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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/18
LAST UPDATED 2/09/18 **HB** 54/aHCPAC

SPONSOR Lewis/Rehm

SHORT TITLE Increase DWI Penalties **SB** _____

ANALYST Sánchez

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
	\$375.0	\$375.0	Recurring	Other State Funds

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			\$3,077.0- \$6,089.9	\$3,077.0 – \$6,089.9	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB34, HB50, HB71, SB26

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Defender Department (PDD)
 Department of Transportation (NMDOT)
 Administrative Office of the Courts (AOC)
 Administrative Hearing Office (AHO)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of HCPAC Amendment

House Consumer and Public Affairs Committee Amendment to House Bill 54 removes Section 1 of the original bill, which sets out the additional fees for driving while under the influence of intoxicating liquor or drugs, and restores the changes in the original bill made to community service.

Synopsis of Original Bill

House Bill 54 proposes to amend Section 31-12-7 NMSA 1978 to change the fee for driving while under the influence of intoxicating liquor or drugs as follows for:

- The first offense from \$75 to \$100;
- The second offense \$200; and
- The third and subsequent offense to \$300.

The fee will continue to be used to fund comprehensive community programs for the prevention of driving while under the influence of intoxicating liquor or drugs.

The bill adds a conviction for DWI to the habitual offender statute (Section 31-18-17 NMSA 1978). It also makes driving while under the influence when driving privileges are suspended or revoked guilty of a fourth degree felony. It changes great bodily harm by vehicle from a third degree felony to a second degree felony.

The bill changes the amount of community service on a

- first conviction from not less than 24 hours to not less than 80 hours;
- second conviction from not less than 48 hours to not less than 160 hours;
- third conviction from not less than 96 hours to not less than 240 hours;

Changes to imprisonment for a

- Fourth conviction from 18 months to 36 months of which 18 months shall not suspended, deferred or taken under advisement.
- Fifth conviction from 2 years to 3 years with 2 years not suspended or deferred or taken under advisement.
- Sixth conviction from 30 months to 42 months of which 30 months cannot be suspended, deferred or taken under advisement.
- Seventh conviction from 3 years to 4 years of which 3 years cannot be suspended, deferred or taken under advisement.

FISCAL IMPLICATIONS

Although the NMCD’s budget may not be negatively impacted in FY18 or FY19, it will be impacted as early as FY20 and ten years thereafter if this bill becomes law. Based on the average admissions over the last four years where the most serious charge is a DWI, provided by the NMSC for FY16 the table below shows the estimated increase to the general fund by charge.

Most Serious Charge Admission Charge	Estimated Annual Admissions (average of last 4 years)	Increased Sentence length (in years) ¹	Estimated Increased Cost Per Offender	Estimated Increased Cost for all Offenders
DWI 4th	36	0.5	\$44,779	\$806,022
DWI 5th	44	0.5	\$44,779	\$985,138
DWI 6th	30	0.5	\$44,779	\$671,685
DWI 7 th	26	0.5	\$44,779	\$582,127
Total				\$3,077,000

1. Sentence length assumes inmates will receive earned meritorious deductions while in prison that will reduce their sentence by 50 percent.

The total impact to the general fund with earned meritorious deductions (EMD) while an inmate at NMCD is \$3 million, without EMD the amount goes up to \$6.1 million.

The Public Defender Department (PDD) anticipates a need for additional appropriations should this bill or similar bills become law. Although it does not annualize the cost, PDD does provide the cost of a mid-level trial attorney between \$92.5 thousand and \$99.7 thousand depending on the area of the state where additional attorneys would be needed. The cost outside of Santa Fe and Albuquerque are at the higher level because it has to provide a salary differential to maintain qualified employees. In addition to the mid-level attorney, PDD would also need to hire support staff, a secretary, investigator and social worker, which would cost on average \$77.1 thousand per attorney. Other annual operating costs per attorney are estimated at \$2.3 thousand. Nonrecurring costs to add a new attorney and support staff is estimated at \$3.1 thousand. The average impact to the general fund annual operating budget to add one attorney is \$175.1 thousand per year.

The New Mexico Department of Transportation (NMDOT) anticipates an annual increase to its community driving while impaired program (CDWI) of \$375 thousand. The amount available to the program would increase from \$450 thousand to \$825 thousand per year based on an average of 4,500 first DWI offense convictions, 1,500 second DWI offense convictions, and 350 third DWI offense convictions each year. The bill is also estimated to generate about \$375 thousand for the program starting in fiscal year 2019. NMDOT manages the CDWI program funded by revenue collected under Section 31-12-7 NMSA 1978 and provides counties money that must be used for DWI prevention efforts within the county.

The Administrative Office of the Courts (AOC) anticipates an increase in the number of jury trials and appeals because the bill increases fines, a new fourth degree felony penalties under Sections 66-5-39 and 66-5-39.1 NMSA 1978, a specific inclusion of a noncapital felony conviction pursuant to Section 66-8-102 as a trigger for the increase of a basic sentence for a habitual offender, and a significant increase in the penalties related to homicide by vehicle and great bodily harm by vehicle. In general, prosecutions brought pursuant to laws with increased penalties can take up a considerable amount of judicial time and resources. Additionally, habitual offender cases require more judicial time for the actual trial and sentencing.

The bill would increase the probation compliance monitoring requirements of the courts. First, second, and third DWIs are tried and sentenced by the magistrate courts. The magistrate courts, except in very limited circumstances, do not have the ability to sentence a probationer to monitoring by the Probation and Parole office. Some, but not all, magistrate courts have county compliance offices that will monitor misdemeanor probationers. Some magistrate courts have to do their own probation monitoring. Increasing the community service hours for misdemeanor DWIs would increase the amount of time it takes probationers to complete this requirement, and the amount of time the courts are required to monitor and verify completion. It would also increase the likelihood that probationers would fail to complete this requirement, because more hours would give probationers more opportunities to get off track with requirements. This would lead to more probation violation hearings and court time required to address these issues. Therefore, the bill could potentially increase court workloads, without the additional resources necessary to handle the increase.

The Administrative Office of the District Attorney's (AODA) also anticipates a need for more resources if more cases are filed under this provisions of this bill.

SIGNIFICANT ISSUES

AOC states that proposed new subparagraph (D) of Section 31-18-17 NMSA 1978, in the bill, may run counter to the double jeopardy clauses of the United States and/or New Mexico Constitutions, which prohibit multiple punishments for the same offense.

AODA cites the following cases in which the court did not allow felony DWI to be enhanced by the habitual offender statutes, *State v. Anaya*, 1997-NMSC-010). In *Anaya* the Supreme Court determined that the Legislature did not plainly indicate in either statute that it intended to include a felony DWI as subject to the habitual offender statute so the sentence for a felony DWI could not be enhanced. Cf., (*State v. Peppers*, 110 N.M. 393, (Ct. App. 1990) cert. den. (1990). (The same fact may not be used twice, both as an element of the crime and a basis for enhancement or as a basis for separate enhancement unless the legislature specifically authorizes such double use. *State v. Lacey*, 2002-NMCA-032, cert. den. (1990). Absent a showing of permissive legislative intent, multiple use of the same facts to prove a predicate offense and to enhance the sentence is precluded by double jeopardy.) It will likely take an appellate review to decide if the supplemental language can overcome a claimed double jeopardy violation.

With regard to license suspension or revocation, AODA cites the following cases:

- *State v. Herrera*, 111 N.M. 560 (Ct. App. 1991). Actual notice is not required so long as the notice given is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
- *Maso v. Taxation and Revenue Dep't.*, 2004-NMSC-28. Despite the statute permitting the motor vehicle department to give notice by mail (See, Sec. 66-2-11, NMSA 1978), a mailed notice, without more, is insufficient to prove the defendant facing a revocation hearing had notice of the hearing.
- *City of Albuquerque v. Juarez*, 93 N.M. 188 (Ct. App. 1979).
- *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016), *State v. Vargas*, 2017-NMCA-023, aff'd., 2017-NMSC-028 and *State v. Storey*, No. A-1-C 35013 (Ct. App. 2017).

According to PDD, the bill increases DWI penalties by increasing the “self-enhancing” penalties in the DWI statute and including DWI as a countable offense under the habitual offender statute.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the following performance measures:

- District Courts:
 - Cases disposed of as a percent of cases filed;
 - Percent change in case filings by case type;
- District Attorneys:
 - Average caseload per attorney;
 - Number of cases prosecuted;
 - Number of cases prosecuted per attorney;
- Public Defenders:
 - Percent of cases taken by contract attorneys;

- Percent of cases that go to trial with clients defended by contract attorneys.

The bill may also impact NMDOT's performance measure: reduction of alcohol related traffic crashes and fatalities.

ADMINISTRATIVE IMPLICATIONS

AOC also points out that some jurisdictions are limited in the number of locations where community service hours may be performed. Increasing the number of required community service hours may create an additional strain in areas where demand may outweigh supply. Moreover, increasing fees may increase nonpayment by indigent offenders, potentially leading to warrants and county jail time, and an increased use of court resources.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Conflicts with
HB50 Homicide & Bodily Harm by Boat
HB34 DWI Blood Quantums & Ignition Interlocks
HB71 DWI Suspect Blood Testing
SB26 DWI Testing Requirements

OTHER SUBSTANTIVE ISSUES

NMDOT believes that the bill has the potential to reduce DWI related deaths and injuries thus having a positive impact.

ALTERNATIVES

PDD states it may be preferable to either increase the DWI self-enhancement or to remove the self-enhancement and handle DWI under the habitual offender scheme, but not both.

ABS/al/jle