

Initiative 85: Increase Penalties for Fentanyl Crimes

Placed on the ballot by citizen initiative • Passes with a majority vote

Initiative 85 proposes amending the Colorado statutes to:

- increase penalties for possession and distribution, including the selling, transfer or sharing, of any amount of certain synthetic opioids, commonly known as fentanyl; and
- eliminate the possibility of reduced penalties for certain possession and distribution offenses with mitigating circumstances.

What Your Vote Means

YES

A “yes” vote on Initiative 85 makes possession of any amount of fentanyl a felony, requires a mandatory minimum 8-year prison sentence for any quantity of fentanyl distribution, and eliminates options to reduce penalties for certain possession and distribution offenses.

NO

A “no” vote on Initiative 85 keeps minor fentanyl possession charges a misdemeanor, maintains tiered felony penalties for fentanyl distribution based on drug quantity, and keeps options to reduce penalties for certain possession and distribution offenses.

Summary and Analysis of Initiative 85

What is fentanyl?

The term “fentanyl” refers to a type of potent synthetic opioid. Fentanyl is used medically for pain relief, but possessing or distributing fentanyl without a prescription is illegal. Fentanyl has become the leading cause of drug overdose deaths in both Colorado and the United States because it can be fatal in very small amounts and is often mixed into other illicit drugs without a user’s knowledge. Fentanyl belongs to a class of potent synthetic opioids with similar characteristics. The measure impacts fentanyl along with these related drugs.

What are the current penalties for fentanyl offenses in Colorado?

Penalties for fentanyl offenses are based on the type and quantity of the drug, and whether the offense involved personal use or intent to distribute. Current penalties range from court-ordered treatment, fines, and probation to time in prison. State law specifies which fentanyl offenses require prison sentences, which qualify for alternative penalties and reduced charges, or are subject to judicial discretion. The severity of the penalty also depends on the weight of the

substance involved. A “substance” includes the total weight of any mixture containing fentanyl rather than the amount of fentanyl itself.

Who can and cannot go to prison under current law?

The most serious fentanyl-related drug crimes mandate a minimum prison sentence of 8 years up to a maximum of 32 years. This includes offenders who:

- distributed to a minor;
- distributed more than 50 grams of a substance; or
- distributed at least 4 grams of a substance that caused death.

In other cases, state law allows for sentences such as probation and treatment, and prohibits state prison for offenders who either:

- possessed less than 1 gram of a substance with no intent to distribute and do not have multiple past fentanyl convictions;
- possessed between 1 to 4 grams of a substance with no intent to distribute and provided evidence they were unaware the substance contained fentanyl; or
- distributed less than 4 grams and were eligible for “Good Samaritan” protections that reduce criminal penalties for reporting an overdose and staying until help arrives.

When prison time is neither mandated nor prohibited by state law, a judge may determine a sentence within a penalty range. In these scenarios, the judge may consider the unique circumstances of the case, including if the offender was aware of fentanyl in the substance, criminal history, risk to public safety, acceptance of responsibility, or any other circumstance that is relevant to consider at sentencing. Judges may also reduce or modify a penalty in exchange for successful completion of treatment.

How will penalties change under Initiative 85?

Initiative 85 increases criminal penalties for fentanyl offenses by expanding felony charges for possession and distribution, imposing longer prison sentences, and limiting judicial discretion.

For those convicted of distributing any amount of fentanyl, the measure requires a prison sentence of between 8 and 32 years. It eliminates the possibility for reduced penalties in “Good Samaritan” cases involving distribution.

The measure also makes possession of any amount of fentanyl a felony. However, if a person possesses less than one gram and successfully completes court-ordered drug rehabilitation treatment, the felony charge may be reduced to a misdemeanor. Individuals charged with a felony for possessing more than one gram are no longer eligible for this reduction, but the measure keeps “Good Samaritan” penalty reductions for other low-level possession offenses. Although not mandated, the measure permits varying lengths of imprisonment for possession.

Judicial discretion is limited by imposing mandatory minimum prison sentences for fentanyl distribution cases. Additionally, courts must order treatment for individuals charged with possessing less than one gram of a substance containing fentanyl, regardless of the

circumstances. Finally, judges may not consider mitigating factors, such as whether an offender reasonably believed the substance did not contain fentanyl.

Table 1 compares fentanyl offense sentencing between current law and Initiative 85.

Table 1
Fentanyl Offense Prison Sentencing under Current Law and Initiative 85

Offense	Sentencing under Current Law	Sentencing under Initiative 85
Distribution over 50g	Mandatory, 8-32 years in prison.	Mandatory, 8-32 years in prison.
Distribution 4-50g	Possible, 4-8 years in prison. Increased charges for distribution resulting in death or distribution to a minor.	Mandatory, 8-32 years in prison.
Distribution under 4g	Possible, 2-4 years in prison. Increased charges for distribution to a minor; reduced charges for "Good Samaritan" actions.	Mandatory, 8-32 years in prison.
Possession 1-4g	Possible, 0.5-1 year in prison. Reduced charges for reasonable deniability or completing alternative sentencing, such as treatment.	Possible, 2-4 years in prison.
Possession under 1g	No prison time. Increased charges for multiple past convictions; reduced charges for reasonable deniability or completing alternative sentencing, such as treatment.	Possible, 0.5-1 year in prison. Eligible for reduced charges for completing treatment.

Argument For Initiative 85

- 1) Fentanyl is highly potent and deadly, and it warrants stronger penalties than other drugs. The measure targets drug traffickers with harsher sentences and disrupts the distribution of fentanyl, including when it is mixed into other substances. Mandated prison sentences for drug dealers are likely to enhance public safety by keeping them off the street, as well as provide victims and their families with a greater sense of justice. The measure also increases accountability for drug users and may deter fentanyl use, helping reduce overdose deaths. Initiative 85 demonstrates Colorado's commitment to addressing fentanyl-related crime.

Argument Against Initiative 85

- 1) Initiative 85 is unlikely to reduce fentanyl use, lower crime rates, or prevent overdose deaths. Individuals may be discouraged from seeking addiction treatment, or calling for emergency assistance during overdoses, due to fear of criminal prosecution and prison time. The measure treats people who distribute trace amounts of fentanyl as major drug dealers. In addition, longer prison sentences are expensive and would shift resources away from

underfunded treatment programs, education, and other public services and toward an already overcrowded and understaffed prison system.

Information about the organizations supporting and opposing this measure is available on the Colorado Secretary of State's website:

www.coloradosos.gov/pubs/elections/Initiatives/ballot/contacts/2026.html

Fiscal Impact of Initiative 85

State Revenue

Initiative 85 increases state revenue to the Judicial Department by \$23,000 in the first year, and \$73,000 in the second and future years from additional criminal fines due to the measure's increase in crime classification.

State Spending

Initiative 85 increases state spending to cover increased criminal justice system costs for the courts, public defenders, and prisons. These costs are paid from the state General Fund. Specifically, the measure increases state spending in the first budget year by \$0.9 million to pay for costs in the courts and for public defenders. In the second year, state spending under the measure is estimated to increase to \$8.9 million as more individuals are sent to prison for distributing or possessing. Prison costs will continue to increase as individuals are incarcerated for longer periods of time. By year five, total state spending is estimated to increase by \$68.2 million. In addition, due to the estimated increase in the future prison population, the state may need to construct or contract for additional prison space.

The measure does not specify a funding source to pay for this increased criminal justice-related spending, and it is assumed that these costs will be paid from the General Fund. While the measure may reduce money available for other uses (the three largest of which are Health Care Policy and Financing, Education, and Higher Education), the effect of the measure on other programs is unknown and will depend on future budgeting decisions by the state legislature.

Local Government

Similar to the state, costs will increase for county-funded district attorneys to prosecute longer cases with enhanced penalties.