



Firearm Possession “Red Flag” Laws

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In recent years, many state legislatures have considered laws creating extreme risk protection orders, commonly referred to as “red flag laws.” While each state’s legislation differs, red flag laws generally allow courts to temporarily prohibit a person from possessing a firearm based on a showing that the person constitutes an imminent danger. Red flag laws may raise certain constitutional concerns, but have withstood court challenges in at least three states. In Wisconsin, red flag legislation has been introduced, but not enacted, with the issue remaining the subject of public debate.

GENERAL FEATURES OF RED FLAG LAWS

Seventeen states, as well as the District of Columbia, have passed versions of red flag laws, though the provisions of each state’s law vary, making the laws difficult to categorically discuss. That said, red flag laws typically contain the following common elements:

- **Specified petitioners.** Only certain individuals are allowed to petition a court for an order prohibiting an individual from possessing firearms. In some states, only law enforcement may petition, while others allow petitions by health professionals and household members, among others.
- **Ex parte and final orders.** A court typically issues a preliminary, or “ex parte,” order without notice or a hearing. Ex parte orders are in effect for a brief period, typically ranging two to 21 days, depending on the state. After the respondent is given notice of and an opportunity for a hearing, the court may enter a final order if the specified legal standard has been met, resulting in a prohibition on firearm possession for a longer period of time.
- **Legal standard and burden of proof.** The court must make certain findings of fact prior to entering ex parte or final orders. A common legal standard is that an individual poses a significant risk or danger. In addition, some states require that the legal standard be shown by a preponderance of evidence, generally meaning “more likely than not,” or by clear and convincing evidence, a higher burden of proof. In some states, the same legal standard and burden of proof apply to both ex parte and final orders, while other states apply a different standard or burdens to each type of order.
- **Relinquishment process.** Upon entry of an ex parte order, an individual may be required to surrender firearms and ammunition to law enforcement either immediately or within a particular timeline. Additionally, the court may issue a search warrant authorizing seizure by law enforcement.
- **Duration and renewal of order.** In most states, the final order is effective for one year, though some states provide a shorter duration or a petition process for terminating the order. Many states also allow for renewal of the final order before it terminates, by following a similar process.

CONSTITUTIONAL ISSUES

Constitutional concerns regarding red flag laws have primarily focused on two constitutional provisions: (1) the right to keep and bear arms under the Second Amendment to the U.S. Constitution; and (2) the right to due process of law when the government deprives a person of life, liberty, or property under the Fifth and Fourteenth Amendments to the U.S. Constitution. However, limited case law exists concerning red flag laws.

Second Amendment

Under the Second Amendment to the U.S. Constitution, a “well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ Similarly, the Wisconsin Constitution provides that: “The people have the right to keep and bear arms for security,

defense, hunting, recreation, or any other lawful purpose.”² However, the U.S. Supreme Court has recognized that the right to bear arms is not absolute and is limited by the states’ police power to implement reasonable firearms regulations.³

Indiana’s red flag law, upheld in 2013, was challenged on several grounds, including the right to bear arms under the Second Amendment.⁴ The court found that the law did not materially burden the core value of the right to bear arms for self-defense, because it provided a mechanism for regaining the right, did not preclude possession of other weapons for self-defense, and employed a heightened burden of proof, that being the “clear and convincing evidence” standard.

In 2016, a Connecticut appellate court held that Connecticut’s red flag law did not implicate the Second Amendment, because it did not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes, and because the law fell within the “longstanding presumptively lawful regulatory measures that prohibit the possession of firearms by felons and mentally ill persons.”⁵

Due Process

Both the U.S. and Wisconsin Constitutions provide a right to due process of law when the government deprives a person of life, liberty, or property. Very generally, when a person has a protected interest in property, due process requires a person have an “opportunity to be heard at a meaningful time and in a meaningful manner.”⁶ When determining whether those opportunities have been afforded to an individual, courts analyze the following three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the fiscal and administrative burdens that additional or substitute procedural safeguards would entail.⁷ Procedural due process requirements are generally met if the state provides adequate post-deprivation remedies.⁸

Until recently, no appellate court decisions had addressed due process challenges to “red flag” laws. On September 25, 2019, a Florida appellate court concluded that Florida’s law did not violate due process. In support of this conclusion, the court cited the fact that a hearing must be held within 14 days, thereby affording the respondent a prompt opportunity to be heard prior to the entry of a final order. The court also found the law incorporated adequate safeguards, by requiring petitioners to meet the heightened “clear and convincing” burden of proof, limiting the duration of the order to 12 months, and including a mechanism for the respondent to request early termination of the order.⁹

WISCONSIN

Wisconsin has not adopted a red flag law, but does require the surrender of firearms as a consequence upon conclusion of certain proceedings, such as mental health commitments and restraining orders. Recently, lawmakers have introduced LRB-4383/1, which would authorize a law enforcement officer or a person’s family or household member to petition a court for an “extreme risk protection order.” Under the bill, the court may grant an injunction prohibiting the respondent from possessing a firearm, effective for a period up to one year, if the court finds “by clear and convincing evidence that the respondent is substantially likely to injure the respondent or another person if the respondent possesses a firearm.”

¹ U.S. Const. amend. 2.

² Wis. Const. art. I, s. 25.

³ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴ *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013).

⁵ *Hope v. State*, 133 A. 3d 519 (Conn. App. Ct. 2016).

⁶ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁷ *Id.* at 335.

⁸ *Thorp v. Town of Lebanon*, 2000 WI 60 ¶ 53.

⁹ *Davis v. Gilchrist Cty. Sheriff’s Office*, No. 1D18-3938 (Fla. Dist. Ct. App. Sept. 25, 2019).