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FISCAL IMPACT REPORT

SPONSOR <u>HTPWC</u>	LAST UPDATED <u>3/12/23</u>
SHORT TITLE <u>DWI Testing Requirements</u>	ORIGINAL DATE <u>3/11/23</u>
	BILL NUMBER <u>CS/House Bill 158/HTPWCS/aHJC</u>
	ANALYST <u>Hanika-Ortiz</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Corrections**	No fiscal impact	\$57.9-\$579.0	\$57.9-\$579.0	\$115.8-\$1,158.0	Recurring	General Fund
DOH (chemical blood tests)	No fiscal impact	\$478.1	\$478.1	\$956.4	Recurring	General Fund
LOPD/Courts (implied consent issues)	No fiscal impact	\$257.0	\$232.0	\$489.0	Recurring	General Fund
DPS (overtime)	No fiscal impact	\$135.0	\$135.0	\$270.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

**Cost per DWI offender per average length of stay is \$57.9

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 New Mexico Sentencing Commission (NMSC)
 Administrative Office of the District Attorneys (AODA)
 Administrative Offices of the Courts (AOC)
 New Mexico Corrections Department (NMCD)
 Department of Health (DOH)
 Department of Public Safety (DPS)
 Law Offices of the Public Defender (LOPD)

SUMMARY

Synopsis of HJC Amendment to HTPWC Substitute for House Bill 158

The House Judiciary Committee Amendment to House Transportation, Public Works and Capital Improvements Committee for HB158 strikes the term “cannabis” when referring to the influence of alcohol, ~~cannabis~~ or a controlled substance...; and its comprehensive definition from the act.

Synopsis of Original HTPWC Substitute for House Bill 158

The House Transportation, Public Works and Capital Improvements Committee substitute for HB158 (HB158/ HTPWCS) amends Section 66-8-102, Section 66-8-103, Section 66-8-104, Section 66-6-111, Section 66-13-1, Section 66-13-6 and Section 66-13-7 NMSA 1978, which relate to driving a motor vehicle while under the influence of drugs or alcohol, or both, and chemical blood testing.

- Section 2, Section 66-8-103 NMSA 1978 replaces the term “laboratory technician” with “emergency medical technician or certified phlebotomist” with respect to who shall draw the blood sample, and replaces the term “blood-alcohol” with “chemical blood test.”
- Section 3, Section 66-8-104 NMSA 1978 clarifies that officers are only allowed to make an arrest or direct the performance of chemical blood test while on official duty.
- Section 4, Section 66-8-111(A) NMSA 1978 allows a law enforcement officer to obtain a search warrant for a chemical blood test if there is probable cause to believe a person was under the influence of alcohol, cannabis, or a controlled substance when they caused the death or great bodily injury of another or committed a felony or a misdemeanor. If a person refuses a chemical test and did not cause great bodily injury of another, or if there was probable cause to believe a person had committed a misdemeanor while under the influence of those substances, the person’s charge may be elevated to aggravated.

This section also defines “cannabis” very broadly to mean all parts of the plant, extracts from the plant, and products made from the plant, including edible or topical products.

- Section 5, Section 66-8-111.1(A) NMSA 1978 is amended to make applicable Section 66-8-111 NMSA 1978 as it pertains to obtaining a chemical test and serving notices.
- Section 6, Section 66-13-1 NMSA 1978 is amended to update section references in NMSA 1978 applicable to the “Boating While Intoxicated Act.”
- Section 7, Section 66-13-6 NMSA 1978 identifies who is qualified to perform a chemical blood test and limits their liability in civil or criminal actions, except if negligent.
- Section 8, Section 66-13-7 NMSA 1978 clarifies under the Boating While Intoxicated Act, officers shall only make an arrest or obtain a chemical blood test if on official duty.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The bill may result in an increase in the number of blood draws conducted by law enforcement, which could result in overtime costs. To the extent that the bill increases the number of warrants for blood draws, it may increase the number of DWI cases that are charged and result in a corresponding increase in public defender caseloads. The impact on prisons would come from a possible increase in convictions due to law enforcement’s expanded ability to conduct chemical tests on persons suspected of DWI, in some situations, without their consent, which could increase inmate populations and probationers. The average per-day cost to incarcerate in the

state's prison system is \$150.30, according to NMSC, and the average length of stay of those currently convicted under the state's driving under the influence (DWI) laws is 385 days.

DOH states the bill may significantly increase the number of blood alcohol and intoxicating chemical specimens received at the Scientific Laboratory Division toxicology bureau. This may have a financial impact on the laboratory due to the need for additional reagents as well as staff to run the assays and provide court testimony. DOH reports the estimated cost to run the additional tests is \$142 thousand per year. In addition, staffing needs for three additional forensic scientists to run the additional tests and handle court testimony is \$273 thousand per year. The table above reflects those costs and estimates overtime for DPS.

The Law Offices of the Public Defender notes, whenever the state draws an unwilling person's blood, it invites litigation on the lawfulness of the search. LOPD could probably absorb the fiscal impact but depending on the volume of charges initiated by a given district attorney in a locale, there may be a recurring increase in needed LOPD FTE for the office, as well as a need for contract counsel compensation. The recurring cost of an LOPD associate trial attorney's is \$104,860 in Albuquerque and Santa Fe and \$113,350 in the outlying areas. For more experienced attorneys handling felony cases, those costs are \$114,670 and \$123,160, respectively. Average support staff (secretarial, investigator, and social worker) costs per attorney would total \$102,226.

SIGNIFICANT ISSUES

HB158/HTPWCS expands the authorization for, and regulation of, blood-testing under the state DUI statutes by including testing for substances other than alcohol and by authorizing search warrants for blood in circumstances where there is probable cause to suspect a misdemeanor was committed. It also makes changes to the list of persons authorized to draw the blood sample.

AODA said adding the words "or misdemeanor" on page 13, line 25 would allow law enforcement to obtain a search warrant where there is probable cause to believe a person is driving under the influence and refused to submit to testing. This is referred to as the Birchfield Fix:

Presently, the only way that law enforcement can obtain a search warrant for chemical testing is if the person who was driving while under the influence thereby causing the death or great bodily injury of another person, or the person committed a felony while under the influence. See *Birchfield v. North Dakota*, 136 S.Ct. 2160.

LOPD believes HB158/HTPWCS's increase in penalties are likely to result in more defendants invoking their right to trials, as well as to jury trials. Indigent offenders are entitled to public defender services.

LOPD added:

Birchfield v. North Dakota (2016) and *State v. Vargas* (2017) established the constitutional requirement of a warrant before a blood test can be compelled. In New Mexico, law enforcement can only obtain a warrant for a blood draw on DWI and driving under the influence of drug (DUID) arrests when there is probable cause the person caused the death or great bodily injury of another person, or committed a felony.

State v. Adams (2022) established that the Implied Consent Act in its present form

already allows the admission at trial of blood evidence collected by “emergency department technicians.” The expanded bill language is therefore unnecessary.

ADMINISTRATIVE IMPLICATIONS

DOH notes its Scientific Laboratory Division Toxicology Bureau will require additional staff and resources to run the assays to find and measure substances and to provide court testimony.

TECHNICAL ISSUES

NMAG noted the New Mexico Administrative Code 7.33.2.7 defines a test for blood draws, and it may be helpful to define chemical blood test in the bill.

NMAG thought Section 66-8-111(B) should be clarified.

It appears unclear whether the subsection refers to a person’s refusal to submit to a chemical test in general, or refers only to refusal to submit to a chemical test for which a warrant has been issued in accordance with subsection (A). Clarifying that refusal to submit to a chemical test “for which a warrant has been issued as provided in subsection A” would be helpful.

OTHER SUBSTANTIVE ISSUES

LOPD provided the following comments:

Blood Evidence Not Always Necessary

The Implied Consent Act requires submission to a breath test. Refusal can be used as evidence of guilt—often to great success—at trial. This bill would therefore be most impactful on cases involving drugs, not alcohol, which cannot be detected by a breath test. In other words, these blood draw warrants are most desired if a person gives a breath test showing no alcohol, and the officer wants to test for drugs. While this is understandable, there is other evidence of impairment that the State can present at trial, including observations of bad driving and officer descriptions or videos of a defendant’s behavior during the investigation and arrest process. Indeed, an officer’s lapel camera video of a defendant can be highly effective, as jurors—in their life experience and common sense judgment—can see when a person is obviously impaired, despite a clean breath test for alcohol. The state can also present *drug recognition* evidence from an officer specifically trained to recognize impairment by common drugs and a defendant’s refusal of testing can be used as evidence of consciousness of guilt.

Blood Evidence is Burdensome to Present

Increasing the number of cases involving a blood draw will be a strain on an already strapped system. To get a blood draw takes at least one officer off the street, often for hours, in order to get the blood draw at a hospital in the first place. Then, the blood has to be tested by an authorized laboratory—labs that are already heavily inundated with crime-related testing and where felonies such as sexual assaults and homicides should be prioritized. Thereafter, to admit blood test results in court in the DUI case itself will

require expert testimony from the scientific laboratory analyst who must be available for pretrial interviews, and thereafter has to appear for trial. Analysts often have to drive hours from the lab to sit around and wait for hours to testify. In many cases, it may also involve a defense expert witness, and where 80 percent of defendants are represented by public defenders, that cost is ultimately borne by taxpayers, too.

The law currently limits the incurring of these time and resource costs to felony DUI cases and/or cases involving an accident where someone was injured. This is a rational and reasonable limitation in the interests of judicial efficiency and the recognition that blood results will not always be necessary to achieve a conviction.

The Scientific Laboratory Division of DOH tests for drugs in all implied consent cases in which the blood alcohol level is less than 0.08. In 2018, 90 percent of blood specimens tested for drugs by the lab in DWI cases were positive for drugs other than alcohol.

The New Mexico DWI report found that alcohol-involved fatal crashes account for about 37 percent of all fatal crashes in 2020 (https://gps.unm.edu/gps_assets/tru_data/Crash-Reports/DWI-Reports/2020-dwi-report.pdf).

Federal Centers for Disease Control and Prevention research suggests less is known about the harmful effects of drug-impaired driving than alcohol-impaired driving because of data limitations (https://www.cdc.gov/transportationsafety/impaired_driving/impaired-driv_factsheet.html).

The 2020 NM DWI report found that 1,551 convictions in New Mexico were repeat offenders (https://gps.unm.edu/gps_assets/tru_data/Crash-Reports/DWI-Reports/2020-dwi-report.pdf).

A FY2022 LFC report on New Mexico treatment courts found that treatment courts operated at approximately 46 percent of capacity (<https://www.nmlegis.gov/handouts/CCJ%20082222%20Item%203%20FY2022%20DTJ-Treatment%20Court%20Report.pdf>).

Age, gender, and prior DUI records are among the best predictors of recidivism. (<https://www.sciencedirect.com/science/article/pii/S0001457505001454>).

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