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

SPONSOR Rehm **ORIGINAL DATE** 02/07/11 **LAST UPDATED** **HB** 49

SHORT TITLE DWI as Drug in Blood & Interlock for Alcohol **SB**

ANALYST Daly

Relates to SB 3, SB 127

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	$0.0-$190.0	$0.0-$190.0	$0.0-$380.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorney (AODA)
Attorney General's Office (AGO)
Taxation & Revenue Department (TRD)
Department of Finance & Administration (DFA)
NM Sentencing Commission (NMSC)
Public Defender Department (PDD)
Department of Health (DOH)
Corrections Department (NMCD)
Department of Public Safety (DPS)
NM Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

House Bill 49 would make it illegal to drive with blood levels of cocaine, methamphetamines, amphetamines or heroin above specified levels. It would also set per se standards for cocaethylene, the biologically active metabolite of cocaine, or either 6-monoacetyl morphine or morphine, the biologically active metabolites of heroin, and for 3,4-methylene dioxymethamphetamine.

In addition, HB 49 would provide that the ignition interlock requirement upon DWI conviction applies only to persons convicted of driving under the influence of alcohol.

FISCAL IMPLICATIONS

Since existing law already makes it illegal to drive under the influence of drugs and this bill is simply establishing per se standards for specified drugs and metabolites, HB 49 may not significantly increase the number of arrests or prosecutions.

DOH, however, anticipates that if law enforcement requests all DWI blood samples be tested for the presence of drugs, the resulting cost would be $190,000 per year for an analyst and test materials, based upon a 60% increase in testing. If the current practice of testing for drugs only when blood alcohol is less than 0.08% continues, there would be no additional cost. It is this range of costs that appears in the table above.

AODA notes the new requirement that appears to require drivers with any amount of alcohol in breath or blood install an ignition interlock (see Technical Issues) could increase costs, and no funding is provided to pay for such devices for indigent drivers.

SIGNIFICANT ISSUES

DOH states:

> Driving under the influence of drugs is a legitimate public health concern as it puts drivers, passengers and others who share the road at risk. In calendar year 2010, 87% of the blood specimens received from DWI for testing by the state's Scientific Laboratory Division (SLD) which had alcohol levels less than 0.08 tested positive for drugs. In addition, approximately 8% of the drug positive cases, the alcohol levels were zero.
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> 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 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. 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.
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> HB 49 would 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 five drugs specified: cocaine, methamphetamines, amphetamines, heroin, ecstasy or their biologically impairing conversion products would be sufficient for conviction. This would 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 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.
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> The drugs listed in the bill are those which account for a majority of driving under the influence of drugs cases in New Mexico. The per se standards set in the bill are those found in similar laws in other states, and are levels at which the laboratory can detect

> with certainty and quantify the presence of the drug, although research to develop standard drug impairment levels has been inconclusive.

The AGO comments:

> Currently there are no agreed-upon national or state per se standards for the drugs and metabolites listed in the bill, and unsafe driving due to the effect of these drugs and metabolites is already made unlawful under section 66-8-102(B) in existing law.

The PDD raises similar concerns.

DFA advises:

> The per se drug standards in HB 49 are unreasonably high and usually not found at these levels in the impaired driver. There is overwhelming consensus by the experts in the field that any detectable amount of these drugs can cause impairment in some drivers. Heroin and 6-Monoacetylmorphine likely will not ever be found in a driver as these compounds break down in the body within minutes. This proposed language will not help prosecute drugged drivers.
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> This bill does not cover Marijuana and its Metabolites, which are found in a high percentage of driving under the influence of drugs cases. Another significant group that is not addressed involves prescription drugs and impairing over-the-counter drugs.

Additionally, TRD expresses concern that the amendments to sections 66-8-111, 66-8-111.1 and 66-8-112 of the Implied Consent Act that strike language setting forth the per se standards for alcohol concentration and makes reference back to the standards for both alcohol and drugs set out in the amendments to Section 66-8-102 imposes the criminal standard of proof on the issues and findings for the administrative license revocation hearing. TRD advises that in revocation proceedings, it is the alcohol concentration at the time of the test rather than the time or driving that is the deciding factor, nor it is necessary to prove that the test was conducted within a specified time frame from the time of the stop, which are at issue in criminal prosecutions for driving under the influence.

TRD also points out that HB 49's proposed amendments to the implied consent laws calls into question what actually constitutes a implied consent violation, since Section 66-8-102, in addition to setting per se standards for alcohol (and certain drugs under this bill, also prohibits driving under the influence of any amount of alcohol or drugs if it renders the person unable to safely drive a vehicle. These amendments could be read to mean that anyone arrested for DWI with any alcohol or drug concentration has violated the implied consent laws and is subject to license revocation

The AGO notes a similar concern with the proposed deletion of the per se standards in section 66-8-110(C), which change would require the arresting officer to charge when a test reveals any alcohol, even if it is below the presumed levels of intoxication.

ADMINISTRATIVE IMPLICATIONS

DOH asserts that the passage of this bill would reduce the use of its scientific lab personnel

appearing as expert witnesses in court, noting an increase of more than 70% in the past year in the number of subpoenas received relating to DWI prosecutions. Providing that testimony has led to delays in other work performed by those personnel, including cause of death testing.

RELATIONSHIP

HB 49 relates to:

SB 3, Blood Tests for Intoxication and Drugs
SB 127, DWI Plea Agreements & Refused Chemical Tests

TECHNICAL ISSUES

The amendment to subsection O of Section 66-8-102 which imposes the ignition interlock requirement appears to require an offender who is convicted of driving under the influence of drugs to be subject to the interlock requirement if that person had any alcohol concentration in the blood or breath as specified in that subsection, even if the amount was less than the per se standards for alcohol, and had not been convicted of driving under the influence of alcohol.

OTHER SUBSTANTIVE ISSUES

DOH has advised that the number of drug-involved drivers in motor vehicle crashes increased 72% from 2005 to 2006. From 2001 to 2006, the presence of cocaine in fatally-injured drivers rose to 170% and 89% for those who were found to be under the influence of methamphetamine. More generally, DOH reports that in 2009, it is estimated that 33% of fatally injured drivers in the U.S. (with known test results) tested positive for a drug other than alcohol.

The NMSC reports that nineteen states have "per se" laws for drugged driving, including: Alaska, Arizona, Delaware, Georgia, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Ohio, Pennsylvania, Rhode island, South Carolina, Utah, Virginia and Wisconsin. Forty-seven states, including New Mexico, have Drug Evaluation Classification (DEC) programs that train law enforcement officers to become certified Drug Recognition Experts (DRE) who can identify indicators of impairment.

In 2007, in response to HM 102 - Study Driving While on Drugs, a report was prepared by the task force convened pursuant to the Memorial. 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 were 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 would have to be established.
5. The per se law should be implemented within existing New Mexico Implied Consent Act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AODA advises that if this bill is not enacted, driving under the influence of drugs will remain difficult to prove. Specifying the type and amount of a controlled substance or metabolite that makes it unlawful to drive will aid in prosecution of these cases.

MD/bym