twenty-one days (California, Oregon).

Section 7(B) of HB 83 requires the court to obtain evidence in the case, specifically conducting a criminal background check and determining if the respondent is subject to other civil orders of protection or restraining orders. AOC highlights its concern by noting that “the Court should not be responsible for producing evidence in a case. The Court may take judicial notice of court records, but should not be required to actively research the criminal and civil history of the respondent. The court does not have access to any national database where this information may readily be found. This duty is more appropriately placed on the petitioner, or as some states on the Attorney General’s or District Attorney’s offices.”

Section 7(D) of HB 83 sets the standard of proof to obtain a one year ERPO as a preponderance of evidence. Nationally, more jurisdictions require a clear and convincing standard since the issuance of an ERPO results in a restriction on a respondent’s constitutional right to bear arms. Changing the standard in HB 83 to a higher standard of proof may be more in line with similar state practices when taking into account the consequence of the order (see California, Connecticut, Florida, Illinois, Maryland, Rhode Island, and Vermont).

According to AOC, section 8 of HB 83 has several significant issues:

- Section 8(A) only allows a respondent to request a termination of the ERPO once during the effective period of the order.
- Section 8(B), does not define who has the burden of serving the petitioner with a notice of the hearing and there is also no indication of how to handle service of process when the Petitioner seals his/her address.
- Section 8(B) requires the court to set a hearing no sooner than fourteen days and no later than thirty days “from the date of service of the request on the petitioner”. Since it is not possible to predict when a petitioner may be served the notice of hearing, it would be best to change this language in HB 83 to trigger the computation of the date to begin on the date the court received respondent’s request for termination rather than the date the petitioner was served.
- HB 83 does not indicate if the respondent would be charged fees for service of process or for filing a request to terminate the ERPO in district court.

Section 9 allows the petitioner to apply for an extension of the ERPO for one additional year. It is unclear from HB 83 whether the petitioner may only request the extension of the ERPO once, or whether the petitioner can request the court extend the ERPO as many times as needed.

Finally, AOC notes:

Section 10(A) of HB 83 mandates the court to issue a search warrant when an ERPO is issued and a “finding of probable cause that the respondent” has firearms. As written, HB 83 does not require the petitioner to provide specific information that the respondent is unlikely or unwilling to comply with the court’s order but rather obligates the issuance of a search warrant in all cases where an ERPO is issued. This mandate upon the court is overly broad and empowers law enforcement to execute the search warrant at any “location where the firearm or ammunition is reasonably believed to be and authorizing the seizure of any firearm or ammunition discovered” regardless of ownership. In addition, it is important to note that a search warrant can only be issued pursuant to the Criminal Rules of Procedure under Rule 5-211 NMRA and HB 83 appears to combine both civil and criminal processes. This legislation should not utilize a criminal process for a civil cause of action.

NMAG highlights that:

This bill impacts a respondent’s Second Amendment right to keep and bear arms. Generally, courts employ intermediate scrutiny to classifications involving the Second Amendment. *State v. Murillo*, 2015-NMCA-046, ¶ 9, 347 P.3d 284. Section 10 of the bill – which details the law enforcement seizure of a respondent’s firearms and ammunition – raises Fourth Amendment implications.

Oregon has a similar law, passed in 2018. See O.R.S. § 166.543. It does not appear that a constitutional challenge to this provision has been pursued or at least there is no case on the subject yet.

The court need only find a preponderance of the evidence to warrant a year-long order but must find probable cause to warrant the issuance of an order under Section 5. It is unclear why the standard of proof is lower for the year-long order. Seizure of firearms under this section – if there is no probable cause finding – would be potentially violating the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution.

PERFORMANCE IMPLICATIONS

The timelines outlined in HB 83 will likely have significant performance implications for the judiciary. At a minimum, implementation of HB 83 will require a cell phone for the after-hours judge and additional staffing to ensure requests for ex parte orders are reviewed and issued the same day and that hearings are scheduled and held within the ten day time frame.

ADMINISTRATIVE IMPLICATIONS

By its terms, the bill will require the AOC to draft a petition form with instructions for completion and to report all such extreme risk protection orders to the FBI. See Sections 3 and 12. The bill also requires district court to issue, decide, extend, and possibly terminate the orders. See Sections 5-8. Law enforcement agencies are tasked with serving the orders, seizing the weapons, retaining the weapons, and disposing or returning the weapons upon expiration of the order. See Sections 10 and 11.

This legislation would require the courts and law enforcement to set up a new system to handle the issuance of ERPOs and the relinquishment and storage of firearms and ammunition. These additional responsibilities are likely to strain both the finances and personnel for the judiciary and law enforcement. This legislation would have a significant impact on self-help centers, clerk offices, judges and hearing officers throughout the judiciary that would need to implement different processes and procedures to comply with HB 83.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

AOC highlighted:

Section 12 of HB 83 conflicts with Section 34-9-19 NMSA 1978 by requiring the AOC to report a respondent subject to an ERPO to the federal bureau of investigation's national instant criminal background check system (NICS) "no later than one business day" after issuing, extending, dissolving or terminating an order subject to this new act. This time period is much shorter than the time frame provided in Section 34-9-19(A) NMSA 1978 of "as soon as practicable within ten day of receipt of the information . . . to update, correct, modify or remove information affecting a person's eligibility to receive or possess a firearm or ammunition . . . in the national instant criminal background system."

TECHNICAL ISSUES

The showing necessary to warrant an ex parte temporary extreme risk protection order appears to be the same as that for the emergency extreme risk protection orders. It is unclear why there are two separate sections.

Section 10(D) in HB 83 states "a court that has probable cause to believe a respondent has custody or control of, owns or possesses firearms or ammunition that the respondent failed to relinquish pursuant to this section . . . shall issue . . . a search warrant." As drafted, HB 83 is placing the court in the position of both determining whether probable cause exists and issuing a search warrant. Law enforcement usually drafts a probable cause affidavit and requests the court to consider issuing a search warrant. According to AOC, as drafted, "HB 83 would have the court issue a warrant sua sponte and does not delineate who should execute the search warrant."

Furthermore, AOC writes that "section 11(E) states 'law enforcement . . . may dispose of the firearm or ammunition six months from the date of proper notice to the respondent of the intent to dispose of the firearm or ammunition unless the firearm or ammunition is claimed by the lawful owner.' This legislation does not include any reference requiring law enforcement to provide the respondent with notice of the intent to dispose of the firearm or ammunition. Section 11 should be changed to require law enforcement to issue notice of 'intent to dispose of firearm and ammunition.'"

OTHER SUBSTANTIVE ISSUES

The judiciary recommends a list of amendments to HB 83, which are attached.

AMENDMENTS

The House Consumer and Public Affairs Committee amendment to HB 83 changes the language of Section 13, Subsection A. Originally, Section 13(A) provided for immunity from civil and criminal liability to any person “who files a petition, provides information or otherwise participates in proceedings authorized by the Extreme Protection Order Act,” unless that person “acted in bad faith or with malicious purpose.” After the amendment, that section now provides for immunity as long as “the person acted with reasonable care.”

The amendment is not a significant substantive, and does not alter the performance implications or the fiscal implications of this bill. The NMAG notes that the “amendment does, however, create a significant issue regarding the interpretation of the language contained in the amendment, which is a more vague standard for determining immunity from liability than the standard established by the language contained in the original bill.”

IT/al/gb

**ADMINISTRATIVE OFFICE OF THE COURTS
BILL ANALYSIS
2019 REGULAR SESSION**

*This bill analysis is submitted by the AOC and shall not be construed
as a submission by the Supreme Court or any other court.*

AMENDMENTS

The judiciary recommends the following amendment to HB 83:

Section 1 should change the name of this act from the “Extreme Risk Protection Order Act” to the “Gun Violence Protection Act” and change all references to an “Extreme Risk Protection Order” in this legislation to “Gun Violence Protection Order”.

Section 3 should be changed as follows:

- Subsection A should be changed from “a petitioner may seek an extreme risk protection order . . . either where the petitioner or respondent resides or is *sheltered*” to, “where an alleged victim of domestic violence resides or is *found*”. This change would mirror the language in section 40-13-2(C) NMSA 1978 of the Family Violence Protection Act.
- Subsection A should be changed from “Law enforcement agencies and the clerk of the court shall make available upon request standard simplified petition forms with instructions for completion approved by the administrative office of the courts” to “Standard simplified petition forms with instruction for completion shall be available to all parties. Law enforcement agencies shall keep such forms and make them available upon request”. This change mirrors language in the Family Violence Protection Act and shifts the responsibility away from law enforcement and/or the court having to develop and make petition forms available. Ultimately, the Supreme Court would be the final authority of creating and approving forms for use under this new act.
- Subsection C(1) should be changed from “the name and address of the petitioner; provided that upon the request of petitioner, the address shall not be listed on the petition but shall be disclosed to the court” to “the name and address of the petitioner; provided that upon request of petitioner, the address may be sealed by the court”. As written, HB 83 would be overly burdensome for the court to accommodate and it would be easier to merely seal the petitioner’s address.
- Subsection C(1) should be changed from “if known, the respondent’s name and address”. to “the name and address of the respondent”. The petition should not be filed without including both the name address of the respondent since law enforcement must execute the search warrant at the respondent’s address.
- Subsection E is awkwardly worded and would suggest changing it to read, “Any healthcare information provided in the petition is sealed, except under the following circumstances . . .”

- Delete Subsection F, which reads: “aggregate statistical data indicating the number of extreme risk protection orders issued, renewed denied, dissolved or terminated”. HB 83 requires the district court or court administrator to compile statistics to be available upon request. This is exceptionally time consuming and is very broad as written. No other state requires this type of statistical data. Only Massachusetts has a data requirement which is an annual report.

Change Section 7(B) which reads, “Before issuing a one-year extreme risk protection order, the *court* shall ensure that a reasonable search has been conducted for: criminal history records related to the respondent; and civil orders of protection or restraining orders related to the respondent” to “Before issuing a one-year extreme risk protection order, the [*Attorney General or District Attorney*] shall ensure that a reasonable search has been conducted for: criminal history records related to the respondent; and civil orders of protection or restraining orders related to the respondent” As mentioned before, the court should not be required to actively research the criminal and civil history of the respondent. The court does not have access to any national database where this information may readily be found.

Change Section 8(B) which reads, “The hearing shall occur no sooner than fourteen days and no later than thirty days *from the date of service of the request upon the petitioner*” to “The hearing shall occur no sooner than fourteen days and no later than thirty days *from the date the notice of termination is received from the respondent*”.

Change Section 9(A) which reads "A petitioner may request extension of a one-year ERPO at any time within the three months before the expiration of the order" to “A petitioner that would like to extend the ERPO may file a request prior to the ERPO’s expiration with ample time to allow the court to set a hearing to determine if circumstances still exist to warrant the extension of the one-year ERPO”. This change would better align with Section 11(A) that directs law enforcement to notify the petitioner that the order will expire “Thirty day prior to the expiration of the one-year ERPO”.

Section 12 which reads “No later than one business day after a court issues . . . an extreme risk protection order” to “As soon as practicable within ten days after a court issues, extends, dissolves or terminates an emergency, ex parte or one-year ERPO . . . the administrative office of the courts . . . shall electronically transmit information from the court proceedings . . . to the federal bureau of investigation’s national instant criminal background check system”. This change would align HB 83 with the time frame provided for in Section 34-9-19(A) NMSA 1978.