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FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/14
LAST UPDATED 02/13/14 **HB** 190 & 191/HTPWCS

SPONSOR HTPWC

SHORT TITLE DWI Drug Metabolite Amounts **SB** _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Narrative				Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Public Safety (DPS)
 New Mexico Corrections Department (NMCD)
 Department of Health (DOH)
 Attorney General’s Office (AGO)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of Bill

The House Transportation and Public Works Committee substitute for House Bills 190 and 191 would modify New Mexico’s DWI Laws by adopting uniform reference to unlawful alcohol, controlled substance, and controlled substance metabolite concentrations in the driver’s blood or breath, and define what those concentrations are; by restricting the requirement for automotive ignition interlock to persons convicted of driving while under the influence of intoxicating liquor or alcohol (persons convicted of driving while under the influence of any drug would no longer be subject to the ignition interlock requirement); and, by making minor grammatical corrections, and changing gender references to gender neutral.

FISCAL IMPLICATIONS

The New Mexico Corrections Department estimates that there is likely to be a minimal to moderate number of additional DWI convictions resulting from this bill, which would increase

the Department's costs by causing minimal to moderate increases to the inmate population and probation/parole caseloads.

This would result in some cost savings to the DOH Scientific Laboratory Division (SLD) in the areas of travel and overtime by reducing the demand for the toxicologist to travel to courts all across the state to provide interpretive testimony in drug-related DWI cases.

TRD stated that there may be an impact on TRD's Hearings Bureau, potentially requiring additional FTEs, due to increased hearings on DUIs related to controlled substances or metabolites.

SIGNIFICANT ISSUES

The State Laboratory Division (SLD) tests for drugs in all Implied Consent cases in which the blood alcohol level is less than 0.08. In 2011, 79 percent of the blood specimens tested for drugs by DOH SLD in DWI cases were positive for drugs other than alcohol. In addition, in approximately 8 percent of these cases, there was no alcohol present in the blood.

DOH provided the following analysis:

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 interpret the causal relationship between each drug detected in the defendant's blood to the observed impaired behavior witnessed by the arresting law enforcement officer. As a result of recent rulings by the Supreme Court of the U.S. (*Melendez-Diaz vs. MA* and *Bullcoming vs NM*), the specific analysts who performed the drug tests must testify. Because drug-related DWI cases commonly involve several drugs, it is not uncommon for the SLD to be required to send 2-4 analysts plus an interpretive toxicology expert to testify in a single DWI case involving drugs.

Unlike alcohol impairment, however, it is impossible to predict impairment solely from the concentration of drug in the body so, under current law, the testimony of the toxicologist is required to testify that the presence of the drug found in the defendant's blood indicates consumption of the drug, and also that the drugs found can produce the impairment observed by the law enforcement officer at the time of the driver's arrest.

This bill would change the prosecution of the impaired driving case. Following the establishment of probable cause by the demonstration of impairment of the driver and arrest by a law enforcement officer, the documentation of the presence of certain specified levels of any of the six drugs 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 in the blood of an impairing substance capable of explaining the observed impairment.

In contrast to alcohol, for which blood alcohol levels do correlate with and predict degree of impairment, blood concentrations of the drugs specified in HB191 do not, by themselves, predict impairment. These specified drugs merely document the presence of impairing substances in the body; the proof of impairment is in the person's observed behavior, documented by the arresting officer.

The AGO provided the following analysis:

In addition to the presumptive .08 BAC level, current state law also prohibits driving a vehicle while under the influence of intoxicating liquor to the "slightest degree." However, it is illegal to drive a vehicle while under the influence of any drug only if the person is impaired to a degree that renders the person incapable of safely driving a vehicle (this is higher than the "slightest degree" standard for alcohol). If enacted, the bill would seem to modify the standard for drug impairment to the "slightest degree" standard as well.

TRD provided the following analysis:

The language on pg 16, lines 23 thru pg 17 line 5, on pg 19, lines 7-13 and page 22, line 22 thru page 23, line 2 and page 23 line 21 thru page 24, line 2. If the point of the bill is to amend the Implied Consent Act to refer to alcohol concentrations and drugs under Section 66-8-102 then the language should be amended:

“...indicated the presence of alcohol or drugs or drug metabolites in the person’s breath or blood at a level that is unlawful pursuant to Section 66-8-102 or two one-hundredths ...”

The bill strikes references to alcohol concentrations and drug concentration in the Implied Consent Act and replaces the language with a reference to Section 66-8-102 NMSA 1978 putting issues and findings for the administrative revocation hearing under criminal burden. For example, case law provides that the issue under the Implied Consent Act is the alcohol concentration at the time of the test. In the administrative hearing there is no requirement to relate the alcohol concentration back to the time of driving or prove that it was taken within a specified timeframe from the time of the stop, as required in the criminal setting. This increased state burden may decrease the number of suspensions.

The language referred to above also creates an issue for what the Implied Consent Act violation actually is. Section 66-8-102 contains per se levels for alcohol, but it also prohibits driving with any amount of alcohol or any drug if it renders the person unable to safely drive a vehicle. This could mean that a person stopped by law enforcement with any alcohol concentration or any type of drug concentration has violated the Implied Consent Act.

OTHER SUBSTANTIVE ISSUES

AODA provided the following:

The HTPWC substitute bill does not add any new offenses, does not alter any penalties for DWI, and does not affect the rights of anyone contesting a DWI or an administrative license revocation. By making the standard for DWI with drugs the same as the standard for DWI with intoxicating liquor, the bill would utilize a standard that has been in place for over 70 years. See, *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274 (1938), and which is the basis for the DWI alcohol jury instruction promulgated by the Supreme Court. Cf., UJI 14-4501 “([T]he defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor they are less able to the slightest degree, either mentally or

physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and to the public.”) Applying the same standard to drugs in 2014 used for alcohol since 1938 seems logical and reasonable.

The precise amounts in a person’s blood for nine common drugs or their metabolites that would be a per se drug violation of the DWI statute are specified. They would provide an easy standard for determining a DWI drug violation, just like the amount of alcohol specified for per se violations of driving under the influence of intoxicating liquor does. Some of the per se limits specified may be below therapeutic levels for prescription medicine.

The nine substances listed, including the active ingredient in marijuana, are some of the drugs most commonly used but other drugs which are abused are not included. The state Scientific Laboratory Division (“SLD”) has routinely tested for nearly 20 common drugs, and can test for other specific drugs if requested because there are significant indications that someone was driving while impaired after consuming them. Synthetic cannabinoids, commonly known as “Spice” or K2,” and synthetic cathinones, sometimes called “bath salts,” are not included although their usage appears to be increasing dramatically. SLD has reported finding poly-drug combinations and drug and alcohol combinations in blood samples they have tested. Unless one of the drugs is listed and is beyond the threshold amount specified, expert testimony will probably still be required on the effects of any of the other drugs and of poly-drug combinations, presumably using the same standard as now exists for alcohol: did it/they render someone less able physically or mentally, or both, to operate a motor vehicle with safety?

For uniform application of the "uniform reference to unlawful alcohol, controlled substance, and controlled substance metabolite concentrations in the driver’s blood or breath", the following New Mexico statutes may also need to be amended:

- Section 66-5-68 NMSA 1978 concerning disqualification to hold a commercial driver's license
- Section 66-8-102.1 NMSA 1978 concerning DWI guilty pleas
- Section 66-13-3 NMSA 1978 concerning operating a motorboat while under the influence of intoxicating liquor or drugs
- Section 66-13-4 NMSA 1978 concerning boating while intoxicated guilty pleas
- Section 66-13-11 NMSA 1978 concerning boating while intoxicated chemical tests

EC/svb