

LFC Requester:	
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**AGENCY BILL ANALYSIS
2019 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date Jan. 17, 2019
Bill No: HB87

Sponsor: Deborah A. Armstrong
Short Title: Domestic Violence & Firearm Possession

Agency Code: 264
Person Writing: Gail MacQuesten
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	0	unknown	unknown	unknown	recurring	general

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: none found

Duplicates/Relates to Appropriation in the General Appropriation Act: none found

SECTION III: NARRATIVE

Section 1 of HB87 amends Section 30-7-18 NMSA 1978, New Mexico’s “felon in possession of a firearm” statute, to expand the categories of persons who cannot receive, transport or possess a firearm to include a person subject to an order of protection or a person convicted of any of the following:

- Battery against a household member pursuant to Section 30-3-15 NMSA 1978;
- Aggravated battery against a household member pursuant to Section 30-3-16 NMSA 1978;
- Criminal damage to property of a household member pursuant to Section 30-3-18 NMSA 1978; stalking pursuant to Section 300-3A-3 NMSA 1978; or
- A crime listed in 18 U.S.C. 922 (federal firearm offenses).

HB87 provides that a person in possession of a firearm who is subject to an order of protection or convicted of one of the crimes listed above shall be guilty of a misdemeanor. (This is a lesser penalty than the penalty provided in the current statute for a felon in possession. That crime is itself a felony.)

The remaining sections of HB87 amend and add additional provisions to the Family Violence Protection Act:

- Section 2 amends the definition section to add definitions of “firearm” and “law enforcement officer.”
- Section 3 amends Section 40-13-5 NMSA 1978, to require orders of protection to order the restrained party 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 of law enforcement agency while the order of protection is in effect, and to refrain from purchasing, receiving, possessing or attempting to purchase, receive or possess any firearm while the order of protection is in effect. Section 3 also amends the statute to require the order of protection to contain notice that violation of any provision of the order of protection is a crime pursuant to federal and state law.
- Section 4 sets out the process for relinquishing firearms under a protective order. The firearms must be turned over within 48 hours; a restrained party who does not own or have possession, control or custody of a firearm must file a declaration of non-relinquishment with the court that issued the order of protection within five days. The law enforcement officer or agency receiving a firearm must follow designated procedures for issuing receipts to the restrained party, the petitioner and the court. A court that has

probable cause to believe that a restrained party has failed to relinquish a firearm or received or purchased a firearm, shall issue a search warrant authorizing the seizure of any firearm found in the search. The restraining order must describe the requirements, including the requirement that the restrained party file with the court within 72 hours a receipt identifying all firearms relinquished or taken, or a declaration of non-relinquishment. The Section also contains provisions governing the return or disposal of firearms.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

HB87 creates additional crimes and, as discussed below, will probably raise new issues to be litigated at trial and on appeal. This will cause additional costs for the district attorneys.

SIGNIFICANT ISSUES

1. HB87 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). HB87 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 HB87 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 HB87, however, those defendants would argue that they are entitled to a misdemeanor sentence for possession of a firearm, because HB87 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, HB87 should be amended, as suggested below.

2. HB87 makes it is misdemeanor for a person subject to an order of protection to possess a firearm.

HB87 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. Currently, Section 40-13-5 NMSA 1978 allows the court to impose such provisions “as the court deems necessary for the protection of a party.”

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). HB87 requires each protective order to contain a prohibition against possessing a firearm. And HB87 makes violation of that particular provision a separate misdemeanor. There is certain to be 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. HB87 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 HB87, 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 HB87 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. HB87 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. HB87 contains conflicting time provisions.

Section 4, paragraph F provide 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. But paragraph A of Section 4 doesn't say when a restrained person should receive a receipt. (The restrained person must relinquish firearms within 48 hours, but the law enforcement officer or agency issues the receipt. HB87 states they must provide a copy of the receipt to the petitioner and file a receipt with the court within 72 hours, but does not provide a time limit for providing a receipt to the restrained person.) Also, 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 5 days. That's 120 hours, not 72.

PERFORMANCE IMPLICATIONS

See Significant Issues, above.

ADMINISTRATIVE IMPLICATIONS

See Significant Issues, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

See Significant Issues, above.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Felons in possession of a firearm will continue to be guilty of a felony. There will be no provisions prohibiting a person subject to an order of protection or a person convicted of a misdemeanor under any of the statutes listed in HB87 from having a firearm.

AMENDMENTS

Section 1, paragraph A3 of HB87 should be amended as follows:

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