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FISCAL IMPACT REPORT

LAST UPDATED _____
ORIGINAL DATE 2/23/2023

SPONSOR Cervantes/Romero, A

BILL
NUMBER Senate Bill 427

SHORT TITLE Firearm Sales Waiting Period

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 to \$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.

Relates to House Bill 101
Conflicts with House Bill 100

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)
Department of Public Safety (DPS)

SUMMARY

Synopsis of Senate Bill 427

Senate Bill 427 requires a 14-day waiting period before the completion of a sale of a firearm. Physical control of a firearm cannot be transferred to the buyer earlier than 8am 14 days after submission of the federal instant background check. The penalty for violating this provision is a misdemeanor offense. The bill exempts people with a valid New Mexico concealed carry license from background check requirements, both those contained in existing law and the 14-day waiting period established by the bill. The bill also expands the new and existing provisions regarding background checks and waiting periods to apply to federal firearms license holders. Finally, SB427 requires records of firearm sales be made available for inspection by any law enforcement agency upon request during normal business hours (9am to 5pm on weekdays).

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. SB427 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 serve 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 SB427, are not included in this analysis, but may be incurred.

SIGNIFICANT ISSUES

Gun Violence and Waiting Periods. The Department of Health (DOH) reports 578 firearm-related deaths in New Mexico in 2021, including 305 suicides, 230 homicides, and 26 legal interventions. The state's firearm death rate in 2021 was 27.8 deaths per 100 thousand residents, 22 percent higher than 2020 and the third-highest firearm age-adjusted death rate in the nation.¹ In its analysis of a similar bill (House Bill 100), DOH noted the state's suicide death rate in 2020 was 24.6 deaths per 100 thousand residents, 23 percent higher than 2010.²

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

¹ <https://wonder.cdc.gov/Deaths-by-Underlying-Cause.html>

² <https://www.nmhealth.org/news/information/2021/12/?view=1739>

shootings or on the gun industry.³

In its analysis of HB100, DOH explained suicide attempts “are often impulsive and studies suggest that most suicide survivors contemplated their actions for less than 24 hours before making the attempt.”⁴ Additionally, DOH noted waiting periods give law enforcement agencies additional time to complete background checks, writing 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.”⁵

The Public Defender Department (PDD) notes that while exempting holders of concealed carry licenses from the 14-day waiting period rationally relates to the understanding that these people have already been vetted, it does not appear to advance the policy aims related to suicide, domestic violence, and homicide prevention.

The Administrative Office of the Courts (AOC) notes the presence of firearms in domestic violence situations has been found to increase the risk of homicide by five times.⁶ 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.⁷

Background Checks. AOC further 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.⁸ However, while SB427 would require a waiting period that may be sufficient to complete background checks, it does not require the background check be completed prior to transferring control of the firearm to a buyer.

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

Laws criminalizing activity related to guns often raise questions of constitutionality under the Second Amendment. SB427 criminalizes transferring physical possession of a gun to a buyer without a valid New Mexico concealed carry permit within fourteen days of submission of a federal instant background check, no matter when the background check comes back. While a total ban on handgun possession violates the Second Amendment,⁹ a ten-day waiting period for all firearms purchases was upheld by the Ninth Circuit in *Silvester v. Harris*.¹⁰

³ https://www.rand.org/pubs/research_reports/RRA243-4.html

⁴ <http://www.hsph.harvard.edu/means-matter/means-matter/impulsivity>

⁵ <https://www.fbi.gov/services/cjis/nics>

⁶ 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)

⁷ <https://ipvdrt.health.unm.edu/>

⁸ <https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view>

⁹ See *D.C. v. Heller*, 554 U.S. 570, 635 (2008).

¹⁰ 843 F.3d 816 (9th Cir. 2016), *cert denied*, 138 S. Ct. 945.

The Supreme Court of the United States declined to hear that case.¹¹ This makes the *Silvester* opinion valid law, even though the Supreme Court has not expressed an opinion on the matter.¹² Also, decisions of the Ninth Circuit are not legally binding on New Mexico courts.¹³ Even if the *Silvester* decision were binding, a litigant could attempt to obtain a different result by arguing that differences between SB427 and the scheme upheld in *Silvester* lead to a different result for SB427.

Additionally, SB427 treats gun purchasers differently based on whether or not they have a valid conceal carry permit. There may be a possibility that SB427 could face an equal protection challenge arguing that for the purposes of SB427, gun owners with a valid conceal carry permit are in the same position as gun buyers without a permit, and therefore the bill impermissibly treats similarly situated people differently.¹⁴

The bill's requirement that records of firearms sales be available also potentially raises a Fourth Amendment search and seizure question.¹⁵ New Mexico courts are generally more protective of rights against search and seizure than federal courts.¹⁶ SB427 does not specify whose records are to be available for inspection, the seller's or the buyer's. If an individual person's records are to be available for inspection the bill almost certainly raises a Fourth Amendment issue.¹⁷

CONFLICT, RELATIONSHIP

SB427 conflicts with House Bill 100, which similarly creates a 14-day waiting period for firearm sales, but with differing provisions than SB427.

¹¹ *Silvester v. Becerra*, 138 S. Ct. 945 (2018).

¹² See *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”).

¹³ See *Innovation L. Lab v. Wolf*, 951 F.3d 986, 989 (9th Cir. 2020) (“New Mexico is in the Tenth Circuit.”); *Georgia v. President of the United States*, 46 F.4th 1283, 1304 (11th Cir. 2022) (“one circuit’s decisions are not binding on the others.” (citations omitted)).

¹⁴ See *Cardenas v. Aztec Mun. Sch.*, 2022-NMCA-038, ¶ 7, *cert. granted* (Aug. 11, 2022) (“The equal protection clauses of both the United States and New Mexico Constitutions require the government to treat similarly situated persons the same, absent a sufficient reason to justify the disparate treatment. (quotation marks and citation omitted)); *id.* ¶ 12 (“In deciding whether individuals are similarly situated, our Supreme Court instructs us to look beyond the classification to the purposes of the law.” (citation omitted)); *id.* (“Only classifications serving the purposes of the statute are permitted.” (citation omitted)).

¹⁵ See *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 481–82 (S.D.N.Y. 2019) (“The Ordinance . . . is an act of municipal legislation that compels the production of data to an executive branch regulator. Insofar as the paradigmatic Fourth Amendment search ‘implies a quest by an officer of the law,’ *Hale v. Henkel*, 201 U.S. 43, 76, 26 S.Ct. 370, 50 L.Ed. 652 (1906), such as a law enforcement agency, and the paradigmatic Fourth Amendment seizure “contemplates a forcible dispossession of the owner” of the items to be seized, *id.*, the Ordinance is, in these respects, an outlier. . . . Notwithstanding these features, the Court has little difficulty holding that the Ordinance is a search or seizure within the Fourth Amendment.”).

¹⁶ *State v. Gomez*, 1997-NMSC-006, ¶ 24, 122 N.M. 777, 784 (“There is established New Mexico law interpreting Article II, Section 10 more expansively than the Fourth Amendment.” (citations omitted)).

¹⁷ See *Carpenter v. United States*, 201 L. Ed. 2d 507, 138 S. Ct. 2206, 2213 (2018) (“The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”).

SB427 relates to House Bill 101, which makes reference to the section of law SB427 proposes to amend (Section 30-7-7.1 NMSA 1978).

TECHNICAL ISSUES

DOH notes page 1, line 18, uses the word “or” despite the bill requiring both a background check and a required waiting period, and suggest “or” be replaced with “and.”

The office of the New Mexico Attorney General (NMAG) notes the bill does not specify whether the waiting period is measured in calendar days or business days, and it may be helpful to clarify the period in question. As written, NMAG writes that it would likely be interpreted to include weekends and legal holidays, potentially resulting in a waiting period ending during a holiday when a store is not open.

NMAG further notes the bill requires records of gun sales be made available for law enforcement agency inspection, but does not specify who must make these records available. NMAG writes that this “appears to be directed at records of sellers (likely businesses) rather than sellers and individual buyers” but “The Legislature may wish to specify which parties involved in the transaction must make their records available to avoid confusion, particularly if the Legislature does not intend for individual people to make their personal records available but does wish a business entity to make records available whether the entity is a buyer or seller.”

OTHER SUBSTANTIVE ISSUES

The Department of Public Safety (DPS) notes the bill does not contain an exception for sales of firearms to certified law enforcement officers, retired certified law enforcement officers, or members of the New Mexico Mounted Patrol, despite those individuals having been subjected to a higher degree of scrutiny than individuals who hold a concealed carry license. DPS suggests the bill be amended to include an additional exemption for sales “to a certified law enforcement officer, a retired certified law enforcement officer who provides a letter from the agency from which the officer retired certifying that the officer was a certified law enforcement officer pursuant to the Law Enforcement Training Act for at least fifteen years prior to retirement, or a current member of the New Mexico mounted patrol.”

NMAG notes the following:

The bill does not specify 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), or is some other mental state required? Appellate courts will generally assume that some mental state is required.¹⁸ The Legislature may wish to define what mental state is required explicitly in the text to limit future litigation.

¹⁸ 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)).

PDD notes:

SB427 would allow for a third-party “license holder” to be involved in a transaction, as a keeper of the firearm pending the waiting period, and also subjects these third-parties to prosecution for violation of the statute. The utility of this addition is unclear, and implicates constitutional vagueness doctrines and enforcement issues.

PDD further writes:

...it is as yet unclear the extent to which the third-party license holder would be involved in firearm transactions, what the role of such persons would be, and whether the proposed legislation would create constitutional concerns about the prosecution of such persons or the interference with businesses.

ER/rl/ne/mg