

LFC Requester: _____

**AGENCY BILL ANALYSIS
2018 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 Amendment _____
Correction _____ Substitute _____

Date Jan. 20, 2018

Bill No: HB 54

Sponsor: Tim Lewis

Agency Code: 264

Short Increase DWI Penalties

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
FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	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 54 would: increase the incarceration imposed for most felony DWI convictions; include felony DWI convictions among the offenses for which the sentence can be enhanced as a habitual offender; create a new felony offense if a person was convicted of DWI when their privilege to drive had been suspended or revoked for a previous DWI or violation of the Implied Consent Act; provide that anyone who committed homicide by vehicle or great bodily harm while under the intoxicating liquor or drugs, or while driving recklessly, would be guilty of a second degree felony; and, increase the mandatory community service required after misdemeanor driving while intoxicated (“DWI”) convictions;. The bill would also increase the fees imposed after any state or municipal DWI convictions to fund community programs for the prevention of DWI and other traffic safety purposes.

FISCAL IMPLICATIONS

Unknown. The bill would create a new fourth degree felony that if someone is convicted of DWI for an offense that occurred while their license was suspended or revoked for a previous DWI or violation of the Implied Consent Act so there could be more cases filed which will require more resources for courts, prosecutors and defenders. The bill would also increase the penalties for great bodily harm by vehicle, and homicide and great bodily harm by vehicle while driving recklessly. It would also include felony DWI’s as subject to the habitual offender statute. The bill would also increase the penalties imposed for most felony DWI’s. Those changes could also affect the number of cases litigated and not resolved by pleas and might affect the number of persons incarcerated in the department of corrections and the lengths of their sentences.

SIGNIFICANT ISSUES

HB 54 would amend the habitual offender statute to expressly include a conviction for a felony DWI so someone with one, two, or three or more prior felony convictions could have their sentence enhanced by one, four or eight years. (See, Sec. 31-18-17(A), (B) and (C), NMSA 1978). The bill also states, “A prior conviction for (DWI) that is used to enhance the punishment for driving

under the influence of intoxicating liquor or drugs shall also be used as the basis for enhancement of the offender's sentence..." If adopted, that provision of the bill is likely to be challenged because for the past 20 years appellate courts have not allowed a felony DWI sentence to be enhanced by the habitual offender statute. See, 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.

HB 54 would create a new fourth degree felony for anyone convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs at a time when their driver's license had been suspended or revoked for a DWI or a violation of the Implied Consent Act. Due process requires notice and an opportunity for a hearing before the State can suspend or revoke a person's driver's license. See, 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. See, 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. See, City of Albuquerque v. Juarez, 93 N.M. 188 (Ct. App. 1979). Since the penalty for driving after their license had been suspended or revoked for DWI or a violation of the Implied Consent Act would be a fourth degree felony, it is likely that the underlying suspension or revocation will be attacked in addition to the DWI at issue. It should also be noted that a person whose license was revoked under the Implied Consent Act for refusing to voluntarily submit to a blood test requested by a law enforcement officer who believed they were driving a vehicle while under the influence of intoxicating liquor or drugs cannot face criminal sanctions because a compelled blood test is a violation of their right to privacy. See, 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).

HB 54 would revise the punishment for great bodily harm by vehicle and increase it from a third degree felony to a second degree felony, that is now the punishment for homicide by vehicle while under the influence of intoxicating liquor or drugs. The bill would also increase the punishment for either homicide by vehicle or great bodily harm by vehicle while driving recklessly from a third degree felony to a second degree felony.

HB 54 would increase the imprisonment terms specified for fourth, fifth, sixth and seventh felony DWI convictions. The term of imprisonment for a fourth DWI felony conviction would be increased to 30 months, 18 months of which would be mandatory and not subject to being suspended, deferred or taken under advisement, from the present levels of 18 months, six months of which are mandatory. Upon a fifth DWI conviction, the imprisonment term would be three

years, with two years mandatory, instead of the present levels of three years with two years mandatory. The sentence for a sixth DWI conviction would be 42 months, with 30 months mandatory, instead of 30 months with 18 months mandatory that is now in place. The sentence for a seventh DWI conviction would be four years, with three years mandatory, instead of the present levels of three years with two years mandatory. The imprisonment levels for an eighth or subsequent conviction would remain unchanged at twelve years, ten years of which are mandatory. Almost every time that penalties are increased, more cases are litigated with pre-trial motions and trials and fewer cases are resolved by plea agreements.

Although the incarceration specified for misdemeanor DWI's would remain unchanged, HB 54 would increase the required community service. It would be raised from the current requirement of 24 hours to at least 80 hours for a first conviction, be increased from 48 hours to at least 160 hours for a second conviction, and be increased for a third conviction from 96 hours to at least 240 hours.

HB 54 would increase the fees imposed after a state or municipal DWI conviction that are for community programs for prevention of DWI and other traffic safety purposes. Currently the fee is \$75.00 for all cases, and the bill would increase that to \$100.00 for a first offense, \$200.00 for a second offense, and \$300.00 for a third or subsequent offense.

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