



## Firearm Possession “Red Flag” Laws

Prepared by: Amber Otis, Senior Staff Attorney

In recent years, a number of 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 various constitutional issues, 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

Several states have passed versions of red flag laws, though the provisions of each vary, making the laws difficult to categorically discuss. That said, red flag laws tend to 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 questions regarding red flag laws have primarily focused on two provisions: (1) the right to bear arms under the U.S. Constitution’s Second Amendment; 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 regarding red flag laws.

### Second Amendment

Both the U.S. and Wisconsin Constitutions protect the right of people to keep and bear arms.<sup>1</sup> The U.S. Supreme Court has held that the Second Amendment protects an individual’s right to possess a firearm and to use that firearm for lawful purposes such as self-defense, though the Court also identified certain presumptively lawful regulatory measures, such as “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places.”<sup>2</sup>

In *New York State Rifle & Pistol Association v. Bruen*, 579 U.S. \_\_\_\_ (2022), the Court held that when the Second Amendment’s plain text covers an individual’s conduct, whether publicly or in the home, such conduct is presumptively protected, unless the government demonstrates that its regulation is consistent with the Nation’s historical tradition of firearm regulation. In *Bruen*, the Court struck down New York State’s requirement that an applicant provide “proper cause” to be issued an unrestricted license to carry a handgun outside his or her home.

Though few state appellate courts have decided cases analyzing red flag laws to date, the limited decisions that do exist have upheld the laws when challenged on Second Amendment grounds.<sup>3</sup> However, those cases were decided pre-*Bruen* and thus did not apply *Bruen*’s test. Future courts will have to determine whether red flag laws implicate a right covered by the constitutional text, and if so, whether a state can demonstrate the law’s consistency with historical traditions of firearm regulation.<sup>4</sup>

## 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.” When determining whether those opportunities have been afforded to an individual, courts analyze: (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. Procedural due process requirements are generally met if the state provides adequate post-deprivation remedies.<sup>5</sup>

Again, few appellate court decisions have addressed due process challenges to “red flag” laws, though in 2019, a Florida appellate court concluded that its red flag law did not violate due process. Within its reasoning, the court cited the specific aspects of the law, including that it affords a respondent a prompt opportunity to be heard prior to the entry of a final order and incorporates other adequate safeguards.<sup>6</sup>

## LEGISLATIVE EFFORTS

Wisconsin has not adopted a red flag law, though legislation has been introduced in recent legislative sessions.<sup>7</sup> Wisconsin law does, however, require firearm surrender as a consequence upon conclusion of certain proceedings, such as mental health commitments and restraining orders. Recently, federal legislation was enacted that, in part, allows states to use certain federal grant funds for “extreme risk protection order programs,” provided such programs meet specified minimum requirements, including certain pre- and post-deprivation procedural rights, the right to be represented by counsel at no expense to the government, and certain heightened evidentiary standards.<sup>8</sup>

---

<sup>1</sup> U.S. Const. amend. 2; Wis. Const. art. I, s. 25.

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>3</sup> See, *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013) (holding that Indiana’s law did not burden the right to bear arms for self-defense, because it had a process for regaining the right, allowed possession of other weapons for self-defense, and used a heightened burden of proof); and *Hope v. State*, 133 A. 3d 519 (Conn. App. Ct. 2016) (holding that Connecticut’s law did not restrict the right to use arms in defense of the home, and fell within the “longstanding presumptively lawful regulatory measures” contemplated by *Heller*).

<sup>4</sup> The *Bruen* Court noted a historical record of regulation in certain “sensitive places” and therefore that “courts can use analogies to those historical regulations . . . to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.” [579 U.S. at \_\_\_\_ (slip. op., at 21).] Concurring opinions written separately by Justice Alito and Justice Kavanaugh both directly reaffirm prior U.S. Supreme Court precedent as to permissible restrictions on the possession or carrying of firearms. See, *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *Heller*, 554 U.S. at 626-27.

<sup>5</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Thorpe v. Town of Lebanon*, 2000 WI 60 ¶ 53.

<sup>6</sup> *Davis v. Gilchrist Cty. Sheriff’s Office*, No. 1D18-3938 (Fla. Dist. Ct. App. Sept. 25, 2019).

<sup>7</sup> See, e.g., 2021 Assembly Bill 638, 2019 Assembly Bill 573, and 2017 Senate Bill 530.

<sup>8</sup> Pub. Law No. 117-159 (expanding the Edward Byrne Memorial Justice Assistance Grant Program).