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FISCAL IMPACT REPORT

SPONSOR Ely/Armstrong, D/Garratt **ORIGINAL DATE** 1/29/2020 **LAST UPDATED** 2/01/2020 **HB** 7
SHORT TITLE Extreme Risk Firearm Protection Order Act **SB** _____
ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications			See Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 5
 Relates to HB 35, HB 113, HB 114

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Law Offices of the Public Defender (PDD)
 Municipal League
 New Mexico Counties
 Administrative Office of the District Attorneys (AODA)
 Department of Public Safety (DPS)
 Department of Health (DOH)
 New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

House Bill 7 creates the Extreme Risk Firearm Protection Order Act (“ERFPO Act”). The Act provides for a new civil process where a household member or a law enforcement officer can petition the appropriate district court for an extreme risk firearm protective order (“ERFP Order”) against an individual respondent 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 ERFPO Order, the court shall issue a search warrant that describes the firearm or ammunition, authorizes a search of the location where the firearm or ammunition is reasonably believed to be, and authorizes the seizure of any firearm or ammunition relinquished or discovered during the search. A person who obtains or possesses a firearm or ammunition in violation of an ERFPO Order is guilty of a misdemeanor, punishable under Section 31-19-1 NMSA 1978.

Sections 3 through 7 of HB 7 outline three different types of ERFPO Orders.

1. Emergency ERFPO Order – Issued when a law enforcement officer states to the district court the need for an emergency ERFPO Order and the court finds there is probable cause to believe an individual “poses an immediate danger of causing personal injury to self or others by having custody, control or possession of a firearm or ammunition.” The district court is required to hold a hearing within fifteen days after the order is issued to determine if a one-year ERFPO Order shall be issued. The emergency ERFPO Order remains in effect until the hearing is held. A district judge must be made available in each judicial district to hear petitions for an emergency ERFPO Order.
2. Ex Parte Temporary ERFPO Order – A household member or law enforcement officer, as defined in the ERFPO Act, requests a district court to issue an ex parte temporary ERFPO Order by including in the petition for a one-year ERFPO Order a sworn statement alleging that an individual poses an immediate danger of causing personal injury by possessing or obtaining a firearm or ammunition. The district court must immediately issue an ex parte order upon a finding of probable cause. If the order is granted, the district court is required to hold a hearing within fifteen days to determine if a one-year ERFPO Order shall be issued. The ex parte ERFPO Order remains in effect until the hearing is held. If the order is denied, the district court shall hold a hearing within ten days on the petition for a one-year ERFPO Order.
3. One-Year Order – At a hearing, the district court shall issue a one-year ERFPO Order if the court finds by a preponderance of the evidence that the respondent poses a significant danger to self or others by possessing or obtaining a firearm.

HB7 permits a respondent against whom a one-year ERFPO Order has been issued to submit one request for a hearing to terminate the order at any time while the order is in effect. HB7 permits a petitioner to ask that a one-year ERFPO Order be extended for an additional year at any time within three months before the order expires.

HB7 provides a process for seizure and relinquishment of firearms and ammunition when an ERFPO Order is issued and for their return at the expiration of the order. If a firearm or ammunition is not claimed within six months after a law enforcement agency has notified a respondent, the law enforcement agency may destroy the firearm or ammunition or sell it to a licensed firearms dealer.

HB7 requires a person who has custody of a firearm and resides with a respondent subject to an ERFPO Order to safely secure the firearm as provided in the bill. Violation of this provision is punishable as a misdemeanor.

HB7 amends the Concealed Handgun Carry Act to provide that a concealed handgun license cannot be issued to someone who is subject to an ERFPP Order.

The effective date of this bill is July 1, 2020.

FISCAL IMPLICATIONS

AOC states that district courts, which are responsible for issuing ERFPP Orders, may be impacted by HB7's requirements if numerous requests for ERFPP Orders are filed. Implementation of this new law may result in courts requesting additional judicial positions to accommodate additional responsibilities to comply with HB7, including approving after-hours (emergency) petitions, requests for warrants and reviewing ex parte petitions.

AODA states that the bill creates two new crimes with misdemeanor penalties 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 HB 7 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 the bill may result in indeterminate costs to DPS for additional recordkeeping and tickler systems, additional storage space for guns and ammunition, additional training, notifications to petitioners and respondents and the provision of forms for petitions and instructions for their completion.

SIGNIFICANT ISSUES

According to DPS, HB7, 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 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 8th highest firearm suicide rate in the U.S., the 9th highest overall firearm death rate, and the 20th 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 to 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 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)

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, ERPO 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, <http://pediatrics.aappublications.org/content/130/5/e1416.full>)

HB7 is New Mexico’s version of a so-called “red flag” gun law. AOC explains HB 7’s focus is on removing firearms from individuals that pose an immediate danger to themselves or others. Proponents claim that the special protective orders may help prevent suicides and mass shootings by individuals who are suffering from severe mental issues and have access to firearms. According to AOC, 17 states (California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia have enacted legislation similar to HB7. NMAG states 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).

Several agencies note that HB7 raises certain constitutional issues. First, 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. Second, 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. Finally, NMAG states that Section 10 of the bill – which details the seizure of a respondent’s firearms and ammunition by law enforcement officers – has Fourth Amendment implications.

According to NMAG, it is unclear how ERFPO Orders will interact with the Domestic Violence Protection Orders currently authorized under Family Violence Protection Act, NMSA 1979, Sections 40-13-1 to 13. Specifically, Section 40-13-5, effective on July 1, 2019, includes provisions allowing the courts to order the restrained party to deliver any firearms in their possession to law enforcement. *See* § 40-13-5(A)(2)(a)-(b). Section 40-13-13, also effective July 1, 2019, sets out extensive procedures governing the relinquishment or seizure of firearms from respondents pursuant to a lawful search or discovered in plain sight.

AOC expresses a general concern with the burden the bill places on household members who are expected to petition a district court for an ERFP Order and litigate the case. In addition, situations may arise where a petitioner misuses or abuses the law by falsely alleging that a household member is a threat. To alleviate these concerns, AOC suggests that, as in other states with similar legislation, HB7 allow only law enforcement or other state officials with the necessary training and experience to file ERFP Order petitions.

AOC suggests that the definition of petitioner might be expanded to include individuals in addition to household members that may have information that an individual poses an immediate danger of causing harm to themselves or others. Other states allow individuals such as employers, coworkers, mental health professionals, medical professionals, educators, and school administrators to file a petition.

AOC has identified issues with the following sections of HB7:

- Section 5-emergency ERFP Orders. According to AOC, accommodating a hearing within 15 days of issuing an emergency order may be extremely difficult for a court. AOC also notes that HB7 does not prevent law enforcement from seeking an emergency ERFP Order outside of traditional business hours, so the court will need to ensure that judges are available at all times to consider a request for an emergency order.
- Section 7(B)-one-year ERFP Orders. AOC believes this provision improperly places responsibility on the district court to search databases for criminal history records and orders of protection related to the respondent prior to issuing a one-year ERFP Order. AOC notes that district courts have access to a statewide case management system, they do not have access to any national database where the required information may readily be found.
- Section 8-termination of ERFP Orders. The first sentence of Section 8(B) requires the court to set a date for hearing upon receipt of a respondent's request for termination. The remainder of the provision requires service of the termination notice on the petitioner and states that the hearing shall occur no sooner than fourteen days and no later than thirty days from the date of service of the termination request on the petitioner. To avoid any ambiguity concerning when the court should set the hearing date, the first sentence might be changed to require the court to set the hearing date when the petitioner is served with the termination notice, rather than upon receipt of the termination request. AOC points out that using the date of service to set the hearing date creates some uncertainty regarding the timing of the hearing because it is not possible to predict when a petitioner may be served with the notice.
- Section 10 – relinquishment of firearms and ammunition. AOC is concerned with the bill's requirement that a court issue a search warrant when an ERFP Order is issued and the court finds probable cause that the respondent possesses a firearm. AOC notes that since HB7 allows a household member to obtain an ex parte ERFPO, a judge could issue a search warrant to seize firearms and ammunition without a hearing or notice to the respondent. The bill does not address the effect of the search warrant on firearms belonging to persons residing with a respondent.

AODA addresses Section 14's requirement that a person who possesses a firearm and resides with a respondent subject to an ERFP Order secure the firearm so it is not accessible to the respondent. A person who violates the requirement is guilty of a misdemeanor. AODA notes that, as written, a person could violate the requirement even if they had no actual or constructive

knowledge that the person they were residing with was subject to an ERFPO Order. AODA suggests that, as in other criminal statutes, HB7 require that the person “knew or should have known” that they were residing with a respondent subject to an ERFPO Order.

LOPD notes that the bill may have a disparate impact on respondents who are indigent. The fact that a “respondent may seek the advice of an attorney” (Section 5(E)(6)) does not ensure the availability of an attorney for poor or disadvantaged persons who cannot afford to pay for a consultation. A public defender is currently only provided to individuals charged with crimes punishable with jail time. Other states with laws similar to HB7, such as Colorado, have mandated that an attorney be appointed to represent respondents at a hearing on the issuance of an ERFPO Order.

The Municipal League focuses on HB7’s provisions allowing ERFPO Orders to be issued at the request of a petitioner after an ex parte hearing held without notice to the respondent. Hand gun ownership is a right guaranteed by the federal and New Mexico Constitutions and should be protected. The Municipal League notes that the standard for issuing such orders is probable cause, which is relatively easy to meet. In contrast, the preponderance of evidence standard for a respondent to prevail in a request for termination of an order is significantly greater.

ADMINISTRATIVE IMPLICATIONS

AOC notes that HB7 would have significant performance implications for the judiciary, in particular due to standards required for an emergency ERFPO Order and the need to have a judge on-call to process the requests. HB7’s requirement that the district courts or court administrator keep “aggregate statistical data indicating the number of extreme risk protection orders issued, renewed denied, dissolved or terminated” would be exceptionally time consuming. Further, according to AOC, HB7 would require the courts and law enforcement to set up completely new systems to handle the issuance of ERFPO Orders and the relinquishment and storage of firearms and ammunition. These additional responsibilities would likely put a strain on 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 HB7.

AODA states HB7 might create additional training, case management and office hardware needs, as well as more personnel.

LOPD states that to the extent HB7 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, district attorneys, LOPD and the Corrections Department.

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 and ammunition 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 and ammunition. HB7’s amendments to the New Mexico Concealed Handgun Carry Act disqualifying applicants for a concealed handgun license if they are subject to an ERFPO Order will require additional training of officers and DPS employees involved in the issuance of concealed handgun carry licenses.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates SB 5

Relates to:

HB 35-increases sentence enhancements for a firearm used in a crime

HB 113-increases the penalty for a felon in possession of a firearm

HB 114-creates crime of carrying a firearm while trafficking a controlled substance

TECHNICAL ISSUES

Section 6(D) of HB7 contains a drafting error. In the first sentence, the language after the semi-colon (on line 18), which begins “provided that if notice of hearing cannot be served...” does not make sense in the context of the rest of the provision. Section 6(D) addresses the situation where an “ex parte temporary” ERFPO Order is not granted, but the proviso refers to a 72-hour period for serving a notice of hearing and continuation of an “emergency” ERFPO Order. Emergency orders are covered in Section 5 of the bill. It appears that the language may be left over from a previous version of the bill and should be deleted.

Section 9(E) provides that an extension of an ERFPO Order expires after one year, “subject to termination by further order of the court at a hearing held pursuant to Subsection B of this section.” The reference to “termination” appears to be an error since Subsection 9(B) relates to a hearing on a petitioner’s request for an extension of an ERFPO Order.

OTHER SUBSTANTIVE ISSUES

AODA notes that Section 13(A) provides immunity for a person who petitions the court or otherwise provides information or participates in proceedings to have firearms removed from another, provided that the person acts with reasonable care. AODA suggests that the reasonable care standard may be too broad and could potentially confer immunity on persons who make allegations about another out of spite, ill will, revenge, etc., to prevent that person from owning or possessing firearms.

The Municipal League similarly notes that HB7 provides no protection to respondents from petitions that are filed in bad faith or that are motivated by anger or revenge.

AMENDMENTS

AOC suggests the following amendments:

1. Section 3(A).

The first sentence, which states “A petitioner may seek an extreme risk protection order by filing a petition in the ... judicial district where either the petitioner or respondent resides or is *sheltered*” might be changed to, where “the petitioner or respondent “resides or is *found*.” This change would mirror the language in Section 40-13-2(C) NMSA 1978 of the Family Violence Protection Act.

The second sentence, which states “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” might be changed 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 for creating and approving forms for use under the ERFPO Act.

2. Section 3(C)(2). The requirement that a petition for an ERFPO Order contain “if known, the respondent’s name and address” should be changed to read, “the name and address of the respondent.” The petition should not be filed without including both the name and address of the respondent since law enforcement must execute the search warrant at the respondent’s address.
3. Section 12. AOC suggests that the provision be changed so that it is consistent with Section 34-9-19(A) NMSA 1978, which makes AOC responsible for “notifying, as soon as practicable within ten days of the receipt of the information, the federal bureau of investigations to update, correct, modify or remove information affecting a person’s eligibility to receive or possess a firearm or ammunition pursuant to state or federal law in the national instant criminal background check system.”

BG/al