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FISCAL IMPACT REPORT

SPONSOR Romero/Serrato LAST UPDATED _____
ORIGINAL DATE 2/7/2023
BILL _____
SHORT TITLE 14 Day Waiting Period for Firearm Sales NUMBER House Bill 100
ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to County Jails	Indeterminate but minimal	At least \$9.6 to \$19.2	At least \$9.6 \$19.2	At least \$19.2 to \$38.4	Recurring	County General Funds

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
New Mexico Attorney General (NMAG)
Sentencing Commission (NMSC)
Department of Health (DOH)
Corrections Department (NMCD)
Department of Public Safety (DPS)

SUMMARY

Synopsis of House Bill 100

House Bill 100 requires a 14-day waiting period before the completion of a sale of a firearm. Ownership, possession, or control of a firearm cannot be transferred to the buyer earlier than 14 calendar days after submission of the federal instant background check. The penalty for violating this provision is a misdemeanor offense.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result

from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and jails, consequently increasing long-term costs to state and county general funds. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. HB100 may increase the number of incarcerated individuals.

The penalty for failing to adhere by the 14-day waiting period is a misdemeanor, punishable by up to a year in jail; for purposes of this analysis, it is estimated an individual could spend between six months and one year incarcerated for this offense. Based on the marginal cost of each additional inmate in New Mexico's jail system, each offender sentenced to jail for this crime could result in estimated increased costs of \$9,614 to \$19.2 thousand to counties.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to jail each year for this crime, at a cost of \$9,614 to \$19.2 thousand. To account for time to adjudication, these costs are not anticipated to be incurred until one year after the bill takes effect, in FY25; however, a minimal cost may apply in FY24 for individuals who are detained for some period of time prior to adjudication.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB100, are not included in this analysis, but may be incurred.

SIGNIFICANT ISSUES

Gun Violence and Waiting Periods. The Department of Health (DOH) reports 479 firearm-related deaths in New Mexico in 2020, including 303 suicides, 149 homicides, and 14 legal interventions.¹ The state's firearm death rate in 2020 was 22.7 deaths per 100 thousand residents, the highest rate since 1999 and the seventh-highest firearm age-adjusted death rate in the nation.² The state's suicide death rate in 2020 was 24.6 deaths per 100 thousand residents, 23 percent higher than 2010.³

According to a 2023 meta-analysis of research evidence on the effects of gun policies in the United States from the Rand Corporation, there is moderate evidence waiting periods decrease firearm suicides and decrease overall homicides, and limited evidence waiting periods decrease total suicides and decrease firearm homicides. Studies provided inconclusive evidence regarding both the existence and direction (increase or decrease) of the impact of waiting periods on mass shootings or on the gun industry.⁴

DOH explains suicide attempts "are often impulsive and studies suggest that most suicide survivors contemplated their actions for less than 24 hours before making the attempt."⁵

¹ <https://www.cdc.gov/injury/wisqars/index.html>

² <https://wonder.cdc.gov/Deaths-by-Underlying-Cause.html>

³ <https://www.nmhealth.org/news/information/2021/12/?view=1739>

⁴ https://www.rand.org/pubs/research_reports/RRA243-4.html

⁵ <http://www.hsph.harvard.edu/means-matter/means-matter/impulsivity>

Additionally, DOH notes waiting periods give law enforcement agencies additional time to complete background checks, noting that “Each year approximately 3,800 ineligible people acquire firearms through ‘default proceed’ sales in which a dealer completes a sale without a completed background check after three business days, as allowed under federal law. As a result, FBI experts have recommended extending the time to complete background checks to reduce the number of purchased firearms by default proceeds.”⁶ The Administrative Office of the Courts (AOC) reports that, in 2021, 446.5 thousand background checks could not be resolved within three business days at the national level, allowing sellers to conduct default proceed sales.⁷

AOC further notes the presence of firearms in domestic violence situations has been found to increase the risk of homicide by five times.⁸ The New Mexico Intimate Partner Death Review Team reviews incidents of intimate partner violence or sexual assault that result in at least one death. In 2019, it reviewed 58 deaths resulting in 71 deaths (both by homicide and suicide); 73 percent of deaths were as a result of a gunshot wound.⁹

Constitutional Concerns. The office of the New Mexico Attorney General (N MAG) provides the following analysis regarding potential constitutional challenges to the proposed law:

Bills criminalizing gun possession often raise a question of constitutionality. HB100 denies ownership, possession, and control of a firearm to a buyer for two weeks after a federal instant background check is submitted, no matter what the result of the background check or how soon the background check comes back. The Supreme Court of the United States has determined a total ban on handgun possession violated the Second Amendment. *D.C. v. Heller*, 554 U.S. 570, 635 (2008). HB100 prohibits possession of a specific gun by a specific person for a specific time, and may appear to be constitutionally suspect under *Heller*.

However, the Ninth Circuit Court of Appeals addressed a 10-day waiting period under California law in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), *cert denied*, 138 S. Ct. 945. California had established a 10-day waiting period on all firearms purchases. *Id.* at 818. The case involved a challenge that the law was unconstitutional under the Second Amendment with respect to a purchaser who already owned a gun or had a conceal carry permit and who passed the background check in less than 10 days. *Id.* at 818-819. The Ninth Circuit held the 10-day waiting period did not violate the Second Amendment “because the 10 day wait is a reasonable precaution for the purchase of a second or third weapon, as well as for a first purchase.” *Id.* at 819. The Supreme Court of the United States declined to hear that case, *Silvester v. Becerra*, 138 S. Ct. 945 (2018).

Because New Mexico is not in the Ninth Circuit, federal courts in New Mexico would not be required to follow *Silvester*, and there are factual differences between the law in California and that proposed in HB100. It may be argued that

⁶ <https://www.fbi.gov/services/cjis/nics>

⁷ <https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view>

⁸ J.C. Campbell, et al., “Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study,” *American Journal of Public Health* 93, no.7 (2003)

⁹ <https://ipvdrt.health.unm.edu/>

HB100 is sufficiently different from California’s statutory scheme that a different result should be reached; for example, it could be argued that California requires checking multiple databases often requires a “manual review” while HB100 only requires a federal instant background check, making a waiting period more justifiable under California’s scheme than under New Mexico’s. *See Silvester*, 843 F.3d 816, 825 (9th Cir. 2016). HB100 could be challenged in New Mexico courts as unconstitutional, citing reasonableness of the 14-day wait and differentiating facts from California’s *Silvester* case.

The Public Defender Department provides analysis regarding potential challenges under the state constitution, writing:

Article II, Section 6 of the New Mexico Constitution has long been viewed as more extensive than its federal counterpart in that it does not limit possession of firearms to military or self-defense purposes. *State v. Dees*, 1983-NMCA-105, ¶ 5, 100 N.M. 252 (“Although the federal Second Amendment’s history is grounded squarely on the notion of a civilian militia, clearly New Mexico’s provision is broader than that.”)

However, it is likely the amendment would survive a state constitutional challenge (e.g., due process or unreasonable infringement on Article II, Section 6 rights). While municipalities are prohibited from regulating firearm transfer and possession, the State of New Mexico is properly charged with promulgating such regulations. *Baca v. NM Department of Public Safety*, 2002 -NMSC- 017, ¶ 6, 132 N.M. 282 (“The broad language in Article II, Section 6 of our Constitution prohibiting municipalities and counties from regulating an ‘incident’ of the right to keep and bear arms ‘in any way’ indicates an intent to preclude piecemeal administration at a local level and to ensure uniformity in the regulation of firearms throughout the State of New Mexico.”).

TECHNICAL ISSUES

NMAG notes “Paragraph E states each party to a “sale” may be charged separately and Paragraph F says each firearm “sold” is a separate offense, but the new proposed language in HB100 does not use the term “sale”, potentially raising a question as to whether or how Paragraphs E and F apply to the new proposed language.”

OTHER SUBSTANTIVE ISSUES

NMAG raises the following additional issues:

The proposed language is silent on what type of intent, or mental state (“mens rea”) is necessary – must the crime be committed intentionally, knowingly, negligently, is there no mental state requirement at all (a strict liability crime)? Courts will likely assume that some mental state is required if the Legislature does not include a specific intent. *See Santillanes v. State*, 1993-NMSC-012, ¶ 11, 115 N.M. 215, 218 (“When a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the legislature intended to enact a

no-fault or strict liability crime. Instead, it is well settled that we presume criminal intent as an essential element of the crime unless it is clear from the statute that the legislature intended to omit the *mens rea* element.” (citation omitted, italics in original)). The Legislature may wish to define what mental state is required explicitly in the text so there is no question under the statute of the elements of the crime.

The language in HB100 does not explicitly prohibit conduct only by the seller of a gun; could a buyer transfer ownership, possession or control to themselves? Paragraph E says that each party to a sale can be charged, but the new language does not use the term “sale”. The Legislature may wish to be clear whether only the seller or both seller and buyer can be charged under the new language.

NMAG makes the following suggestion: “To address drafting issues, the Legislature may want to change the new section to read: ~~Ownership, possession or control of a firearm shall not be transferred~~ A seller shall not make a sale to the a buyer earlier than fourteen calendar days after submission of the federal instant background check.”

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