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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/20/07

SPONSOR Maestas LAST UPDATED \_\_\_\_\_ HB 1233

SHORT TITLE DWI Concentrations for Time Periods SB \_\_\_\_\_

ANALYST C. Sanchez

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

**Duplicates, Relates to, Conflicts with, Companion to**  
 HB 1247, SB 443, HB 403, HB 420, SB 440 and HB 1247.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Bernalillo County Metropolitan Court (BCMC)  
 Public Defenders (PD)  
 New Mexico Department of Transportation (NMDOT)  
 Administrative Office of the District Attorneys (AODA)  
 Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

Section 66-8-102 NMSA 1978 currently provides that it is unlawful to operate a vehicle with an alcohol concentration in one's blood or breath ("BAC") of .08 or more. HB 1233 would amend that statute as follows:

- A. HB 1233 would make it unlawful to drive a motor vehicle if the operator has: a BAC of .08 at the time of driving, .09 or more within one (1) hour of driving and the alcohol concentration results from alcohol consumed before or while driving; a BAC of .10 or more within two (2) hours of driving and the alcohol concentration results from alcohol consumed before or while driving; and a BAC of .11 or more within three (3) hours of driving and the alcohol concentration results from alcohol consumed before or while driving.

- B. HB 1233 would make it unlawful to operate a commercial motor vehicle if the operator has: a BAC of .04 at the time of driving, .05 or more within one (1) hour of driving and the alcohol concentration results from alcohol consumed before or while driving; a BAC of .06 or more within two (2) hours of driving and the alcohol concentration results from alcohol consumed before or while driving; and a BAC of .07 or more within three (3) hours of driving and the alcohol concentration results from alcohol consumed before or while driving.
- C. HB 1233 would redefine aggravated driving under the influence as having: a BAC of .16 at the time of driving, .17 or more within one (1) hour of driving and the alcohol concentration results from alcohol consumed before or while driving; a BAC of .18 or more within two (2) hours of driving and the alcohol concentration results from alcohol consumed before or while driving; and a BAC of .19 or more within three (3) hours of driving and the alcohol concentration results from alcohol consumed before or while driving.

HB 1233 also amends NMSA 66-8-110 by providing that tests performed under the Implied Consent Act more than three (3) hours after driving may be introduced as evidence of the alcohol concentration in the defendant's blood at the time of the test and the trier of fact can then determine what weight to give to the test result.

### **FISCAL IMPLICATIONS**

According to the New Mexico Department of Transportation (NMDOT), “federal requirements mandate states to implement a strict BAC.04 law for Commercial Driver License holders. A bill was passed in the 2004 Legislative session to bring New Mexico into compliance. However, this bill would impact the strict BAC .04 provision. If the State does not have this law, the New Mexico Department of Transportation will be subject to a 5% withholding of Federal Construction Funds (approximately \$10 Million) the first year, and 10% (approximately \$20 million) in subsequent years.”

The bill would probably result in a minimal to moderate increase in the number of DWI convictions because the “expanded testing window” will bring more individuals into the scope of the law. The bill will probably cause a minimal to moderate increase in the Correction Department's prison population and probation/parole caseloads. However, is difficult to estimate just how many new convictions will result if this bill becomes law. The bill does not make any appropriation to cover any increases in prison population and probation/parole caseloads that the bill is likely to cause.

### **SIGNIFICANT ISSUES**

In State v. Day, 140 N.M. 544, 14 P.3d 103 (Ct.App. 2006), the Court of Appeals held that, in prosecuting DWI cases, the State must introduce evidence regarding BAC of the defendant at the time the driver was operating the vehicle. The Court rejected the State's argument that NMSA 66-8-102(C) (1) creates a statutory presumption of intoxication for BAC readings of .08 or greater when no significant delay occurs between driving and testing and held that a “reasonable amount of time” and “no significant delay” are much too uncertain for any presumption or for a rational jury inference of a .08 BAC or more at the time of driving.

The Scientific Laboratory Division of the Department of Health (“SLD”) has a limited number of experts available to provide the scientific extrapolation evidence demanded by the Court of Appeals; therefore, the effective prosecution of DWI cases in New Mexico has been jeopardized by the holding in Day.

The Court of Appeals further stated in Day, however, that the “difficulty of proof in using the scientific retrograde extrapolation process to prove a BAC at the time of driving is an important reason why our Legislature should address the need for effective legislation.” This legislation is an attempt on the part of the Legislature to address the issue raised in Day by eliminating the need for an expert SLD witness in most DWI prosecutions in the state.

### **PERFORMANCE IMPLICATIONS**

As provided above, if adopted, the bill would address the holding of the Court of Appeals in State v. Day and eliminate the need for an expert SLD witness in most DWI prosecutions in the state.

### **ADMINISTRATIVE IMPLICATIONS**

According to the Administrative Office of the District Attorney, because HB 1233 is scientifically unsound, the long term impact of HB 1233 would be to make prosecution of DWI cases based upon per se blood or breath alcohol levels much more difficult, and would probably have an adverse effect within the State.

HB 1233 proposes a time-dependent increase in legal blood alcohol level for instances when the alcohol test is taken at 1, 2, and 3 hours after the traffic stop, based upon the idea that blood alcohol levels decline over time. However, a time-dependent increase is unnecessary, because it has been documented in refereed scientific journals that blood alcohol concentrations do not change over a period of 2 hours after the traffic stop for DWI. Between 2 and 3 hours after the traffic stop, if the alcohol levels change at all from the time of driving, they will decline slightly by perhaps 0.01-0.02 %. It is only after 2-3 hours that the blood alcohol begins a linear decline with time. Therefore, adjustment of the legal blood alcohol limits is not necessary within 3 hours of the traffic stop.

Furthermore, if one wanted to compensate for the physiological decline in blood alcohol levels over time, one could do it by adjusting the legal blood alcohol downward over time which is the opposite of what is proposed in HB 1233. The time-dependent adjustment of legal blood alcohol levels upward proposed by HB 1233 actually has the opposite effect of what is intended by the sponsor. That is, it effectively increases the legal limit for blood alcohol at the time of driving above 0.08%. Blood alcohol level has been demonstrated to plateau for at least 2 hours of the traffic stop, so a time-dependent adjustment over this time period is unnecessary and could be seriously problematic.

### **RELATIONSHIP**

No other bills duplicate HB 1233.

The following bills relate to HB 1233: SB 443, HB 403, HB 420 and SB 440. However, each of these bills provides a three hour window for testing after operation of the vehicle without providing the sliding scale set forth in HB 1233.

HB 1247 likewise relates to HB 1233, but provides a two hour window for testing after operation of the vehicle without providing the sliding scale set forth in HB 1233.

### **TECHNICAL ISSUES**

It will be difficult to “group” DWI defendants into a .09 or .10 or .11 category, etc. Proposed Section C (1) and (2) seems to categorize all intoxicated drivers of either ordinary vehicles or commercial vehicles as having similar blood alcohol levels after a certain time period passes. That is unrealistic based on our lack of knowledge as to defendant’s metabolic rate, elimination rate, meals eaten that day, amount of drinks ingested that day, type of alcohol ingested that day, medical history, etc.

### **OTHER SUBSTANTIVE ISSUES**

This escalating scale is contrary to the available research on this issue. Research shows that a person’s BAC after being stopped for a DWI is likely to “level off” for up to a two hour period. Then, for each additional hour, the person’s BAC would drop approximately .01 per hour. For example, if a person was stopped at 8:00 p.m. with a BAC of .08, the person would still likely have a BAC of .08 at 10:00 p.m. At 11:00 p.m., the person would likely have a BAC of .07, at 12:00 midnight a BAC of .06, etc. However, this bill would require this same person to have a BAC of .10 at 10:00 p.m. and a BAC of .11 at 11:00 p.m., etc. This is a lower standard and is contrary to available research.

### **ALTERNATIVES**

Revising HB 1233 to include accurate scientific data in regards to BAC levels.

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

*Status quo*, meaning that if DUI laws are not amended, post-*State v. Day*, if a driver is charged with driving while intoxicated *and* the prosecution lacks evidence of “driving impairment to the slightest degree” *or* chooses to proceed exclusively under *per se* DUI, which requires proof of a breath or blood alcohol concentration [BAC] at or above a defined level *at the time of driving*, BAC test results, obtained *after the time of driving*, will have to be related back to the BAC at the time of driving through scientific evidence.

CS/mt