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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Brandt **ORIGINAL DATE** 2/17/2025

BILL

SHORT TITLE Removal of Unlawful Occupants **NUMBER** Senate Bill 359

ANALYST Dinces

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

Agency/Program	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMCD	No fiscal impact	At least \$15.7	At least \$42.3	At least \$58.0	Recurring	General Fund
LOPD	No fiscal impact	At least \$275.0	At least \$275.0	At least \$550.0	Recurring	General Fund
District Attorneys	No fiscal impact	At least \$275.0	At least \$275.0	At least \$550.0	Recurring	General Fund
Total	No fiscal impact	At least \$565.7	At least \$592.3	At least \$1,158.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Relates to House Bills 309 and 332

Sources of Information

LFC Files

Agency Analysis Received From

Administrative Office of the Courts (AOC)
 Law Office of the Public Defender (LOPD)
 New Mexico Sentencing Commission (NMSC)
 Department of Public Safety (DPS)

Agency Analysis was Solicited but Not Received From

Administrative Office of the District Attorneys (AODA)
 New Mexico Municipal League (NMML)
 Council of State Governments

SUMMARY

Synopsis of Senate Bill 359

Senate Bill 359 (SB359) would create a process for a property owner to remove persons who are unlawfully occupying the owner’s real property. “Unlawfully occupying” is a crime constituting trespassing.

SB39 would allow a property owner or agent to request at a police station or sheriff’s office the

immediate removal of a person or persons unlawfully occupying real property owned by the property owner, requiring that:

- The requester is the property owner or authorized agent;
- The real property includes a residential dwelling;
- The occupant(s) entered without permission from the owner and continuously reside on the property;
- The property was not open to the public at the time the occupants entered;
- The owner has directed the occupant(s) to leave the property;
- The occupant(s) are not current or former residents of the property pursuant to a rental agreement under the Uniform Owner-Resident Relations Act;
- The occupants are not immediate family members of the owner;
- There is no pending litigation related to the real property between the owner and any known unlawful occupant(s).

Upon receipt of a complaint, a peace officer of the county shall verify that the complainant is the record owner of the real property or the authorized agent and appears entitled to relief. If so, the peace officer shall serve notice to immediately vacate on all unlawful occupants. The officer shall attempt to verify the identities of all unlawful occupants, and if appropriate may arrest any person found on the property for trespass, outstanding warrants, or other legal cause. The owner or agent is not liable for the loss, destruction, or damage to personal property unless the removal was wrongful.

If damage to a property amounts to more than \$1,000, the person is guilty of a second-degree felony (currently a fourth-degree felony). A person removed from property may bring a civil cause of action for ejectment to restore possession of real property and may recover actual costs and damages and statutory damages.

SB359 includes a section amending Section 30-16-6 NMSA 1978, increasing the sentencing for whoever commits fraud when the value of the property misappropriated or taken exceeds \$20 thousand from a second- to a first-degree felony.

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns if enacted, or June 20, 2025.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so the primary fiscal impacts examined in this analysis relate to the length of time served in prison that might result from this bill. The increase of felony degree or increase of sentencing penalties will likely increase the population of New Mexico's prisons and long-term costs to the general fund. Increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher, leading to increased costs. For LFC analysis, marginal costs were used to determine the increase in cost for one individual being sentenced and in prison under the new legislation. Since SB359 also increases the penalty for fraud from a second to a first-degree felony, there will likely be some additional longer term cost increases that are not accounted for in the table above because they will take place after FY27.

Additionally, there would likely be increased costs for the courts and public defenders. LFC assumes, based upon LOPD reports that the cost of one full-time attorney plus support staff is \$275 thousand per year. This would be for both the public defender and district attorneys.

The analysis below is from House Bill 309, which is a near duplicate of SB359:

According to the Corrections Department:

While the extent of “unlawful occupying” is unknown, the bill introduces a substantial increase in potential penalties, with a maximum sentence of nine years in prison, compared to the current 18-month maximum for property damage exceeding \$1,000. Individuals convicted under the new law may serve time in prison or face longer periods of probation supervision.

The New Mexico Sentencing Commission (NMSC) adds:

It is difficult to determine what the effect of passing this bill would be on the state’s prison population. The average per day cost to incarcerate someone in the state’s prison system is \$155.63/day; this average includes private and public facilities.

The Administrative Office of the Courts (AOC) adds:

Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, appeals from convictions, and an increase in court and parole hearings. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and although laws and policies designed to deter crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

According to DPS’s analysis for House Bill 309, this bill raises several legal concerns, particularly regarding the removal of unlawful occupants from real property and involvement of peace officers in this process:

The bill allows property owners or their authorized agents to request the immediate removal of unlawful occupants. The bill requires that property owners complete a detailed form indicating that the occupant is unlawfully present. There is a risk of property owners or agents misusing this process.

The bill gives peace officers the authority to act in removing unlawful occupants, which could blur the lines between civil matters (eviction/trespassing) and criminal enforcement. Law enforcement officers would essentially be acting as a judge and enforcer in property disputes, which could raise constitutional and procedural concerns regarding due process. Moreover, the peace officer is required to identify unlawful occupants and may arrest individuals for trespassing or other offenses. However, the bill

does not specify what happens if the removal is later found to be unlawful, potentially leaving room for civil liability for law enforcement.

While the bill absolves the property owner or agent from liability for personal property damage unless the removal is wrongful, the bill does not clarify who is responsible for the property damage during the eviction process or if damage occurs during law enforcement's involvement. The vague provisions might lead to future litigation regarding who bears the costs of damage caused during the eviction and could expose DPS to potential liability for carrying out the process set forth in this bill.

With respect to due process concerns, the ability to remove people quickly without a court hearing or determination of the underlying facts may violate the constitutional protections of due process under the 14th Amendment of the U.S. Constitution. While the bill requires some verification and form submission, it may still run the risk of conflicting with the right to fair notice and a hearing before eviction. Additionally, the bill raises concerns about equal protection by creating a process that may disproportionately affect certain groups of people (e.g., low-income individuals or minorities).

The bill also has provisions that allow peace officers to charge fees for standing by during the lock-changing process, which could disproportionately affect property owners with fewer financial resources and may lead to legal challenges regarding the fairness and reasonableness of the fees.

NMSC adds:

The escalation of the penalty provided for in this bill in Section 30-15-1 NMSA 1978, regarding criminal damage to property, increasing the penalty for damage over \$1,000 from a fourth-degree felony to a second degree felony, represents a tremendous jump in penalties for this statute. In present law, criminal damage to property under \$1,000 is only a petty misdemeanor. Additionally, second degree felonies are usually for the most serious crimes, involving harm to others and/or weapons, or far larger amounts of money (compare the larceny statute, Section 30-16-1, where larceny does not rise to a second degree felony until the value of the property stolen is over \$20 thousand, or the embezzlement statute, Section 30-16-8, where embezzlement does not rise to a second degree felony until the embezzled amount is over \$20 thousand).

AOC enumerates a number of significant issues to consider:

- 1) **Potential Redundancy.** While the bill may be attempting to provide for process for reclaiming property, there are already mechanisms under the law to accomplish this. Unlawfully occupying is defined as trespassing, which makes this largely redundant since trespassing is already an arrestable misdemeanor. Arrest for trespass or other crime under the bill is redundant because by definition an unlawful occupier is a trespasser.
- 2) **Potential Lack of Due Process.** The individuals alleged to be “unlawful occupants” of real property may not be afforded full due process—notice and an opportunity to be heard by a judge—where they are expected to vacate the property immediately upon receiving the notice from the law enforcement officer. Further, it allows for service by posting which may not result in actual notice being provided to the “unlawful occupant.”
- 3) **Police Process.** The bill may create tension between usual judicial review of police action and immediate removal
 - a. **No judicial review.** This bill would require a peace officer to put the

complainant in possession of the property and would further authorize the peace officer to arrest the “unauthorized occupants” of real property based on the allegations of a citizen in a complaint. This is less than the usual process which requires a judge to review a sworn affidavit and criminal complaint from a law enforcement officer of a crime or the judge finding probable cause for either an arrest warrant or a search warrant to be issued to enter and search the property.

b. **Fees.** The bill would also authorize police agencies to collect a fee from purported property owners for the act of removing an occupant from a property. This mimics somewhat the process by which law enforcement are paid to effectuate service of process, but does so outside of the realm of the Courts because the process would simply be the removal of an occupant of a property that occurs outside of an authorized court proceeding. This “fee for service” aspect of the bill seems to be contrary to established norms that typically prevent citizens from paying police for specialized services.

4) **Increased Penalty for Criminal Damage.** The bill, by increasing the degree of the charge, increases the penalty for criminal damage to property over \$1,000 from 18 months to 9 years, with no connection to the rest of the bill. Most crimes with monetary damages have graduated penalties that increase with the higher value of the damage. *See e.g.* NMSA 1978, § 30-16-1(F) on larceny. Generally, the damages are over \$20 thousand before the degree of crime is as high as a second degree felony; whereas financial crimes of \$1,000 or more are typically only fourth degree felonies. It would seem inequitable for the crime of criminal damage to property of a \$1,000 or more to be a second degree felony when larceny of over \$500 to \$2,500 is only a fourth degree felony.

5) **Civil Cause of Action.** The bill creates a civil cause of action that provides for statutory damages without including any damage calculations in the statute. Additionally, the bill requires courts to “advance the cause on the calendar”, without any guidance and burdening court dockets. As a statute attempting to direct court process, specifically the court docketing, this appears to be contrary to *Ammerman v. Hubbard Broadcasting, Inc.*, 1976-NMSC-031, ¶ 15 *quoting and affirming*, *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975), “Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly, statutes purporting to regulate practice and procedure in the courts.

LOPD states:

If this law is used to target the unhoused, those cases could see significant litigation under the New Mexico Constitution. *See City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 563-64, 144 S. Ct. 2202, 2228 (2024) (“For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional. Punishing people for their status is ‘cruel and unusual’ under the Eighth Amendment.”) (Sotomayor, J., Kagan, J., and Jackson, J., dissenting) (citing *Robinson v. California*, 370 U.S. 660 (1962)).

PERFORMANCE IMPLICATIONS

AOC mentions:

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed

- Percent change in case filings by case type

This bill may have an impact on the judiciary's performance measures without the additional resources to comply with the bill.

LOPD states:

Enactment of any higher criminal penalty is likely to result in more trials, as more defendants will prefer to risk a trial than take a plea to the greater penalty. If more higher-penalty trials result from enactment, LOPD may need to hire more trial attorneys with greater experience to address these additional trials and ensure compliance with constitutional mandates of effective assistance of counsel.

ADMINISTRATIVE IMPLICATIONS

The courts may have some increased costs, but AOC did not estimate how much these additional costs would be. The increased administrative burden may be the result of an increase in caseload and/or in the amount of time necessary to dispose of cases. There will also likely be a drop in plea agreements for criminal damage to property given the increased consequences

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill is a near duplicate of HB309. The notable differences are SB359 requires a sheriff to remove unlawful occupants and SB359 increases the penalty for fraud regarding property worth over \$20 thousand from a second degree to a first-degree felony.

Additionally, this bill is related to HB 332 "Unlawful Squatting" (creating a felony crime functionally identical to misdemeanor trespass).

OTHER SUBSTANTIVE ISSUES

AOC listed other potential concerns in the agency's analysis of HB309:

- 1) **Scope.** The scope of the bill may be unnecessarily broad because it contemplates real property that *includes* a residential dwelling extending the reach of the procedure to sheds, garages, yards, or commercial property that also has a residence in the same lot.
- 2) **Investigation Difficulties.** The process contemplated by the bill provides little room for investigation.
 - a. There is little or no verification of the facts claimed in the complaint, with an immediate response required by law enforcement. The complainant does not have to present any actual proof of ownership or any other fact claimed in the complaint.
 - b. Then law enforcement officers are required to make a legal determination and apparently to check property records while also immediately responding to eject the person occupying the property.
 - c. While the bill purports to require a "verified" complaint, which usually indicates that the document is notarized, the process does not meet the criteria for a "verification on oath or affirmation" in the Revised Uniform Law on Notarial Acts, NMSA 1978, § 14-14A-15.
- 3) **Additional Police Process.** The bill may be in conflict with established limits of

police

authority, creating tension in the requirements of the statute and the requirements of police procedure.

- a. **Mandates law enforcement action.** HB309 would require a peace officer to remove the “unauthorized occupants” of real property based on the allegations of a citizen in a complaint and without a Judge having received and reviewed a Civil Petition for Forcible Entry and Unlawful Detainer and a Writ having been issued by the Court. By requiring mandatory removal, HB 309 appears to supplant the discretion normally given to law enforcement to determine how to deploy personnel and resources, and whether to effectuate an arrest for minor violations of the law. The provision providing for the collection of fees adds the additional concern that HB 309 would provide a financial incentive for police to over prioritize property-occupant removal actions over other law enforcement activities.
- b. **May not meet standards of reasonable suspicion or probable cause.** A sworn statement of a citizen does not meet the legal standards or probable cause that a law enforcement officer must satisfy before a judge will issue an arrest or search warrant. Also, a “verified” complaint by a citizen also does not satisfy the evidentiary requirement of general intent to trespass. Additionally, attempts to verify the identities of the occupiers may not be legally permitted if there is not some independent legal basis to request identification.

ALTERNATIVES

DPS suggests the following revisions to provide greater clarity, ensure fairness, and protect constitutional rights while maintaining the intended effectiveness of the bill:

- (1) Implement documentation and pre-screening processes to verify claims and prevent misuse by property owners and agents;
- (2) clarify law enforcement’s role by ensuring that law enforcement acts only to carry out lawful removals and has no decision-making role in disputes;
- (3) provide civil liability protections to shield law enforcement from civil liability if acting in good faith and place liability for unlawful removal on the property owner or agent;
- (4) clearly assign responsibility for property damage to the property owner or agent;
- (5) require a court hearing or process to review removal requests, allowing time for legal challenges and implementing due process safeguards.

SD/hj/SL2