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FISCAL IMPACT REPORT

SPONSOR Maez ORIGINAL DATE 03/02/15
LAST UPDATED _____ HB 544
SHORT TITLE Negligent Storage Of Firearms SB _____
ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (AGO)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

House Bill 544 creates a new section of the Criminal Code titled “Negligent Storage of a Firearm – Minors.”

Minor is defined in the bill as a person under the age of seventeen.

Negligent storage of an unloaded firearm consists of the owner of a firearm keeping an unloaded firearm within any premises that are under the owner’s custody or control and storing or leaving the unloaded firearm in a location where the owner knows or reasonably should know that a minor is likely to gain access, without the permission of a parent or legal guardian. However, if the owner takes reasonable action to secure the firearm against access by a minor, then they are not in violation of the act.

HB 544 makes the violation of negligent storage of an *unloaded* firearm a petty misdemeanor and subject to a fine of \$250.

Negligent storage of a *loaded* firearm consists of the owner of a firearm keeping a loaded firearm

within any premises that are under the owner’s custody or control and storing or leaving a loaded firearm in a location where the owner knows or reasonably should know that a minor is likely to gain access, without the permission of a parent or legal guardian. If the owner takes reasonable action to secure the firearm against access by a minor, then they are not in violation of the act. The act makes the violation of negligent storage of a loaded firearm a petty misdemeanor and subject to imprisonment in the county jail for a definite term not exceed 6 months or to a fine up to \$500 fine or both.

Negligent storage of a firearm leading to threatening behavior in which a minor gains access to a firearm and possesses it in a public place or exhibits it in a threatening manner toward another person makes the owner of the firearm guilty of a misdemeanor and can be sentenced to imprisonment in the county jail for a definite term not to exceed nine months or to a fine up to \$750 or both.

Negligent storage of a firearm leading to death or injury in which a minor gains access to a firearm and then uses it and causes death or injury to the minor or to another person make the owner of the firearm guilty of a misdemeanor and can be sentenced to imprisonment in the county jail for a definite term not to exceed 1 year or to a fine up to \$1000 or both.

HB 544 defines the terms firearm, loaded firearm, minor, and secure. It additionally states that a violation of this section shall be subject to civil liability to any person injured by the violation for damages, attorney fees and costs of the action as determined by the court.

FISCAL IMPLICATIONS

HB 544 includes no appropriation.

HB 544 may be constitutionally challenged and cause the state to incur litigation costs.

PDD states however: There would be litigation on the facial unconstitutionality of the proposed statute, but it would likely be in a discrete case and absorbed in the ordinary course of business.

AODA states the fiscal impact is unknown.

SIGNIFICANT ISSUES

HB 544 intends to limit access to firearms by minors in any setting where the owner of a firearm, who also has custody or control of the premises where the firearm is located, knows that a minor is likely to gain access, without permission of the minor’s parent or legal guardian. Various fines and misdemeanor charges are meant to discourage firearm owners from leaving guns accessible to minors.

However an unintended consequence of HB 544 may actually be to reduce the charges again persons responsible for such crimes, from a felony to a misdemeanor. Further, the bill if enacted appears likely to spark constitutional challenges.

AODA analysis sees both the potential for a constitutional challenge on the grounds of double jeopardy, as well as a possible reduction in charges from a felony to a misdemeanor, as follows:

HB 544 appears to be directed at requiring persons to keep their firearms locked in a gun safe or disabled with a trigger lock or some similar mechanism but not interfere with a gun owner's constitutional right to bear arms. See, Amendment II to the United States Constitution and Article II, Sect. 6 of the New Mexico Constitution.

However it appears to be legislating in an area that has been traditionally prosecuted as child abuse, because a child was endangered, for example, by being allowed to gain access to a firearm. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be placed in a situation that may endanger the child's life or health. See, Sect. 30-6-1D1 NMSA 1978. If the child does not suffer death or great bodily injury a first offense is a third degree felony. Second and subsequent offenses are classified as second degree felonies. If the abuse results in great bodily harm or death of the child, the offenses are first degree felonies, punishable by imprisonment for either 18 years or life respectively.

If the bill is enacted as drafted it could be argued that the law would supersede a child abuse charge if a child gained access to an unsecured firearm which had been negligently stored. A defendant charged with child abuse because a child got access to an unsecured firearm would almost certainly argue that there is a violation of their constitutional rights against double jeopardy, and the more specific crime of negligent storage of a firearm should control over the more general crime of child abuse. If two statutes deal with the same subject matter conflict then the more specific statute will prevail over the more general statute, absent a clear expression of legislative intent to the contrary. See, *State v. Santillanes*, 2001—NMCA—018.

To put it bluntly, a child could be killed or seriously injured by an unsecured firearm and the highest charge could be a misdemeanor with a maximum penalty of less than a year in jail or a \$500.00 fine or both.

AOC analysis likewise sees the conflict with the child abuse statute and reaches the same conclusion:

Section 30-6-1A-3 criminalizes child abuse or abandonment when “a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child....” Pursuant to Section 30-6-1D1, “abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be ... placed in a situation that may endanger the child's life or health....”

Pursuant to Sections 30-6-1E and F, negligent child abuse is a felony. So, if a firearm owner recklessly, wantonly or willfully leaves a firearm somewhere that creates “a situation that may endanger the child's life or health,” that is already a felony under the law.

The specificity of the bill's language would mean that its provisions, rather than that of the criminal child abuse statute, would apply and would reduce the crimes to misdemeanors.

PDD analysis states that the bill would likely result in constitutional challenges on disparity and

second amendment grounds:

HB 544 appears to be facially unconstitutional in that it ties the culpability of the offender to the behavior of an independent actor. A retired police officer whose early onset of senility symptoms caused him to forget to close the door of his safe when his grandchildren visited could be punished more severely than a drug dealing felon willfully raising his children amidst piles of fully automatic weapons - all depending only on how a minor - an independent actor - behaved with the gun s/he recovered. Less dramatically stated, this proposed legislation would treat identical behavior by offenders differently, depending upon the later and totally independent actions of third parties. Such a disparity would be subject to constitutionality challenges.

Further:

HB 544 is unconstitutional in that it would criminalize *any* storage of a firearm if a minor gained access and used it to hurt someone. Under the proposed legislation, it doesn't matter if a police officer keeps his gun locked with a trigger lock in a locked safe in a locked safe room in his locked house: if the neighborhood delinquent breaks into the house, gets into the safe room, opens the safe and pries off the trigger lock - and then hurts someone - the police officer has committed a misdemeanor.

Individuals have a constitutional right to possess firearms for self-defense, *see District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), and this bill's "no matter what, you're guilty" provisions would unconstitutionally intrude upon such rightful ownership. Due to the wording of section G, the bill's later attempt at defining "secure" does nothing to mitigate this facial unconstitutionality.

OTHER SUBSTANTIVE ISSUES

The fact that HB 544 would apply only when a minor accesses a firearm without authorization by a parent or guardian is problematic. AOC analysis states:

Subsections A and C of the bill impose criminal liability for leaving a firearm in a place where a minor may access it absent authorization by a parent or legal guardian. There are many foreseeable circumstances in which someone other than a parent or legal guardian would have custody and control over a minor and firearms might be present. Such circumstances could include staying at another family's home before a hunting trip, or spending a summer with grandparents. In none of these situations will a parent or legal guardian be present, but a minor could have well-supervised, controlled access to firearms by authorization of someone other than a parent or legal guardian. Because people who are legally defined as a minor would have access to firearms by authorization of, for instance, a grandfather, the owner of that firearm would still be exposed to criminal responsibility.

AODA points out that

Punishment would be increased if a child gained access to an unsecured firearm and possessed it in a "public place" or exhibited it in a "threatening manner." There is no

guidance on what would be a public place so, for example, if the child never left a house with a gun after they took it, then their [the gun owner's] greatest punishment would probably be only what is prescribed for the petty misdemeanors. There is also no guidance on what exhibited the firearm in a threatening manner means. It is possible that people could feel threatened if they saw a child with a firearm but the child may not have any intent to threaten people with it. A person would only be held responsible if they left a firearm loaded that was unsecured and it was used to cause death or injury to a child who found it or to another person. If it was left unloaded, even if there was ammunition available to the child—who could be a teenager—who also found the ammunition and was able to load the firearm and then inflict death or injury the firearm owner could not be found guilty of the most severe charge.

...for the more serious violations, the firearm must be both unsecured and stored or left in a place where a minor gained access to it, and then took the firearm to a public place, exhibited in a threatening manner toward another person, or used the firearm to cause death or injury to themselves or another. Since the statute would encompass children from birth through 16 years of age that means what may be a reasonable place to keep the firearm for a child of tender years would not be a reasonable place for an adolescent. That is also complicated because the petty misdemeanor offenses require the firearm owner to be aware that a child is likely to gain access without permission of their parent or guardian which would require some insight into the relationship between those adults and the child.

This bill defines “firearm” in such a way that it would include firearms that have been rendered inoperable or that are clear museum antiques (such as the antique flintlocks found in the Museum of the Palace of the Governors). This is the sort of flawed definition that has led a 72-year-old collector to face a ten-year prison term for transporting an unloaded 250-year-old flintlock pistol in his locked glove box.

According to the Law Center to Prevent Gun Violence, as of August 1, 2013, 28 states and the District of Columbia had enacted so-called “Child Action Prevention” (“CAP”) laws. For a detailed listing and discussion of the variety of state CAP laws and their varying provisions, see http://smartgunlaws.org/child-access-prevention-policy-summary/#footnote_25_5958.

ALTERNATIVES

PDD suggests the following:

With the exception of the definitional issue raised in Other Substantive Issues, sections A, B, C, D & J appear constitutionally fine - and severable.

The bill could be rewritten so that the penalty does not vary with the subsequent actions of the independent third-party (minor) actor: this would eliminate a primary challenge to the bill's constitutionality.

The bill could be re-written so that there would be no unconstitutional consequences for the gun owner whose reasonably secured gun was used to injure someone - although writing a proper definition for “reasonably secured” should be given close attention.

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The bill could be re-written so that the definition of “firearm” does not include historical/inert display pieces.

AODA analysis points out that there is no guidance in the bill as to what is meant by “public place” or “threatening manner.”

CAC/bb/aml