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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 1/31/17  
**LAST UPDATED** 2/27/17     **HB** 49/HJCS  
**SPONSOR** HJC  
**SHORT TITLE** DWI Interlock Requirements     **SB** \_\_\_\_\_  
**ANALYST** Sánchez

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund/Other State Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB22, HB31 and HB74

### SOURCES OF INFORMATION

LFC Files

Responses Received From  
 Administrative Office of the District Attorneys (AODA)  
 Department of Health (DOH)  
 Public Defender Department (PDD)  
 Department of Public Safety (DPS)  
 Office of the Attorney General (OAG)  
 New Mexico Corrections Department (NMCD)  
 Taxation and Revenue Department (TRD)  
 Department of Transportation (DOT)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Committee Substitute

House Judiciary Committee Substitute for House Bill 49 addresses several of the concerns expressed by agencies responding to the original bill. The HJC substitute makes the following changes

- The sobriety monitoring program is court-ordered instead of court-supervised;
- Use of the sobriety monitoring device is verified by NMDOT Traffic Safety Bureau;
- The sobriety monitoring program is approved by the Traffic Safety Bureau instead of the courts;

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- Uses sobriety monitoring device instead of breathalyzer;
- Removes the 48-hour jail term for failure to maintain sobriety or comply with the program; and
- Requires the courts to collect the fee for the sobriety monitoring device, expanding the purpose of the interlock device fund.

House Bill 49 proposes to amend the Motor Vehicle Code to require a minimum of six months of driving with an interlock license or a minimum of six months of successful participation in a court-ordered sobriety program for reinstatement of a license revoked for a DWI offense. It would require evidence of at least 20 ignition interlock tests over six months at least one week apart for those with an interlock. It would also require that the interlock or sobriety monitoring device had not recorded more than two tests at a BAC greater than 0.05 in the most recent six months. A DWI offender who did not install an interlock device and obtain an interlock license would be required to maintain sobriety and participate in a court-approved sobriety monitoring program for the same period as the interlock requirement (or the end of the period of supervision by the court). Each failure to maintain sobriety or to comply with the monitoring program would result in a jail term of 48 hours for each offense. Unless determined to be indigent, the offender would be responsible for all costs associated with sobriety monitoring. If the offender installed an interlock and obtained an interlock license, the court may suspend the sobriety maintenance and monitoring requirements. HB49 also includes home breathalyzer devices with interlock devices in requiring the offender to pay an annual fee to the interlock device fund, and allow the interlock device fund to pay up to \$30 per month toward the lease of a home breathalyzer device for indigent offenders.

### FISCAL IMPLICATIONS

The Taxation and Revenue Department (TRD) reports that it will cost \$16.8 thousand for its information technology staff to make and implement the necessary changes to the motor vehicle system. Those changes will take approximately six weeks to complete. It also points out that if the DWI Compliance Unit has to review for additional requirements more staff may be needed. The average salary and benefits of one compliance officer is \$33.4 thousand.

The Administrative Office of the Courts (AOC) states that more staff time and costs would be needed to monitor offender compliance with the program. The courts would also need to collect another fee, which would need to be added to the current case management system for proper accounting and distribution to the appropriate fund.

In fiscal years 2015 and 2016 the courts and the New Mexico Corrections Department (NMCD) spent \$318.7 thousand and \$378.3 thousand, respectively on monitoring contracts, including sobriety devices.

The Public Defender Department (PDD) states in its response that the additional testing requirement and associated jail sanctions could require litigation of those alleged violations.

The National Highway Traffic Safety Administration reported in its “Transdermal Alcohol Monitoring – Case Studies” that offenders in the jurisdictions included in the case studies paid a \$500 retainer fee to cover installation costs of \$75 and daily monitoring costs of approximately \$12 per day for about 30 days of sobriety monitoring. If the sobriety monitoring term is longer than 30 days, the offender is then required to pay \$12 per day until released. Offenders in the

study were monitored an average of 137 days. Offenders that cannot afford the program would be excluded unless the state has resources to assist with the cost of the device. The report provides the cost, in one jurisdiction, of sobriety monitoring devices of \$1,400 per device. If the state has to purchase the devices before an offender is placed on the program, and ten percent of the offenders using interlock devices in FY16, or 130 are placed on sobriety monitoring, the cost to the state could be \$182 thousand.

According to the Department of Health (DOH), approximately 80 percent of convicted offenders in 2013 were required to install an interlock as part of their sentence.

### **SIGNIFICANT ISSUES**

The PDD points out that the requirements imposed by this bill constitute punishment in a way that the interlock requirements do not. The interlock requirements are not punishment because they are conditions placed on maintaining a government benefit – a license to drive on the State’s highways. The breathalyzer requirements in the proposed legislation are not tied to any government benefit. The disparity in the treatment of defendants who obtain interlock ignition licenses and those who do not opens the legislation to attack on equal protection grounds and is likely to result in increased costs to the taxpayer from litigation associated with defending it.

AOC notes counties may not have the resources to provide sobriety monitoring programs required by the bill and providing financial assistance through the interlock device fund may not fully address the lack devices in some counties.

According to the Department of Transportation (DOT), heightened standards for compliance-based removal could increase the number of interlocked vehicles, further protecting New Mexico citizens from drunk driving. The requirements and penalties of the court sobriety monitoring program may result in increased numbers of individuals choosing the interlock requirement.

The Office of the Attorney General (OAG) states that HB49 seeks to reduce recidivism of impaired driving by instituting a new sobriety monitoring program where presently none exists – for offenders who do not obtain interlock devices. Similar program have been instituted in other states and are typically referred to as “24/7” programs. These programs are built around requiring offenders to provide two breath samples per day to ensure they are remaining sober. Implementation of such a program would provide means to monitor offenders who claim they are not driving subsequent to a conviction to avoid the ignition interlock requirement.

The Administrative Office of the District Attorneys (AODA) replies HB49 is unclear how the sobriety monitoring would take place. If it requires the DWI driver to appear in person at a probation office, police station or other agency, that might be a hardship for persons in rural areas or without access to public transportation, and appearing twice daily could interfere with their work or other obligations. If the bill anticipates installation of a breathalyzer device in the offender’s home, in addition to problems related to making sure the offender provides the sample to be tested, it might require the device be connected to a telephone line. Fewer people rely on a landline and getting a landline installed and paying for it will probably be a hardship for many offenders. If a device is used that is secured to the offender and records and stores their alcohol levels for download later, it could result in someone having a violation that was not detected for some time. HB49 requires sobriety tests at least twice daily for 12 months for someone who does not have an ignition interlock driver’s license and an ignition interlock device installed on

any vehicle they own. That could mean someone in a court-approved sobriety program could have over 700 tests while someone with an interlock license and installed device might have less than 50 tests. In the six months preceding their application persons with an ignition interlock device may have as few as 20 tests while people in the sobriety monitoring program had over 350. Persons who violate the court-approved sobriety program could serve at least 48 hours for each failure to maintain sobriety or comply with the monitoring program, and no standards are prescribed for determining sobriety or program compliance. “Successful participation” is also not clarified so a due process and/or equal protection challenge might be presented.

TRD states that although this bill does not conflict with other laws, amending these sections to include a sobriety monitoring program with little statutory restrictions could possibly obviate the legislative intent of requiring an ignition interlock device to ensure that a person is not driving while intoxicated. The court-approved program requirements in HB49 are not specifically delineated on how the program would be administered to ensure that a person was maintaining sobriety while not being tested by an ignition interlock. Since alcohol remains in a person’s system for a short duration of time, this could potentially make it more challenging to discover without frequent testing. The bill simply provides for a twice daily *monitoring* of a person who is in a court-approved program, but a breathalyzer is not mandatory, a breathalyzer only *may* be included (see HB49, page 12 [Section 66-8-102 NMSA 1978 Comp. (R )]). A potential consequence of not requiring an ignition interlock is that the court is more open to determine what will be appropriate to monitor sobriety. This could lead to some inconsistency amongst programs and wider latitude for reinstating a license. For example, a person might be authorized by their sobriety monitoring program to submit a handwritten log of their day for the applicable time period rather than a breathalyzer or a urinalysis. On the other hand, the sobriety monitoring program would be required of individuals who currently do not have an ignition interlock on their vehicle making a person who is not driving still required to participate in a court-approved sobriety monitoring program which could be an improvement to the current statutes as more people would possibly be monitored.

TRD continues that it is unclear which options will be available to a person who is found guilty of implied consent, or if the requirements in the bill will be applied only to those who have a criminal conviction. Offenders might be confused if the court allows the breathalyzer for a criminal conviction but the Motor Vehicle Division (MVD) still requires the interlock due to implied consent.

#### **ADMINISTRATIVE IMPLICATIONS**

TRD reports that implementation of this proposed legislation will likely increase the amount of reviews by and calls to the MVD DWI Compliance Unit. Reviews may take longer if compliance officers have to review both the breathalyzer test results and the interlock test results for one customer, which could result in the need for additional FTE.

DOT reports that In order to implement the law, NMDOT’s Traffic Safety Division (TSD) would have to promulgate new rules and amend current rules, design a licensing protocol, and develop a network of providers for the sobriety monitoring devices. There is an estimated six to nine month process to promulgate and amend these rules for the New Mexico Administrative Code.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to House Bill 22, DWI for Certain Drugs & Interlocks; House Bill 31, Driver’s License for Some With Only 1 DWI; and House Bill 74, Sentencing on Felony DWIs.

**TECHNICAL ISSUES**

AODA notes the language in the substitute bill on page 2, lines 22-25 and continuing on page 3, lines 1-2 is unclear. The substitute uses the phrase “verified active usage,” but does not specify what “active use” is, nor what constituted verification.

The New Mexico Corrections Department (NMCD) suggests clarifying which agency will be responsible for monitoring sobriety since the substitute does not make that clear.

DOT recommends changing the wording “no alcohol measurements of five one hundredths or more recorded by the ignition interlock device” found at what would be NMSA 1978, Section 66-5-33.1(B)(5) to “the driver has failed an initial breath test six (6) times within a period of three (3) hours, or the driver has failed initial breath tests or random retests ten (10) times within a period of thirty (30) days.” (See Subsection (U)(2) and (3) of 18.20.11. NMAC.). It also recommends adding the following phrase at the conclusion of the first sentence of what would be NMSA 1978, Section 66-5-33.1(B)(6), “provided active usage is verified.”

TRD suggests amending the bill to include making the breathalyzer mandatory rather than a possible addition to the sobriety monitoring program for more consistency in monitoring.

DOT reports that individuals sentenced to the court sobriety monitoring program could be indigent, and thus eligible to use the Interlock Device Fund. HB49 does not include a clear method for the collection of the Indigent Device Fund fee for the court monitoring sobriety program participants. NMSA 1978, Section 66-8-102.3 creates the Interlock Device Fund in the state treasury and requires that the MVD collect the fund. This statute also requires TSD to administer the fund. It is not clear in HB49 if MVD will be responsible for the collection of the sobriety program participant’s fees or if TSD must collect those fees.

**OTHER SUBSTANTIVE ISSUES**

In 2010, the United States National Highway Traffic Administration conducted a case study on transdermal devices in six jurisdictions. It reports the following results:

- Typical duration of transdermal device use are from 90 – 180 days;
- There are four types of monitoring bracelets available from two companies and is either owned, installed and maintained by the government agency or by a private company;
- Fees for using the devices are assessed on the offender and additional funding is available from the government;
- Data is recorded on the bracelet, stored and then uploaded to the monitoring system modem over telephone landlines;
- Participants must have a telephone landline and the landline must be of sufficient quality to transfer data;
- Offenders can be required to use both transdermal monitoring and ignition interlock devices;

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- Participants are also required to participate in alcohol abuse treatment;
- A formal evaluation of the effectiveness of the devices and program are essential to determine the effect on reducing recidivism;
- Transdermal devices do not detect drug use;
- The cost of transdermal devices is higher than those for ignition interlocks, \$5 to \$12 per day versus \$2.25 - \$2.75.

PDD opines that the cost of testing would be borne disproportionately by the taxpayer. The proposed legislation necessarily exempts the indigent from the requirement to pay for the breathalyzer equipment. Defendants who forego an interlock ignition license are likely to have done so because they are indigent and could not afford the license and equipment required to operate a motor vehicle after a DWI conviction.

New Mexico has been identified as a national leader in the use and administration of ignition interlock devices as a tool to combat DWI. In FY16, approximately 13,000 ignition interlocks devices were installed in the state. The same year, 2,143 applications were approved for use of the Ignition Interlock Device Fund, and DOT paid approximately \$360,000 from the Fund for eligible participants.

A 2010 report by the National Highway Traffic Safety Administration entitled *Key Features for Ignition Interlock Programs* evaluated ignition interlock programs in the United States, and highlighted programs and features believed to best serve traffic safety interests. Compliance-based removal was identified as key in reinstatement of an offender's license. The report likewise recommended that offenders demonstrate: (1) no alcohol-related lockouts; and (2) continued vehicle use during the final three to six months of the interlock period, prior to license reinstatement.

DOH provided links to the following reports related to DWI in New Mexico:

- *New Mexico DWI Offender Characteristics and Recidivism Report 2003 – 2013*, <http://nmhealth.org/data/view/substance/1478/>).
- *Alcohol-Impaired Driving*, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812357>).
- *Alcohol-Impaired Driving Fact Sheet*, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812350>
- *Reducing Alcohol-Impaired Driving: Ignition Interlocks*, <http://www.thecommunityguide.org/mvoi/AID/ignitioninterlocks.html>).

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