

LFC Requester:	
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AGENCY BILL ANALYSIS
2015 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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: Date Jan. 29, 2017
Original Amendment Bill No: SB 238
Correction Substitute

Sponsor: Craig W. Brandt Agency Code: 264
Short DUI Penalties and Changes Person Writing Gary Cade
Title: _____ Phone: 505-507-7752 Email cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 238 would recodify most of the current driving while intoxicated (“DWI”) statutes, the Implied Consent Act and the Ignition Interlock Licensing Act into a “Driving Under the Influence (“DUI”) Act.” It would add some new definitions, mandate treatment programs, allow an alcohol monitoring bracelet to be worn in lieu of up to 50% of the jail or prison time imposed, increase jail time for someone convicted of driving on a revoked license if the revocation was because of a DUI, limit plea agreements, and create a DUI treatment fund which would, at least in part, be funded by changing distribution of the liquor excise tax that is now directed to the lottery tuition fund.

In addition to the current penalties and the requirements to attend a DWI school and complete a screening program, SB 238 would require that anyone convicted of a misdemeanor DUI be ordered by the court, “...in accordance with the results and recommendations of the screening program, participate in a...treatment program that is approved by the court and that is an inpatient, residential, in-custody, or outpatient—for “regular” first offenders only, program.” The treatment programs duration would vary depending upon the type and sequence of DUI conviction. For a “regular” first offense DUI conviction the program length would be 28 days. If convicted of an *aggravated first* offense DUI, the program length would be 90 days, 28 days of which must be in an inpatient, residential or in-custody program. Anyone convicted of a “regular” second offense DUI would also have to participate in a 90-day treatment program, 28 days of which must be in an inpatient, residential or in-custody treatment program. If they were convicted of an *aggravated second* offense DUI, or a “regular” third offense DUI, they would be required to participate in a 90-day inpatient, residential or in-custody treatment program. If they were convicted of an *aggravated third* offense DUI, the bill would require they be sentenced to a jail term of at least sixty consecutive days and participate in a 90-day inpatient, residential or in-custody treatment program. Anyone convicted of a third DUI offense, regardless of the type, would also have to participate in an and complete a drug court or other substance abuse treatment program approved by the court.

SB 238 would create a new “driving under the influence treatment fund,” that would be funded by appropriations, distributions and money otherwise accruing to the fund. The money would be appropriated to the department of health, “to provide for treatment programs provided for in the (DUI) Act.” One source of the funds would come from revising distributions made from the liquor excise tax. If the bill is passed it would take the 39% distribution of the net liquor excise tax that now goes to the lottery fund and instead send it to the DUI treatment fund beginning July 1, 2017. The bill also provides that \$1,500,000.00 be appropriated from the general fund to the DUI treatment fund in FY-2018, and subsequent fiscal years “...to establish

administrative procedures and treatment programs to which offenders are sentenced pursuant to the (DUI) Act.” Unexpended balances would not revert to the general fund.

SB 238 would add a new section to the DUI Act that if a person had their driver’s license revoked for a DUI, then the threshold for an aggravated DUI would be only .08, instead of the .16 usually required for an offense to be an aggravated DUI. It would also amend the revoked statute to increase the penalty for that offense from seven days to a mandatory 30-days incarceration if their driver’s license had been revoked for a DUI or violation of the Implied Consent Act.

SB 238 would add another new section to the DUI Act that if an offender has been convicted of driving under the influence of intoxicating liquor or drugs within the previous ten years in New Mexico or a similar offense in another jurisdiction, “...the offender shall not enter into a plea agreement and a prosecutor shall not negotiate a plea agreement that includes a provision that inaccurately reflects the actual number of the offender’s convictions for (DUI), or an equivalent offense.”

SB 238 would add a completely new section that, “In lieu of incarceration in a jail or prison, a court may order an offender convicted of driving under the influence of intoxicating liquor or drugs to wear an alcohol-monitoring bracelet for no more than fifty percent of the length of the offender’s sentence that the offender would be required to spend incarcerated.” The (traffic safety) bureau would be responsible for costs associated with an alcohol-monitoring bracelet.

FISCAL IMPLICATIONS

SB 586 contains a general fund appropriation of \$1,500,000.00. The proposed treatment programs are mainly residential or inpatient and range from 28 days to 90 days and would apply to every DWI conviction and would be costly. Limiting prosecutorial discretion regarding plea agreements and increasing the punishments for persons driving on a license revoked for DWI or a violation of the Implied Consent Act are virtually certain to increase the number of cases being litigated and result in more motion hearings, more trials, more appeals and probably longer incarceration periods so more personal and financial resources will be needed for the courts, district attorneys, defenders and correctional facilities.

SIGNIFICANT ISSUES

SB 238 is not clear why the existing DWI laws should be re-codified and re-named the DUI Act because most of the substantive language remains unchanged, although the mandatory treatment programs are a significant addition. Some of the additional definitions would help interpret the Act. The bill would continue the existing law requiring convicted DWI offenders to participate and complete, within the time specified by the court, an alcohol or drug abuse screening program approved by the department of finance and administration (“DFA”) and, if necessary, a treatment program approved by the court. See, Sect. 88-8-102(L), NMSA 1978. Current law now requires anyone convicted of a second or third DWI to participate in and complete, within the time specified by the court, a 28-day inpatient, residential or in-custody treatment program approved by the court; a 90-day outpatient treatment program approved by the court; a drug treatment program approved by the court; or any other substance abuse treatment program approved by the court. See, Sect. 66-8-102(M), NMSA 1978. The bill would make a drug court or other approved substance abuse treatment program mandatory for persons convicted of their second and third DUI offenses in addition to the other treatment programs described below.

SB 238 substitutes language that convicted first offense DUI offenders shall be ordered by the court, to "...in accordance with the results and recommendations of the screening program, participate in a (28—90 day) treatment program that is approved by the court and that is an inpatient, residential, in-custody, or (for "regular" first-time DUI offenders only) outpatient program." As drafted, it is unclear what criteria determines if participation in the treatment programs for first offenders is mandatory, especially since the language uses both "results and recommendations," which implies it is optional. Length of the treatment programs and whether it could be conducted in an inpatient or out-patient setting vary depending upon the type of conviction so it removes some (most?) discretion from the screeners in formulating a treatment plan. Some DUI offenders might have a treatment recommendation that doesn't match up with the treatment programs mandated by the Act.

SB 238 would also create the DUI Treatment Fund to, "provide for treatment programs provided for in the (DUI) Act." But it also states that "...the court may order the offender to pay the costs of court-ordered screening and treatment programs," in addition to any other fine or fee imposed pursuant to DUI conviction. Cf., Sect. 66-8-102(T), NMSA 1978.

SB 238 would, for the first time, allow a court to sentence convicted DUI offenders to wear an alcohol monitoring ankle bracelet for up to 50% of the sentence they would be required to spend incarcerated. The (traffic safety) bureau would be required to pay for "...costs associated with placing, removing, monitoring and maintaining" the alcohol-monitoring ankle bracelets. No guidance is provided on what consequences should be given if an offender was determined to have consumed alcohol while wearing the bracelet, or tampered or interfered, or had attempted to tamper or interfere, with its proper operation. Cf., Sect. 66-5-504(B), NMSA 1978. (Tampering with an ignition interlock device may subject the offender to the penalties provided for driving without a license that had been revoked for DWI or a violation of the Implied Consent Act.) The alcohol monitoring ankle bracelet would apparently not be able to detect someone who had consumed drugs, even though a person could be convicted of driving a vehicle after consuming drugs. Whenever punishment is different for the same offense it can invite an equal protection challenge. See, U.S. Constitution, Amendment XIV and N.M. Constitution, Article II, Sect. 18.

As drafted SB 238 does not limit the offenses for which the court could order an offender to wear an alcohol-monitoring ankle bracelet. The prescribed mandatory incarceration for DUI punishments in the bill range from 48 consecutive hours in jail, for an aggravated first DUI conviction, up to twelve years imprisonment, ten years of which shall not be suspended, deferred or taken under advisement, for an eighth (or subsequent) conviction for DUI. If a person is ordered by a judge to wear an ankle bracelet that monitors their location by global positioning satellite (GPS) that monitors their location as a condition of release from jail, they must be given pre-sentence credit for that time. See, *State v. Guillen*, 2001-NMCA-079. In addition, a person wearing a GPS ankle bracelet can serve their mandatory six-month sentence for DWI. See, *State v. Frost*, 2003-NMCA-002. Likewise, a GPS ankle bracelet can be used for the mandatory one-year sentence required for someone convicted of using a firearm to commit a felony. See, *State v. Wood*, 2010-NMCA-017. Since mandatory incarceration periods for a felony can be served using a GPS ankle bracelet, then persons convicted under the proposed DUI Act could ask that at least half their time be served with the alcohol-monitoring ankle bracelet, including the sentence(s) imposed for felony convictions with lengthy mandatory sentences. That might be prohibited for the second and third degree felony convictions but it's not certain. Cf., Sect. 31-20-2(A), NMSA 1978. (Any person sentenced to imprisonment of one year or more shall be imprisoned in a corrections department facility, unless a portion is suspended to provide for imprisonment of no

more than 18 months, in which case a local sentencing option can be used.) It is also unclear if a person could serve half their sentence with an alcohol-monitoring ankle bracelet, and some, or all, of the remainder with a GPS ankle bracelet.

SB 238 would classify a DUI offense as aggravated DUI if the offender had a blood or breath alcohol test result of at least .08 and a prior DWI or DUI conviction. When someone is arrested and charged with DWI, information regarding prior convictions is often (usually?) not available at that time. To enhance the punishment because of a prior conviction there must be a showing that the prior conviction was valid and free from error. It is often difficult to obtain admissible proof of prior convictions within the state of New Mexico, and sometimes impossible to obtain proof of prior convictions from other states and Indian nations. In addition, there are often no records for many persons convicted of a DWI to show that the proceedings were such as to be free from error, e.g., there is frequently no record that someone convicted of DWI made a knowing and intelligent waiver of their right to counsel or knowingly waived their rights before they entered a plea. Without admissible evidence that documents the validity of the prior DWI conviction, then the person cannot be prosecuted for an aggravated DWI. Those same obstacles also would apply to that portion of the bill that would prohibit any plea agreement, "...that inaccurately reflects the actual number of the offender's convictions for (DUI) or an equivalent offense." The limitation on a prosecutor's discretion, in addition to the logistical problems noted, also appears to violate the constitutional requirements for separation of powers. See, N.M. Constitution, Article III, Sect. 1.

SB 238 would also incorporate language from the current DWI statute that "Notwithstanding any provision in law to the contrary, if an offender's sentence was suspended or deferred, in whole or in part, and the offender violates any condition of probation, the court may impose any sentence that the court could have originally imposed and credit shall not be given for time served by the offender on probation." Although the "no credit" language is almost the same language used in the current DWI statute, appellate courts have repeatedly it is inapplicable because of the language in a separate, general, statute regarding probation. "Whenever the period of suspension expires without revocation of the order (of probation), the defendant is relieved of any obligations imposed on him by order of the court and has satisfied his criminal liability for the crime." See, Sect. 31-20-8, NMSA 1978. If the probationary period has expired without an order of revocation the defendant is relieved of any obligations under the order and cannot be punished further, even if a motion to revoke probation was filed before the end of their probation, regardless of the language in the DWI statute. See, *State v. Ordunez*, 2010-NMCA-095, aff'd, 2012-NMSC-024, and *State v. Lara*, 2010-NMCA-075.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

SB 238 would also make some grammatical changes to make the DUI Act gender neutral and use better syntax regarding minors.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS