



LRO SNAPSHOT

A policy brief from the Legislative Research Office

Raising Red Flags: Mental health and Firearms

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The tragic effects of mass shootings are far reaching and everlasting. As communities across the country struggle to deal with the aftermath, policymakers are wrestling with the dilemma created by these tragedies. Can they be prevented? Is there any way to prevent future incidents? How can policymakers keep firearms out of the hands of potentially violent people, while preserving constitutional protections?

Red flag laws, extreme risk protection orders (ERPOs), and gun violence restraining orders are all names for a new type of measure states are using to address gun violence. Thirteen states¹ have enacted some form of red flag legislation. In January, New York legislators passed a red flag bill that the Governor is expected to sign. Meanwhile, measures are pending in at least five states, including Nebraska, where Senator Adam Morfeld has introduced LB 58, the Extreme Risk Protection Order Act.

How do red flag laws work?

Red flag laws provide a process for law enforcement, family members, and other concerned persons to petition a court for a type of restraining order that authorizes law enforcement to temporarily take guns from individuals whose behavior indicates they may harm themselves or others, but who have not otherwise committed a crime.

Typically, petitioners must present evidence alleging an individual poses an extreme risk of causing harm to self or others by possessing firearms (although knowing whether someone actually possesses firearms is not required in every state). Evidence can include recent acts or threats of acts of violence; relevant criminal, mental health, or substance abuse history; violations of other protection orders; recklessly brandishing firearms; or the recent acquisition of firearms.

Gun restraining orders can be issued ex parte, meaning without prior notice to the subject named in the petition. Whether or not an ex parte order is issued, a hearing at which the subject of the petition can attend must be held before a final order is issued. The judge then determines whether to issue (if an ex parte order was not first issued) or extend a gun restraining order. Usually, the effective

period for a final gun restraining order is a year, although several states set the time at no more than six months. The orders can be renewed, and most states allow the subject of an order to seek early termination.

States also can confiscate or suspend concealed carry permits or firearm purchase certificates, some confiscate ammunition; and two states broaden the orders beyond firearms to include explosives (Vermont) and deadly weapons (Oregon).

Is there any evidence they work?

Generally, it is too early to tell whether red flag laws work. The majority of red flag laws were enacted in 2018; only two states had laws in place prior to 2014, allowing little time for extensive study.

Two studies to date have focused on the laws' effects on suicides, which the Centers for Disease Control and Prevention states constitute the majority of gun deaths in the United States. Researchers at Duke University studied Connecticut's risk warrant law, reviewing 762 risk warrants issued from 1999 to 2013. They concluded the law had the effect of preventing one suicide for every 10 to 20 guns seized.² Additionally, the majority of persons for whom the risk warrants were issued had no prior contact with the public behavioral health system, leading researchers to conclude the law provided a portal to mental health and substance abuse services.

Another study of both Connecticut's and Indiana's laws found a reduction in gun suicides in those states after passage of their laws.³

“Many mass shooters displayed warning signs prior to their killings, but federal and state laws provided no clear legal process to suspend the shooters’ access to guns, even temporarily.”

- Washington's Extreme Risk Protection Order Act, Rev. Code Wash. 7.94.010(4).

1. California, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, and Washington.

2. Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides? Swanson, J.W., et al, 2016, Law and Contemporary Problems, pgs. 179-208.

3. Effects of Risk-Based Firearms Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015, A.J. Kivisto and P.L. Phalen, Psychiatric Services, June 1, 2018.



Red Flag Laws in the United States

State (year enacted)	Allowable Petitioner	Standard for issuing ex parte or emergency protection order	Criminal database reporting
Connecticut (1999)	State's attorney or assistant state's attorney; any two law enforcement officers.	Probable cause person poses risk of imminent personal injury to self or others.	Not in statute.
Indiana (2005)	Law enforcement.	Probable cause person is dangerous and possesses a firearm.	Not in statute.
California (2014)	Immediate family member, including domestic partner; law enforcement	Substantial likelihood affidavit is true. Subject represents an immediate and present danger.	Yes.
Washington (2016)	Family or "household member" – including domestic partners; Law enforcement.	Preponderance of the evidence respondent poses significant danger in near future.	Yes.
Oregon (2017)	Law enforcement; family or household member.	Clear and convincing evidence subject presents a risk in the near future, including imminent risk of suicide or harm to others.	Yes.
Delaware (2018)	Family member, including former spouses, dating relationships; law enforcement	Preponderance of the evidence of an immediate and present danger.	Not in statute.
Illinois (2018)	Family member or housemate; law enforcement	Probable cause.	Yes
Florida (2018)	Law enforcement.	Reasonable cause to believe.	Yes.
Maryland (2018)	Law enforcement, family members, roommates, specified health professionals.	Probable cause.	Not in statute.
Massachusetts (2018)	Family or household member; law enforcement.	Cause to conclude subject poses risk of causing bodily injury by possessing firearms.	Yes.
New Jersey (2018)	Family or household member; law enforcement.	Good cause to believe.	Yes.
Rhode Island (2018)	Law enforcement.	Probable cause subject of petition poses significant danger of causing imminent injury.	Yes.
Vermont (2018)	State's Attorney, Office of the Attorney General.	By a preponderance of the evidence subject poses an imminent and extreme risk.	Not in statute.

There is evidence the laws are being used. Maryland reported receiving more than 302 requests for gun restraining orders in the first three months after its law took effect and Florida, whose law passed in the wake of the Parkland school shooting, ordered more than 450 persons to surrender guns in the first four months its law was operative.

What's the argument against them?

Unlike many gun control measures, red flag laws find bipartisan political support. In polls, Americans tend to support the idea that law enforcement should be able to keep firearms out of the hands of violent or mentally unstable people.

However, since red flag laws involve firearms restrictions, their constitutionality under the Second Amendment will be questioned. Additionally, opponents see a potential violation of due process because the measures allow firearms to be confiscated under the authority of emergency, ex parte warrants. To other critics, red flag laws paint an inaccurate picture of the majority of persons with mental illness, who are more likely to be victims than perpetrators of violent crime.

Appellate courts in Connecticut and Indiana have upheld challenges to their respective states' laws. In a Second Amendment challenge in Connecticut, the court found the

law "does not implicate the second amendment as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes; sec. 29-38c restricts for up to one year the rights of only those whom a court has adjudicated to pose a risk of imminent physical harm to themselves or others after affording due process. ..."⁴

To address some of their concerns, opponents have suggested red flag laws should:

- Include criminal penalties for bringing false or frivolous charges.
- Require proof, by clear and convincing evidence, that an individual is a danger to self or others.
- Provide a statutory process for returning firearms after an order terminates.
- If an emergency ex parte order is unavoidable, to timely schedule a full hearing.
- Include admittance to a treatment facility.
- Provide that gun restraining orders lapse in the shortest time possible—some have said a month—unless, by clear and convincing evidence, the identified danger persists.

4. Hope v. State of Connecticut, 133 A.3d 519 (2016).