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FISCAL IMPACT REPORT

ORIGINAL DATE 1/31/08

SPONSOR Rehm, W LAST UPDATED _____ HB 592

SHORT TITLE Controlled Substance in Blood as Violation SB _____

ANALYST C. Sanchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	NFI		General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non- Rec	Fund Affected
Total			Indeterminable			General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of District Attorneys (AODA)
 Bernalillo County Metropolitan Court (BCMC)
 Public Defender (PD)
 Department of Health (DOH)
 Department of Corrections (DOC)

SUMMARY

Synopsis of Bill

House Bill 592 amends Section 66-8-102 NMSA 1978 to provide that it is unlawful for a person who has a detectable amount of a controlled substance or its metabolite in the person's blood to drive a vehicle in this state if possession of that controlled substance is in violation of the Controlled Substances Act.

The effective date of the Act is July 1, 2008.

FISCAL IMPLICATIONS

The bill, if adopted, may significantly increase the number of cases brought before state courts as the DWI statute will henceforth criminalize not only the operation of a vehicle while under the influence of alcohol or drugs, but also the operation of a vehicle while *not* under the influence of drugs and alcohol, but where the driver is found to have had a detectable amount of a controlled substance in his or her system.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary and department of public safety would be proportional to the enforcement of this law and commenced prosecutions.

According to the Department of Health, HB592 may increase the drug testing workload at the Scientific Laboratory Division by approximately 1,800 cases per year, more than doubling the current drug caseload for Implied Consent work. The recurring resources required to perform the drug analysis and to follow up the lab work with expert witness testimony for criminal prosecution as a result of passage of HB 592 would be \$200,000 per year to pay for 2 additional FTE (chemists), test kits and reagents for the additional testing, and in-state travel costs to provide expert witness testimony.

SIGNIFICANT ISSUES

1) The Controlled Substances Act, Section 30-31-1 NMSA 1978, and specifically Sections 30-31-6 through Section 30-31-10, Schedules I through V, contains lists of controlled substances.

2) The amendment to Section 66-8-102 prohibits a “detectable amount” of a controlled substance or its metabolite from being in the blood of a driver of a vehicle. Other unlawful acts under this section are:

- Driving while under the influence of intoxicating liquor
- Driving while under the influence of intoxicating liquor to a degree that renders the person incapable of safely driving a vehicle
- Driving with specific blood alcohol levels in the person’s blood or breath

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

HB 592 could increase the caseload of various court divisions like Case Initiation, Background Investigation, Probation, etc., that are directly impacted by each new DWI case.

The bill could also increase the inmate population or probation/parole caseloads by a large number, thus increasing workloads for current prison and probation/parole staff.

TECHNICAL ISSUES

Due to the fact that this statute calls for a finding of controlled substances in one's blood, it is unclear how this finding would be made absent a blood draw on an individual. It would be very difficult for an officer, acting on reasonable suspicion that the individual *might* be under the influence of a controlled substance, to confirm or dispel that suspicion absent the extremely intrusive practice of drawing blood. Additionally, an officer may not be qualified to make the determination of presence of a controlled substance. This issue is before the New Mexico Court of Appeals. See *State v. Aleman*, Ct. App. No. 25, 224; and *State v. Valenzuela*, Ct. App. No. 25, 225

OTHER SUBSTANTIVE ISSUES

According to Bernalillo County Metropolitan Court, the proposed bill raises several legal issues, including the following:

1. The proposed language may be unconstitutionally void for vagueness, as the amendment would result in an internal contradiction. Whereas paragraph B provides that it is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state, the new paragraph C makes it unlawful for an individual merely to have a “detectable amount” of a “controlled substance” (which themselves are included among “any drugs”) in his or her blood while driving – irrespective of the effect on the individual's ability to safely drive a vehicle. The proposed amended statute may be similarly void for vagueness as the criminalization of “detectable amount[s]” of controlled substances in the blood while driving – rather than threshold limits or any relation to the ability of the person to safely operate a vehicle – may not allow individuals the fair opportunity to determine whether their conduct is prohibited by the statute.
2. The proposed language is overbroad, in that it prohibits innocent as well as criminal conduct. The new language is unrelated to the harm that the legislature sought to prevent by enacting the DWI statute, i.e., the operation of vehicles by persons under the influence of drugs or alcohol. Rather, the proposed language appears designed to circumvent the prohibition against criminalizing the presence of drugs in the body as illegal possession (see e.g. *State v. Twayne H.*, 123 N.M. 42, 933 P.2d 251 (Ct.App. 1997); *State v. McCoy*, 116 N.M. 491, 864 P.2d (Ct.App. 1993)) by ostensibly tying the “illegal possession” to the operation of a motor vehicle.
3. The proposed language, if enacted, would conflict with existing statutes.

ALTERNATIVES

According to the Administrative Office of District Attorneys, it may be advisable to increase the penalties for refusing a blood test. Otherwise knowledgeable defendants who have been using illegal drugs will refuse a blood test and getting a search warrant is so cumbersome that many police officers either won't or don't do that. A drugged driver would therefore be likely to avoid any consequences for being under the influence of drugs and driving, aside from the minimal administrative sanction for refusing a test.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

A new violation would not be created for driving with a detectable amount of a controlled substance or its metabolite in the blood when possession of the controlled substance is not authorized by the Controlled Substances Act; a “per se” law for drugged driving.

CS/bb