

*Colorado Legislative Council Staff Fiscal Note*

**STATE and LOCAL  
REVISED FISCAL IMPACT**

(replaces fiscal note dated February 24, 2012)

**Drafting Number:** LLS 12-0685  
**Prime Sponsor(s):** Sen. King S.  
(None)

**Date:** April 4, 2012  
**Bill Status:** Senate Appropriations  
**Fiscal Analyst:** Hillary Smith (303-866-3277)

**TITLE:** CONCERNING THE PENALTIES FOR PERSONS WHO DRIVE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS.

<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	\$423,734	\$433,153
<b>FTE Position Change</b>	2.4 FTE	2.4 FTE
<b>Effective Date:</b> Upon signature of the Governor, or upon becoming law without his signature.		
<b>Appropriation Summary for FY 2012-2013:</b> The Office of the State Public Defender requires \$423,734 General Fund and 2.4 FTE, and the Department of Revenue requires \$16,280 cash funds, which should be reappropriated to the Governor's Office of Information Technology.		
<b>Local Government Impact:</b> The bill may create a need for more county jail space due to an increase in convictions and the likelihood of longer sentences for offenders convicted under the expanded DUI per se charge.		

**Summary of Legislation**

*This fiscal note is revised to reflect amendments adopted in the Senate State Veterans and Military Affairs Committee, new information from the Department of Public Health and Environment, an updated fiscal impact to the Department of Corrections, and an updated departmental differences section.* This bill specifies that in any prosecution for driving under the influence (DUI), driving while ability impaired (DWAI), vehicular assault, or vehicular homicide, there will be a permissible inference for the jury to consider that the defendant was under the influence of drugs if, at the time of the commission of the alleged offense or within a reasonable time

thereafter (defined as two hours for cases involving vehicular assault or vehicular homicide), the defendant's blood contains five nanograms or more of delta 9-tetrahydrocannabinol (THC) per milliliter in whole blood, or the defendant's blood or saliva contains any amount of:

- a schedule I controlled substance, except for THC;
- a schedule II controlled substance;
- salvia divinorum; or
- synthetic cannabinoids.

Under current law, there is a permissible inference that the defendant was under the influence of alcohol if his or her blood alcohol content (BAC) was 0.08 or greater at the time of the alleged offense or within two hours after. DUI, DWAI, and DUI per se are all misdemeanors. Vehicular homicide is a class 3 felony if the driver was under the influence of alcohol, drugs, or both. Vehicular assault is a class 4 felony if the driver was under the influence of alcohol, drugs, or both.

Current law specifies that a driver whose BAC is 0.08 or greater while driving or within two hours of driving can be charged with DUI per se in addition to DUI. There is no corresponding DUI per se charge for drivers accused of driving while under the influence of drugs. This bill expands the definition of DUI per se to apply to drivers whose blood contains five nanograms or more of THC per milliliter in whole blood while driving or within two hours of driving, or whose blood or saliva contains, within the same time frame, any amount of:

- a schedule I controlled substance, except for THC;
- salvia divinorum; or
- synthetic cannabinoids.

Finally, the bill repeals 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" are also repealed.

## **State Revenue**

Revenue has the potential to increase as a result of this bill because convictions of vehicular homicide while under the influence, vehicular assault while under the influence, DUI, and DWAI may increase. In addition, DUI per se convictions will increase as a result of the expanded definition of DUI per se.

The bill will increase state revenue from fines by an indeterminate amount, beginning in FY 2012-13. Pursuant to Section 18-1.3-401 (III) (A), C.R.S., the fine penalty for a class 3 felony is \$3,000 to \$750,000, the fine penalty for a class 4 felony is \$2,000 to \$500,000, and the fine penalty for a class 5 felony is \$1,000 to \$100,000. Unless otherwise provided by law, the fines are to be deposited in the state Fines Collection Cash Fund for annual appropriations to cover associated administrative and personnel costs. All unexpended balances of the cash fund revert to the state General Fund at the end of each fiscal year. To the extent that more individuals are convicted of class 3 felony vehicular homicide while under the influence rather than class 4 felony vehicular

homicide or are convicted of class 4 felony vehicular assault while under the influence rather than class 5 felony vehicular homicide, fine revenue has the potential to increase. However, the courts have the discretion of incarceration or imposing a fine. Therefore, the impact on state revenue cannot be determined.

Individuals convicted of DUI, DWAI, 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, DWAI, and DUI per se, so the impact to state revenue cannot be determined. It should be noted that the repeal of the habitual user statute has the potential to decrease state revenue. However, charges of habitual user are rare, so any impact is expected to be minimal.

**State Expenditures**

**Office of the State Public Defender (OSPD).** The OSPD requires \$423,734 General Fund and 2.4 FTE for FY 2012-13, and \$412,447 General Fund and 2.4 FTE for FY 2013-14, and each year thereafter. Adding a permissible inference to DUI, DWAI, vehicular homicide, and vehicular assault crimes involving certain controlled substances and THC and expanding the scope of DUI per se to include certain controlled substances and THC will increase state expenditures beginning in FY 2012-13. These costs relate to work performed by the OSPD. Although the bill is not expected to result in a significant increase in cases, it will increase attorney workload. Both the permissible inference for DUI and related drug cases and the expanded definition of DUI per se will require more preparation on the part of the defense attorney and an increased need for retesting and expert testimony. Table 1 summarizes the costs to the OSPD. Additional detail regarding these expenses is provided below.

<b>Table 1. OSPD Expenditures Under SB 12-117</b>		
<b>Cost Components</b>	<b>FY 2012-13</b>	<b>FY 2013-14</b>
Personal Services	\$135,167	\$135,167
FTE	2.4	2.4
Operating Expenses and Capital Outlay	\$13,567	\$2,280
Expert Analysis and Retesting	\$275,000	\$275,000
<b>TOTAL</b>	<b>\$423,734</b>	<b>\$412,447</b>

*Increased attorney workload.* Exact numbers concerning the percentage of DUI cases that involve drugs only are not available. This fiscal note assumes that of the 6,100 DUI cases the OSPD handles per year, 18 percent, or 1,100 cases, will be impacted by the bill. Due to the complexity of the science concerning impairment by drugs and the need for the OSPD to rebut the permissible inference that *any* amount of certain controlled substances or a specified amount of delta 9-THC suggests impairment, this fiscal note assumes that attorneys will need 1.5 additional hours of case preparation per case for all cases, or 1,650 hours. In addition, 25 percent of these cases, or 275 cases, will require additional attorney time above the 1.5 hours devoted to all cases as a result of expert witness testimony. The fiscal note assumes that those 275 cases will require 4.5 hours of additional attorney time, for a total of 1,238 hours. In total, the bill creates the need for 2,888 attorney work hours. These extra hours will create a need for 1.4 additional attorney FTE. Pursuant to American Bar Association staffing models, additional attorney FTE create the need for 1.0 FTE of additional support staff.

*Expert testimony and retesting.* Expert testimony is already used in DUI cases, but the bill makes it more likely that the OSPD will bring in an outside expert rather than relying on a cross-examination of the prosecution's expert. Because the science concerning impairment by drugs has not been as tested in the courts as the science concerning impairment by alcohol, it is expected that the OSPD will need more expert testimony to rebut both the permissible inference for DUI cases and the five nanogram limit for delta 9-THC. This fiscal note assumes that of the 1,100 cases affected by the bill, some combination of retesting and other expert analysis is either already done or is not needed in 75 percent of these cases, or 825 cases. This fiscal note assumes that retesting or other expert analysis will be necessary in the remaining 25 percent, or 275 cases, as a result of the bill. Such costs are estimated at \$1,000 per case.

***Department of Corrections.*** This bill is anticipated to increase General Fund expenditures in the Department of Corrections by \$20,706 for FY 2013-14 and \$6,212 for FY 2014-15. The Department of Corrections will experience an increase in costs because more offenders will be convicted of vehicular assault while under the influence of drugs rather than vehicular assault, and therefore will receive longer prison sentences. These costs are based on the following facts and assumptions:

- about 100 people are convicted of vehicular assault while under the influence per year, 40 percent of whom are sentenced to the DOC ;
- last year, 36 people were charged with vehicular assault while under the influence, a class 4 felony, but were convicted of vehicular assault, a class 5 felony; and
- this fiscal note assumes that at least one person every five years will be convicted of vehicular assault while under the influence of drugs rather than vehicular assault due to the permissible inference created by the bill, and his or her length of stay will be increased by 15.2 months.

While convictions for vehicular homicide while under the influence of drugs may also increase under the bill, the number of individuals charged with that offense is very low (35 people in FY 2010-11). This fiscal note assumes that any change in the number of individuals convicted of vehicular homicide while under the influence of drugs rather than vehicular homicide as a result of the bill will be minimal and will be addressed during the annual budget process.

Current law prohibits the General Assembly from passing any bill to increase periods of imprisonment in state correctional facilities without appropriating an amount sufficient to cover the increased capital construction and operating costs of the bill in each of the first five fiscal years. However, current law also allows the DOC to place offenders classified as medium custody and below in private contract prisons, for which no state capital construction costs are incurred.

Offenders sentenced under this bill to DOC may be placed in either a state-run or a private contract prison, depending on several factors. As state-run facilities are currently at or near capacity, any such offenders that *must* be housed in a state-run prison will likely require a shift of other inmates in that facility to private contract prisons. Therefore, *this fiscal note assumes that the impact of this bill will be accommodated through the use of private contract prisons, and that no new capital construction funds are necessary.*

Offenders placed in a private contract prison cost the state about \$56.73 per offender per day, including the current daily rate of \$52.69 and an estimated \$4.04 per offender per day for medical care provided by the DOC. Table 2 shows the estimated cost of the bill over the next five fiscal years.

<b>Table 2. Five-Year Fiscal Impact On Correctional Facilities</b>				
<b>Fiscal Year</b>	<b>Inmate Bed Impact</b>	<b>Construction Cost</b>	<b>Operating Cost</b>	<b>Total Cost</b>
<b>FY 2012-13</b>	0.0	\$0	\$0	\$0
<b>FY 2013-14</b>	1.0	0	20,706	20,706
<b>FY 2014-15</b>	0.3	0	6,212	6,212
<b>FY 2015-16</b>	0.0	0	0	0
<b>FY 2016-17</b>	0.0	0	0	0
<b>Total</b>		\$0	\$26,918	\$26,918

**Department of Revenue.** For FY 2012-13, the Department of Revenue will incur one-time information technology (IT) reprogramming costs of \$16,280 from the Licensing Services Cash Fund, all of which will be reappropriated to the Governor's Office of Information Technology. The bill creates two new DUI per se misdemeanor offenses related to operating a vehicle while under the influence of certain drugs. The bill will not increase DUI drug cases, but will now require the cases to be tracked separately. Multiple convictions of DUI per se result in driver's license restraints. The Driver License System will require 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 is not expected to have a significant impact on the trial courts. The number of case filings is not expected to increase substantially, because law enforcement is already making contact with and arresting individuals who are committing DUI, DWAI, vehicular homicide, or vehicular assault while under the influence of drugs. DUI per se charges are rarely if

ever filed without DUI charges, so any increase in DUI per se charges will not affect the number of case filings. There may be a small reduction in trial rates if defendants who might otherwise have gone to trial choose not to due to the permissible inference for drugs established by the bill. Although the bill may increase convictions for DUIs and related crimes, the workload for trial courts is similar whether a defendant is convicted or acquitted. The probation department may see an increase in cases, but any impact to the Judicial Branch is expected to be minimal and absorbable within existing appropriations.

### **Expenditures Not Included**

Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. The centrally appropriated costs subject to this policy are summarized in Table 3.

<b>Table 3. Expenditures Not Included Under SB 12-117*</b>		
<b>Cost Components</b>	<b>FY 2012-13</b>	<b>FY 2013-14</b>
Employee Insurance (Health, Life, Dental, and Short-term Disability)	\$14,734	\$14,734
Supplemental Employee Retirement Payments	\$7,206	\$8,297
<b>TOTAL</b>	<b>\$21,940</b>	<b>\$23,031</b>

*\*More information is available at: <http://colorado.gov/fiscalnotes>*

### **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 creates a new factual basis for DUI per se. A description of the expanded definition of DUI per se is summarized on page 2 of this fiscal note. The bill also creates a permissible inference that a defendant was driving under the influence of drugs, as explained on pages 1 and 2 of this fiscal note. Neither a permissible inference nor a charge of DUI per se related to drugs exists under current law.

The bill is not expected to significantly affect the number of charges for DUI, vehicular homicide while under the influence, or vehicular assault while under the influence. However, charges of DUI per se will increase. This fiscal note assumes that approximately 18 percent of DUI, vehicular homicide, and vehicular assault cases involve a driver who is under the influence of drugs only. If all such drivers meet the thresholds specified in the bill, then the bill will increase DUI per se charges as follows:

- 3,964 DUI per se charges added to DUI cases;
- 6 DUI per se charges added to vehicular homicide cases; and
- 38 DUI per se charges added to vehicular assault cases.

It is possible that charges of DUI will increase while charges of DWAI may decrease, as individuals who have any amount of certain controlled substances in their system could now be charged with both DUI per se and DUI. 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 will cease, but such charges are rare. According to the CDAC, only 9 habitual user charges were filed in 2011, 3 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 DUI and DUI per se is 5 days to 1 year imprisonment in a county jail and a fine of \$600 to \$1,500, depending on the offender's number of prior convictions. The penalty for DWAI is 2 days to 1 year imprisonment in a county jail and a fine of \$200 to \$1,500, depending on the offender's number of prior convictions. 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. For the current fiscal year, the state reimburses county jails a daily rate of \$50.44 to house state inmates. Jails are likely already housing individuals convicted of DUI, DUI per se, and DWAI, however the bill may increase convictions for such crimes, and an additional charge of DUI per se may increase an offender's sentence. Therefore, it is possible that the bill will create a need for additional county jail space.

### **Departmental Differences**

The Office of the State Public Defender identified total costs of \$542,965 and 3.3 FTE in FY 2012-13 and \$528,957 and 3.3 FTE in FY 2013-14. The OSPD calculates annual attorney time per FTE as 1,712 hours, rather than the standard 2,080 hours used for other state FTE by Legislative Council Staff. The OSPD's calculations are based on its 2008 weighted caseload study, which estimated the actual average time an attorney is available to work a caseload, accounting for other obligations such as training, non-case-related administrative activities, etc. If the 1,712 hour estimate were used, and an additional 10 percent of attorney FTE were added to the total for

supervisory and management needs pursuant to the OSPD's staffing model, then the OSPD would require 1.9 attorney FTE and 1.4 FTE of support staff, for a total of 3.3 FTE. The OSPD notes that if its staffing model is not used, necessary staff will not be available to support the office's overall caseload. This note does not assume a need for an extra 10 percent of attorney FTE because it is not clear that the need is a direct result of the bill.

The OSPD identified leased space costs of \$28,849 per year and travel costs of \$2,729 per year. The office calculates leased space at \$8,742 per FTE, which covers the long-term growth in space requirements across the OSPD's trial offices and its central administrative and appellate division offices. Travel is calculated at \$827 per FTE, based on the OSPD's prior year actual costs for its entire staff. These costs are not included in the fiscal note because leased space costs for bills that create the need for less than 20 FTE are generally not included. In addition, it is not clear that the travel expenses are created by the bill.

### **State Appropriations**

For FY 2012-13, the Office of the State Public Defender requires a General Fund appropriation of \$423,734 and 2.4 FTE. The Department of Revenue requires an appropriation of \$16,280 from the Licensing Services Cash Fund, which should be reappropriated to the Governor's Office of Information Technology.

### **Departments Contacted**

Colorado Counties, Inc.	Corrections	District Attorneys
Judicial	Law	Public Health and Environment
Public Safety	Revenue	Sheriffs