F I S C A L I M P A C T R E P O R T

SPONSOR Rehm/Lewis **ORIGINAL DATE** 2/4/19 **LAST UPDATED** **HB** 317

SHORT TITLE Drugged Driving Penalties **SB**

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$0.0	At least $108.8	At least $108.8	At least $217.6	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 355.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Law Office of the Public Defender (LOPD)
New Mexico Attorney General (NMAG)
Department of Public Safety (DPS)
Administrative Hearing Office (AHO)

SUMMARY

Synopsis of Bill

House Bill 317 would amend Section 66-8-102 NMSA 1978 to provide specific chemical limits of certain compounds found in a person's blood within three hours of driving a vehicle and the controlled substance or metabolite concentration results from consumption of a controlled substance before or while driving the vehicle as driving under the influence of a listed substance.

House Bill 317 removes text from Section 66-8-102(B) NMSA 1978; specifically, House Bill 317 removes the provision: "to a degree that renders the person incapable of safely driving." In doing so, Section B is rendered to read that any person that is under the influence of any drug when operating a vehicle is now guilty of driving under the influence (DUI) or drugged driving specifically; it, therefore, appears to create a zero tolerance policy for certain substances. However, House Bill 317 also seeks to add a Section D to 66-8-102 NMSA 1978 that would define the precise limits of more commonly used non-prescription drugs that could be in a person's system to qualify him or her as under the influence or not under the influence.

House Bill 317 also proposes to amend statute governing administrative revocation rules for driver's licenses related to alcohol concentration infractions to comport with the bill's changes. The bill also updates chemical testing rules and revocation hearing notice rules to comply with the changes made by the bill.

The bill would also amend the requirement for an offender to place an ignition interlock device on his or her vehicle to only apply to offenders who had an alcohol concentration in their blood or breath.

FISCAL IMPLICATIONS

LOPD explains "it is particularly difficult to assess whether there would be a significant fiscal impact of this bill's passage on the Law Offices of the Public Defender (LOPD) because it is difficult to predict whether the bill's passage would result in more or fewer DUI prosecutions, and it is equally difficult to predict how many more or how many fewer prosecutions would occur. The answer likely turns a great deal on the quality of the numeric limits chosen in HB 317. Assuming the purpose of the bill is to make a factfinder's job of evaluating evidence more cut and dry, the number of resulting prosecutions would not necessarily increase. Instead, detection efforts would likely remain status quo, but convictions might increase if the numeric chemical limits are, in fact, a valid per se measure of impairment by a particular substance. If that were the case, LOPD should be able to absorb the costs of prosecution because the overall number of prosecutions would not increase. On the other hand, if the numeric limits are invalid or even dubious, charges could increase and more court challenges would occur with respect to such cases, resulting in a substantial increase in trials, which would increase LOPD workload and resources, necessitating additional attorneys, staff, investigators, and social workers. Commensurately, prosecution offices and courts would also see an increase in workload and resource expenditure."

LOPD also states:

> The addition of the 'per se' levels may induce law enforcement to seek blood testing more often in an attempt to get more convictions (i.e. where evidence of impairment is slight). Blood testing will ordinarily implicate the warrant process, and warrantless DUIs based on chemical tests for blood will be subject to constitutional challenges under Birchfield v. North Dakota, 579 U.S. __ (2016). Again, such challenges will create more work for LOPD, prosecutors and courts.
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> LOPD attorneys might also need experts to challenge any dubious testing processes, and, pursuant to State v. Schoonmaker, 2008-NMSC-010, and State v. Brown, 2006-NMSC-023, LOPD is required to pay for expert services of indigent individuals who are privately represented upon receipt of a court order. Any increases in expert witness contracts brought about by the proposed legislation together with the cumulative effect of all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.
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> A LOPD Assistant Trial Attorney's mid-point salary including benefits is $102,187 in Albuquerque/Santa Fe and $109,362 in the outlying areas (due to salary differential required to maintain qualified employees). Recurring statewide operational costs per attorney would be $2,300 with start-up costs of $3,128; additionally, average support staff (secretarial,

investigator and social worker) costs per attorney would total $77,113.

AHO explains that because the proposed legislation adds an additional category of Implied Consent Act violations not previously included under that act, there is potential for an increase in the volume of Implied Consent Act hearings adjudicated by the Administrative Hearings Office.

> It is difficult to quantify the exact number of additional hearings. However, looking at NM DOT driving while intoxicated (DWI) arrest statistics from 2014, there were a total of 10,826 DWI arrests that year. A 2014 report from the state Department of Health shows that 12.2 percent of DWI offenses in 2013 involved the primary use of drugs other than alcohol. Applying this 12.2 percent rate to the total number of arrests in 2014, there is a possibility of 1,321 additional Implied Consent Act violations under the legislation that previously would not have been subject to the Implied Consent Act. Only approximately 30 percent of those arrested typically request a hearing. Speculatively, since this would be a new law not previously applied in New Mexico, it is possible that a larger percentage of arrested drugged-drivers could request a hearing. Consequently, we estimate that 40 percent of those arrested under the new drugged-driver provisions of this legislation will request a hearing, possibly resulting in an additional 528 Implied Consent Act license revocations per year. [The 528 potential new cases is close to the average workload of 612 cases per year of one administrative law judge.]

AHO also states there would be no significant reduction to the number of hearings due to the elimination of the language under the Implied Consent Act for the revocation of licenses for persons driving commercial vehicles with blood or breath alcohol levels between .04 and .08.

AHO estimates the recurring cost to hire an additional administrative law judge, including benefits, continuing education, and travel to be $108.8 thousand per year, not including nonrecurring costs like initial office set up.

> The potential increase of 528 Implied Consent Act license revocation hearings will affect AHO's ability to timely set and hold hearings by the strict 90-day statutory deadline, one of our essential performance measures. In order to continue to meet that statutory requirement and performance measure bench mark, it is anticipated that AHO will need an additional FTE Adm. Law. Jdg.

SIGNIFICANT ISSUES

The AOC explains the bill could strain the resources of State Laboratories Division (SLD) and provides legal history:

> It should be noted that this bill would remove the language under Section 66-8-102(B) NMSA 1978 which says "to a degree that renders the person incapable of safely driving a vehicle" so that section would just say, "[i]t is unlawful for a person who is under the influence of any drug to drive a vehicle within this state." This adjustment would reflect the language in Section 66-8-102(A), which makes it "unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." The New Mexico Supreme Court has held that the term "under the influence" means that a person is to the slightest degree less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public. *See*

State v. Deming, 1959-NMSC-074, 66 N.M. 175, 344 P.2d 481. Therefore there would be no reason to conclude that the courts would apply a different meaning to the term as used in Section 66-8-102(B), even without the explicit statutory language which the bill would remove.

As stated above, this Bill may impact the resources of the SLD, as it would require testimony from an SLD analyst to substantiate the levels of controlled substance found in a blood test of the accused. *See State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1. The Chief Judges Council supports efforts to properly fund the SLD and believes that it is important that all entities within the criminal justice system be provided adequate resources.

The Law Office of the Public Defender explains:

The addition of Section D in 66-8-102 NMSA 1978 stands to create confusion when read in connection with Section B as modified by House Bill 317. House Bill 317 stands to be interpreted so that either only persons using the drugs specified in Section D can be convicted of DUI by non-alcohol or that there will be a zero tolerance policy for anyone having used any other drug. No tolerance with respect to prescription drugs or any other drug not enumerated in Section D would result in standardless and disparate prosecutions; the question of whether the person has been rendered incapable of safely driving a car gives officers some guidance. If House Bill 317 is interpreted to not cover persons under the influence of any other drug, House Bill 317 risks creating a safe zone for persons who might be dangerous if operating a car under any non-enumerated drug.

If section B is read to cover all drugs not specified in Section D, and the test of whether persons are rendered incapable of safely driving is removed, police officers in the field will be left without guidance as to what being under the influence of any particular substance means. This could result in mistaken symptoms and wrongful convictions.

LOPD provided links to two studies relevant to this bill:

"While alcohol concentration (BAC or BrAC) is an accurate measurement of alcohol impairment of driving, the presence of THC in the driver's body has not been shown to be a reliable measure of marijuana impairment of driving." (link to study)

"Substantial whole blood THC concentrations persist multiple days after drug discontinuation in heavy chronic cannabis users." (link to study)

NMAG submitted the following analysis:

House Bill 317 removes "to a degree that renders the person incapable of safely driving a vehicle" from Section 66-8-102(B) leaving it as such:

"It is unlawful for a person who is under the influence of any drug to drive a vehicle within the state."

The removal of this language could lead to the interpretation that if you are driving with any drug in your system, you are in violation of Section 66-8-102(B). This could call into question the constitutionality of Section 66-8-102(B), and its overall purpose and intent.

While House Bill 317 removes the language listed above, it also adds "per se" levels for nine drugs/metabolites (i.e., amphetamines, cocaine, marijuana, heroin, and methamphetamines) via a new section. In reviewing the above deletion in conjunction with the addition of the "per se" violations, it is ambiguous as to what is now unlawful. Is having any drug, at any level, in your system while driving unlawful? Or is it only unlawful when you have one of the nine drugs/metabolites in your blood, at/or above the "per se" level, within three hours of driving?

House Bill 317 creates per se DWI levels for the nine drugs/metabolites, but does not create per se levels for Aggravated DWI of those same nine drugs/metabolites.

House Bill 317 limits who will be required to have an ignition-interlock license when convicted under Section 66-8-102 NMSA. House Bill 317 would only require convictions stemming from liquor/alcohol to obtain an ignition-interlock license.

House Bill 317 may create a conflict within Section 66-8-110 NMSA because it removes "(1) eight one hundredths or more; or (2) four one hundredths or more if the person is driving a commercial vehicle", from Section 66-8-110(C) leaving it as such:

"The arresting officer shall charge the person tested with a violation of Section 66-8-102 NMSA 1978 when the blood or breath of the person contains an alcohol concentration [or a controlled substance or metabolite concentration that is unlawful pursuant to the provisions of Section 66-8-102 NMSA 1978]"

The potential effect of removing the above-mentioned language is that if a person has any alcohol concentration in their breath or blood, they must be charged. This appears to conflict with Section 66-8-110(B), which provides that if a person's alcohol concentration is less than four one hundredths, that person is presumed not under the influence of intoxicating liquor.

House Bill 317 makes a similar deletion to Section 66-8-111(C) NMSA. This deletion may result in the Motor Vehicle Division having to revoke a person's license if they have any alcohol concentration and not just for "per se" violations.

House Bill 317 also makes a similar deletion to Section 66-8-111.1 NMSA as it did in Section 66-8-111(C) NMSA. This deletion may result in a law enforcement officer issuing written notice of revocation of a person's license if they have any alcohol concentration and not just for "per se" violations.

It is unclear if enacting this bill will change the way officers charge or the way courts convict on drug DWIs. At the present time, not having a "per se" standard allows officers, the Court, and juries to decide about DWI involving drugs using the "impaired to the slightest ability" standard.

DPS explains:

The most significant issue presented by passage of the proposed legislation is the inclusion of listed amounts of controlled substances as proof of illegal intoxication pursuant to the current statute. The identified per se levels would provide a non-rebuttable presumption of

impairment by drug as a matter of law. This statutory change would facilitate prosecution of individuals who may now be arrested for driving while under the influence of drugs, and not convicted because of the difficulty of proving impairment simply based upon an officer's observations of driving behavior and field sobriety test results, despite detection of drugs in an associated blood test.

In order to obtain drug concentration level information a blood test is required, which could be unconstitutional without a warrant in a criminal case. Pursuant to the United State Supreme Court case, Birchfield v. North Dakota, 136 S. Ct. 2160, 195 L.Ed. 560, 84 USLW 4493 (2016), absent a warrant, blood tests cannot legally be obtained pursuant to the Implied Consent Act unless the individual consents to the blood test without threat of criminal penalty enhancement, or it is obtained in exigent circumstances. Birchfield decided that there is no implied consent to blood tests to be used for criminal purposes, although consent may still be implied for civil penalties.

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