

**STATE and LOCAL
FISCAL IMPACT**

Drafting Number: LLS 12B-2008
Prime Sponsor(s): Rep. Waller; Fields
 Sen. King S.

Date: May 14, 2012
Bill Status: House SVMA
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TITLE: CONCERNING THE PENALTIES FOR PERSONS WHO DRIVE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS.

Fiscal Impact Summary	FY 2012-2013	FY 2013-2014
State Revenue 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	
State Expenditures General Fund Cash Funds Licensing Services Cash Fund	\$12,000 16,280	\$12,000
FTE Position Change		
Effective Date: Upon signature of the Governor, or upon becoming law without his signature.		
Appropriation Summary for FY 2012-2013: The Office of the State Public Defender requires \$12,000 General Fund, and the Department of Revenue requires \$16,280 from the Licensing Services Cash Fund, which should be reappropriated to the Governor's Office of Information Technology.		
Local Government Impact: Minimal and will not create 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 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. 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 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 Other references to charges of "habitual user" are also repealed.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 DUI per se will increase. 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 has the potential to decrease state revenue. However, charges of habitual user are rare, so any impact is 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 will increase 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) will incur costs of \$12,000 General Fund per year beginning in FY 2012-13. The expanded definition of DUI per se increases attorney workload for the OSPD and increases the office's need for retesting and expert testimony. This fiscal note assumes that the OSPD can absorb the estimated 72 additional attorney work hours created by the bill. However, expert testimony and retesting costs are estimated at \$12,000 per year.

The workload and need for extra retests or expert analysis stem 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 will challenge 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 Chemtox indicating that between 5 and 17 percent of samples submitted for DUI investigations test positive for THC. The bill is 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 also be impacted, because prosecutors will now be 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 will test positive for five nanograms or more of THC and will not indicate a BAC of 0.08 or higher;
- 10 percent of those 122 cases, or 12 cases will be close enough to the five-nanogram level that the OSPD will 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 will require 6 extra attorney hours per case, for a total of 72 hours, or 0.03 attorney FTE, which the OSPD can absorb without additional appropriations; and
- the 12 cases will also require 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 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 a new DUI per se misdemeanor offense related to operating a vehicle while under the influence of THC. The bill will not increase DUI cases, but will require 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 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 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 will not affect the number of case filings. 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.

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. 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 will increase 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 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 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 will be minimal and will not create 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 indicates that it can 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 requires a General Fund appropriation of \$12,000. 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 Municipal League
Corrections
Judicial
Office of Information Technology
Public Safety
Sheriffs

Counties
District Attorneys
Law
Public Health and Environment
Revenue