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FISCAL IMPACT REPORT

ORIGINAL DATE 02/04/21

SPONSOR Rehm LAST UPDATED _____ HB 187

SHORT TITLE Drugged Driving Penalties SB _____

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$659.1	\$659.1	\$1,318.2	Recurring	General Fund
Total		\$883.0		\$883.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB63

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of Bill

House Bill 187 amends provisions of the Motor Vehicle Code to:

- make it unlawful for a person who is under the influence of any drug to drive a motor vehicle. Under current law, the prohibition applies only if a person is under the influence of drugs to the degree it renders the person incapable of safely driving a vehicle;
- make it unlawful for a person to drive a vehicle if the person has specified amounts of listed controlled substances or metabolites in the person's blood within three hours of driving the

vehicle and the controlled substance or metabolite concentrations result from the consumption of a controlled substance before or while driving; and

- provide that ignition interlock requirements apply only to offenders with an alcohol concentration in their blood or breath.

The effective date of HB187 is July 1, 2021.

FISCAL IMPLICATIONS

DOH provides the following information regarding the fiscal impact of the bill:

HB187 will require four more staff within the Forensic Toxicology Bureau of the Scientific Laboratory Division (SDL). The bill will require our laboratory to complete multiple assays on all samples which arrive in the lab, therefore increasing workload substantially. The bill will require 2.5 FTE staff in the first year to help develop and validate new methods. Two of those FTE will do validation while 0.5 of the FTE will complete ‘measurement of uncertainty’ studies on all drug compounds listed in the bill. The increase in analysis will cost money in terms of consumable drug standards and extraction materials.

SLD does not have enough equipment to handle the increase in testing capacity, therefore we will require two new liquid chromatograph-triple quadrupole mass spectrometers (LC-MSMS) as well as 1 automated extraction robot and evaporator. Each LC-MSMS needs its own power isolation and battery backup to protect state resources as well as provide the best quality data output.

<i>Recurring</i>	
PS&EB	
4 FTE at pay band 80 - $\$31.29 \times 2080 \times 1.36 = \$88,513.15$ annual salary plus benefits x 4	\$354,053
Lab Supplies	
Drug Standards & internal standards	\$40,000
Solvents	\$10,000
2 LC-MSMS Equipment maintenance contracts	\$65,000
Automated extraction robot consumables	\$100,000
IT costs – Enterprise costs such as subscriptions, help desk	\$1,500
<i>Non-recurring</i>	
Computer resources for 4 staff	
Computer setup - \$2,000 per FTE x 4	\$8,000
Laboratory Information Management System Integration	\$60,000
Laboratory Instrumentation – Capital Equipment	
Liquid Chromatography- triple quadrupole mass spectrometer	\$700,000
Power Isolation & Battery backup	\$20,000
Automated Extraction Robot & Evaporator	\$95,000

PS&EB	
2.5 FTE at pay band 80 - $\$31.29 \times 2080 \times 1.36 = \$88,513.15$ annual salary plus benefits x 2.5	\$221,283

NOTE: While DOH lists 2.5 FTE as nonrecurring costs, LFC has treated those FTE as recurring costs for purposes of calculating the operating budget impacts of the bill, consistent with LFC policy.

LOPD states that it is difficult to assess whether there would be a significant fiscal impact on LOPD because it is difficult to predict whether the bill’s passage would result in more or fewer DI prosecutions. If prosecutions and trials did increase, LOPD workload would increase, necessitating additional attorneys, expert toxicology witnesses, and support staff. LOPD also states that LOPD attorneys might need experts to challenge any dubious testing processes, and New Mexico case law requires LOPD 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 this bill, 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.

AOC states that any fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. Depending on the number DWI prosecutions and trials resulting from the bill, there may be an increase in the amount of work that needs to be done by the courts, thus requiring additional resources to handle the increase.

NMCD states that the fiscal impact of this bill is not known and difficult to estimate, as convictions for these cases would be the telling factor. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, which pushes the overall prison population higher. NMCD states that the average cost per day to incarcerate someone in the state’s prison system is 299 days. NMCD reports the average cost to incarcerate a single inmate in FY20 was \$44.8 thousand; however, due to the high fixed costs of the state’s prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$23.3 thousand per inmate per year across all facilities.

SIGNIFICANT ISSUES

DOH states that driving under the influence of drugs is a growing problem in New Mexico. The Scientific Laboratory Division (SLD) of DOH tests for drugs in all implied consent cases in which the blood alcohol level is less than 0.08. In 2018, approximately 90 percent of the blood specimens tested for drugs by the SLD in DWI cases were positive for drugs other than alcohol. Additionally, a 2018 report by the Governor’s Highway Safety Administration reported (using FARS data from 2016) that of fatally injured drivers who were tested, 43.6 percent tested positive for one or more drugs other than alcohol and 37.9 percent tested positive for alcohol. There was a high overlap of drugs and alcohol, with 40.7 percent of drug-positive drivers also testing positive for alcohol. Additionally, the percent of alcohol-positive fatally injured drivers decreased from 2006 to 2016 (41.9 percent in 2006 to 37.9 percent in 2016) while the percent of fatally injured drivers who tested drug-positive increased (27.8 percent to 43.6 percent) over the

same timeframe.

DOH also notes that in contrast to alcohol, for which blood alcohol levels correlate with and predict degree of impairment, the blood concentrations of the drugs specified in HB187 do not, by themselves, predict impairment. Detection of these chemicals document the presence of possibly impairing substances in the body; the proof of impairment is in the person's observed behavior, documented by the arresting officer. Creating per se limits for drugs runs a risk of convicting prescribed drug users who may be tolerant as well as failing to convict naive drug abusers who may be significantly impaired by small amounts of the specified substances.

DOH states that it will not be able to provide adequate services under HB187 with current detection capability. SLD is currently capable of detecting six out of nine substances at the proposed levels, but not the other substances at the levels proposed. Specifically, there is no method for heroin detection, and the SLD detection limits for the heroin metabolites are above the desired per se levels. Further, drug screening does not focus on amphetamine, so a new screening method will need to be validated and implemented. To detect all the controlled substances at concentrations specified in this bill, testing capabilities at the proposed detection levels will need to be established. Sample throughput is another significant issue, which could be remedied by increasing staffing and instrument resources.

DOH believes it is reasonable to limit the assignment of ignition interlock devices, which detect breath alcohol, only to individuals convicted of driving under the influence of alcohol. This is because the ignition interlock is not directly relevant and preventive for a person convicted of driving impaired due to a drug other than alcohol.

NMAG states that the bill's provision making driving under the influence of any drug unlawful may be subject to legal challenge on the grounds that is constitutionally overbroad. NMAG notes that as defined by the International Association of Chiefs of Police and used by prosecutors and law enforcement nationwide, a drug is: "Any substance that, when taken into the human body, can impair the ability of the person to operate a vehicle safely."¹

LOPD notes that the bill amends Section 66-8-102(B) to make it unlawful for a person under the influence of any drug to drive a vehicle and amends Section 66-8-102(D) to make it unlawful to drive if they have specified concentrations of listed drugs in their blood. This is confusing because it suggests that it is unlawful to drive under the influence of any drug except for the listed drugs, which include amphetamine, cocaine, heroin, and marijuana. A person can be under the influence of the listed drugs as long as the amount in their blood is under the limits specified in Section 66-8-102(D). If the prohibition against driving under the influence of drugs is intended to apply only to those listed in Section 66-8-102(D), the bill should make this clear to avoid any confusion regarding its application.

AODA states that because the bill eliminates the language "to a degree that renders the person incapable of safely driving a vehicle" in the prohibition against driving under the influence of drugs, prosecutors would only need to prove that a person was driving a motor vehicle and the chemical testing revealed that they had ingested one or more of the enumerated controlled

¹www.theiacp.org/sites/default/files/all/ij/International%20Standards%20of%20the%20DECP%20October%202017.pdf

substances and had a blood concentration level at the specified amount or above. The enumeration and quantification of controlled substances will mean that prosecutors will only need to submit evidence from chemical testing to be able to prove their case. This could be considered a “per se” law.

Like AODA, DPS points out that HB187’s provisions that specify the amounts of controlled substances for proof of illegal intoxication would provide a non-rebuttable presumption of impairment by drug as a matter of law, and would facilitate prosecution of individuals who are arrested for driving while under the influence of drugs. According to DPS, proving impairment and obtaining convictions in drug DWI cases under the current law is difficult because it is based upon an officer’s observations of driving behavior and field sobriety test results.

In regard to the bill’s amendment to Section 66-8-102(B) that makes it unlawful to drive under the influence of any drug, AOC notes that, as amended, the provision reads similarly to 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.” According to AOC, 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. AOC believes that courts likely would apply the same meaning to the term “under the influence” in Section 66-8-102(B), as amended by the bill.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB187 conflicts with HB63, which also amends Sections 66-8-102, 66-8-111 & 66-8-11.1 NMSA 1978.

BG/sb/rl