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## FISCAL IMPACT REPORT

**SPONSOR** Armstrong, D/ Sen. Sedillo Lopez      **ORIGINAL DATE** 1/23/19  
**LAST UPDATED** 2/12/19      **HB** 87/aHCPAC/aHF1#1

**SHORT TITLE** Domestic Violence & Firearm Possession      **SB** \_\_\_\_\_

**ANALYST** Glenn

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate		Recurring	See Fiscal Implications

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 52, HB 83, HB 316, SB 328

Conflicts with HB 52, HB 316, SB 328

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Attorney General (NMAG)  
 Administrative Office of the District Attorneys (AODA)  
 Administrative Office of the Courts (AOC)  
 Department of Health (DOH)

### SUMMARY

#### Synopsis of HF1#1 Amendments

The House Floor Amendments #1:

- amend the title of the HB 87 to include “Changing the Definition of ‘Felon’; Changing Certain Penalties.”
- provide that a felon found in possession of a firearm in violation of the prohibition in Section 30-7-16 of the Criminal Code is guilty of a third degree felony, and delete language providing for a fourth degree felony with an increase to a third degree felony if the felon had previously been convicted of certain crimes.

- change the definition of “felon” for purposes of Section 30-7-16 by deleting language that applied the definition only when less than 10 years had passed since a person convicted of a felony completed serving a sentence or probation period. As amended, the definition of “felon” applies to any person convicted of a felony unless the person has been pardoned and received a deferred sentence.

#### Synopsis of HCPAC Amendment

The House Consumer & Public Affairs Committee (HCPAC) amendment to House Bill 87 amends the list of crimes that subject a person to the bill’s prohibition against possessing or transporting a firearm by removing aggravated battery against a household member and changing stalking to a first offense of stalking. The changes removed crimes that are felonies and are already covered by the existing law, which prohibits any “felon” from possessing or transporting a firearm.

The HCPAC amendment also changes the time a person subject to an order of protection under the Family Violence Protection Act must file a declaration of non-relinquishment of a firearm from five days to seventy-two hours.

#### Synopsis of Original Bill

House Bill 87 amends NMSA 1978, § 30-7-16 to expand the list of persons who are not lawfully permitted to receive, transport, or possess a firearm or destructive device.

In addition to felons covered by the existing statute, the bill’s prohibition applies to the following:

- a person subject to an order of protection under the Family Violence Protection Act (“FVPA”) or the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act
- a person convicted of any of the following crimes:
  - battery against a household member
  - aggravated battery against a household member
  - criminal damage to property of a household member
  - stalking
  - a federal crime related to the transport of firearms and ammunition in interstate commerce under 18 U.S.C. § 922

A person in the categories added by HB 87 who receives, transports or possesses a firearm or destructive device may be found guilty of a misdemeanor.

HB 87 adds definitions of “firearm” and “law enforcement officer” for purposes of the FVPA.

HB 87 amends Section 40-13-5 of the FVPA to require a court entering an order of protection to require the restrained party to relinquish any firearm owned by or in the possession of the restrained party to a law enforcement officer or law enforcement agency while the order of protection is in effect. The bill also prohibits the restrained person from purchasing, receiving, possessing or attempting to purchase, receive or possess any firearm while the order of protection is in effect.

HB 87 adds a new section to the FVPA, which requires a restrained party under an order of protection to relinquish all firearms to law enforcement; requires law enforcement to take possession of all firearms that are relinquished by the restrained party, are in plain sight, or are discovered pursuant to a lawful search; requires a court that has probable cause to believe that a restrained party has failed to relinquish a firearm to issue a search warrant; provides for the return of a firearm to a formerly restrained party; and provides for the disposal of firearms that are not claimed by a formerly restrained party.

The effective date of HB 87 is July 1, 2019.

### FISCAL IMPLICATIONS

AODA states that HB 87 creates additional crimes and may raise new issues to be litigated at trial and on appeal. This will cause additional costs for the district attorneys.

AOC believes it is highly likely that all district courts, which are responsible for issuing orders of protection, would be significantly impacted by the additional requirements under HB 87. Implementation of this new law could likely result in courts requesting additional judicial positions to accommodate the many additional responsibilities placed on the court to compel restrained parties to comply with relinquishment of firearms.

### SIGNIFICANT ISSUES

NMAG notes that the U.S. Supreme Court has clearly stated that its opinion in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), does not overturn the longstanding prohibition on the possession of firearms by felons and other prohibited persons. The right to possess firearms is not beyond the reach of all government regulations so long as the individual is afforded sufficient due process, including the right to a hearing, before an individual constitutional right is taken away. In this regard, NMAG refers to a federal court opinion addressing a federal statute making unlawful the possession of a firearm or ammunition by individuals subject to a domestic violence injunction that met the statute's procedural requirements. *See U.S. v. Luedtke*, 589 F.Supp.2d 1018 (E.D. Wis. 2008). The court held that the federal law, 18 U.S.C.A. § 922(g)(8), (9), did not violate an individual's right to bear arms under the Second Amendment and that the procedures of Wisconsin's law governing domestic violence injunctions were consistent with the federal law's requirements.

FVPA's procedures for orders of protection include procedures similar to those of the Wisconsin statute, including notice and hearing before a court may issue a final order of protection restraining an alleged perpetrator of domestic violence. See NMSA 1978, §§ 40-13-3 to -5. These procedures increase the likelihood that HB 87's provisions barring individuals subject to an order of protection from possessing a firearm would survive a Second Amendment challenge.

AODA makes the following points:

1. HB 87 likely lowers the penalty for some felons in possession of a firearm.

Currently, being a felon in possession of a firearm is itself a felony (either a fourth degree felony or a third degree felony). HB 87 adds a list of specific offenses, and provides that a person

convicted of one of those offenses who is in possession of a firearm is guilty of a misdemeanor. However, some of the offenses added by HB 87 can be either a felony or a misdemeanor. For example, aggravated battery against a household member is a misdemeanor if the injury is not likely to cause death or great bodily harm, but it can be a third degree felony in other situations. See 30-3-16 NMSA 1978. And some of the crimes listed in 18 U.S.C. 922 are felonies and some are misdemeanors. See 18 U.S.C. 924.

Under current law, a person in possession of a firearm who has been convicted of felony aggravated battery against a household member would be subject to a felony charge of felon in possession of a firearm. Similarly, a person in possession of a firearm who has been convicted of a felony offense under 18 U.S.C § 922 would be subject to a felony charge of felon in possession of a firearm. Under HB 87, however, those defendants would argue that they are entitled to a misdemeanor sentence for possession of a firearm, because HB 87 provides that penalty for the specific offenses listed. A court would likely agree, applying the rule of lenity, which provides that a court should apply any unclear or ambiguous law in the manner most favorable to the defendant. If this result is not the intent of the drafters, HB 87 should be amended, as suggested below under Amendments.

2. HB 87 makes it a misdemeanor for a person subject to an order of protection to possess a firearm.

Section 3 of HB 87 makes it mandatory for an order of protection to require the restrained party to relinquish any firearm and refrain from acquiring any firearm while the order is in effect. Note that this provision is mandatory- a court would not have discretion in its application. This is a change from current law, which allows the court to impose such provisions “as the court deems necessary for the protection of a party.” See NMSA 1978, § 40-13-5.

3. Violation of a protective order is already a misdemeanor. Will a separate misdemeanor based on violating a protective order by possessing a firearm violate double jeopardy?

Violation of any provision of a protective order is already a misdemeanor under Section 40-13-6(F). HB 87 requires each protective order to contain a prohibition against possessing a firearm. And HB 87 makes violation of that particular provision a separate misdemeanor. This may result in litigation on whether convicting a person of violating the terms of a protective order by possessing a firearm can be punished under both statutes.

4. HB 87 makes it a misdemeanor for a person subject to a protective order or convicted of certain domestic violence offenses or federal firearm offenses to possess a firearm.

As discussed above, a person convicted of a felony under the domestic violence statutes or the federal firearm statute is already subject to the “felon in possession” statute, and would be charged with a felony if caught with a firearm. But the domestic violence statutes and the federal firearm statute also define misdemeanor offenses. Under HB 87, possession of a firearm by a person convicted of those offenses would be charged with a misdemeanor if caught with a firearm. In addition, under HB 87 all protective orders will contain a provision prohibiting the restrained party from having a firearm, and possession of a firearm by a restrained party will be a misdemeanor.

5. Section 3 of HB 87 requires protective orders to state that violation of any provision is a crime pursuant to federal and state law.

Violation of a protective order is a crime under state law. See Section 40-13-6(F). Some violations may be a violation of federal law. See 18 U.S.C. § 2262, Interstate Violation of Protective Order. A person who violates a restraining order by possessing a firearm violates federal law. See 18 U.S.C. §§ 922, 924. But not every violation of a state protective order is a federal crime.

6. HB 87 contains conflicting time provisions.

Section 4(F) provides that an order of protection shall include a statement that the restrained person must file with the court within 72 hours a receipt identifying all firearms relinquished or taken, or a declaration of non-relinquishment. Paragraph D of Section 4 provides that a restrained person who does not have a firearm shall file a declaration of non-relinquishment with the court within five days. That's 120 hours, not 72.

AOC identifies the following issues with HB 87:

1. Federal law prohibits purchase and possession of firearms by people who have been convicted of a “misdemeanor crime of domestic violence,” and/or who are subject to domestic violence orders of protection. A couple of issues that complicate enforcing this federal prohibition are:

- difference in federal definition of a “misdemeanor crime of domestic violence” and state criminal domestic violence statutes. For example, the federal definition of a misdemeanor crime of domestic violence requires the use or attempted use of physical force or the threatened use of a deadly weapon;

- difference between the federal definition of “intimate partner” and the state “household member” definition. For example, dating partners are not within the federal prohibitions unless the partners have cohabitated as spouses or have a child in common; and

- no mandatory relinquishment requirement in state law for domestic violence orders of protection.

Although federal law prohibits defendants who have been convicted of certain domestic violence misdemeanors and restrained parties subject to certain domestic violence protective orders from purchasing or possessing guns, federal law does not require these individuals to relinquish their firearms. It appears that HB 87 attempts to remedy this situation by creating state prohibitions, closing the gap in federal laws.

2. Twenty-nine states and the District of Columbia have statutes that also prohibit purchase or possession of firearms by certain people convicted of misdemeanor domestic violence offenses. New Mexico is not one of these states. Twenty-nine states and the District of Columbia have statutes that require restrained parties named in a domestic violence order of protection to relinquish their firearms. New Mexico is not one of these states.

3. Section 1 of HB 87 clarifies that all convicted felons, defendants convicted in certain misdemeanor domestic violence crimes, defendants found guilty of stalking and any restrained party named in a domestic violence order of protection are prohibited under state law from

possessing a firearm. This section does not require a mandatory relinquishment of the firearm, but merely creates penalties for violators.

4. Sections 2, 3 and 4 of HB 87 amend the FVPA and create a mandatory relinquishment of firearms by restrained parties subject to an order of protection. These changes will have a significant impact on both the courts and law enforcement. It is highly likely that both the courts and law enforcement will require additional resources to be able to handle the mandatory firearms relinquishment requirements in HB 87.

5. Section 4, paragraph E states that a district court “that has probable cause to believe that a restrained party has failed to relinquish a firearm ... shall issue a search warrant.” As drafted, HB 87 is placing the court in the position of both determining whether probable cause exists and issuing a search warrant. Law enforcement usually drafts a probable cause affidavit and asks the court to consider issuing a search warrant. As drafted, HB 87 would have the court issue a warrant sua sponte and does not delineate who should execute the search warrant.

## CONFLICT, RELATIONSHIP

### Relates to:

HB 52 Harm to Companion Animals as Domestic Abuse  
HB 83 Extreme Risk Protection Order Act  
HB 316 Increase Penalty for Felon Possessing Firearm  
SB 328 Orders of Protection & Firearm Ownership

### Conflicts with:

HB 52, which also amends Section 40-13-2 NMSA 1978  
HB 316, which also amends Section 30-7-16 NMSA 1978  
SB 328, which also amends Sections 30-7-16, 40-13-2 and 40-13-5

## AMENDMENTS

AODA suggests that Section 1, paragraph A(3) of HB 87 be amended as follows:

(3) a person convicted of a misdemeanor under any of the following ~~crimes~~ statutes:

AOC proposes the following amendments to HB 87:

### Section 1

- Section 30-7-16(A), the crime of Assault Against Household Member (Section 30-3-12 NMSA 1978) should be added as it is also a crime that would constitute a misdemeanor crime of domestic violence under Federal Law (18 U.S.C. 921(a)(33)(A)). Including this crime would ensure that a complete list of crimes under the FVPA is included in HB 87, thus preventing possible confusion.

- Section 30-7-16(A)(2), which provides “a person subject to an order of protections pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978” should be amended to “a restrained party subject to an order of protections pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978” since “restrained party” is a defined term under the FVPA and is the proper term used here. This change would more accurately identify that only a restrained party named in an order of protection should relinquish firearms.

- Section 30-7-16(C), which provides “any person subject to an order of protection pursuant to Section 40-13-4 or 40-13A-5 NMSA 1978” also should be amended to read “a restrained party pursuant Section 40-13-2 NMSA 1978.”

- As to the addition of “a crime listed in 18 U.S.C. 922” in Section 30-7-16(A)(3)(e), it should be amended to “any misdemeanor crime of domestic violence as defined under the Brady Handgun Violence Protection Act in 18 U.S.C. 921 and 922.”

### Section 3

Section 40-13-5(A)(2), which provides “relinquish any firearm owned by the restrained party or in the restrained party’s possession, care, custody or control to a law enforcement officer or law enforcement agency while the order of protection is in effect” should be amended to “relinquish any firearm owned by the restrained party or in the restrained party’s possession, care, custody or control to a law enforcement officer or law enforcement agency within forty-eight hours of the entry of an order of protection and for so long as that order is in effect.” Including the time period of forty-eight hours for surrendering a firearm would be consistent with the new material added in Section 4, paragraph A of HB 87 which specifically requires relinquishment within forty-eight hours.

### Section 4

- All references to “petitioner” in Section 4 should be amended to “protected party” since a petitioner is not always the protected party. For example, a counter-petition may be filed by the respondent and the respondent is ultimately issued an order of protection, making the respondent the true “protected party”.

- Paragraph C (3), which requires a copy of the receipt to be provided to the petitioner within seventy-two hours of taking possession of the firearm should be deleted. This should be deleted because a law enforcement officer typically would not have access to the petitioner’s (protected party’s) address and this requirement would be overly burdensome. As a copy is also being filed with the Court, so a protected party could verify the relinquishment of firearms through the court record.

- Paragraph E, which concerns when a court has probable cause to believe that a restrained party has failed to relinquish a firearm should be amended to read: “A law enforcement officer with probable cause to believe a restrained party has failed to relinquish a firearm in violation of an order of protection shall present a search warrant to any court that: (1) describes the firearm; (2) authorizes a search of the location where the firearm is reasonably believed to be; and (3) authorizes the seizure of any firearm discovered pursuant to the search.” As currently written, HB87 does not indicate how a court becomes aware of the restrained party’s failure to comply with the relinquishment of firearms provision and issues a search warrant. A court cannot sua sponte issue a search warrant because the court is unable to execute the search warrant, only law enforcement can request and execute a search warrant.

- Paragraph I that provides that “evidence establishing ownership or possession of a firearm pursuant to this section shall not be admissible as evidence in any unrelated criminal proceeding” should be deleted as this is vague and whether or not evidence is admissible is subject to the Rules of Evidence and the discretion of the court. This language in HB 87 is duplicative and unnecessary.

- Paragraph K, which references a “licensed firearms dealer” should be amended to reference “a federal firearms licensee” as that is the defined term under the Federal Gun Control Act. Any other references in Section 4 to “licensed firearms dealer” also should be amended to reference “a federal firearms licensee.”

- Paragraph K(1), which provides that “the licensed firearms dealer has displayed proof

that the formerly restrained party has transferred the firearm to the dealer” should be further amended to read: “the federal firearms licensee has provided proof that the formerly restrained party has transferred ownership of the firearm to the licensee.” The term “displayed proof” is vague and should be amended.

- Paragraph K(2), which provides that “the law enforcement agency has verified the transfer with the formerly restrained party” should be deleted because federal firearms licensees are already required to complete federally required forms on all gun transfers so confirmation of the transfer from the formerly restrained party is unduly burdensome for law enforcement officers.

- Paragraph N should be amended so that it is the Supreme Court that will develop requisite forms and not the Administrative Office of the Courts.

BG/al/sb