

**LFC Requester:** \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2025 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

**AgencyAnalysis.nmlegis.gov**

*{Analysis must be uploaded as a PDF}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**     **Amendment**    \_\_\_\_\_  
**Correction**     **Substitute**    \_\_\_\_\_

**Date** Feb. 24, 2025  
**Bill No:** HB 567-280

**Sponsor:** Jimmy Mason  
Randall T. Pettigrew  
**Short Title:** DWI Saliva Testing

**Agency Name and Code** LOPD-280  
**Number:** \_\_\_\_\_  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY25</b>	<b>FY26</b>	<b>FY27</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HB 106 (passed Legislature as HB 8)** (also amended the DWI chemical testing statutes)

Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: HB 567 would amend all DWI chemical testing statutes that refer to breath and blood testing to add “oral fluid” tests approved by scientific laboratory division of the department of health (SLD) to the existing options of breath and blood, “or any combination thereof” for chemical testing that can later be used to prosecute a person for DWI.

In so doing, the bill would also amend Section 66-8-110 provisions that set presumptions about impairment based on blood-alcohol concentrations, and would add a presumption that a person is “under the influence of drugs,” if a blood, breath, or “oral fluid” contains *any* quantity of a controlled substance. It would also extend mandatory charging, currently required for certain alcohol concentrations, to include “the presence of a controlled substance.” A new subsection specifies that “The determination of the presence of a controlled substance shall be based on a test of a person’s blood or oral fluid that shows the blood or oral fluid contains the controlled substance.”

Sections 4, 5, and 6 of the bill would extend the controlled substance presumption to administrative MVD proceedings.

**FISCAL IMPLICATIONS**

This legislation would surely increase the number of defendants in the criminal legal system, which would fiscally impact LOPD because it may be necessary to litigate whether this testing is accurate in proving probable cause that a person is intoxicated by drugs and under the law should not be driving. Both the prosecution and the defense would need to hire experts. This would be a great expense to both sides. This also means there will be an increased need for more experienced attorneys to handle these cases and an increased likelihood that such cases would be taken to trial and appealed, as opposed to being resolved through a plea.

While it is possible the LOPD could absorb an increase in cases due to the passage of this bill, any increase in LOPD expenditures brought about because of the passage of this bill and other proposed criminal legislation would likely require an increase in indigent defense funding to adequately represent individuals charged under this act and other prospective crimes. Presumably the courts and DAs would also be affected in similar measure to LOPD, and an increase in sentences would also likely have a fiscal impact on DOC.

## SIGNIFICANT ISSUES

In 2023, the Legislature reviewed HB 275, which proposed the enactment and funding of a pilot project to test oral fluid during a roadside stop for driving while under the influence of drugs or alcohol. The purpose of HB 275 was to collect data on the efficacy of using the roadside detection, determining if the roadside detection device could replace or augment drug recognition experts, determining if it is efficient and cost-effective for law enforcement use, such as whether DUI stops are conducted quicker and if there is an increase in convictions. HB 275 was tabled in House Judiciary. To Analyst's knowledge, the pilot project was never funded or created. To Analyst's knowledge, SLD has not approved any form of oral fluid testing.

While HB 567 predicates oral fluid testing on tests "approved by the scientific laboratory division," it is unclear whether the bill would be limited to SLD testing in a laboratory setting, or would include roadside testing, if SLD approved such a device. Oral fluid testing for alcohol or controlled substances remains controversial, as its accuracy is still undetermined.

"Accuracy and sensitivity of currently available devices vary, however, three particular OF devices prove more than sufficient in their results, and therefore toxicologists and law enforcement alike are pursuing further evaluation and implantation. The technology used in these devices is similar, but not identical to, that which is used in toxicology laboratories. Yet, since the technology is not identical, the results are not identical either, and accuracy may vary depending upon the drug being tested. Also, these devices are designed to avoid false positive readings, yet sometimes at the expense of missing true positives. Yet, while they aren't perfect, accuracy measurements are generally in the 90% range or higher for most drugs and in the 80% range for THC."

*We Save Lives, Highway Safety Advocates*, Roadside Oral Fluid Testing, <https://wesavelives.org/solve-the-problem/roadside-oral-fluid-testing/>. This means that in cases involving marijuana, there is a 20% chance that there is no probable cause to arrest a citizen pulled over on suspicion of driving while under the influence of drugs, but that citizen is arrested because the test read positive.

Also, as noted above, there may be a positive result for a person who is no longer intoxicated but used marijuana within a 24 hour period, however, the positive result would automatically give the authorities probable cause to arrest. Currently, it does not appear that this new form of testing would survive a *Daubert* analysis as to "(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known [or] potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field." *State v. Aleman*, 2008-NMCA-137, ¶ 21, 145 N.M. 79, 87. If it was proven to be scientifically accurate, there would be no need for a pilot project testing its accuracy. Therefore, it should not be used to prove that there was probable cause for an arrest.

Similar issues are likely with respect to other substances, which is especially problematic in light of the presumption based on *any* detectable amount of *any* controlled substance. Controlled substances do not automatically result in impairment unless they are present in certain concentrations. The bill is sure to result in convictions for wholly unimpaired drivers.

## **PERFORMANCE IMPLICATIONS**

A drug recognition officer not being available does not hinder police agencies in conducting DUI investigations or prosecutors in prosecuting such cases of driving while under the influence of drugs without drug recognition officers present. Even officers who are *generally* trained in detection of drugs are allowed to conduct the investigation and testify in court as to their findings, resulting in convictions for driving while under the influence of drugs. Juries may review video footage of a person's driving and their behavior during the investigation, and lay jurors are qualified to identify many signs of impairment, including bad driving, slurred speech, and erratic or unusual behavior.

Appellate courts have interpreted *State v. Aleman*, a drug recognition expert case, to mean that while a DRE is helpful to the jury it is not required in every case. In utilizing this understanding, the appellate courts often affirm convictions obtained without a DRE investigation or testimony. *See, e.g., State v. Lozoya-Hernandez*, No. A-1-CA-38422, ¶¶ 18-23, 2021 WL 4496291 (N.M. Ct. App. Oct. 1, 2021); *State v. Anker-Unnever*, No. A-1-CA-37437, ¶ 15, 2020 WL 2096409 (N.M. Ct. App. Apr. 21, 2020). Therefore, it does not seem to impact the conviction rate of DUIs in rural areas that do not have great access to DREs.

## **ADMINISTRATIVE IMPLICATIONS**

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

### **TECHNICAL ISSUES**

### **OTHER SUBSTANTIVE ISSUES**

### **ALTERNATIVES**

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

Status quo. DUIs will continue to be criminalized and will be proven through the investigations currently utilized to prove DUI by alcohol or drugs, for example, drug recognition experts, breathalyzers, field sobriety tests, and blood draws.

### **AMENDMENTS**