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FISCAL IMPACT REPORT

ORIGINAL DATE 2/7/2017

SPONSOR SJC **LAST UPDATED** 3/11/2017 **HB** _____

SHORT TITLE DUI Penalties and Changes **SB** 238/SJCS

ANALYST Rogers

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
-	-	-	-

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
\$0.0	Uncertain, potentially up to (\$21,000.0)	Uncertain, potentially up to (\$21,000.0)	Recurring	General Fund
\$0.0	Uncertain, potentially up to \$21,000.0	Uncertain, potentially up to \$21,000.0	Recurring	Driving Under the Influence Treatment Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Potentially Significant	Potentially Significant	Potentially Significant	Potentially Significant	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with and relates to HB 271, HB 22, HB 31, HB 49, HB 74, HB 129, HB 151, HB 271, SB 136, SB 174.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Office of the Public Defender (LOPD)
Department of Transportation (DOT)
Administrative Office of the Courts (AOC)
Administrative Hearings Office (AHO)
Department of Finance and Administration (DFA)
Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

The Senate Judiciary Committee (SJC) substitute for Senate Bill 238 does not contain an appropriation.

SB 238 proposes to enact the Driving Under the Influence Act, Sections 66-8A-1 through 66-8A-27 NMSA 1978, re compiling sections of the Motor Vehicle Code into new Article 8A, and enacting and repealing statutory sections. Presumptive levels of intoxication are established pursuant to 66-8A-5 and 66-8A-6.

In addition to reorganizing the existing Section 66-8-102 NMSA 1978 into discreet statutory sections, SB 238 takes the following actions:

- Section 18: provides that a court may order an offender convicted of DUI to wear an alcohol-monitoring bracelet for no more than 50 percent of the length of the offender's incarceration sentence. SB 238 provides that the jail or prison shall pay for the costs associated with the ankle bracelet.
- Section 40: creates the "Driving Under the Influence Treatment Fund," with monies appropriated to the Department of Health to provide for treatment programs provided for in the Act.
- Section 41: amends Section 66-5-39.1(B) NMSA 1978, governing driving while license revoked, to increase the term of imprisonment or monitored house arrest when a license was revoked for DUI or a violation of the Implied Consent Act from not less than seven days to not less than 30 days.
- Section 42: amends Section 7-1-6.40 NMSA 1978 to require a distribution of 39 percent of net receipts attributable to the liquor excise tax be made to the Driving Under the Influence Treatment Fund, rather than a distribution being made to the lottery tuition fund.

SB 238 repeals the following statutory sections:

- Section 66-5-502: providing definitions as used in the Ignition Interlock Licensing Act.
- Section 66-8-102: governing driving under the influence of intoxicating liquor or drugs, and aggravated driving under the influence of intoxicating liquor or drugs, and providing penalties.
- Section 66-8-103: governing blood alcohol tests.
- Section 66-8-104: limits the ordering of blood alcohol tests and the making of arrests to those taken and made in the performance of official duties and as otherwise authorized by law.

FISCAL IMPLICATIONS

New Fund Created and Continuing Appropriation

This bill creates a new fund, the Driving Under the Influence Treatment Fund and provides for continuing appropriations. The LFC has concerns with including continuing appropriation language in the statutory provisions for newly created funds, as earmarking reduces the ability of the legislature to establish spending priorities. Additionally, distributions to the fund in an amount equal to 39 percent of the net receipts of the liquor excise tax shall be made to the fund instead of the Lottery Tuition Fund as in current statute.

Agency Responses

TRD and DFA estimate the bill will reduce general fund revenue by \$19 million in FY18 and \$20-\$21 million in each of the following years with revenues increasing in the Driving Under the Influence Treatment Fund by the same amounts.

LOPD states the proposed change in penalties causes concern that many more cases will be more likely to go to trial. If more trials result, LOPD is likely to need to hire more trial attorneys. These trials would be handled by entry-level attorneys (Assistant Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. The Assistant Trial Attorney's mid-point salary including benefits is \$83.7 thousand.

Under present statute, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide constitutionally mandated effective assistance of counsel to their existing clients. Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

AOC points out there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, as well as a potential increase in both jury trials and appeals as a result of increased penalties, and the likelihood of constitutional challenges given the potential for unequal application of alternative sentencing, absent factors to consider. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

AHO notes it expects no fiscal impact will result to the office as a result of the bill.

SIGNIFICANT ISSUES

LOPD explains “the possibility of de facto incarceration in inpatient, residential, or in-custody treatment, even for first offenses, would likely vastly increase the number of DUI prosecutions that go to trial. Defendants who could previously protect themselves from the possibility of jail

time by entering a plea bargain would be exposed to the results of the screening programs, and might chose to go to trial instead. The loss of the prosecutorial discretion in charging and plea bargaining prior DUI convictions would also likely do the same, for similar reasons. The proposed legislative requires placement in a drug court program for second DUI offenses. This would take away flexibility from courts in sentencing such offenders. It would force drug court programs to accept offenders who may not be particularly well-suited or motivated to benefit from such placement. It would also prevent drug court programs from accepting offenders who would be suited and motivated to benefit for lack of capacity.” Some of these concerns could be allayed by the SJC Substitute for SB 238.

DOT submits the following analysis:

New Mexico’s current implied consent and DUI laws criminalize the refusal of both blood and breath testing at the time of arrest. The states that were the subject of *Birchfield v. North Dakota*, __ U. S. __, 136 S. Ct. 2160 (2016), criminalized refusal of a blood test with a separate criminal charge for the refusal of a blood test at the time of arrest. New Mexico criminalizes the refusal of a breath or blood test by enhancing a defendant’s sentence with an aggravated charge of DUI. The aggravated charge requires a mandatory minimum sentence that must be imposed if the driver is convicted. In the *Birchfield* decision, the Court ruled that chemical tests (breath and blood) used in DUI investigations are searches that fall under the protection of the Fourth Amendment. The Court held that breath testing requires no search warrant because the search falls under the search-incident-to-arrest warrant exception. *Birchfield*, 126 S. Ct. at 2184. The Court went on to state that the same exception does not apply to blood testing incident to arrest. *Id.* The Court required that police must obtain a search warrant to retrieve and test a driver’s blood, unless the driver consents to a blood test, or if exigent circumstances require police to obtain the blood without a warrant because “blood tests are significantly more intrusive and their reasonableness must be judged in light of availability of the less invasive alternative of breath” testing. *Id.* SB 238 does not address the ruling in *Birchfield*.

PERFORMANCE IMPLICATIONS

LOPD states enactment of the proposed legislation would likely result in a need for additional attorneys to meet the increased litigation that would follow. There is no way to predict how many defendants in a given year would forego plea bargains in DUI cases and insist on exercising their rights to trial, so there is no way to predict the number of cases that will result in additional litigation. However, given the relatively common nature of the offense, it is likely that enactment of proposed legislation would require additional attorney resources at the district attorney, public defender, and attorney general. Additional demand on court resources would also likely result.

DOT has performance measures related to the reduction of alcohol related traffic crashes and fatalities. Not amending New Mexico’s DUI and related statutes to address the *Birchfield* ruling could have a negative impact on law enforcement’s ability to obtain and use blood tests for a DUI arrest. DOT funds and relies heavily on law enforcement to impact the reduction in DUI related crashes and deaths.

ADMINISTRATIVE IMPLICATIONS

Prisons and jails will have additional responsibilities associated with alcohol-monitoring ankle bracelets, some may have to expand their programs.

TR/sb/jle