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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/19/07

SPONSOR Cervantes LAST UPDATED \_\_\_\_\_ HB 1247

SHORT TITLE DWI Chemical Test Time Limits SB \_\_\_\_\_

ANALYST C. Sanchez

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to,  
HB 1247: SB 443, HB 403, HB 420, SB 440 and HB 1233.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Bernalillo County Metropolitan Court (BCMC)  
 Administrative Office of the District Attorneys (AODA)  
 Public Defenders (PD)  
 Department of Health (DOH)  
 Corrections Department (DC)

### SUMMARY

#### Synopsis of Bill

House Bill 1247 amends Section 66-8-102 NMSA 1978, and redefines the crime of DWI based upon breath/blood alcohol content such that it will be illegal for a person to drive a vehicle in New Mexico if the person has an alcohol concentration of eight one hundredths (0.08) or more in the person's blood or breath ***within two hours of driving the vehicle*** where the alcohol concentration results from alcohol consumed before or while the person was driving the vehicle.

House Bill 1247 also redefines the crime of DWI for commercial drivers under similar circumstances – i.e., where the theory of the intoxicated driving is based upon breath/blood alcohol rather than impairment to the slightest degree – such that it will be illegal for a person to

drive a commercial motor vehicle in New Mexico if the person has an alcohol concentration of four one hundredths (0.04) or more in the person's blood or breath ***within two hours of driving*** where the alcohol concentration results from alcohol consumed before or while driving the commercial motor vehicle.

Similarly, the crime of aggravated DWI based upon breath/blood alcohol content is redefined, such that it will be illegal for a person to drive a vehicle in this state when that person has an alcohol concentration of sixteen one hundredths (0.16) or more in the person's blood or breath ***within two hours of driving the vehicle*** where the alcohol concentration results from alcohol consumed before or while driving the vehicle.

Another, less substantive, but noteworthy change, is to make the language of the statute gender neutral throughout.

House Bill 1247 allows first-time offenders to be sentenced to more than forty-eight (48) hours of community service by ***removing the language that set the maximum cap of forty-eight (48) hours***, and leaving in place the language setting a minimum of twenty-four (24) hours of community service that must be assessed.

Finally House Bill 1247 mandates that second-time offenders be sentenced to ***no less than forty-eight (48) hours of community service***, rather than prescribing forty-eight (48) hours as the amount that must be assessed, and mandates that for a third conviction, an offender be sentenced to ***no less than ninety-six (96) hours of community service***, rather than prescribing ninety-six (96) hours as the amount that must be assessed.

## FISCAL IMPLICATIONS

No significant fiscal implications involved, as the legislation does not require any direct additional expenditure(s) in order to be implemented.

## SIGNIFICANT ISSUES

In State v. Day, 140 N.M. 544, 14 P.3d 103 (Ct.App. 2006), the Court of Appeals held that, in prosecuting DWI cases, the State must introduce evidence regarding the BAC of the defendant at the time the driver was operating the vehicle. The Court rejected the State's argument that NMSA 66-8-102(C)(1) creates a statutory presumption of intoxication for BAC readings of .08 or greater when no significant delay occurs between driving and testing and held that a "reasonable amount of time" and "no significant delay" are much too uncertain for any presumption or for a rational jury inference of a .08 BAC or more at the time of driving.

The Scientific Laboratory Division of the Department of Health ("SLD") has a limited number of experts available to provide the scientific extrapolation evidence demanded by the Court of Appeals; therefore, the effective prosecution of DWI cases in New Mexico has been jeopardized by the holding in Day.

The Court of Appeals further stated in Day, however, that the "difficulty of proof in using the scientific retrograde extrapolation process to prove a BAC at the time of driving is an important reason why our Legislature should address the need for effective legislation." Twice in the past 3 years, the NM courts have asked that the NM Legislature address this issue in the law. HB

1247 could do so and eliminate the need for expert witnesses from SLD in approximately 70% of the alcohol DWI prosecutions in the state.

By far the most significant impact of this legislation, if enacted, will be to redefine what constitutes DWI/DUI in New Mexico based upon breath/blood alcohol concentration. Instead of drawn-out, technical and scientific arguments involving retrograde extrapolation and pinpointing what an individual's breath/blood alcohol was at the time of driving, and whether breath/blood alcohol was increasing or decreasing – factoring in such myriad variables as metabolism, absorption rates, past experience with alcohol, whether food or other beverages were consumed and when, etc. –, this bill will allow the parties to focus instead on what that breath/blood alcohol is *at the time of the chemical test*, provided (1) the test occurs no more than two hours after driving, (2) the results are 0.08 or higher (unless one is a commercial driver, for whom it is 0.04), (3) and the State can prove beyond a reasonable doubt the alcohol was consumed before or while driving. Indeed, the legislation really does appear to be an elegant solution to the problem of retrograde analysis and extrapolation. If one views those issues as “problems,” the solution proposed by this bill is to redefine the crime, *rather* than attempting to redefine the evidence – the former being well within the domain of the legislature, the latter being an intrusion into the purview of the judiciary.

### PERFORMANCE IMPLICATIONS

House Bill 1247 is likely to have a positive effect on the resources and on the allocation of personnel from a number of different entities – law enforcement, prosecution, and laboratory analysts and their support staff, for the reasons discussed above under “Significant Issues.” Because the crime itself will have been redefined, there should be fewer arguments focusing on the concept of “relation back”; i.e., what was the accused's BAC at the time of driving. Although “relation back” will not be eliminated as an issue, it is likely to assume a more peripheral role – confined mainly to those cases that fall outside the two-hour window created by the bill. Instead, the parties are likely to invest their resources into either challenging the chemical test results themselves or challenging whether the state has met its burden of showing that the alcohol was consumed prior to or while driving, rather than afterward. Neither of these should have the same deleterious effects on resources and personnel allocation as the current status quo, in which frontline prosecutors are contemplating needing scientific testimony in *every* DWI/DUI case, a situation that will rapidly prove impractical at best and impossible at worst for the laboratories and analysts involved.

### ADMINISTRATIVE IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. 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.

The long term impact of HB1247 could be to allow existing FTE at the Department of Health to complete their required workload of drug testing within acceptable times to meet the needs of clients (law enforcement and Office of the Medical Investigator). In recent years, the growing demand for expert witness testimony in DWI cases has diverted manpower from performing lab analyses and caused delays in results that have adversely affected DWI prosecution and the

issuance of death certificates. Legislators and the Governor have received complaints about the delays. HB 1247 could help remedy these delays.

HB1247 could also assist prosecutors by giving them more time to prepare their case and would reduce the number of cases lost to the “6 month” rule for timely prosecution of DWI cases (as well as autopsy cases for the Office of the Medical Investigator who could help produce certificates of death at a faster rate).

## **RELATIONSHIP**

The following bills relate to HB 1247: SB 443, HB 403, HB 420 and SB 440. However, rather than two (2) hours, each of these bills provides a three hour window for testing after operation of the vehicle.

HB 1233 also relates to HB 1247, but differs in that it prohibits: a BAC of .08 at the time of driving, .09 or more within one (1) hour of driving and the alcohol concentration results from alcohol consumed before or while driving; a BAC of .10 or more within two (2) hours of driving and the alcohol concentration results from alcohol consumed before or while driving; and a BAC of .11 or more within three (3) hours of driving and the alcohol concentration results from alcohol consumed before or while driving. HB 1233 also amends NMSA 66-8-110 by providing that tests performed under the Implied Consent Act more than three (3) hours after driving may be introduced as evidence of the alcohol concentration in the defendant’s blood at the time of the test. HB 1247 contains no such amendment to NMSA 66-8-110.

## **OTHER SUBSTANTIVE ISSUES**

Blood alcohol analysis in DWI cases is the attempt to measure the amount of alcohol within the person’s blood at any given time.

Much of this session’s legislation appears to rely on the use of retrograde extrapolation in order to redefine DWI/DUI in New Mexico. Retrograde extrapolation is the process by which someone’s blood alcohol concentration at the time of driving is estimated by projecting backwards from a later chemical test. This process involves estimating the absorption and elimination of alcohol in the time period between driving and testing.

The use of this process relies on assumptions regarding the amounts of alcohol and food consumed and the time taken to consume the alcohol and food. The process also assumes that absorption of alcohol has been completed and the peak BAC has been reached.

The difficulty in this process is the reasonableness and justifiability of the assumptions made. When reasonable and justifiable assumptions are made alcohol elimination rates of .015 of blood alcohol concentration to .020 blood alcohol concentration per hour can be assumed.

In practical terms this means that an individual who has a BAC of .08 three hours after the stop and arrest will have had a BAC of .04 at the time of the stop. This is calculated as follows:

BAC Test	First hour	Second hour	Third hour	Extrapolated Measure
0.08	-0.015	-0.015	-0.015	=0.04

## TECHNICAL ISSUES

The 2 hour “window” of HB 1247 is less than the 3 hour window already present in the NM “Boating While Intoxicated” law, passed by the NM Legislature in 2003, leaving inconsistencies between the 2 laws.

## ALTERNATIVES

Because of the number of bills introduced addressing the issue of breath/blood alcohol testing and DWI/DUI in New Mexico, the legislature could do any of the following: (1) pass HB 1233, which addresses the issue by tying the BAC level to elapsed time since driving, (2) pass one of the bills establishing a three-hour window, (3) pass the bill presently under discussion, **HB 1247**, which sets a two-hour window, or (4) leave the issue of chemical testing in DWI/DUI cases as-is, and let trial and appellate courts continue to navigate the evidentiary issues involved.

## WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the Administrative Office of the District Attorneys, the consequence of not enacting the bill (if none of the other, comparable pieces of legislation redefining DWI/DUI on the basis of breath/blood alcohol content, are passed either) is that prosecutors statewide are facing the prospect of needing scientific testimony on *every* DWI/DUI cases relying upon chemical testing. This is due to two recent N.M. appellate cases – State v. Day and State v. Lizzol. While that could conceivably be a manageable burden on the prosecution, it is rapidly approaching the point where the burden it places on laboratories and their analysts will be untenable. Most such analysts already complain of having in excess of thirty (30) subpoenas for different proceedings on any given day, often in different courthouses (metropolitan, magistrate, &/or district), frequently in different venues, a burden that also cuts back on their time in the laboratory *performing chemical tests*.

As noted above, by redefining the crime itself, the legal battleground will shift significantly, and is likely to free up resources currently expended over the issues of retrograde extrapolation and “relation back.”

CS/nt