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## FISCAL IMPACT REPORT

**SPONSOR** Garratt/Hickey/Little **LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 2/9/23  
**SHORT TITLE** Firearms in Certain Areas & Circumstances **BILL NUMBER** House Bill 224  
**ANALYST** Daly

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$0.0	At least \$26.6	At least \$37.6	At least \$64.2	Recurring	General Fund
<b>Total</b>						

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Administrative Office of the District Attorneys (AODA)  
Department of Health (DOH)  
Law Offices of the Public Defender (LOPD)  
New Mexico Attorney General (NMAG)  
Corrections Department (NMCD)  
New Mexico Sentencing Commission (NMSC)

## SUMMARY

### Synopsis of House Bill 224

House Bill 224 creates a criminal offense of unlawful carrying of a firearm within a high-population jurisdiction while under the influence of an intoxicant or narcotic. A “high population jurisdiction” is a municipality having a population in excess of 90 thousand according to the most recent federal decennial census. An offender is guilty of a fourth-degree felony.

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. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. HB224 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

The proposed new crime of unlawful carrying of a firearm within a high population jurisdiction while under the influence of an intoxicant or narcotic is a fourth-degree felony, which carries an 18-month prison sentence; the Sentencing Commission (NMSC) estimates the average length of time served by offenders released from prison in FY21 whose highest charge was for a fourth-degree felony was 516 days. Based on the marginal cost of each additional inmate in New Mexico's prison system, each offender sentenced to prison for this crime could result in estimated increased costs of \$37.6 thousand to NMCD.

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 prison each year for this crime, a cost of \$37.6 thousand. Because the estimated time served is greater than one year, the costs of one year (\$26.6 thousand) would be incurred in the first year of incarceration, while the cost of the remaining 151 days (\$11 thousand) would be incurred in the second year of incarceration. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25. Because the estimated time served is greater than one year, costs are anticipated to increase in FY26, as an offender admitted in FY25 serves the remainder of their term and another offender is admitted but will level out that same year (as offenders begin to be released from prison) and remain level in future fiscal years.

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 HB224, are not included in this analysis but could be moderate.

## SIGNIFICANT ISSUES

According to a number of responding agencies, HB224 may raise constitutional issues. NMAG first discusses challenges under the Second Amendment of the U.S. Constitution (the right to bear arms):

Carrying a firearm while under the influence of an intoxicant or narcotic is already illegal in New Mexico under NMSA 1978, Section 30-7-4 and is punished as a petty misdemeanor. This law was challenged directly in *State v. Rivera*, 1993-NMCA-011, 853 P.2d 126, and found to be constitutional under essentially a rational basis level of scrutiny. *Rivera* was then abrogated by *State v. Murillo*, 2015-NMCA-046, 347 P.3d 284, and it was determined that challenges to the right to keep and bear arms would be

evaluated under intermediate scrutiny. *Murillo* found a prohibition on switchblades to be constitutional under this heightened level of scrutiny, but did not directly address Section 30-7-4.

The U.S. Supreme Court in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 213 L. Ed. 2d 387 (June 23, 2022) limited the previous intermediate scrutiny approach that was widely used to evaluate Second Amendment challenges, stating “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129–30. Means-end scrutiny will no longer be used to determine whether a law unconstitutionally infringes upon the Second Amendment. *Murillo* and *Rivera* were both decided prior to *Bruen*, so while previously the government had to show that a statute was substantially related to an important government purpose (intermediate scrutiny), and Section 30-7-4 had been found constitutional under the lesser rational basis level of scrutiny, that analysis might no longer be applicable. After *Bruen*, any law addressing conduct covered by the plain text of the Second Amendment will need to be found “consistent with this Nation’s historical tradition of firearm regulation” to be upheld. A regulation on carrying firearms while intoxicated might be found to comport with that standard. *Rivera* and *Murillo* both reference a myriad of other state laws that affect the right to bear arms under certain conditions and in specific locations that have existed for decades. Increasing the penalty for carrying firearms while intoxicated in specific municipalities may draw a constitutional challenge, and the reviewing court would need to determine whether or not it comports with the *Bruen* standard.

Like other responding agencies, NMAG raises an issue under the equal protection doctrine:

Because individuals in large cities (from the 2020 census, only Albuquerque, Las Cruces, and Rio Rancho would qualify under HB224’s requirement of 90,000 or more people) would be treated differently from people living outside of large cities, an examining court would need to determine which level of scrutiny to apply in review. If, as in *Rivera*, the court determines that “[t]here is no constitutional right of intoxicated persons to carry firearms” (*Rivera*, at 16), then it would fall under rational basis review. *See Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 23, 378 P.3d 13, 24 (“Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class.”). In this case, the challenger must show that the disparate treatment of people in cities with more than 90,000 people and people in every other city is not rationally related to a legitimate government purpose. If, however, the reviewing court determines that HB244 restricts the ability to exercise “an important right” (*Id.*), then it will be reviewed under intermediate scrutiny. The government would need to show that said disparate treatment was substantially related to an important government interest. (*Id.*).

Similarly, LOPD comments:

This bill would have the result of imposing different penalties for the same conduct based solely on the geographic location of the offender, which appears to treat city-dwellers more harshly than individuals who reside in smaller communities. This distinction could lead to equal protection constitutional challenges, or potentially constitutional challenges regarding the right to travel. While exclusion zones around schools and other protected areas are narrowly targeted, the breadth of felony liability for an entire municipality is

likely to invite constitutional litigation.

AOC also notes the potential for constitutional challenge, calling attention to the penalty for negligently carrying a firearm in a high population city, which is increased from a petty misdemeanor to a fourth-degree felony “without any nexus to justify the increased penalty.” NMSC notes a petty misdemeanor is punishable by a jail term of no more than six months in jail; a fourth-degree felony carries an 18-month prison sentence.

The language requiring that the crime occur “within the jurisdiction” of a municipality that meets the population criteria may also be problematic. As LOPD notes, it is unclear if this term is meant to limit application to the geographic “city limits,” or if it is intended to include an area of “legal jurisdiction.”

## TECHNICAL ISSUES

The strikeout in line 25 on page 2 appears to make some of the provisions in Section 2 inherently contradictory. As drafted, a peace officer or public employee while lawfully engaged in carrying out the officer’s or employee’s duties may carry a firearm while under the influence of drugs or alcohol—activity that is currently prohibited in Subsection A (2), and is not subject to the exclusion in Subsection (B). Authorizing such activity appears to be contrary to lawful engagement in carrying out the officer’s or employee’s duties, and likely not the intent of this change.

## OTHER SUBSTANTIVE ISSUES

DOH provides this analysis of the health impact of HB 224:

Implementation of the proposed bill may result in individuals who are convicted of unlawfully carrying a firearm within populous areas in New Mexico experiencing a longer period of incarceration. Incarceration has long-term negative mental and physical impacts on the individual who is incarcerated, as well as long-term negative impacts on the mental and physical health of their non-incarcerated partners and children ([Christopher Wildeman, Emily A Wang. 2017. Mass incarceration, public health, and widening inequality in the USA, The Lancet](#)) Compared with non-incarcerated populations, incarcerated individuals have increased prevalence of infectious disease, chronic medical conditions, substance use disorders, and mental health disorders ([Wildeman & Wang, 2017](#)). According to a Profile of New Mexico Prison Population published by the University of New Mexico in December 2021, 57% of the New Mexico prison population is Hispanic and over 90% is male ([Chin, Derek, 2021](#)

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