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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 2/8/2023

**SPONSOR** Mason/Martinez, A

**BILL**

**SHORT TITLE** Oral Fluid Roadside Detection Pilot Project **NUMBER** House Bill 275

**ANALYST** Hanika-Ortiz

### APPROPRIATION\* (dollars in thousands)

| Appropriation |         | Recurring<br>or Nonrecurring | Fund<br>Affected    |
|---------------|---------|------------------------------|---------------------|
| FY23          | FY24    |                              |                     |
|               | \$650.0 | Nonrecurring                 | Cannabis Regulation |

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

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

|                          | FY23             | FY24                             | FY25                             | 3 Year<br>Total Cost             | Recurring or<br>Nonrecurring | Fund<br>Affected       |
|--------------------------|------------------|----------------------------------|----------------------------------|----------------------------------|------------------------------|------------------------|
| DPS                      | No Fiscal Impact | \$325.0                          | \$325.0                          | \$650.0                          | Recurring                    | Cannabis<br>Regulation |
| Local Law<br>Enforcement | No Fiscal Impact | Indeterminate<br>likely moderate | Indeterminate<br>likely moderate | Indeterminate<br>but moderate    | Recurring<br>2024-2027       | Local<br>Government    |
| AODA, LOPD,<br>Courts    | No Fiscal Impact | Indeterminate<br>likely moderate | Indeterminate<br>likely moderate | Indeterminate<br>likely moderate | Recurring<br>2024-2027       | General Fund           |

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

Relates to

### Sources of Information

LFC Files

#### Responses Received From

Department of Public Safety (DPS)  
 Law Offices of the Public Defender (LOPD)  
 New Mexico Attorney General (NMAG)  
 Administrative Office of the Courts (AOC)  
 Administrative Offices of the District Attorney (AODA)

## SUMMARY

### Synopsis of House Bill 275

House Bill 275 (HB275) appropriates \$650 thousand from the cannabis regulation fund to DPS to conduct an oral fluid (saliva) roadside detection pilot project with local law enforcement, purchase handheld roadside detection devices, pay per diem and mileage to a panel of experts that have been convened to assist the department in designing the pilot project, and other related expenses.

The bill includes definitions for “handheld roadside detection device” which is a portable screening instrument that can detect the presence of one or more drug categories through the collection of oral fluid, and “oral fluid” which is saliva that is collected by a swab or by spitting into a vial.

The bill creates a four-year pilot project conducted by DPS, in cooperation with sheriff's offices and municipal police departments from Bernalillo, Dona Ana, San Juan, Lea, and San Miguel counties. The main purpose of the pilot is to determine if handheld roadside detection devices are accurate, reliable, cost effective, and if they can replace drug recognition experts, particularly in rural areas.

DPS would select devices to purchase, presumably pursuant to the Procurement Code although the bill is silent in that regard, and train in their use. Law enforcement officers would participate in the pilot. Roadside oral fluid testing would be voluntary for the suspected impaired driver, and may be used to determine probable cause. The bill would require detection of a drug category by a handheld roadside detection device to be confirmed by a blood test. Each participating law enforcement agency would collect the data and DPS would use the data to evaluate accuracy and reliability of the device. DPS would provide periodic reports to an interim committee and produce a final report to the governor and the Legislature, including findings and recommendations.

Lastly, the bill includes a temporary provision that DPS shall have the oral fluid roadside detection pilot project operational by January 1, 2024, and provides an appropriation to conduct the study.

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**

The appropriation of \$650 thousand contained in this bill is a nonrecurring expense to the cannabis regulation fund at RLD for FY24 through FY27. Any unexpended or unencumbered balance remaining at the end of FY27 shall revert to the cannabis regulation fund. The expenditures from the fund will be for expert panel per diem and the purchase of equipment and field supplies. DPS would be required to apply for any available federal funds for the purposes of the pilot. However, DPS reports the appropriation should be sufficient to carry out the provisions in the bill. AOC was not so sure, suggesting any expert witness fees could exceed the amount of the appropriation.

Money in the Cannabis Regulation Fund (Section 26-2C-39 NMSA 1978) is subject to appropriation by the Legislature to fund the Cannabis Control Division, Department of Health, Department of Environment, New Mexico Department of Agriculture, Taxation and Revenue Department, and Department of Public Safety for the purposes of carrying out the provisions of

the Cannabis Regulation Act and Lynn and Erin Compassionate use Act. Any unexpended or unencumbered balance remaining at the end of any fiscal year reverts to the general fund. The appropriation therefore would divert money that would otherwise be deposited to the general fund.

Although this bill does not specify future appropriations, multiyear appropriations, particularly if used to fund services, create an expectation the program will continue in future fiscal years; therefore, this cost could become recurring after the funding period.

It may be of interest to the device makers to fund the pilot project, and learn whether or not their handheld roadside detection devices are accurate, reliable and cost-effective for law enforcement.

LOPD says drug recognition experts in the field are necessary because there is currently no portable device that can accurately determine impairment by drugs. For instance, marijuana can be detectable, after use, 12 hours in blood, 24 hours in saliva, and 90 days in hair. This means there is more of a likelihood of finding probable cause to arrest for “driving while under the influence of drugs” even if someone used marijuana 24 hours earlier but was no longer intoxicated.

LOPD believes this bill would increase defendants in the criminal justice system because it may be necessary to litigate whether this device is accurate in proving probable cause that a person is intoxicated, and under the law should not be driving. Both the prosecution and the defense would need to hire experts. This would be a great expense to both sides. There is also an increased likelihood cases would be taken to trial and appealed, as opposed to being resolved through a plea.

## **SIGNIFICANT ISSUES**

The bill states the device will be used for probable cause for arrest, and statistics kept on convictions using the device. However, both AOC and AODA point to concerns whether or not the roadside detection device is accurate and reliable, or would be allowed in court. Since an officer cannot obtain a warrant for a blood draw for impaired driving if it is a misdemeanor, there would need to be another method to establish the accuracy of the device. LOPD noted in terms of accuracy, the devices appear to be in the 90 percent range for drugs, and 80 percent range for THC.

NMAG says the lack of admissibility in court could complicate whether or not the device is an effective law enforcement aid, because of difficulty tying the device to actual conviction rates.

NMAG notes while a driver may consent to the oral fluid test, they may refuse the confirmatory blood test which the officer would not be able to obtain if only suspected of misdemeanor DWI. DPS says until those limitations for collecting blood samples from suspects are lifted, the data collected from the saliva sample will likely be of little use in aiding in successful prosecutions.

## **PERFORMANCE IMPLICATIONS**

DPS reports that while the pilot program would start providing information on the validity of the tests, the state would not get a true account if they are successful until allowed in court.

## **ADMINISTRATIVE IMPLICATIONS**

DPS would be required to promulgate rules for the pilot project.

AOC notes there may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB158 that allows law enforcement to seek a warrant for a blood draw when there is probable cause to believe that the person has committed any level of driving under the influence.

## **TECHNICAL ISSUES**

It is unknown if the data collected will be allowed to be shared and used by the company that manufactures the device. Also, the device should be purchased pursuant to the Procurement Code.

## **OTHER SUBSTANTIVE ISSUES**

NMAG says with the likelihood that the results of an oral fluid test would be inadmissible in court, the ability of these tests to replace drug recognition experts is unlikely. In addition, there are no regulations through the Scientific Laboratory Division that address the testing of saliva for drugs. There is also no indication regarding what happens to the oral fluid collected after testing is conducted. Collection of oral fluid (saliva) is potentially more invasive than a breath sample and involves an individual's DNA profile. The act could benefit from a section that directs those involved to take steps to dispose of an individual's oral fluid sample after testing is completed.

## **ALTERNATIVES**

LOPD says to avoid hiring experts to testify on a device that has not been determined to be accurate and reliable, evidence collected should be excluded for probable cause and conviction purposes.

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

DUIs will continue to be processed using drug recognition experts, breathalyzers, field sobriety tests, etc., and in cases involving alleged offenses that rise to a felony level, by blood testing.

AHO/al/ne/rl