

LFC Requester:	
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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. 19, 2018
Bill No: SB 26

Sponsor: Daniel Ivey-Soto, et al
Short DWI Testing Requirements
Title: _____

Agency Code: 264
Person Writing Gary Cade
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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: SB 26 would allow a law enforcement officer to obtain a search warrant to obtain blood for a chemical test in all cases in which there is probable cause that someone has driven a motor vehicle while under the influence of alcohol or a controlled substance, not just cases that while doing so they caused the death or great bodily injury of another person or they committed a felony. It would also change the statute on driving while under the influence of intoxicating liquor or drugs (“DWI”) so that a person could only be charged with aggravated DWI for refusing a breath test, and not for refusing a blood test requested by a law enforcement officer. The bill would also revise the current mechanisms for issuing a temporary driver’s license for someone refusing a breath tests requested by a law enforcement officer or whose test results are at or above the per se limits for DWI. It would also make some minor grammatical changes so the implied consent statutory language would be gender neutral.

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

SB 26 will address two significant issues in DWI cases. In June 2016 the United States Supreme Court held that a person suspected of DWI may not be punished for refusing a warrantless blood draw absent exigent circumstances. See, Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160 (2016). After the opinion was published, appellate courts in New Mexico followed *Birchfield* and held that a defendant suspected of driving drunk cannot be held criminally liable for refusing to submit to a warrantless blood test and set aside her conviction for aggravated DWI that was based on her refusing to voluntarily submit to a blood test as provided by the Implied Consent Act. See, State v. Vargas, 2017-NMCA-023, aff’d., 2017-NMSC-029. A similar ruling has also been issued in a case where the driver was suspected of driving under the influence of marijuana. See, State v. Storey, No. A-1-CA-35013 (Ct. App. Sept. 2017). SB 26 will address the right to privacy constitutional deficiencies in the DWI statute and the Implied Consent Act.

SB 26 would also amend the Implied Consent Act to permit law enforcement officers to pursue a search warrant to secure a blood test in all DWI arrest cases, including misdemeanors. Currently, to obtain a search warrant to obtain a blood sample from a suspected drunk or impaired driver, the officer must also show probable cause that the person thereby caused the death or great bodily harm (“GBH”) of another person, or probable cause they committed a felony while under the influence of alcohol or a controlled substance, in addition to probable cause for DWI. Unless a

driver suspected of being under the influence voluntarily consents to a blood draw, officers are unable to obtain blood test results for a majority of DWI cases because a search warrant cannot be issued unless the evidence will produce evidence for a felony prosecution.

Timing is an essential element of the crime of *per se* DWI. See, *State v. Baldwin*, 2001-NMCA-063. Three hours is the threshold for DWI chemical tests, although test results may be introduced even if they were taken after three hours. See, Sec. 66-8-102 and Sec. 66-8-110(E), NMSA 1978. Delays getting a search warrant affidavit prepared and presented to an appropriate judge to obtain a chemical test in under three hours from the time the suspected offender was driving is difficult even for the felony applications where it is now permitted. Law enforcement officers may not have timely information on whether a person injured by a suspected DWI driver suffered death or GBH, or the suspected driver had committed a felony while under the influence of alcohol or a controlled substance. This is especially so for traffic stops and motor vehicle crashes in rural areas of New Mexico where medical providers can be far from the scene and officers have limited assistance. Although a felony DWI can be the underlying felony justifying issuance of a search warrant to obtain a blood or breath sample for chemical testing (See, *State v. Duquette*, 2000-NMCA-006), many times law enforcement officers do not know or have timely access to information on whether the current DWI charge would be a felony and it is harder to research that issue outside of normal business hours. Even during a normal work day determining whether a person has three (or more) prior DWI convictions, so the current DWI would be a felony, is time consuming.

Although refusing consent for a requested chemical test now carries administrative penalties of driver's license revocation for presumptively one year (See, Sec. 66-8-111(B)—(C), NMSA 1978) with the *Birchfield* and *Vargas* decisions noted above, the administrative penalty can only apply to refusal of a requested breath test and drivers cannot be deemed to voluntarily consent to a blood test under the Implied Consent Act. Removing the requirements that a warrant can be issued only for the two specific circumstances, causing death or GBH or commission of a felony while under the influence of alcohol or a controlled substance, will enable law enforcement officers to file appropriate charges, or not, depending upon what the chemical test results indicate. See, Sec. 66-8-110(B)(1), NMSA 1978. (When an alcohol concentration of the person tested is less than .04, it shall be presumed they were not under the influence of intoxicating liquor.)

SB 26 would change the process for issuing a temporary driver's license to anyone who refuses a breath test or has test results at least equal to the *per se* limits for their vehicle or age: .02 for minors, .08 for adults and .04 if they were driving a commercial vehicle. Instead of confiscating their license and issuing a temporary permit when they serve a notice of their right to a hearing on the license revocation which is the current practice, the written notice of revocation and right to a hearing issued by a law enforcement officer would be a temporary license. It would be valid for 20 days or, if the driver requests a hearing, until the date the administrative hearing officer issues an order following that hearing. The bill would also make a few grammatical changes in the statute.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 26 is the same as HB 71, except for the changes regarding a temporary driver's license.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS