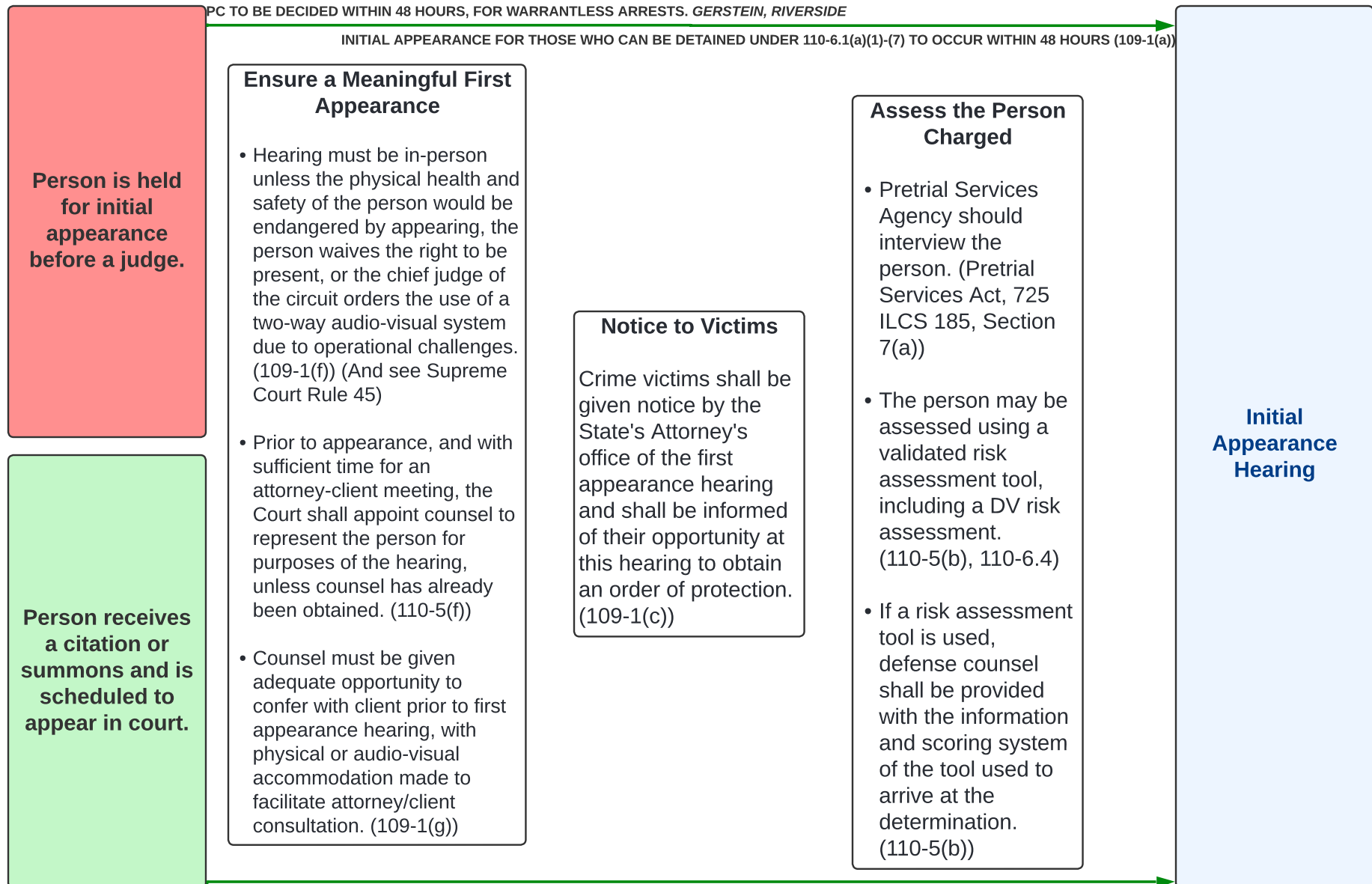


## Pre-First Appearance Activities



## Current as of December 14, 2022 (post-PFA Trailer Bill)

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### Illinois Pretrial Implementation Task Force Pretrial Fairness Act Key Provisions and Implementation Considerations

#### Pre-First Appearance Activities

725 ILCS 5 Reference	Description	Considerations
<b>Court Appearance After Arrest</b>		
109-1(f)	"At the hearing at which conditions of pretrial release are determined, the person charged shall be present in person rather than by two-way audio-video communication system video unless the accused waives the right to be present physically in court, the court determines that the physical health and safety of any person necessary to the proceedings would be endangered by appearing in court, or the chief judge of the circuit orders use of that system due to operational challenges in conducting the hearing in person. Such operational challenges must be documented and approved by the chief judge of the circuit, and a plan to address the challenges through reasonable efforts must be presented and approved by the Administrative Office of the Illinois Courts every 6 months."	<p><u>Interpretation Considerations</u></p> <ul style="list-style-type: none"><li>• This language appears in multiple sections of the PFA, and it applies to all pretrial hearings: first appearances, detention hearings, revocation hearings, sanctions hearings, etc.</li><li>• It addresses the waiver of in-person appearances, and the approval by the court of remote appearances in lieu of an in-person appearance for pretrial hearings. The language should be read in conjunction with Supreme Court Rule 45 on remote appearances. The PFA allows remote appearances in the following situations:<ul style="list-style-type: none"><li>○ The accused waives the right to be present in court.</li><li>○ The court determines that the physical health and safety of any person necessary to the proceedings would be endangered by appearing in court.</li><li>○ The Chief Judge of the circuit allows for virtual proceedings due to operational challenges.</li></ul></li></ul> <p><u>Operational Considerations</u></p> <ul style="list-style-type: none"><li>• If the accused waives the right to be present in court, must their defense counsel be present in court?</li></ul>

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725 ILCS 5 Reference	Description	Considerations
109-1(a)	"A person arrested with or without a warrant for an offense for which pretrial release may be denied under paragraphs (1) through (6) of Section 110-6.1 shall be taken without unnecessary delay before the nearest and most accessible judge in that county except when such county is a participant in a regional jail authority, in which event such person may be taken to the nearest and most accessible judge, irrespective of the county where such judge presides, within 48 hours, and a charge shall be filed."	<p><u>Interpretation Considerations</u></p> <ul style="list-style-type: none"><li>• Under the statute, the timing of first appearance for those who are arrested for an offense listed in section 110-6.1(a)(1) through (a)(6), must be "without unnecessary delay," and "within 48 hours" of arrest. This applies <b>to offenses in which pretrial release may be denied</b>.<ul style="list-style-type: none"><li>○ Stakeholders are questioning and examining whether the calculation of this timeframe includes or excludes weekends or holidays, and whether first appearance hearings must be convened on such days.</li><li>○ Note that the 48 hours requirement only applies to people arrested for an offense listed in subsections (a)(1) through (a)(6). It does not include subsections (a)(6.5), (7), and (8).</li></ul></li><li>• <i>Note</i> there is no language around the timing of the initial appearance for offenses where pretrial release <b>may not be denied</b>.</li><li>• There is consensus that the Supreme Court cases of <i>Gerstein v. Pugh</i> and <i>Riverside v. McLaughlin</i> require that probable cause be established (<i>ex parte</i> is permitted) within 48 hours of custodial arrest for all warrantless arrests.</li></ul> <p><u>Operational Considerations</u></p> <ul style="list-style-type: none"><li>• Even though the law permits two-way audio-visual proceedings, conducting initial appearances within 48 hours of arrest will be challenging for rural counties that do not have a full-time public defender office or an assistant State's Attorney, or that do not hold court on a daily basis.</li></ul>
<b>Access to Counsel</b>		

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Pre-First Appearance Activities-2

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725 ILCS 5 Reference	Description	Considerations
109-1(a-5)	"A person charged with an offense shall be allowed counsel at the hearing at which pretrial release is determined under Article 110 of this Code. If the defendant desires counsel for his or her initial appearance but is unable to obtain counsel, the court shall appoint a public defender or licensed attorney at law of this State to represent him or her."	<u>Interpretation Considerations</u> <ul style="list-style-type: none"><li>• This section, read in conjunction with the sections below, makes clear that people must be given defense counsel for the first appearance hearing. And see the row below for the need to appoint counsel prior to the first appearance hearing.</li></ul>
110-5(f)	"Prior to the defendant's first appearance, and with sufficient time for meaningful attorney-client contact to gather information in order to advocate effectively for the defendant's pretrial release, the court shall appoint the public defender or a licensed attorney at law of this State to represent the defendant for purposes of that hearing, unless the defendant has obtained licensed counsel. Defense counsel shall have access to the same documentary information relied upon by the prosecution and presented to the court."	<u>Interpretation Considerations</u> <ul style="list-style-type: none"><li>• There are questions about whether the requirement to appoint counsel is satisfied once the initial appearance occurs due to the "purposes of that hearing" language. Does this account for representation in subsequent court appearances?</li><li>• This subsection also establishes that the defense must have access to the same information relied upon by the prosecutor in court.</li></ul> <u>Operational Considerations</u> <ul style="list-style-type: none"><li>• Note: 55 ILCS 5/3-4014 establishes a public defender grant program: "the Administrative Office of the Illinois Courts shall establish a grant program for counties for the purpose of training and hiring attorneys on contract to assist the county public defender in pretrial detention hearings."</li><li>• Chief Judges may wish to consider issuing a standing order to appoint the Public Defender or other counsel for all first appearances.</li><li>• The need to provide "sufficient time for meaningful attorney-client contact" in advance of the hearing may pose operational challenges for some counties.</li></ul>

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725 ILCS 5 Reference	Description	Considerations
109-1(g)	“Defense counsel shall be given adequate opportunity to confer with Defendant prior to any hearing in which conditions of release or the detention of the defendant is to be considered, which a physical accommodation made to facilitate attorney/client consultation. If defense counsel needs to confer or consult with the defendant during any hearing conducted via a two-way audio-visual communication system, such consultation shall not be recorded and shall be undertaken consistent with constitutional protections.”	<u>Operational Considerations</u> <ul style="list-style-type: none"><li>• Defense counsel and corrections should collaborate to find space for private/confidential conversations to take place between counsel and the charged person.</li><li>• Note that Covid protocols could make it difficult for defense counsel to meet in-person with their client.</li><li>• Corrections and public defender/defense counsel should collaborate to decide if meeting with a client must be in person or not.</li></ul>
<b>Conducting a Pretrial Assessment</b>		
Pretrial Services Act, 725 ILCS 185/7(a), (b)	<p>“ Pretrial services agencies shall perform the following duties for the circuit court:</p> <p>(a) Interview and assemble verified information and data concerning the community ties, employment, residency, criminal record, and social background of arrested persons who are to be, or have been, presented in court for first appearance on felony charges, to assist the court in determining the appropriate terms and conditions of pretrial release;</p> <p>(b) Submit written reports of those investigations to the court along with such findings and recommendations, if any, as may be necessary to assess appropriate conditions which shall be imposed to protect against the risks of nonappearance and</p>	<u>Operational Considerations</u> <ul style="list-style-type: none"><li>• The Office of State Pretrial Services and other pretrial services agencies may need the time and opportunity to interview the person and prepare a report in advance of the hearing.<ul style="list-style-type: none"><li>○ If that is the case, pretrial services agencies must coordinate with corrections to create a timely process as well as space for an interview to occur, and/or if the interview must be done in person.</li><li>○ However, note that under 110-6.4, if a risk assessment is used within a circuit that does not require a personal interview to be completed, the Chief Judge of the circuit or the director of the pretrial services agency may exempt the interview requirement under the Pretrial Services Act.</li></ul></li></ul>

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725 ILCS 5 Reference	Description	Considerations
	commission of new offenses or other interference with the orderly administration of justice before trial.”	
110-5(b)	“The Court may use a regularly validated risk assessment tool to aid its determination of appropriate conditions of release as provided for in Section 110-6.4. If a risk assessment tool is used, the defendant's counsel shall be provided with the information and scoring system of the risk assessment tool used to arrive at the determination. The defendant retains the right to challenge the validity of a risk assessment tool used by the court and to present evidence relevant to the defendant's challenge.”	<p><u>Operational Considerations</u></p> <ul style="list-style-type: none"><li>• The Office of Statewide Pretrial Services (OSPS) and other pretrial services agencies who use a risk assessment tool, must have time to conduct a validated assessment tool and prepare a report for the Court.</li><li>• This section applies to all assessment tools used, including DV-related risk assessment tools.</li></ul> <p><u>Impact on the Cindy Bischof Law</u></p> <ul style="list-style-type: none"><li>• The PFA repealed 110-5(f)(12) and replaced it with 110-5(b), the provision that governs risk assessments generally. This was intended to increase the ability of courts to use DV-specific risk assessments.</li><li>• The PFA did not repeal the Cindy Bischof Law, which focuses on ensuring people accused of violating Orders of Protection received proper attention and evaluation. Mandatory conditions such as staying away from the victim and the victim's home for 72 hours remain in effect. Over time, language was added to that section of the law that created specific requirements around the use of risk assessments in domestic violence situations. The PFA removed those restrictions from 110-5 at the urging of advocates against domestic violence, who said that they were actually limiting the use of risk assessments in these cases. Now, risk assessment tools in domestic violence cases are governed by 110-5(b) and (d) (which</li></ul>

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Pre-First Appearance Activities-5

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725 ILCS 5 Reference	Description	Considerations
		<p>allows the court to consider the results of assessments for purposes of deciding how to respond to a violation of a protective order).</p> <ul style="list-style-type: none"><li>• In addition, the PFA establishes a Domestic Violence Pretrial Practice Working Group convened by the Illinois Criminal Justice Information Authority (<a href="#">20 ILCS 3930/7.8</a>). This working group will issue a final report issuing recommendations for evidence-based improvements to court procedures.</li></ul>
<b>Protecting Victims</b>		
109-1(c)	"The court may issue an order of protection in accordance with the provisions of Article 112A of this Code. Crime victims shall be given notice by the State's Attorney's office of this hearing as required in paragraph (2) of subsection (b) of Section 4.5 the Rights of Crime Victims and Witnesses Act and shall be informed of their opportunity at this hearing to obtain an order of protection under Article 112A of this Code."	<p><u>Interpretation Considerations</u></p> <ul style="list-style-type: none"><li>• This section requires the State's Attorney's office to give notice to crime victims of the initial hearing.</li><li>• Note that the definition of "court proceedings" in the Rights of Crime Victims and Witnesses Act was amended so that it no longer excludes initial appearances. See 725 ILCS 120/3(e) (page 278 of HB 1095).</li></ul> <p><u>Operational Considerations</u></p> <ul style="list-style-type: none"><li>• State's Attorney's offices should have a policy and process (and a form) to provide notice to crime victims, sufficient time in advance of the scheduled date.</li><li>• State's Attorneys should be prepared to seek orders of protection at the initial appearance.</li><li>• If court hearings will be held on the weekend, victim assistance groups must be notified to ensure assistance is available to victims as needed.</li></ul>