

LFC Requester: _____

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{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:

Original X **Amendment** _____
Correction _____ **Substitute** _____

Date Jan. 12, 2016

Bill No: HB 081

Sponsor: Paul A. Pacheco

Agency Code: 264

Short DWI With Revoked License

Person Writing Gary Cade

Title: Penalties

Phone: 505-507-7752 **Email** cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	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: HB-81 is identical to HB-565 that was introduced in 2015 by Rep. Pacheco. It would create a new crime for anyone who had previously had their driver’s license revoked or suspended for driving while under the influence of intoxicating liquor or drugs (“DWI”) and then was, “...subsequently convicted of (DWI) or a violation of the Implied Consent Act (and convicted) of driving with a suspended license... or with a revoked license.” Violation would be a fourth degree felony.

The bill also provides that anyone who knowingly permits a vehicle they own or control to be driven on a highway by another person at a time that they reasonably should know the other person’s driver’s license was revoked or suspended for DWI then “...may be charged as a party to the crime of driving with a revoked license.”

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

HB-81 would require the state to convict someone of a DWI or a violation of the Implied Consent Act and of driving on a suspended or revoked driver’s license, and then would also have to prove that when the offender was driving their license had been suspended or revoked because of a prior DWI in order to have the offender punished with a fourth degree felony for the revoked license violation. To get the enhanced penalty there must be proof that the prior proceedings that produced a conviction for DWI or revocation of driver’s license for a violation of the Implied Consent Act were valid and free from error. Both of those proceedings have specific elements that must be proven and specific procedures and deadlines that must be complied with and met. It also requires proof that the defendant’s driver’s license was revoked or suspended for a DWI or violation of the Implied Consent Act. The penalty for driving on a revoked license would be increased from the current penalties of seven days incarceration and a fine of \$300.00 to \$1,000.00 to a possible

sentence of 18 months imprisonment plus a \$5,000.00 fine, so it is very likely that DWI and revoked license defendants will vigorously contest the charges and, if convicted, aggressively challenge the validity of any prior verdicts or findings.

The license revocation hearings are conducted under the Implied Consent Act so the constitutional protections required in criminal prosecutions may not be applied to those administrative proceedings. Defendants are likely to complain that since a finding that they previously violated the Implied Consent Act could result in significantly increased punishment that should not support the punishment that would be applied for a subsequent revoked license offense because their constitutional rights, perhaps including due process, were not protected. Cf., *Shuster v. State Taxation & Revenue Dep't.*, 2012-NMSC-025 (The MVD hearing officer must find that the arrest of a DWI offender was constitutional in order to proceed with the administrative license revocation hearing.) and *State ex rel. Schwartz v. Kennedy*, 120 N.M.619 (1995) (Driver's license revocation proceedings are remedial, not punitive, and involve loss of a privilege, not loss of a right.) They will almost certainly challenge the option for the increased punishment for a violation of the Implied Consent Act for the second violation since any fact that may increase the punishment beyond the standard sentence must be submitted to a jury and proved beyond a reasonable doubt. See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *State v. Frawley*, 2007—NMSC—057. Defendants may also raise a double jeopardy challenge to any punishment that would be applied for driving on a revoked or suspended license that also requires proof of DWI. When there is a valid double jeopardy claim because the offenses merge then punishment for the lesser offense can be vacated. See, *State v. Santillanes*, 2001—NMSC—018.

HB 81 would also permit someone who authorizes or knowingly permits another person to drive their car to be charged with as a party to the crime of driving while license was suspended or revoked. That would apply if the person they allowed to drive had their license previously revoked or suspended for a DWI, and the person who gave permission or authority to drive their car “reasonably should have known” that, and then the driver was again arrested for DWI. To prove that the state will have to offer evidence to show that the driver had previously been driving while intoxicated and that their license was revoked or suspended for that offense and the person providing the car was aware of the suspension or revocation and knew that it was based on the person driving while intoxicated. Significantly, it does require that the driver to have been convicted of the previous offense or the later charge. Of course, if the evidence of DWI was developed in the administrative hearing conducted under the Implied Consent Act and the driver had their license suspended but was not convicted in the criminal DWI trial there is likely to be an issue regarding how that fact should be considered. It's also unclear how it would be applied if the actual driver challenges the underlying proceedings or their subsequent arrest for DWI.

While there is broad latitude for charging party to a crime for an offense in the Motor Vehicle Code (See, *State v. Marquez*, 2010—NMCA—064) requiring proof of prior offenses is a new variation. There is no procedure for joinder of defendants in magistrate or metropolitan court. Cf., Rule 5-203(B), S.C.R.A. 1986. (Joinder of defendants in district court.) It is unclear if the person charged as a party to a crime, for another person driving with a revoked license, would be allowed to participate in the proceedings involving the actual driver. For example, could they move to suppress the arrest of the driver or evidence of DWI derived from that arrest? Could they try to obtain exculpatory information from the actual driver if they were facing charges for DWI

and driving on a revoked or suspended license? Could they object to a possible plea bargain for the driver who might elect to waive their defenses in favor of a plea to a reduced DWI charge. It's also unclear what would happen if person driving was acquitted or convicted of something other than DWI since the bill only requires that the driver be charged with DWI after having had their license revoked for a prior DWI and the person giving permission was aware of the revocation and the reason why it was done.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS