

Health Care Professionals Now Allowed to Obtain Extreme Risk Protection Orders

Sadly, disruptive patient behavior is increasingly becoming more common in medical offices. According to the American Hospital Association, 44 percent of nurses reported experiencing physical violence and 68 reported experiencing verbal abuse during the COVID-19 pandemic.¹ The Occupational Health and Safety Administration (OSHA) states that health care and social service workers face an increased risk of work-related assaults resulting from violent behavior of their patients, clients, or residents across all settings, and has published a guidance document to help prevent violence against health care workers.²

Effective in August 2019, New York State passed a “red flag law” known as the Extreme Risk Protection Act.³ This law allows law enforcement, school staff, family, and housemates to file an application in New York State Supreme Court for an Extreme Risk Protection Order (ERPO) barring an individual from buying firearms if the court finds the individual is a danger to themselves or others. This year, Governor Hochul signed a significant amendment to the law, to include certain medical professionals in the list of individuals who may petition for an ERPO. The list of petitioners now includes physicians, psychiatrists, psychologists, RNs, licensed clinical social workers, certified clinical nurse specialists, certified NPs, licensed clinical marriage and family therapists, registered professional nurses, and licensed master social workers or licensed mental health counselors. In order to apply for an ERPO, the health care professional must have treated the person within the six months immediately preceding the filing of the petition.

An ERPO prohibits a person from purchasing or possessing firearms, rifles, or shotguns and requires the person to surrender any guns they already own or possess. An ERPO can also direct the police to search a person, premises, or a vehicle for firearms and remove them. The application is a civil proceeding. ERPO cases have no criminal charges or penalties.

The court system has made the process very accessible to the public, including instructions and a fillable online form to apply for the ERPO.⁴ Once filed, the judge will act very quickly. The judge may question the applicant and any witness to determine if there is probable cause to believe that the individual, i.e. the “respondent,” is likely to engage in conduct that would result in serious harm to themselves or others, as defined in the New York Mental Hygiene Law.⁵

¹ “Fact Sheet: Health Care Workplace Violence and Intimidation, and the Need for a Federal Legislative Response,” American Hospital Association, accessed November 18, 2022, <https://www.aha.org/fact-sheets/2022-06-07-fact-sheet-workplace-violence-and-intimidation-and-need-federal-legislative>.

² “Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers,” US Department of Labor, Occupational Safety and Health Administration, accessed November 18, 2022, <https://www.osha.gov/sites/default/files/publications/osha3148.pdf>.

³ New York CPLR §§ 6340-6347.

⁴ “Forms & Instructions – Application for an Extreme Risk Protection Order,” NYCourts.gov, accessed November 18, 2022, <https://ww2.nycourts.gov/erpo>.

⁵ Mental Hygiene Law § 9.39 (a) defines “likelihood to result in serious harm” as: (1) substantial risk of physical harm to himself or herself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he or she is dangerous to himself or herself or (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

In deciding the application, the judge must consider any relevant information, including whether the respondent has threatened or committed violence or physical force against anyone, violated a protection order, been convicted of a crime or is facing charges involving the use of a weapon, used a gun recklessly, recently bought ammunition, or recently abused drugs or alcohol. The judge will make a decision on the application the same day it is filed in court and may make a temporary order. The temporary order must be followed until the judge holds a hearing. The police will serve a copy of a temporary ERPO on the respondent and will remove any guns that the respondent has. The case will get a date for both sides to come to court. At the hearing, both sides get a chance to tell the judge their version of the story. If the judge grants the application, the respondent must follow the order until its expiration date, which is a maximum of one year. The respondent may apply for return of any guns after the ERPO expires, and the applicant may apply for an extension of the ERPO within 60 days of the expiration date.

The amended law also explicitly authorizes health care providers applying for the ERPO to disclose protected health information (PHI) that is necessary for the full investigation and disposition of the application. When disclosing PHI, the provider shall make reasonable efforts to limit the disclosure to the minimum necessary to successfully file the application. The court may also issue orders to obtain any other records or documents relating to diagnosis, prognosis, or treatment and clinical records necessary to investigate and decide the application for the ERPO. All PHI shall be sealed by the court and will not be available to the public. Finally, providers who are applicants are given immunity from civil and criminal liability relating to any disclosure of records or any decision not to disclose records, as long as these decisions are made in good faith.

So far, challenges to the constitutionality of Act have not succeeded. In New York, the Supreme Court of Westchester County held that the law did not violate the Second Amendment right to bear arms, Fourth Amendment protections against unreasonable search and seizure, Sixth Amendment right to counsel, or Fifth Amendment right against self-incrimination.⁶

At present, the Extreme Risk Protection Act is not well known in the medical community. However, it is a very important tool available to health care professionals to provide reassurance to workers who feel threatened, and to prevent gun violence against health care workers by individuals who exhibit warning signs that they pose a risk of harm to themselves or others.

If you have any questions regarding the content of this article, please contact Fran Ciardullo, special counsel, at fciardullo@barclaydamon.com, or another member of Barclay Damon's Health & Human Services Providers Team.

AUTHOR'S BIOGRAPHY

⁶ *Anonymous Detective at Westchester County Police v. A.A.*, 71 Misc. 3d 810 (Sup. Ct. Westchester Co. 2021) .



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As special counsel at Barclay Damon LLP, Fran concentrates her legal practice on health care and risk-management issues. She counsels physicians, physician groups, dentists, hospitals and health systems, nursing homes, and other health care providers on matters involving professional misconduct, professional liability, medical-staff issues, scope of practice, mandated reporting, peer review, and regulatory compliance. Fran also handles consent for treatment and surrogate decision making, patient care, EMTALA, and health-information privacy issues.

A former Town of Schroepfel town justice, Fran is also trained in alternative dispute resolution and has mediated and arbitrated a variety of civil actions and disputes. She routinely publishes industry articles and presents educational programs on legal matters to hospitals, medical and dental practices, and trade associations.