

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 02/01/10

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 187

SHORT TITLE Certain Drugs in Blood Stream as DWI SB \_\_\_\_\_

ANALYST Wilson

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

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$1.0-\$200.0	\$1.0- \$200.0		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 46, HB 65, HB 115, HB 139, HM 207, SB 3, SB 4, SB 5, SB 32, SB 151, SB 170  
SB 176

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General's Office (AGO)  
 Department of Health (DOH)  
 Department of Transportation (DOT)

### SUMMARY

#### Synopsis of Bill

House Bill 187 makes it illegal to drive with blood levels of cocaine, methamphetamines, amphetamines or heroin above specified levels.

HB187 also makes it illegal to drive with a specific blood level of cocaethylene, the biologically active metabolite of cocaine, or either 6-monoacetyl morphine or morphine, the biologically active metabolites of heroin.

In addition, HB187 provides that the ignition interlock requirement upon DWI conviction applies only to persons convicted for driving under the influence of alcohol.

### FISCAL IMPLICATIONS

There will be a minimal administrative cost to the Judiciary 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.

## **SIGNIFICANT ISSUES**

PDD provided the following:

There is no proven scientific correlation between the number derived from a drug test and driving impairment. The chemists employed by the state's Scientific Laboratory Division (SLD) have consistently testified, or else stated in pre-trial interviews, that they cannot determine from a specific drug test result whether a person's driving is impaired by the presence of drugs. The National Highway Traffic Safety Administration's expert panel on drugs and driving has as recently April 24, 2009 concluded that developing a definitive list of impairing substances was not possible because of varying effects from dose, tolerance, drug combinations, latency between dosing and driving and metabolic differences.

Furthermore, the proposed levels for the enumerated drugs include metabolites. Metabolites occur in both active and inactive forms. Inactive metabolites do not have any physiological effects on the body because the drug had long since been eliminated from the body. Nonetheless, the presence of an inactive metabolite will result in the erroneous conclusion that a person has drugs in his or her system. In addition, many medications are prescribed for therapeutic levels of drugs that contain compounds related to cocaine, amphetamines, and heroin or morphine, a metabolite of heroin. These therapeutic drugs are used for treatment of attention deficit disorder, cancer, and chronic pain. The science suggests that safe therapeutic levels do not affect the physiological or cognitive ability of a patient in performing normal tasks such as driving. Nonetheless the test result will show the presence of drugs thus leading to an erroneous conviction.

The method and reliability of the drug screening process is also critical. There are inherent limitations in the various methods for performing drug tests. Also, many substances may produce false positives for an offending substance. There is a substantial gap between the questions that the legal community will like to have answered by drug testing and the answers that the scientific community is able to provide. The real danger lies in the legal community's failure to mind the gap by drawing unwarranted inferences from drug test results.

DOH states the following:

Driving under the influence of drugs is a growing problem in New Mexico. In calendar year 2008, 38% of the blood specimens received from DWI arrests for testing by the SLD had alcohol levels less than 0.08. Of these specimens with alcohol less than 0.08, 75% tested positive for drugs other than alcohol. In addition, in 54% of the drug positive cases, alcohol levels were zero.

Under current law, when a driver is suspected of being impaired due to drugs other than alcohol anywhere in the state, blood samples are sent to the SLD for testing. If drugs are found, the laboratory must send a toxicologist to testify in court as an expert witness to explain how the test result indicates the presence of a drug that could cause the impaired behavior witnessed by the law enforcement officer.

Unlike alcohol, however, it is impossible to ascertain impairment from any given level of drug in the body, and the substance of the testimony of the toxicologist is that the presence of the drug in the blood indicates consumption of the drug and the drug can produce impairment.

HB187 will change the prosecution of the impaired driving case. Following demonstration of impairment by law enforcement, the documentation of the presence of certain specified levels of any of the four drugs specified: cocaine, methamphetamines, amphetamines, heroin, or their specified biologically active conversion products will be sufficient for conviction. This will place the emphasis of the prosecution back on the observation of impairment in the driver and restoring the role of the drug test to merely confirming the presence of the drug capable of explaining the observed impairment. Under current law, the emphasis on the specific level of drug, which does not correlate with level of behavioral impairment, is overly burdensome to the prosecution and distracts the focus from the demonstration of impaired behavior. This is completely different from alcohol, for which blood levels do correlate with degree of impairment.

As of 2008, 14 states had established per se levels of drugs for impaired driving. Twelve of these 14 states disallow any detectable limit of drugs or their metabolites. Two of the 14 states specify maximum allowable levels of the drugs and their metabolites. The per se levels of drugs listed in HB187 are similar to the levels specified in the 2 states with similar laws and are levels at which the laboratory can detect, quantitate and be absolutely certain that the detected drug was present in the person tested.

There is concern that HB187 will allow individuals to be found guilty of possession of drugs by the presence of the drugs in their blood. However, similar to current law, a blood sample can only be requested of a driver following the establishment of a reasonable suspicion of impairment by performance on field sobriety tests or evaluation by a drug recognition expert. Anyone tested for the presence of these drugs will have already demonstrated impaired function and provided probable cause.

## **ADMINISTRATIVE IMPLICATIONS**

PDD claims that the provisions of this bill will increase burden on staff and they will need to hire additional staff to provide effective representation.

DOH notes that currently SLD only tests for drugs when blood alcohol levels are less than 0.08, so there will be no additional cost to the laboratory.

## **RELATIONSHIP**

HB 187 relates to:

- HB 46, DWI Chemical Test Fees
- HB 65, Increase Certain Vehicular Homicide Penalties
- HB 115, DWI License Revocations & Interlocks
- HB 139, Expungement of Certain DWI Records
- HM 207, Interlock Fund Eligibility
- SB 3, DWI Incarceration Requirements

SB 4, DWI Plea Agreements & Refused Chemical Tests  
SB 5, Increase DWI Penalties & Fines  
SB 32, DWI Chemical Test Fee Increase  
SB 151, Minimum Concentration for DWI  
SB 170, Ignition Interlock License Plates  
SB 176, Use of DWI Convictions for Sentencing

**OTHER SUBSTANTIVE ISSUES**

In 2007, in response to HM 102, Study Driving While on Drugs, a report was prepared by the designated memorial task force. The document presented information indicating the extent of the problem in New Mexico, the status of laws passed in other states and provided recommendations for possible changes in law to address driving under the influence of drugs. The following recommendations are listed:

1. The per se legislation should apply to controlled and prohibited substances and their metabolites.
2. The controlled and prohibited substances covered should be specified in a schedule.
3. The per se legislation should apply to any detectable amount in the blood.
4. The per se legislation should not apply to situations where an individual is taking the controlled/prohibited substance legally (via valid prescription). In such cases, impairment will have to be established.
5. The per se law should be implemented within existing New Mexico Implied Consent Act.

DOT notes HB 187 addresses all the items listed in the memorial.

DW/svb