

**FINAL  
FISCAL NOTE**

**Drafting Number:** LLS 12-0685  
**Prime Sponsor(s):** Sen. King S.  
 Rep. Waller

**Date:** June 4, 2012  
**Bill Status:** Deemed Lost  
**Fiscal Analyst:** Hillary Smith (303-866-3277)

**TITLE:** CONCERNING THE PENALTIES FOR PERSONS WHO DRIVE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

<b>Fiscal Impact Summary</b>	<b>FY 2012-2013</b>	<b>FY 2013-2014</b>
<b>State Revenue</b> Cash Funds Fines Collection Cash Fund Crime Victim Compensation Fund Persistent Drunk Driver Cash Fund Rural Alcohol and Substance Injury Abuse Fund Colorado Traumatic Brain Injury Trust Fund	Potential increase	
<b>State Expenditures</b> General Fund Cash Funds Licensing Services Cash Fund	\$12,000	\$12,000
	16,280	
<b>FTE Position Change</b>		
<b>Effective Date:</b> The bill was deemed lost on May 9, 2012, when the General Assembly adjourned sine die without taking final action.		
<b>Appropriation Summary for FY 2012-2013:</b> The Office of the State Public Defender would have required \$12,000 General Fund, and the Department of Revenue would have required \$16,280 from the Licensing Services Cash Fund, which would have been reappropriated to the Governor's Office of Information Technology.		
<b>Local Government Impact:</b> Minimal and would not have created a need for additional county jail space.		

**Summary of Legislation**

Current law specifies that a driver whose blood alcohol content (BAC) is 0.08 or greater while driving or within two hours of driving can be charged with DUI per se in addition to driving under the influence (DUI). There is no corresponding DUI per se charge for drivers accused of driving while under the influence of drugs. This bill would have expanded the definition of DUI per se to apply to drivers whose blood contains five nanograms or more of delta 9-tetrahydrocannabinol (THC) per milliliter in whole blood while driving or within two hours of driving. DUI per se offenses may be charged whenever the results of a breath or blood test administered to a driver exceed the legal limits for alcohol or some other substance.

The bill also would have repealed the law specifying that it is a misdemeanor for a habitual user of any controlled substance to drive a motor vehicle or low-power scooter. Other references to charges of "habitual user" were also repealed.

### **State Revenue**

Revenue had the potential to increase as a result of this bill because convictions of DUI per se would have increased. Individuals convicted of DUI per se and habitual user offenses are subject to a number of fines and surcharges. The fines range from \$200 to \$1,500, depending on the offender's number of prior convictions and the discretion of the court. Surcharges are mandatory and range from \$1 to \$500. Fine and surcharge revenues are deposited into the following cash funds:

- Fines Collection Cash Fund;
- Crime Victim Compensation Fund;
- Persistent Drunk Driver Cash Fund;
- Rural Alcohol and Substance Abuse Fund; and
- Colorado Traumatic Brain Injury Trust Fund.

Courts have the discretion to suspend the fines for DUI per se, so the impact to state revenue cannot be determined. It should be noted that the repeal of the habitual user statute had the potential to decrease state revenue. However, charges of habitual user are rare, so any impact was expected to be minimal.

### **State Expenditures**

Expanding the definition of DUI per se to apply to drivers whose blood contains five nanograms or more of THC per milliliter in whole blood would have increased state expenditures by an estimated \$28,200 in FY 2012-13 and \$12,000 per year thereafter. These costs are described in greater detail below.

***Office of the State Public Defender.*** **The Office of the State Public Defender (OSPD) would have incurred costs of \$12,000 General Fund per year beginning in FY 2012-13.** The expanded definition of DUI per se would have increased attorney workload for the OSPD and increased the office's need for retesting and expert testimony. This fiscal note assumes that the OSPD could have absorbed the estimated 72 additional attorney work hours created by the bill. However, expert testimony and retesting costs were estimated at \$12,000 per year.

The workload and need for extra retests or expert analysis stemmed from the OSPD's need to rebut the DUI per se charge for defendants whose blood samples are at or near the five nanogram THC threshold established by the bill. The public defender would have challenged that charge either by illustrating that a retest indicates that the sample does not meet the threshold, or by attempting to establish through expert testimony that at the time of driving, the defendant would not have been impaired.

This fiscal note assumes that of the 6,100 DUI cases the OSPD handles per year, 10 percent, or 610 cases, involve impairment by THC. This estimate is based on data from CDPHE and ChemaTox indicating that between 5 and 17 percent of samples submitted for DUI investigations test positive for THC. The bill was mainly expected to affect cases in which THC, but no alcohol, is present. However, cases in which the blood alcohol content (BAC) is below 0.08 but the sample contains five nanograms or more of THC may have also been impacted, because prosecutors would have been able to pursue a DUI per se charge that would not exist under current law. The fiscal note is based on the following assumptions:

- 20 percent, or 122 cases would test positive for five nanograms or more of THC and would not indicate a BAC of 0.08 or higher;
- 10 percent of those 122 cases, or 12 cases would be close enough to the five-nanogram level that the OSPD would use some combination of retesting and expert testimony in an attempt to establish that the defendant was not above the five-nanogram threshold or was not impaired at the time of driving;
- those 12 cases would have required 6 extra attorney hours per case, for a total of 72 hours, or 0.03 attorney FTE, which the OSPD could have absorbed without additional appropriations; and
- the 12 cases would also have required a combination of retesting and expert testimony estimated at \$1,000 per case, for a total of \$12,000.

***Department of Revenue.*** For FY 2012-13, the Department of Revenue would have incurred one-time information technology (IT) reprogramming costs of \$16,280 from the Licensing Services Cash Fund, all of which would have been reappropriated to the Governor's Office of Information Technology. The bill would have created a new DUI per se misdemeanor offense related to operating a vehicle while under the influence of THC. The bill would not have increased DUI cases, but would have required the cases related to THC to be tracked separately. Multiple convictions of DUI per se result in driver's license restraints. The Driver License System would have required 220 hours of programming at \$74 per hour in order to modify reinstatement requirements for offenders with multiple DUI per se convictions.

***Judicial Branch.*** The bill was not expected to have a significant impact on the trial courts. The number of case filings was not expected to increase substantially, because law enforcement is already making contact with and arresting individuals who are driving while under the influence of THC. DUI per se charges are rarely if ever filed without DUI charges, so any increase in DUI per se charges would not have affected the number of case filings. The probation department may have seen an increase in cases, but any impact to the Judicial Branch was expected to be minimal and absorbable within existing appropriations.

### **Comparable Crime**

Pursuant to Section 2-2-322 (2.5), C.R.S., Legislative Council Staff is required to include certain information in the fiscal note for any bill that creates a new crime, changes the classification of an existing crime, or changes an element of the existing crime that creates a new factual basis for the offense. In these cases, the fiscal note is to include 1) a description of the elements of the new

crime, or a description of the changes to an existing crime, 2) an analysis of whether the new crime, or changes to an existing crime, may be charged under current law, 3) a comparison of the proposed crime classification to similar types of offenses, and 4) an analysis of the current and future anticipated prevalence of the behavior that the proposed new crime, or changes to an existing crime, intends to address.

This bill would have created a new factual basis for DUI per se. Under current law, no charge of DUI per se related to THC exists. This fiscal note assumes that approximately 10 percent of all DUI, vehicular homicide, and vehicular assault cases in the state involve a driver who is under the influence of THC, and that 20 percent of those cases involve drivers whose blood contains five or more nanograms of THC. Based on those assumptions, the bill would have increased statewide DUI per se charges as follows:

- 440 DUI per se charges added to DUI case filings;
- 1 DUI per se charges added to vehicular homicide case filings; and
- 4 DUI per se charges added to vehicular assault case filings.

It is possible that charges of DUI would have increased while charges of DWAI decreased, as individuals who have any amount of certain controlled substances in their system could have been charged with both DUI per se and DWAI. However, according to the Colorado District Attorneys' Council (CDAC), charges of DWAI are rare and generally occur in cases involving alcohol.

Finally, charges for habitual user would have ceased, but such charges are rare. According to the CDAC, only nine habitual user charges were filed in 2011, three of which did not include charges of DUI, DUI per se, or DWAI as well. It should be noted that information from the Colorado District Attorneys' Council does not reflect statewide data and therefore may be incomplete.

### **Local Government Impact**

The penalty for a DUI per se is 5 days to 1 year imprisonment in a county jail and a fine of \$600 to \$1,500, among other things. Because the courts have the discretion to determine the period of incarceration and the fine amount, the impact at the local level cannot be determined. The cost to house an offender in county jails varies from \$45 to \$55 per day in smaller rural jails to \$62 to \$72 per day for larger Denver-metro area jails. It is assumed that the impact of the expanded definition of DUI per se would have been minimal and would not have created the need for additional county jail space.

### **Departmental Differences**

It is the policy of the OSPD that it can absorb the costs of bills that create a need for less than 0.3 FTE. Therefore, the OSPD indicated that it could absorb both the 0.03 FTE and the \$12,000 per year required by the bill. This fiscal note agrees that the minimal workload increase does not require additional staff. However, the costs of expert testimony and retesting are shown to reflect the estimated additional costs of implementing the bill.

**State Appropriations**

For FY 2012-13, the Office of the State Public Defender would have required a General Fund appropriation of \$12,000. The Department of Revenue would have required an appropriation of \$16,280 from the Licensing Services Cash Fund, which would have been reappropriated to the Governor's Office of Information Technology.

**Departments Contacted**

Colorado Counties, Inc.  
Judicial  
Public Safety

Corrections  
Law  
Revenue

District Attorneys  
Public Health and Environment  
Sheriffs